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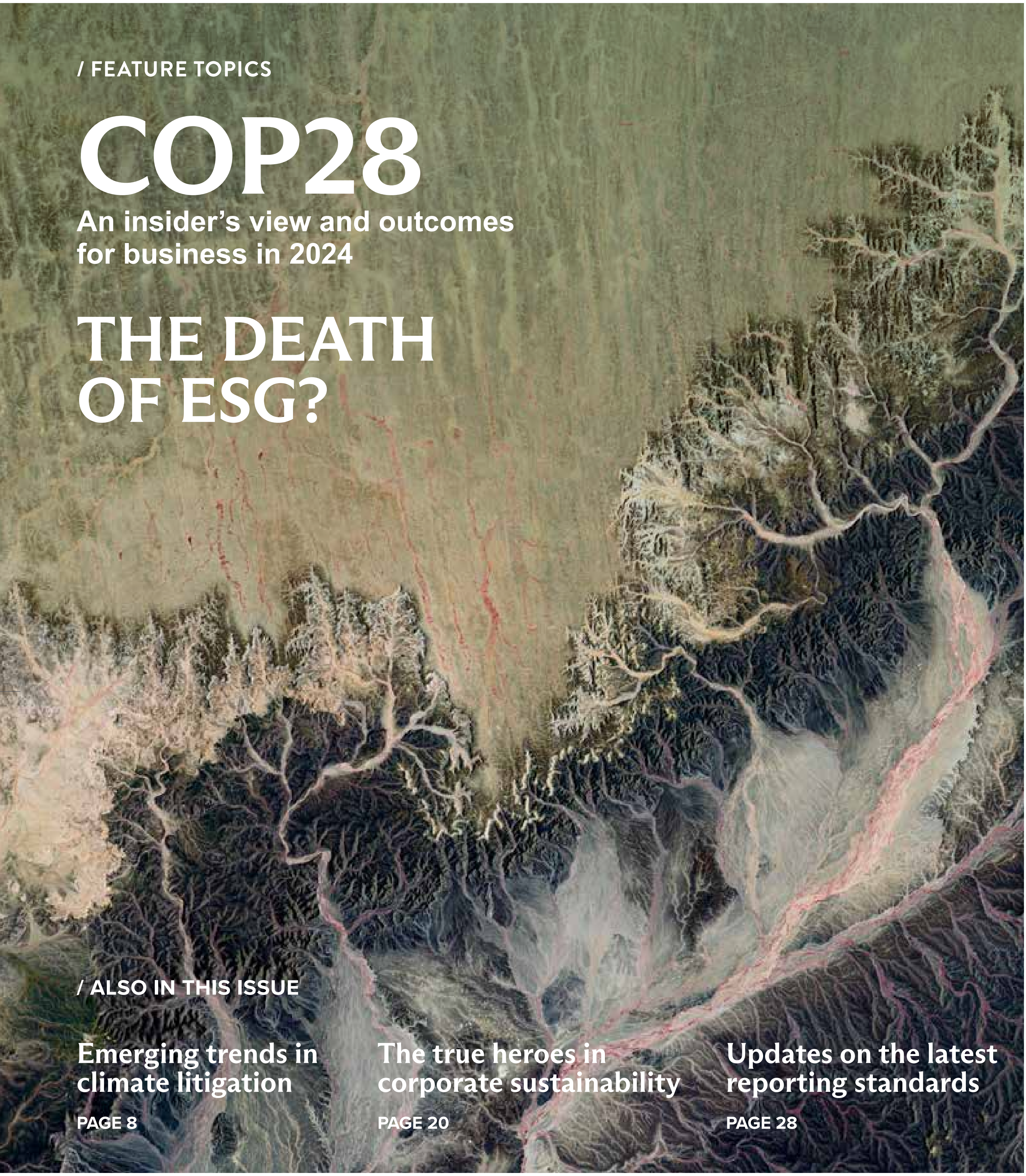
SUSTAINABILITY INSIGHTS

A strategic review of the latest in sustainability policy and practice

GILBERT + TOBIN

BWD Strategic



/ FEATURE TOPICS

COP28

An insider's view and outcomes for business in 2024

THE DEATH OF ESG?

/ ALSO IN THIS ISSUE

SUSTAINABILITY INSIGHTS

BWD & GILBERT + TOBIN PRESENT A STRATEGIC REVIEW OF THE LATEST IN SUSTAINABILITY

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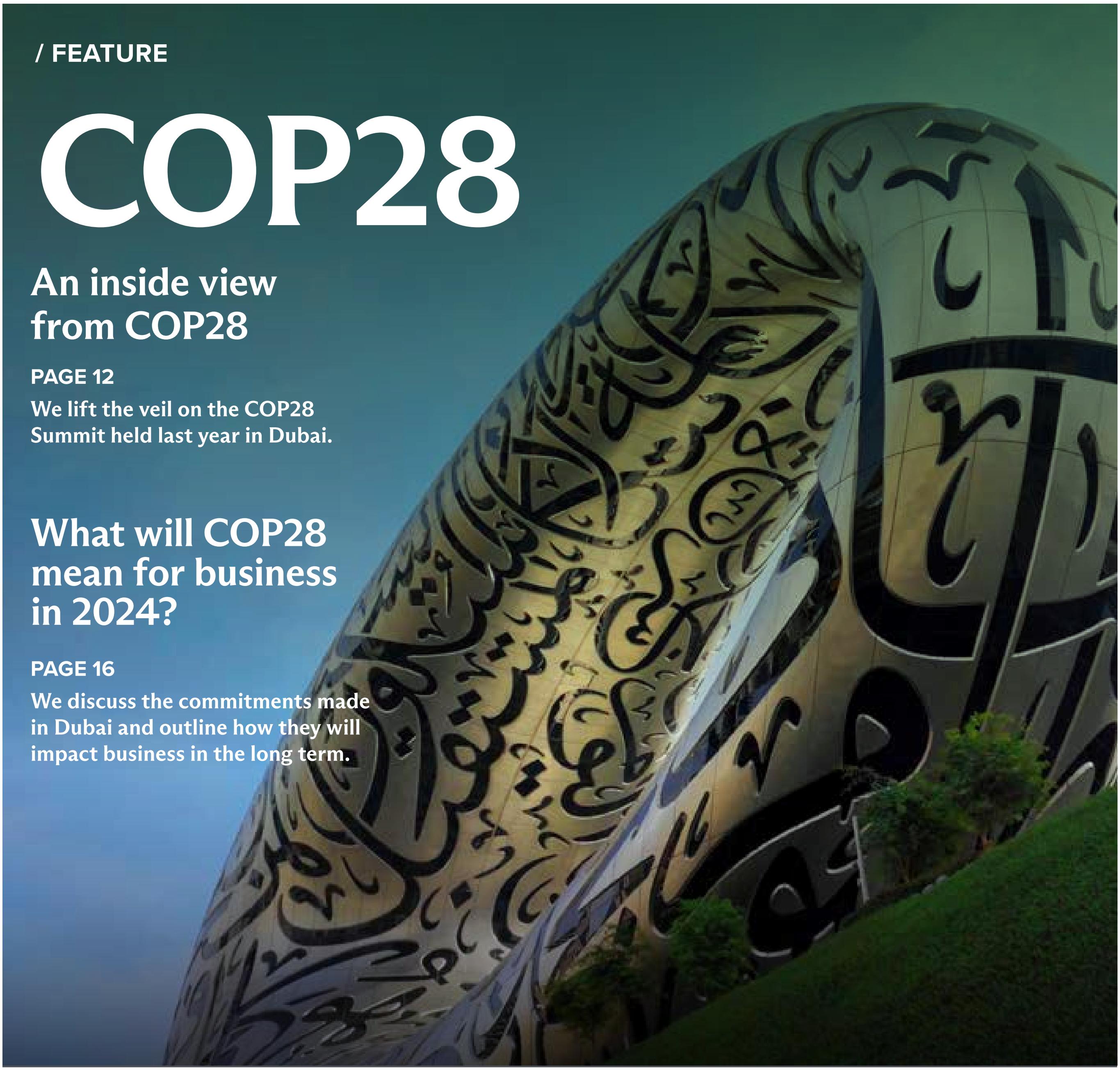
INSIDE THIS ISSUE



/ FEATURE

ESG IS DEAD...

LONG LIVE SUSTAINABILITY!

PAGE 4

Buried by its own hubris, the American culture wars, and the cooling interest of fund managers herding towards the next tradeable fad. What comes next?

COVER IMAGE CREDIT: Photo by USGS on Unsplash

/ FEATURE

Carrying the weight of the world

PAGE 20

Corporate Sustainability leaders have a lot riding on their shoulders. We uncover the reasons why so many are burnt out and understand how their evolving roles they play in organisations impact performance.

/ ANALYSIS

Lab-grown meat: Too good to be true?

PAGE 24

Investment in lab-grown meat is growing, however we address three key areas of concern and what this means for protein on a plate.

/ IN DEPTH

Due diligence frameworks

PAGE 42

We deep-dive into due diligence obligations and accountability in relation to business and showcase the implications for Australian corporations.

/ FEATURE

ESG IS DEAD...

LONG LIVE SUSTAINABILITY!

ESG IS DEAD, BURIED BY ITS OWN HUBRIS, THE AMERICAN CULTURE WARS, AND THE COOLING INTEREST OF FUND MANAGERS HERDING SHEEP-LIKE TOWARDS THE NEXT TRADEABLE FAD. BUT EVEN TRUE BELIEVERS SHOULD REMAIN DRY-EYED AT ITS PASSING.

This is a contrarian view. So why do I hold it with conviction? This article explains why ESG has become toxic, and how its underlying principles should be reconceived to support long-term business success. ***Spoiler: The solution – reframing ESG as sustainability – is hiding in plain sight.***

/ WORDS BY

Luke Heilbuth
CEO, BWD Strategic

WHY THE ESG BUBBLE BURST

Look around. I bet you still see ESG everywhere. I'll admit to using the phrase until well into 2023. So why herald its end? Because ESG has lost its relevance, much like corporate social responsibility in years past. Let's unpack why.

1. The Republican Party has weaponised the term

In the past 18 months, Republicans have found a new source of red meat to energise the base: ESG. Trump, De Santis and Ramaswamy have made hay on claims that ESG equals woke capitalism, at odds with a business's fiduciary duty to maximise returns for shareholders. The pressure is working. Once a noisy advocate, BlackRock CEO Larry Fink now says he won't use the 'weaponised' term.

The counter-offensive has been funded in part[1] by fossil fuel interests. After years on the defensive, they've seized the political moment to strike back against environmental activists. Take Exxon, which recently filed a lawsuit[2] to prevent a climate proposal from even reaching a shareholder vote; a move that would have been PR suicide at the peak of the ESG bubble in 2021.

In January 2024, Republican lawmakers in New Hampshire introduced a bill[3] that would make it a felony to consider ESG factors in an investment made on behalf of the state, punishable by up to 20 years in prison.

This all might sound irrelevant to readers outside the US. But that view misunderstands the omnipresence of American soft power. Like it or not, American norms infiltrate every aspect of global culture. If Wall Street titans like BlackRock excise ESG from the corporate lexicon, many overseas equivalents will follow.

2. Fund managers have fallen out of love

Investors have always considered ESG factors in their capital allocation decisions. But in recent years, a critical mass has come to realise that some non-financial risks are systemic in nature, capable of breaking the most basic assumptions of an investment thesis.

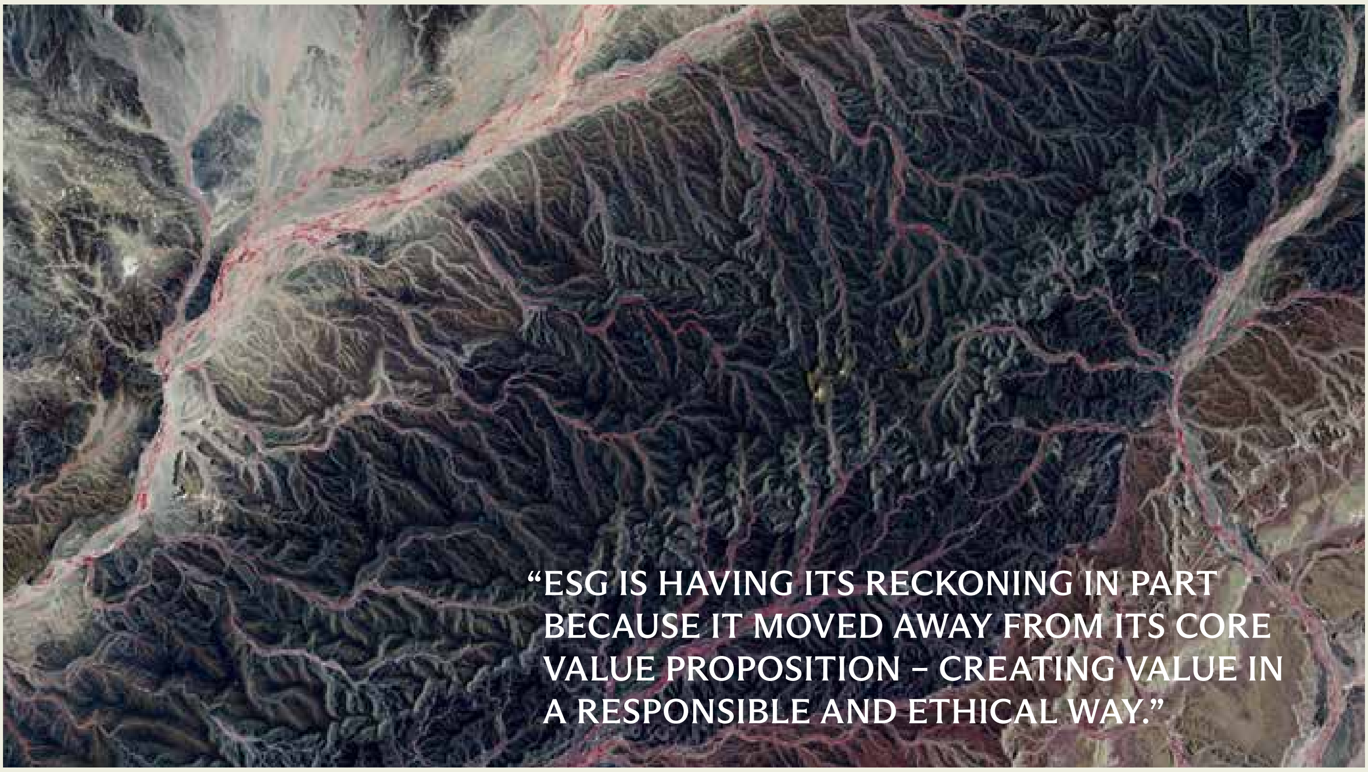
The GFC took the global economy to the brink, for example, by exposing the inadequacy of the financial sector's approach to governance. Many Wall Street firms are only extant today because of the largesse of the American taxpayer.

ESG investment reached its peak at the end of the COVID pandemic, as fossil fuel prices languished and global capital turned its attention to the enormous financial opportunities of the transition. By 2022, US$100 trillion sat in ESG funds[4].

The bubble has deflated since, driven by tighter scrutiny of fund greenwashing[5], political opportunism, and the revival of fossil fuel prices post an extended war in the Ukraine. Just six funds citing ESG considerations[6] launched in the second half of 2023, compared to 55 in the first six months of the year.

Some of the ESG 'experts' inhabiting the sleazier end of funds management have turned to spruiking generative AI. More cerebral investors, though, have argued that ESG has *always* been intellectually compromised. While ESG ratings agencies play a role in promoting responsible business practices, ratings tend to make little intuitive sense. For example, tobacco giant Philip Morris International scored 85 out of 100[7] in the 2023 S&P Global Corporate Sustainability Assessment (CSA). Tesla scored 36[8].

Elon Musk is rightly criticised for his dumpster fire approach to corporate governance. But it's hard to take seriously a ratings framework that lionises a company which intentionally kills people for profit, while recording as a laggard the business which single-handedly ushered in the electrification of transport.



3. ESG got high on its own supply

This critique may not endear me to the vested interests that inhabit the ESG universe. But ESG is having its reckoning in part because it moved away from its core value proposition – creating value in a responsible and ethical way. Republicans might have politicised the issue, but they could only do so because of the bad or misplaced faith of a range of ESG advocates.

Guilty parties include:

— ESG ratings agencies tying companies in green tape
— Consultants greenwashing for fossil fuel interests
— Corporate sustainability professionals peddling 'win-win' claims
— Management adopting social causes to virtue signal

Let's briefly review each.

ESG ratings agencies

This is an emperor's new clothes scenario. Corporates *know* that taking three different analytical pillars (E, S and G) and combining them into a single score provides little useful information about their company's ethics or investment quality. But they pay for the hustle anyway, not wanting to risk being excluded from an ESG investor's screening process and the financial loss that could result.

The irony is palpable; in seeking to measure ethical behaviour, the process itself is anything but. In fact, for-profit ESG ratings agencies create rent-seeking behaviour twice over. First, by charging companies to create their product for them (ESG scores).

And second, by supplying those scores to ESG investors, who charge unjustifiably higher fees to clients for investing in an 'ethical' fund. We are left with a circular economy of profit under the guise of principle; a marketplace built on the appearance of virtue, rather than its practice.

Consultants

Many consultants, meanwhile, swear undying support for the transition while taking the dollars of oil and gas companies[9] actively seeking to slow it. Admittedly, this is a grey area. Improving the ESG approach of a company in a hard-to-abate sector can provide some of the most impactful consulting work available.

But in my view, the prospective client *must* have an evidence-based transition plan. Without one, consultancies are complicit in greenwashing and cannot credibly claim they are committed to a better future. Our consultancy, BWD[10], does not work with companies which do not take a scientific approach to the transition, despite the financial cost.

Corporate sustainability professionals

Another ESG fudge is the tendency of corporate sustainability professionals to claim that social and environmental objectives align with opportunities for profit. In reality, ESG-focused business decisions often increase costs and reduce efficiencies, even as they enhance organisational resilience[11]. An example is investing in a diversified, slavery-free supply chain, robust enough to withstand single points of failure. This is a good business decision; but the costs are real.

Sustainability practitioners lose credibility when they downplay the costs and trade-offs inherent in ESG. You might win a battle, but you'll ultimately lose the war. A decision-maker, often the CFO, who says yes the first time an overly optimistic ESG claim is pitched will often say no the second time around.

Virtue signalling management

In recent years, some CEOs have been outspoken on social issues that have little to do with their business. I've changed my mind on the wisdom of this stance over the past year based on the public mood, which sees big corporates as generally elitist and out-of-touch.

Whether a business leader engages in social advocacy should be decided on a case-by-case basis. One threshold question to ask is whether the cause under consideration has a direct link to the business's industry or offering.

That said, it is almost *always* a mistake to virtue signal a cause célèbre to appease the demands of a vocal minority when doing so will alienate a much larger base of employees and customers.

'REAL' SUSTAINABILITY IS MORE IMPORTANT THAN EVER

The critique above might imply that I'm wavering on the role that sustainability can play in accruing long-term business success. Nothing could be further from the truth.

The swing towards sustainable business has happened at speed, and with all that money from the transition on the line, some whiffy practices have emerged. Some kind of recalibration was inevitable, even healthy. Calling time on ESG is not a dismissal of sustainability, but a recognition of its enduring importance.

Indeed, the intellectual underpinnings of the ESG movement are more relevant than ever. Any moderately capable decision-maker recognises the paradox of making money. Considerations outside the balance sheet – social norms, political trends, emerging technologies, demographic changes, natural resources, climate change – will always be critical to sustaining shareholder returns over time.

At the risk of torturing a metaphor, my children love Disney movies; especially *Moana*. If you've seen it, you'll remember Te Fiti, the goddess who provides her heart to allow the world to flourish in perpetuity. When the trickster Maui removes her heart, the islands and seas are plunged into darkness. Sustainability is similarly the lifeblood of a business, the secret to its flourishing over a long span of time.

THE GOAL OF SUSTAINABILITY

The goal of sustainability is to build long-term value and resilience for an organisation.

These two ideas – value and resilience – are mutually reinforcing. *Valuable* businesses are more *resilient*, because of the financial buffer at their disposal in navigating challenging times. *Resilient* businesses are more *valuable*, because they're capable of evolving in the face of the inevitable shocks and tipping points which eliminate less hardy competitors.

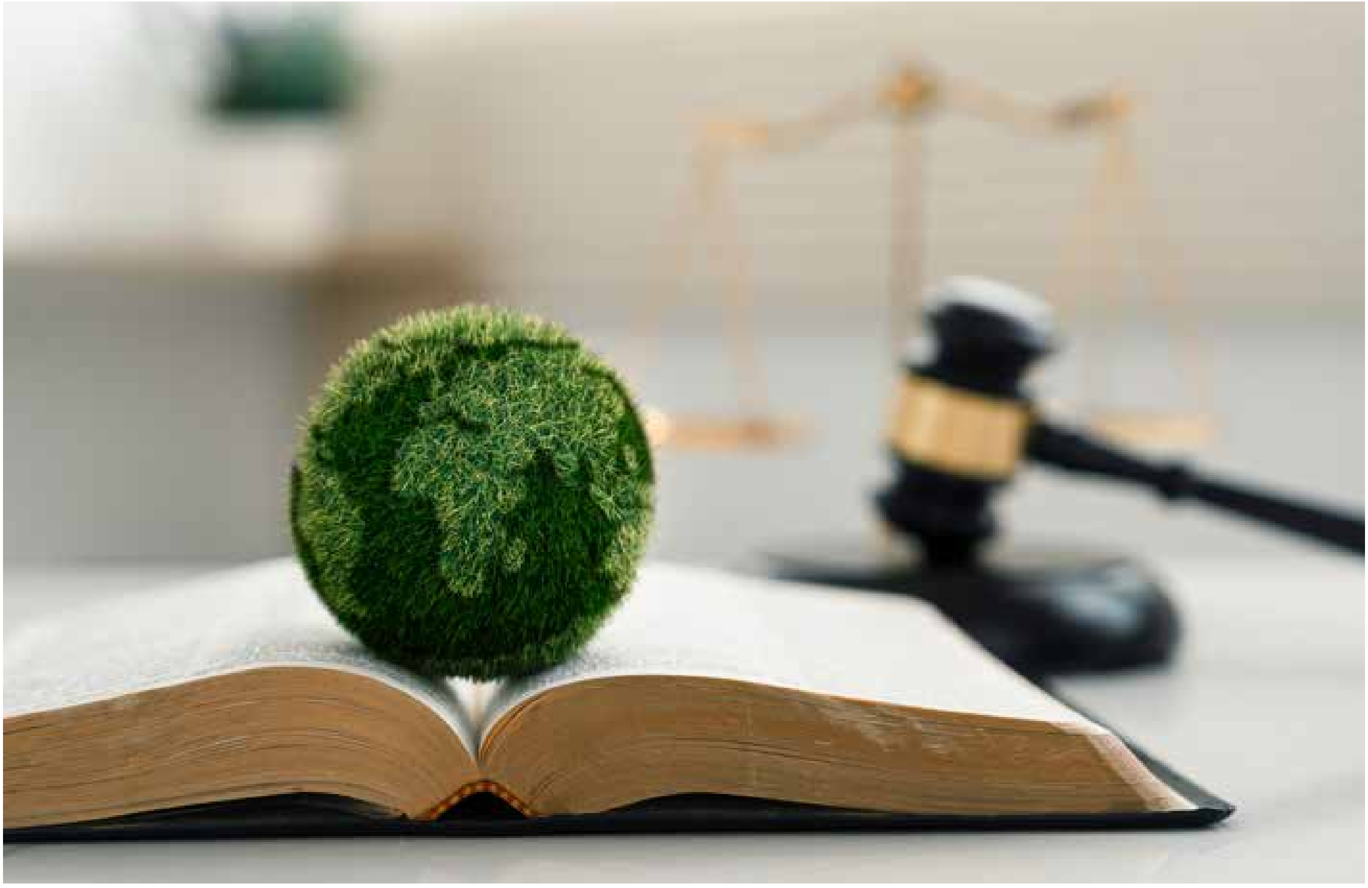
There are multiple benefits for a business that frames sustainability in this way:

- A business's sustainability strategy is *indistinguishable* from its enterprise strategy because the common objective is to build long-term value and resilience.
- Sustainability must necessarily become part of *everyone's job* because every employee must contribute to long-term business value.
- Sustainability can't be easily *politicised*, because all rational people agree that value creation and resilience are goals worth pursuing.
- Sustainability does not pretend win-win outcomes are always possible. Financial costs are real and *ethical trade-offs* common.
- Focusing on 'value' in the general sense respects that a business may choose to create non-financial value as an end in itself, like supporting sustainable development outcomes through the SDGs[12].
- Focusing on 'long-term' value protects the organisation from implementing *fads and moral panics* which do not enjoy widespread societal support.
- Focusing on resilience accepts the reality that the *future is unknown*; and that to succeed over time, businesses must prepare for constant change.
- Sustainability (unlike ESG) incorporates *systems thinking*[13]; the wisdom to understand and accept that a business's success is ultimately contingent on the flourishing of the society and the planet that surrounds it.

In conclusion, any shift from ESG to a broader and more integrated concept of sustainability is not a retreat but an advancement in our understanding of what makes a company succeed or fail over time. As champions of our discipline, we must embrace the notion that sustainability is an investment in quality; the ultimate decision-making hack for leaders seeking to ensure their business prospers through the vicissitudes of time.

"SOME KIND OF RECALIBRATION WAS INEVITABLE, EVEN HEALTHY. CALLING TIME ON ESG IS NOT A DISMISSAL OF SUSTAINABILITY, BUT A RECOGNITION OF ITS ENDURING IMPORTANCE."

/ TREND WATCH



Emerging trends in climate litigation: What's in store in 2024?

/ WORDS BY

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2023 was another year of growth in climate litigation in Australia and around the world, with strategic litigants continuing to find innovative avenues through which to hold governments and corporations accountable for their carbon emissions. Meanwhile, a number of recent cases brought by large emitters points to litigation being used as a tool to push back against the general dominance of environmental organisations and individual actors as the plaintiffs in climate proceedings. We reflect on some highlights in climate litigation from 2023, and trends we expect to see in 2024.

Greenwashing

Scrutiny on greenwashing shows no sign of easing

Greenwashing was a dominant theme throughout 2023. For the first time, the Australian Securities and Investments Commission (**ASIC**) launched civil penalty proceedings against multiple financial institutions alleging greenwashing conduct, including with respect to the investment practices of superannuation funds marketing themselves as 'ethical'.[14] Later in the year, the Australian Competition and Consumer Commission (**ACCC**) issued its first public court-enforceable undertaking to a yoghurt manufacturer, following an investigation into its '100% ocean plastic' representations.[15] With both regulators naming greenwashing as a 2024 enforcement priority, we expect these types of regulatory actions to continue.

2023 was also a significant year for greenwashing actions by private litigants targeting carbon credit use by energy and resources firms:

(a) Climate advocacy organisation Australian Parents for Climate Action (**AP4CA**) launched proceedings against EnergyAustralia alleging misleading or deceptive conduct in relation to its 'Go Neutral' electricity and gas products. Among others, AP4CA challenges EnergyAustralia's use of 'avoidance' credits, which AP4CA says do not remove carbon from the atmosphere and therefore do not negate the emissions impact of the Go Neutral products.[16]

(b) Just before the year's end, Greenpeace Australia commenced proceedings against Woodside Energy, alleging the company's statement that it cut direct emissions by 11% was deceptive because of its heavy reliance on carbon offsets.[17]

While Australian greenwashing proceedings focused on large energy and resources firms, overseas other industries are being targeted. In the US, 2023 saw new cases commenced against three airlines (KLM, Delta and United), as well as other types of business including clothing brand Nike, and online retailer Etsy.[18] Meanwhile, the UK Advertising Standards Authority issued a number of rulings banning certain advertisements run by airlines and energy companies.[19]

Directors' duties

Directors' duties and disclosure obligations in the spotlight

What could a new climate risk disclosure regime mean for director liability?

2023 saw Client Earth seek permission to file a derivative claim in the UK High Court against Shell's Board, alleging that Shell's Directors had breached their duties under UK Company Law in relation to their climate targets and strategy. While unsuccessful, the case was supported by several of Shell's institutional investors, and marked the first time that an action has sought to target individual directors as personally liable for alleged failures to manage material climate risks. It reflects the increasing concern of shareholders and particularly institutional investors in the climate risk management practices of their investee companies. While we are yet to see a similar case in Australia, such a test case is unlikely to be far away.

It is notable that the Federal Government is developing a framework for mandatory sustainability-related financial disclosures through amendments to the Corporations Act and Australian Securities and Investments Commission Act, with the effect that certain sustainability disclosures, starting with climate, will be subject to potential liability for breach of directors' duties (among other things). The Government has proposed a 'modified liability' approach that would protect reporting companies from certain types of actions for the first three years of the regime, and we expect to see private litigants test the operation and scope of the modified liability approach once legislated.

Directors' duties and nature-related risk disclosure: a new frontier?

2023 was undoubtedly the year that the world acknowledged nature-related risks as material risks for business. In a legal opinion published in October, following launch of the Taskforce on Nature-related Financial Disclosures (**TNFD**) recommendations, two Australian barristers warned that directors who fail to consider nature-related risks could be found liable for breaching their duty of care and diligence under the Corporations Act.[20] Shortly afterward, an individual ANZ shareholder filed an application for preliminary discovery, seeking copies of ANZ's internal risk management framework to enable them to determine whether the bank's governance systems adequately deal with climate change and biodiversity risks.[21]

This could be the first of a new wave of litigation that focuses on directors' duties in the context of both climate and nature-related financial risk disclosure and management.

Class actions

Feeling the impact of class action proceedings

In 2023, the significance of class actions for Australian climate law and policy emerged, demonstrating that even unsuccessful climate litigation can have important impacts:

— the ultimately unsuccessful representative action of a group of Australian children in *Minister for the Environment v Sharma*[22] provided the catalyst for independent senator David Pocock's proposed '*Climate Change Amendment (Duty of Care and Intergenerational Climate Equity*) Bill 2023'. If passed, the Bill would add statutory duties to multiple Acts (including the Environment Protection and Biodiversity Conservation Act 1999) that would require members of the executive considering decisions likely to result in substantial greenhouse gas emissions to consider the likely impact on the health and wellbeing of current and future Australian children.

— the *O'Donnell v Commonwealth* class action – where the plaintiffs alleged the Commonwealth failed to disclose climate information in connection with the issue of Australian Government Bonds, including physical and transition risks that would impact the bonds' value – finally settled. The settlement statement published by both Parties comments on the systemic risk that climate change presents and includes various acknowledgements of these risks from the Commonwealth.[23]

Looking ahead to 2024, we expect strong interest to continue on the ongoing *Pabai Pabai v Commonwealth of Australia* class action, where two Torres Strait Island leaders representing all Torres Strait Islanders argue the Commonwealth owes them a duty of care to take reasonable steps to protect them from climate change harms.

It also remains to be seen whether Australia will see an emergence of class actions focused on greenwashing, as has been the case in the US.[24]

ESG litigation

Will 2024 see litigation used as a tool to push back on ESG?

While we expect the general trend of environmental organisations and individual actors as the plaintiffs in climate proceedings to continue this year, two proceedings commenced in the US this year could indicate a swing toward large emitters using litigation as a tool to push back against the consideration of ESG factors in governmental policies and corporate decision-making:[25]

(a) First, a group of US business and industry association groups commenced proceedings against the Californian Air Resource Board (**CARB**), and its chair and CEO, in relation to new Californian laws that require companies to disclose certain climate-related information.[26] Among other things, the plaintiffs allege that the disclosure laws violate their constitutional rights to free speech.[27] Commentators predict that we will see further litigation like this once the US Securities and Exchange Commission (**SEC**) finalises its own climate disclosure rules, which we expect to see later in 2024.[28]

(b) Second, two Exxon Mobil Corporation shareholders proposed a motion for Exxon to accelerate its efforts to reduce its greenhouse gas emissions, including through adopting Scope 3 emissions reduction targets. In response, Exxon filed court proceedings to prevent the shareholders from presenting the motion at the company's 2024 AGM,[29] in a move commentators label an 'aggressive push back against climate activists who use shareholder voting to influence boardroom strategy'.[30] Exxon alleges (among other things) that the motion violates SEC rules designed to prevent shareholders from being able to 'micromanage' day-to-day business decisions through shareholder proposals, and the proceeding raises interesting questions about the role of shareholder activism in the next zero transition. It remains to be seen whether similar actions take root in Australia, where shareholder activism in relation to the emissions reduction strategies of large energy firms such as Woodside and Santos has been particularly dominant in recent years (although commentators observed a slight decline in shareholder activity in climate lobbying in the 2023 proxy season.)

"WE EXPECT THE GENERAL TREND OF ENVIRONMENTAL ORGANISATIONS AND INDIVIDUAL ACTORS AS THE PLAINTIFFS IN CLIMATE PROCEEDINGS TO CONTINUE THIS YEAR."

Future focus

Looking ahead: What's in store for 2024?

If one thing is clear, it is that 2024 is set to be another interesting and fast-evolving year in domestic and international climate litigation. Looking ahead, companies should be prepared for:

- greenwashing scrutiny from regulators and private litigants to continue, and for scrutiny of carbon credit use in net zero strategies to remain high;
- strategic litigants to look for innovative avenues to hold directors accountable for their approaches to disclosing and managing climate – and nature-related – risks; and
- Federal legislation and policy to continue to evolve in response to climate proceedings.

Meanwhile, it remains to be seen whether the push back against ESG that shows signs of emerging in the US takes hold in Australia, or whether regulator and private litigation actions will continue to dominate.

"A SWING TOWARD LARGE EMITTERS USING LITIGATION AS A TOOL TO PUSH BACK AGAINST THE CONSIDERATION OF ESG FACTORS IN GOVERNMENTAL POLICIES AND CORPORATE DECISION-MAKING."

/ FEATURE

Billionaires, women entrepreneurs and the climate trade-offs left unsaid: An inside view from COP28

ARRIVING AT COP28, IT'S CLEAR THAT NO EXPENSE HAS BEEN SPARED. THE SANDS THAT ONCE ENVELOPED THE OUTER REACHES OF DUBAI HAVE BEEN TRANSFORMED INTO NEAT HEDGEROWS OFFSET BY A MAD JUMBLE OF GAUDÍESQUE BUILDINGS. IN THE MIDDLE OF THE GREEN ZONE SITS A SPECTACULAR MODERNIST DOME THAT CALLS ON THE ARCHITECTURAL LEGACY OF ISLAM.

/ WORDS BY

Luke Heilbuth
CEO, BWD Strategic

Dr Patience Mpofu with Luke Heilbuth

DESPITE THE WINTER, IT'S HOT WALKING THE AVENUES.

Passenger buggies are in short supply and most of us are forced to schlep on foot, battling the dreadful glare in inappropriately formal clothing. All around me delegates shuffle along to their next far-flung event, foreheads basted in a thin patina of sweat.

The invitation-only CEO Forum is mercifully self-contained; a venue within a venue for 500 business, political and philanthropy leaders. The aim is a word salad of corporatese: 'to facilitate co-creation, collaboration and acceleration to unlock innovative climate and nature solutions and drive impactful results at a global scale'.

My new friend on arrival, a Zimbabwean-Australian named Patience, thinks the Emirati Government researched our sustainability-minded profiles on LinkedIn. We laugh at our good fortune to be here and pledge to make the most it.

The women and men in attendance look unremarkable, but each introduction reveals another scarcely believable story of success. An Indian man says hello over coffee. I soon realise I'm speaking with one of the planet's wind farm pioneers, whose company Suzlon has since spread throughout the world.

Then I'm listening to the CEO of ZeroAvia, who is solving aviation emissions through green hydrogen-fuelled planes. He casually mentions the recent backing of Gates and Bezos; Musk turned him down after meeting, given his penchant for battery solutions.

A friendly Canadian explains how his company, East African Power, makes power purchasing agreements directly with African leaders – transforming lives by providing affordable electricity, often for the first time.

Drawing on the Arabic I learned as a young diplomat, I sit next to a lone Emirati to ask him what he thinks of it all. Abdalla works directly for COP President Sultan Al Jaber. He's all smiles as he explains the pride Emiratis feel at being at the centre of global attention.

Wealth, power and innovation

I make my way into the main theatre, where Bear Grylls is emceeing. When the teleprompter malfunctions, so does Bear, falling silent mid-sentence. He has the grace to laugh at himself before rolling out more introductions for some of the world's famous people.

In a panel session, Bill Gates repeats what he's argued in his book *How to avoid a climate disaster*; philanthropic capital is critical to seeding the moon-shot technologies required to solve the climate and nature crises. He tells the wealthy in the room to get in touch if they want some advice on giving.

The Honorable John F. Kerry addresses COP28

Nidhi Pant, co-founder of S4S Technologies

Ray Dalio's here too, seemingly unaffected by his reputational trashing in the media. He talks of a passion for deep sea exploration and the importance of preserving our long-neglected oceans. We have the money and the brilliance to solve climate change, he says. The missing ingredient is how we are with each other.

Champion climate talker John Kerry owns the stage after lunch, admitting that even he's tired of the platitudes. He rails against coal and the toxicity of the fossil fuel lobby, calling on the room to put our businesses on the line for the sake of the transition.

I've always been sceptical of COP. All the expense, talking and air miles. Incredibly, the carbon intensity of the global energy system fell faster in the 30 years before the first major UN climate conference (Kyoto) than after it[31]. Since the Kyoto Protocol was adopted in 1997, both total and per capita emissions have risen faster than in the period prior. More than half of all emissions burned by humans have occurred after the first airing of Seinfeld[32]. But it's hard not to get swept up in the good intentions. I just about believe the idea that all this wealth and innovation is now coalescing to begin the task of fixing the world.

Twiggy Forrest comes to the stage. He tells the audience to ask their leaders a simple question: When are you going to stop burning fossil fuels?

After humblebragging of Fortescue's success, he wonders when the Australian Government will stop offering more than $10 billion in fossil fuel subsidies. The room is attentive and approving as he rolls on; I overhear an Indian delegate behind me ask who this man is.

As the afternoon extends, Twiggy is back, this time as a judge. He and two others are up there to put a series of young, award-winning sustainability entrepreneurs through their paces. The three standouts are all young women.

Sarah Lamaison, co-founder of Dioxcycle,[33] is using electrolysis to convert CO_2 into a wide range of commodities such as carbon monoxide, ethylene and ethanol. The aim is to recycle over 600 megatonnes of carbon dioxide each year while producing a sustainable alternative to fossil-fuel derived commodities like plastics.

Nidhi Pant, co-founder of S4S Technologies[34], is helping rural Indian women become micro-entrepreneurs by repurposing imperfect crops into new products using solar-powered food dehydration systems. And Nicole Mao, co-founder of Tiger New Energy[35], is providing affordable lithium-ion batteries-as-a-service to electrify Bangladesh's huge network of two-and three-wheelers.

Trade-offs

The evening has fallen when I step out into the relieving night air. Ahead, the Saudi Pavilion glitters like an adult Disneyland. Inside it's all sound and light, with wall-to-wall AV screens showing deserts repopulated with oryx and ibex. A 360-degree oval immersion showcases the Saudi highlands geo-engineered with palms among green grasses.

The whole experience, like COP itself, is designed to awe and overwhelm; a green-techno microcosm of what the region's authoritarian, often visionary leaders hope to compel into reality with their endless supply of petrodollars and even larger imaginations.

Heading back to my hotel, the metro is packed with South Asian workers out with friends. It's Emirati National Day and Dubai is bumping. The long ride gives me time to think. Have I been swept up by the excitement of attendance? Or is real change finally here?

"THE WHOLE EXPERIENCE, LIKE COP ITSELF, IS DESIGNED TO AWE AND OVERWHELM; A GREEN-TECHNO MICROCOSM OF WHAT THE REGION'S AUTHORITARIAN, OFTEN VISIONARY LEADERS HOPE TO COMPEL INTO REALITY WITH THEIR ENDLESS SUPPLY OF PETRODOLLARS AND EVEN LARGER IMAGINATIONS."

The well-trammelled cliche is that climate talks are nothing more than an endless run of platitudes. The time to act is now. There is no planet B. If only the world just stopped talking and acted, we'd be OK. The sentiment is right. But it inadvertently ignores the even harder conversation around the trade-offs required to advance progress.

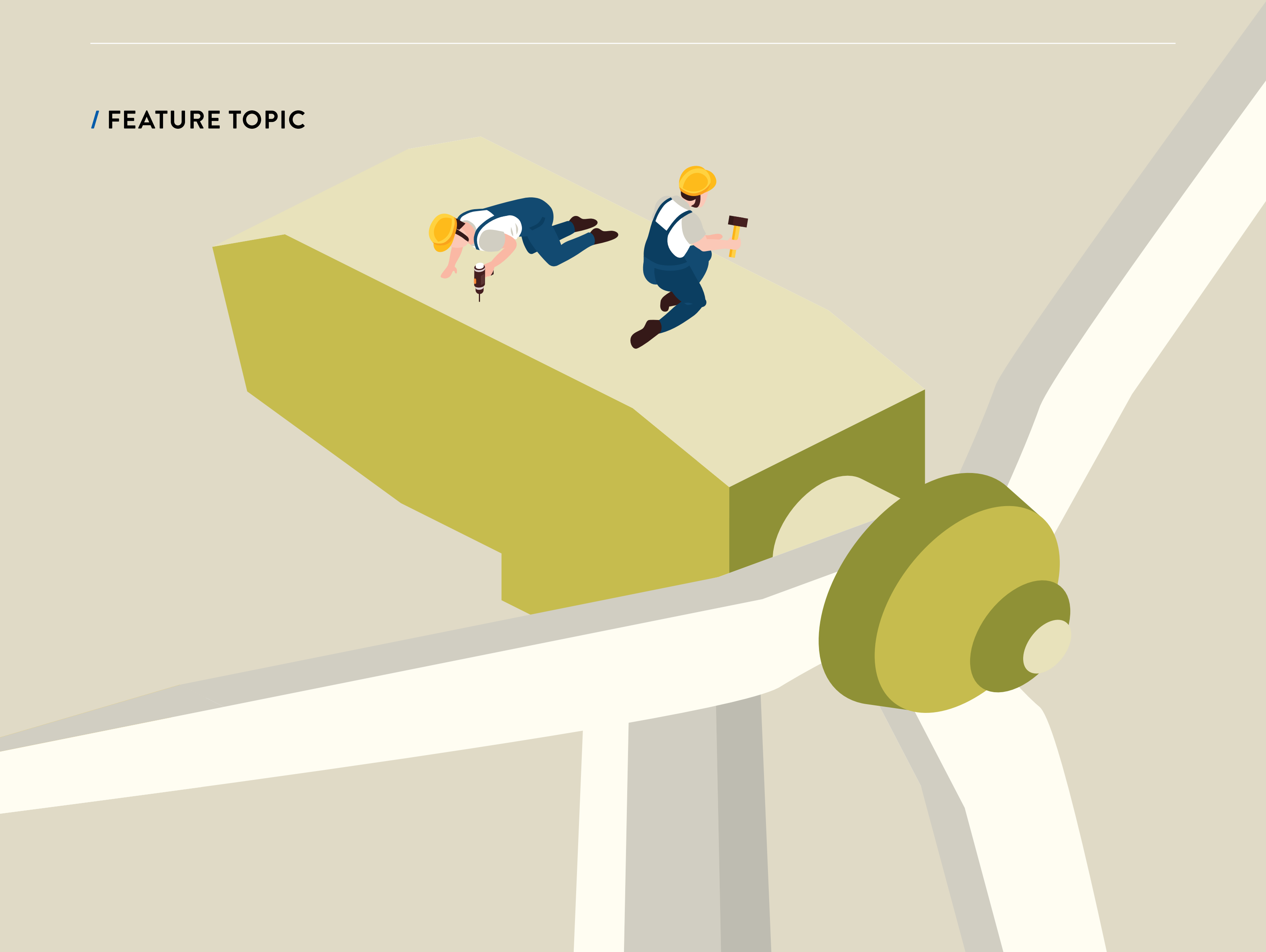
For example, Chinese companies produce the world's cheapest solar panels but some use forced labour to do so. Is it justified for a buyer, who won't otherwise be able to upgrade to solar for cost reasons, to purchase an unethical product? What matters more? Reducing emissions or preventing human cruelty?

What about rich nations offering financial aid to the Global South? Developing countries did not cause climate change but suffer its worst effects. Do we have a moral imperative to aid them, as per the 'loss and damage' fund announced during the last COP? I believe we do. But the harder question is how we prevent hard-won tax dollars from ending up in the personal bank accounts of reprehensible ministers and generals.

Finally, what of the fossil fuel giants and global consultancies slinging credibility for hire? They will benefit the most from the trillions in spending required to transition. Does it matter that those who created the problem will benefit most from solving it? Or does the end justify the means?

Like all things in climate change, there are no easy answers. But we must find them all the same. To borrow from what Weber once said of politics, climate action is 'a strong and slow boring of hard boards … Man would not have attained the possible unless time and again he had reached out for the impossible.'

/ FEATURE TOPIC

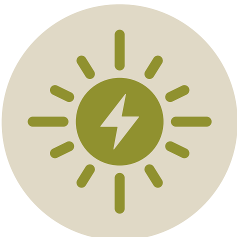


What will COP28 mean for business in 2024?

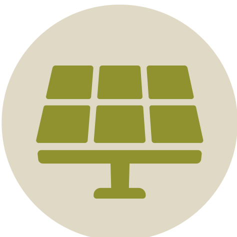
/ WORDS BY

Ilona Millar
Partner, Gilbert + Tobin

Two months have passed since the COP28 climate conference, where Parties finalised the first Global Stocktake (GST) with the finding that collective climate action to date falls well short of meeting the goals of the Paris Agreement.



2X
global energy efficiency targets by 2030



3X
global renewable energy targets by 2030

The cover decision from the conference calls on Parties to transition away from fossil fuels toward net zero, encourages them to submit economy-wide Nationally Determined Contributions (**NDCs**), articulates a new target to triple renewables and double energy efficiency by 2030, and aims to build momentum towards a new architecture for climate finance.

COP28 also saw Parties agree to operationalise the global loss and damage fund that will provide financial assistance to vulnerable nations suffering from climate change impacts, and a framework for the Global Goal of Adaptation. Meanwhile, negotiations on Article 6 of the Paris Agreement saw less progress, with a number of issues deferred for further consideration this year.

The outcomes of COP28, in combination with the plethora of declarations and initiatives that were announced alongside the conference, will give rise to a number of challenges and opportunities for Australian governments and businesses.[36]

Looking ahead, 2024 will be a busy year for national climate policy, as Parties implement responses to the commitments made in Dubai, develop updated NDCs due in 2025, and intensify work toward Parties agreeing a new collective quantified goal on climate finance at this year's conference in Baku, Azerbaijan.

Transition away from fossil fuels and a commitment to the energy transition

After days of deliberations, the final hours of the conference saw Parties adopt a decision on the GST – this was a critical outcome, as the decision is to inform Parties' next round of NDCs due in 2025. The text makes clear that developed countries' next NDCs should contain ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories; and align with limiting global warming to 1.5°C (taking account of differences in national circumstances).

Perhaps the most contentious element of draft GST texts was whether the text would include language calling for a 'phase out' or 'phase-down' of fossil fuels. Ultimately, the final decision focuses on accelerating efforts towards the 'phase-down of unabated coal power', 'transitioning away' from fossil fuels in energy systems, 'in a just, orderly and equitable manner', and 'phasing out inefficient fossil fuel subsidies'.

For Australian businesses in emissions intensive sectors, this language is important: it highlights the importance of decreasing reliance on fossil fuels, and building just transition concepts into corporate decarbonisation strategies.

For governments, the need for adequate and innovative financing and incentives to support the energy transition will continue to pose challenges. Meanwhile, we expect to see a particular focus on just transition in 2024, with the Federal Government's 'Net Zero Economy Authority' expected to be legislated this year: one function of the Authority will be supporting transition of workers impacted by net zero transition, particularly workers in coal-fired power stations and dependent mines.[37]

> *"WE EXPECT 2024 TO OFFER PARTICULAR OPPORTUNITIES FOR INVESTMENT AND INNOVATION IN RENEWABLE ENERGY."*

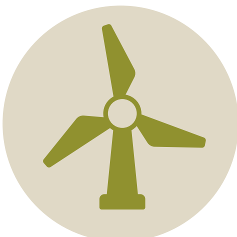
Scaling up efforts on renewables and energy efficiency

A critical takeaway from last year's COP was the focus on renewable energy and energy efficiency. In the early days of the conference, Australia was one of over 100 countries who pledged to triple worldwide installed renewable energy generation capacity to at least 11,000 gigawatts and to double the global average annual rate of energy efficiency improvements from around 2% to more than 4% each year until 2030.[38] Importantly, this commitment was also reflected in the final decision text.[39]

The Australian Government's plan to achieve 82% renewables across the national energy system by 2030, and initiatives to support renewable generation in Australia such as the proposed capacity investment scheme, as well as the Hydrogen Headstart Program, are seen as important domestic contributions towards these goals. In the wake of the conference, the Government has announced several funding awards for renewable energy projects and initiatives,[40] and this month launched consultations on a new 'New Vehicle Efficiency Standard' to reduce transport emissions that is expected to take effect in 2025.[41]

We expect 2024 to offer particular opportunities for investment and innovation in renewable energy and energy efficiency technologies, and for renewables firms to capitalise on a need for increased production.

This should also translate into opportunities for businesses in the critical minerals sectors, who provide inputs for renewable energy technology. Meanwhile, industries with energy efficiency needs can expect to see opportunities to work with government to improve efficiency.



2X

Australia has pledged double the global average annual rate of energy efficiency improvements until 2030

120

countries, including Australia, signed the landmark 'UAE Climate and Health Declaration'

Tackling methane emissions

COP28 put the spotlight on methane emissions, with the GST decision calling on Parties to contribute to efforts to accelerate and substantially reduce non-carbon-dioxide emissions globally, including in particular methane emissions by the end of this decade. Outside of negotiations, more governments joined the 'Global Methane Pledge' (to which Australia is already a party[42]), and the US Environmental Protection Agency (US EPA) announced rules aimed at reducing methane emissions from oil and gas operations.[43]

In the wake of the conference, this month the US EPA announced a 'Methane Emissions Reduction Program' to fund particular projects that reduce methane emissions.[44] In Australia, we are yet to see any nation-wide strategy for combatting methane emissions (unlike the likes of the EU and Canada), although last year Australia signed an agreement with Japan, Korea, the US and the EU to lower methane emissions in the LNG supply chain;[45] and following COP, the Government announced support for a new research centre to develop technologies that reduce livestock methane emissions.[46]

For Australian businesses with material methane emissions, the outcomes of COP28 signal the need to better measure, account for and manage methane and other short-lived greenhouse gases in their decarbonisation strategies.

Coalescence of climate, nature and health

COP28 saw Parties recognise the critical links between achieving emission reductions and protecting biodiversity. This is reflected in the decision text, which emphasises the importance of conserving, protecting and restoring nature and ecosystems towards achieving the Paris Agreement temperature goal, and notes the importance of ensuring the integrity of all ecosystems and protection of biodiversity. A reference to enhanced efforts towards halting and reversing deforestation and forest degradation by 2030 was also included in the final text.

Outside of negotiations, in a landmark development, Australia was among over 120 countries to sign the 'UAE Climate and Health Declaration', committing to pursue a range of common objectives towards ensuring better health outcomes in the context of climate change, including through the transformation of health systems to be climate-resilient, low-carbon, sustainable and equitable.[47]

This coming together and mainstreaming of biodiversity and human health concerns at a climate COP reflects the expansive and intensifying impacts of global heating on our society.

For Australia, work is underway by the Clean Energy Regulator to implement the recently-passed Nature Repair Act 2023 – which creates a framework for a voluntary national biodiversity market:[48] it remains to be seen how this new scheme will develop throughout 2024, but it can be expected to offer opportunities for landholders in areas with biodiversity restoration potential.[49]

This year will also see the Government finalise its updated Strategy for Nature and national nature targets ahead of the 16th meeting of the Conference of the Parties to the Convention on Biological Diversity in October.[50]

On the health front, the Government recently launched Australia's first 'National Health and Climate Strategy', setting out Australia's approach for addressing the impacts of climate change on our health and wellbeing,[51] and we expect this to be a focus area for the Government this year.

International carbon markets

In an unfortunate outcome, negotiations on Article 6 carbon markets stagnated at COP28. On Article 6.2, Parties could not agree on authorisation processes, and disagreements also arose as to whether and how to define 'cooperative approaches'. Meanwhile with respect to Article 6.4, Parties failed to adopt recommendations from the Supervisory Body in respect to guidance on methodologies and removal activities. As a result, 2024 means another year of uncertainty for countries participating in Article 6.2 approaches, and another year without operationalisation of Article 6.4.

Despite the lack of progress in negotiations, voluntary carbon market standards and initiatives had a strong presence at COP28: six of the world's major independent crediting standards including Gold Standard and Verra's 'Verified Carbon Standard' announced their intent to collaborate on promoting market integrity throughout this year, including by applying for independent assessment against the Integrity Council for the Voluntary Carbon Market 'Core Carbon Principles'.

These developments can be expected to help bolster integrity and transparency in voluntary markets, which may in turn help overcome barriers to businesses using high quality credits as part of ambitious decarbonisation strategies.

/ FEATURE TOPIC

Carrying the weight of the world

Corporate sustainability leaders are our epic heroes. Don't let them fall into the abyss.

/ WORDS BY

Karimah Hudda
Senior Advisor, BWD Strategic
(North America)

Dr Alex Gold
CEO, BWD Strategic
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"My remit was increased threefold, I was given zero extra resources or budget, and after exhausting myself to align everyone on the forward strategy, my leadership decided they were not going to go ahead with the strategy after all," said a friend as I asked her what had prompted her to leave the Chief Sustainability Officer position at a large company.

It had been her dream position. Her career rise was meteoric. Yet, not two years into the original CSO role, she quit, took a beat, and joined another large company as their sustainability lead.

This story has become increasingly common over the past two years. According to a survey[52] conducted by the Association of Corporate Citizenship Professionals in 2023, over half of corporate sustainability professionals report burnout. Many of us estimate that the 50% figure is a conservative estimate.

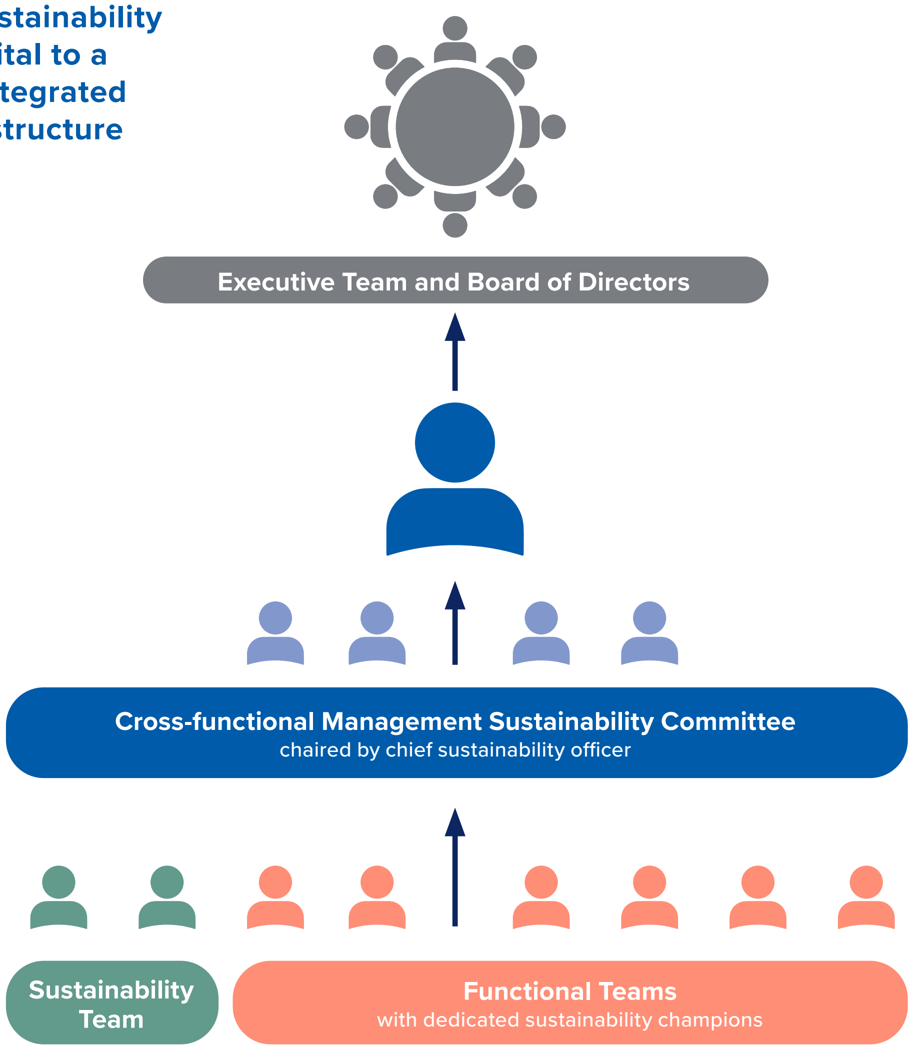
Sustainability leaders today feel like they need to be a combination of Hercules, Sisyphus and Arjuna.

Carrying the weight of the world: sustainability leaders as Hercules

Corporate sustainability leaders are aware that the world exceeds our tolerable emissions limit by 50%, that human rights risks abound, and that supply chain risks will far outweigh the political headwinds against taking action on environmental and social issues. Furthermore, they see the trend toward increased corporate accountability, as sustainability and reporting mandates continue to sweep the globe.

For most of the leaders we know, sustainability is not just a profession, but a mission, dedicated to transforming companies on the path to sustainable growth. The ranks of corporate sustainability leaders are increasing, which means there are more opportunities to step up to this mission than ever before.

Corporate sustainability leaders are vital to a company's integrated governance structure



> "SUSTAINABLE VALUE CREATION IS A 'MUST-WIN' FOR COMPANIES; BUT TO WIN, SUSTAINABILITY LEADERS NEED TO BE SET UP TO WIN AS INDIVIDUALS, LEADERS OF TEAMS, AND COMPANY-WIDE CATALYSTS."

In 2021, a survey across 62 countries found that the number of Chief Sustainability Officers tripled.[53]

That said, with the perma-crisis of economic uncertainty, (often climate linked) supply chain risks and war, sustainability often jostles for space on the C-Suite and Board agenda. This combination of knowing the scope of the problem, gaining a mandate to lead, and lack of space to influence change is a recipe for attrition among sustainability leaders today.

If companies are to retain top talent, support is needed in two forms: individual and community. As a sustainability leader in Fortune 100 and Fortune 200 companies, I found the combination of the two invaluable; as have many of my fellow leaders across the profession.

Rolling a boulder up a hill for eternity: corporate sustainability leaders as Sisyphus

The best leaders we know work across the environmental, social and governance spectrum. In recent years, sustainability professionals have skewed to one of those three pillars. In our experience, the fast growth in demand has led to environmental experts being asked to stretch across social and governance advisory; whereas governance, finance and legal experts have been asked to become somewhat akin to climate scientists.

Human beings have the capability to learn anything. The challenge is the speed at which new sustainability leaders are expected to learn the breadth of issues, while competing with the rest of the industry for top talent to fill their own teams. When sustainability leaders in our network secure their teams, they often report that talent with technical expertise often lack experience with working in large, cross-functional companies and their talent therefore get frustrated that their ideas don't gain traction with their internal stakeholders.

Corporate sustainability leaders today need to upskill themselves and their teams, both on the 'what' of sustainability and the 'how' of driving change within a corporate system that doesn't always understand what they do. Targeted team building and coaching, cross-functional alignment and expert learning events are key for a leader to sustain themselves and to attract, retain and grow their talent.

50%

over half of corporate sustainability professionals report burnout

3X

a survey across 62 countries found that the number of Chief Sustainability Officers tripled

Brave enough to face five in 100 odds: corporate sustainability leaders as Arjuna

Corporate sustainability leaders are designed to be catalysts, rather than building their own mega functions, even if the size of the average sustainability team has tripled[54], from five to 15 people. That said, sustainability leaders joining companies that are at the beginning of their journey may find they are a team of one. These small but mighty functions are charged with moving the whole company, and increasingly, moving the company's whole upstream supply chain, as well as engaging downstream customers.

In the best of times, sustainability leaders' stakeholders are focused on several other targets, some of which may lead the company's work in the opposite direction of its sustainability strategy. Short-term financial pressures threaten budgets, while ambitious KPIs with significant overhead pressures can force cross-functional teams to prioritise other targets over sustainability priorities. Even if sustainability targets enjoy broad organisational alignment, a change in a cross-functional partner can bring the sustainability leader back to square one, based on the need to find common cause with a new cross-functional partner.

The best sustainability leaders know success lies in convincing their C-Suite and Board to embed sustainability as a company-wide imperative, and a driver of culture and engagement. Yet it is not uncommon to see the sustainability lead transition after one or more of their top leadership changes.

This is where deeper work is needed. Empowering the sustainability leader to engage and align top leadership consistently is key, rather than constantly bogging them down in the minutiae of technical work.

The companies that are considered sustainability leaders take the time to refine their purpose, principles and values to inspire action and create lasting impact. They embed environmental, social and governance issues into their long-term business strategy. With this foundational alignment and integration, leading companies win by making sustainability part of everyone's job. Companies taking this approach find that the sustainability lead and teams become catalysts for everyone to become sustainability champions, rather than having to battle for attention and space to get the job done.

Sustainable value creation is a 'must-win' for companies; but to win, sustainability leaders need to be set up to win as individuals, leaders of teams, and company-wide catalysts.

/ ANALYSIS

Lab-grown meat: it looks like meat, tastes like meat, and is slaughter-free. But is it too good to be true?

Investment in lab-grown proteins is growing, driven by concerns about the environmental impact of livestock production. What was once a sci-fi concept is now being served up on diners' plates; Singapore approved the world's first lab-grown meat product in 2020.

/ WORDS BY

Nicola Atkin
Senior Strategy Manager, BWD Strategic

The reduced environmental footprint of lab-grown proteins looks promising; less land, less water, and lower emissions (see further details in Table 1). However, it doesn't take much digging to identify a few concerns:

1. **Research is disproportionately funded by Big Ag.**
2. **Assumptions made in lifecycle assessments (LCAs) are unrealistic.**
3. **The variation between emission types is oversimplified by use of 'carbon-equivalent'.**

Let's address each in turn.

Research

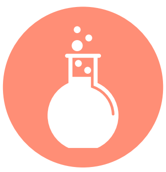
Research is disproportionately funded by Big Ag

Big agriculture corporations such as Tyson Foods, Cargill and JBS Foods have made significant investments in alternative protein start-ups and technologies in recent years.[55] Unsurprisingly, these same companies commission and fund much of the research on alternative proteins.[56] Industry funded efforts distract attention from independent research and can lead to greater emphasis being placed on favourable outcomes.[57] For example, research on alternative proteins tends to focus on GHG emissions, while overlooking other (potentially less favourable) outcomes such as impact on consumer health and animal welfare.[58]

Lifecycle assessments

Assumptions made in lifecycle assessments (LCAs) are unrealistic

Although lab-grown protein is often promoted as slaughter-free and cruelty-free, it relies on a growth medium typically derived from the blood of unborn calves (fetal bovine serum).[59] To date, there are few scalable alternatives. Yet, many lifecycle assessments assume that once lab-grown proteins are commercialised, fetal bovine serum will not be a required input.[60] This downplays the fact that current methods still depend on animals, which is misleading in terms of both animal welfare and environmental impact.



Emissions

The variation between emission types is oversimplified by use of 'carbon-equivalent'

Carbon-equivalent (CO_2-e) is the common way to measure greenhouse gas (GHG) emissions. This method converts all GHGs into an equivalent volume of carbon dioxide based on warming potential. However, this approach overlooks an important detail. Methane, which is produced by livestock, has a strong warming effect but is short-lived in the atmosphere. In contrast, carbon dioxide has a milder short-term warming effect but persists in the atmosphere for hundreds of years. Lab-grown proteins are highly energy intensive to produce. The associated reduction in emissions is therefore wholly dependent on the availability of low-carbon energy.[61]

So, is lab-grown meat too good to be true? The jury is out.

What I'd like to see is:

- More government funding to support independent research on alternative proteins, considering both the protein sources and methods of production.
- A broadening of the alternative protein narrative to consider other outcomes alongside reduced GHG emissions.
- More accessible, unbiased information available for both consumers and policymakers.

TABLE 1: THE ENVIRONMENTAL IMPACTS OF LAB-GROWN MEAT PRODUCTION COMPARED WITH BEEF PRODUCTION

Protein Type	Land use (m^2/ 100g protein)	GHG emissions (kg CO_2-e/100g protein)	Fresh water withdrawals (litres/100g protein)
Beef (beef herd)[62]	164	50	728
Lab-grown meat[63]	2	6	209

3 countries

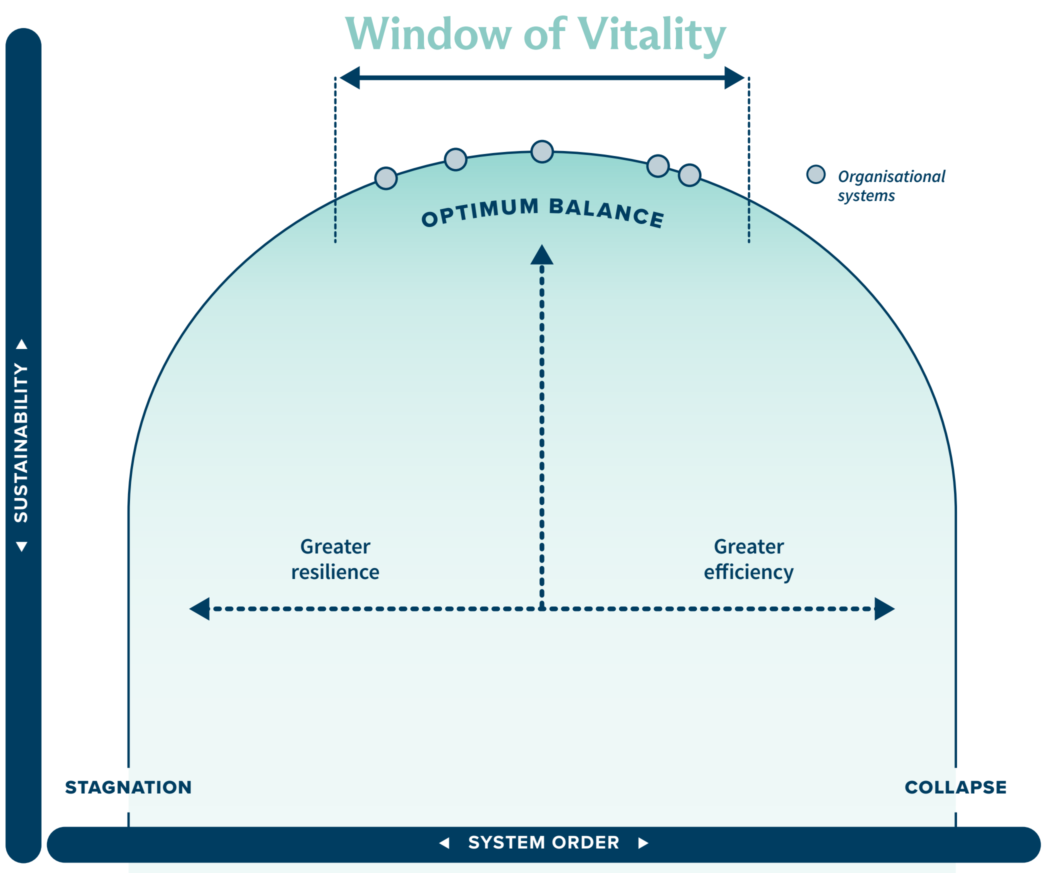
The sale of lab grown meats is now legal in three countries – Singapore, US and the Netherlands

/ IN BRIEF

The Window of Vitality:

How great businesses balance efficiency and resilience

Luke Heilbuth
CEO, BWD Strategic



Are you familiar with the 'Window of Vitality'? It refers to the idea that all sustainable ecosystems exist within a fixed range of what ecologists call system order.

These ecosystems are successful because they balance efficiency (the optimum use of resources) with resilience (the capacity to adapt to disruptive events).

To illustrate the concept, let's take the metaphor of a river. Most years, it channels the path of least resistance, flowing fast and direct to the sea.

The river is surrounded by floodplains which don't move water efficiently. Meandering, often stagnating, they appear to be a waste of potential energy.

When the deluge comes, though, the floodplains become crucial. They absorb excess water, preventing mass flooding and creating opportunities for new life.

Our corporate culture tends to overinvest in efficiency (the river) at the expense of resilience (the floodplain).

Mired in the short-termism of the quarterly earnings cycle, many investors and bonus structures incentivise management teams to optimise for cost and efficiency.

By contrast, the hallmarks of resilience – sustainability, flexibility, diversity and learning – are viewed as optional at best and wasteful at worst.

Successful organisations stay firmly within the window of vitality by understanding and balancing the inherent tension between efficiency and resilience.

Is your business over-investing in efficiency at the expense of resilience? If so, what steps can you take to right the balance?

- **Assess** your megatrends/long-term context
- **Develop** an approach that prepares you for a range of scenarios
- **Disclose** performance to enable organizational learning and adaptation over time

As Nassim Taleb says, "*Never cross a river if it is on average four feet deep." To succeed over the long term, prepare for the flood.*

CASE STUDY / **GOOGLE**

Consider Google, whose founders created one of the best businesses ever by allocating a meaningful portion of firm resources to 'non-productive' innovation.

Borrowing the idea from 3M, Brin and Page instituted the 20% Project, where employees were encouraged to spend up to a fifth of their time working on personal projects.

In a culture that prized individual freedom and celebrated creativity, employees invented the cash-gushing creations Google AdSense, Gmail and Google News.

Ironically, the 20% Project was discontinued in 2013 after excessive management oversight of new ideas and an overt focus on efficiency stifled its intended innovation.

In the decade since, Google has trended further towards hyper-efficiency at the expense of the blue-sky thinking of its engineers.

OpenAI's ChatGPT, for example, leapfrogged Google Bard in the race to monetise large language models, despite the latter having much deeper pockets and more AI talent.

This surrender of AI leadership was driven in part by the judiciousness of its legal and accounting teams, who were overly focused on legal risk and cost-cutting.

CEO Sundar Pichai and CFO Ruth Porat remain outstanding business leaders. But in my view, they can do more to ensure Google remains within the window of vitality.

Restoring the optimum balance between efficiency and resilience might include the following steps:

- **Restart the 20% Project:** Explain to investors that short-term costs are the price of creativity and innovation, and a necessary bulwark against future disruptions.
- **Minimum % of investment for 'other bets':** Defend moonshot ideas like Waymo (self-driving cars) and Calico (longevity) from the vagaries of the economic cycle.
- **Talent redistribution:** AI is undermining the value of average engineers. Focus on a smaller technical team and reinvest in other disciplines (e.g. physics, sustainability).
- **Modularise project teams:** Hire and promote people especially good at adapting to change and faster cycles of knowledge acquisition.
- **Champion sustainability:** Follow Microsoft in developing technology solutions to decarbonisation; stop the current use of mass offsets to claim carbon neutrality.
- **Resilience management:** Set aside a resilience fund to respond to unforeseen future disruptions and invest in technologies that safeguard against such events.
- **Ethical use of AI:** Work with major competitors to develop a framework to guide the development and use of AI, to ensure AI-generated content is accurate and safe.
- **Invest in trust:** Use DeepMind to showcase how AI can help solve humanity's greatest challenges, burnishing Google's reputation as a champion for the common good.

/ IN DEPTH

An update on Australia's mandatory reporting standards

/ WORDS BY

Ilona Millar
Partner, Gilbert + Tobin

Climate-related risk disclosure developments

Australia's mandatory climate-related financial disclosures regime

In June 2023, the International Sustainability Standards Board (ISSB) issued its first two International Financial Reporting Standards: 'IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information' (IFRS S1) and 'IFRS S2 Climate-related Disclosures' (IFRS S2) (together, the ISSB Standards), which became effective for financial reporting periods commencing on or after 1 January 2024.[64] IFRS S1 requires companies to disclose information about their sustainability-related risks and opportunities that is useful to investors when making decisions about providing resources to these companies. Meanwhile, IFRS S2 requires the disclosure of information specifically linked to climate-related risks and opportunities, and is designed to be used in conjunction with IFRS S1.

Australian regulators have expressed their support for the ISSB Standards, and the Federal Government is currently in the process of establishing an Australian mandatory climate-related financial disclosure regime. In January, Treasury released the exposure draft Treasury Laws Amendment Bill 2024: *Climate-related financial disclosure* (Cth) (**Bill**) which proposes amendments to the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth) (**Corporations Act**), prescribing the obligations for Australia's mandatory climate-related financial disclosure regime, the type of information that is to be reported, assurance requirements, and the liability approach that will apply to sustainability reporting.[65]

This development follows the release by the Australian Accounting Standards Board of exposure draft *Australian Sustainability Reporting Standards* (**ASRS**) in October last year.

The ASRS sets out the detailed content of the disclosures that reporting entities would need to make, and align closely with the ISSB Standards insofar as they relate to climate change, with some modifications for the Australian context. Public consultation on draft ASRS closed on 1 March 2024 and the release of the final statement is anticipated later in 2024.

Phased approach to implementation

The Bill proposes a phased approach to climate-related financial disclosure obligations. 'Group 1' entities will be required to prepare disclosures for financial years that commence from 1 July 2024; 'Group 2' entities will be required to prepare disclosures for financial years that commence from 1 July 2026; and 'Group 3' entities will be required to prepare disclosures for financial years that commence from 1 July 2027. A 'Group 1' entity is any of the following:

— an entity that meets at least two of the following three criteria:
  - the consolidated revenue of the entity (and the entities it controls) is equal to or greater than $500 million;
  - the value of the consolidated gross assets at the end of the financial year of the entity (and the entities it controls) is equal to or greater than $1 billion;
  - the entity (and the entities it controls) have, at the end of the financial year, 500 or more employees; or

— an entity that is a registered corporation under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) or required to make an application to be registered under subsection 12(1) of the NGER Act and that meets a publication threshold in subsection 13(1) of the NGER Act.

The Bill also proposes amendments to the Corporations Act to provide that where accounting standards require an entity (the group head) to prepare financial statements in relation to a consolidated entity, the group head can elect to prepare a sustainability report on the same consolidated basis: in this case, the sustainability report must be prepared as if the consolidated entity is a single entity.[66]

Content of disclosures

Proposed amendments to section 2M of the Corporations Act will require climate disclosures to be contained in a 'sustainability report' which will form part of reporting entities' annual reports, along with the financial report, directors' report and auditors' report. The sustainability report will be required to contain a 'climate statement' (together with notes to the statement) that comply with the ASRS.

As a result, reporting entities will need to look to the ASRS to understand their specific disclosure obligations.[67] Like the ISSB Standards (and the predecessor Task Force on Climate-Related Financial Disclosures (**TCFD**) recommendations), the ASRS take a 'four pillar' approach to the required content of disclosures across governance, strategy, risk management and metrics and targets. Notable disclosures that will be required under the ASRS (if finalised in its current form) include:

— Scope 3 emissions (from the entity's second sustainability report onwards); and

— climate resilience assessments against at least two scenarios one of which must be consistent with the most ambitious global temperature goal set out in the *Climate Change Act 2022* (Cth) (i.e., 1.5°C above pre-industrial levels).

A notable difference between the ASRS and the ISSB Standards is that the ASRS prioritises measurement of Scope 1 and 2 emissions using NGER Act methodologies (unlike the ISSB, which uses the GHG Protocol as default). This can be expected to help streamline the reporting practices of reporting entities who already report under the NGER Act.

Sustainability reports will be subject to limited assurance reviews until 2030, and these reviews will only cover Scope 1 and 2 emissions disclosures. The Australian Auditing and Assurance Standards Board has been tasked with setting a pathway for phasing in assurance requirements over time, so that assurance of all climate disclosures will be required from 1 July 2030 onwards.

Modified liability regime

An important feature of the Bill is the 'modified liability' approach which is proposed to be established by including the proposed new section 1705B of the Corporations Act. The modified liability approach would apply for the first three years of the regime, and would protect reporting entities from certain types of actions or proceedings in relation to a statement in a sustainability report about Scope 3 emissions or scenario analysis.[68] Entities would not be protected from criminal proceedings, or civil actions brought by the Australian Securities and Investments Commission (**ASIC**) where ASIC alleges the contravention of a Commonwealth law and seeks only an injunction or declaration.

Preparing for change

Entities that will be required to report under the Australian mandatory climate-related financial disclosure regime – particularly those that meet the Group 1 thresholds – should review the requirements of the Bill and ASRS. For entities who already report in accordance with TCFD recommendations, undertaking an analysis of any gaps between current reporting and the requirements of the Bill may help to enhance their climate-related disclosures and prepare for mandatory reporting obligations to commence. Entities should also prepare for the additional costs that complying with the mandatory climate-related financial disclosure regime will entail. For example, companies may need to hire experts to provide information and advisory services to meet reporting obligations. Companies should also consider the fact that climate-related disclosures can bring about reputational risks, as detailed climate reporting may expose companies to the scrutiny of key stakeholders and activists.

California's Climate Accountability Package

In October 2023, the California Governor signed into law two core bills of the California Climate Accountability Package, Senate Bill 253, the Climate Corporate Data Accountability Act (**SB 253**)[69] and Senate Bill 261, the Greenhouse Gases: Climate-Related Financial Risk Act (**SB 261**).[70] This legislation requires certain companies doing business within the state to make climate disclosures, including reports relating to greenhouse gas (**GHG**) emissions and climate-related financial risks.

Specifically, SB 253 requires all private and public companies with an annual revenue of more than $1 billion and that are 'doing business' in California to publicly disclose all Scope 1, 2 and 3 GHG emissions. In California, Scope 1 and 2 disclosures need to be made in 2026 and Scope 3 disclosures in 2027, with annual reporting thereafter. SB 261 requires all private and public companies with an annual revenue of more than $500 million and that are 'doing business' in California to publicly disclose their material climate-related risks and measures adopted to reduce the same. By 1 January 2026, each covered entity must file its first report with the California Air Resources Board and also make a copy publicly available on its website. Covered entities will need to disclose every two years thereafter.

Draft implementation guidance documents for the European Sustainability Reporting Standards

In January 2024, the European Financial Reporting Advisory Group published the first three draft implementation guidance documents for the European Sustainability Reporting Standards (**ESRS**) for public feedback. The public consultation period closed on 2 February 2024. The ESRS were adopted in July 2023 for use by all companies subject to the Corporate Sustainability Reporting Directive (**CSRD**). The ESRS cover the full range of environmental, social and governance issues, including human rights, biodiversity and climate change.[71] Undertaking a materiality assessment is the starting point for sustainability reporting under the ESRS. The required materiality assessment should involve identifying sustainability-related impacts, risks and opportunities, of both the relevant business and its value chain, and assessing their materiality.

The guidance documents that were on public consultation were:

— *Draft EFRAG IG 1: Materiality assessment*,[72] which describes the ESRS reporting requirements in relation to the required materiality assessment including the description of possible steps of the assessment process.

— *Draft EFRAG IG 2: Value chain*,[73] which describes the ESRS reporting requirements regarding value chains.

— *Draft EFRAG IG 3: Detailed ESRS datapoints*,[74] which includes a list of the detailed requirements of each ESRS disclosure requirement and other application requirements.

Companies that are subject to the CSRD should familiarise themselves with these guidance documents in order to understand what is considered best practice when reporting under the directive.

"ENTITIES SHOULD ALSO PREPARE FOR THE ADDITIONAL COSTS THAT COMPLYING WITH THE MANDATORY CLIMATE-RELATED FINANCIAL DISCLOSURE REGIME WILL ENTAIL."

Decarbonisation developments

Climate Active Review

In October 2023, The Department of Climate Change, Energy, the Environment and Water (**Department**) sought feedback by way of public consultation on proposed Climate Active reforms.[75] Climate Active is a Federal Government program that awards certification through a trade mark to organisations which have achieved carbon neutrality against the requirements of the Climate Active Carbon Neutral Standard which is adapted from the GHG Protocol.[76] The consultation was open for eight weeks from October through to December 2023 and posed a question about the value that Climate Active has provided to businesses, organisations, consumers and the climate.[77]

The paper considered eight key proposed reforms:

— to strengthen the emission reduction strategy requirement by requiring all participating businesses and organisations to:
  - set near, and long-term gross emissions reduction targets that are aligned with Australia's Nationally Determined Contribution made in accordance with the Paris Agreement; and
  - credibly demonstrate that they are on track to meet their near-term gross emissions reduction targets;

— to develop additional guidance to support businesses and organisations in establishing an emissions boundary;

— to implement the Climate Change Authority's (CCA) recommendation that eligible international carbon offsets under the program be subject to a five-year rolling vintage, whereby all units must have been issued no more than five years prior to their cancellation and use under the program;

— that all businesses and organisations seeking certification be required to source a minimum percentage of renewable electricity under the market-based accounting method and use this method to calculate their emissions liability;

— that abatement from all Australian carbon credit units used under Climate Active would count toward meeting Australia's emissions reduction target under the Paris Agreement;

— to discontinue the term 'carbon neutral' to describe the certified claim and to use a different term; and

— to introduce a certification pathway for the program to assist members to meet the Climate Active certification requirements.

The underlying goals of these proposals is to modernise the program and raise the standards required to be met by members reflecting increased engagement in Australia with ESG practices by businesses and organisations, and greater expectations from the public, investors, and consumers. The Department will conduct Standard-specific consultation early this year as it prepares updates to the program.

The Climate Change Authority's 2023 Annual Progress Report

In October 2023, the CCA published their 2023 Annual Progress Report which was provided to the Minister for Climate Change and Energy. The report, which undertook critical analysis of climate policy infrastructure at a Federal level, found that Australia was not yet on track to meet 2023 targets. Despite the Federal Government's 'broad and deep' climate change policy, preliminary estimates detailed in the report were indicative of a slight rise in Australia's emissions – totalling 467 million tonnes – in the year to June 2023.[78]

The CCA made concerning findings about Australia's risk of falling short of its emissions reduction targets and renewable energy targets. These findings were contextualised by findings about, for example, the association between mining and manufacturing with GHG emissions and the association between lagging regulations in the transport sector with comparatively high prices for electric vehicles.[79] Despite the concerning findings, the CCA is of the opinion that the 2030 emissions reduction target is still achievable and made 42 recommendations for Australia to get back on track.

The recommendations target a comprehensive range of areas, including all of the aforementioned areas where Australia is lagging, along with waste, land use and carbon markets. They also contemplate providing greater support for climate change science and global policy developments, including giving a leadership role to First Nations people to incorporate their knowledge about our climate system and solutions.[80] The implementation of these recommendations could lead to more comprehensive climate change related obligations in the future. Companies should continue to monitor developments in the climate change policy area for any regulatory developments that may affect their business.

The Climate Change Authority's 2023 review of the *National Greenhouse and Energy Reporting Act 2007* (Cth)

The NGER Act establishes the legislative framework for the National Greenhouse and Energy Reporting (**NGER**) scheme.[81] The scheme provides a national framework for reporting GHG emissions, GHG projects and energy consumption and production by corporations in Australia. In December 2023, the CCA released its second review of the scheme as is required every five years.[82] It found "*The NGER scheme is performing well but the time is right to make some changes to ensure it remains fit for purpose*." As a response to the global net zero transition, 25 recommendations have been put forward to the Federal Government to ensure the NGER scheme remains best practice. Key themes of the recommendations include:

- changing the coverage of the NGER scheme including reporting thresholds and sectoral coverage. Recommendations under this theme include maintaining current levels of emissions reporting (at a minimum) and expanding coverage to agricultural and land sectors, including publicly owned landfills;
- encouraging transparency by providing resources to the Clean Energy Regulator (CER) to improve accessibility of published data and allow users to download and programmatically query the data;
- increasing the accuracy of reported fugitive methane emissions in the NGER scheme, with a focus on resourcing the Department to establish higher order estimation methods for fugitive methane emission sources; and
- changing aspects of the administration of the NGER scheme and compliance with the NGER scheme. Recommendations under this theme include authorising the CER to deregister corporations in liquidation from the NGER scheme, and requiring corporations that meet reporting thresholds to ensure completeness of datasets.

If the NGER review recommendations are implemented, additional Australian businesses may be covered by the NGER scheme and existing participants can expect expanded reporting requirements and they may need to improve their data collection processes.

Australia's Carbon Leakage Review

On 13 November 2023, the Department released its first consultation paper on its proposed approach to assessing carbon leakage risk and possible policy options to address it.[83] Carbon leakage refers to the potential to shift production "from countries with more ambitious emissions reduction policies to those with weaker (or no) emissions reduction policies."[84] Whilst the consultation paper acknowledges that there are multiple reasons why production may shift locations, such as resources and skilled labour, it also contemplates that it can occur due to some countries pursuing increasingly ambitious emission reduction policies that impose greater restrictions which increase production costs.

> **"AS A RESPONSE TO THE GLOBAL NET ZERO TRANSITION, 25 RECOMMENDATIONS HAVE BEEN PUT FORWARD TO THE FEDERAL GOVERNMENT TO ENSURE THE NGER SCHEME REMAINS BEST PRACTICE."**

The consultation was open until 12 December 2023,[85] and sought feedback from interested stakeholders on matters related to whether the description of carbon leakage that has been adopted for the purposes of the review is appropriate, the perceived impact of carbon leakage on stakeholders' businesses or industries, and the appropriateness of various existing and future policy options both at a domestic and international level. The consultation paper considered the role of the Safeguard Mechanism in managing leakage risk in energy-intensive trade exposed sectors through adjustments to the baseline decline rate for affected facilities, noting this could be the baseline from which any policy developments in respect of carbon leakage could be considered. However, many participants in trade-exposed sectors have been advocating for the additional introduction of a carbon border adjustment mechanism (**CBAM**), noting that similar measures are being adopted in other jurisdictions such as the EU. The consultation paper also contemplates the need for a policy response that incorporates multilateral and plurilateral initiatives, such as sharing information and harmonising regulatory systems, to mitigate the risk of leakage. It does, however, note that coordinating efforts amongst countries will be a complicated process.[86]

The next stage in this review is a second round of consultation in mid-2024 which is likely to focus on the possible elements of an Australian CBAM, with the review due to complete by 30 September 2024.

United Kingdom's proposed Carbon Border Adjustment Mechanism

On 18 December 2023, The United Kingdom (**UK**) government announced that it plans to establish a CBAM for certain carbon-intensive imported goods to match prices with domestic products.[87] The policy will target imports of iron, steel, aluminium, ceramics and cement – industries with some of the highest emissions levels globally. These imported materials will face a comparable carbon price to equivalents produced in the UK, pending further consultation on the CBAM in 2024.

The proposed CBAM intends to prevent cheaper imports flooding UK markets if overseas manufacturers don't face similar carbon costs, protecting domestic producers. It also aims to incentivise trading partners to reduce supply chain emissions. With this proposal, the UK joins the European Union in planning carbon border adjustments on emissions-intensive imports like electricity and steel. Further details on implementation will likely influence the competitiveness of key UK exporters as well as environmental impact.

The proposed CBAM demonstrates the UK's aim leading up to 2050 net zero emissions to normalise carbon pricing across both domestic and overseas production. The UK's proposed CBAM is signalling globally escalating climate policy impacts on trade. If implemented after 2024 planned consultations, Australian exporters in affected materials may face major new carbon costs to reach this export market – either forcing changes in production emissions or product prices.

Australia's Guarantee of Origin Scheme

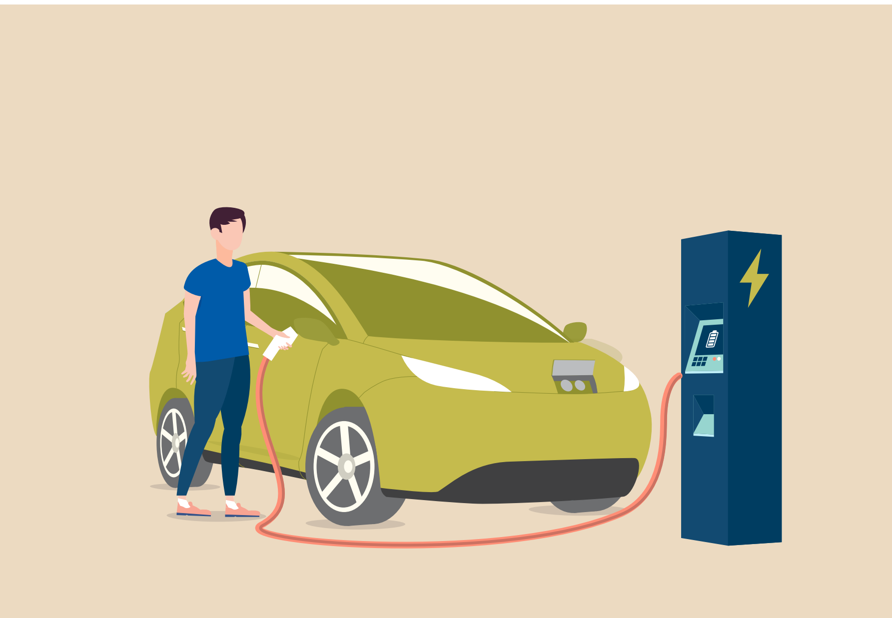
The Department is in the process of developing Australia's Guarantee of Origin Scheme (**GO Scheme**) which is an internationally aligned emissions accounting framework. Following trials throughout 2022 and 2023, the Department released its latest round of consultation in September 2023, closing in November 2023. The GO Scheme is designed to track and verify emissions associated with hydrogen, renewable electricity and potentially other products made in Australia. The GO Scheme will identify where a product has come from, its manufacturing process and the lifecycle of its carbon intensity.[88] The Department sought stakeholder feedback on the design of the scheme in areas with respect to the regulatory burden and integrity. Particularly, feedback was sought on both the practicality of the scheme and how the proposed approach reflects contracts and business models, and the transparency measures.

The GO Scheme will allow consumers and investors to factor in the climate/environmental integrity of a product before electing whether to endorse it. This will be facilitated by participants (product sellers) registering/enrolling in the Scheme. They will then be able to produce GO Certificates which provide evidence of each product's emissions data over its lifecycle. As part of various GO Scheme consultations, the CER has recently released the latest consultation package including the latest version of its Hydrogen Production Emissions Calculator. The calculator is a tool to help stakeholders estimate GHG emissions from the production of hydrogen and consider what information they might need to report if participating in the GO Scheme.[89]

Australia's proposed new Vehicle Efficiency Standard

In February 2024, the Federal Government announced that it is introducing a New Vehicle Efficiency Standard (**NVES**).[90] Following its initial consultation on the National Electric Vehicle Strategy in 2022 and subsequent consultation on the design of a NVES in 2023, the Federal Government released its Consultation Impact Analysis (**CIA**) on the NVES on 4 February 2024.[91] The NVES will aim to improve the fuel efficiency and reduce the emissions of new vehicles sold in Australia. Once finalised, it will represent a significant move to reduce transport emissions as the Federal Government progresses towards its net zero emissions reduction target.

The CIA presents a baseline 'do-nothing' scenario where there is no NVES, and measures three options against this scenario: A – a slow start; B – fast but flexible; and C – fast start. The Federal Government's preferred approach is Option B. This would impose a headline target for vehicle importers (suppliers) in grams of CO_2 emissions per kilometre travelled by passenger and light commercial vehicles.



The headline CO_2 emissions target would be based on a supplier's fleet of new passenger and light commercial vehicles sold from 1 January 2025, as opposed to each individual vehicle. Heavy vehicles and vehicles subject to heavy vehicle emissions tests would be exempt from the NVES. The headline CO_2 emissions target would then reduce every year until at least 2029, by which time the passenger vehicle emissions intensity would be expected to be 58g/kg and the light commercial vehicle emissions intensity would be 81g/km. This would involve a reduction in carbon intensity over that period of approximately 60%. A penalty for exceeding the target of $100 per g/km would be applied to suppliers who did not meet the target.

The consultation period closed on 4 March 2024 and the Federal Government is presently reviewing submissions to determine the final design of the NVES. The NVES is likely to drive innovation for clean technology and to create new business opportunities. However, for companies that rely on vehicles to run their business, there may be significant transition costs when the NVES is finalised.

Canada finalises Electric Vehicle Availability Standard

In December 2023, the Canadian government enacted the *Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations: SOR/2023-275* (**Regulations**).[92] The Regulations, which are also referred to as Canada's Electric Vehicle Availability Standard, will "require that a specified percentage of manufacturers' and importers' … fleets of new light-duty vehicles offered for sale in Canada are zero-emission vehicles."[93] Under the Regulations, vehicle manufacturers and importers must meet annual zero-emission vehicle (**ZEV**) regulated sales targets. The targets will begin for the 2026 model year, and the requirement will be that at least 20% of new light-duty vehicles offered for sale in 2026 be ZEVs. The requirements increase annually to 60% by 2030 and 100% in 2035. Given the Australian Federal Government's consideration of new vehicle efficiency standards, the Canadian Regulations provide a comparative benchmark for potential targets that could be adopted in Australia.

US EPA finalises rule targeting methane emissions in oil and natural gas operations

On 2 December 2023, the US Environmental Protection Agency (**EPA**) announced a final rule that will aim to reduce emissions of methane and harmful air pollution from oil and natural gas operations.[94] The final rule includes new Source Performance Standards that have been drafted in the aim to reduce methane and smog-forming volatile organic compounds from new, modified and reconstructed sources. It also includes emissions guidelines, which set procedures for States in the US to follow as they develop strategies to limit methane emissions from sources that already exist.[95] The EPA is of the opinion that this rule will 'yield significant climate and health benefits for all Americans by achieving historic reductions in methane pollution' and other air pollutants.[96] The final rule builds on the initial proposed rule that was proposed in 2021,[97] and a supplemental proposed rule from 2022.[98]

This rule is unlike previous attempts to regulate the industry, notably because it is the first rule applicable to pre-existing sources of pollution in the US. However, it provides States, and Tribes that wish to regulate existing sources, with two years for the development and submission of plans to reduce emissions, and three years for compliance.[99] The rule also provides guidelines for the development of these plans. Further, it encourages the use of innovative technologies such as satellite monitoring and on-site sensor networks to detect fugitive emissions, which refers to the escape of methane during the production of natural gas, and leaks.[100]

The final rule is unlikely to directly impact most Australian businesses, as it applies specifically to the US oil and gas industry. However, the standards being adopted in the US may influence Australian regulators that are actively considering the regulation of measurement and reporting frameworks for methane emissions. Further, the final rule may spur more development of emissions monitoring and leak detection technologies in the US, which Australian businesses could look to adopt or collaborate on.

Singaporean International Carbon Credits Framework

In October 2023, Singapore announced seven criteria for assessing whether carbon credits are eligible for use in Singapore's International Carbon Credits (ICC) Framework.[101] The ICC Framework was introduced in 2022, and enables companies liable under Singapore's carbon tax to offset up to 5% of their taxable emissions with eligible ICCs.

The criteria are designed to ensure that ICCs surrendered for carbon tax compliance demonstrate high environmental integrity and align with the rules under Article 6 of the Paris Agreement, so that Singapore can use these credits toward its Nationally Determined Contribution. Accordingly, criteria include that the ICC is real, verified and additional; that the underlying emission reduction or removal occurs after 2020; and that a corresponding adjustment has been applied so that the ICC is not double counted between Singapore and the host country.

Importantly, the Singapore Government has released a list of specific ICC types that it has assessed as meeting the criteria, and which carbon tax-liable companies can use from 1 January this year.[102] These are currently limited to ICCs from projects under certain methodologies under the Gold Standard for the Global Goals, Verified Carbon Standard, American Carbon Registry and Global Carbon Council, and must take place within Papua New Guinea – a country with whom Singapore finalised an Article 6 cooperation agreement last year.[103]

For Australian project developers with projects in PNG that are registered under these methodologies, the development signals that carbon-tax liable Singaporean entities could provide an important new source of demand for their credits.

Meanwhile, last month the Integrity Council for the Voluntary Carbon Market (**ICVCM**) announced its intention to release a first list of methodologies that have been assessed as meeting the requirements of the 'Core Carbon Principles' (**CCPs**) by the end of March.[104] The CCPs are designed to provide a global benchmark for high-integrity carbon credits,[105] and a number of governments have indicated their intention to integrate the CCPs into domestic processes:[106] for example, although eligibility criteria under Singapore's ICC Framework do not refer to the CCPs, Singapore's Monetary Authority has indicated that it is considering aligning its 'transition credit' program to support early retirement of coal-fired power plants with the requirements of the CCPs.[107] Closer to home, some sophisticated Australian carbon credit purchasers are looking to use CCP alignment as a prerequisite to project investment and purchase of credits.

In this light, Australian project developers with projects assessed as meeting CCP requirements may benefit from increased demand over coming years, and we expect there to be interest in the list released by the ICVCM next month.

Proposed regulations for the Inflation Reduction Act's Advanced Manufacturing Production Credit

The US Internal Revenue Service recently released proposed regulations regarding the Inflation Reduction Act's (**IRA**) advanced manufacturing production credit. The proposed regulations seek to implement the advanced manufacturing production credit in order to incentivise the production of eligible components in the US, including applicable critical minerals, certain solar energy and wind energy components, qualifying battery components and inverters.[108] Separate guidelines confirm that aviation biofuels achieving at least 50% lifecycle emissions reductions compared to conventional jet fuel qualify for the Sustainable Aviation Fuel Credit.[109] These regulations and guidelines provide clarity for the major new climate policy mechanisms in the IRA that are aimed at spurring US investment in renewable energy and transport decarbonisation in line with the country's ambitious climate goals.

The IRA's incentives for domestic clean energy manufacturing and sustainable aviation fuel production are an example of rising incentives in major economies to localise green industries, which Australian renewable energy exporters should factor into competitive planning. While the IRA policy mechanisms themselves are US-focused, the global momentum they reflect towards using domestic policy levers to onshore strategic decarbonisation supply chains could inspire similar proposals from Australian lawmakers. This may progressively impact the competitiveness of Australia's renewable exporters in major markets abroad.

"THIS LEGAL OPINION UNDERSCORES THE RAPIDLY EVOLVING EXPECTATIONS FOR COMPANIES TO INTEGRATE BIODIVERSITY AND NATURE RISK ASSESSMENT WITHIN THEIR APPROACHES TO STRATEGIC PLANNING AND RISK MANAGEMENT."

Nature developments

Legal opinion on nature-related risk and directors' duties

Barrister Sebastian Hartford-Davis and lawyer Zoe Bush have published a legal opinion on nature-related risk and directors' duties which was commissioned by Pollination Law and the Commonwealth Climate and Law Initiative.[110]

The opinion considers how directors' duties under the Corporations Act may be linked to nature-related risks, noting that a director 'should at least identify the company's nature-related dependencies and impacts, and consider the potential risks this may pose to the company'. The authors also opine that directors could be found liable for breach of their duty of care and diligence from a failure to consider nature-related risks where those risks are material to a company.

The authors note that, although the Taskforce on Nature-related Financial Disclosures (**TNFD**) is not itself binding, its development reflects increasing investor and stakeholder focus on 'nature-related risk' and underscores the utility of the TNFD as a framework for directors to assess their impacts and dependencies on nature and to assess associated risks and opportunities. They also note the potential for the TNFD to follow a similar trajectory to the TCFD-aligned reporting, which has been adopted in guidance from Australian regulators and is now mandatory in some jurisdictions.[111] As such, the potential for this regime to become binding at some point in the future is evident.

This legal opinion underscores the rapidly evolving expectations for companies to integrate biodiversity and nature risk assessment within their approaches to strategic planning and risk management. Prudent Australian directors should aim to proactively evaluate impacts and dependencies on nature and consider their approach to nature-related financial disclosures.

Nature Repair Schemes

In December 2023, the *Nature Repair Act 2023* (Cth) (**Nature Repair Act**) was enacted. The Nature Repair Act establishes the world's first legislated national framework aimed at harnessing the growing private sector interest in financing conservation through a voluntary biodiversity market. The Nature Repair Act sets out the requirements of running a biodiversity project under the Nature Repair Act – an approach drawn from existing experience with the carbon farming initiative. Running such projects will enable eligible land managers to access new revenue streams for approved nature restoration and protection projects in Australia.

In 2024, the Department and the CER will be developing the systems and procedures that are required to implement the biodiversity scheme.[112] As part of this, they are working with stakeholders to establish an Expert Reference Group and Nature Repair Committee, consulting on subordinate legislation including legislative rules, developing assessment tools and methodologies through workshops with partners, and other key elements required to administer the market-based scheme for protecting nature and biodiversity.

The establishment of a national biodiversity market presents new opportunities for Australian businesses to invest in accredited nature conservation projects. However, it remains unclear how the new framework will interact with existing approaches to environmental accounting or existing voluntary schemes that support the creation of nature-positive credits.

Separately we note that the UK and New Zealand (**NZ**) have been developing schemes that will support the development of biodiversity credits that support nature-positive outcomes. In February 2024, the UK launched its biodiversity scheme which is called the Biodiversity Net Gain (**BNG**). The BNG requires developers of new building projects to deliver a 10% net gain in biodiversity or habitat. Developers can achieve this by creating or enhancing biodiversity on or off development sites, making financial contributions, or buying statutory credits as a last resort to meet this target.[113] In NZ a government consultation closed in November 2023 after seeking feedback on the need for a biodiversity credit system which would enable landowners who undertake projects that protect or enhance native biodiversity to earn credits.[114]

> "THE ZERO DRAFT ATTEMPTS TO COMPREHENSIVELY TACKLE THE ISSUES OF PLASTIC POLLUTION THROUGHOUT ITS LIFECYCLE."

Circular economy developments

Plastics Treaty negotiations

On 2 March 2022, the United Nations Environment Assembly adopted the resolution *End Plastic Pollution: Towards an internationally legally binding instrument* (**Resolution**).[115] In the Resolution, the Assembly agreed to establish an intergovernmental negotiating committee to develop a legally binding agreement to end plastic pollution (**Plastics Treaty**) by 2024.

The Plastics Treaty is intended to include both binding and voluntary approaches that will address the full lifecycle of plastics, including product design, consumption and waste management. The Resolution also encourages action by the private sector in developing and implementing the Plastics Treaty. The UN member States have decided that the following elements should be considered in developing the new Plastics Treaty:

- global objectives to tackle plastic pollution in marine and other environments and its impacts;
- global obligations and measures along the full lifecycle of plastics, including on product design, consumption and waste management;
- a mechanism for providing policy-relevant scientific information and assessment;
- a mechanism for providing financial support to the treaty implementation;
- national and international cooperative measures;
- national action plans and reporting towards the prevention, reduction and elimination of plastic pollution; and
- treaty implementation progress assessment.

States have been negotiating the zero-draft text for a Plastics Treaty since June 2023. There have now been two drafting sessions at which States have elaborated on different options for each of the above-listed elements. The most recent zero-draft text (UNEP/PP/INC.3/4)[116] (**Zero Draft**) highlights some of the significant divergences between different States and groups. At the third session of the intergovernmental negotiating committee to develop a Plastics Treaty, members had different positions on what should be included in the Zero Draft.[117] Some key areas of contention are detailed below.

The scope of the Plastics Treaty

Multiple delegations including AOSIS, the EU, the UK and Australia noted that the scope of the Plastics Treaty had already been determined by the Resolution, as it sets out a detailed approach to addressing the full lifecycle of plastic. However, some States help the position that the scope should be expanded. For example, Morocco said the Plastics Treaty should address matters such as the sources of plastic pollution and leakage and legacy plastic. Tunisia held the position that the scope should focus on the prevention and elimination of plastic pollution and the associated human health risks. The US noted that there are challenges in extending the scope beyond plastic pollution and Cuba held the position that the scope should not extend beyond what is included in the Resolution.[118]

In the current form of the Zero Draft, there is only a placeholder for a scope article, with no options for its draft text. Therefore, significant negotiations on this matter are still required.

Key Themes

The Zero Draft attempts to comprehensively tackle the issues of plastic pollution throughout its lifecycle. As such, there are several key issues that emerge across the document's sections, indicative of the complex approach that is required to address the problem. Each of these key issues are important in achieving the instrument's objectives and they work together to address the human and environmental impacts of the production, use and disposal of harmful plastic products.

Reducing Plastic Production and Pollution

At its core, the treaty seeks to reduce the production and demand of primary plastic polymers and other plastic products. Some of the suggested measures in the instrument include:

- Removing subsidies for the production of primary plastic products
- Promoting sustainable alternatives
- Establishing regulatory thresholds and a governing body tasked with upholding these requirements

Being perhaps the central issue being addressed by the instrument, the imperative to reduce plastic emissions and production across its lifecycle aims to minimise the human health and environmental impacts that arise from plastic production until plastic disposal.

Regulation of Chemicals and Problematic Plastics
The instrument aims to adopt a framework for better management of polymers of concern and other harmful plastic products. These also include problematic and avoidable plastic products, as well as intentionally added microplastics. Some of the strategies discussed in the draft text that highlight the need for a better understanding of the chemicals in plastics and better management for the environmental consequences include:

- Reporting requirements – both on the chemical composition of plastics and the progress of adopting the instrument
- The promotion of safe, sustainable alternatives to plastics
- Regulatory thresholds for plastic products of concern

Ultimately, the regulation of harmful plastic chemicals and problematic plastics is intended to lead to a reduction in the production and use of these products.

Waste Management and Recycling
Whilst the entire lifecycle of plastics is intended to be covered by the treaty, there is a specific focus on waste management and recycling. These sections of the instrument deal with best practices for sorting, handling and recycling plastic waste. These practices include:

- Development of infrastructure to assist with these processes
- Technological innovation and technology sharing
- Global cooperation
- Specifically dealing with fishing gear

Financial Support Mechanisms
In order to accommodate for the specific circumstances of each member Party, the instrument acknowledges the need for flexible requirements based on the Parties' capacity. As such, the draft pays particular attention to:

- Financially supporting more vulnerable members
- Capacity building
- The use of new financial mechanisms
- Information sharing with a special focus on technology sharing

To do this, the governing body intends to establish funds, as well as other types of financial mechanisms, to support the combined global effort of addressing plastic pollution. This underpins the key message of how critical international cooperation is, on a financial and technological level.

Extended Producer Responsibility
Extended Producer Responsibility (**EPR**) systems are proposed to be established under the treaty in order to ensure that environmental costs of plastics, throughout its lifecycle, are incorporated into the market price of plastics. This will seek to improve waste management procedures and the recycling process as a whole.

EPR systems will focus on the producers' part of the plastics lifecycle, calling for a change to how these materials are designed, produced and disposed of, and attempting to change that by absorbing extra costs.

National Action Plans
An underlying theme of the instrument is specifically tailoring requirements and thresholds to the needs of more vulnerable nations. The draft outlines a framework for developing and implementing National Action Plans that deal with reducing the pollution of plastics, incentivising the use of plastic alternatives, dealing with waste management and facilitating a just transition.

International Cooperation and Engagement, Reporting and Information Sharing
International cooperation and engaging all stakeholders are central to the treaty. These stakeholders include member nations, NGOs, vulnerable communities (with a focus on Indigenous communities) and corporations from the private sector. The goal of the treaty is to create provisions that encouraged a culture where these stakeholders share information, best practices and resources in order to address plastic pollution and its entire lifecycle.

In a similar way that global cooperation acts as a process for accountability, reporting mechanisms are proposed to be introduced into the instrument to assess the effective implementation of the treaty in terms of its objectives. This will also foster transparency amongst stakeholders, assisting international cooperation.

The importance of the Plastics Treaty
The potential adoption of the Plastics Treaty presents important implications for businesses worldwide. Companies should closely follow the development of the treaty, as it aims to establish global standards covering the full plastics lifecycle – from production and product design to use and disposal. While plastics producers would be most directly impacted, even companies that simply use plastic packaging or components could face new restrictions, mandates, costs and reporting requirements. The treaty likely will create pressure to minimise virgin plastic use, while incentivising sustainable innovations in reusables, recyclables and circular approaches. Standardised data collection and national plastic waste reduction targets could significantly increase corporate transparency and accountability around plastics footprints.

Canada's intent to launch a Federal Plastics Registry

On 30 December 2023, the Canadian Minister of the Environment announced plans to launch a federal plastics registry requiring domestic manufacturers and importers of plastics to report detailed data on volumes and lifecycle flows of plastics in the country.[119] The proposal, if passed, would mandate certain producers to disclose information on plastics produced or imported into Canada as well as data on end-of-life outcomes including recycling, disposal, energy recovery and inventory stockpiling. The intent is to finalise reporting requirements this year for the period 2024 to 2026. This new registry signifies Canada's next steps to increase transparency and quantify plastic waste flows as a necessary foundation for the country to implement broader policy action targeting the mounting pollution challenges from single-use plastics.

This development illustrates the growing scrutiny of corporate plastic flows. Although not directly imposing compliance obligations, Canada's registry would require increased transparency on lifecycle flows of plastics. This could increase expectations for Australian companies exporting plastic-packaged goods abroad to prepare for expanding producer responsibility laws tracking materials from source manufacturing through to disposal.

Greenwashing developments

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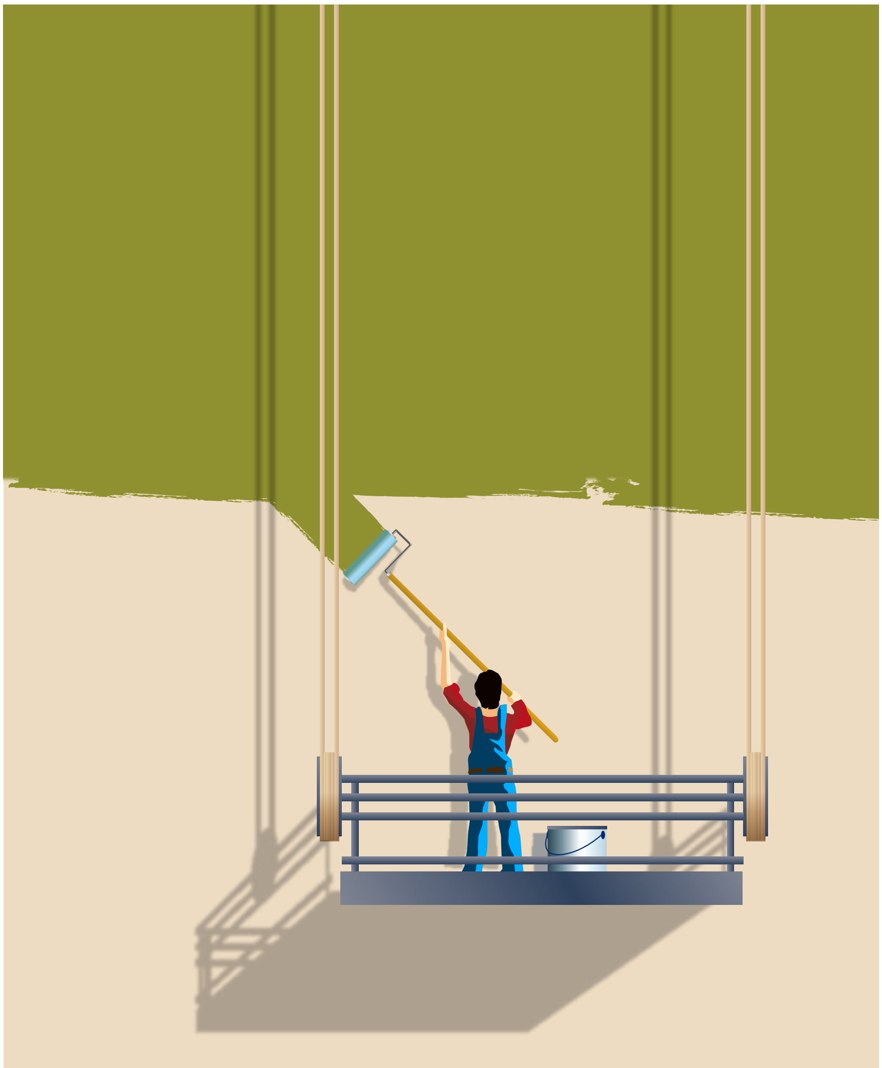

Australian Competition and Consumer Commission releases guide to making environmental claims

In December 2023, the Australian Competition and Consumer Commission (**ACCC**) published *Making environmental claims: A guide for business* (**ACCC Guidance**),[120] which details eight principles to help businesses with any environmental marketing and advertising claims that they make. The principles are a response to an earlier report that found over half of the Australian companies surveyed had concerning environmental or sustainability related claims.[121]

The eight principles are:

1. Make accurate and truthful claims.
2. Have evidence to back up your claims.
3. Don't hide or omit important information.
4. Explain any conditions or qualifications on your claims.
5. Avoid broad and unqualified claims.
6. Use clear and easy-to-understand language.
7. Visual elements should not give the wrong impression.
8. Be direct and open about your sustainability transition.

Ultimately, these principles intend to empower businesses to more confidently make meaningful claims that consumers can understand and trust. The ACCC's principles for credible corporate environmental claims recognise the growing consumer scrutiny of sustainability messaging amidst accusations of greenwashing. The publication of the ACCC Guidance follows a wider trend of consumers seeking a more sustainable option in Australian markets.

Upon the release of the ACCC Guidance, ACCC Acting Chair Catriona Lowe stated that "misleading environmental and sustainability claims continue to be an enforcement and compliance priority for the ACCC." The ACCC's focus on greenwashing sharpens the imperative for Australian companies to substantiate any public-facing sustainability claims.

> "THE PRINCIPLES ARE A RESPONSE TO AN EARLIER REPORT THAT FOUND OVER HALF OF THE AUSTRALIAN COMPANIES SURVEYED HAD CONCERNING ENVIRONMENTAL OR SUSTAINABILITY RELATED CLAIMS."

Employment developments

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Tom Brett
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Background to the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023

Following a raft of initial changes passed in December 2023, the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2023* (Cth) (**Amending Act**) received royal assent on 26 February 2024.[122] This second tranche of the amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) includes significant reform to the Australian employment law, including (but not limited to):

— a right to disconnect;

— new casual employee definition and conversion rights;

— underpayment changes; and

— protections for gig-workers, road transport workers and contractors.

We discuss the above changes and our suggested recommended steps for employers are examined below.

Introduction of the statutory workplace right to disconnect

The Amending Act introduces the 'right to disconnect' which allows employees to ignore workplace contact after hours if it is reasonable to do so.[123] Section 333M of the FW Act will give all employees a right to refuse to monitor, read or respond to contact from an employer outside their working hours – unless that refusal is unreasonable.[124] This reform allows employees to ignore workplace contact after hours if it is reasonable to do so and extends to contact from customers or clients. Without limiting the matters to take into account, the Amending Act lists these factors as factors that must be considered in determining whether an employee's refusal to be contacted is unreasonable:

— the reason for the contact;

— the form of contact and the level of disruption it causes the employee;

— the extent of the employee's compensation to perform work outside of their ordinary working hours;

— the nature of the employee's role and responsibilities;

— the employee's personal circumstances (including family or caring responsibilities); and

— whether or not the relevant contact is required by law or was for the reason of "emergency or a genuine welfare matter".

Attempts to resolve a dispute about an employee's right to disconnect must first be made at the workplace level between the employer and employee. If unresolved, an application can be made by the employer or the employee to the Fair Work Commission (**Commission**), who can make an order to prevent the employee from continuing to unreasonably refuse to monitor or to stop the employer requiring a response to contact attempts. Any breach of such orders can result in a civil penalty being imposed.

Timing

These changes will be effective on 26 August 2024 for non-small business employers and from 26 August 2025 for small business employers (employers with less than 15 employees).

Businesses will not automatically contravene the FW Act by contacting an employee outside their working hours. However, they would be prohibited from dismissing (or taking other adverse action against) an employee who reasonably refuses to respond to out-of-hours contact.

Further, all modern awards will be now required to include a right to disconnect term, which will essentially enable the right to be tailored to different industries appropriately.

Recommendations for employers

Where a business determines that some level of out of hours contact is inevitable, employers should consider:

— the applicable modern award for their industry, and any tailored right to disconnect terms (once they are published);

— whether relevant employees are remunerated in a way that takes this expectation into account;

— whether employment contracts should be updated to make that expectation of out of hours contact explicit and that their remuneration takes into account this expectation; and

— how this out of hours contact impacts the obligation to provide, so far as is reasonably practicable, a healthy and safe workplace (including psychologically and in the context of job design that is mindful of psychosocial hazards more generally).

A new definition of casual worker

The Amending Act introduces a new definition of a casual employee, which has relevance from an ESG perspective, particularly in respect of equity matters, where women are generally overrepresented in forms of work such as casual employment. The new definition provides that casual employment is where there is:

— an absence of a firm advance commitment to continuing and indefinite work; and

— the employee is entitled to casual loading or specific rate of pay.

The Amending Act outlines criteria to determine whether there is an absence of firm advance commitment to continuing employment, including having regard to the 'real substance, practical reality and true nature of the relationship'. Similar to the tests to now be applied for independent contractors – this is a further step away from the emphasis given to the contract in earlier High Court decisions – with an emphasis now on the relationship in practice.

> "EMPLOYERS WITH ≥500 EMPLOYEES WILL BE REQUIRED TO HAVE A POLICY OR STRATEGY IN PLACE FOR EACH OF THE SIX GENDER EQUALITY INDICATORS."

Under a new 'employee choice' process, a casual employee may notify their employer that they believe they no longer meet the above definition of a casual employee and, if the employer accepts the notification, the employee's employment status changes to permanent employment. The onus is on the employee to request change to their employment status after six months (or 12 months for small businesses); however, this can be refused upon fair and reasonable grounds.[125]

If the employer does not accept the notification, they must advise that they do not accept the notification on one or more of the following grounds:

— the employer believes the employee is correctly classified as a casual employee;

— there are fair and reasonable operational grounds for not accepting the notification; or

— a change of employment status would not comply with a recruitment or selection process required by a Federal or State/Territory law.

Disputes about casual conversion can also be dealt with by the Commission.[126]

Timing
These changes will be effective on 26 August 2024.

Recommendations for employers

— Review their current casual employees to determine their status under the new definition.

— Review template casual employment contracts to ensure they reflect the recent changes to the law.

— Consider whether existing casual conversion processes will comply with the new laws (noting the onus is now on casual employees to make a request to change their employment, rather than on the employer, which many casual conversion processes were aligned to).

Underpayments

The first tranche of the Government's Closing Loopholes reforms introduced significant changes relating to underpayment of employee entitlements, including a new criminal wage theft offence. Under this new offence, employers who intentionally (rather than accidentally or inadvertently) underpay staff could face a penalty of up to 10 years in prison and a maximum fine of up to $7.825 million, or three times the underpaid amount (if it exceeds the cap).[127] This new criminal offence is set to start the later of 1 January 2025 or when (and not before) the Commission's Voluntary Small Business Wage Compliance Code starts.[128]

The Amending Act also allow unions to enter workplaces without notice to investigate suspected contraventions of the Fair Work Act in respect of members, including underpayments. Unions must obtain an exemption certificate from the Commission so that the usual 24-hour notice is not required.

An exemption certificate must be issued if the Commission is satisfied giving an employer advance notice of the entry might result in evidence destruction or hindrance of an effective investigation.

Timing
The new right of entry for suspected underpayments provisions will come into effect on 1 July 2024.

Recommendations for employers
Employers should be reviewing their current right of entry protocols and training for managers to ensure the business and each site is adequately prepared for entry by unions under these new provisions, without prior notice.

An introduction for a definition to capture 'digital labour platform' work, i.e., gig economy work

The first tranche of the Closing Loophole reforms empowered the Commission to determine Minimum Standard Orders (**MSOs**) to protect individuals who perform work on 'digital labour platforms' and 'employee-like workers'.[129] MSOs could incorporate factors such as payment terms, insurance, and record-keeping in relation to specific matters or cost recovery. The Amending Act expands on this framework to:

— enable the Commission to make 'contractual chain orders' that will apply to the supply chain in the road transport industry; and

— require the Commission to be satisfied there are no adverse public interest consequences when approving any collective agreement to cover 'employee-like' gig economy workers or road transport workers and that the agreement is not contrary to the public interest.

Timing
These changes will be effective from 26 August 2024.

Recommendations for employers
Employers in these industries should consider the impact of the framework possibly applying, particularly in relation to increases on labour costs.

Workplace Gender Equality Act

In 2023, the Australian Government passed the *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth) to amend the *Workplace Gender Equality Act 2012* (Cth) in an effort to encourage companies to improve their gender pay gaps. Importantly, the reforms require the Workplace Gender Equality Agency (WGEA) to publicly publish remuneration data, for each relevant employer for each reporting period.[130]

WGEA began publishing private sector employer gender pay gaps from 27 February 2024, limited to employers with more than 100 employees. Public sector employer gender pay gaps will be published from late 2024/early 2025.

WEGA related changes coming up in April 2024:

- Employers will need to provide further additional information beyond what was shared in their WGEA Executive Summary and Industry Benchmark Reports, including the age and primary workplace location of employees, as well as details on the remuneration of the CEO, Head of Business and Casual Manager.
- Reporting on sexual harassment and on sex or sex-based discrimination to become mandatory from April 2024.
- Employers with ≥500 employees will be required to have a policy or strategy in place for each of the six gender equality indicators. These indicators are as follows:
  - workforce gender composition;
  - gender composition of boards and governing bodies;
  - equal remuneration between men and women;
  - employer policies, strategies and actions relating to flexible working arrangements;
  - consultation with employees on issues concerning gender equality in the workplace; and
  - employer policies, strategies and actions to prevent and respond to sexual harassment, harassment on the ground of sex or discrimination in the workplace.[131]

Revisiting the Secure Jobs Better Pay Act

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) amended the FW Act in several significant ways.[132] We provide a high-level summary of the key changes of relevance from an ESG standpoint.

Updates

- **Prohibition of pay secrecy:**[133] From 7 June 2023, pay secrecy clauses preventing employees from sharing or not sharing information about their pay could no longer be included in employment contracts that were entered into on or after 7 December 2022.
- Introduction **of further protected attributes (breastfeeding, gender identity and intersex status) into the FW Act from 7 December 2022**:[134]
- These attributes were already protected under the *Sex Discrimination Act 1984* (Cth) (**Sex Discrimination Act**) but the inclusion of these attributes in the FW Act means that employees can apply to the Commission for a remedy if they feel that they have been discriminated against or treated less favourably because of these attributes. So, it essentially provides another avenue for alternative dispute resolution to the Australian Human Rights Commission.
- **Equal Remuneration Orders:**[135] Significantly, from a pay equity standpoint, the Secure Jobs Better Pay reforms gave the Commission the power to make equal remuneration orders from 7 December 2022, which requires certain employees be given equal remuneration for work of equal or comparable value.
- **Prohibition of sexual harassment in connection with work:**[136] From 6 June 2023, giving the Commission the ability to deal with sexual harassment disputes. The Commission can do this by making orders to stop sexual harassment in connection with work or through its usual conciliation process; again, this provides an alternative avenue to complainants than going down the Sex Discrimination Act route.
- **Flexible work and fixed term contract reforms:**[137] Commenced on 6 June 2023. Employees can also make flexible work arrangement requests which employers must consider and discuss with the relevant employee. New rules regarding fixed term contracts and their limits commenced from 6 December 2023 including a maximum two-year contract period limit on fixed contracts for employees other than casuals, including renewals and extensions.

/ IN DEPTH

EMERGING HUMAN RIGHTS DUE DILIGENCE FRAMEWORKS AND IMPLICATIONS FOR AUSTRALIAN CORPORATIONS

/ WORDS BY

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The focus on accountability in relation to business and human rights continues to grow as the 'S' forms an actionable part of the ESG agenda.

This is driving a trend towards due diligence obligations resulting in more active supply chain management across a broader range of risk areas with stakeholder expectations being driven by both regulation and civil society.

The EU continues to take the lead in terms of regulation with the planned Corporate Sustainability Due Diligence Directive (**CSDDD**) which is likely to impose far-reaching obligations on entities to carry out human rights and environmental due diligence. Although final agreement has not yet been reached on the exact scope of the CSDDD, it will very likely have global implications (direct and indirect) for companies operating in the EU and their business partners – including Australian businesses.

However, the interest in and discussion around the CSDDD and the obligations it might impose is indicative of current and emerging stakeholder expectations globally in relation to what businesses should be doing when it comes to addressing human rights matters. And, further, that stakeholders are looking to hold companies accountable for alleged human rights impacts. We expect this to continue into 2024.

The impact of the EU CSDDD in Australia

What is the CSDDD?

At a high level, the CSDDD as currently proposed would require in-scope EU and non-EU companies to, amongst other things: (i) carry out due diligence on human rights and environmental impacts of their own operations, their subsidiaries and their entire value chains (e.g. direct and indirect suppliers); (ii) mitigate and remediate any identified adverse impacts; and (iii) monitor the effectiveness of their due diligence policies and measures.

On this basis, the CSDDD will impose human rights and environmental due diligence obligations on non-EU companies that operate in the EU market and hit certain size thresholds. In addition, an Australian company doing business with entities that are caught by the CSDDD could be indirectly impacted by increased due diligence requirements, additional contractual assurances (for example compliance with a code of conduct or a prevention action plan) and/or measures to verify compliance (e.g. audits and reporting). Australian companies will therefore need to ensure that they have in place systems and processes to source, validate and provide the necessary information that will be requited by in-scope entities.

The importance of the UNGPs

The standards articulated in the CSDDD lean on established soft law standards in relation to human rights, around which there has been longstanding business convergence and, in particular, on concepts of due diligence outlined in the UN Guiding Principles on Business and Human Rights (**UNGPs**) (a set of guidelines for States and companies designed to create a practical framework for preventing, addressing and remedying human rights abuses committed in business operations).

Notably, the 'universally endorsed' content of the UNGPs was specifically recognised by the Dutch court in the 2021 judgement given against Shell in the case brought by Milieudefensie[138]. In this landmark case, the Dutch court applied the UNGPs as a suitable guideline when determining the extent to which Shell had a duty of care under the Dutch Civil Code to take action in preventing dangerous climate change through the corporate policy it determines for the Shell group. Similarly, it is likely that the EU regime will be relevant to legal actions for alleged human rights abuses, in establishing the standard of care expected from companies.

While some form of due diligence and/or reporting obligation in relation to human rights is already in place in some jurisdictions (see further below), the CSDDD is of particular relevance for Australian entities with global operations because it is likely to represent a threshold compliance requirement and the benchmark to which many stakeholders will expect organisations to hold themselves. It is also being closely looked to by Australian policymakers shaping the future direction of regulation in this area.

How does this relate to the Modern Slavery Act?

Notably, one of the key recommendations coming out of the 2023 statutory review of the *Modern Slavery Act 2018* (Cth) (**Modern Slavery Act**) is a recommendation that a positive obligation be imposed on reporting entities to have a due diligence system and explain the activity associated with that system in its annual modern slavery statement. If this recommendation was adopted, it would represent a significant strengthening of the existing provisions, requiring businesses to evidence how the systems they have in place operate, and align with the international trend (spearheaded by the CSDDD) towards due diligence requirements in relation to human rights issues.

In any case, the systems and controls that businesses in Australia have in place to be able to prepare the modern slavery statement required under the existing Modern Slavery Act should serve as a framework for incoming requirements, whether these are required by legislation that has either direct impact (under a reformed Modern Slavery Act), indirect impact (as a result of a value chain entity needing to comply with the CSDDD) or as a result of global stakeholder expectations putting pressure on companies to commit to higher human rights standards more broadly across their operations and supply chains.

The global evolution of mandatory human rights and environmental due diligence

While the scale (and reach) of the proposed requirements under the CSDDD are new, there is already in place a patchwork of regulation in this space which is driving a move towards transparency and accountability in relation to human rights issues and in complex global supply chains.

Lessons learned from the French Devoir de Vigilance

In particular, the 2017 French Devoir de Vigilance is considered by many as a precursor to the CSDDD, and requires companies to draft a 'vigilance plan', seeking to identify and prevent serious violations of human rights and fundamental freedoms, health and safety of individuals and damage to the environment resulting from the corporates' activities and its value chain. The vigilance plan must be published and companies must report on its effectiveness in their annual report. Activists have been using the Devoir de Vigilance to hold corporates accountable with respect to both the climate and human rights impacts of their operations, challenging the effectiveness and suitability of vigilance plans.

The first decision rendered on the merits (on 5 December 2023) ordered a State-owned postal company to amend and supplement its vigilance plan and the French court took the opportunity to set out its expectations with respect to, amongst other things, the risk mapping required in relation to human rights and environment and the assessment of the effectiveness of the measures taken under the vigilance plan[139]. Such detailed guidance is instructive for businesses globally when looking to put in place due diligence regimes that may need to comply with multiple overlapping regulations in this regard as well as shifting stakeholder expectations.

The number of actions that have been commenced within the six years since the enactment of the Devoir de Vigilance indicate that interested stakeholders intend to use statutory requirements in relation to due diligence to hold companies to account in relation to both climate change and human rights (and often both[140]), including in more creative ways. For example, in September 2023, four environmental NGOs reportedly filed a (non-public) criminal complaint against a French corporate in the energy sector in parallel to its civil action under the Devoir de Vigilance.

Germany is hot on the heels of France, with its Supply Chain Due Diligence Act which came into force in January 2023 and, broadly, requires companies above certain employee thresholds in Germany to observe human rights and environment-related due diligence obligations in their supply chains – and this requires that in-scope companies directly engage with their suppliers to fulfil their due diligence obligations. Notably, additional practical guidance issued in August 2023, suggesting that measures which ask too much of a supplier considering the supplier's resources, size, branch, and position in the supply chain as well as the specific local circumstances are, in principle, invalid, has caused some uncertainty among businesses.[141] Although issued specifically with respect to the Germany Supply Chain Due Diligence Act, such guidance can be instructive of the (proportionate) approach that may be taken more globally and can be factored into systems and controls put in place by Australian companies operating at a global level (including those who will be impacted by the CSDDD).

Other global regulatory initiatives

Earlier regimes tended to impose reporting obligations, as a soft means of encouraging businesses to take action. By way of example, as well as Australia, the UK[142] and California[143] have had modern slavery reporting obligations in place for some time. Broadly, these require commercial organisations doing business in these jurisdictions to publish details on the steps they are taking to address modern slavery risk in their operations and supply chains. They rely heavily on public censure for enforcement and have been the subject of criticism because of the (low) level of modern slavery statements produced which lack detail on how policies and processes are implemented in practice. Notably, a large number of companies report jointly under the UK and Australian regime and therefore lawmakers (and companies) in one jurisdiction will be closely watching the other.

Beyond an obligation to carry out due diligence, legislation is in some circumstances imposing direct bans on certain types of conduct. For example:

— Any company seeking to import goods into the United States may need to consider the Uyghur Forced Labor Prevention Act (which allows the US Customs and Border Protection Agency to seize and detain goods wholly or partly made in the Chinese region of Xinjiang, on the rebuttable presumption that the goods have been made using forced labour). Canada's Forced and Child Labour in Supply Chains Act came into effect in January 2024 and requires certain Canadian entities to release Board-approved reports detailing their efforts to prevent and reduce the risk that child or forced labour was part of the organisation's supply chain (with penalties for non-compliance).

"CIVIL SOCIETY GROUPS ARE INCREASINGLY USING NON-JUDICIAL MECHANISMS TO RAISE COMPLAINTS AND EXERT PRESSURE ON CORPORATES IN RELATION TO ALLEGED HUMAN RIGHTS IMPACTS …"

— Further, the European Union's Deforestation Regulation[144] (which came into force on 29 June 2023) places obligations on operators and traders to verify and issue a due diligence statement confirming that certain products placed on the EU market have not led to deforestation or forest degradation and has already resulted in a number of criminal prosecutions.[145] Similarly, the EU Conflict Minerals Regulation[146] imposes due diligence and reporting obligations that cover adverse impacts occurring in the supply chains of certain entities importing specified minerals into the EU from conflict-affected or high-risk jurisdictions (enforcement is Member State specific).

— Finally, the EU's Proposal for a Regulation on Prohibiting Products Made with Forced Labour proposes to ban products made using forced labour and would apply to any company placing products on the EU market (including Australian companies) and *Australia's Customs Amendment (Preventing Child Labour) Bill 2023* (Cth) proposes to ban the importation of products obtained or produced using child labour.

An uptick in companies being held to account for failure to adequately conduct human rights due diligence

Strategic litigation in Australia (and globally) focusing on human rights issues has looked to failure to comply with due diligence obligations as a way to hold companies to account. Of particular note is the complaint brought in relation to the Santos gas development project in the Barossa gas field in which the complainants alleged, amongst other things, that in lending to or investing in Santos, the banks and super funds acted inconsistently with alleged public commitments regarding human rights, including in relation to due diligence and FPIC.

Civil society groups are increasingly using non-judicial mechanisms to raise complaints and exert pressure on corporates in relation to alleged human rights impacts, in particular, the complaints process established under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (**OECD Guidelines**).

2023 saw the Australian National Contact Point (**NCP**) make a finding that a mining company had not undertaken human rights due diligence or engaged meaningfully with stakeholders in relation to its decision to divest from a mine in Myanmar contrary to the OECD Guidelines.[147] In this case, the Independent examiner also made recommendations that the Australian NCP work with relevant Australian Government agencies to ensure appropriate guidance is in place to assist companies with human rights policies and conducting human rights due diligence, particularly in the context of high-risk and conflict areas, indicating that these non-judicial avenues have the potential to result in policy-based outcomes that go beyond the individual case at hand.

The OECD Guidelines were updated in 2023 to (amongst other changes): (i) include an increasing focus on the need to conduct human rights due diligence, including identification and management of risks throughout the value chain; and (ii) strengthen the authority of the NCPs to make findings and follow up on agreements they facilitate or recommendations they make. While the intention is to increase their effectiveness as a 'non-judicial grievance mechanism', we are already seeing NCP complaints forming a quasi-case law of their own, and this strengthening of the NCPs mandate will continue this trajectory.

The need for businesses to actively engage with human rights

Against that background, it is increasingly important for companies to be actively engaging with human rights and be able to explain how human rights is relevant to, and impacted by, their operations, including and especially at a Board level (particularly given the focus on directors' liability for ESG-related risks). This may require consideration of existing issues – including climate – through a specifically human rights lens.

The key to this, and to preparing for emerging requirements in relation to human rights due diligence (whether legislated for or not), is developing a process to identify the human rights impacts within and arising from business operations, assessing (on a continuous basis) what needs to be done to manage and/or mitigate those impacts, and ensuring that there are policies and operational frameworks in place to support this.

/ FEATURE

Privacy Act Review

FEDERAL GOVERNMENT OFFERS MODEST RESPONSE TO PRIVACY ACT REVIEW WITH (EVEN) MORE CONSULTATION AHEAD

/ WORDS BY

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It was almost four years ago, back in December of 2019, that the review of the *Privacy Act 1988* (Cth) (Privacy Act) was first announced by the then Attorney-General (the Review).

After years of extensive public consultation, including around an issues paper released in October 2020 and a discussion paper released two years ago in October 2021, the *Privacy Act Review Report* (the Report) was released in February of this year, which included 116 proposals for reform.

In October 2023, the Federal Government delivered its long-awaited response to the Report (the **Response**). Whilst the total reform agenda is significant and was always expected to be in tranches, the announcement was hoped to offer industry and individuals clarity on how the Federal Government plans to reform the Privacy Act.

However, the Response as delivered offers a fairly modest (if not timid) schedule of agreed reforms and defers most matters to further consultation, signalling that the Review may be an even more protracted process than first envisioned following the Report.

Overview of Federal Government Response

The Report contained 116 proposals for how to make the Privacy Act, in the words of the Attorney-General, "fit for purpose" and able to "adequately protect Australians' privacy in the digital age." As such, the proposals ranged from relatively uncontroversial uplifts, through to those leveraging GDPR-esque reforms and changes (said to be) responding to recent shifts in technology and community expectations.

In its Response, the Federal Government **agrees** with 38 of the Report's 116 proposals, **agrees in-principle** with a further 68, and **notes** the remaining 10.

Before we get into the detail on what has and has not been agreed to, it's important to understand what each of these outcomes means in practice and how it relates to next steps:

— '**Agrees**' is relatively straightforward, and is what most lawyers would generally interpret as 'agreed in principle'. That is: the principle is agreed, and the Federal Government will move forward to implement the principle into draft legislation, which will then be subject to targeted consultation.

— '**Agrees in-principle**' is a little murky. The 'glass half empty' view, and reading the strict words of the Response, is simply a directional indicator that the Federal Government likes the idea, but needs to consult on '***whether*** and how they could be implemented so as to proportionately balance privacy safeguards with potential other consequences and additional regulatory burden'. So it's not just a matter of *how* to implement, but there is also a question of whether to implement. Hence the murkiness.

— '**Notes**' is the most non-committal of the Government's responses offered; yet as we discuss in this article, does fall short of actual rejection or disagreement. However, given the volume of agreed and agreed in-principle proposals to progress, we suggest that, in practice, 'notes' amounts to a rejection at this time.

What has been agreed to?

Whilst there has been a fair amount of press that the Government has agreed to 38 proposals, which is true, many of these proposals are:

— not substantive changes to the privacy protections offered to individuals, and instead relate to enhanced regulatory powers for the Government; or

— merely proposals to further consult or consider a given issue.

Agreed: New obligations on regulated entities

Indeed, if you look at the proposals 'agreed' which are substantive shifts in the protection offered to individuals, you end up with a much smaller number.

Surprisingly, only two of the 38 agreed proposals are for a new **express obligation on regulated entities** (or a new right for individuals), with both relating to automated decision-making.

The first, proposal 19.1, would require regulated entities to ensure that their privacy policies set out the types of personal information that will be used in 'substantially automated decisions' which have a legal or otherwise significant effect on an individual. The Response cited denials of consequential services or support, or access to basic necessities, as examples of decisions to which this new requirement could apply.

Proposal 19.3, also agreed, proposes that individuals should have a right to request meaningful, jargon-free and clear information about how automated decisions are made which have a legal (or similarly significant) effect on an individual's rights.

These proposals are modelled on Article 22 of the GDPR but would apply to a wider range of automated decision making than under the GDPR, which applies to *solely* automated, rather than *substantially* automated, decisions.

Agreed: Enhanced regulatory powers

A majority of the 'agreed' proposals relate to **regulatory powers, enforcement and investigations**. These include bolstering the scope and powers of the Office of the Australian Information Commissioner (**OAIC**), expanding the order-making powers available to the courts for interferences with privacy, and enabling the Attorney-General to permit the sharing of information with appropriate entities in the fallout of an eligible data breach where such sharing would reduce the risk of harm.

Another major area of agreed change is regarding the OAIC's code-making and subordinate instrument powers, including temporary APP codes, more targeted Emergency Declarations and the introduction of a 'Children's Online Privacy Code' that applies to online services likely to be accessed by children.

"THE RESPONSE ALSO SUGGESTS THAT AT LEAST SOME OF THE PROPOSALS AGREED IN-PRINCIPLE ARE LIKELY TO INTERACT WITH SEPARATE REFORM PROCESSES UNDERWAY IN CYBERSECURITY, AI, AUTOMATED DECISION MAKING AND DIGITAL IDENTITY CONTEXTS."

(Noting that increased protection for the privacy of children was also a proposal mooted in the Online Privacy Bill under the previous Coalition government.)

Finally, there are a handful of agreed proposals that relate to commissioning enhanced or new OAIC guidance on a range of issues, including capacity and consent, Australian Privacy Principle (**APP**) 11, new technologies and emerging privacy risks.

Agreed: Further consultation

Interestingly, eight of the 38 'agreed' proposals were merely proposals for **further consultation on or consideration of** a particular issue or reform. The subject matter of such further consultation ranges from fairly impactful (such as proposal 4.7, which relates to a new criminal offence for malicious re-identification of de-identified information), to administrative in nature (such as proposal 25.10, which proposes the OAIC conduct an internal review into their own enforcement posture).

Some of the agreed consultation proposals relate to other proposals which have not been agreed outright. For example, while proposal 13.1 (which recommended that entities be required to conduct privacy impact assessments for high-risk activities) was only agreed in-principle, the associated proposal 13.2, to consider how enhanced risk assessment requirements for facial recognition technology could be adopted as part of implementing 13.1, was 'agreed'.

As with the proposals agreed in-principle, the timeline for consultation on these agreed items and the practical outcomes of such consultation remains unclear. We note that these proposals were of course framed as consultative by nature in the Report, which inherently narrows how the Federal Government can respond.

Agreed: Key refinements, tests and terminology

Finally, around a quarter of the 'agreed' proposals relate to discrete, but key, sections of the Privacy Act and either play a clarifying role, or serve to loosen or tighten the nature of certain provisions.

For example, proposal 9.11 relates to the existing journalism exemption in the Privacy Act and creates a strengthened eligibility test for accessing the exemption that requires media organisations to be subject to adequate privacy standards. This can be read as a counterbalance to the Federal Government's 'noting' of some of the other proposals around journalism.

In a welcome development for clarity, agreed proposal 23.2 will introduce a mechanism to prescribe countries and certification schemes as providing substantially similar protection to the APPs under APP 8.2(a). As the Report commented on, but contained no proposals relating to, Cross-Border Privacy Rules or domestic certification schemes, agreement to proposal 23.2 should nevertheless assist regulated entities in understanding and complying with their cross-border privacy obligations.

In a notable 'tightening' of language, agreed proposal 25.2 would remove the concept of 'repeated' from the existing 'serious and repeated interferences with privacy' offence at section 13G of the Privacy Act. It would also see a new list of what 'serious interferences' would include, such as practices involving sensitive information, adversely affecting large groups of people, impacting vulnerable people, wilful misconduct or serious failures to take proper steps to protect personal information. Repeated breaches are also included as a proposed example here, so while an interference will not need to be repeated as under the current law, it may still be a relevant component when considering whether the serious threshold is met.

Agreed in-principle

The majority of proposals in the Report were agreed in-principle by the Federal Government. The Response notes that these proposals will be subject to further engagement and impact assessments to ensure the right balance is struck between the privacy of Australians, impacts on regulated entities, and broader economic benefits and costs. These include the proposal to act fairly and reasonably when handling personal information, an amended definition of consent, a direct right of action to enforce individual privacy rights, a statutory tort for serious invasions of privacy, tighter timeframes for notifiable data breaches, and a requirement to conduct privacy impact assessments for high privacy risk activities.

The Response also suggests that at least some of the proposals agreed in-principle are likely to interact with separate reform processes underway in cybersecurity, AI, automated decision making and digital identity contexts. As such, the Attorney-General's Department is tasked with navigating further consultation with these other reform programs in mind – many of which are only in the very early stages.

As mentioned above, it is not clear what the fate of these proposals will be; however, there is no commitment that any will be reflected in the draft legislation. While sequencing some of the agreed in-principle proposals around other reform processes may be viewed as sensible (and perhaps as necessary on some issues), delivery timelines of these reforms are either unclear or a fair way in the future.

"We note your proposal"

In the Response, the Federal Government 'notes' 10 proposals, indicating that they will not incorporate these proposals into forthcoming draft legislation, and that they also are not able to offer in-principle agreement.

It appears, however, that 'notes' may also be another way of deferring a decision to another time. Indeed, several of the instances where the Federal Government notes a proposal are also accompanied by a statement that the Federal Government will further consider the matter.

Commentators were also quick to point out that proposals 8.1 through to 8.6, each relating to a tightening of the Privacy Act for political entities, were each noted without further commentary from the Federal Government about a future appetite for reform.

What's next?

While the Response stops short of offering a target date for draft legislation, we do not expect to see this until (at least) the end of the first quarter of 2024. We understand that this draft will at minimum reflect the proposals agreed by the Federal Government, and may include some of the agreed in-principle proposals. The Attorney-General's Department will consult again when a draft has been finalised, in addition to what sounds like a raft of other consultation processes it will lead in 2024 and beyond.

With only a modest selection of proposals now having a clear (or clearer) path of reform set, the Response can be characterised as concise, cautious and (certainly) consultative. The Response indicates that the Federal Government sees the overhaul of Australia's privacy framework as an even longer-term project.

/ SUSTAINABILITY CALENDAR

ESG Events and Conferences

A showcase of events to be inspired ... roll-up your sleeves and get involved, and learn about incredible sustainability initiatives around the globe. It's a busy start to the year so pop these in the diary.

MAR

B Corp Month

1-31 March 2024 Global in-person and virtual events

An annual campaign across the globe to showcase the best in community collaboration, sustainability campaigns along with client and customer engagement experiences across all sectors and business. Join in to celebrate the movement for collective action addressing society's critical challenges with webinars and workshops, events to get together and share initiatives plus it gives you a chance to network with fellow B-Corp champions. It's a fun way to show the world how we can make a difference towards better business, together.

bcorporation.net/en-us/b-corp-month/

APR

Impact X Sydney Summit 2024

22-23 April 2024
ICC, Sydney, AU

Australia's largest global summit for climate and nature will address the urgent need for short-term action, calling on all stakeholders to raise ambition. A collaborative agenda will demonstrate bold commitment to achieve 2030 goals and accelerated implementation on net zero, nature-positive plans. Impact X will focus directly to 2030 with speakers and participants bringing targets, implementation plans and commitments.

impactx.tech/ixsummitsydney

JUN

Australian Energy Week 2024

11-14 June 2024
Melbourne Convention and Exhibition Centre, AU

Major annual conference and expo for the entire energy supply chain, bringing together generators, networks, retailers, end users and government to help shape the energy transition. It is the place to hear from industry leaders, make connections, and do business with representatives from the whole energy value chain– from CEOs to analysts, energy traders to engineers. And everyone in between.

energyweek.com.au

JUN

ESG and Impact Forum 2024

12-13 June 2024
The Sheraton Hotel Melbourne, AU

Facing challenges of a warming planet, social inequality and rapid technological advancement, governments are attempting to steer markets using regulation and multinational agreements. In contrast, super funds have a powerful tool to nudge behaviour. Large questions remain for fiduciary investors. How do we transition to zero carbon? This is one of the questions addressed.

ciiconferences.com.au/upcoming-events/esg-forum-2024

OCT

The Global Nature-Positive Summit 2024

8-10 October 2024
ICC, Sydney, AU

The Summit aims to drive private sector investment to protect and repair our environment. Recognising the significant challenges facing the public and private sector in moving to a nature-positive approach, the Summit will focus on three key themes to drive discussion, agreement and action including transparency and reporting, investment in nature and partnerships and capacity development.

dcceew.gov.au/environment/international/nature-positive-summit

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132 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**FWL Amending Act**).
133 FWL Amending Act, section 321 of the FW Act.
134 FWL Amending Act, sections 12, 153(1), 195(1), 351(1), 578(c), 772(1)(f), 789HB of the FW Act.
135 FWL Amending Act, section 302(3) of the FW Act.
136 FWL Amending Act, sections 6(6), 12, 527A of the FW Act.
137 FWL Amending Act, sections 65A, 141A, 333E of the FW Act
138 Milieudefensie et al. v. Royal Dutch Shell plc.
139 Sud PTT v S.A. La Poste
140 See the case of Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas. The case at issue is whether BNPP's plan is adequate to precent the violation of human rights and deforestation.
141 See guidance issued by the Federal Office for Economic Affairs and Export Control (BAFA) entitled: Collaboration in the supply chain between obliged enterprises and their suppliers
142 Modern Slavery Act 2015
143 California Transparency in Supply Chains Act signed into law in 2010
144 EU Regulation 2023/1115
145 On 6 and 11 September 2023, French criminal courts found two companies criminally liable for having breached the specific due diligence obligations under the EU deforestation regulation.
146 EU Regulation 2017/821 which came into force on 1 January 2021
147 Publish What You Pay Australia in its own name and on behalf of the Myanmar Alliance for Transparency and Accountability and the Bawdwin Labour Union v Mallee Resources Limited, Final Statement, 2 August 2023

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