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ISSUE THREE, OCTOBER 2023

QUARTERLY ESG UPDATE

A strategic review of the latest in sustainability.

BWD Strategic | GILBERT +TOBIN

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

/ OUR CONTRIBUTORS

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The materiality matrix is Grandma's Ham

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Whether you're looking at investor disclosure, multi-stakeholder disclosure, or a double materiality approach, none of the established standards suggest the use of a matrix today.

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G+T celebrated the FIFA Women's World Cup by hosting a forum on ESG, sport and human rights hosted by former Matildas vice-captain and G+T partner Moya Dodd.

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ESG reporting updates

2023 reporting trends from the International Sustainability Standards Board (ISSB)

Is your business ready to expand its climate reporting?

10 JULY 2023

ISSB to take over TCFD monitoring, FSB marks the "culmination of the work of the TCFD"

View announcement at IFRS Foundation

The Financial Stability Board (FSB) has asked the International Sustainability Standards Board (ISSB) of the IFRS Foundation to take over the monitoring of companies' progress on climate-related disclosures from the Task Force on Climate-related Financial Disclosures (TCFD). The newly-issued IFRS S1 and IFRS S2 sustainability disclosure standards fully incorporate the recommendations of the TCFD. As such, the FSB noted that the Standards mark "the culmination of the work of the TCFD", which was established in 2017 at the request of the Financial Stability Board.

This announcement should put a widely-held misunderstanding to rest. Last year the SASB Standards, Integrated Reporting Framework, and Climate Disclosure Standards Board were consolidated into the IFRS Foundation to support the development of global standards through the ISSB. The TCFD was not consolidated into the IFRS Foundation, leaving many to believe that the TCFD would continue to issue climate-related reporting recommendations separate to the IFRS' work.

The reason that the TCFD was not consolidated into the IFRS Foundation was a procedural matter. Before consolidation, the SASB Standards, Integrated Reporting Framework, and CDSB were maintained by standalone entities that could be cleanly merged/consolidated into the IFRS. The TCFD, by contrast, was a task force set up within the Financial Stability Board and thus not a standalone entity that could be subsumed into the IFRS Foundation. Instead, the TCFD worked closely with the IFRS in the development of its IFRS S2 Climate-related Disclosures standard, and has now announced it will effectively transfer its functions over to the IFRS.

25 JULY 2023

IOSCO endorses ISSB standards

View announcement at IFRS Foundation

The International Organization of Securities Commissions (IOSCO) has formally endorsed the new sustainability disclosure standards released in June 2023 by the ISSB of the IFRS Foundation. IOSCO includes capital market regulators of 130 member jurisdictions worldwide, including the U.S. SEC and CFTC.

IOSCO is now calling on its member jurisdictions—capital markets authorities that regulate more than 95% of the world's securities markets—to consider how they can incorporate the ISSB Standards into their respective regulatory frameworks to deliver consistency and comparability of sustainability-related disclosures worldwide.

To coincide with the endorsement, the IFRS Foundation has published a high-level roadmap (Adoption Guide overview) providing transparency around the IFRS Foundation and the ISSB's strategy to support jurisdictional adoption.

26 JUNE 2023

ISSB issues inaugural global sustainability disclosure standards

View announcement at IFRS Foundation

The ISSB of the IFRS Foundation has released its first two sustainability disclosure standards:

- IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information
- IFRS S2 Climate-related Disclosures

IFRS S1 provides a set of disclosure requirements designed to enable companies to communicate to investors about the sustainability-related risks and opportunities they face over the short, medium and long term. IFRS S2 sets out specific climate-related disclosures and is designed to be used with IFRS S1. Both fully incorporate the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), and incorporate elements of the SASB Standards (which were consolidated into the IFRS Foundation in 2022).

These standards remain voluntary until codified into country-level regulation. Several countries – including Canada, the UK, Japan, and Australia – have indicated they intend to legislate sustainability disclosure standards based on IFRS S1 and/or IFRS S2. There is no indication of adoption by the U.S. government in the near-term, and so U.S. adoption is likely to remain market-driven as current SASB and TCFD reporters move to the IFRS standards as the "next versions" of SASB and TCFD.

A critical next step toward national adoption will be endorsement by the International Organization of Securities Commission (IOSCO), which includes over 170 countries' market regulators as members. IOSCO has indicated that it is conducting an independent assessment of the new standards and intends to complete the review promptly.

18 MAY 2023

ISSB adds metrics on financed emissions to SASB Standards

View staff paper on revisions to the SASB Standards

The ISSB of the IFRS Foundation has approved revisions to the Asset Management & Custody Activities, Commercial Banks and Insurance SASB Standards to include disclosure topics and associated metrics covering the topic of financed emissions. These topics and metrics include:

- Absolute gross financed emissions, disaggregated by (1) Scope 1, (2) Scope 2 and (3) Scope 3
- Total amount of assets under management (AUM) included in the financed emissions disclosure
- Percentage of total AUM included in the financed emissions calculation
- Description of methodology used to calculate financed emissions

The amendments are effective for annual reporting periods beginning or after 1 January 2024.

Circularity

/ CIRCULARITY

Circular economy developments

Proposed new EU Commission rules to combat textile waste

On 5 July 2023, the European Commission released its plans to revise the Waste Framework Directive with a set of proposed new rules targeting the sustainable management of textile waste[1], which currently contributes the fourth highest environmental global impact generating over 12.6 million tonnes of waste per year. The proposed new rules follow the introduction by the EU Commission in March 2022 of the EU Strategy for Sustainable and Circular Textiles. The EU Strategy for Sustainable and Circular Textiles has a key aim of ensuring all textile products in the EU are "durable, repairable and recyclable."[2]

The proposed new rules aim to incentivise producers to minimise waste, increase textile circularity and commit to innovating new systems. The proposal puts forward plans for Extended Producer Responsibility (EPR) systems, which has been successful in the waste management of electronics. The proposed rules provide that member States shall ensure producers have extended producer responsibility for any textile, textile-related and footwear products that they make available on the market for the first time in the territory of a Member State.

They also provide that Member States shall ensure that the producers of textile, textile-related and footwear products cover certain costs, including the following:

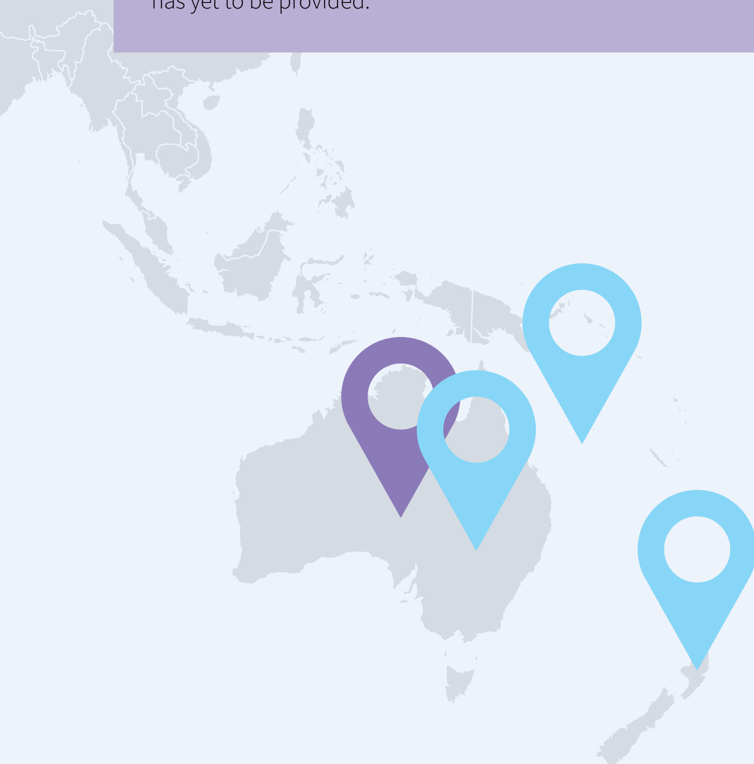
- the collection of textile, textile related and footwear products and subsequent management that entails, for example, the collection of those products for re-sale and the separate collection of waste products for preparation for the re-use and recycling;
- data gathering and reporting to the competent authorities; and
- support to research and development to improve the sorting and recycling processes, particularly in view of scaling up fibre-to-fibre recycling.

The rules also seek to manage and combat the illegal export of textile waste to ensure that it is managed and transported through environmentally conscious practice.[3] As the costs associated with textiles will increase if the proposed rules are approved, the cost of textiles being produced and recycled in the EU will likely increase. This will have an impact on Australian companies that import textiles from the EU.

Australia takes stricter measures to address packaging waste

On 9 June 2023, in a landmark decision made during the Environment Ministers Meeting which comprises the Commonwealth Minister for the Environment and the Environment Minister from each Australian state and territory, Australia has committed to introducing mandatory obligations for packaging design as part of a new packaging regulatory scheme. This move, based on international best practices, aims to hold industries accountable for the packaging they introduce to the market.[4] The new rules will aim to eliminate packaging waste from the outset and will include mandatory packaging design standards and targets, with a focus on recycled content and the reduction of harmful chemicals and contaminants. These rules will ensure that packaging waste is minimized, and where packaging is necessary, it is designed for recovery, reuse, recycling or reprocessing. Additionally, the textile and clothing sector has received a clear message that if they do not take responsibility for their waste by mid-2024, the Australian government will introduce regulations like those being implemented for packaging.

This announcement has been welcomed by numerous industry and environmental associations in Australia, including the Australian Packaging Covenant Organisation, WWF-Australia, Australian Food and Grocery Council and National Retail Association.[5] These stakeholders have advocated for more decisive guidance on the issue. This development marks a significant stride toward achieving a circular economy for packaging in Australia. Businesses operating in the country should take note of the impending stricter packaging regulations, although a specific timeline has yet to be provided.



Australia, New Zealand and Pacific Island Countries Plastics Pact

The ANZPAC Plastics Pact (ANZPAC) is a collaboration between businesses, NGOs and governments in the Australia, New Zealand and Pacific Islands region. ANZPAC is part of the Ellen MacArthur Foundation's Global Plastics Pact Network, a global network seeking to deliver a common vision of the circular economy for plastics. There are currently over 100 members of ANZPAC who are working towards achieving four Regional Plastic Targets by 2025:

- eliminate unnecessary and problematic plastic packaging through redesign, innovation and alternative (reuse) delivery models;
- 100% of plastic packaging to be reusable or compostable by 2025;
- increase plastic packaging collected and effectively recycled by at least 25% for each geography within the ANZPAC region; and
- average of 25% recycled content in plastic packaging across the region.[6]

In May 2023, ANZPAC released its first Impact Report, which has provided a look into how the region is progressing towards the development of a circular economy for plastic. The report contains aggregated data from Member reports, providing insight into the gaps and opportunities for collective action of members and tracks progress.

The key findings of the report for each of the targets are:

Target 1
Eliminate unnecessary and problematic plastic packaging. The report states that 2,232 tonnes of this plastic was removed throughout the reporting period.

Target 2
100% of plastic packaging to be reusable, recyclable or compostable by 2025. The report states that 63% of packaging put on the market by members is currently designed for this purpose.

Target 3
Increase plastic packaging collected and recycled by 25% for each geography in the region. The report stated that 16% recovery rate of plastic was reported across the region entirety.

Target 4
Average of 25% recycled content in plastic packaging across region. The report recorded that 7.5%.[7]

As Australia continues work on the aim of meeting the Regional Plastic Targets by 2025, it is likely that companies will be required to make changes to their businesses for Australia to meet the targets. For example, one of the targets is for 100% of plastic packaging to be reusable, recyclable or compostable by 2025. Therefore, businesses will need to make changes so that this target can be met.

/ CIRCULARITY

Paving the path to a circular economy:

Could humanity's strengths be our best bet?

Watching the power and grace of a 35 tonne humpback whale effortlessly cruise through the blue waters off the coast of Australia got me thinking...

These mammals journey nearly 10,000km annually, likely using Earth's magnetic field for orientation. Their flippers are edged with small bumps to allow manoeuvrability and agility in the water. Pleats on their throats allow them to gulp tonnes of water and food in each mouthful. And baleen plates trap tiny prey of which they need half a tonne of everyday. More akin to humans than fish, it was humbling to watch even a snippet of their multi-month migration.

Getting up-close-and-personal with our cetacean cousins got me thinking about what our strengths are as a species, and how might we use them to accelerate a transition to a circular economy. I landed on five strengths:

1

Inventiveness

We excel at problem-solving. We harnessed energy to create light in the darkness. We invented the wheel to enable long-distance transportation. We created the compass to aid navigation. At times, humanity can be destructive, cruel and thoughtless. But we also have an unrivalled genius for invention.

2

Learning from experience

Our successful moon landing over five decades ago was not the result of luck, but a process marked by failures, learning, and iteration. The Apollo 1 tragedy, for instance, paved the way for safer future missions.

3

Forward thinking

We have the unique ability to envisage the future and influence its outcomes, something we do on a continual basis in order to achieve our dreams, goals, and aspirations.

4

Cooperation

Despite societal fractures, our collective achievements show what we create when we come together. From architectural marvels such as the Great Pyramids and Machu Picchu, to rapid medical breakthroughs like the COVID-19 vaccines.

5

Creating movements

Change starts small, often instigated by a pioneer who dares to stand apart. Once a mass of supporters gather, transformative change is triggered. Watch how this lone dancer initiates an unexpected mass gathering.

Inventiveness, experiential learning, forward-thinking, cooperation, and creating movements – these are the tools we must use to hasten the transition to a circular economy. As we embark on this journey, the lessons from the remarkable migrations of our cetacean cousins remind us of our resilience and the power of adaptation.

/ WORDS BY

Nicola Atkin
Senior Strategy Manager, BWD

Inventiveness

As Einstein observed, new problems require new thinking. To identify circular opportunities, we must first understand the elements of a system and how these interact. Material flow mapping[8] in the city Rotterdam allowed the municipal government to identify circular opportunities such as obtaining phosphorus from sewage for use in urban farms, and using green infrastructure to store water, ultimately delivering a 20% reduction in wastewater spill events[9].

Learning from experience

Shifting away from an economic paradigm that has delivered increased living standards and ongoing GDP growth is a major challenge. It will require us to test and try new things, learn from failure, and share our knowledge. Italy's largest bank – Intesa Sanpolo – has launched a Circular Economy Lab to facilitate open innovation for new models of value creation in the collective interest.

Forward thinking

Modelling illustrates what the planet's future might look like if we do not take urgent and drastic action. We know we need to change but finding approaches that are mutually beneficial for all stakeholders is often the sticking point. There are however examples of the circular economy in action from companies such as Philips, offering light-as-a-service and Caterpillar producing remanufactured machinery. Both business models are delivering cost savings through reduced material use, lower operating costs, and increased reliability.

Cooperation

The circular economy requires collaboration across organisational boundaries; waste to one organisation is a resource to another. Sustainable Synergies, an industrial symbiosis cluster of 25 Danish companies who exchange residual and surplus resources, exemplifies the benefits; reduced waste management and procurement costs, additional revenue generated through product innovation, and reduced greenhouse gas emissions.

Creating movements

Tipping points are often associated with negative consequences as they represent critical thresholds that, when crossed, trigger self-reinforcing and potentially catastrophic changes. But tipping points can be positive too, leading to transformational change. To facilitate a tipping point for the circular economy, we must take steps to empower, remove obstacles, and most importantly rally behind our circular pioneers, innovators, and change-makers.

/ FEATURE

Sustainability disclosure

/ FEATURE: SUSTAINABILITY DISCLOSURE

Introducing a visionary concept into corporate strategy and reporting

New sustainability reporting standards (IFRS S1 and IFRS S2) have introduced resilience science into business strategy and disclosure. The implications for business are profound.

Background

On 26 June 2023, the International Sustainability Standards Board (ISSB) issued its inaugural standards, IFRS S1 and IFRS S2. The Standards create a common language for companies to report on how sustainability and climate-related risks and opportunities affect their prospects. They reflect what investors want, and will form the basis of mandatory climate-related reporting requirements in many advanced jurisdictions (not the United States).

This article explores the most interesting part of IFRS S2: the climate resilience assessment. Building on the TCFD which IFRS S2 has now supplanted, climate resilience is defined as the "resilience of a company's strategy and business model to climate-related changes, developments and uncertainties" [emphasis added]. This language is worth reflecting on, as it brings the concept of resilience science into mainstream business thinking.

Tipping points and ignorance

Invented by Canadian ecologist C. S. "Buzz" Holling in 1973, resilience science explains how human-natural systems (the interconnected relationship between humans and the environment) do not exist in a fixed state, but are instead characterised by constant change and tipping points.

This is not how businesspeople usually think. Instead, they assume that a complex system, like an organisation, is stable, isolated, measurable and linear. Take COVID. Most of us thought things would be disrupted for a time, before 'bouncing back' to normal. The mistake is right there in the language. Post pandemic, we didn't go back. The way we live and work changed.

A better understanding of the world acknowledges that systems go through adaptive cycles of growth, decay, restructuring and renewal. As business leaders, we must acknowledge our lack of certainty and control. We should reimagine our actions, plans, and strategies as experiments that, as in science, must be constantly re-evaluated.

As Nassim Taleb says in Fooled By Randomness, probability is "the acceptance of the lack of certainty in our knowledge and the development of methods for dealing with our ignorance."

That's why IFRS S2 is not the dry reporting standard it appears at first view, but something quite visionary. The Standard embraces uncertainty and consents to our ignorance. It asks us to see through the 'illusion' of the pristine, perfectly self-contained balance sheet, where the ledger is always squared and all things are known.

Focus on the process

To explain the "changes, developments and uncertainties" that arise from the physical and transition risks and opportunities of climate change, a company is required to use scenario analysis. The analysis is not meant to predict what might happen in the future. Instead, it offers up 'what if' scenarios to help your business better think through its options and plan better.

IFRS S2 says you must disclose the "inputs and key assumptions" used in your scenarios, not just the result. In other words, your explanation of the process is essential. This is because investors want to test the quality of your thinking, rather than simply reading a claim that your business is resilient.

Staying practical

The method of scenario analysis you employ is up to you, and should be "commensurate with your circumstances". For most businesses, an expensive quantitative modelling exercise is not required or even the best option. The authors of IFRS S2 recognise the burden that companies face in complying with a science-based approach to climate change.

As a result, they have sought to navigate a practical approach that requires the use of "all reasonable and supportable information" (the floor of the effort required) available at the reporting date without "undue cost or effort" (the ceiling). The concept is explained by ISSB Vice-Chair Sue Lloyd in this webinar. The IPCC, IEA, and PRI all provide publicly available scenarios which provide the basis for a useful, cost-effective and strategic approach.

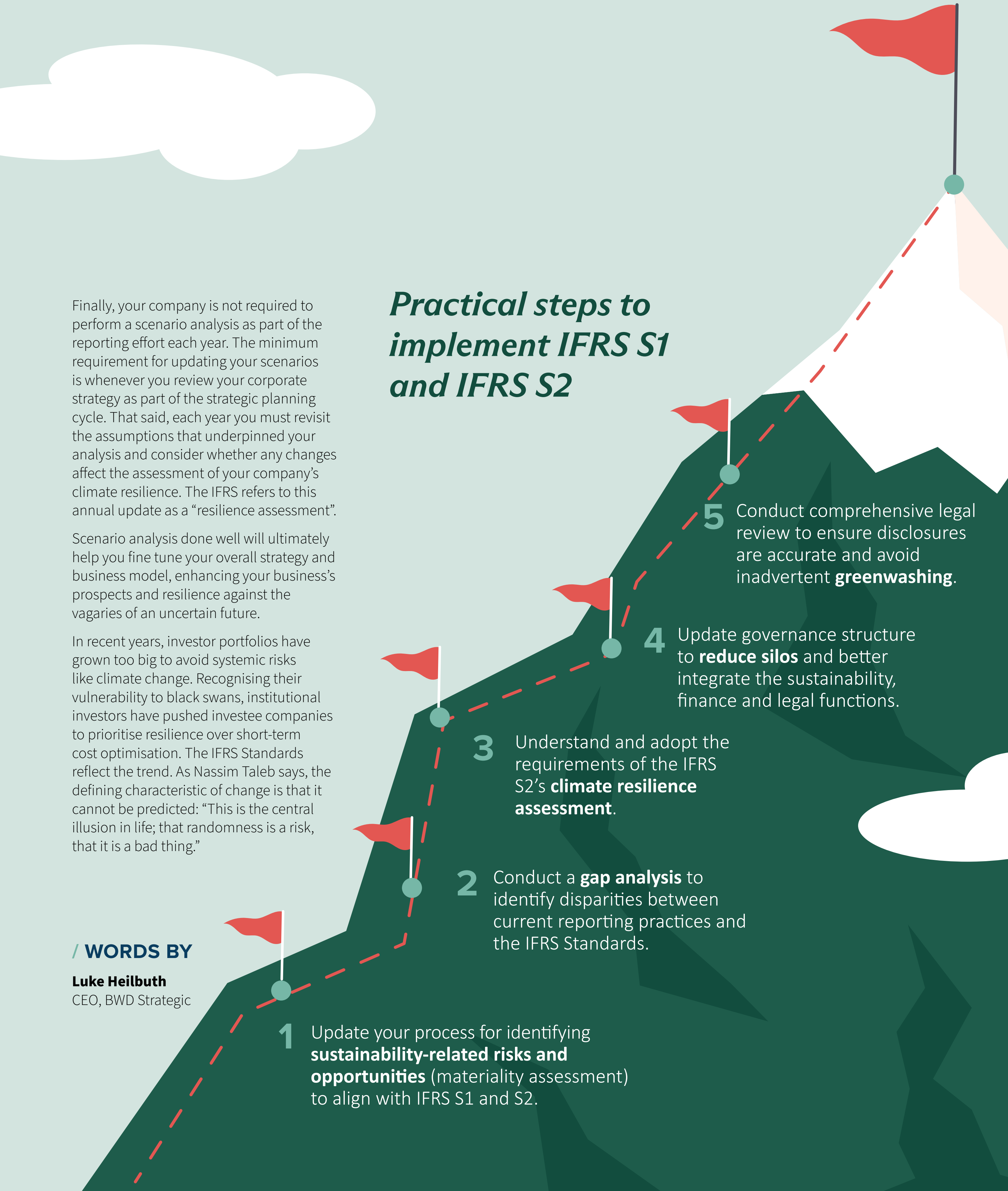
Finally, your company is not required to perform a scenario analysis as part of the reporting effort each year. The minimum requirement for updating your scenarios is whenever you review your corporate strategy as part of the strategic planning cycle. That said, each year you must revisit the assumptions that underpinned your analysis and consider whether any changes affect the assessment of your company's climate resilience. The IFRS refers to this annual update as a "resilience assessment".

Scenario analysis done well will ultimately help you fine tune your overall strategy and business model, enhancing your business's prospects and resilience against the vagaries of an uncertain future.

In recent years, investor portfolios have grown too big to avoid systemic risks like climate change. Recognising their vulnerability to black swans, institutional investors have pushed investee companies to prioritise resilience over short-term cost optimisation. The IFRS Standards reflect the trend. As Nassim Taleb says, the defining characteristic of change is that it cannot be predicted: "This is the central illusion in life; that randomness is a risk, that it is a bad thing."

/ WORDS BY
Luke Heilbuth
CEO, BWD Strategic

Practical steps to implement IFRS S1 and IFRS S2



/ FEATURE: SUSTAINABILITY DISCLOSURE

ISSB issues final versions of its sustainability standards

On 26 June 2023, the International Sustainability Standards Board (ISSB) published 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).[10]

Overview of the ISSB Standards

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.[11] Meanwhile, IFRS S2 requires disclosure of information specifically linked to climate-related risks and opportunities, and is designed to be used in conjunction with IFRS S1.[12]

IFRS S1 and IFRS S2 both adopt a four-pillar core content framework (similar to the recommendations of the Taskforce on Climate-related Financial Disclosures (**TCFD**)), which requires a company to provide disclosures on governance, strategy, risk management and metrics and targets.

The ISSB Standards are effective for annual reporting periods beginning on or after 1 January 2024. However, a transitional relief provision in IFRS S1 allows entities to disclose information on only climate-related risks and opportunities under IFRS S2 for the first reporting period (in other words, entities only need to apply IFRS S1 in so far as it applies to climate-related disclosures for the first year).

IFRS S1

IFRS S1 sets out the overall requirements for providing users of general-purpose financial reports (referred to as 'Users') with a complete set of sustainability-related financial disclosures. It applies to all sustainability-related risks and opportunities that could reasonably be expected to affect an entity's cash flows, its access to finance or cost of capital over the short, medium or long term.

Entities must disclose information that is 'material', which according to IFRS S1, information is material if 'omitting, misstating or obscuring that information could reasonably be expected to influence decisions that Users make on the basis of general-purpose financial reports, which include financial statements and sustainability-related financial disclosures and which provide information about a specific reporting entity'.

The core content of IFRS S1 requires entities to make disclosures about:

Governance— entities need to disclose the governance processes, controls and procedures they use to monitor and manage sustainability-related risks and opportunities. This includes providing information about the governance bodies responsible for oversight, and management's roles in governance.

Strategy—entities need to disclose their approaches to managing sustainability related risks and opportunities. Among other things, IFRS S1 requires entities to disclose information that enables Users to understand the sustainability-related risks and opportunities that could reasonably be expected to affect their prospects, and how these factors affect their business models and value chains. Entities need to describe the short, medium and long term effects of these factors on their financial position, financial performance and cash flows. Interestingly, IRFS S1 enables entities to define 'short, medium and long term' for themselves, provided that they explain their reasoning. In addition, entities need to disclose the resilience of their strategies to identified sustainability-linked risks.

Risk Management—under this pillar, entities need to describe how they identify, assess, prioritise and monitor sustainability-related risks and opportunities. Among other things, entities need to describe the extent to which any processes for identifying, assessing, prioritising and monitoring sustainability-related risks and opportunities are integrated into and inform their overall risk management processes.

Metrics and Targets—the final core pillar centres around reporting on performance in relation to sustainability-related risks and opportunities, including progress towards any targets an entity has set or is required to meet by law or regulation. With respect to metrics, while there is a requirement to apply any relevant metrics under another IFRS standard, when entities define their own metrics, they need to provide information about (among other things) how the metric was calculated and whether it has been validated by a third party. With respect to any targets, entities need to provide information about the period over which it applies, any interim targets, and – where a target has been revised – an explanation for the revision (among other things).

IFRS S1 also sets out other general requirements, including requirements for disclosing information relating to measurement uncertainty and judgments made by entities when preparing their disclosures, as well as requirements to correct errors where possible.

Importantly, general requirements include the sources that entities need to consider when identifying the sustainability-linked risks and opportunities that could reasonably be expected to affect their prospects. In particular, in addition to applying any applicable IFRS sustainability standards (i.e., IFRS S2), entities also need to look to the disclosure topics listed in industry-specific standards published by the Sustainability Accounting Standards Board (SASB).

IFRS S2

IFRS S2 requires reporting entities to make disclosure about their exposure to climate-related risks (both physical and transition risks) and opportunities, where these factors could reasonably be expected to affect the entity's cash flows, access to finance or cost of capital over the short, medium or long term.

IFRS S2 also sets out 'core content' requiring entities to disclose information regarding governance, strategy, risk management and its metrics and targets. Key aspects that must be disclosed under each pillar complement the requirements of IFRS S1 and include:

Governance – The entity's processes, controls and procedures used to monitor and manage climate-related risks and opportunities. This includes governance bodies responsible for overseeing these risks and opportunities and the extent to which these bodies consider these factors when overseeing the entity's strategy.

Strategy – Entities must disclose climate-related risks and opportunities that could reasonably be expected to affect their prospects, whether identified risks are physical or transition risks and the applicable time horizon; and quantitative and qualitative information on the impacts of these risks and opportunities on the entity's financial position and performance.

Risk management – Entities must disclose information regarding how the entity assesses the nature, likelihood and magnitude of the impacts of climate-related risks, and whether they use scenario analysis to inform the identification of these risks and opportunities.

Metrics and targets – Metrics that must be disclosed under IFRS S2 include not only an entity's scope 1 and 2 greenhouse gas emissions, but also scope 3 emissions (including upstream and downstream value chain emission). Further key metrics include (among other things) the percentage of assets or business activities that are vulnerable to climate-related risks and aligned with climate-related opportunities; and whether and how the entity is applying an internal carbon price in decision-making. The percentage of executive management remuneration linked to climate-related considerations also needs to be reported. For entities with climate-related targets, IFRS S2 requires disclosure of metrics used to set their targets; any interim targets; and processes for reviewing the target and progress toward reaching their targets (among other things).

/ WORDS BY

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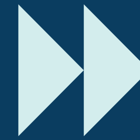

NEXT STEPS

While the ISSB Standards will remain voluntary unless a jurisdiction decides to mandate reporting in line with the ISSB Standards, multiple national governments and regulatory authorities have indicated an intention to integrate the ISSB Standards into their own regulatory landscape. For example, the Hong Kong Stock Exchange has recently consulted on the introduction of mandatory climate-related disclosures in line with the ISSB Standards.[13] In addition, the European Union issued the European Sustainability Reporting Standards on 31 July 2023, which to a high degree, are aligned with the ISSB Standards. The European Commission, the European Financial Reporting Advisory Group and the ISSB will also work together to publish interoperability guidance material.[14]

Separately, the ISSB will be developing more disclosure standards and in May 2023, announced that it is seeking feedback on the ISSB's priorities over the next two years. The ISSB has identified four potential projects:

- **Biodiversity, ecosystems and ecosystem services.**
- **Human capital.**
- **Human rights.**
- **Integration on reporting.**

Specifically, the ISSB is seeking feedback on:

- **The strategic direction and balance of the ISSB's activities.**
- **The criteria for assessing which sustainability-related matters to prioritise.**
- **The scope and structure of potential new search and standard-setting projects.[15]**

/ FEATURE: SUSTAINABILITY DISCLOSURE

Consultations on a mandatory climate-related financial risk disclosure framework

In parallel to the development of the ISSB Standards, the Australian Federal Government has been consulting on the introduction of a framework for mandatory climate-related financial risk disclosures for Australian businesses since December 2022.[16]

Following an initial consultation round that closed in February and received almost 200 submissions (1st Consultation Paper), Treasury released a second consultation paper (2nd Consultation Paper).[17] The 2nd Consultation Paper outlines Treasury's proposed position on the design and implementation of the framework in light of initial feedback. This framework will be formally established by the Australian Accounting Standards Board (**AASB**) and is intended to align as closely as possible with the ISSB Standards, particularly IFRS S2. The first phase of reporting is proposed to commence in 2024-25.

Key proposals for feedback

Some of the Government's key proposals in the 2nd Consultation Paper include:

Covered Entities
Entities meeting prescribed size thresholds and that are required to lodge financial reports under Chapter 2M of the *Corporations Act 2001 (Cth)* (**Corporations Act**) would be required to make climate-related financial disclosures. It is proposed that the disclosure framework will have a three-phased implementation approach, whereby covered entities will initially be limited to large entities that expands over time to progressively apply to smaller entities. The initial size thresholds proposed for 2024-25 onwards ('group 1 entities') are that the entity must meet two of the following criteria:

- has over 500 employees;
- the value of the consolidated gross assets at the end of the financial year for the company and any entities it controls is $1 billion or more;
- the consolidated revenue for the financial year of the company and any entities it controls is $500 million or more.

Obligations for smaller Corporations Act companies ('group 2 entities') will commence from 2026-27, with obligations for smaller scale businesses applying from 2027-28 onwards ('group 3 entities'). Entities required to report under Chapter 2M of the Corporations Act that are 'controlling corporations' under the National Greenhouse and Energy Reporting (**NGER**) Act and meet NGER publication thresholds will also be initially covered, with obligations for controlling corporations who do not meet publication thresholds to commence later.

Materiality
The principles of financial materiality would apply. The 2nd Consultation Paper notes that "climate-related financial information would be material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general financial reports make on the basis of the reports" which largely aligns with the ISSB's approach to materiality in the ISSB Standards.

Disclosure content
Companies would be required to disclose information on governance processes, and procedures used to monitor and manage climate-related risks and opportunities. Disclosures must be informed by qualitative scenario analysis at first, moving to quantitative scenario analysis.

Transition plans
Companies will need to disclose their transition plans (if any), including information about target setting and mitigation strategies. Where offsets are contributing to transition plans, information must be disclosed on whether offsets are verified though a recognised standard.

Scope 3 reporting
From commencement, disclosure of scope 1 and 2 emissions would be required. Material scope 3 emissions would need to be reported for all reporting entities from their second reporting year onwards. In its 1st Consultation Paper, the Government sought views to ensure liability is proportionate to inherent uncertainty, noting the US Securities and Exchange Commission's proposal for a specific safe harbour regime for disclosure on scope 3 emissions in its draft rules to enhance and 'standardise climate-related disclosures for investors' that were announced in 2022 and will likely commence in 2024. A legal opinion by barristers Sebastian Hartford-Davis and Kellie Dyson concluded that a 'safe harbour' for scope 3 emissions reporting is neither required nor desirable, as it would remove the incentive to improve and avoid substandard disclosure practices.[18] The 2nd Consultation Paper proposes that climate-related financial disclosure requirements be drafted as civil penalty provisions. The application of misleading and deceptive conduct provisions to scope 3 emissions and forward-looking statements would be limited to regulator-only actions for three years, meaning that companies will be protected from claims from private litigants over this period.

Transitional period
A transitional period from 2024-25 to 2026-27 would impose 'relatively less onerous' disclosure requirements on reporting entities, to give them time to develop internal capabilities. In addition to the transition for scope 3 reporting described above, assurance requirements would start with limited assurance transitioning to reasonable assurance over time.

Feedback received on the 2nd Consultation Paper

Submissions to the 2nd Consultation Paper closed on 21 July 2023, with some of the key issues raised in these submissions including:

Transitional liability relief
Some submissions noted that relief should apply for three years for each reporting cohort (i.e., not just a fixed 3 years) and the relief should apply to all forward-looking statements and not just in relation to transition plans and scenario analysis. Submissions also noted the complex interaction of liability provisions in the Corporations Act and noted the proposed access to relief under sections 1317 and 1318 may not be sufficient.

Extra clarity and guidance
Some stakeholders were of the view that extra clarity and guidance is required including clarity that climate disclosures need to be made on an annual basis only and do not need to be updated throughout the year; guidance on the interaction with the continuous disclosure regime; clarity on which disclosures are mandatory and which are subject to an organisation's materiality assessment; and further clarity on the two possible future states for climate resilience assessments.

Modified Directors and Management declarations
It was proposed that the director's resolution authorising the issue of the director's report should include a statement that they have complied with climate standards on a good faith basis; and the director's and management declarations for the financial report should be similarly modified reflecting the emerging nature of the disclosures.

Thresholds
Concerns were raised that 'group 3' would capture too many entities and would impose an excessive compliance burden. Questions were also raised on how the framework would apply to the charities andnot for profit sector.

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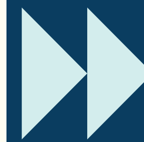


NEXT STEPS

According to the 2nd Consultation Paper, the AASB will be responsible for establishing final disclosure standards, and the Government intends that Australian framework will be aligned as far as practicable with the ISSB Standards. The AASB is expected to consult on these standards later this year.

Australian Sustainable Finance Taxonomy

In the coming months the Federal Government, working alongside the Australian Sustainable Finance Institute (ASFI), will progress the development of a sustainable finance taxonomy to provide uniform standards and definitions for what activities are considered environmentally sustainable.

This follows the publication of the ASFI's final report on Designing Australia's sustainable finance taxonomy (Final Report)[19] in March 2023. The Final Report provided recommendations on the design of the Australian sustainable finance taxonomy, and the roadmap and timeline for its development. The key recommendations of the Final Report included that:

- the Australian Taxonomy be guided by the four principles of credibility, usability, interoperability, prioritisation and impact;
- the purposes of the Australian Taxonomy should be to:
  - direct capital flows towards economic activities which substantially contribute to sustainability objectives and in particular, climate mitigation;
  - assist in an orderly and just transition to a sustainable economy; and
  - address greenwashing;
- the Australian Taxonomy cover the sustainability objectives of climate change mitigation; climate change adaptation; environmental management, including the protection and restoration of ecosystems and biodiversity; resource resilience and the transition to a circular economy; and social objectives. However, the Final Report also recommended that the Australian Taxonomy first prioritise developing criteria for climate change mitigation;
- the Australian Taxonomy first cover priority sectors and when deciding which sectors should be considered as a priority, to consider the sector's:
  - contribution to sustainability objectives;
  - contribution to the national economy by share of gross domestic product; and
  - potential economic growth and global competitiveness opportunities;
- the Australian Taxonomy include a transition category and adopt a 'traffic-light colour coding framework' to distinguish between:
  - green activities which are aligned to the Taxonomy objectives;
  - transition activities which are on a pathway to align with the Taxonomy objectives; and
  - excluded activities which are unsuitable or do significant harm and/or have no credible pathway to be aligned with the Taxonomy objectives;
- the Australian Taxonomy include the additional criteria of 'do no significant harm' but ensure that it meets Australian needs including respecting Indigenous rights and heritage; and
- to address greenwashing concerns, reporting on taxonomy alignment should be mandatory where companies are seeking to make claims regarding the sustainability objectives covered by the Australian Taxonomy in relation to their activities, financial instruments, and/or products.

In addition to the proposed mandatory reporting on taxonomy alignment, the Australian Taxonomy could also be utilised by Australia's regulatory bodies. For example, both the Australian Securities and Investment Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) could use the Australian Taxonomy as a reference when investigating whether a company's statement or claim amounts to greenwashing. The development of an Australian taxonomy will help channel capital towards decarbonisation efforts in Australia, and in turn help Australia achieve its emissions reduction targets.[20]

In August 2023 the ASFI commenced the development phase of the Australian sustainable finance taxonomy with the appointment of the Taxonomy Technical Expert Group (**TTEG**). The TTEG will provide input into the development of the Taxonomy and also endorse the Taxonomy for consideration by the Federal Government. Members of the TTEG have a mix of skills and experience that will be used to inform the Taxonomy's development, including in climate and environmental science and policy, sustainable finance, whole-of-economy decarbonisation, Indigenous rights and human rights.[21]

/ FEATURE: SUSTAINABILITY DISCLOSURE

The materiality matrix is Grandma's Ham

The story goes like this:

A couple is cooking together for the first time. They are cooking a large ham, and one of them trims the ends off before putting it in the oven.

"Why are you cutting the ends off the ham?"

"Because that's what my mother did."

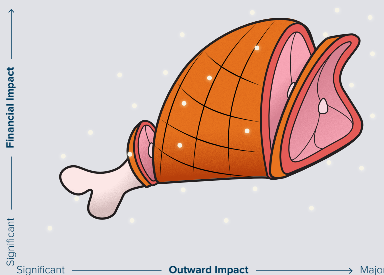
"Why did she do that? It's a waste of good ham!"

"I don't know, let's call her to find out."

The mother says she trims the ham because her mom did it. So they call the grandmother. Nonna is also unsure why. She asks her husband. He thinks for a moment, before remembering:

"After we got married, our house had a really small oven. I had to cut the ends off the ham for it to fit."

The materiality matrix is Grandma's Ham. Today's matrices (an example to the right) try to communicate the importance of various sustainability-related topics as a function of both financial importance and stakeholder importance (double materiality).



But whether you're looking at investor disclosure, multi-stakeholder disclosure, or a double materiality approach, none of the established standards suggest the use of a matrix today.

STANDARD	LANGUAGE ON DISCLOSING IMPORTANT RISKS, OPPORTUNITIES, OR IMPACTS
IFRS S1 General Requirements (June 2023)	IFRS S1 paragraph 30(a) asks a company to describe sustainability-related risks and opportunities that could reasonably be expected to affect its prospects The word "matrix" does not appear in the standard
GRI 3: Material Topics 2021	GRI Disclosure 3-2 requires companies to disclose a list of material topics The word "matrix" does not appear in the standard
European Sustainability Reporting Standards (June 2023)	Disclosure Requirement SBM-3 asks a company to disclose its material impacts, risks and opportunities and how they interact with its strategy and business model The word "matrix" does not appear in the standard

So if you're aligned with one or more of the above standards and using a matrix, you should be asking *why*.

The matrix has never had a place in double materiality

A key lesson of Grandma's Ham is to question older practices to ensure they remain fit-for-purpose. After all, practices can morph over time to the point they become ends-in-themselves, so ubiquitous that no one questions them.

Proponents of today's double materiality matrices sometime refer to GRI's 2016 standards – which *did* suggest the use of a matrix (see below).

A closer comparison will reveal that the axes on today's double materiality matrices are different to what was proposed by GRI. Double materiality matrices feature axes of:

- Stakeholder impact
- Impact on the business

Yet the axes on GRI's 2016 matrix are:

- Influence on stakeholder assessments & decisions
- Significance of economic, environmental, & social impacts

This is a key point. GRI has never been interested in expanding its remit to incorporate the concept of double materiality (i.e. "impact on the business"). In fact, no standard has ever suggested the use of a matrix for *double* materiality.

Any GRI enthusiast seeking to keep the 2016 matrix alive may find the below quote instructive:

The materiality matrix is a techno-rational tool that simplifies the inherent complexity of assessing material sustainability issues, stakeholder engagement, and the societal pursuit of sustainable development.

It is instructive not only for its substance, but also because of who wrote it. The lead author on the paper is Carol Adams, now Chair of the Global Sustainability Standards Board – the authority that issues the GRI Standards. If the leader of GRI questions the relevance of the materiality matrix, you should too.

The matrix is a misleading illusion of certainty

Take another look at the matrices above. In both matrices, diversity and inclusion is deemed more important or impactful than workplace health and safety. As an LGBTQ+ person, I have faced anguish in the workplace and will always fight for the importance of diversity and inclusion.

But is it more *important* than my health and safety? Aren't they intertwined? On the flip side, is an incident of discrimination really more impactful than someone dying on the workroom floor?

No one would actually say that an issue like diversity and inclusion "is about 15% more important" than another issue like health and safety, yet this is what the matrix says. The prioritization in the matrix represents false choices that don't actually reflect how these issues are prioritized strategically. Businesses will do what they need to do to achieve diversity and safety objectives together. As fellow sustainability reporting enthusiast Elaine Cohen wrote:

I don't think we need to mess around with shades of materiality...high materiality, low materiality, average materiality.... what difference do these labels make in terms of management attention, resource allocation, due diligence? All material topics should be assigned the level of resource required to address the need, the relative priority is superfluous to requirements.

In addition to the illusion of order, the matrix offers the illusion of stability. Even if it were true that diversity and inclusion is 15% more important than health and safety at the time of the materiality assessment, would it still be 15% more important after a series of safety-related incidents? There is also risk here, as the matrix may invite criticism that the company deprioritized health and safety and could have done more to prevent the incidents. Why open yourself up to this when you know things are always changing in reality?

With change comes uncertainty, and an unbiased appreciation of uncertainty is a cornerstone of rationality.[22] The illusory certainty of the matrix fails this test. A more realistic representation would simply list important issues and disclose how the business managed them through the reporting period.

Start asking why

In the case of Grandma's Ham, cutting off the ends was originally of use to fit the ham in the oven. Over time, it became a process that was unnecessary and wasteful. By asking "why", the new couple was able to recognize that the practice was no longer fit-for-purpose.

So if you're using a materiality matrix today and it seems a bit forced and artificial, trust your instincts.

/ WORDS BY

Alex Gold
CEO North America, BWD Strategic

/ FEATURE: SUSTAINABILITY DISCLOSURE

Decarbonisation developments

Advances in global efforts to improve carbon credit integrity: release of the Core Carbon Principles and Claims Code of Practice

Introduction

The integrity of carbon crediting frameworks has faced growing scrutiny in recent years, both at a domestic level with respect to Australia's carbon crediting legislation, and at an international level, with stakeholders raising concerns as to the emissions impacts and sustainable development safeguards linked to projects undertaken under global crediting standards. In parallel, scrutiny of the accuracy and robustness of claims by users of carbon credits has intensified as Australian and overseas regulators seek to combat 'greenwashing' by organisations in relation to their decarbonisation efforts.

International initiatives have responded through the release of two key sets of global guidance that address carbon credit integrity at the supply and demand sides: in July, the Integrity Council for the Voluntary Carbon Market (ICVCM) – an independent governance body for the voluntary carbon market – released its long-awaited final set of ten 'Core Carbon Principles' (CCPs). Also recently, the Voluntary Carbon Markets Integrity Initiative (VCMI) launched its Claims Code of Practice (Claims Code). The Claims Code addresses integrity on the demand side by guiding purchasers of carbon credits on how to make voluntary use of carbon credits as part of their climate commitments, and on the associated claims they can make regarding the use of those credits.[23]

Core Carbon Principles

The ICVCM is an independent governance body for the voluntary carbon market. Its release of the final CCPs marks the conclusion of months of public consultation on draft principles, which attracted over 350 submissions.[24] The CCPs are designed to set a global benchmark for the supply of high-integrity carbon credits.

It is intended that purchasers of carbon credits can identify high integrity credits by seeking out credits that are labelled as meeting the requirements of the CCPs. Accordingly, the CCPs are accompanied by an Assessment Framework that the ICVCM will use to assess whether carbon crediting programs and credits meet the requirements of the CCPs. Carbon credits will receive the CCP label only if both the carbon-crediting program that issued them and the credit category are assessed by the ICVCM and meet the requirements of the CCPs.

Credits that are tagged with the CCP label can be tagged with additional 'CCP Attributes' where they satisfy additional criteria (for example, where they have been authorised in accordance with Article 6 of the Paris Agreement, or are linked with an activity that provides quantified positive sustainable development impacts.[25]

Claims Code of Conduct

VCMI is an independent non-profit organization announced by UNFCCC COP26 President-Designate Alok Sharma in 2021. In summary, the purpose of VCMI's Claims Code is to guide organisations on how to credibly make voluntary use of carbon credits as part of their emissions reduction objectives, as well as the claims they can make regarding the actions taken and use of those carbon credits.[26]

To comply with the Code, organisations must first meet a set of foundational criteria (including, for example, maintaining a public annual greenhouse gas emissions inventory).

Credits that organisations use must be of the highest quality (i.e. meet the requirements of the CCPs), and must only be used for beyond-value-chain mitigation[27]

When it comes to making claims about credit use, the Code requires transparent reporting and third-party assurance. It sets out particular metrics which need to be reported on, and a requirement that reporting be publicly available on the company's website, in a standalone report or in a more comprehensive report (e.g. sustainability report). Each metric needs to be independently verified by a third party in line with international standards such as IOSCO.[28]

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Takeaways

While it will take time for crediting programs and credits to be assessed and labelled with the CCP label, we expect that the CCP label will provide a useful tool for companies looking to leverage carbon credits as part of their decarbonisation strategies to identify high integrity credits. Some standards, including the Gold Standard have indicated that they meet the requirements under the CCPs and will apply for recognition under the CCPs.[29]

The CCP's could also have significance for Australia's domestic carbon crediting framework: the report on the independent review of Australian Carbon Credit Units (ACCUs) released last year recommended that the Offsets Integrity Standards for Australian ACCU projects be supplemented with 'ACCU Scheme Principles', and that international experience and initiatives such as the CCPs should be taken into account when implementing this recommendation.[30] The Federal Government has committed to consult on these ACCU Scheme Principles, and it remains to be seen the extent to which (if at all) the CCPs are integrated into these principles in that process[31]

Equally, we expect that the Claims Code will provide useful guidance for organisations looking to demonstrate appropriate use of carbon credits, and minimise greenwashing risk when making claims about their uses of carbon credits. Of course, these organisations will still need to have regard to other anti-greenwashing laws and guidance from regulators. The VCMI will expand the Code over coming months with additional modules, including rules for claims at the product, service or brand level, as well as sector-specific guidance (among other things), and organisations should monitor for these extra materials.[32]

The ten CCPs span three key areas as follows:[43]

Governance

1. Additionality
2. Permanence
3. Robust quantification of emission reductions and removals
4. No double counting

Emissions Impact

5. Effective governance
6. Tracking
7. Transparency
8. Robust independent third-party validation and verification

Sustainable

9. Sustainable development benefits and safeguards
10. Contribution to net zero transition

Climate Change Authority's consultation regarding setting, tracking and achieving Australia's emissions reduction targets

In May 2023, the Climate Change Authority (Authority), an independent statutory authority established under the *Climate Change Authority Act 2011* (Cth) to provide advice on climate change to the Australian Government, published an Issues Paper entitled 'Setting, measuring and achieving Australia's emissions reduction targets' (Issues Paper).[33]

The Issues Paper focuses on four interrelated projects:

- Providing advice on tracking progress to emissions reductions targets and setting a Nationally Determined Contribution (**NDC**) towards reducing global emissions under the Paris Agreement for 2035.
- Providing advice for the 2023 Annual Progress Report to be delivered by the Minister for Climate Change and Energy.
- The Authority's legislative reviews of the *National Greenhouse and Energy Reporting Act 2007* (**NGER Act**) and the *Carbon Credits (Carbon Farming Initiative) Act 2011* (**CFI Act**), which establishes the Australian Carbon Credit Unit (**ACCU**) Scheme, both due to the Minister for Climate Change and Energy by 31 December this year.

The Issues Paper provides guidance by way of three conceptual frameworks related to strategic policy, progress and target-setting:

- The strategic framework identifies six actions that drive deployable abatement and adaptation changes that should inform policy advice: managing climate risk, efficient production, switching fuels, electrification, deploying technology solutions and carbon sequestration.
- The progress framework relates to assessing and advising progress on targets while emphasising well-being and the need for a just transition for first nations, regional and low-income earning households. This is balanced against the wider context of economic impacts and opportunities, physical impacts and adaptation, geopolitics, climate science, international policies and voluntary corporate action.
- The target-setting framework concerns what setting various targets in a post-Paris Agreement world looks like. It emphasises international considerations, sectoral pathways, economic analysis and non-economic wellbeing.

The Issues Paper identifies eight cross-cutting issues relevant to the Authority's projects for which it is seeking input. They are:

- Leading indicators of progress toward climate change adaptation and mitigation – specifically, how best to improve resilience and preparedness.
- Sectoral pathways, their opportunities and risks, such as supply chain issues, and the most appropriate role of the government in managing these.
- Extraterritorial contributions, such as international partnerships, fossil fuel exports, the role of international maritime and aviation emissions (which do not count toward national targets) in the Authority's advice.
- Societal preparation, that is, how the government should prepare Australia for changes that come with a decarbonising world impacted by climate change while minimising inequities.
- Targets, such as emissions budgets, net zero and net negative, sectoral, conditional, interim, climate finance, technology, conservation, adaptation, voluntary and mandatory targets.
- Kyoto-era schemes, such as the NGER scheme and the CFI Act, their strengths, weaknesses and areas for improvement.
  - Carbon credit integrity and how confidence in carbon trading markets and exchange platforms could be bolstered, especially with any residual concerns regarding ACCU integrity following the adoption of recommendations of the Independent Review of ACCUs.
  - International units and clarifying their role in Australian markets.

In addition to the above issues, the Issues Paper called for input on other matters that might fall outside their scope, soliciting even broad commentary, information, research, data, evidence and submissions made to other consultation processes.

The CCA has recently provided initial feedback in relation to its review of the ACCU Scheme. The areas of focus being prioritised are scaling integrity; valuing non-carbon outcomes; managing supply and demand and competing land uses; scaling emissions removals and Paris Agreement alignment, including in respect of international trade considerations. In addressing integrity, the CCA is closely tracking the implementation of the guidance from the Integrity Council on the VCM (see previous article).

Net Zero Authority

The Australian Government announced on 5 May 2023 that it is establishing the Net Zero Authority (**Authority**) to ensure workers, industries and communities can seize the opportunities of Australia's net zero transformation.[34]

The Government will work to legislate the Net Zero Authority following consultation across government and stakeholders to refine the functions and powers of the authority before legislation is developed.

To kick-start the Authority's responsibilities before then, the Government has appointed the Net Zero Economy Agency, led by the Hon Greg Combet AM and an advisory board[35] to design and establish the legislated Authority.

The purpose of the Authority is to:

1. Support workers in emissions-intensive sectors to access new employment, skills and support throughout the net zero transformation.

2. Coordinate programs and policies across government to support regions and communities to attract and take advantage of new clean energy industries and set those industries up for success.

3. Help investors and companies to engage with net zero transformation opportunities.[36]

The Authority will help steer the Government's ambitions to make Australia a renewable energy superpower. Its mission is aligned to the Paris Agreement and emphasises the need for a just energy transition. The Authority will include a focus on regions and industries that have traditionally powered Australia's economy, such as coal. As traditional industries adapt and transform, the Authority will work to ensure new industries are coming online, and workers, communities and regions are supported. It will work with state and territory governments, regional bodies, unions, industry, First Nations groups and others to help ensure that key regions, industries, employers and others are proactively managing the transformation to a clean energy economy.

National Reconstruction Fund

The Australian Government has committed $15 billion to establish the National Reconstruction Fund (**NRF**). The NRF will provide finance for projects that diversify and transform Australia's industry and economy.[37] The NRF will provide finance to projects in priority areas to leverage Australia's natural and competitive strengths. It will do so through a range of finance options including loans, equity investment and guarantees across seven priority areas: renewables and low emissions technologies, medical science, transport, value-add in agriculture/forestry/fisheries, resources, defence and enabling capabilities.

The Minister can declare new priority areas of the Australian economy from time to time, allowing for the NRF to adapt to changes in the Australian economy as needed.

So far, $8 billion has been identified for:

- renewables and low emissions technologies ($3 billion);
- medical manufacturing ($1.5 billion);
- value-adding in resources ($1 billion);
- critical technologies ($1 billion);
- advanced manufacturing ($1 billion); and
- value-adding in agriculture, forestry, fisheries, food and fibre ($500 million).[38]

The Fund is intended to be a co-investment scheme, aiming to encourage separate private investment into such projects which otherwise might not have received such funding. This, in turn, is intended to make it easier for industry to commercialise innovation and technology, support the development of Australia's national sovereign capabilities and drive regional economic diversification and development. An initial $5 billion will be made available to the Fund from commencement while the remaining $10 billion will be made available by 2 July 2029 in instalments.

In August 2023, the Government announced the appointment of Mr Martijn Wilder AM as Chair of the independent board of Fund, along with 7 other experienced board members. The Fund will aim to commercially deliver a positive rate of return as guided by the Board's investment decisions. That revenue will be available to the Fund for reinvestment. The responsible Ministers will be required to develop an 'Investment Mandate' with broad expectations to guide how the Board makes and manages investments. The Board will also have a duty to 'take all reasonable steps' to ensure that all investments made by the Fund are 'solely or mainly Australian-based'.[39]

Sovereign green bonds program

On 21 April 2023, the Federal Government confirmed they will introduce a Sovereign Green Bonds Program (**Program**).[40] The Program will be designed to enable investors to back projects within the public sector that have the objective of driving Australia's net zero transformation and the growth of the green finance market. The Program will seek to attract more green capital to Australia, by increasing transparency around climate outcomes and the scale of green investments available in Australia.

It is anticipated that the Program will be operational by mid-2024, following the development of a Green Bonds Framework.[41] The Program will be managed by the Australian Office of Financial Management. The Federal Treasurer, Jim Chalmers, had initially prefaced that the Program was contingent on the cost of debt being at a feasibly low level, as there is additional cost associated with using green bonds as a financing method. However, the Program has since been given the green light. The development of both the Program and the Green Bonds Framework demonstrates the Federal Government's commitment to supporting the integrity and growth of green capital markets.[42]

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Nature-related disclosure

/ NATURE-RELATED DISCLOSURE

Nature developments

Nature Repair Market Draft Bill

On 26 August 2022, the Federal Government committed to establishing a nature repair market (**Market**), which requires the development of a Biodiversity Certificates Scheme (**BCS**). The proposed Market is designed to help protect nature and biodiversity through encouraging investment into biodiversity solutions.[44] The BCS is intended to operate in a similar way to Australia's current carbon crediting legislation, and will aim to make it easier for businesses and individuals to invest in landscape management and restoration.[45] The proposal for a new Market in Australia could present an opportunity for businesses to undertake or invest in landscape management and restoration,[46] and deliver biodiversity outcomes, whilst also generating another revenue stream.

Following public consultation on Exposure Draft legislation (**Exposure Draft**), in March 2023, the Government took the next step toward establishing this new market by introducing into Parliament the Nature Repair Market Bill 2023 (**Bill**) and accompanying Nature Repair Market (Consequential Amendments) Bill 2023. If passed, the Bill will establish a framework for eligible landholders who undertake projects that enhance or protect biodiversity to receive tradeable biodiversity certificates, through a process similar to that established for the carbon market under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (**CFI Act**). In parallel, the Nature Repair Market (Consequential Amendments) Bill 2023 will amend the *Clean Energy Regulator Act 2011 and National Greenhouse and Energy Reporting Act 2007* to support the commencement of the Bill.

Among other things, the Bill (consistent with the Exposure Draft) contains provisions that:

- establish an independent Nature Repair Market Committee (Committee) to advise on scheme integrity;
- require methodology determinations to meet legislated 'biodiversity integrity standards' and be endorsed by the Committee;
- create a biodiversity assessment instrument to consistently measure improvements in biodiversity;
    - create a public register of projects and certificates issued; and
    - create an assurance and compliance framework.[47]

During consultations on the Exposure Draft, multiple companies and organisations made submissions, including the Australian Sustainable Finance Institute[48], the Environmental Defenders Office (**EDO**)[49], the National Environmental Law Association (**NELA**)[50], the Carbon Market Institute (**CMI**)[51], the Wentworth Group of Concerned Scientists[52] and Pollination[53]. Generally, those who made submissions were supportive of a new mechanism for funding conservations actions, however multiple issues with the design of the BCS were raised.

Key issues raised during consultations included:

- lack of clarity over the Bill's objectives, in particular in respect to how using biodiversity certificates as offsets would align with the object "to facilitate the enhancement or protection of biodiversity in native species in Australia";
- understanding the supply and demand dynamics for the proposed scheme, in particular for nature positive outcomes (as distinct from net outcomes);
- how the proposed upfront, one-time payment model for certificates for a 25-year period model would work in practice, in particular whether it would provide sufficient security or guarantee of biodiversity outcomes for investors, and whether a single certificate per property would enable the development of a liquid market for certificates;
- the potential overlaps with the existing carbon crediting framework administered by the Clean Energy Regulator, and the need to take into consideration the recommendations from the Chubb Review of scheme governance.

The Senate referred the provisions of both bills to the Environment and Communications Legislation Committee for inquiry and report by 1 November 2023.[54] The Government has indicated that further analysis of feedback from consultations is still underway, and will be considered whilst finalising the Bill, as well as during development of subordinate legislation and other mechanisms enabled by the market.[55]

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/ NATURE-RELATED DISCLOSURE

Connecting

In October 2024 Sydney will host the first ever Global Nature Positive Summit. It's a major milestone in what is shaping up as a big couple of years for biodiversity.

The eyes of the world will soon be on Australia. In 2024, Sydney will host the first Global Nature Positive Summit, which aims to grow private investment in nature protection[56].

The event, which brings together leading finance professionals and environmentalists, represents another major milestone for the global biodiversity agenda. Last September saw a landmark global agreement to protect biodiversity, the Global Biodiversity Framework (GBF)[57]. This September will see the launch of the Taskforce for Nature-related Financial Disclosures' (TNFD) final framework[58]. While the Australian Government has mooted new National Environmental Standards to guide planning and development nation-wide[59] and a world-first Nature Repair Market to attract investment to restore of natural ecosystems[60].

NATURE IS ALL THE RAGE. SO HOW SHOULD ORGANISATIONS RESPOND?

Strategy, naturally

First, organisations need to grapple with the meaning of 'nature'. That might seem a little redundant: nature, after all, has been part of the conservation and sustainability discourse for decades. Isn't the concept well understood?

In truth, organisations have tended to think of nature as a passive entity, separate from human activity and outside of 'core business'. This view of nature is incomplete, and has encouraged a reporting season 'tick-a-box' approach to how we engage with it.

A different approach to understanding is now evolving: one that frames nature as dynamic, intertwined with human activity, and a provider of essential resources and services to society. This is reflected in the TNFD, which identifies the varied biomes, assets and services that are reflected in nature.

This is intended to help decision-makers assess not only how their organisations interact with nature, but also how they interact with the benefits provided it – directly to the organisation itself, as well as general benefits for society.

Adopting and operationalising this new view of nature will, for most organisations, be a bit of a leap. But the TNFD has got you covered here, too. Its aptly named 'LEAP' framework takes organisations through an analysis of how they interact with nature to help them identify and assess their nature-related risks and opportunities.

BWD Strategic is currently working with a pioneering Australian company on a LEAP assessment – one of the first of its kind in Australia. The project has provided us and our client with direct insights into how a better understanding of nature-related risks and opportunities supports superior strategic decision-making. For instance, risk management can be improved by tracking how vital ecosystems might change over time, affecting an organisation's markets, access to resources, its reputation, and even the broader regulatory environment. Likewise, identifying nature-based risks can help organisations develop new products and services that solve problems for customers, creating new sources of revenue.

A LEAP assessment can also illustrate how much an organisation may depend for its longevity on natural assets and services they do not exclusively own or operate. This understanding, in turn, frames collaboration with other stakeholders to protect nature as a strategic investment in the organisation's own resilience.

Connecting with nature

BWD Strategic recently convened a roundtable of high-profile business and government leaders to discuss biodiversity trends. There was a shared sense of urgency to educate business and the general public on the value of biodiversity. There was also consensus on the need for smarter regulation: to ease the way for innovative solutions, to make protecting nature a priority in planning and land-use policy, and to create incentives and tools for business to properly evaluate nature.

A number of potential initiatives were discussed, but there was agreement that securing sustainable funding for successful nature-repair solutions – many of which are already underway but under-invested – was a necessary first step. There was also cautious optimism that nature-positive thinking could become embedded in financial decision-making processes – bringing nature into the 'core business' of strategy and risk management, and making biodiversity protection a mainstream concern.

There are huge opportunities. Nature-based solutions – the use of natural assets to tackle socio-environmental issues – may provide more than a third of the climate mitigation needed by 2030 to stabilise global warming below 2°C[61]. The provision of nature-positive solutions – such as sustainable fisheries management, and precision-technology farming – could also yield USD 10.1 trillion in business opportunities and create 395 million jobs by 2030, according to the World Economic Forum[62].

with nature

COME 2024, AUSTRALIAN BUSINESSES SHOULD PROVE THEMSELVES READY TO CAPTURE MANY OF THESE OPPORTUNITIES. BUT IT WILL BEGIN WITH 'TAKING THE LEAP' TO UNDERSTAND NATURE IN A NEW AND MORE HOLISTIC WAY.

/ WORDS BY

Josue Castro
Senior Strategy Manager, BWD Strategic

/ NATURE-RELATED DISCLOSURE

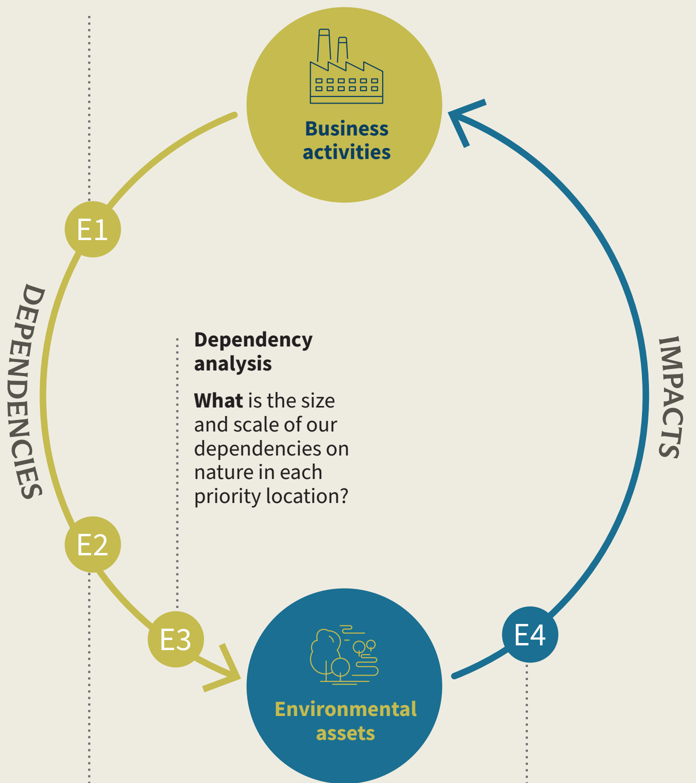
TNFD LEAP Framework

1. LOCATE

Interface with nature

2. EVALUATE

Dependencies and Impact

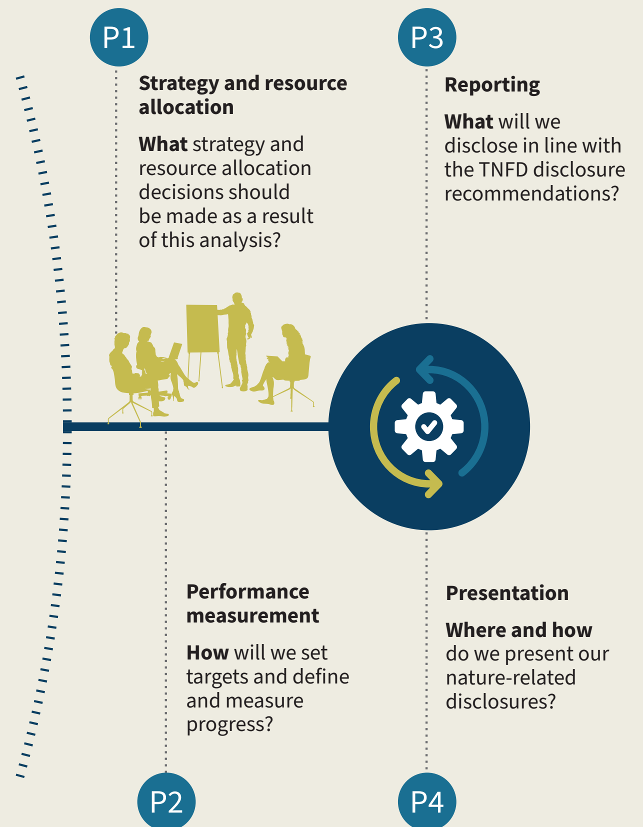


3. ASSESS

Risks and opportunities

4. PREPARE

To respond and report



/ NATURE-RELATED DISCLOSURE

The Australian native food industry is booming, but Indigenous people remain underrepresented

Demand for native Australian foods and ingredients (bush foods) has risen substantially over the past decade.

The bushfood industry was valued at $81.5 million in 2019-20, and has the potential to double by 202563. Ingredients such as Kakadu plum, lemon myrtle and pepperberry are increasingly used in cosmetic products, beverages and foods, while new cookbooks, restaurants and natural beauty brands market native ingredients to customers64.

While demand for bush foods is booming, research by the Bushfood Sensations, a native food collective, shows Indigenous representation in the native ingredients supply chain is less than one per cent. The industry is dominated by non-Indigenous producers, raising concerns among Indigenous people about the misappropriation and commercialisation of Indigenous knowledge systems without compensation[65]. Misappropriation can go so far as to include monopolisation over the use of a native resource through intellectual property rights such as patents. This is called biopiracy[66].

US company Mary Kay for example, attempted (unsuccessfully) to patent an extract from Australia's native Kakadu plum for use in a skincare cream in 2010, without consulting Indigenous custodians. In this case, exclusive ownership rights over the Kakadu plum extract would have:

- Misappropriated Indigenous knowledge associated with the Kakadu plum
- Failed to share economic benefits with Indigenous communities from commercialisation
- Potentially excluded Australian companies from exporting similar products overseas[67].

Recent analysis of the World Intellectual Property Organisation database shows a number of patent applications for Australian native ingredients, highlighting the continued potential for biopiracy[68].

Developing the Australian bushfood sector; a shared responsibility

To retain a strong social licence and reputation, companies already sourcing native Australian ingredients should consider the international and national frameworks that regulate the access and benefit sharing of such ingredients with Indigenous peoples.

To date, the only international framework that regulates the misappropriation of Indigenous knowledge attached to genetic and biological resources is the Nagoya Protocol. The Nagoya Protocol applies to genetic resources that are covered by the Convention of Biological Diversity, and to the benefits arising from their use.

<1%

INDIGENOUS REPRESENTATION IN THE NATIVE INGREDIENTS SUPPLY CHAIN

1.

Understand the Nagoya Protocol

Australia is a signatory to the Nagoya Protocol, and has made laws to regulate access to genetic and biological resources. While a nationally consistent approach is lacking[69], the Australian Government has developed a model contract to showcase how an ethical access and benefit sharing contract should be structured.

2.

Identify and support existing Indigenous-led sourcing programs

Look for Indigenous-led sourcing programs or enterprises that may already exist to source your ingredient. For example, the Northern Australia Aboriginal Kakadu Plum Alliance (NAAKPA) is a cooperative of Aboriginal enterprises that ethically harvests and processes Kakadu plum across Northern Australia.

3.

Work with indigenous peoples to maximise their participation in the supply chain

Make sure to consider community protocols when engaging with Indigenous communities. Community protocols are unique to each community and have been established within respective customary laws. These protocols may help guide access and benefit sharing contracts[70].

/ WORDS BY

Laura Trueb
Senior Strategy Associate, BWD Strategic

Greenwashing

ACCC investigating a number of businesses for potential 'greenwashing'

In March 2023, the ACCC released the 'Greenwashing by businesses in Australia – Findings of the ACCC's internet sweep of environmental claims' (Greenwashing Report).[71] An investigation conducted across 247 Australian companies across diverse industry sectors, found that 57% raised concerns with respect to greenwashing claims.[72] This has prompted the ACCC to launch several investigations, with any enforcement action to follow if deemed necessary.[73] This follows ASIC's decision to initiate proceedings against Mercer Superannuation, with ASIC alleging the superfund made misleading statements about the sustainable nature of some of its investment options.[74]

ACCC's guidance on environmental and sustainability claims

In July 2023, the ACCC released the 'Environmental and sustainability claims Draft guidance for business' (ACCC Draft Guidance).75 The ACCC Draft Guidance seeks to assist business in complying with their obligations under Australian Consumer Law, being Schedule 2 of Competition and *Consumer Act 2010* (Cth) (ACL), 76 specifically when making claims with respect to their sustainability practices. The eight key principles mentioned in the ACCC Draft Guidance include:

- make accurate and truthful claims;
- have evidence to back up your claims;
- do not leave out or hide important information;
- explain any conditions or qualifications on your claims;
- avoid broad and unqualified claims;
- visual elements should not give the wrong impression; and
- be direct and open about your sustainability transition.[77]

Whilst the ramifications for non-compliance from an ACCC preceptive are still to be determined, there is little doubt that greenwashing will form a large part of the ACCC enforceability agenda going forward.

ASIC's greenwashing interventions report

In May 2023, ASIC released its Greenwashing Interventions Report (Intervention Report).[78] The Intervention Report outlines increased surveillance activities, which is line with additional funds devoted to greenwashing regulation and enforcement provided by the 2023 federal budget. The Intervention Report also detailed the 35 greenwashing actions initiated in the period between 1 July 2022 and 31 March 2023, with 23 corrective disclosure outcomes, 11 infringement notices and 1 court action making up the balance.

An example corrective disclosure outcome was when ASIC ordered a managed fund to amend it Product Disclosure Statement (PDS) due to the presence of vague and unexplained language.[79] The PDS described the fund's investment approach with phrases such as 'social diversity', 'robust sustainability practices' and 'protection of the planet', without providing sufficient qualifications to justify these labels.

/ WORDS BY

Jeremy Jose
Partner, Competition,
Gilbert+Tobin

Due diligence and human rights

/ DUE DILIGENCE AND HUMAN RIGHTS

Gilbert + Tobin's ESG, Sport and Human Rights Forum

Gilbert + Tobin celebrated the FIFA Women's World Cup by hosting a forum on ESG, sport and human rights in Sydney, hosted by former Matildas vice-captain and G+T partner Moya Dodd. We called it "Passion. Purpose. Profit." As the business world has focussed on sustainability, social impact and responsible governance like never before, the forum presented a series of lively discussions about how sport has become a microcosm of our responses to the challenges of ESG and human rights.

With numerous sporty lawyer types – and sporty non-lawyer types - in town for the World Cup, we were able to muster a stellar lineup of speakers. With plenty of non-sporty lawyer types in the mix too, it made for a great day of knowledge-sharing and collaboration.

Held in conjunction with the Business and Human Rights Lawyers Association (BHRLA) – of which G+T is a member - the forum featured global BHRLA Co-Chair **Rae Lindsay** who explained its goal of helping commercial lawyers to better serve their clients by recognising the responsibility to respect human rights, as articulated in the UN Guiding Principles (**UNGPs**) on Business and Human Rights.

The UNGPs were established in 2011, and have been widely recognised as representing the standard by which businesses should respect human rights. While not legally binding, they adopt the familiar construct of a due diligence approach to identify the impacts of a business upon people, whether directly or now, and to address them.

In Europe, the due diligence approach of the UNGPs – already observed by many businesses under "soft law" standards – has evolved into proposed new mandatory requirements which are presently under consideration. This would require companies to establish due diligence processes and report upon their impacts. Many businesses see this as a positive way to level the playing field and ensure that all players abide by the same minimum thresholds. Should this be passed into European law, it will also affect non-EU headquartered companies that conduct business in the EU (over certain thresholds), including an estimated 600 Australian companies. The effect will be felt worldwide, as global businesses will be required to become more ESG conscious.

G+T Partner **Ilona Millar** expanded on the growth of ESG considerations in Australia, where the Modern Slavery Act requires companies to report on themselves, but stops short of requiring them to act in response to the matters reported. While this transparency measures are beneficial – "if you want to improve something, measure it" - the recent review of the Modern Slavery Act has recommended that a positive obligation be added to have a due diligence system in place, and to explain the activities associated with that system in their modern slavery reports. Civil penalties would apply for breach.

Australia is therefore on a similar path to Europe, but less progressed and watching closely – especially as some Australian companies with European operations could be directly affected by any changes to European law.

Ilona also discussed the trend away from shareholder primacy to stakeholder capitalism, where companies value their relationships with stakeholders more broadly, and not just investors. This is reflected in the matters they report publicly on, and in the way they engage around their social licence to operate including discrimination and harassment and cultural heritage issues. Some well-known incidents have led to major public reactions and severe pressure on companies to change their conduct; and in some cases it is driving law reform as legislatures respond to community sentiment.

Anti-Bribery & Corruption Developments

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (Cth)

The *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023* (**Bill**)[80] was introduced in attempt to strengthen laws on foreign bribery. If passed, the Bill will amend the offence of bribery of a foreign public official under section 70.2 of the *Criminal Code Act 1995* (Cth) and introduce a new offence of failure of a body corporate to prevent foreign bribery by an associate under proposed section 70.5A.[81] The proposed alterations would be enforced on an absolute liability basis, and as such there would be no requirement to demonstrate fault and no defence of honest and reasonable mistake.

/ DUE DILIGENCE AND HUMAN RIGHTS (CONTINUED)

Football Australia's General Counsel **Mel Mallam** joined the discussion and elaborated on how organisational values reflect community standards and shape decision-making beyond legal requirements to encompass the "pub test" of stakeholder sentiment. Examples included FIFA's proposed Visit Saudi sponsorship, the Socceroos' public statements prior to the Qatar 2022 World Cup, the Matildas' equal pay CBA, and the 40/40/20 rule in Football Australia's statutes (requiring a minimum of 40% women on its board). Football Australia has also set a target of 50/50 gender participation as a legacy of hosting the World Cup, which requires safe and appropriate spaces and infrastructure for women and girls to be included, and is looking to develop an ESG plan with a more formalised approach and public accountability.

We were also thrilled to host former USA goalkeeper **Mary Harvey** (a World Cup winner and Olympic gold medallist, now the CEO of the Centre for Sport and Human Rights) with **Rachel Davis** (Co-Founder, Shift, former independent chair of FIFA's Human Rights Advisory Board, and adviser to the IOC) and G+T partner **Darren Fittler**, (disability advocate and Tough Mudder participant) for a deep dive into how social obligations can be embedded into organisations, and what businesses can learn from human rights in sport.

When FIFA reformed its statutes in 2016 - in the wake of the FIFAGate corruption crisis – it included a ground-breaking amendment in Article 3:

> *FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.*

It was an extraordinary pledge in the sporting world. To give it shape and meaning, FIFA appointed a Human Rights Advisory Board, led by Rachel Davis, which spent four years collaborating both inside and outside FIFA, promoting deep engagement on human rights issues, and independently assessing and reporting on FIFA's human rights opportunities and obligations (before it was abolished and replaced by an internal committee). During its tenure, FIFA issued a Human Rights Policy containing firm commitments based on the UNGPs.

Rachel elaborated on the approach that was applied under the UNGPs:

> *You look for the most significant risks that you may have to people, and then you work out what you can reasonably do about it. It doesn't mean that you become legally liable for those risks throughout your value chain or throughout your relationships… but it does mean you need to make reasonable, credible efforts that are appropriate or proportionate to the severity of those risks to people.*

One example of the Human Rights Advisory Board's impact was the case of Hakeem Al-Araibi during his detention in Thailand, where it set out seven steps for FIFA to take in order to apply leverage. They included letter-writing and sending a FIFA representative to attend his hearing in Thailand. While the seven recommendations were not made public at the time, FIFA did follow through on the basis of advice that was given quietly and provided FIFA with the chance to act.

The Centre for Sport and Human Rights was also active in Hakeem's case. CEO Mary Harvey explained the Centre's approach to working with the whole sports eco system to build progress on human rights in sport, acting as a safe space for difficult conversations rather than a "name and shame" body. For example, while FIFA received advice from its own Advisory Board as to how to use its leverage, the Centre looked to identify other leverage points such as state actors and the IOC – and at Hakeem's court hearing, representatives of 12 governments attended to observe, sending a powerful message to those with the power to release him.

That said, it was acknowledged that there are still major challenges in holding people and entities to account in the unique environment of a member-driven sports governing body. FIFA has vast leverage at its disposal, and we need to see more progress in using those levers.

G+T partner Darren Fittler then shared his experience as a blind athlete. He had qualified for the Paralympics in 1996, but couldn't afford to attend. Darren expanded on his experience doing the Tough Mudder: some elements such as evenly spaced monkey bars were straightforward, while others like hanging gymnastic rings were very hard to find. It meant he had to be stronger and better than other participants just to be able to participate on an equal footing.

> *You know, this world is not built for blind people. So every single day I have to find another way to do what I do.*

This requires innovative thinking and challenging norms every day. Darren spoke to the importance of including people with diverse perspectives at the highest levels of governance, then cascading through organisations to influence how they regard, recruit and nurture their workforce.

The forum also heard directly from other athletes and sports organisations.

Fatima Yousifi, goalkeeper for Afghanistan's women's football team, had a fascinating 1:1 conversation with **Alison Battisson** (Director Principal, Human Rights For All) who was instrumental in the Kabul uplift of numerous athletes. Fatima shared her extraordinary experiences as a refugee escaping the Taliban, her time since arriving in Australia (including playing in a Melbourne Victory-supported team), and her wish for the national team to be able to continue to compete and represent Afghanistan.

Julie Uhrman, President and Co-Founder of Angel City FC (a club in only its second season in the US professional league) shared her story of how purpose is embedded into the club's existence. It not only seeks to win medals, but to make a positive social impact in their community of Los Angeles. Incredibly, Angel City is now the highest-revenue women's football team in the world, albeit just a few years old. Julie explained the coming together of mission and capital to create a USD100M+ valuation in what is effectively a new asset class of women's sports teams. (Not to mention its ownership list which includes co-founder Natalie Portman, Alexis Ohanian, and numerous former US women's national team players.)

All of Angel City's sponsorship agreements have a mandatory 10% contribution to a social impact project. Doordash, for example, is a sponsor whose 10% goes to delivering meals to the hungry on the streets of LA. Close to a million meals have been delivered to date as a result. Sponsors are finding that purpose goes hand in hand with their commercial objectives.

Julie's view is that Angel City is itself more than a football club; it's a brand that drives conversations about women's sports and equity for women, which is entirely consistent with business success.

> *Leading with purpose is actually good business, right? I'm here to say that because we lead with purpose, we actually generate more revenue, we attract a larger fan base, they're more engaged, we actually have more forgiveness when we make mistakes, and we have a little bit more of a leeway to build what it is we want to build, because there's something bigger than the sport when you think about Angel City.*

Gaby Garton, former international goalkeeper and now Player Relations Co-ordinator with the World Players Association, joined a discussion about human rights remedies, elaborating on a case taken to FIFA involving instances of sexual abuse, homophobia and harassment of players by a national team coach. While dismissing the complaint, FIFA also revealed the (previously confidential) identities of the players who brought complaints.

The grievance mechanisms available to players are not trauma-informed and give no procedural rights to victims. There is a need for an independent safe sport entity which can both support survivors as well as focus on investigations and ensure sanctions are carried out. Importantly, the mindset of first looking to doubt a victim's story, rather than protecting them from the risks inherent in reporting such matters, needs to change.

In all, the forum was an occasion for rich discussions, progressive thought leadership, and real-life global connection which we hope will bear fruit as ESG becomes more important in all our lives.

/ WORDS BY

Moya Dodd
Partner, Gilbert+Tobin

/ DUE DILIGENCE AND HUMAN RIGHTS

Modern Slavery Act 2018 (Cth) Review

When the *Modern Slavery Act 2018* (Cth) (Act)[85] was passed it established a national modern slavery reporting requirement which requires entities carrying on business in Australia with annual consolidated revenue of at least AU$100 million (Reporting Entities) to report on how they are addressing and preventing modern slavery risks in their operations and supply chains.

Reporting Entities comply with the Act by preparing annual modern slavery statements, which are published by the Federal Government on the Modern Slavery Statements Register for transparency.86

A statutory review of the Act is to be conducted three years after its commencement. This statutory review was conducted, and the report on the review (**Review Report**[87]) was published on 25 May 2023. The Review Report reveals a broad spectrum of opinions on the effectiveness and utility of the overall regime, with 64% of respondents viewing it positively, while 21% felt its impact was poor. Over 130 written submissions were made in response to the Review's Terms of Reference and associated Issues Paper.

The Review Report made a number of recommendations, which are summarised below.

i. Reporting Thresholds

Recommendation 4 of the Review Report proposes lowering the threshold for when companies must report under the Act, from $100m in consolidated revenue to $50m. This proposal drew mixed reactions, with 29% of submissions supporting the reduction, 24% against it, and 14% neutral.

Modelling indicated that an additional 2,393 entities would fall under the new threshold. Despite arguments against lowering the threshold, and alternative options, such as a staged reduction approach (to $75m at first, then $50m) or differential reporting for entities of different sizes, the review recommended the reduction to $50m for the sake of simplicity. To support small to medium sized enterprises the Review also recommended that the Guidance for Reporting Entities be amended to provide more tailored guidance to facilitate compliance.

In defending the recommendation, the Review Report noted that not only was a $50m threshold originally mooted from the outset by the Joint Standing Committee that preceded the original Act, but that entities newly captured by the new threshold would have until "late 2024/early 2025 at the earliest" to report "under a well-known law that will by then have been operating for over five years".[88] A $50m threshold was originally the reporting threshold under the NSW's Modern Slavery Act (although this was later superseded by the Commonwealth Act) and is aligned more closely with the thresholds in the UK, New Zealand and Canada.

ii. Changes to Reporting and a New Anti-Slavery Commissioner

Recommendation 8 of the Review Report proposes amending the mandatory reporting criteria under the Act, including the introduction of additional minimum criteria. Revisions to existing criteria include:

(a) replacing the phrase 'operations and supply chains' with 'operations and supply networks';

(b) reverse the order of reporting under criteria 3 and 4 of the Guidance for Reporting Entities, as follows: (1) describe how the entity identifies and assesses risks, (2) report on the risks identified, and their assessed level (high/medium/low), and (3) describe how it is addressing those risks;

(c) separating out the process of reporting on assessment of risks, how they were addressed, the due diligence processes and the remediation processes more clearly – which is also addressed through the proposed imposition of obligations on entities to establish a due diligence system;

(d) adapting the existing guidance for specific sectors; and

(e) describing the governance processes adopted by the reporting entity (to better explain any group-wide diligence framework and internal consultation / engagement).

The newly suggested criteria include:

(a) reporting on modern slavery incidents or risks identified during the reporting year;

(b) grievance and complaints mechanisms made available to staff members; and

(c) internal and external consultation undertaken by the entity during the reporting year relating to modern slavery risk management.

The Review Report also recommended that the mandatory reporting criteria be prescribed in a rule or regulation made pursuant to the Act, rather than being hard-coded in the Act itself. This will provide the government with additional flexibility to amend the mandatory reporting criteria from time to time.

The Review Report also discussed the future of regulatory guidance aimed at assisting compliance with the reporting criteria, noting that the existing iteration of the Guidance for Reporting Entities was acknowledged as being highly regarded and heavily relied upon by reporting entities. First and foremost, the Review Report recommends creating a legislative anchor for regulatory guidance in the Act, formalising its status and expressly encouraging reporting entities to have regard to them when preparing statements.

The review also suggests that the Anti-Slavery Commissioner (a new office committed to by the Australian Government in the October 2022 Budget) should be consulted routinely and methodically about the adequacy of official guidance.

The Anti-Slavery Commissioner would also be able to make written declarations that a region, location, industry, product, supplier or supply chain has a high risk of modern slavery. Reporting entities would be required to have regard to these written declarations when preparing their modern slavery statements.

iii. Ensuring Modern Slavery Risks are Confronted: Due Diligence Implementation

The Review Report states that an "elementary weakness" in the Act is that it only imposes an obligation on entities to describe their due diligence activities, but not a duty to

implement and act upon the results of such due diligence.[89] Under the current law, a reporting entity that had poor or ineffective modern slavery due diligence practices would nevertheless be meeting its obligations under the Act so long as it described these practices in its modern slavery statement.

Recommendation 11 of the Review Report recommends 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 were adopted, it would represent a significant shift in the way that the Act seeks to ensure that modern slavery risks are appropriately addressed by the private sector. The threat of an adverse public reaction will no longer be the primary risk for companies that have poor modern slavery practices. Rather, the failure to have a proper due diligence system in place will, in and of itself, comprise an offence under the Act. Companies will need to turn their minds as to whether their modern slavery due diligence practices are sufficient and effective and, if necessary, uplift these practices.

iv. Penalties for Non-Compliance with the Act

Currently, the Act provides little in way of penalties or enforcement mechanisms to address non-compliance. Under section 16A, the Minister is able to publish the identity of a reporting entity who failed to comply with the Act and failed to comply with remedial notices in relation to that non-compliance. However, this power has never been exercised.

The Review Report argues that it is 'incongruous that the Modern Slavery Act imposes a reporting duty as regards a matter of fundamental global human rights importance but contains no robust procedure to ensure that duty is performed', further commenting that compliance and enforcement records to date show that "Australia has not borne out the promise that good faith and the fear of adverse publicity are enough to ensure that statements will be submitted by all entities that are required to do so".[90]

To remedy this, the Review Report proposes that penalties be introduced for clear reporting failures that breach objective standards. Recommendation 20 suggests the Act be amended to include the following offences:

(a) Failure to submit a statement, without a reasonable excuse.

(b) Submission of a statement with materially false information.

(c) Failure to comply with a statutory direction to take specified remedial action to ensure compliance with the reporting requirements of the Act.

(d) Failure to have a due diligence system in place.

However, it is proposed that these penalty provisions would not apply to entities within the $50-$100M reporting band until two years after they become subject to the reporting requirements in the Act.

The Review Report also considered the practicality of having a name-and-shame list instead of, or alongside, penalties. It was decided that this was impracticable because it would require accessing taxation records on corporate revenue, then checking if an entity was covered by a joint statement or had been through corporate restructure or had fallen below the reporting threshold.

Other enforcement proposals that were considered but not included in recommendations were: *Corporations Act* disqualifications; exclusion from the ASX; and introducing an enforceable undertaking procedure to comply with reporting requirements.

While it is uncertain which of the Review Report's recommendations will be adopted by the Australian Government (noting that many of these recommendations require legislative change), it appears likely that more entities will be covered by the Act, the obligations imposed by the Act will increase, and that there will be greater enforcement of the Act, with penalties for non-compliance.

/ WORDS BY

Ashleigh McCoach
Associate, Climate + Sustainability, Gilbert+Tobin

Updated OECD guidelines for multinational enterprises on responsible business conduct

The OCED Guidelines for Multinational Enterprises on Responsible Business Conduct (Guidelines) are recommendations addressed by governments to multinational enterprises.

The guidelines aim to encourage positive contributions by enterprises to economic, environmental, and social progress.82 The Guidelines cover all key areas of business responsibility, including human rights and labour rights.

On 8 June 2023, the updated OECD guidelines were released, responding to urgent social, environmental, and technological priorities facing businesses. The guidelines include key updates and important recommendations on the disclosure of responsible business conduct information across key areas such as climate change, biodiversity, business integrity and supply chain due diligence.[83] In relation to supply chain due diligence, the Guidelines provide that the nature and extent of due diligence will be affected by factors such as the context of an enterprise's operations and should be proportionate to the size of the enterprise, its involvement with an adverse impact and the severity of adverse impacts. It is provided that the measures that an enterprise takes to conduct due diligence should be risk-based and proportionate to the likelihood of the adverse impact occurring. It is acknowledged that it may not be feasible to address all identified impacts at once, in which case an enterprise should prioritise the order in which it takes action based on the severity and likelihood of the adverse impact.

The Guidelines also recognise that it may not be feasible for most enterprises to assess or to engage with all the individual entities with which they have a business relationship, including those in their supply chain. Where enterprises have large numbers of suppliers and other business relationships, they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise these areas for due diligence.[84]

Observance of the Guidelines by enterprises is voluntary and not legally enforceable. However, some matters covered by the Guidelines may also be regulated by national law or international commitments. Therefore, Australian companies may still be required to follow parts of the Guidelines.

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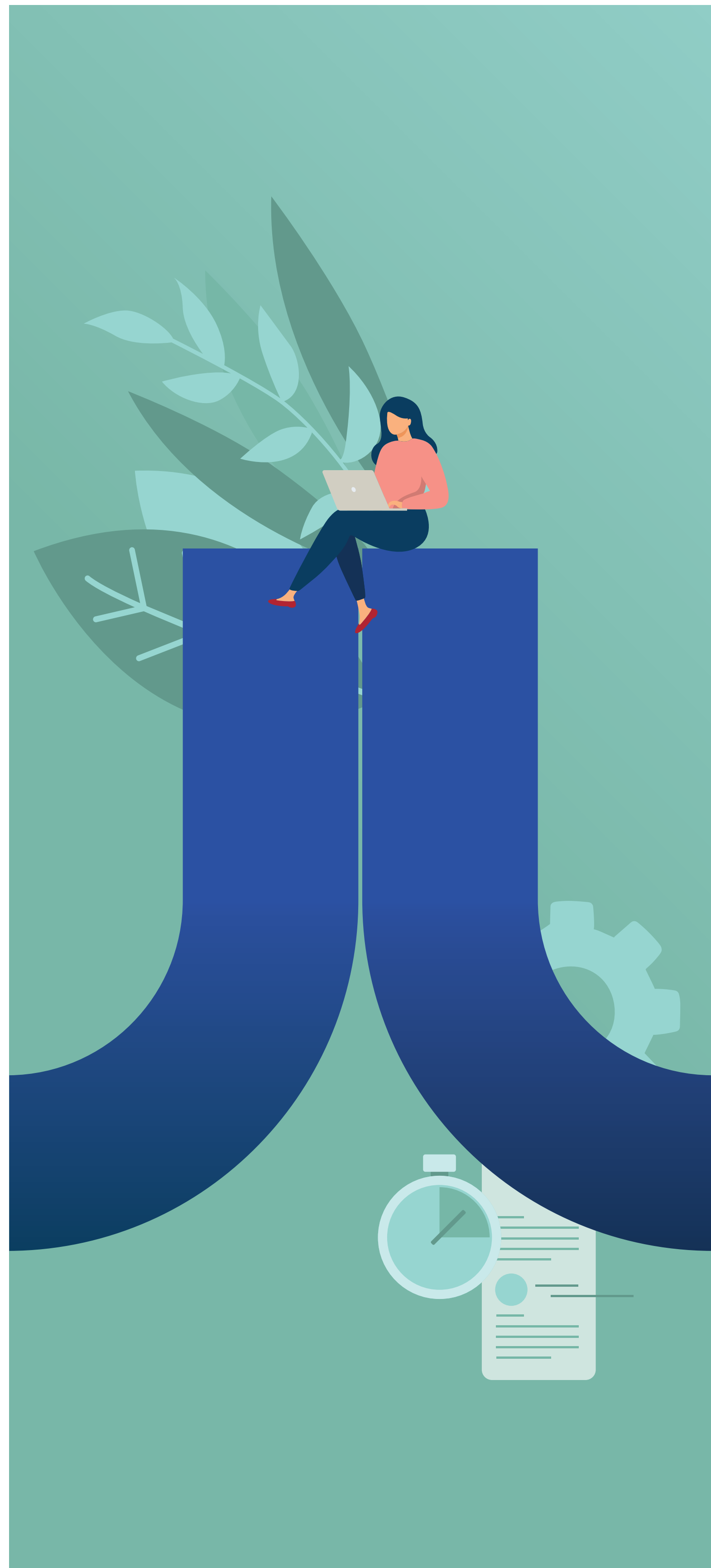

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