The Transparency Era

Perspectives on an evolving commercial landscape

September 2022

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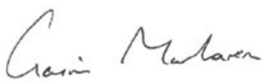
Foreword

The Australian commercial and legal landscape is evolving in response to inflationary pressures, rising interest rates, geopolitical uncertainty, supply chain challenges and a sharper focus by stakeholders on environmental, social and governance (**ESG**) issues, in particular on the energy transition.

This collection of insights provides a guide for general counsel on the important interface between regulators and businesses in the current environment and the relevance of transparency and trust in navigating these challenges.

We hope you enjoy reading this selection of articles about the changing legal landscape.



Gavin MacLaren

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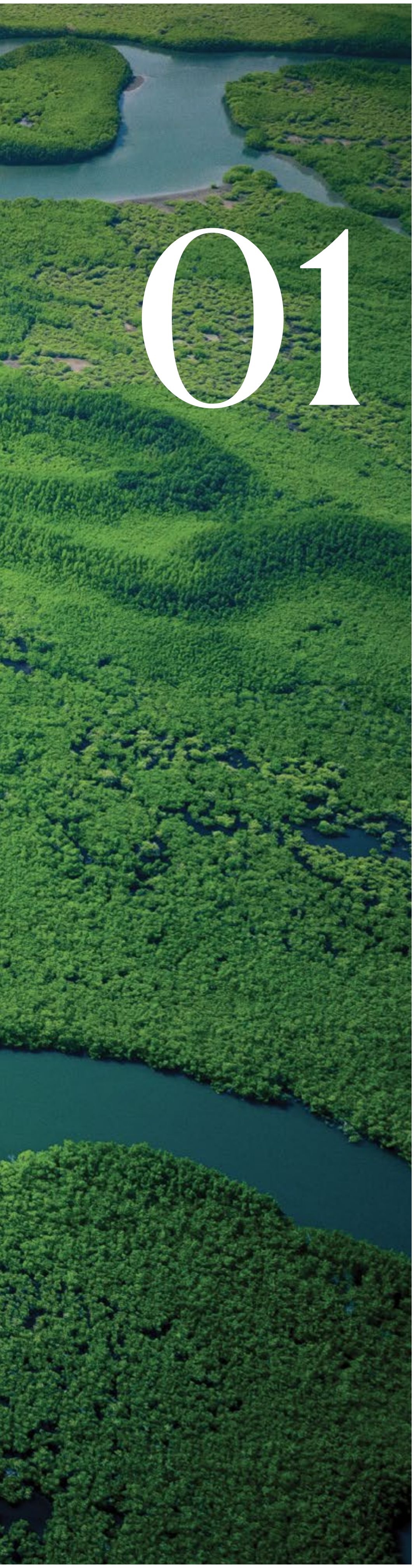
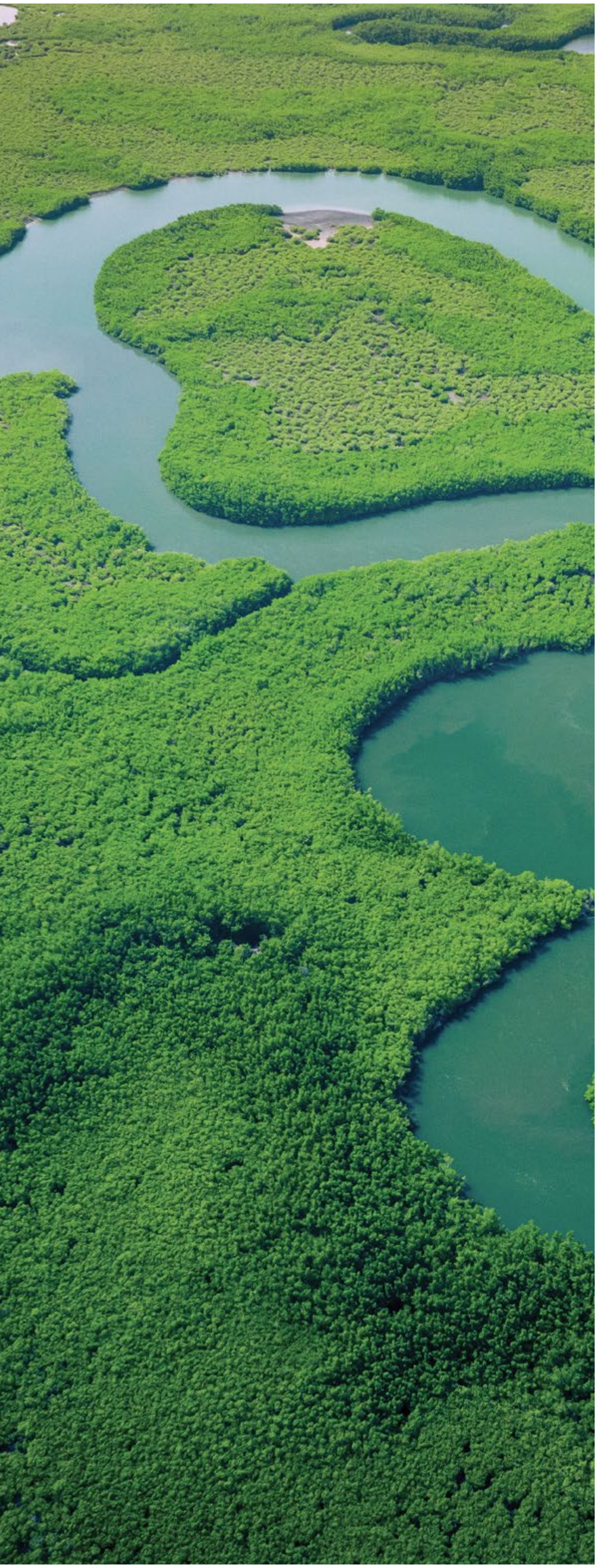


The heat is on: directors facing increased expectations in relation to sustainability disclosures

By **Abigail Gill**, Head of Investigations and Inquiries, **Sandy Mak**, Head of Corporate, **Dr Phoebe Wynn-Pope**, Head of Responsible Business and ESG, **Lillian Vadasz**, Senior Associate and **Georgia Whitten**, Law Graduate

In a reflection of the growing influence of stakeholders including shareholders, investors, customers and employees, the management of environmental, social and governance (**ESG**) risks as part of an integrated approach to strategic decision-making and operations is now commonplace for corporate organisations.

Regulators globally are placing an increasing focus on the management of sustainability risks, reporting and disclosure. This is particularly the case for so-called 'greenwashing' risks – where inflated or misleading claims about sustainability credentials are made to attract or retain customers and investors.



Over the past five years, the conversation in boardrooms around the world has centred largely on the duties that corporations have in respect of climate change risks in the context of their ongoing operations and strategies. In the last two years, the focus for regulators has pivoted from issuing various notes and guidance to their regulated markets to enforcing prudent management of sustainability reporting and disclosure using existing legal frameworks.

A number of jurisdictions are also seeking to clarify and codify the obligations on companies to explain how ESG risks are factored into strategic and operational considerations through regulation. It therefore seems inevitable that a wave of enforcement activity will follow in the near future, targeting those entities that embellish their sustainability credentials and reporting and that ignore the clear signals from regulators at their peril.

Recent global developments

On 10 March 2021, the European Union (**EU**) Sustainable Finance Disclosure Regulation came into force, requiring asset managers, pension funds and insurers to disclose how they consider ESG risks in their investment decisions in order to prevent greenwashing of financial advice.

In February this year, the European Commission released its long-awaited draft regulation on corporate sustainability and due diligence, which appears to be the current high watermark in proposed ESG regulation. The draft regulation has been met with some opposition, with critics suggesting it is not risk-based and may pressure some businesses to simply withdraw from certain markets rather than address the more stringent regulatory expectations. As drafted, it would require businesses to assess the actual and potential environmental and human rights impacts of their operations and supply chains, take action to mitigate and remedy those impacts and communicate these matters publicly. A failure to comply could result in administrative penalties and civil liability.

In July 2022, the Monetary Authority of Singapore released new disclosure requirements for ESG funds, which come into effect from January 2023 and specifically seek to reduce greenwashing risks. This follows an observation by Reuters that there has been a sharp increase in money flowing into funds that promote misleading ESG credentials.

In 2021, following the creation of a Climate, Environmental, Social and Governance Task Force, the US Securities and Exchange Commission (**SEC**) proposed standardised climate-related disclosure rules for public issuers. The SEC may also require domestic and foreign private issuers to include climate-related disclosures in registration statements and periodic reports.

The UK Competition and Markets Authority published its Green Claims Code in 2021, and has commenced a review of environmental claims in the fashion retail sector. It has signalled a plan to evaluate other sectors in due course, warning that where there is evidence of breaches of consumer law, it may take enforcement action.

Authorities in Germany and the United States have announced investigations into alleged greenwashing claims connected to the promotion of ESG financial products by a large global bank. In May 2022, an investment adviser firm agreed to pay a fine to the US SEC that was associated with allegations that the firm had incorrectly stated all investments in a fund had undergone an ESG quality review when that was not always so.

What does this mean for Australia?

The influence of a stricter global ESG regulatory regime and increasing enforcement activity overseas is likely to flow through to Australian companies, particularly those operating internationally or trading offshore. It also makes the prospect that a similar regulatory framework will be introduced here more likely. There are already indications that the Federal Government may propose legislation about ESG definitions for investment products in the new year. The Australian Securities and Investments Commission (**ASIC**) has also suggested that some form of mandatory ESG regulation appears to be inevitable.[1]

In the absence of regulation (or while it is under development), Australian boards can look to the standards being mandated overseas for the kind of sustainability measures they should consider incorporating into their decision-making, risk processes and approach to disclosure. At the very least, organisations should adopt the recommendations of the Taskforce on Climate-related Financial Disclosures (**TCFD**) as the primary framework for voluntary climate change-related disclosures.

However, the adoption of elevated levels of sustainability-related disclosures comes with increasing expectations on Australian directors to take responsibility for ensuring sustainability-related statements made publicly are truthful, supported by evidence and take into account the material impacts the organisation has on society and the environment.

The duties imposed on directors under section 180 and 181 of the *Corporations Act 2001* (Cth) (**Corporations Act**) require the exercise of care and diligence of a reasonable person in their position and that decisions be made in good faith, for a proper purpose and in the best interests of the company.

Applied to non-financial risk, a director's duty is to take reasonable steps to prevent foreseeable risk of all harm to the company's interests, including its reputation.[2]

Sustainability reporting can be a powerful tool in this respect, holding organisations accountable for actions taken to ensure the company fulfils its ESG commitments and ambitions. However, overstatement of climate credentials may expose directors to action from regulators, shareholders and activists. Directors must also be alive to the risk of being found to be personally liable under the Corporations Act or Australian Consumer Law (**ACL**) for disclosures that are false or misleading.

While Australian regulation is not developing at the same pace as overseas, there are signs that this is changing. To illustrate:

- in November 2021, APRA issued its 'Prudential Practice Guide: CPG 229 'Climate Change Financial Risks';
- in March 2022, ASIC Chair Joseph Longo confirmed that "greenwashing is very much in our sights";[3]
- in June 2022, ASIC's information sheet 'INFO 271: How to avoid greenwashing when offering or promoting sustainability-related products' was released, outlining the existing prohibitions on greenwashing and the regulator's expectations about how managed funds should avoid it; and
- in August 2022, the Financial Services Council released its 'Guidance Note 44: Climate Risk Disclosure in Investment Management', which similarly targets fund managers and how they can avoid greenwashing.

Enforcement action against directors

Holding directors responsible for false or misleading sustainability disclosures signals an attempt to incentivise decision-makers within companies to tackle climate-related issues in a truthful and transparent way.

1 See, for example, Joseph Longo, 'Reflections from the ASIC Chair' (Speech, ASIC, 4 June 2022). Longo alludes to the possibility that Australia may implement mandatory climate disclosures, in light of the steps taken in other jurisdictions, where climate disclosures have been mandated. See also Karen Chester, 'ASIC update at the Financial Services Council member webinar' (Speech, 16 June 2022). Chester remarks that several jurisdictions 'have already taken steps to mandate climate disclosure', and that ASIC wants 'to make sure Australian companies keep up with international standards for climate disclosure'.

2 See *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 at [483]. Also see the written opinion of Bret Walker AO SC and Gerald Ng on the current interpretation of the 'best interests' duty by the Australian Courts – The Australian Institute of Company Directors, *The content of Directors' "Best Interest" Duty'*, 24 February 2022.

3 Joseph Longo, 'ASIC's corporate governance priorities and the year ahead' (Speech, AICD Governance Summit, 3 March 2022).

A 2022 policy report by the Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy into global trends in climate change litigation confirms that cases involving personal responsibility will be on the agenda in the coming year. One notable example of this trend is litigation commenced by activist shareholders overseas who are pursuing allegations that organisations are not doing enough to address climate change, that this is putting the company's long-term value and commercial viability at risk and that directors are therefore acting in breach of their duties. While these claims are unresolved, they suggest that there is an increasing appetite among stakeholders to hold directors liable where they believe the directors are not providing adequate oversight to ensure climate risks are being addressed.

In Australia, while actions have in the past been taken by the Australian Competition and Consumer Commission (**ACCC**) under the ACL for false representations in respect of sustainability related claims,[4] in a recent development, proceedings raising allegations of greenwashing have been commenced by a shareholder advocacy organisation under the ACL. The proceedings challenge the accuracy of the company's net zero emissions target and statements about its proposed actions as part of the energy transition and seek injunctive relief and public declarations to clarify these matters and restrain further publications. The case, the first of its kind in Australia, suggests that shareholder activists may increasingly start to make greenwashing claims themselves, rather than rely on regulatory intervention to test the accuracy and validity of climate-related disclosures.

Shareholders have also sought to rely on section 247A of the Corporations Act to seek access to books that concern the commitments a bank has made in connection with the future funding of thermal coal projects.[5] The shareholders are likely to be using this process, which has historically been deployed to scrutinise the propriety of board action, to seek evidence about the extent of board oversight in relation to climate related public commitments.

Indeed, in their 2021 *Opinion on Climate Change and Directors' Duties* for The Centre For Policy Development, prominent Australian barristers Noel Hutley SC and Sebastian Hartford Davis posited that regulators may rely on 'stepping stone' liability to hold directors personally liable for exposing the entity to a risk of contravention which was foreseeable and for facilitating or failing to prevent that risk.

While each company will have a different risk framework to consider, we are strongly of the view that companies (and their directors) should not resile from their duties to consider the impact of sustainability risks on their businesses, as the failure to take proactive steps to identify and mitigate such risks could expose them to significant liability. The focus should now be on ensuring that the related disclosures are fulsome and not misleading – to falter at this juncture would lead to an unfortunate erosion of stakeholder trust and set back the company's sustainability journey.

Key takeaways for Australian directors

Ensuring climate reporting and disclosures are accurate, holistic and transparent is not a simple task, and increasing scrutiny in this area will be a challenge that Australian boards must be prepared for.

Attaching climate disclosures to future enterprise value poses its own set of challenges in Australia. Boards must exercise caution when making these forward-looking statements. Recent cases illustrate the importance of having a clear, implementable plan to achieve those commitments in order to demonstrate there is a reasonable basis for the view taken. Similarly, ongoing monitoring of adherence to targets or predictions is essential to avoid a need for corrective statements. Where a departure from the target is identified, negative disclosures should be addressed promptly and directly.

While this will inevitably be challenging, there is a consensus among regulators and industry professionals that transparency is what matters most.

4 See for example *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166.

5 *Guy Abrahams & Kim Abrahams v Commonwealth Bank of Australia ACN 123123124* (Federal Court, NSD864/2021, commenced 26 August 2021).

Managing greenwashing risks – DOs and DON'Ts

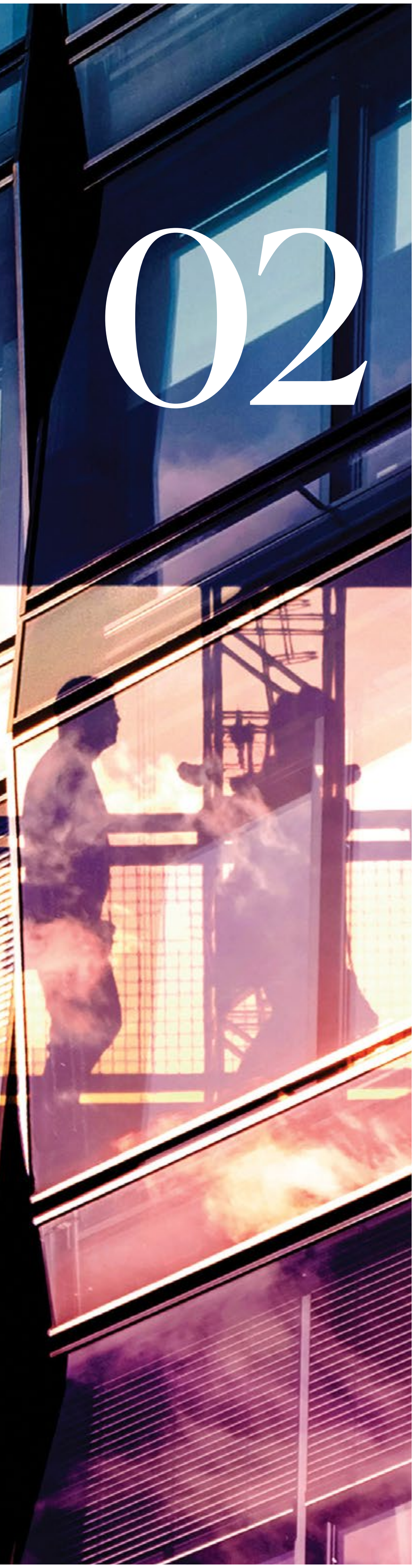
When evaluating a public statement for greenwashing risk, **DO** familiarise yourself with ASIC's 'How To' guidance in Information Sheet 271, which has broader application than sustainability-related products issued by funds.

Prior to signing off on sustainability targets (i.e. forward-looking statements) **DO** ensure:

1. It is clear the matters in the statements are based on information available at the time and that information is accurate and can be substantiated.
2. There is a reasonable basis for the target (including statements about the plan to achieve the target) and all relevant assumptions are disclosed.
3. There are processes in place to ensure ongoing compliance with continuous disclosure obligations (i.e. monitoring of the plan and target to identify material deviations).

DON'T think of sustainability reporting as a marketing document. It needs to paint a clear and accurate picture of efforts to address sustainability risks (including any limitations or challenges).

For directors and those advising them, **DO** think about allocating more time and resources to sustainability management and education.



Emerging trends in Australian regulatory enforcement

By **Mark Wilks**, Head of Commercial Litigation, **Felicity Healy**, Partner and **Steven Rice**, Partner

While the appropriate degree of regulatory oversight and intervention is the subject of much debate, regulation is accepted as being necessary to aid a properly functioning economy – whether by promoting conduct that meets societal expectations or by passing on the economic costs of those actions that create social harm.

By understanding emerging trends in enforcement, organisations can make informed decisions about whether there is a need to shift resources to those areas of most relevance or interest to regulators.

One feature common to almost all regulated industries in Australia is the steadily increasing complexity of the regulatory environment and consequent soaring compliance costs.

The ability to carefully calibrate and balance cost pressures with appropriate risk appetite remains, for some, something of a dark art. As expected, these costs will exponentially increase when an organisation operates in an industry that is the subject of heightened regulatory oversight. However, by staying in front of regulatory trends and embedding a positive risk culture, many organisations will improve their ability to smooth out peaks in compliance costs and ameliorate the prospects of avoiding enforcement activity.

Below, we identify three emerging trends in regulatory enforcement that apply across a range of sectors, and outline possible steps organisations can take now to minimise the likelihood of being the subject of oversight – and mitigate detriment in the event that enforcement action is taken.

Trend 1 – Direction from the top and close collaboration between regulators

While primary motivations may differ, regulators face many of the same costs pressures of the private sector. However, regulators must also contend with high levels of scrutiny and political and public expectations that those regulators will identify and punish all instances of corporate wrongdoing and misconduct. To achieve this, regulators are required to make strategic decisions about the areas they wish to target and the tools they intend to use to do so.

Leadership within a regulator is critically important for the setting of strategic direction and enforcement priorities. The Australian market is carefully calibrating the impact of a number of recent changes to the leadership of some of Australia's most visible regulators, and a new Federal Government. These changes make it challenging to extrapolate nuances in the approach that will be adopted, but subtle changes are already being observed.

While it may be too early to see the impact that newly appointed Member of the Australian Prudential Regulation Authority (**APRA**) Margaret Cole and Chair of the Australian Competition and Consumer Commission (**ACCC**) Gina Cass-Gottleib will have, Australian Securities and Investments Commission (**ASIC**) Chair Joseph Longo has publicly committed to "enforcing the law using all of [ASIC's] regulatory tools to litigate and act against misconduct" and has quietly distanced himself from the regulator's former 'Why not litigate' mantra.

ASIC in particular continues to broaden its focus beyond seeking enforcement remedies in respect to 'traditional' provisions to include more novel causes of action. This has seen ASIC move from pursuing alleged breaches of the 'efficiently, honestly and fairly' obligation,[1] the prohibitions on misleading or deceptive conduct[2] and unconscionability[3] to taking action in relation to defective systems and inadequate controls. This has been driven by ASIC's belief that many corporations rely on outdated and bolted-on systems, which have limited functionality to provide oversight or proper record-keeping, and that this makes them particularly prone to cyber attacks. The industries of most interest to regulators continue to be those where there is an element of customer vulnerability or asymmetric information which can be exploited by sophisticated algorithms able to discretely manipulate data to influence decision-making.

A greater inter-reliance of regulators leading to the sharing of investigative functions – including between ACCC and ASIC – has also allowed resources to be deployed in a more strategic manner. One of the less well-known provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) for example, is the power under section 102 which permits ASIC to delegate many of its powers to a staff member of the ACCC. Likewise, section 26 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) permits most of the powers of the ACCC to be delegated to ASIC staff members. We anticipate that these powers will be used more frequently over the short to medium-term and expect to see even greater information sharing between the two regulators.

Trend 2 – Greater focus on individual punishment

In the past, the focus of regulatory enforcement action tended to be at the organisational level, with regulators rarely resorting to criminal prosecution of individuals. However, recent initiatives by both the ACCC and ASIC demonstrate a clear push to identify and punish misconduct at an individual level. For example, in what was a highly visible attempt by the ACCC to criminally prosecute the individuals said to be the masterminds of market manipulation, the Commonwealth Director of Public Prosecutions (**CDPP**) laid criminal cartel charges against three banking and financial services companies and criminal charges against a number of senior executives in June 2018, following an investigation and referral by the ACCC (all proceedings were recently abandoned by the CDPP and ACCC).

1 *Corporations Act 2001* (Cth), section 912D.
2 *Corporations Act 2001* (Cth), section 1041H; *Australian Securities and Investments Commission Act 2001* (Cth), section 12AD.
3 *Australian Securities and Investments Commission Act 2001* (Cth), section 12CB; *Australian Consumer Law*, section 21.

Equally, ASIC has put enormous effort into increasing the number of banning and disqualification orders it imposes on company directors and senior executives in financial services, who it is asserted are an ongoing threat to investors and consumers. Banning orders of this nature have very serious consequences given they often prevent an individual from working in their chosen profession, sometimes indefinitely.

Individuals who are appointed as directors (including subsidiaries in a corporate group) should keep in mind the potential personal exposure they have. For those officeholders exiting an organisation, it may be helpful to seek details of their insurance position and determine whether an entry into co-operation agreement is necessary. It can often seem obvious with hindsight, but difficulties in accessing relevant corporate information can significantly complicate the defence of enforcement proceedings.

Trend 3 – The rise of non-traditional techniques to signal enforcement priorities

Following public statements from ASIC that it has now closed all remaining issues arising out of the Financial Services Royal Commission, there has unsurprisingly been a notable decrease in the number of new enforcement proceedings and regulatory investigations being commenced by ASIC over the last 12 months.

It was surmised that the recent introduction of the 'reportable situations' regime might create a second wave of litigation stemming from the increase in data that ASIC would receive, which it hoped would identify industry trends and provide early alerts of serious misconduct. However, flaws in the design of the regime, inconsistent approaches to reporting and a massive influx of reports has rendered the regime in need of refinement, a point somewhat acknowledged by ASIC in its 10 August 2022 media release, 22-214MR 'ASIC's approach to breach reporting: implementation of reportable situations regime'.

ASIC has also recently shown an increased willingness to deploy its administrative powers, such as stop orders and banning orders, to punish misconduct. Remedies of this kind are unusual in the sense that ASIC acts effectively as both investigator and adjudicator. These orders are also not subject to the same judicial oversight that court proceedings would be, nor are the processes bound by strict rules of evidence. However, given the control ASIC exercises over the process, use of these methods will likely continue to increase. It has highlighted the importance of ensuring that examinees are legally represented and that they do not simply accept the propositions put to them by ASIC as an easy way out.

Over the last 12 months, ASIC has also adopted a number of more novel enforcement techniques, outside of the usual traditional regulatory toolkit, aimed at clearly signalling to the market ASIC's expectations and those areas of most interest to the regulator. Measures include sending an open letter to ASX CEOs reminding them of their obligations to comply with whistleblowing legislation and posting messages on behalf of the regulator in chat rooms warning of possible criminality in respect of 'pump and dump' strategies. By tracking these more informal measures, organisations can take proactive steps well in advance of enforcement action.

By understanding emerging trends in enforcement, organisations can make informed decisions about whether there is a need to shift resources to those areas of most relevance or interest to regulators. Acting on clear signalling can also carefully avoid the very expensive task of responding to a regulatory investigation and ensure enforcement action is deemed unnecessary.

Fostering relationships with regulators

By **Mark McCowan**, Head of Competition and **Ian Reynolds**, Partner

It is common for businesses to perceive, and treat, regulators as hostile adversaries – and they often are. However, for many large and complex organisations, engagement with regulators like the Australian Competition and Consumer Commission (ACCC) is a necessary and increasingly frequent activity.

In that environment, to what extent is there merit in fostering an organisation's relationship with a regulator, and are trust and transparency a relevant currency?

Business' engagement with the regulators like the ACCC can take many and varied forms, including merger reviews, industry inquiries, authorisation processes and enforcement investigations and litigation – and in each case, a business may be the target / subject of the ACCC process or an interested third-party.

There has been a clear trend in recent years towards the ACCC becoming generally less trusting and more sceptical in its interactions with businesses and pushing for greater structure and formality in its processes. For instance, the ACCC is lobbying for merger reforms to impose compulsory filing and information requirements, is making greater use of its compulsory information gathering powers (including to obtain sworn oral evidence from executives), is now routinely seeking production of all documents produced to other agencies in global merger review processes, and has implemented a new process to require privilege claims made in relation to documents withheld from the ACCC to be identified and justified.

Trust is also a two-way street, and the ACCC relies to a degree on the trust and goodwill of businesses (as well as a healthy dose of self-interest) to make its processes work, including in encouraging self-reporting, immunity and leniency applications, and in soliciting submissions and commercially sensitive information from third parties in merger and enforcement processes.

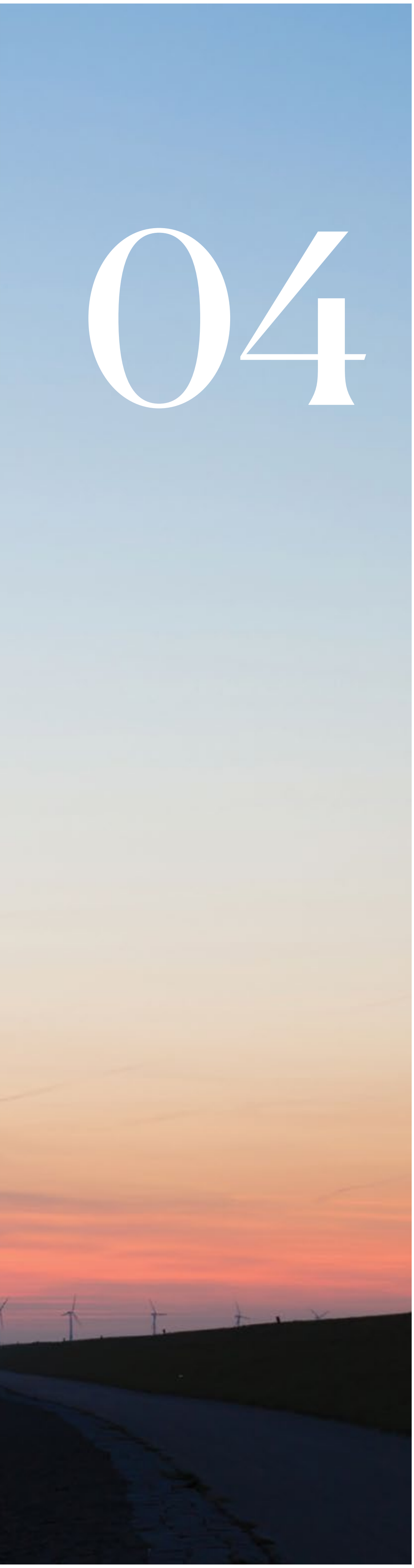
While it is awkward to talk about having a 'relationship' with a government enforcement agency with 1,300 employees, we regularly perceive clients with different histories, or approaches to engaging, with the ACCC being treated with differing degrees of trust or suspicion. We observe that, in otherwise similar situations, some clients are treated with a degree of hostility and suspicion, and others enjoy a more open dialogue with the ACCC and find their submissions more likely to be taken at face value.

While the merits of argument should and usually do carry the day, regulators' decisions are made by people and relationships are important. The ACCC has clear enforcement priorities, and various internal processes to drive robustness and consistency in decision-making, but it is not monolithic. The views formed by ACCC staff and Commissioners, including regarding the conduct of investigations, are inevitably and unavoidably influenced by their assessment of the trustworthiness and integrity of the organisations and advisors that provide information to it, which is in turn based upon relational factors. It is possible to have meaningful personal relationships with ACCC staff and Commissioners with whom you interact regularly, and organisations and advisors can also develop reputations (favourable or unfavourable) with the regulator.

> “Even for businesses under intense regulatory scrutiny, there are several ways to foster respectful and constructive relationships with regulators.

Even for businesses under intense regulatory scrutiny, there are several ways to foster respectful and constructive relationships with regulators:

- Value the business’ credibility and reputation within the regulator as a forthright and reliable organisation. There are many opportunities to be ‘sharp’ in providing information to regulators (without being inaccurate or misleading), but the potential longer-term risks to the business’ relationship with the regulator need to be considered. For the same reason, always verify factual information that is provided to the ACCC and avoid strained or implausible arguments that are poorly supported by evidence.
- Recognise the mutuality in the relationship with regulators over the longer term. Sometimes there is merit in assisting the ACCC in circumstances where the business is indifferent, but the assistance is important for the work of the ACCC.
- Be strategic about the person or people within a business that ‘owns’, or is primarily responsible for, engagement with a particular regulator, and seek to provide continuity where possible. Also, recognise the potential risks in non-legal employees owning relationships with regulators – while government affairs and policy professionals are often more adept at relationship management, there are significant trade-offs in terms of protecting privilege and being able to identify legal hazards that emerge from policy engagements.
- Be transparent about the commercial rationale for a transaction or other proposal. Vague, aspirational statements often serve only to arouse suspicion about ‘what’s really going on’.
- Choose advisors who care about their relationships with the regulators, and who value their personal credibility and reputation.
- Never lose sight of the fact that regulators are first and foremost enforcement agencies.



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Subsea cable interconnector projects: an introduction to risks and opportunities

By **Andrew Stephenson**, Head of Projects, **Dr Louise Camenzuli**, Head of Environment and Planning and **Nastasja Suhadolnik**, Head of Arbitration

As governments work towards their climate goals and traditional sources of energy are replaced by renewable ones, energy infrastructure is increasingly moving offshore. Offshore solar and wind projects provide examples of a growing trend, with other nascent ocean energy technologies quickly emerging. Alongside power generation, appropriate deepwater transmission infrastructure will be required to export clean energy across long distances between countries and continents.

Offshore power generation and transmission will require long-term, capital-intensive investments in state-of-the-art infrastructure. This can only be efficiently delivered if there is both trust and transparency in how projects are regulated and risks shared – particularly when it comes to the development of infrastructure beyond areas of national jurisdiction.

Submarine power transmission systems (also referred to as ‘interconnectors’) consist of high-voltage direct current (**HVDC**) submarine cables, which are today a mature technology with an approximate 10,0000 km of cables cumulatively in service worldwide.[1] In Australia, the Basslink interconnector has been in service since 2006, linking the Tasmanian and Victorian grids. Presently, the longest interconnectors globally are in the construction phase, including the EuroAsia Interconnector (a 3,200 km HVDC cable connecting the grids of Israel, Cyprus and Greece) and the North Sea Link (a 720 km subsea HVDC cable connecting the UK and Norway grids).

Below, we explore some of the key issues the proponents of submarine interconnector projects should bear in mind, including:

- the recently introduced legislative framework governing offshore energy transmission infrastructure in Australian Commonwealth waters and the regulatory framework governing power transmission beyond areas of national jurisdiction;
- the main technical and legal risks involved in creating and operating transnational interconnectors; and
- strategies for effective risk allocation and management.

Regulatory frameworks governing offshore energy transmission

Submarine cables within Australian waters are governed by a combination of Commonwealth and state and territory legislation. In June 2022, the *Offshore Energy Infrastructure Act 2021* (Cth) (**OEI Act**) came into force, introducing a new licensing regime applicable to fixed and floating offshore renewable energy generation and transmission infrastructure located within Commonwealth waters. That regime applies alongside others, including those under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), and state or territory frameworks in circumstances where the transmission infrastructure traverses coastal waters (the first three nautical miles from the coastline).

Pursuant to the OEI Act, the installation and operation of submarine cables in Commonwealth waters now requires a transmission and infrastructure licence to be granted by the Federal Minister for Climate Change and Energy. A licence is subject to compliance with regulatory requirements, conditions and a management plan, which must be developed and periodically updated by the licensee. The management plan details how the project will operate to ensure, among other things, that environmental and marine users’ interests are protected.

Regulations made under the OEI Act, which are presently available in draft form, will provide details on a number of key issues, including the criteria for granting a license under the Act. The OEI Act and draft regulations contemplate a number of merits criteria applicants will need to meet, including:

- a demonstration of adequate technical and financial capability;
- a project’s commercial viability (including project costs and returns, and key upstream and downstream supply chain participants); and
- an applicant’s suitability (including the applicant’s corporate governance and compliance history).

Further, according to the draft regulations, the impacts of the proposed project are also to be assessed, including impacts on Australia’s national interest, on security and on existing users of the licence area.

In circumstances where the project will impact on matters of national environmental significance within the Commonwealth seabed area (3 to 200 nautical miles off the coastline of Australia) – for example, Commonwealth-listed threatened marine species – then the proponent must refer the action to the Commonwealth Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) for assessment as to whether the action is a ‘controlled action’ requiring approval under the EPBC Act. The Offshore Renewables Environmental Approvals guidance note recommends obtaining the EPBC Act approval prior to applying for the transmission and infrastructure licence.

The conditions of both the EPBC Act approval and transmission and infrastructure licence will support the preparation of any management plan that will be approved by the Regulator of the OEI Act.

The laying of submarine cables within and beyond Commonwealth waters is also governed by the UN Convention on the Law of the Sea (**UNCLOS**). Pursuant to UNCLOS, in maritime areas outside of coastal states’ territorial seas (extending up to 12 nautical miles from coastline), all states enjoy the freedom to lay, maintain and repair submarine cables.[2] While referred to as a ‘freedom’, the rights are not absolute – they are limited by the rights exercisable by coastal states within their declared Exclusive Economic Zone (**EEZ**) and continental shelf (such as to exploit their natural resources), and other uses (or ‘freedoms’) of the seas exercisable by all other states (such as the freedom of navigation). To the extent submarine cables traverse a coastal state’s EEZ or continental shelf, the exercise of the freedom to lay cables is subject to a number of obligations.

1 J Gordonnat and J Hunt, *Subsea cable key challenges of an intercontinental power link: case study of Australia-Singapore interconnector*, Energy Transitions (2020) 4:169-188, 170.

2 This is also referred to as one of the defined ‘freedoms of the high seas’. The freedom does not apply within a coastal state’s territorial sea, internal waters or archipelagic waters.

These include obligations to have 'due regard' to the rights and duties of the coastal state and the cables or pipelines already laid in the area,[3] and to comply with the laws and regulations governing those areas, which the coastal state may adopt pursuant to UNCLOS. Conversely, coastal states have the right to take 'reasonable measures' to explore and exploit natural resources within their continental shelf boundaries,[4] although such measures cannot unreasonably impede the exercise of other states' freedom to lay or maintain submarine cables.

In waters regulated by UNCLOS, environmental impact assessments are required to be prepared. The United Nations Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction is finalising an international legally binding instrument under UNCLOS which will increase assessment requirements in respect of marine sustainability.[5]

Risks associated with offshore energy transmission infrastructure

Submarine power cable technology has become increasingly more sophisticated over recent decades, but the risk of cable damage and interruption in service remains high. Empirical data shows that most instances of submarine cable damage are caused by external human events such as the dropping of fishing gears, anchors or other objects. These risks are higher in shallower waters. Physical damage can also occur where submarine cables intersect other submarine infrastructure including power and communications cable systems and gas pipelines. Other causes of cable damage include complex submarine conditions and environmental factors, including ocean currents, heat waves and thermal stress, and events such as tsunamis, seismic activities and chemical corrosion. Seabed depth variation and slope gradients present their own set of risks, such as the risk of sediment movement triggered by earthquakes and turbidity currents.

These risks underscore the importance of undertaking detailed geotechnical and seabed surveys during the feasibility stage of a project to determine the appropriate route of the cable and develop an understanding of the seabed topography. The charting of the route amounts to a risk assessment exercise, as it seeks to avoid hazards to the infrastructure due to the geomorphology of the seabed, as well as environmentally significant zones.

Submarine power cables are laid offshore by specially designed 'cable laying vessels' (or '**CLVs**'). CLVs can carry only a certain length of cable per shift and may require several trips back to the manufacturing facility to complete cable installation, any of which may be affected by factors such as weather conditions and restrictions imposed to protect marine life.

The laying of a cable in deepwater presents additional challenges. While the risk of cable damage from external human events is lower (for which reason cables in deep waters are typically surface-laid and not buried), the operation is significantly more complex and cables are often damaged during installation. The repair of cables in deepwater sections is also more challenging. Repairs are done on vessels offshore and ultimately result in additional length of cable being installed. Repairing a section of cable typically requires that a corridor of a sufficient width be available on either side of the cable route for the replacement cable to be laid (typically perpendicular to the initial cable route).[6]

As with other major projects, environmental approvals are a key component of an interconnector project and may take significant time to be prepared, assessed and approved. This is particularly so given the overlay of UNCLOS, the EPBC Act and state and territory environmental laws, which will require a significant degree of coordination. A key focus of the assessment process involves the risk of cable operations disturbing the marine environment, including reefs and other fragile ecosystems. Heat loss and physical disturbances in certain marine areas may also require closer analysis of the cumulative impacts on the environment and, as a consequence, may attract environmental approval conditions to mitigate and manage this issue. The State of New York commissioned an Environmental Sensitivity Analysis for offshore wind projects to inform a Masterplan. The analyses identified receptors, i.e. fish and turtles, and the stressors on these receptors during each stage of the project process, which informed a sensitivity model. These types of sensitivity analyses could be required in Australia when seeking an environmental approval for any type of infrastructure located within the marine environment. Any such analyses would support transparency around environmental impacts in Australian waters, particularly if there is a proliferation of these types of projects.

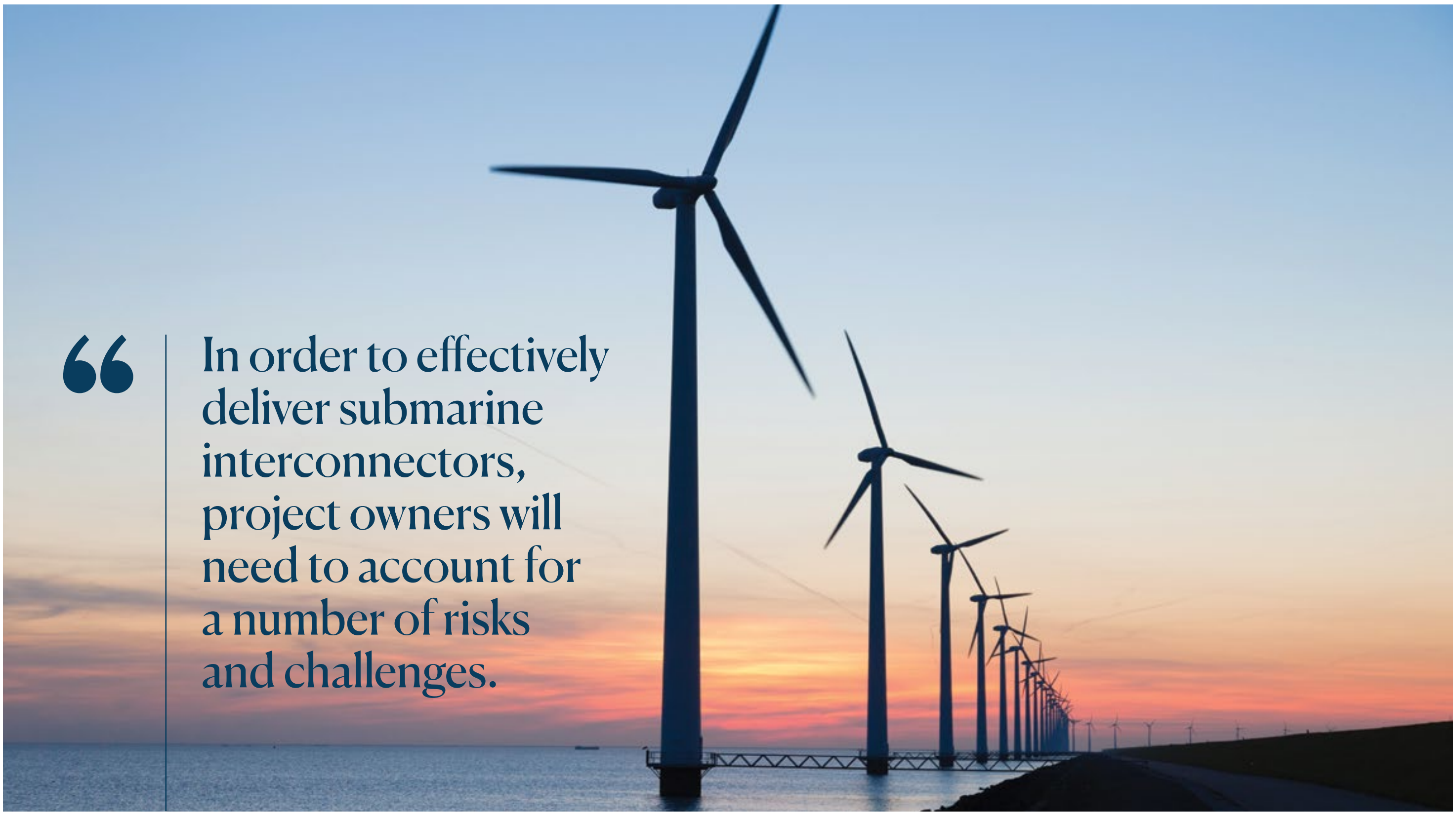
Relevantly, assessment and reporting on cumulative environmental impacts are key recommendations of the Final Report of the Independent Review of the EPBC Act (released October 2020) (**Samuel Review**) with the new Federal Labor Government refocusing its attention on the recommendations as part of a wider federal environmental reform agenda.

3 UNCLOS Articles 58(3) and 79(5).

4 UNCLOS Article 79(2).

5 See generally the work of the Intergovernmental Conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/239).

6 J Gordonnat and J Hunt, S*ubsea cable key challenges of an intercontinental power link: case study of Australia-Singapore interconnector*, Energy Transitions (2020) 4:169-188, 177.



Another aspect of offshore development that requires a significant degree of trust and transparency is the co-existence of marine infrastructure with native title rights and the rights of First Nations people. There is likely to be an increased focus on upfront engagement with First Nations people when developing major infrastructure projects in the future, and an emphasis on obtaining free, prior and informed consent (or **FPIC**).

The foregoing risks and challenges are exacerbated in the case of transnational interconnectors due to the fact that cable repair activities must be undertaken in areas under the jurisdiction of a foreign state. Particular problems can arise where the cable passes through areas designated for the development of hydrocarbons, as oil and gas exploitation is prioritised by coastal states over cable infrastructure. In some instances, cable owners have had to compensate a hydrocarbon concessionaire in order to be able to transit the area covered by the concession.[7]

Further risks involve a possible withdrawal of necessary permits or licenses due to non-compliance with regulatory requirements or marine damage, a failure by the coastal state to use statutory means to protect the cable route or the coastal state's failure to exercise due diligence to prevent cable damage by third parties. Politically-inspired events and governmental actions adopted by the coastal state may also have a material adverse effect on the operation of an interconnector, interfere with cable repair operations, or otherwise hamper the continued operation of the cable.

Risk management and sharing

How are the risks associated with offshore energy transmission infrastructure to be shared and managed?

Proponents of submarine interconnector projects should bear in mind the following key issues:

1. **Projects of this nature require a satisfactory revenue stream**. Accordingly, the power purchase agreement (**PPA**) is of fundamental economic importance. From the purchaser's point of view, the reliable delivery of power is also essential. The risk of outages (both planned and unplanned) needs to be dealt with comprehensively in the PPA. Consideration should be given to whether the project owner must have at all relevant times ships and other equipment necessary on standby to rectify any damage to the cable as quickly as possible (and in locations proximate to the interconnector route). It is common for the PPA agreement to deal with this expressly. The intention is to minimise disruption to both the purchaser of the power and to the revenue of the project owner. Consideration also needs to be given to the extent of force majeure relief in circumstances additional to the environmental and other usual force majeure events discussed on the following page.

7 Yvan Logchem, *Submarine Telecommunication Cables in Disputed Maritime Areas* (2014) 45 Ocean Development & International Law 107, 109.

2. **Cable protection typically requires the balancing of various interests and risks**. To protect against physical damage, submarine cables are typically buried under the seabed (typically 1.5 – 1.6m deep) in shallower waters, which requires specific equipment. Cable protection at the point of cable or pipeline crossing requires additional protective measures which may be provided by installing protective structures such as rock or concrete mattresses.[8] Deep cable burial, while potentially being more secure, can also harm the cable by reason of temperature rise and corrosion from the seabed.[9]
3. **Crossing agreements may need to be entered into**. Where submarine cables cross other submarine infrastructure, it is common for the operators to enter into crossing agreements which define mutually capped indemnities against damage caused by the other party's operations. Thus, for example, if pollution is caused due to a power cable damaging a pipeline, liability as between the pipeline and cable owners will typically be determined under the crossing agreements between them.
4. **The specific risks in play require a careful negotiation of the contractual risk allocation, as well as appropriate insurances**. Consideration should be given to contractual risk sharing or transfer to the party best placed to manage the risk, in particular in respect of environmental and third party events that may impact the cable. There will usually be relief or force majeure events negotiated into the contractual arrangement which provide for risk sharing in the event that the cable cannot operate for a period due to environmental events external to the project. As noted, responsibility for damage caused by competing uses of the sea floor may be dealt with in the crossing agreements between submarine infrastructure owners.
5. **Contractual environmental liabilities should be clearly identified, including with respect to enforcement action for environmental incidents, breach of environmental approvals and decommissioning requirements**. There are a number of regulators that may be involved in any such enforcement action including the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**), state and territory environment protection authorities and, in the future, a Federal environmental protection agency (which is yet to be established but is one of the proposals under the Federal Government's environmental reform agenda).
6. **The program of works and risk allocation should account for the specific risks of delay involved in offshore cable laying and operation**. These risks include potential delays resulting from (for example) permit processes, weather conditions, the availability and capacity of material and machinery (including CLVs), transport, cable damage or unilateral adverse actions of a coastal state government.
7. **Where the interconnector traverses the jurisdiction of several states, successful and continuous engagement with the coastal state with prescriptive and enforcement jurisdiction over the relevant maritime areas will be critical to ensure the long-term success of the project**. The cable owner may require permits or authorisations from the coastal state for the surveying and laying, maintenance and repair of submarine cables. The coastal state can alter or implement laws that impact the operation and maintenance of the cables, or restrict cable maintenance or repair activities. Political risk insurance and protections available under investment treaties should be explored to ensure that the cable owner is protected against the political risks involved when operating in a foreign jurisdiction. Ideally, there should be an investment treaty in force between the home state of the cable owner and each coastal state along the cable route. The treaty should have provisions that allow the cable owner to seek compensation from the coastal state before an independent panel of arbitrators in the event of any adverse acts or omissions by the coastal state that might impede the laying, maintenance or repair of the submarine cable. In considering the best available treaty protections, consideration must be given to the territorial scope of any applicable treaties and, in particular, whether the relevant treaty applies to the trajectory of the cable through maritime areas under the costal state jurisdiction.[10]

The foregoing overview provides but a sample of risks and challenges project owners will need to account for in developing contracting strategies and risk mitigation tools to effectively deliver submarine interconnectors. The best contracting strategy will ultimately depend on a combination of factors, including (but not limited to) a project's individual characteristics, cable length and the water depth along the cable route, the relevant coastal jurisdictions and the political risk of operating within those jurisdictions. This will require a holistic assessment a project's risk profile, and unique and innovative approaches to project planning, financing and delivery.

8 J Gordonnat and J Hunt, *Subsea cable key challenges of an intercontinental power link: case study of Australia-Singapore interconnector*, Energy Transitions (2020) 4:169-188, 175.

9 W Wang, X Yan, S Li, L Zhang, J Ouyang and X Ni, *Failure of submarine cables used in high-voltage power transmission: Characteristics, mechanisms, key issues and prospects 2021* (15) IET Generation, Transmission & Distribution 1387, 1397.

10 For further detail on the territorial scope of investment treaties see the Corrs article *'Investment in disputed territories: lessons for investors'*, published 4 August 2022, available at corrs.com.au.

The transparency differentiator: data regulation in a digitised world

By **James North**, Head of Technology, Media and Telecommunications, **Eugenia Kolivos**, Head of Intellectual Property, **James Wallace**, Senior Associate and **Isabella Barrett**, Law Graduate

Customer data has long been viewed by many businesses as an asset to be either commercialised or protected as a competitive advantage. While this has led to a proliferation of new product developments and better targeted marketing for consumers, a fundamental shift in how people think about and value their personal information is occurring.

Consumers are increasingly demanding greater transparency around how their data is collected and used, coinciding with a global trend towards regulatory reform that is giving them more control over the way their data is handled. In effect, transparency has become a product differentiator, with many businesses now promoting features that offer consumers greater control over data collection and handling practices.

Data generation is currently increasing at exponential rates, driven by the rise of e-commerce, continued growth of digital platforms and further digitisation as a result of 5G connected devices. Alongside growing business demand for 'deep data sets' to inform decision-making and power artificial intelligence (**AI**) applications, more data is being collected from consumers and sourced from third parties through complex data sharing arrangements.

Many businesses have tended to view customer data as their own proprietary information. Under this 'proprietary model', customer data is seen as a business asset that is either to be commercialised or protected as a competitive advantage.

But a growing tension with consumer demands for transparency is beginning to shift business thinking and the manner in which products and services are marketed, and the 'proprietary model' is also being disrupted by changing privacy regulations. Privacy law reform is occurring on a global scale, with many of the reforms being driven by different jurisdictions harmonising their laws with the protections under the European Union (**EU**) General Data Protection Regulation (**GDPR**).

Globally, regulatory reforms tend to be centred on two themes:

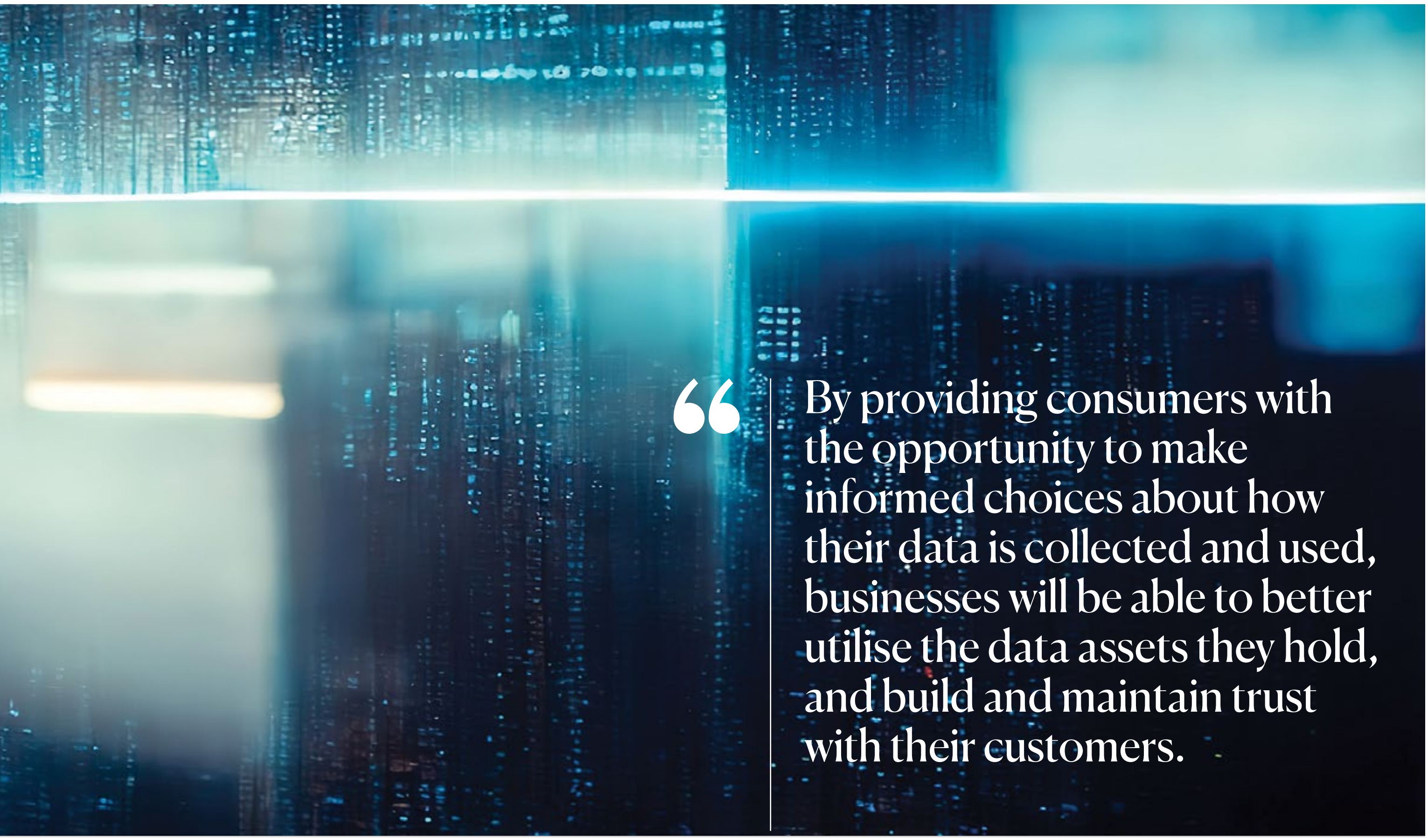
1. Ensuring consumers have an informed choice about the collection and use of their personal information.
2. New rights for consumers to control the data businesses collect about them.

The GDPR requires that individuals be informed and consent to the collection and use of their personal data and that this consent be given in a clear and affirmative act. It is not sufficient to rely on the silence of the consumer or pre-checked default settings. Further, where the processing of personal information has multiple purposes, consent must be given for all of them and not bundled.

The Australian approach

Australian privacy law is expected to adopt this approach and be more prescriptive about what constitutes 'informed consent'. The Federal Government is currently conducting a review of the *Privacy Act 1988* (Cth) as part of its response to the Australian Competition and Consumer Commission (**ACCC**) Digital Platforms Inquiry. The proposed reforms are expected to include the requirement that consent be informed and 'clearly, affirmatively and unambiguously' given for any collection, use and disclosure of personal information that is not necessary to perform the services under the contract to which the consumer is a party. It is also expected that social media services and online platforms will be regulated under a proposed 'Online Privacy Code', which will contain detailed requirements for how user consent is obtained and the purposes for which personal information may be used or disclosed.

Australia's sector-by-sector rollout of the Consumer Data Right (**CDR**) is also expected to effectively prescribe how data may be transferred between competitors at the



express request of the consumer, and has the potential to supersede existing practices of data sharing and data scraping currently leveraged by business.

Further afield

Some jurisdictions have introduced protections that go much further than the GDPR. For example, in the United States, the California Consumer Privacy Act (**CCPA**) creates a right for consumers to know when their personal information is sold and disclosed and to whom, as well as a right for consumers to opt-out of the sale of their information to third parties. This is in addition to a right of erasure of personal information found under both the CCPA and GDPR. There is also a suggestion that the state of California will implement a 'data dividend' that could see companies charged for the information they collect from consumers. These reforms go further than anything currently being considered in Australia, but demonstrate a global trend towards greater individual control over the use of one's personal data.

Regulators across the globe are also turning their attention to the use of AI and the 'deep data sets' required to drive this technology. The proposed EU AI Act aims to regulate the development of AI by providing a framework of obligations for developers, deployers and users that is underpinned by a risk categorisation system. 'High risk' systems would be subject to the most stringent obligations, including that data sets be subject to governance and management practices to identify biases and be checked for inaccuracies, and a requirement to be transparent about when AI is used. These issues are also being considered in Australia, with the Australian Human Rights Commission recently highlighting the human rights risks associated with the use of AI and recommending the introduction of legislation that regulates and effectively prohibits the use of facial recognition technology.

Looking ahead

Going forward, General Counsel should carefully track global privacy reforms, and work closely with Chief Information Officers to establish a data governance framework that enables regulatory compliance. The trend towards combining data from different sources within a business to create a single 'source of truth' will require navigation of complex legal and ethical considerations. Without proper governance, data originally sourced from a customer database may be used by another part of the business for a purpose it was not collected for, resulting in regulatory issues and the erosion of customer trust.

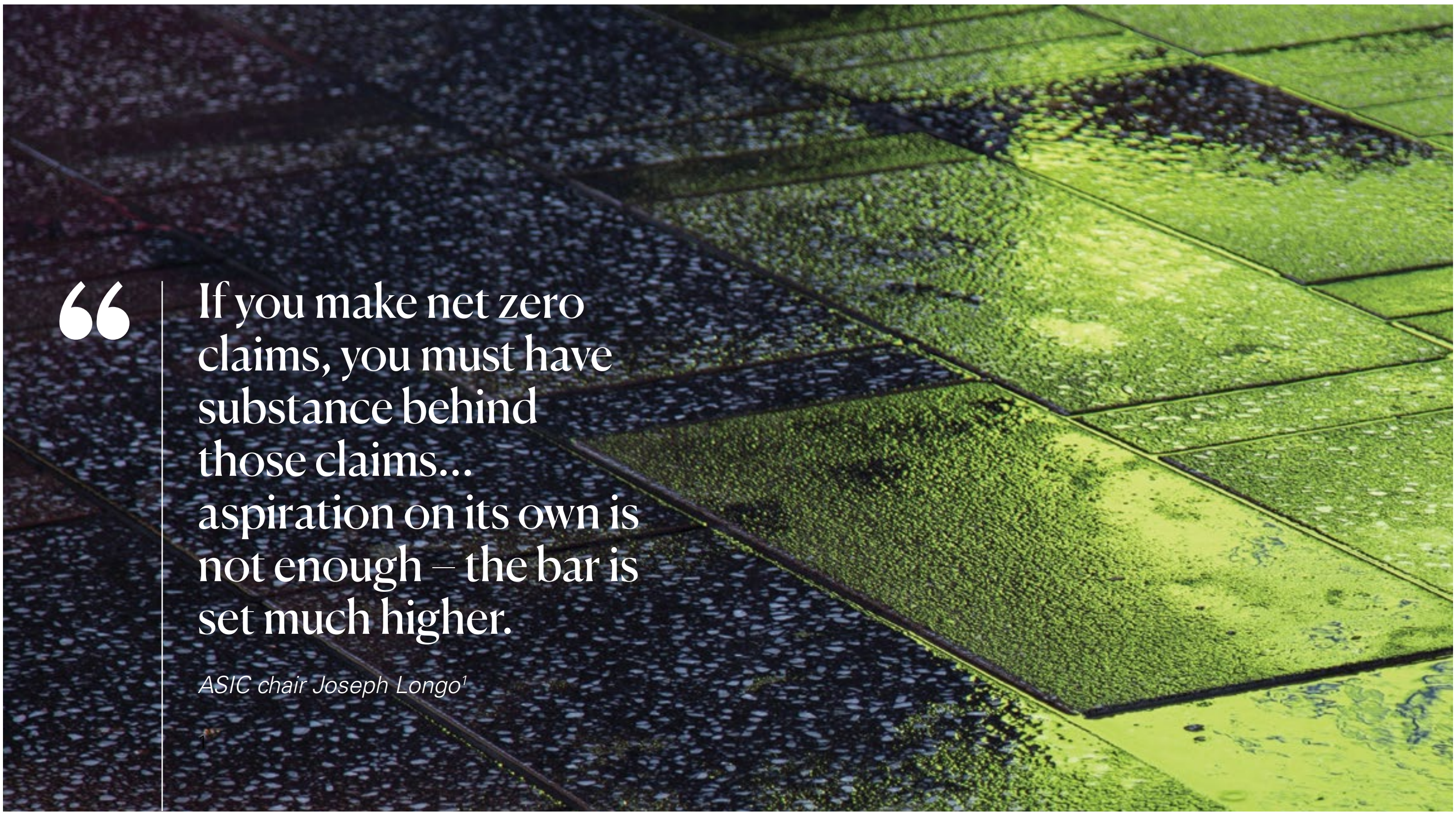
Through sophisticated governance structures, and by providing consumers with the opportunity to make informed choices about how their data is collected and used, businesses will be able to better utilise the data assets they hold, and build and maintain trust with their customers.

Mind the splashback: greenwashing and greywashing in sustainability-linked financing

By **Adam Stapledon**, Head of Banking and Finance, **James Abbott**, Partner and **Emma Avery**, Senior Associate

With an ever-increasing stakeholder focus on environmental, social and governance (**ESG**) outcomes, the corporate world moving to align its objectives with the goal of a net zero carbon economy and an estimated US$1 trillion of sustainable debt expected to be issued this year alone, clear opportunities exist for borrowers and lenders in sustainability-linked financing, both in Australia and internationally.

Accompanying the exponential growth in sustainability-linked financing, however, has been increased scrutiny of the ESG credentials of the parties involved and, in cases where there is a perceived dissonance between reality and the ESG ambitions of the transaction, allegations of 'greenwashing' or 'greywashing'.



The Australian Securities and Investments Commission (**ASIC**) has described greenwashing as ‘the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical’.[2] Whilst this statement was made in the context of ASIC’s guidance for avoiding greenwashing when offering and promoting superannuation and managed funds’ investment products, it is readily applicable to sustainability-linked finance.

‘Greywashing’ is a closely related concept, which involves the setting of a strategy and policies which appear aligned with ESG principles but which are too unambitious, ambiguous or qualified by exceptions and loopholes to result in meaningful change.

Allegations of greenwashing and greywashing have been made against both borrowers and lenders, with those involved in financings of mining (including mining services and supply chain), non-renewable energy and transport companies typically being the target of such claims. Transactions can face such allegations for a variety of reasons, with some common themes being:

- a lack of meaningful, transparent and ambitious ESG targets in the parties’ sustainability policies and strategies, as reflected in the documentation of key performance indicators (**KPIs**) and sustainability performance targets (**SPTs**);
- deficient, inaccurate, or worse, misleading or inflated monitoring, measurement and disclosure of borrower’s performance against KPIs and SPTs; and
- a lack of meaningful consequence (such as an increase in margin, review event or default) where the borrower fails to achieve its KPIs or SPTs.

‘Washing’ can cost more than reputational damage

The most obvious downside of being involved in a financing that is open to allegations of green or greywashing is reputational damage to the lenders, borrower and advisers involved.

This has consequences for the attractiveness of the financial product itself, as well as its integrity and credibility, so much so that earlier this year, the Loan Market Association (**LMA**), Asia Pacific Loan Market Association (**APLMA**) and Loan Syndications and Trading Association (**LSTA**) jointly published *Guidance on Sustainability-Linked Loan Principles*.[3]

1 Joseph Longo, ‘Looking ahead: ASIC’s priorities’ (Speech to the Committee for Economic Development of Australia (CEDA), 23 August 2022).
2 ASIC, ‘22-141MR How to avoid ‘greenwashing’ for superannuation and managed funds’ (Media Release, 14 June 2022)
3 LMA, APLMA and LSTA, *Guidance on Sustainability-Linked Loan Principles* (released March 2022). The LMA, APLMA and the LSTA stated they released the guidance ‘in order to promote the development of this product, and underpin its integrity…to provide market practitioners with clarity on their application and promote a harmonised approach.’

Increasingly, however, participants in sustainability-linked products (whether borrowers or lenders) need to be conscious of scrutiny from, and potential liability to, regulators, shareholders and other stakeholders arising from how they publicise, comply with and report on their sustainability policy / strategy. For example, a number of jurisdictions have codified the obligations on companies to explain and report on how material ESG risks are factored into strategic and operational considerations, and proposed sustainability financial reporting standards contain similar obligations.

In Australia, ASIC's recently published *Corporate Plan 2022-26* is a clear indication that the regulator is focused on supporting 'market integrity through proactive supervision and enforcement of governance, transparency and disclosure standards in relation to sustainable finance'.[4] The plan specifically references greenwashing, with ASIC stating that they 'will take action to prevent harms arising from greenwashing'.[5] ASIC have not wasted any time in implementing this, having publicly confirmed they are conducting at least two investigations into potential greenwashing, including one involving a publicly listed company. This reflects a more general trend away from regulatory guidance and towards codification and enforcement.

Alongside regulator intervention, we have also seen an increase in activist groups commencing novel litigation claims against corporates in respect of their ESG commitments alongside allegations of greenwashing. There are Australian examples of shareholders successfully utilising statutory and court processes to gain access to internal documentation of an Australian corporation and, separately, a major financial institution regarding their investment in fossil fuel projects.

In the case of the corporate, the application was made on the grounds that the company had breached consumer law by misleading investors about its green credentials, and in the case of the financial institution that its participation in fossil fuel projects may contradict its stated policies on commitments to Paris Agreement targets. Such claims will only increase over time, with a logical next step for these proceedings, and other similar recent examples, being the use of the information obtained to launch proceedings, which may include class actions.

The push towards the standardisation of reporting and disclosure and the focus of regulators like ASIC on upholding the integrity of sustainability-linked finance should result in more robust, consistent data becoming available to demonstrate how well corporates are actually meeting their ESG targets.

Likewise, as such sustainability-linked financings start to mature, trends in performance will also become apparent. This may also lead to the inclusion of mechanisms within the financing documentation itself that mandate real consequences (e.g. review event mechanisms, two-way or three-way pricing mechanisms and events of default) for failure to meet SPTs.

Limiting the risks

In the meantime, participants in the sustainability-linked loan market will need to take their own steps to protect their reputations and limit their liability. As a starting point, it is important that the borrower should have (or already be in the process of implementing) a sustainability policy and strategy before commencing a sustainability-linked financing process. The policy and strategy should be clear, transparent and verifiable by actual conduct and outcomes, as this will form the basis for the KPIs and SPTs.

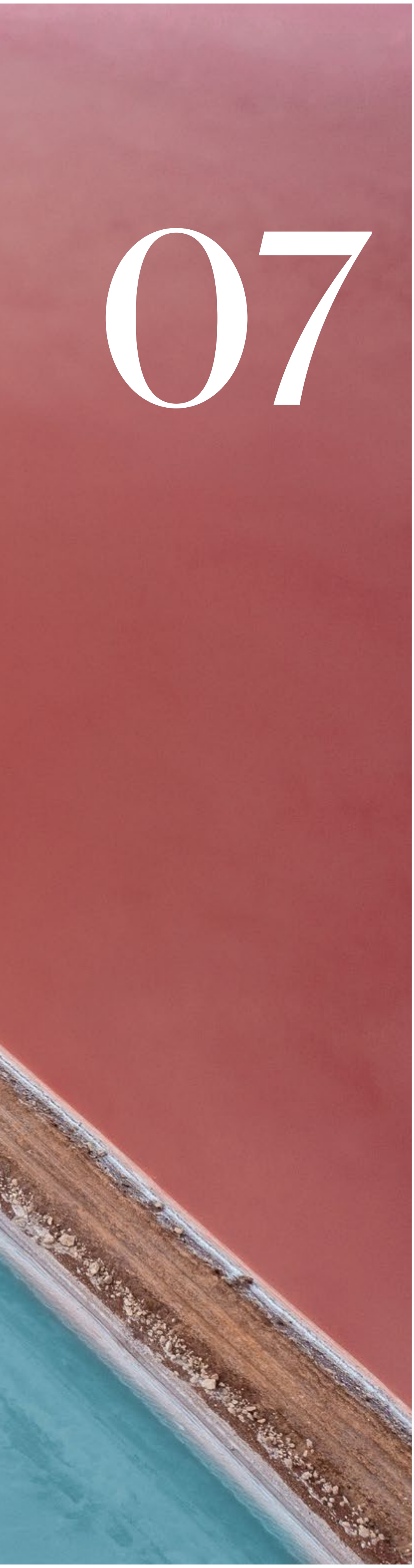
To ensure that the process will withstand scrutiny, the KPIs and SPTs that sit within the financing documentation should be set to ensure that they are:

- relevant and core to ESG factors in the particular borrower's industry;
- material;
- ambitious (i.e. they go beyond 'business as usual')
- future looking;
- verifiable and result in actual improvements;
- scientifically sound and appropriately substantiated; and
- linked to the borrower's revenue driving model.

Having strong sustainability advisers guiding the borrower and lenders, as well as an independent opinion provider, involved upfront (including, for example, the provision of an opinion as a condition precedent) will also assist, and may provide assurance that, among other things, the financing framework is credible and aligned to market principles. Where red flags are raised, lenders need to conduct additional due diligence informed by relevant subject matter expertise. This should be combined with a requirement for ongoing external verification (which is generally a requirement in sustainability-linked loans) on performance against the SPTs.

It is also key to ensure that the reporting and disclosure of performance against the SPTs is transparent (and includes details of the underlying methodology used). To the extent possible, it should be made public. The increasing standardisation of sustainability reporting and mandatory disclosure under standards like those of the International Sustainability Standards Board should assist with this.

4 ASIC, *Corporate Plan 2022-26 – Focus 2022-23* (released August 2022), 4.
5 Ibid, 9.

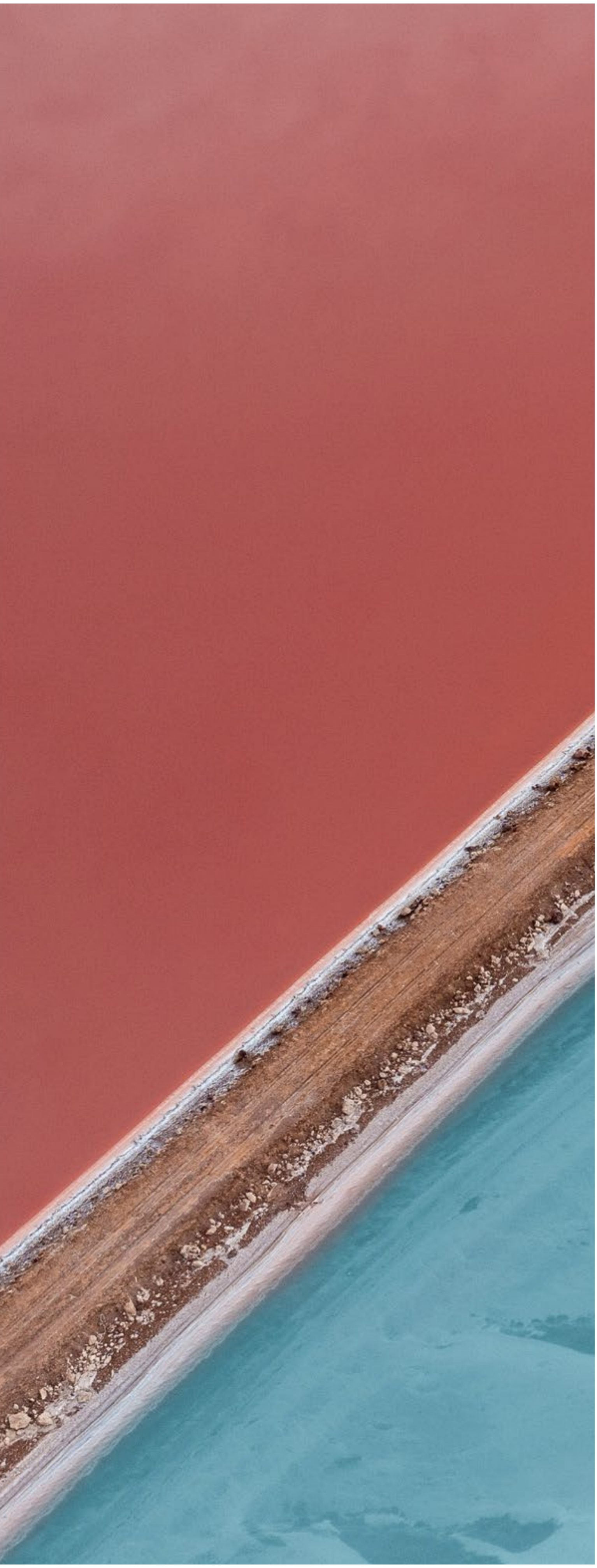


Synergistic ambition: unpacking the Federal Government's environment and climate change reform agenda

By **Dr Louise Camenzuli**, Head of Environment and Planning, **Dr Phoebe Wynn-Pope**, Head of Responsible Business and ESG, and **Julia Green**, Special Counsel

Australia's new Federal Government was elected in May 2022 with a strong mandate to take action on climate change and commit to emission reduction targets in line with the Paris Agreement.

With an ambitious climate change reform agenda that has synergies with an equally ambitious environmental reform agenda, it is clear that the new Government is seeking to restore public and business confidence in the Federal environmental protection regime. What are the implications of this momentum toward increased trust and transparency for business, major projects and human rights?



A common theme in both the State of the Environment Report 2021 (**SoE Report**), released in July 2022, and the Final Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (**Samuel Review**), released in October 2020, is the significant decline in the state of the environment.

The Samuel Review also focuses heavily on building community trust in a broken system:

> “The recommended reforms seek to build community trust that the national environmental laws deliver effective protections and regulate businesses efficiently. The recommendations of the Review provide a path to effective environmental protection and biodiversity conservation, efficient regulation of business and confidence that the Act is working as intended to achieve national important environmental outcomes.
>
> – Samuel Review, Foreword

In order to halt the decline of the environment, mend a broken system and build trust, the Federal Government has made three key commitments:

1. **A formal response to the Samuel Review by the end of 2022**. The Samuel Review was commissioned under the former Federal Government and recommended significant reforms to the EPBC Act.
2. **The implementation of National Environmental Standards (NES)**. The introduction of NES was recommended in the Samuel Review, with a heavy focus on consultation in developing the standards. The NES will identify specific targets around what Australians value from an environmental perspective and what the law needs to protect. It is proposed that the NES would be used by the Federal Minister for the Environment and Water as a decision-making tool and in the development of policies, plans and programs, the objective being increased consistency and improved decision-making that is responsive to community concerns.
3. **The establishment of a Federal Environmental Protection Agency (EPA)**. This will include a compliance and assurance division and an environmental data, information and analysis division.

Implications for business and major projects

The Samuel Review also highlighted that business did not trust that the EPBC Act was delivering for the environment. The NES are an attempt to stem the flow of that lack of trust by providing clear and legally enforceable outcomes that guide decision-making, including for the future assessment and determination of EPBC Act approvals.

There are nine proposed NES, with four identified as priorities:

1. Matters of national environmental significance (**MNES**).
2. Indigenous engagement and participation in decision-making.
3. Compliance and enforcement.
4. Data and information.

The Government has committed to developing NES through consultation. The Samuel Review recommends consultation with states and territories but cautions that 'the process cannot be one of negotiated agreement to accommodate existing rules or development aspirations. To do so would result in a patchwork of protections or rules set at the lowest bar'. We consider that consultation and submissions of states, territories and Indigenous groups could be made public to enhance the transparency of the development of NES, and that the outcome of consultation should not be a setting of standards 'at the lowest bar'.

With a focus on improvements to the conservation and management of MNES, an example of where NES may have a role to play in the EPBC Act approval decision-making process is through increased scrutiny and assessment of the cumulative impacts of an action on MNES. This increased scrutiny will be supported by the preparation of a proposed national plan to monitor and evaluate the outcomes of actions and decisions on each MNES, the objective of which is to instigate a more coordinated, transparent and evidence-based decision-making process for cumulative impacts. It will track all cumulative impacts to the relevant MNES in order to understand the cumulative impacts at the relevant scale (e.g. national, state-side, regional plan areas or project site). With the increasing importance of ESG drivers in investment decisions, regulatory transparency in the Environmental Impact Assessment process and access to information on cumulative impacts of actions will be crucial.

There is also an emphasis on the minimisation of harm to MNES, including employing all reasonable measures to avoid and then mitigate significant impacts and, lastly, to apply appropriate offsets. This requirement, coupled with the increased scrutiny on the integrity of offsets, is generally likely to mean that offsets will be conditioned as a last resort and substantial justification will need to be provided by proponents for their use.

Further, there is a significant emphasis on a more holistic approach to environmental regulation, including through enforcement and compliance. The creation of a new EPA (within the scope of the available constitutional powers) will inevitably result in the increase of regulatory action to ensure compliance and consistency of implementation of approval conditions. A new EPA could play an important role in addressing concerns of corruption and integrity in Australian mining, increasing trust in mining approvals. It could also fill a gap in the EPBC Act by checking the compliance records of proponents and verifying the integrity of Environmental Impact Assessments during the approvals process.

We consider that a key focus of the proposed reforms should also be on the streamlining and harmonisation of environmental assessment and approvals at both a federal and state level. While assessment bilateral agreements are commonplace with states and territories, approval bilateral agreements are not. With the development of NES, approval bilateral agreements will facilitate consistency, enable contextualised and localised decision-making and prevent duplication of conditions.

Implications for Indigenous rights and human rights

The Samuel Review highlighted the failings of the EPBC Act to fulfil the rights of Indigenous Australians in decision-making and to value and incorporate Indigenous knowledge and environmental management practices which have sustained Australian ecosystems for millennia. The SoE Report reinforces this observation and concludes that Indigenous knowledge and participation in the management of the environment and the effects of climate change would lead to improved environmental and human rights outcomes.

The NES, and other EPBC Act reforms proposed by the Samuel Review, will go a significant way towards facilitating Indigenous Australians' participation and engagement in decision-making processes, bolstering cultural heritage protections and integrating Indigenous knowledge alongside Western science in environmental and climate change policy. In particular, the Samuel Review stipulates that the principle of free, prior and informed consent (**FPIC**) is central to the proposed NES for Indigenous engagement and participation in decision-making. FPIC is key to the realisation of the rights of Indigenous peoples to self-determination under international human rights law.

While the Federal Government has not yet committed to implementing all Samuel Review recommendations, the Federal Minister for the Environment and Water The Hon Tanya Plibersek MP has committed to co-designing standalone Federal cultural heritage legislation and incorporating Indigenous knowledge in environmental conservation.

In July 2022, the United Nations General Assembly recognised the right to a clean, healthy and sustainable environment as a universal right, which must be recognised, protected, respected and fulfilled. Many states had already incorporated similar rights into domestic law through their constitution or a bill of human rights. In the absence of a Federal bill of human rights, reforming the EPBC Act to include FPIC principles may assist in fulfilling not only the right to self-determination for Australia's First Nations people, but with facilitating more sensitive environmental approaches and the right of all Australians to a clean, healthy and sustainable environment.

A clear focus on climate change

Signalling the high priority that the new Federal Government is giving to climate change, the Climate Change Bill 2022 was included in its first tranche of bills.

Through the implementation of an annual climate change statement and the provision of advice from the Climate Change Authority on Australia's Nationally Determined Contributions (**NDC**), there is a focus on certainty through target setting and transparency.

Key reforms include:

- emissions reduction targets of 43% on 2005 levels by 2030 and net zero by 2050 (**targets**);
- the relevant Minister must publish an annual climate change statement (**statement**) detailing progress toward the targets, international developments, climate change policy and effectiveness of Commonwealth climate change policies with respect to the targets;
- the Climate Change Authority must provide and publish its advice relating to the statement and, if requested by the Minister, must provide advice on new or updated NDC; and
- the Minister must prepare a written response and, if relevant, reasons for not accepting the advice.

The Climate Change (Consequential Amendments) Bill 2022 seeks to align the functions and objects of various Commonwealth entities and agencies with the targets and NDC. As at the date of publication, both Bills have passed in the lower house and are currently before the Senate Environment and Communications Legislation Committee for inquiry.

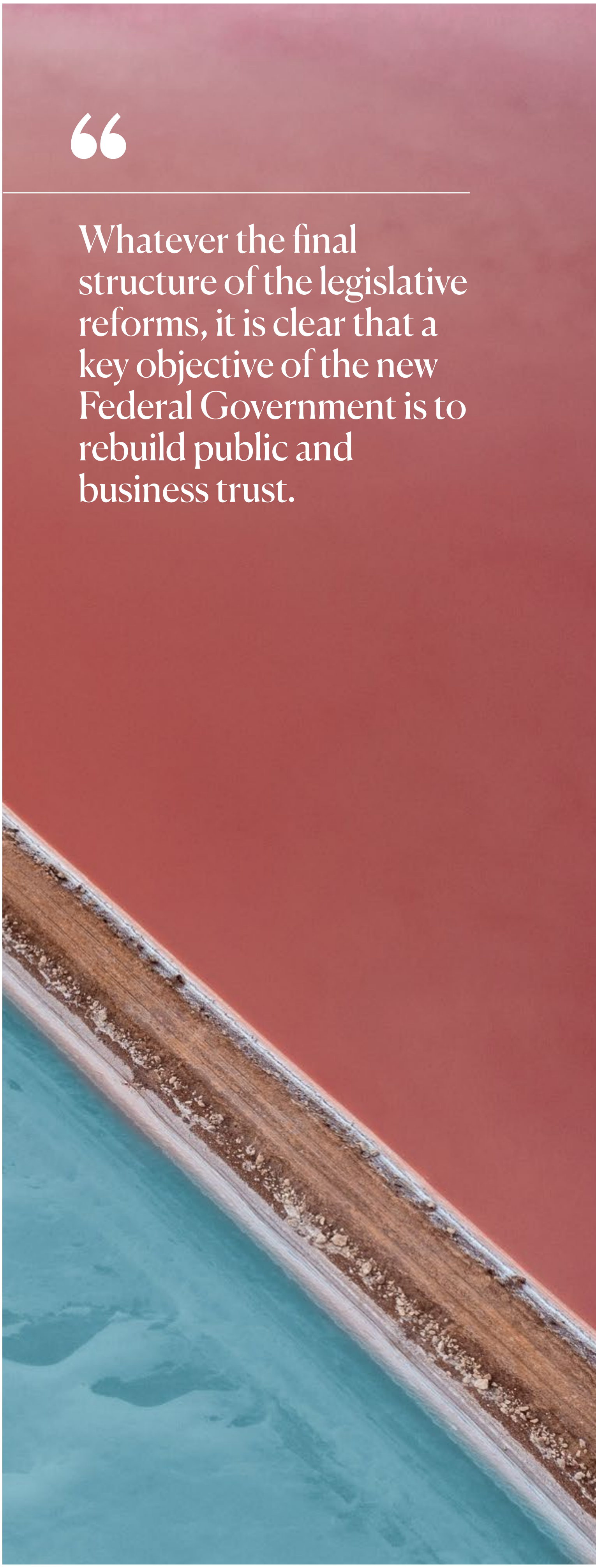
In establishing a legislative platform for climate change management and emissions reduction in Australia, there is renewed focus on the integrity of Australian Carbon Credit Units (**ACCUs**). The Federal Minister for Climate Change and Energy The Hon Chris Bowen MP announced in July 2022 that an independent panel will examine the issue, including whether the scheme's governance arrangements are appropriate and whether its methods for ACCU generation meet offsets integrity standards.

Looking ahead

Given the infancy of the new Federal Government's reform agenda, there are likely to be many twists and turns in implementation. For example, the introduction by the Australian Greens party of a 'climate trigger' bill which would, if adopted, require assessment of the climate impacts of emissions-intensive projects prior to final approval under the EPBC Act.

Given the complexities of the existing federal environmental legal framework, a holistic rather than piecemeal reform agenda is critical to ensure that the appropriate balance is struck between protecting the environment and facilitating development that has merit. This is particularly important in order to support Australia's transition to a low carbon economy given that significant development will be required, such as renewable energy and low emissions technology infrastructure (e.g. offshore wind farms, solar farms, hydrogen facilities and carbon capture and storage development).

Whatever the final structure of the legislative reforms, it is clear that a key objective of the new Federal Government is to rebuild public and business trust. Looking ahead, we are likely to see a strengthening of environmental and climate change regulation, an increase in consistency with the introduction of NES, increased involvement of Indigenous Australians in the development of environmental law and standards at a federal level, and broader enforcement and compliance action taken within the constitutional limits of a new Federal EPA.



Tax in the era of transparency: the ATO's Justified Trust program

By **Rhys Jewell,** Head of Tax

In this era of transparency, which requires that companies devote ever more attention to environmental, social and governance (**ESG**) matters, there are an increasing range of stakeholders – including investors, employees, customers and regulators – that actively evaluate an organisation's identification of and approach to ESG issues.

In the Australian context, there has been much debate regarding the broader social licence of companies to operate, which has extended to a societal expectation that companies pay their fair share of tax in the jurisdiction in which they operate, draw their resources and engage with their customers.

In an environment where government debt levels are increasing, regulators such as the Australian Taxation Office (**ATO**) are likely to increase their audit activity to test compliance with an organisation's tax obligations. Satisfying the social expectations placed on an organisation – which include its approach to tax – requires a building of trust with the relevant revenue authorities and transparency with the community regarding outcomes.

The Australian Commissioner of Taxation long ago put boards on notice that tax risk management and governance is clearly within the purview of the directors. Directors are expected to understand the organisation's approach to tax risk and to diligently prosecute positions adopted in relation to tax matters. Since 2016, the ATO has adopted the concept of 'Justified Trust' from the Organisation for Economic Cooperation and Development (**OECD**) and has applied it to the Top 100 Australian taxpayers (identified by reference to the size of their Australian operations). The link between Justified Trust and ESG is clear: the ATO articulates that the purpose of the program is to build and maintain community confidence that taxpayers are paying the right amount of tax. The ATO does this by seeking objective evidence that would lead a reasonable person to conclude a particular taxpayer paid the right amount of tax.

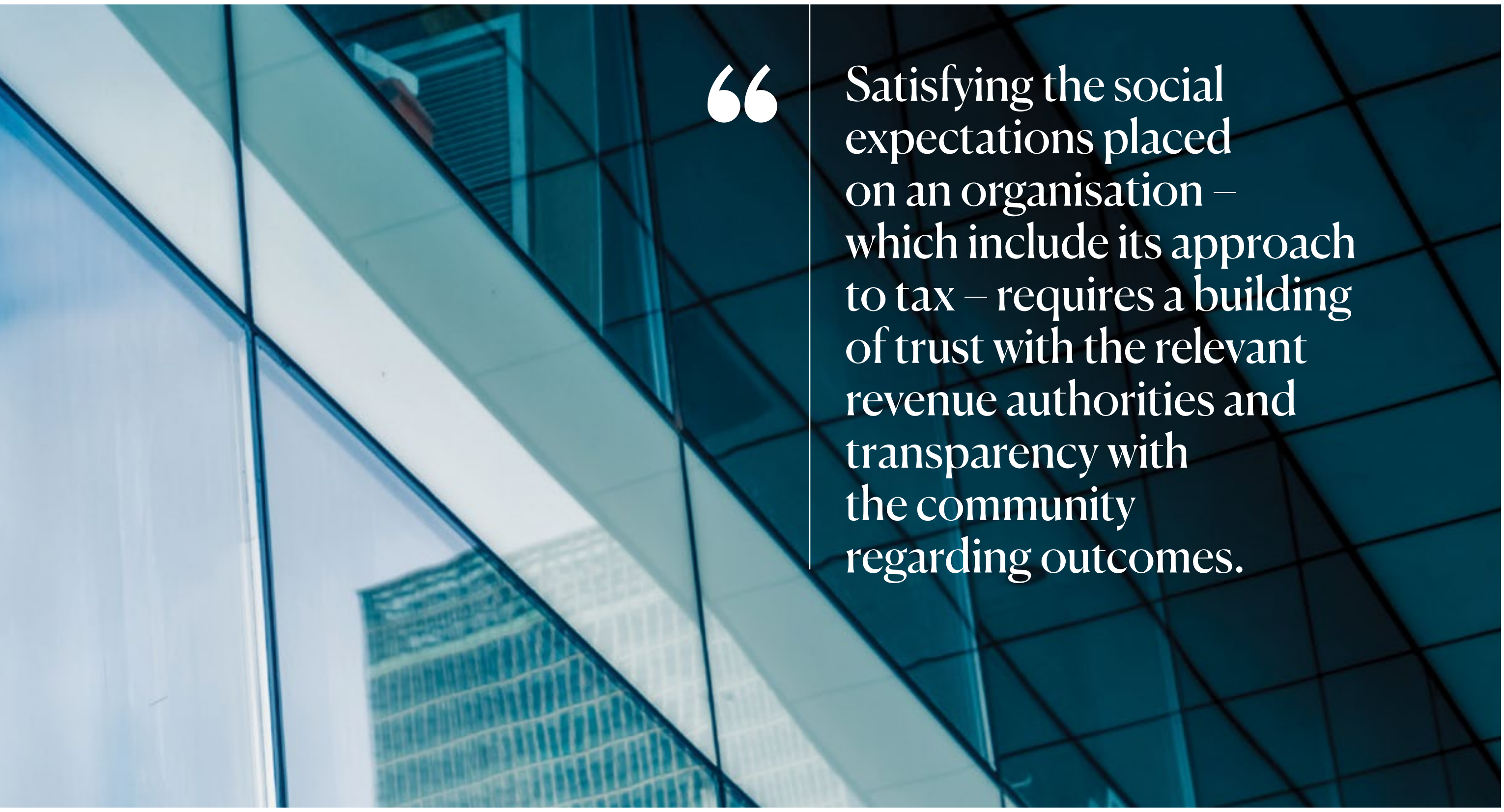
The ATO's review under the Justified Trust program covers the following four areas:

1. Understanding the organisation's tax governance framework (existence, application and testing).
2. Identifying tax risks that the ATO had flagged to the market (e.g. in public rulings or taxpayer alerts).
3. Understanding significant and new transactions.
4. Understanding why the accounting and tax results vary.

There is no doubt that being prepared for, and adopting an accommodating, measured and collaborative approach to, the Justified Trust program will involve a significant investment in the process by the relevant organisation. Obtaining an overall high assurance rating under the program would not mean that there would be less engagement with the ATO, but an organisation could expect that the way in which the ATO engages with them would be improved.

One such improvement would be the prospect of a lighter touch engagement approach from the ATO, known as the 'monitoring and maintenance' approach. Under this approach, the ATO will conduct an annual review for the next two years with a view to maintain its confidence established as part of the initial assessment. The ATO expects a certain degree of proactivity with respect to significant transactions or material changes to the organisation's business, which would involve sharing details in real time.

An organisation that makes a sufficient investment in the Justified Trust program, and particularly those that obtain a high level of assurance such that the ATO adopts the monitoring and maintenance approach, can hold a high degree of confidence that the ATO is comfortable regarding the tax positions the organisation has adopted. It would usually also be reasonable for the directors to be confident that the organisation itself has dedicated the appropriate resources to ensure awareness and understanding of the tax profile of the organisation.



> Satisfying the social expectations placed on an organisation – which include its approach to tax – requires a building of trust with the relevant revenue authorities and transparency with the community regarding outcomes.

Even where an organisation may not achieve the high assurance rating (at least initially), if there has been sufficient investment in the process, there is bound to be some benefit in terms of the incremental increase in trust garnered from the ATO and the identification of areas in which the organisation can improve from a tax risk and governance perspective.

While the ATO cannot publish the assurance rating of an individual taxpayer, an organisation may themselves choose to disclose that rating if it participates in the Voluntary Tax Transparency Code (**Code**) that is facilitated by the ATO. The Code is intended to encourage the public disclosure of tax information by corporate taxpayers with a view to developing an understanding within the community regarding an organisation's compliance with its tax obligations.

There have been a number of principles and minimum standards developed by the Board of Taxation to guide disclosure. While there is no prescribed format for the content, large businesses are encouraged to include:

- a reconciliation between accounting profit to tax expense and to income tax paid or payable;
- an identification of material temporary and non-temporary differences;
- the accounting effective company tax rates for Australian and global operations;
- the approach to tax strategy and governance;
- a tax contribution summary for corporate income tax; and
- information about international related party dealings.

The new Federal Labor Government is also currently in the consultation phase regarding key aspects of its tax reform platform announced during the recent election campaign, which also includes a significant tax transparency element.

The proposal would see enhanced tax transparency of multinational enterprises through measures such as public reporting of certain tax information on a country by country (**CbC**) basis, mandatory reporting of material tax risks to shareholders and requiring tenderers for Australian government contracts to disclose their country of tax domicile. These measures will build on the existing CbC reporting obligations that already apply to significant global entities.

With increased focus on ESG issues generally, the adoption of OECD measures and an expectation that the ATO will only increase its audit activity, organisations may see some benefit in working towards obtaining a high assurance rating under the Justified Trust program.

Organisations may also be able to leverage the results of that program to satisfy the expectations of stakeholders that the organisation makes a fair and reasonable contribution to the Australian tax base.

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