



## ESG Comparative Guide

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## ESG Comparative Guide

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## 1. Legal and enforcement framework

### 1. 1. What regulatory regimes and codes of practice primarily govern environmental, social and governance (ESG) regulation and implementation in your jurisdiction?

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Australia has a fragmented collection of laws across federal and state jurisdictions that relate to ESG issues, but it does not have an agreed 'ESG framework'. Examples of regulatory regimes and codes of practice that govern specific ESG issues are described below.

**Environment:** Federal, state and territory governments have made commitments to achieve net zero emissions by 2050 or earlier, with two states legislating interim emissions reductions targets and most states and territories including renewable energy targets in climate policies or legislative regimes. The federal government has recently introduced a bill to legislate an interim emissions reduction target of at least 43% by 2030 and achieve net zero by 2050. These net zero and interim commitments are complemented by the following environmental laws and regulations:

- National Greenhouse and Energy Reporting Act 2007 (Cth): This establishes a national reporting framework for greenhouse gas (GHG) emissions and energy consumption, and imposes mandatory obligations on certain entities to report GHG emissions and energy usage.
- Emissions Reduction Fund (ERF): This scheme seeks to incentivise carbon abatement technologies in exchange for carbon credits that can be retired or traded. The ERF includes a safeguard mechanism that provides a framework for entities emitting GHGs above a certain threshold to manage their emissions. Where an entity's emissions exceed the baseline set by the Clean Energy Regulator, the safeguard mechanism requires the entity to reduce its net emissions – for example, by offsetting its emissions through the purchase and surrender of carbon credits. The federal government is currently seeking feedback on a consultation paper which considers reforms to the safeguard mechanism. The federal government has also launched an independent review of the integrity of carbon credits.
- Environmental approvals and licensing: The federal government and each state and territory regulate environmental approvals and licensing. State and territory regulatory requirements include obtaining approvals and licences for activities that are likely to impact the environment. Biodiversity offsetting, water management and vegetation protection are also requirements of planning approvals systems in most jurisdictions. Federal laws govern environmental approvals for activities that have, or are likely to have, adverse environmental impacts on matters of national environmental significance. The federal government has indicated its intention to carry out federal environmental law reform, including possibly creating a new Federal Environmental Protection Agency.
- Pollution, contamination and waste: Each state and territory regulates pollution, contamination and waste. Licences are often required for polluting activities. For example, the *Environment Protection Act 2017* (Vic):
  - imposes a general environmental duty on the Victorian government, business and individuals to minimise risks of harm to human health and the environment arising from pollution and waste;
  - requires 'permissions' to be obtained for certain activities; and
  - imposes financial and criminal penalties on companies and individuals for breaches of their obligations.
- Climate Change Bill 2022 (Cth): The Climate Change Bill 2022 (Cth) and the Climate Change

(Consequential Amendments) Bill 2022 (Cth) were tabled in late July 2022. If they are passed in the Senate, Australia's emissions reduction interim and 2050 targets will be legislated. The legislation also requires the preparation of an annual climate change report by the minister and expands the Climate Change Authority's role as an independent adviser – for example, to advise on the annual climate change report.

## **Social:**

- **Human rights:** Human rights legislation has been adopted in Victoria, Queensland and the Australian Capital Territory, and promotes shared responsibility between the executive, the judiciary and the parliament for the consideration of human rights in government decision making. As of February 2022, the Australian Capital Territory is considering introducing the right to a healthy environment into its Human Rights Act 2004. Australia is the only member of the Organisation for Economic Co-operation and Development (OECD) not to have a federal bill of rights.
- **Workers' rights:** These are codified in Commonwealth and state-based legislation. The Fair Work Act 2009 (Cth) is the primary legislation that governs the employee/employer relationship in Australia. The Fair Work Act provides for the National Employment Standards (NES), which are 11 minimum employment entitlements that must be provided to all national system employees. The Fair Work Act also establishes:
  - a system of industry-based awards which sets minimum standards of employment (in addition to the NES); and
  - a system for union representation and collective bargaining through which enterprise agreements are negotiated.

All enterprise agreements must comply with the NES. Most, but not all employees are national system employees. For employees who are not national system employees, their entitlements are otherwise regulated by the industrial relations system in their state or territory.

- **Work health and safety (WHS):** WHS laws are codified in Commonwealth and state-based legislation, and oblige businesses to eliminate risks to health and safety so far as reasonably practicable, including health and safety risks associated with sexual harassment and workplace bullying.
- **Discrimination and equal opportunity laws:** These operate in federal, state and territory jurisdictions. They provide for equal employment opportunity and prohibit workplace discrimination and harassment on the basis of protected attributes.
- **Native title claims:** Australian common law recognises the rights and interests to land held by First Nations peoples under traditional laws and customs. The Native Title Act 1993 (Cth) provides a framework for determining native title claims. States and territories have corresponding legislative regimes.
- **Cultural heritage laws:** These operate in federal, state and territory jurisdictions to protect indigenous cultural heritage. The Environment Protection and Biodiversity and Conservation Act 1999 (Cth) establishes a regime for the protection of natural, Indigenous and historic places deemed to have significant heritage value, and imposes penalties for actions that significantly impact on places recognised as having significant heritage value. The principle of free, prior and informed consent is embedded in guidance on how and when indigenous engagement and consultation should occur under the Environment Protection and Biodiversity and Conservation Act.
- **Modern slavery reporting:** This is mandatory for Australian entities or foreign entities operating in Australia with an annual consolidated revenue in excess of A\$100 million, and to some state and territory government entities, pursuant to the Modern Slavery Act 2018 (Cth). Reporting entities must

disclose annually the risks of modern slavery in their supply chains and actions taken to address those risks. There are no financial penalties for non-compliance. The state-based Modern Slavery Act 2018 (NSW) requires state-owned corporations that are not required to report under the Commonwealth Modern Slavery Act to volunteer to report.

#### **Governance:**

- Corporate reporting: ESG disclosures are not expressly required by law. However, certain disclosure obligations which apply to listed entities under the Corporations Act 2001 (Cth) may require disclosure of ESG issues. See question 3.1 for a description of these disclosure obligations.
- Australian Securities Exchange (ASX): The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations recommend that ASX-listed entities disclose metrics including:
  - gender diversity among the entity's board, senior executives and workforce; and
  - the entity's 'material exposure' to environmental or social risks (see question 3.1).

Listed entities are required to annually report against the recommendations on a 'comply or explain' basis.

- Anti-bribery and corruption laws: These operate in all Australian jurisdictions. Failure to ensure that an entity has sufficient safeguards in place to prevent bribery and corruption may also constitute a breach of directors' and officers' duties under the Corporations Act.
- Directors' duties: Directors' duties under the Corporations Act will likely extend to a duty to ensure that the corporation assesses and makes appropriate disclosure about material ESG-related risks.
- Whistleblowing laws: Provisions in the Corporations Act afford persons who identify and report misconduct and breaches of the law a right to confidentiality and protection from retaliatory conduct.
- Whole-of-government social procurement frameworks: These are designed to promote the strategic use of procurement to drive social, economic and environmental outcomes, and apply to the procurement of all goods, services and construction by government officials – for example, [Victoria's Social Procurement Framework](#) (Department of Economic Development, Jobs, Transport and Resources) and the [Western Australian Social Procurement Framework](#).

1. 2. Is the ESG framework in your jurisdiction primarily based on hard (mandatory) law and regulation or soft (eg, 'comply or explain') codes of governance?

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Australia does not have an 'ESG framework'. Examples of hard and soft laws directed to, or which influence ESG issues, are set out in question 1.1.

1. 3. Which bodies are responsible for implementing and enforcing the rules and codes that make up the ESG framework? What powers do they have?

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A number of regulatory bodies are responsible for overseeing and enforcing compliance with the laws and codes that relate to ESG issues.



## Environment:

- **Clean Energy Regulator:** This is a federal economic regulator that monitors and administers the ERF (and safeguard mechanism) and Commonwealth renewable energy legislation. It also has a role in managing the National Greenhouse and Energy Reporting Act's reporting requirements and enforces compliance with that law.
- **Environment protection agencies:** Agencies in each state and territory develop environmental policy, issue approvals/licences and generally manage matters relating to pollution, contamination and waste. Each environment protection agency in the states and territories is typically responsible for monitoring compliance with and enforcing environmental legislation, licences and approvals. For biodiversity-related matters, including illegal clearing, both the federal, state and territory environmental government departments enforce compliance. The federal government is considering establishing a Federal Environment Protection Agency (within the scope of the available constitutional powers) as part of its wider federal environmental law reform agenda.
- **Biodiversity destruction and water management:** Federal, state and territory environmental government departments have a monitoring, compliance and enforcement role in relation to illegal clearing, habitat destruction and water management.

## Social

- **Australian Border Force (ABF):** The ABF administers the Australian government's Online Register for Modern Slavery Statements. It reviews modern slavery statements submitted in accordance with the Commonwealth Modern Slavery Act and has published guidance identifying key areas of non-compliance. The minister administering the act is empowered to require reporting entities to explain or take remedial actions to address non-compliance with the mandatory reporting requirements set out in the act. The minister can also publicly identify the reporting entities as noncompliant.
- **Fair Work Ombudsman:** This is an independent statutory agency that responds to allegations of non-compliance with the Fair Work Act in accordance with its priority areas, including vulnerable workers. It has both compliance and enforcement powers.
- **State-based wage inspectorates:** Various states have inspectorate bodies in place to respond to allegations of non-compliance with state-based industrial laws such as long service leave legislation. These bodies typically have compliance and enforcement powers.
- **Safe Work Australia:** This is a federal government statutory agency responsible for developing and improving WHS laws across Australia. The regulation and enforcement of WHS laws are the responsibility of individual state and territory-based regulators.
- **Australian Human Rights Commission:** The commission is responsible for investigating and conciliating discrimination and human rights complaints. It does not have enforcement powers or the power to compel an entity to participate in conciliation. Each state and territory has equal opportunity and anti-discrimination agencies with statutory responsibilities under the discrimination and equal opportunity laws in that jurisdiction.
- **New South Wales anti-slavery commissioner:** Created under the Modern Slavery Act 2018 (NSW), the commissioner has the power to:
  - issue codes of practice for the identification of modern slavery in supply chains;
  - maintain a register identifying NSW government agencies which do not comply with the codes of practice; and
  - monitor NSW government agencies' procurement processes.

- **Australian OECD National Contact Point:** This body conciliates complaints of alleged non-observance of the OECD Guidelines for Multinational Enterprises by multinational enterprises legally registered in Australia or any Australian multinational enterprise operating in another country (irrespective of OECD member status).
- **Law enforcement:** The Australian Federal Police investigate offences under the Commonwealth Criminal Code, including modern slavery and foreign bribery. Criminal matters are referred to the Commonwealth director of public prosecutions. Each state and territory also has its own law enforcement agencies responsible for investigating and prosecuting the criminal law in that jurisdiction.

**Governance:** Following the 2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Australian regulators have become more prescriptive in their expectations of board and senior management's oversight and responsibility for instilling a corporate culture which appropriately manages non-financial risks, including ESG issues – particularly in relation to climate change risks. So far, there has been no regulatory scrutiny of social risk disclosures by financial market regulators.

- **Australian Prudential Regulatory Authority (APRA):** APRA is Australia's prudential regulator and performs a supervisory role across the banking, insurance and superannuation sectors for the purpose of protecting financial stability in Australia. In late 2021, APRA released prudential guidance designed to help APRA-regulated entities to manage the financial risks of climate change (CPG 229); and in 2022, APRA announced, and is expected to publish, the findings of a self-assessment survey of APRA-regulated entities, considering how entities identify, assess and manage of climate-related risks. APRA has extensive enforcement powers, including the power to:
  - direct entities to take or cease certain actions;
  - impose licence conditions; or
  - commence enforcement proceedings.

In 2021, APRA released updated prudential standards and a prudential practice guide for remuneration, which introduces a requirements for boards of APRA-regulated entities to:

- play a more active role in determining remuneration outcomes across the organisation and for key individuals; and
- ensure that non-financial measures (including environmental, social and governance outcomes) are given appropriate weight when determining performance-related variable remuneration.
- **Australian Securities and Investment Commission (ASIC):** ASIC monitors, enforces and administers compliance with the broad range of corporate governance provisions in the Corporations Act. It has the power to:
  - compel production of documents and information;
  - conduct surveillance in relation to corporate reporting and governance practices;
  - investigate and prosecute offenders; and
  - seek civil penalties.

ASIC has identified climate change governance as a strategic priority in its 2021-2025 corporate plan. It has set an expectation that the management of climate change risks is a key responsibility of directors; and it is conducting surveillance to identify greenwashing practices in the marketing of financial products. It has also released a greenwashing information sheet to guide fund managers and investors with respect to sustainability claims relating to financial products

- **Australian Competition and Consumer Commission (ACCC):** The ACCC is responsible for promoting competition and fair trade in markets for the benefit of consumers, businesses and the community. It has both compliance and enforcement powers. Its 2022/2023 enforcement priorities identify ESG

claims and greenwashing as a strategic focus

- Australian Transaction Reports and Analysis Centre (AUSTRAC): AUSTRAC is responsible for the prevention and detection of financial crime and has extensive surveillance, compliance and enforcement powers, including the power to:
  - seek civil penalty orders;
  - issue enforceable undertakings and infringement notices; and
  - take remedial action.

AUSTRAC has used its enforcement powers to impose significant civil penalties and seek enforceable undertakings from large Australian financial institutions for failure to comply with their obligations under Australia's anti-money laundering laws to report suspicious transactions and to have appropriate compliance systems in place to detect suspicious transactions.

#### 1. 4. What is the regulators' general approach to ESG and the enforcement of the ESG framework in your jurisdiction?

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Due to Australia's fragmented collection of laws relating to ESG issues and the different mandates of each regulator, Australian regulatory approaches to ESG issues tend to depend on the priorities of each regulatory agency and the enforcement mechanisms available to them under the respective legislation. Those regulators and their approach to enforcement of ESG issues are identified in question 1.3.

#### 1. 5. What private sector initiatives have been launched in your jurisdiction to complement the ESG framework?

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There are many private sector initiatives in Australia. Some aim to address the broad spectrum of ESG issues, while others target specific issues. Examples are provided below.

##### **Finance and investment sector:**

- The Australian Sustainable Finance Initiative (ASFI) was launched in 2020 with the goal of aligning Australia's financial system with the Paris Agreement commitments on climate change, the United Nations Sustainable Development Goals and obligations under international conventions on human rights. Its membership includes major banks, superannuation funds, insurers and peak bodies. The ASFI Roadmap has 37 recommendations for change across four key areas:
  - embedding sustainability into leadership;
  - integrating sustainability into practice;
  - enabling resilience for all Australians; and
  - building sustainable financial markets.
- The Responsible Investment Association of Australasia has 450 members that manage A\$9 trillion in assets globally. It provides certification of responsible, ethical and impact investment products and services in Australia and New Zealand; and seeks to champion responsible investing and a sustainable financial system through advocacy and collective impact.



- The Australasian Centre for Corporate Responsibility is a research and advocacy organisation focused on engaging with investors on how listed companies, industry associations and other entities are managing climate, human rights, labour rights and governance issues. It has a small portfolio of shares held for the purpose of engaging with companies, including through filing shareholder resolutions.
- Investors Against Slavery and Trafficking Asia Pacific (IAST APC) is an investor-led initiative focused on engaging with organisations in the Asia-Pacific region to promote effective action in identifying and preventing modern slavery in operations and supply chains. IAST APAC comprises 35 investors with A\$7.5 trillion in assets under management. It partners with Walk Free Foundation, whose mission is to end modern slavery, and the Finance Against Slavery and Trafficking initiative.
- In August 2022, a group of 20 Australian peak professional, industry and investor bodies representing more than US\$33 trillion in assets under management, and coordinated by the Australian Banking Association, submitted a joint response to the consultation on the ISSB draft sustainability reporting standards, published in March 2022, which supported the introduction of those standards.

**Horticultural sector:** Fair Farms Initiative provides organisations in the Australian horticulture industry with tools, information and training to assist with compliance with legal obligations and establish ethical practices in supply chains.

**Cleaning services sector:** The Cleaning Accountability Framework is directed to ending exploitation of workers. Members include retailers, property services providers, investors, unions and civil society organisations.

## 2.Scope of application

2. 1. Which entities are captured by the rules and codes that make up the principal elements of the ESG framework in your jurisdiction?

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Whether an entity is subject to the piecemeal framework of ESG laws and regulations in Australia will depend on the type of entity and the state and territory in which it is registered or operates. Examples of entities subject to ESG related obligations are outlined below:

- Companies and/or their directors, officers and employees must comply with, and may face criminal or civil liability for contraventions of:
  - work health and safety laws;
  - wage theft laws;
  - environmental protection laws;
  - criminal laws;
  - the Fair Work Act;
  - anti-money laundering/counter-terrorist financing laws;
  - whistleblowing laws; and
  - laws which criminalise or impose civil penalties on individuals involved in conduct with egregious environmental or human rights consequences (eg, illegal logging).

Public companies listed on the Australian Securities Exchange (ASX) are also subject to continuous disclosure requirements and periodic corporate reporting obligations, including the preparation of annual

financial reports under the Corporations Act and ASX Listing Rules.

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- Non-public sector organisations with more than 100 employees are required to report to the Workplace Gender Equality Agency under the Workplace Gender Equality Act 2012 (Cth).
- Entities registered or carrying on business in Australia with a consolidated annual revenue of at least A\$100 million must report annually on how they are addressing the risks of modern slavery in their supply chain and operations under the Commonwealth Modern Slavery Act.
- Commonwealth and state government-owned corporations must comply with annual reporting obligations under the Commonwealth Modern Slavery Act where they meet the reporting threshold and are not entitled to claim protection from the Crown in right of the state. New South Wales (NSW) government-owned corporations must voluntarily comply with the Commonwealth Modern Slavery Act, irrespective of whether they are caught by the reporting threshold under the NSW Modern Slavery Act.
- Commonwealth and state government agencies must also comply with procurement rules and regulations in their jurisdiction which may apply to the procurement of goods, services or works and may require the agency to consider certain ESG values, commitments or principles in determining whether a procurement represents value for money.

## 2. 2. How are entities in your jurisdiction that are not subject to specific rules or codes implementing ESG?

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Most Australian entities are subject to some specific ESG-related laws or codes. However, Australia's fragmented collection of laws means that there is significant scope for entities to implement their own responses to ESG issues. Examples are given below.

#### ESG reporting:

- **Climate change:** Australian entities are increasingly making voluntary commitments to achieving net zero by 2050 and reporting against the Task Force on Climate-related Financial Disclosures (TCFD) recommendations on a voluntary basis (see question 3.2).
- **Modern slavery:** As at 26 August 2022, 621 modern slavery reports had been voluntarily submitted since the Modern Slavery Act came into force on 1 January 2019.

**UN Sustainable Development Goals:** An increasing number of companies now voluntarily:

- make disclosures against the UN Sustainable Development Goals (SDGs) in their sustainability reporting;
- embed the SDGs in their materiality assessments; and
- map corporate strategy to SDGs which the organisation deems relevant to the organisation's operations and activities.

**ESG due diligence:** Many entities subject to the Modern Slavery Act reporting requirements have implemented supplier minimum standards and conduct due diligence on suppliers. Accordingly, even if a supplier is not subject to specific rules or codes, it may be required to conduct environmental or human

rights due diligence in order to satisfy its customers' procurement standards.

See question 3.2 for examples of voluntary ESG disclosures against international principles and frameworks.

## 2. 3. What are the principal ESG issues in your jurisdiction that are either part of the ESG framework or part of the implementation of ESG?

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**Climate change:** Shareholder activist campaigns on climate issues and climate change litigation are an increasingly prominent feature of the Australian ESG landscape. Organisations are grappling with reporting against the TCFD recommendations and whether and how to report on scope 3 emissions.

**Supply chain due diligence:** The Australian Border Force has stated that reporting entities under the Commonwealth Modern Slavery Act are expected to enhance their disclosures year on year, including undertaking deeper analysis of their modern slavery risks beyond first-tier suppliers. International legislative and regulatory developments imposing mandatory supply chain due diligence in some jurisdictions are influencing the level of supply chain due diligence being undertaken by Australian companies and broader ESG due diligence is increasing.

**First Nations peoples' rights:** Corporations are increasingly expected to embed respect for indigenous rights and the United Nations Declaration on the Rights of Indigenous Peoples principles – in particular, free, prior and informed consent and the protection of cultural heritage – in their decision-making processes, operations and activities. These issues are also being addressed through the lens of reconciliation action plans.

**Gender equality:** Gender diversity in leadership will continue to be a significant ESG issue. While over 30% of ASX 200 board directors are women, investors, customers and workforces are continuing to seek evidence of gender diversity at leadership levels and strategies for addressing gender inequality at work. The sex discrimination commissioner's *Respect@ Work: Sexual Harassment National Inquiry Report* has brought to the fore material risks that may arise in corporate cultures which fail to appropriately address and prevent sexual harassment in the workplace. The newly elected federal Labour government has committed to implementing all of the recommendations of this report, including introducing a 'positive duty' on employers to prevent sexual harassment and sex-based discrimination.

## 3. Disclosure and transparency

### 3. 1. What primary disclosure obligations relating to ESG apply in your jurisdiction?

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The primary ESG-related disclosure obligations are imposed under the key regulatory regimes and codes of practice discussed (see question 1.1). Examples of these disclosure obligations are outlined below:

- **Corporate reporting and disclosure:** Section 299A of the Corporations Act requires large proprietary companies, public companies, disclosing entities or registered investment schemes to make periodic disclosure of information that shareholders would reasonably require to make an informed assessment of the entity's operations, financial position, business strategies or future prospects in the operating and

financial review (OFR). The continuous disclosure provisions in Section 674 of the Corporations Act and ASX Listing Rule 3.1 also require listed entities to make continuous disclosure of matters which would have a material effect on the price of the entity's securities.

- **ASX listed entities:** ASX-listed entities are required under Listing Rule 4.10.3 to publish an annual corporate governance statement disclosing the extent to which the entity has followed the ASX Corporate Governance Principles & Recommendations, which include the following recommendations in relation to a listed entity's management of ESG matters:
  - measurable objectives set by the board for achieving gender diversity in the composition of its board, senior executives and workforce generally, and the entity's progress towards achieving those objectives;
  - the respective proportions of men and women on the board, in senior executive positions and across the workforce (or 'Gender Equality Indicators' under the Workplace Gender Equality Act); and
  - the entity's exposure to any material environmental or social risks and how it manages these risks.'Material exposure' means a real possibility that environmental or social risks could materially impact the entity's ability to create or preserve value for shareholders over the short, medium or longer term. While it is not mandatory to comply with every recommendation, the corporate governance statement must disclose the entity's reasons for non-compliance with any recommendation
- **Reporting of scope 1 and 2 emissions:** The National Greenhouse and Energy Reporting Act requires reporting on scope 1 and 2 emissions by Australian corporate groups that emit 50,000 tonnes of carbon dioxide equivalent or more of greenhouse gases, produce 200 terajoules (TJ) or more of energy, or consume 200TJ or more of energy per financial year;
- **Modern slavery reporting:** Reporting entities must prepare a modern slavery statement which reports against eight mandatory criteria in the Commonwealth Modern Slavery Act.
- **Workplace gender equality metrics:** Reporting entities must submit a report to the Workplace Gender Equality Agency (WGEA) containing data in respect of gender equality indicators.
- **Environmental monitoring and reporting:** Most environmental approvals and licences require periodic reporting and independent audits to be carried out as against standards and the conditions imposed. Public disclosure of the reporting or audits is required.

### 3. 2. What voluntary ESG disclosures are also commonly made in your jurisdiction?

#### Australia

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Voluntary sustainability reporting is now a prominent feature of corporate reporting among many large Australian Securities Exchange (ASX) listed entities.

**Net zero commitments:** A growing number of Australian publicly listed entities are making and disclosing commitments to achieve net zero emissions by or before 2050.

**Climate-related disclosures:** The Australian Securities and Investment Commission and the Australian Prudential Regulatory Authority have issued guidance encouraging regulated entities to use the TCFD framework to make climate risk disclosures. In 2020, a number of Australian companies in the energy and resources sector committed to prepare, and put to a non-binding shareholder vote, an annual climate transition action plan (CTAP) in accordance with the Say on Climate initiative.

**Reconciliation action plans (RAPs):** RAPs are a voluntary form of engagement with First Nations peoples. A RAP requires an organisation to commit to taking specific actions to drive the organisation's contribution to reconciliation with First Nations peoples. The commitments are developed following a standardised framework and are accredited by an independent not-for-profit, Reconciliation Australia, which publishes accredited organisations' RAPs on its website.

**Social risk disclosures:** Entities that disclose actual or potential negative impacts of an organisation's operations on human rights tend to do so by reference to:

- the UN Guiding Principles on Business and Human Rights;
- the Global Reporting Initiative (GRI); or
- the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises.

**Sustainability reporting:** Australian entities tend to adopt one or more of the GRI, the UN SDGs or industry-specific standards published by the Sustainability Accounting Standards Board (SASB) following sustainability reporting frameworks when making voluntary disclosures across a range of ESG issues.

**Industry-based reporting frameworks:**

- The Principles for Responsible Investment (PRI) require asset owner or investment manager signatories to meet annual minimum reporting requirements or risk delisting. The majority of Australian industry superannuation funds and some retail funds are PRI signatories.
- The Voluntary Principles on Security and Human Rights are a non-binding framework for companies to:
  - conduct human rights risk assessments in relation to security issues;
  - develop systems for reporting and investigating allegations of human rights abuses; and
  - engage appropriately with public and private security providers.

### 3. 3. What role is played in this regard by (a) the board and (b) other corporate bodies and/or officers?

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**Mandatory ESG disclosure:** The board will oversee the preparation of, and must sign off on, the following disclosures:

- an ASX-listed entity's corporate governance statement (see question 3.1);
- an OFR prepared by a large proprietary company, public company, disclosing entity or registered investment (see question 3.1); and
- a modern slavery statement prepared by a reporting entity.

Members of management must oversee and approve the following mandatory ESG-related disclosures:

- The annual report submitted to the WGEA must be signed by the organisation's chief executive officer (CEO) (see question 3.1); and
- An authorised officer of the company must approve any continuous disclosure announcement the



company is required to make to the ASX (see question 3.1).

**Voluntary ESG disclosure:** Voluntary reporting against the sustainability disclosure frameworks outlined in question 3.3 will generally be overseen by senior executives in the organisation. These disclosures will ordinarily be incorporated in the organisation's annual report or standalone sustainability report, which is prepared by management and signed off by the board. Voluntary modern slavery statements must be approved by the board.

Net zero commitments, CTAPs and RAPs will also usually be endorsed by either the CEO or the board.

### 3. 4. What best practices should be considered in relation to ESG reporting and disclosure?

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Best practice in relation to ESG reporting and disclosure will include a clearly articulated ESG strategy. When reporting against the strategy, clear identification of metrics, data-gathering and reporting methodologies should be incorporated to provide transparency and accountability against those commitments. Best practice climate risk reporting includes adoption of the TCFD reporting framework (consistent with guidance issued by several Australian regulators).

Before adopting a sustainability or ESG reporting framework, companies should:

- undertake a materiality review to identify the organisation's material ESG impacts and risks, and determine the ESG matters that are most important to its stakeholders;
- develop robust and fit-for-purpose ESG risk frameworks and metrics grounded in generally accepted reporting standards such as those described in question 3.2; and
- understand the difference between reporting frameworks and whether they require reporting of material ESG risks to the organisation's operations (eg, SASB and TCFD), or adopt an 'impact materiality' approach requiring reporting of both material ESG risks to the organisation's operations, and the organisation's environmental and social impact (eg, the GRI).

## 4.Strategy and governance

### 4. 1. How is ESG strategy typically designed and implemented in companies in your jurisdiction?

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Best practice ESG strategies are typically designed by:

- consulting the organisation's key stakeholders, including its workforce and relevant community stakeholders, to ensure that the strategy is responsive to stakeholder priorities and expectations;
- adopting integrated and cross-functional risk assessment processes and risk mitigation strategies that recognise the intersectionality of ESG risks that may arise in the organisation's corporate strategy and activities;

- defining the organisation's core ESG principles and embedding them in organisational strategy;
- articulating ESG commitments and setting measurable targets for assessing the organisation's performance against its ESG commitments;
- establishing an effective governance framework and describing the governance practices the organisation has put in place to identify and manage ESG risks and opportunities; and
- embedding integrated ESG risk and opportunity assessments in decision-making processes, including in processes for evaluating and approving all new business activities and projects.

The ESG strategy is typically implemented through an ESG framework comprising:

- policies and guidance to operationalise the organisation's ESG commitments;
- guidelines and processes for implementation; and
- reporting mechanisms to measure performance and maintain accountability.

Organisations with a more mature ESG strategy may also identify, assess and report on the environmental and social impacts of its operations.

#### 4. 2. What role is played in this regard by (a) the board and (b) other corporate bodies and/or officers?

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**Board:** The board is responsible for:

- establishing an organisation's risk management and corporate governance frameworks;
- approving the organisation's ESG strategy, governance processes, metrics and targets;
- approving the organisation's key ESG-related policies; and
- setting the parameters of the organisation's risk appetite within which the board expects management to operate.

Many organisations establish a board risk committee (or combined risk and audit committee) responsible for ensuring that:

- the organisation's risk management framework is periodically reviewed and remains effective and appropriate;
- reporting processes keep the board informed of any material breaches of key governance policies; and
- management is operating within the broader risk appetite set by the board (which typically include relevant ESG risks).

**Management:** Management typically has operational responsibility for ESG issues (risk identification, assessment, management and monitoring) through subject-matter experts across the business – particularly in the sustainability, legal, risk and compliance, human resources and procurement functions.

#### 4. 3. What mechanisms are typically utilised to monitor the implementation of ESG strategy in your jurisdiction?

Australia

Practices and procedures commonly used by Australian organisations to monitor implementation of ESG strategy include:

- compliance programmes;
- scenario planning;
- ESG due diligence processes;
- risk registers;
- supplier audits;
- standard contractual clauses in supply agreements and contracts (eg, modern slavery clauses and supplier minimum standards terms and conditions);
- employee engagement surveys;
- gender equality and diversity and inclusion analytics and reporting; and
- mandatory training on ESG issues for directors, senior management and sometimes employees and suppliers.

Most Australian companies do not yet have mature systems in place to monitor the implementation of ESG strategy, and the adoption of processes and procedures tends to be *ad hoc* and industry dependent.

#### 4. 4. What role is played in this regard by (a) the board and (b) other corporate bodies and/or officers?

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The board or its risk committee should ensure that it receives regular briefings and reports from management on new and emerging sources of ESG risk and the risk controls and mitigation measures that management has put in place to deal with those risks. Where an organisation has material ESG risk exposures (eg, to climate-related risks or social risks – for example, where operations or activities are conducted on or near protected cultural heritage sites), a board or executive committee may be established to oversee the organisation's mechanisms for managing and mitigating those specific risks.

Management is responsible for overseeing the operation and outputs of mechanisms used to monitor the implementation of ESG strategy. However, subject-matter experts across the business will have responsibility for the day-to-day design and implementation of each mechanism. For example:

- the people and culture team may be responsible for managing employee engagement surveys and diversity, equity and inclusion analytics and reporting;
- the risk and compliance function will often manage the risk registers, compliance programmes and ESG due diligence processes (with the input of legal);
- the legal team (or external legal advisers) will draft standard contractual clauses and may provide training on legal or regulatory developments relating to ESG; and
- larger organisations with mature ESG programmes may have specialised climate or human rights functions which will be involved in scenario planning, ESG due diligence processes and ESG training.

#### 4. 5. How is executive compensation typically aligned with ESG strategy in your

jurisdiction?

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Australian companies are increasingly linking incentives to ESG outcomes; however, the types of ESG metrics used to measure executive performance vary considerably, depending on the size of the organisation and the sector and industry in which it operates. More common ESG metrics applied to executive compensation include quantitative environmental and climate outcomes, work, health and safety outcomes or diversity, equity and inclusion outcomes.

Metrics used by some Australian energy companies with significant exposure to climate risk may include carbon transition metrics which measure performance against targets for investment in renewable energy resources and can be used to demonstrate progress against the organisation's net zero commitments. Some companies link executive compensation to qualitative metrics relating to staff engagement and performance against gender equity targets.

While ESG metrics are more commonly used in short-term incentive arrangements in Australia, organisations adopting best practice will also align longer-term incentive arrangements with longer-term ESG targets, including decarbonisation and net zero emissions commitments.

#### 4. 6. What best practices should be considered in relation to the design and implementation of ESG strategy?

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ESG risks and impacts differ vastly between organisations, depending on industry, sector, operations and the size and nature of the workforce. As such, best practice approaches to designing and implementing ESG strategy should be tailored to each organisation's ESG risks and opportunities.

For best practices in relation to the design of ESG strategies, see question 4.1; and for best practice in relation to the implementation of ESG strategies, see question 9.1.

### 5. Financing

5. 1. What is the general approach of lenders towards ESG in your jurisdiction? What internal and external information regarding a prospective borrower will they typically consider in this regard?

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Generally, ESG factors are standard considerations in broader investment and business strategies of financiers and specific borrower assessments. There is no standardised approach to the consideration of ESG factors by Australian financiers; however, a number of trends are emerging.

Australia's major banks and other financiers have developed ESG risk frameworks and set targets for ESG investments. Greater focus is generally placed on a borrower's ESG compliance, even where the borrower is

not seeking to use ESG as a means of improving its borrowing position. It is also common for financiers to have designated ESG teams that focus on implementing ESG-focused financings or monitoring ESG compliance within the organisation.

When considering a potential borrower from an ESG perspective, financiers frequently undertake either positive or negative screening:

- to identify the best performers in an industry or actively pursue borrowers due to their positive ESG impact; or
- to exclude borrowers or sectors that score poorly on ESG factors.

Such factors can include the following:

- Internal:
  - Environmental or waste management record;
  - Workplace relations;
  - Governance issues (eg board diversity);  
Regulatory compliance; and
  - Management of ESG risks generally.
- External:
  - The impacts of any change in legislative and regulatory requirements (eg, in modern slavery or climate change risk regulation); and
  - Shifting societal expectations on the borrower's business and reputation.

For example, fossil fuel participants generally find themselves caught by negative screening; but concerted efforts by to improve fossil fuel participants' carbon footprint or engage with First Nations peoples can result in their inclusion in positive screening.

## 5. 2. Are bonds/loans that are marketed as green bonds/loans, social bonds/loans, sustainability bonds/loans or similar a feature of the markets in your jurisdiction?

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Green, social and sustainable lending options (together, 'sustainable debt') are an increasingly prominent feature of Australian markets. Key products currently available include the following:

- Green bonds: 'Use of proceeds' bond instruments that require money raised to be used strictly for specified green projects, generally in accordance with the International Capital Markets Association's (ICMA) voluntary Green Bond Principles (GBPs).
- Green loans: 'Use of proceeds' instruments in the form of a loan, with loan proceeds to be used for green projects, generally in accordance with a set of voluntary green loan principles.
- Social bonds: 'Use of proceeds' bond instruments that require the money raised to be used to finance eligible social impact projects, generally in accordance with a set of voluntary 'social bond principles'.
- Sustainability linked loans (SLLs): These incentivise the borrower to achieve pre-agreed sustainability performance targets through reductions in interest or other benefits in relation to loan covenants. SLLs are growing in the Australian market and are generally considered more flexible than green and social debt instruments.



The Australian sustainable debt market is still in the early stages of growth in comparison to some offshore markets. Approximately A\$10 billion was raised in the Australian sustainable debt market in 2020, increasing to over A\$12 billion in 2021.

More recently, blue finance has also emerged, offering opportunities for financing linked to the ocean economy. Blue finance aims to build on the GBPs and green loan principles to determine project eligibility.

### 5. 3. What key developments have taken place in the structuring of these instruments in your jurisdiction?

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Key developments have largely mirrored global developments.

Since mid-2010, a number of voluntary best practice guidelines have been developed and updated by collectives such as the ICMA. These are designed to help issuers and purchasers of sustainable debt instruments to achieve greater transparency, integrity and confidence in the validity of the 'sustainable' status of those instruments; and have contributed to the increased uptake of such instruments by improving awareness and understanding of their language and operation. This has encouraged the development of a common approach among market participants and acceptance of standards of transparency and credibility.

Key standards in use in Australia include the following:

- The GBPs, first developed in 2014 and published now by the ICMA (and adopted by the Asia Pacific Loan Markets Association (APLMA)), impose four requirements on appropriately labelled green bonds, plus other recommendations for external review and verification.
- The ICMA also publishes similar standards for social impact bonds in the Social Bond Principles and for projects involving both green and social impact elements in the Sustainability Bond Guidelines.
- For Association of Southeast Asian Nations (ASEAN) member countries, there are equivalent ASEAN Green Bond Standards which mirror the GBPs, but exclude fossil fuel power generation projects from eligibility for status as 'green'.
- The APLMA Sustainability Linked Loan Principles (SLLP) apply to SLLs.

With the release of the Australian Sustainable Finance Initiative's Australian Sustainable Finance Roadmap in late 2020, which included the development of frameworks, tools and standards as a target, and the Australian Prudential Regulatory Authority's final Prudential Practice Guide providing clear definitions and practices in relation to sustainable investments, we may see certain standards become mandatory in the Australian context in the near future.

### 5. 4. What best practices should be considered in relation to ESG in the financing context?

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In addition to adopting the standards and principles referred to in question 5.3, best practice ESG considerations for debt providers of finance include:

- the development of ESG strategies that maintain flexibility; and
- stakeholder management and collaboration.

Financiers should ensure that they develop and implement robust internal ESG policies for screening and engaging with borrowers and issuers, while retaining flexibility in their implementation of those policies, in order to find the correct fit for a borrower.

A key concern with regard to SLLs is the desire for SLLs not to simply reflect a sustainability performance target (SPT) that the borrower is already meeting and will maintain, but to reflect a stretch target. The creation of a stretch target involves a difficult exercise of determining whether the target is sufficiently ambitious yet achievable with some effort. The SLLP requirement is for the targets to be “relevant, core and material to the borrower’s business, to encourage ambitious, positive change through incentives beyond a ‘business as usual’ trajectory”.

In addition to establishing sufficiently challenging SPTs, there is ongoing discussion as to whether the SPTs should be reviewed during the course of the debt funding. The position on this remains unsettled. Linked to this is a question as to whether non-compliance should simply result in margin changes to funding or whether they should be linked to events of default (much the same as any other failure to comply with a contractual undertaking). At present, non-compliance does not trigger events of default; it is expected that this may change over time, but is likely to be considered on a case-by-case basis and not as a general approach.

SLLs also contemplate the appointment of a sustainability coordinator or structuring agent (normally one of the lender arrangers), to help set SPTs, draft the SPT framework and coordinate with second-party opinion providers, in order to substantiate the targets and address ESG related questions that the lender group may have.

Best practice requires:

- ameliorating the risk of greenwashing through thorough due diligence on borrowers by financiers prior to granting SLLs; and
- requiring second-party opinions to confirm the ESG credentials and compliance on SLLs.

However, as the market develops, we expect to see a greater understanding of how to evaluate ESG, particularly in relation to SLLs.

Financiers should ensure that ESG-related undertakings, warranties and covenants are robust; and that borrowers and issuers are aware of the potentially time-consuming and complex actions involved in complying with covenant packages from the outset of a transaction.

## 6. ESG activism

6. 1. What role do institutional investors and other activist shareholders play in shaping ESG in your jurisdiction?

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**Institutional investors:** Australia’s compulsory superannuation scheme means that institutional investors –

particularly industry superannuation funds (which today have close to A\$1 trillion in assets under management) – are in a position to wield significant influence over corporate responses to ESG issues.

Institutional investors typically adopt one or more of the following responsible investment approaches:

- ESG integration: Explicit and systematic incorporation of ESG issues into investment analysis and decision making.
- Positive or negative screening: Ruling in or out investments by reference to the sector or industry of the investment (eg, ruling out investments in weapons, tobacco or emissions-intensive sectors and industries, such as coal-powered energy; and ruling in other sectors, such as renewable energy).
- Impact investments: Investing for positive social or environmental outcomes.
- Active stewardship: Engagement with companies in order to improve their disclosure of, or response to, ESG issues.
- Proxy voting: Expressing approval or disapproval of a public company's action or inaction on one or more specific ESG issues by voting against shareholder resolutions at the AGM.

Responsible investment approaches that seek to identify long-term value and anticipate material risks by incorporating ESG issues into their investment strategy and practice have accelerated capital flows to ESG funds.

**Activist shareholders:** Shareholders of Australian companies with holdings representing 5% or more of the votes, or a group of shareholders comprising at least 100 members, have the right:

- to requisition resolutions at shareholders' meetings in certain circumstances;
- to nominate directors for election to the board; and
- to vote on the election or re-election of directors.

Shareholder advocacy groups are increasingly using these statutory mechanisms to influence corporate behaviour on ESG matters.

We have also seen a coalescing of institutional investors' interests and shareholder activism:

- In 2020 an international institutional investor supported a resolution filed by an activist shareholder group requesting a plan for the closure of a large Australian energy company's coal assets; and
- In 2021, the Australian Council of Superannuation Investors (ACSI) published a climate change policy indicating that from 2022 it would consider recommending that its members – which make up some of the largest institutional investors in Australia – vote against the re-election of directors where ACSI believes the company is failing to adequately manage its climate risk.

## 6. 2. How do activist shareholders typically seek to exert influence on corporations in your jurisdiction in relation to ESG?

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Prominent strategies deployed by activist shareholders include:

- engaging directly with the board;
- proposing shareholder resolutions including constitutional amendments;

- commencing strategic litigation; and
- raising awareness of specific ESG issues through campaigns and briefings.

### 6. 3. Which areas of ESG are shareholders currently focused on?

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Common ESG issues given consideration by shareholders include:

- net zero commitments and climate transition action plans;
- sustainability;
- gender, equity and diversity;
- corporate responses to systemic sexual harassment allegations;
- modern slavery;
- Indigenous rights; and
- protection of cultural heritage.

### 6. 4. Have there been any high-profile instances of ESG activism in recent years?

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Beyond resolutions requisitioned by activist shareholders, there have been many high-profile instances of ESG advocacy and litigation in Australia.

**Advocacy:** High-profile ESG advocacy has largely focused on human rights issues, including lesbian, gay, bisexual, trans, queer and intersex rights, workplace sexual harassment and the rights of First Nations peoples:

- Constitutional inclusion of Australia's First Nations peoples: The Uluru Statement of the Heart and the Voice to Parliament is supported by leading Australian businesses in solidarity and support of broader reconciliation efforts with Australia's First Nations peoples.
- Protection of First Nations peoples' cultural heritage: The destruction of Juukan Gorge – a site of cultural significance to Australia's First Nations peoples – has prompted a review and increased focus on the protection of cultural heritage, including:
  - a parliamentary inquiry;
  - a coalition of institutional investors seeking assurances and shareholder resolutions focused on strengthening mechanisms; and
  - consultation aimed at the preservation of cultural heritage.
- Systemic sexual harassment: Australia's sex discrimination commissioner has brought significant attention to systemic workplace sexual harassment. The Australasian Centre for Corporate Responsibility has also issued an investor briefing titled "Sexual Harassment as a Material Risk" on the basis that sexual harassment damages the organisation's reputation, affects operational and labour costs and presents a significant financial risk.
- **Marriage equality:** Thirty of Australia's largest companies publicly supported the legalisation of same-sex marriage.

**Strategic litigation:** Climate change litigation has evolved at a rapid pace in Australia:

- *McVeigh v REST* (2020): REST, a superannuation fund, settled a claim by a fund member that REST did not adequately consider the risk posed by climate change to the long-term value of his superannuation. REST publicly acknowledged climate change as a real and financial risk and agreed to take active steps to manage climate change risks.
- *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* (2021): In this case the court found that the New South Wales Environment Protection Authority had a statutory duty to develop policies to protect the environment from the threat of climate change. The court accepted the current scientific evidence on the risk to the environment posed by climate change.
- *Sharma v Minister for the Environment* (2022): In this case the Full Federal Court declined to impose an obligation on the federal minister for the environment to avoid personal injury or death to children arising from carbon dioxide and subsequent global warming when exercising the minister's power to approve or not approve the extension of a coal mine.
- *Pabai Pabai v Commonwealth of Australia* (filed in 2021): This case was filed on behalf of all Torres Strait islanders against the Commonwealth alleging that it breached its duty of care to take reasonable steps to protect them, their culture and their environment from harms caused by climate change. This case has not yet been determined.
- *ACCR v Santos* (filed in 2021): In this case it is alleged that Santos has made false and misleading climate risk disclosures. This case has not yet been determined.
- *Guy and Kim Abrahams Family Trust v Commonwealth Bank of Australia* (filed in 2021): In this case the applicant shareholders sought access to the bank's internal records in order to assess compliance with its ESG commitments and policies in relation to its financing of oil and gas projects. Orders that the bank provide access to some internal records, including documents used by the bank to conduct ESG assessments on projects it financed, were made with the consent of the parties.
- *O'Donnell v Commonwealth* (filed in 2020): The applicant in this case argues that the Commonwealth failed to disclose the risks of climate change to sovereign bond investors. This case has not yet been determined.
- *Youth Verdict v Waratah Coal* (commenced in 2020): The applicants, relying on the *Human Rights Act 2019* (Qld), objected to a mining lease application and environmental authority for a coal mine on the basis that the consequent emission of greenhouse gases from mining activities and products would cause adverse impacts to humans and would be incompatible with human rights, including the right to life and cultural heritage rights. Judgment is pending.

## 6. 5. Is ESG activism increasing or decreasing in your jurisdiction? How and why?

### Australia

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ESG activism is increasing in Australia, driven both by broader political and societal context and by market forces.

Political and social developments include:

- a lack of cohesive climate change policies across federal and state jurisdictions, coupled with activist campaigns for more robust climate action, including the 'school strike for climate';
- the 2022 federal election convincingly elected a major party committed to legislating a 43% by 2030



- emissions reduction, as well as pro-climate action minor parties and independents;
- the #blacklivesmatter and #metoo campaigns, driving awareness and demands for social justice; and
- the annual Conference of the Parties meetings and increasing global awareness of the imperative to achieve net zero emissions well before 2050.

Other relevant influences include:

- a better understanding of what ‘sustainability’ and ‘ESG’ mean for Australian organisations, driven by mature debate in overseas jurisdictions such as the European Union;
- a strong preference among consumers and members of investment and superannuation funds for entities that conduct their operations responsibly, in response to which investment managers are investing capital accordingly and lobbying for changes in corporate behaviour;
- continued regulatory scrutiny of corporate Australia’s climate related disclosures and reporting on the impact and management of climate risks, including greenwashing claims;
- the success of activist shareholder campaigns and public interest litigation in bringing attention to specific issues and securing the agreement of companies to increase climate-related disclosures;
- internal and external investigations revealing the scale of systemic sexual harassment in the workplace and evolving societal expectations that sexual harassment risks will be proactively addressed by organisations; and
- demands from employees for fairer and safer workplaces that align with their ethics and values.

## 7. Other stakeholders and rights holders

7. 1. What role do stakeholders or rights holders (eg, employees, pensioners, creditors, customers, suppliers, and Indigenous communities) play in shaping ESG in your jurisdiction? What influence can they exert on a company?

Australia

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Stakeholders beyond shareholders are increasingly influencing legislative, regulatory and corporate responses to ESG issues.

**First Nations peoples’:** Australia’s First Nations communities have long sought to be recognised in corporate and government decision making, particularly concerning the use of traditional lands and impact on sacred sites by the mining, resources and agricultural sectors. In 2021, public outcry over the destruction of the Juukan Gorge caves – a site of cultural significance to Australia’s First Nations peoples – prompted legislators to amend Western Australia’s Indigenous cultural heritage protection laws. Advocacy by First Nations peoples has also called on corporate Australia and federal, state and territory legislatures to redesign and rethink investment decisions and approval processes to embed the protection of cultural heritage and traditional owners’ rights, and to provide for a Commonwealth right of veto under federal legislation. This advocacy has been supported by some institutional investors, and we expect Australian institutional investors to continue to scrutinise corporate respect for the rights of Australia’s First Nations.

**Workers:** Worker unions such as the Australian Council of Trade Unions have long been a strong force in Australia in supporting workers to achieve change and redress on issues such as wage theft, sexual harassment and protecting workers’ rights in the transition to a low carbon economy.

**Human rights oversight bodies:** The Australian Human Rights Commission and the sex discrimination commissioner, who published a report into sexual harassment in the workplace in 2020, have had a significant impact on expectations of organisations' responses to sexual harassment. This has been amplified by advocacy from the 2021 Australian of the Year, Grace Tame, to improve, prevent and respond to sexual abuse, and included scrutiny of the federal Parliament's culture of bullying and harassment.

**Consumers:** Consumers shape ESG developments through information campaigns, boycotts and general purchasing preference. Australian consumers have boycotted supermarket own-brand milk to encourage supermarkets to pay dairy farmers a fairer price. 'Free-range' eggs from large suppliers have also been subject to consumer campaigns alleging misleading labelling, which have successfully shifted corporate behaviour and improved labelling. One of Australia's largest telecommunications companies voiced its support for legalising same-sex marriage when the company's neutral stance on this topic became the target of consumer activism.

More broadly, growing consumer preference for 'ethical' or 'green' products has led to a rise in such products, and with it greater scrutiny of corporate greenwashing in relation to promotional activities to consumers by the Australian Competition and Consumer Commission.

**Academics and the not-for-profit sector:** Academics and advocacy-based not-for-profits also wield significant influence over corporate conduct. Increased scrutiny and benchmarking of performance against public disclosures – such as modern slavery statements– as well as the use of litigation by not-for-profits are driving behavioural change and increased awareness of damaging reputational risk in the market.

## 8. Trends and predictions

8. 1. How would you describe the current ESG landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

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**Current landscape:** Regulators, investors and financiers are increasingly insisting on greater transparency, demonstrable leadership and accountability on ESG issues, despite the absence of a formal ESG framework or system. Activist shareholders are agitating for net zero policies and robust management of climate-related financial risks across the short, medium and long term. Increasingly, socially conscious consumers and employees are inclined to make ethical choices, in turn requiring businesses to make thoughtful decisions about their purpose, products and workplace practices.

The current landscape is being influenced by:

- the election of a federal Labour government, which has made commitments in respect of the environment, workers' rights and sexual harassment prevention;
- accelerating capital flows to ESG funds and businesses;
- the global drive towards net zero;
- movement from voluntary to mandatory ESG regulation;
- increasing shareholder activism; and
- heightened customer and employee sensitivity to ESG risks and opportunities.

## Legislative developments:

- Australian thematic sanctions regime: Thematic sanctions will likely continue to be used to target situations of international concern, including serious human rights abuses, corruption and cybercrimes. These were introduced in December 2021 and first implemented in March 2022. Thematic sanctions, while posing a compliance risk to business, are primarily directed at preventing Australian businesses from engaging with, for example, entities or individuals perpetrating human rights abuses, thereby preventing Australian businesses from funding or supporting perpetrators of human rights abuses.
- Governance and integrity: The proposed Financial Accountability Regime Bill is directed to enhancing executive accountability in the financial services sector. Other proposed legislative reforms include:
  - the imposition of corporate criminal liability for failure to prevent bribery of foreign public officials; and
  - the introduction of a National Integrity Commission to oversee the public sector.
- Workplace reform: The newly elected federal Labour government has promised to legislate a positive duty on employers to prevent sexual harassment and sex-based discrimination. Further reforms to the industrial relations system to enhance workers' rights are also expected over the coming year.
- Modern Slavery Act review: The statutory review of the Modern Slavery Act commenced in March 2022 and will be completed by April 2023, with a report to be tabled in Parliament shortly thereafter. A Parliamentary Committee Report recommended that the review consider introducing penalties for non-compliance and establishing an independent body to oversee the Modern Slavery Act's implementation. The newly elected federal Labour government has indicated its intention to introduce penalties. The Australian Border Force's 2020 Compliance Review also identified that many statements misinterpreted, or failed to address, the act's mandatory reporting requirements. We expect the statutory review will consider introducing amendments to address these issues.
- Climate Change Bill 2022 and Climate Change (Consequential Amendments) Bill 2022: These were tabled in the federal Parliament in late July 2022. Key mechanisms include:
  - an emissions reduction target of 43% by 2030 and net zero by 2050; and
  - preparation of an annual climate change statement relating to:
    - progress towards emissions reduction targets;
    - international developments;
    - climate change policy; and
    - effectiveness of Commonwealth climate change policy toward achieving emissions reduction targets.

The Climate Change Authority will provide independent advice on the preparation of the annual climate change statement and will advise the minister on targets to be included in Australia's nationally determined contributions. The Climate Change (Consequential Amendments) Bill 2022 embeds consideration of emissions reduction targets into objects of commonwealth entities and schemes.

- Proposed federal environmental law reform: The federal government has indicated an intention to reform federal environmental laws in order to halt the decline of the environment and build confidence in the environmental laws.

## 9. Tips and traps

9. 1. What are your top tips for effective ESG implementation in your jurisdiction and what potential sticking points would you highlight?

Organisations that adopt ESG risk management frameworks and processes that are effectively integrated across the organisation will be well positioned to respond to the plethora of developments and related risks and opportunities on the Australian ESG horizon. Tips for best practice include the following:

- Formulate an ESG strategy that clearly defines the organisation's ESG principles and ambitions, and provides for periodic review. This includes setting and communicating measurable performance targets in line with organisational and stakeholder expectations, and the metrics by which progress towards targets will be measured and communicated to internal and external stakeholders (including investors, shareholders and, in future, regulators).
- Invest in rigorous and integrated risk assessment processes and risk mitigation strategies which reflect the intersectionality of ESG risks and utilise cross-functional expertise.
- Embed systematic consideration of ESG risks and opportunities in the organisation's continuous disclosure and periodic corporate reporting processes.
- Mainstream inclusion of ESG considerations into existing risk and compliance policies, processes and due diligence tools at organisational, portfolio and transactional levels to ensure that assets, projects and prospective acquisitions do not present unchecked ESG risks. Investment in scenario analysis across ESG risks may be particularly beneficial at this stage.
- Instil an ESG risk and compliance culture from the board down, including mandatory ESG training and regular briefings for board and senior management on significant or emerging ESG compliance or regulatory risks relevant to the business.
- Embrace early adaptation and resilience strategies. Early implementation of a broad range of ESG identification and risk mitigation strategies will advance the organisation's position and pre-emptively safeguard against any rapid changes in global conditions.

**Acknowledging the contribution of Corrs [Responsible Business and ESG](#) team, including co-authors Eloise O'Brien, [Clare Corke](#), [Abby Gill](#), [Steven Rice](#), [Andrew Lumsden](#), [Heidi Roberts](#), [Julia Green](#), Zoe Caldwell, Alice Maxwell, Isabelle Statz, Alice Johnson and Flynn O'Byrne-Inglis**





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