CLIFFORD CHANCE

APAC ESG PERSPECTIVES: AUSTRALIAN KEY CONSIDERATIONS

– THOUGHT LEADERSHIP

MARCH 2021

APAC ESG PERSPECTIVES: AUSTRALIAN KEY CONSIDERATIONS

Environmental, Social and Governance (**ESG**) considerations are important to businesses for the opportunities they bring, and for the reputational and economic risks that come with making the wrong decisions. This briefing identifies a number of ESG considerations that may be relevant when doing business in Australia.

Environmental

- Climate-related litigation
- Green and sustainability-linked financing
- Carbon credit market
- Emissions, reduction and transparency
- Environmental reporting

Social

- LGBTQ inclusion
- Gender equality
- Modern slavery
- Indigenous Australians
- Consumer data protection and AI

Governance

- ESG-linked reporting
- Directors' liability for climate change inaction
- Anti-bribery and corruption
- Whistleblower protections

ENVIRONMENTAL

Environmental factors are perhaps the most recognisable of the three ESG factors, and are used to measure the sustainability and societal impact of an investment.

Stakeholders are increasingly demanding that environmentally sustainable practices are at the forefront of executive decision-making and planning. In Australia, the "E" pillar extends beyond regulatory compliance with respect to impact on natural resources, to include environmental justice concepts, such as carbon footprints and sustainable financing.

Climate-related litigation

Activist stakeholders, and NGOs are increasingly using litigation in efforts to combat climate change.

There have been a number of recent cases in Australia against businesses and government alleging a failure to adequately disclose climate change risks.

Shareholders driving increased "E" reporting

Abrahams v Commonwealth Bank of Australia[1] involved the shareholders of the bank seeking a declaration in the Federal Court of Australia that the bank had violated the Corporations Act 2001 (Cth) and for an injunction either "restraining the bank from continuing to fail to report" on climate change-related risks or requiring the bank to report on them. The suit was subsequently withdrawn by the shareholders prior to a decision being handed down by the court, and the bank subsequently released its 2017 annual report that acknowledged the risk of climate change and pledged to undertake climate change scenario analysis to estimate the risks to its business.

Fund members driving increased "E" disclosure by superannuation funds

McVeigh v Retail Employees Superannuation Trust[2] involved a ground-breaking climate change settlement involving one of Australia's largest superannuation funds (**REST**) which resulted in REST committing to a raft of new disclosure and climate change-related initiatives including: targeting a 2050 net-zero carbon footprint, monitoring its climate-related progress against the Task Force on Climate-Related Financial Disclosures (**TCFD**) recommendations, and actively considering climate change-related risks to reflect the 2030 climate goals under the Paris Agreement across its investment strategies and engagements with investee companies. In addition to climate change risks, REST also committed to taking steps to ensure its investment managers "consider, measure and manage financial risks posed by […] other relevant ESG risks". Whilst the settlement lacks the binding precedential value of a court determination, it establishes a robust standard against which other superannuation funds may be measured and members may increasingly feel empowered to demand more with respect to the disclosure of ESG related risks. Other businesses that may be affected by pressure from stakeholders to increase disclosure of climate related risks include

1 *Guy Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, VID879/2017, commenced 8 August 2017).

2 *McVeigh v Retail Employees Superannuation Trust* (Federal Court of Australia, NSD1333/2018, commenced 24 July 2018).

those which receive investment funding from Australian superannuation funds, as well as global investment funds, corporates and financial institutions.

Bondholders driving increased "E" disclosure by government

As well as disputes involving companies, there are growing challenges to governments on climate change issues. In July 2020 a 'world first' case was filed in the Federal Court of Australia alleging the government had failed in its duty to disclose climate change impacts on the value of government bonds.[3] The government did not exercise its right to strike out the allegations by the 1 March 2021 deadline; as such the matter is expected to progress in the normal course with the government's defence expected by 25 March 2021.

Green and sustainability-linked financing

There is an increasing wave of green financing that is being used to support a 'build back better' recovery and pathway to a carbon neutral future.

Whilst terminology in the sphere of green and sustainable loans is often used interchangeably, there is a distinction to be drawn between the traditional formulation based on the "use of proceeds" approach where the borrower is required to use the loan proceeds for specific green or sustainable purposes, and the emergence of a new school of "sustainability-linked loans" where pricing is determined based on compliance with certain green or sustainability targets (**SPTs**).

A key driver for many companies in entering into a sustainability-linked loan is that it enables them to preserve flexibility. Loan proceeds may be used for general corporate or other purposes (which may or may not be ESG related) whilst still contributing to a positive ESG impact.

There are no standard set sustainability criteria for sustainability-linked loans meaning each loan can be bespoke depending on a company's sustainability objectives. The most common metrics we see being used by companies include greenhouse gas emissions and ESG scores; with scores being determined by sustainability ratings agencies such as Sustainalytics and Viego Eiris. The pricing adjustments can also be bespoke, although they typically involve a sustainability premium or discount to the margin depending on whether a particular target is met. This has led to an opportunity for lenders to position themselves as "green agents", "sustainability coordinators", or other similar roles to help borrowers structure the ESG components of the loan.

Two key policy initiatives have developed recently in Asia Pacific aimed at moving capital markets towards meeting the growing need for green financing in the region, and these initiatives are also likely to shape the "green financing" market in Australia:

- ASEAN Green Bond Standards: In November 2017, the ASEAN Capital Markets Forum (**ACMF**) adopted the ASEAN Green Bond Standards (**ASEAN GBS**), which aim to serve as a guide to ASEAN countries implementing their commitments under the Paris Agreement and the UN Sustainable Development Goals. The ASEAN GBS are based on the International Capital Markets Association Green Bond Principles (**ICMA GBP**).
- Social and Sustainability Bonds: The ACMF has developed ASEAN Social Bond Standards and Sustainability Bond Standards, which were published in October 2018. These follow the same format as ASEAN GBS in that they align with the ICMA Social Bond Principles and ICMA Sustainability Bond Guidelines, respectively, but also require additional features, similar to those set out in the ASEAN GBS, in order to provide an ASEAN-specific standard and label.

3 *Kathleen O'Donnell v Commonwealth of Australia & Ors* (Federal Court of Australia, VID482/2020, commenced 22 July 2020).

On 24 November 2020, the Australian Sustainable Financing Initiative (**AFSI**) comprised of a coalition of Australia's major banks, superannuation funds, and insurance companies released the Australian Sustainable Finance Roadmap which details policies, frameworks, and rules to align Australia's financial industry with sustainable outcomes, a key component of which is slated to involve green financing.

As the Australian green financing landscape continues to evolve from its early stage and voluntary requirements, companies may need to balance the opportunities associated with promoting sustainable finance to stakeholders – including a diversified investor base, access to additional capital and pricing advantages – with potential added verification and reporting costs, and reputational risks of 'green washing'.

Carbon credit market

Increased participation by the private sector in Australia's carbon market is expected to continue.

Investment in low cost abatement technologies has featured at the core of the federal government's climate change mitigation strategy since the inception of the Emissions Reduction Fund (**ERF**) in 2014.

Rebranded as the Climate Solutions Fund (**CSF**) in 2019, the voluntary offset program intends to deliver on Australia's 2030 Paris Agreement commitments by offering landholders, communities and businesses the opportunity to generate new income streams whilst offsetting emissions (also known as 'carbon farming'). The A$2 billion investment scheme incentivises the development of new and low-cost carbon abatement technologies in exchange for carbon credit units, these units being later sellable for income or tradable on the secondary market. A Safeguard Mechanism complements the emissions reduction elements by placing a legislated obligation on Australia's largest greenhouse gas emitters to keep net emissions below their emissions limit (or baseline).

A range of projects to reduce emissions have been funded under the CSF to date, including projects to replace street lighting systems with more energy efficient light bulbs, native forest and vegetation regrowth projects and the use of gas from waste to create energy.

In May 2020, the federal government agreed to investigate and implement a range of mechanisms to facilitate participation in the CSF by smaller business and help project developers with high project start-up costs. The federal government also adopted 21 of 26 recommendations set out in the Report of the Expert Panel Examining Additional Sources of Low Cost Abatement (**King Review**), with an emphasis on how the CSF can be deployed to leverage greater co-investment from the private sector and other levels of government. Notably, the King Review has recommended a formal 'duty of utmost good faith' on participants to reinforce the importance of ethical behaviour at each stage of engaging with the scheme, including project implementation, measurement, reporting and verification.

Emissions reduction transparency reporting

The Clean Energy Regulator (CER) is focused on making it easier for companies to show how they are reducing net emissions whilst also supporting the growth of a carbon market.

Currently, Australian companies that meet specified greenhouse emissions, energy production and consumption thresholds (**eligible companies**) are required to register these details under a legislated reporting framework pursuant to the National Greenhouse and Energy Reporting (NGER) Act 2007 (Cth) and associated regulations known as the National Greenhouse and Energy Reporting scheme (**NGER**). The collection of NGER data provides vital information in the development of Australia's domestic climate-related policy agendas, in addition to benchmarking Australia's progress against its international climate change commitments.

CER issued a consultation paper on a new Corporate Emissions Reduction Transparency report (**CERT report**) and accompanying Corporate Emissions Reduction Transparency report draft guidelines (**Draft Guidelines**) on 19 February 2021, which are intended to facilitate greater ease of reporting and transparency with respect to Australian companies' annual progress towards their emissions reduction goals. The CERT report, which will be underpinned by the NGER scheme, proposes to publish eligible companies' data in a simple table ledger format to provide a direct comparison of climate action taken by eligible companies which elect to participate. This will include details on a company's reported scope 1 emissions (e.g. direct emissions from activities such as burning coal or diesel fuel or manufacturing) and scope 2 emissions (e.g. indirect emissions from the indirect consumption of an energy commodity), eligible units and certificates surrendered, and the 'net' scope 1 and 2 positions. The Draft Guidelines will outline the technical rules governing the CERT report including topics on participation eligibility, and the calculation, reporting and verification requirements for emissions and offsets.

Eligible companies may reference the CERT report as an authoritative and standardised data source to support their carbon emissions reduction and renewable energy claims to investors and the public. The program is set to launch in mid-2021 and whilst participation will be on an 'opt-in' basis, there is a risk that Australian governments may 'name and shame' businesses that fail to deliver on their emission reductions commitments

Environmental reporting

Companies should be prepared for an increased focus on environmental law compliance and reporting.

There are certain reporting requirements under the Corporations Act 2001 (Cth) with respect to an entity's performance in relation to environmental regulation if that entity's operations are subject to any 'particular and significant environmental regulation' under the laws of the Commonwealth or of a State or Territory of Australia.[4] An example of such environmental regulation may include the Environment Protection and Biodiversity Conservation Act 1999 (Cth) which includes a Commonwealth environmental assessment and approval process to ensure that activities likely to have significant impacts on the environment are properly assessed.

Whilst current practice reflects a risk management approach to environmental impact assessment, companies should be alert to potential increased focus upon environmental law compliance by regulators as cumulative impact assessments continue to develop in line with improved data availability.

4 s299(1)(f) of Corporations Act 2001 (Cth).

SOCIAL

Diversity and inclusion, including LGBTQ, gender, and ethnicity, may affect companies' financial and reputational bottom lines.

The significant correlation between a company's financial performance and cognitive diversity continues to be well-documented.[5] Corporate decision-makers and investors are increasingly recognising the opportunities that come with making business and investment choices that support and actively encourage diversity and inclusion, and the inherent risks of social exclusion and discrimination.

LGBTQ inclusion

Voluntary reporting on LGBTQ inclusion to the Australian Workplace Equality Index.

The Australian Workplace Equality Index provides the definitive national benchmark on LGBTQ workplace inclusion, comprising the largest and only national employee survey designed to gauge the overall impact of inclusion initiatives on organisational culture. As a voluntary employee survey, the index seeks to drive best practice in Australia by setting a comparative benchmark for Australian employers across all sectors. Australian corporate decision-makers and investors continued to demonstrate greater commitment to workplace diversity and inclusion in 2020, with participation in the survey recording a year-on-year increase since its inception in 2012, from 770 responses to its highest response rate of 33,572 responses in 2020.[6] Clifford Chance Australia was awarded the "Small Employer Gold" award at the 2020 Australian LGBTQ Inclusion Awards.

Workplace gender equality

Mandatory reporting on gender equality for non-public employers with 100 or more employees.

Australian non-public sector employers with 100 or more employees are required to report annually against six gender equality indicators (**GEI**)[7] under a mandatory Compliance Reporting Program to the Workplace Gender Equality Agency (**WGEA**):

- GEI 1: the gender composition of the workforce;
- GEI 2: gender composition of governing bodies of relevant employers;
- GEI 3: equal remuneration between women and men;
- GEI 4: availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;
- GEI 5: consultation with employees on issues concerning gender equality in the workplace; and
- GEI 6: sex-based harassment and discrimination.

The WGEA is the dedicated government agency charged with promoting and improving gender equality in Australian workplaces. Non-compliant organisations face potential reputational fallouts, as well as possibly forgoing eligibility for certain grants and contract tender opportunities under Commonwealth and state procurement frameworks which require full compliance.

Modern slavery

Mandatory reporting for large businesses on modern slavery risks in business operations and supply chains.

Since the commencement of the Modern Slavery Act 2018 (Cth) on

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5 See McKinsey&Company, *Delivering through Diversity* (Report, January 2018) <click here for the full-report>.

6 Australian Workplace Equality Index, *AWEI and Ongoing Data Analysis*, (Web Page) <http://www.pid-awei.com.au/2020practicepoints/>.

7 As defined under section 3 of the *Workplace Gender Equality Act 2012* (Cth).

1 January 2019, businesses and other entities in the Australian market with annual consolidated revenue of at least A$100 million are required to prepare a Modern Slavery Statement reporting on their modern slavery risks, including in their operations and supply chains. The statement must identify both risks and the steps taken to address them and is required to be submitted annually within six months after the end of the reporting entity's financial year.

Whilst reporting is compulsory for entities who meet the consolidated revenue threshold, any entity can voluntarily submit a Modern Slavery Statement under the Act. Entities that conduct modern slavery reporting in line with legislative requirements may guard against reputational harm, as well as increase investor confidence, profitability and access to financing opportunities.

The Department of Home Affairs has provided guidance[8] in relation to changes to reporting requirements for entities impacted by COVID-19, and key actions those entities may take to reduce the risk of vulnerable workers in their operations and supply chains becoming exposed to modern slavery as a result of the pandemic.

New South Wales is also taking steps to implement its own modern slavery requirements,[9] following a period of review to ensure consistency with the Commonwealth regime. It remains to be seen whether other States will follow suit and seek to introduce additional regulations in this area.

Rights of Indigenous Australians

Recognition of the rights of Indigenous Australians through the Uluru Statement from the Heart.

Business impact on cultural heritage and ethnicity is an important and growing aspect of the Australian ESG landscape. The Uluru Statement of the Heart (**Uluru Statement**) was endorsed on 26 May 2017 and outlines a number of key reforms with respect to the recognition of the rights of Indigenous Australians including:

- Constitutional change: Amending the Australian Constitution to 'enshrine a First Nations Voice'; and
- Legislative change: Establishing the Makarrata Commission to supervise the process of making agreements between Indigenous groups and Australian governments and overseeing a process of 'truth-telling' about Australia's history and colonisation.

Whilst implementation of a response to the Uluru Statement by Australian governments remains subject to ongoing debate, support for the constitutional change agenda has generated support from some of Australia's leading businesses in the resources, finance and legal sectors including BHP, Lendlease and Qantas.

Many corporates and financial investors are also adopting a Reconciliation Action Plan (**RAP**) to assess any potentially disproportionate environmental or social impacts of their business activities on Indigenous communities.

Although none of the UN Sustainable Development Goals (**SDGs**) focus exclusively on culture, there a number of associated targets that do, including Target 11.4 which highlights the need to strengthen efforts to protect and safeguard the world's cultural and natural heritage. The role of cultural heritage in achieving these SDGs is gaining momentum, and as recent events in Australia have shown with respect to Rio Tinto's

8 Australian Government Department of Home Affairs, *Modern Slavery Act Information Sheet: Coronavirus*, Information Sheet (2020).

9 See the *Modern Slavery Act 2018* (NSW), not yet in force.

reported destruction of two 46,000 year old Juukan Gorge rock shelters in Western Australia, the reputational risks that come with making the wrong decisions with respect to Indigenous and cultural heritage issues are significant.

Consumer protection

Harnessing innovative data transfer and balancing customer privacy concerns for enhanced consumer choice and competition.

On 26 November 2017, the federal government announced the introduction of a "consumer data right" (**CDR**) which gives consumers greater access to, and control over, certain data about them held by third parties. This data can include their banking, energy, phone, and internet transactions. Consumers are able to require the data be transferred to accredited third parties for the purpose of accessing tailored offers based on their current financial data and usage patterns.

Under the new CDR regime, Australia's banks, telecommunications and energy public-private partnerships will be required to comply with the CDR rules established by the Australian Consumer and Competition Commission (**ACCC**), with the aim of enhancing consumer choice, competition and innovation. The government has determined that the CDR regime will first apply to the banking sector, followed by the energy sector and the telecommunications sector. The CDR rules commenced on 6 February 2020 and have been introduced into the banking sector in phases. For example, consumer data relating to credit and debit cards, deposit accounts and transaction accounts were required to be made available from 1 July 2020.

As the lead CDR regulator, the ACCC's role also includes accrediting potential data recipients, monitoring compliance and taking enforcement action where necessary, recommending future sectors for the CDR regime, and communicating with and educating consumers and other stakeholders about their rights and obligations under the CDR.

Businesses operating as accrediting providers or accredited data recipients should be aware of important prescriptive requirements under the CDR rules regarding treatment of any received consumer data. Breaches of the CDR rules and certain privacy safeguards may attract hefty civil penalties of up to A$500,000 for individuals, or for corporations, the greater of A$10,000,000, three times the total value of benefits that have been obtained, or 10% of the annual turnover of the entity committing the breach.[10]

Artificial Intelligence

Accelerating business adoption and adaptation of responsible AI systems to incentivise productivity.

The Department of Industry, Science, Energy and Resources (**DISER**) is consulting on the development of an Artificial Intelligence Action Plan (**the Action Plan**). The Action Plan will specifically help to ensure that the development and use of AI is safe, responsible and ethical, coordinate government policy and national capability under a clear, common vision for AI in Australia, and explore the actions needed for Australia's AI future.

To support the consultation, DISER released a discussion paper in October 2020 entitled 'An AI Action Plan for All Australians: A Call for Views', which identified the requirement for Australian businesses to access high quality, de-sensitised, ethically and legally sourced data sets, with particular consideration of issues like bias and accuracy, raising the concerns of individuals and businesses regarding algorithmic decision-making, and the importance that AI systems respect human rights and diversity, are explainable, enable human oversight, and have clear accountability. The consultation period closed on 27 November 2020 and we are monitoring the outcome of this process for further developments.

10 See *Competition and Consumer Act 2010* (Cth) ss 56EV, 76.

GOVERNANCE

Increased ESG awareness is driving more stringent reporting requirements and a heightened focus on compliance.
Australian regulators have been increasingly willing to take action to address failings in the disclosure and management of non-financial risks, with a growing number of these being ESG related. The absence of an Australian, or global, standard approach to ESG reporting often increases the cost and complexity of compliance for investors.

ESG-linked reporting

There are a number of voluntary and statutory measurement, reporting and disclosure frameworks that are used in Australia with respect to ESG.
In addition to the UN Principles of Responsible Investment, there are various voluntary standards and best practices that are commonly followed in Australia with respect to integrating ESG factors into investment decisions, including those released by the Responsible Investment Association Australasia (**RIAA**), the Australian Council of Superannuation Investors (**ACSI**) and the Investor Group on Climate Change.

When it comes to ESG reporting and disclosure frameworks in Australia, the obligation regime (e.g. mandatory vs comply-or-explain) for companies often depends upon whether or not they are listed.

By way of example, ASX Listing Rule 4.10.3 requires a listed entity to include certain information in its annual report including a corporate governance statement that meets the requirements of that rule, or the URL of the page on its website where a corporate governance statement that meets the requirements of that rule is located. A corporate governance statement must disclose the extent to which that listed entity has followed the recommendations set by the ASX Corporate Governance Council during the relevant reporting period or the reasons for not following the recommendation and what (if any) alternative governance practices it adopted in lieu of the recommendation during that period.

From 1 January 2020, the ASX Corporate Governance Principles and Recommendations issued by the ASX Corporate Governance Council recommend that listed entities benchmark certain corporate governance practices which are the "reasonable expectation of most investors", including topics such as board diversity and sustainability disclosures. Note in particular Recommendation 1.5: "*A listed entity should have and disclose a diversity policy …" and Recommendation 7.4: "A listed entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks*".

The ESG Reporting Guide for Australian Companies released by the ACSI and Financial Services Council is commonly adopted by both listed and unlisted companies on a voluntary basis to assist with their understanding, pricing, analysis and management of ESG investment risks. It is designed to complement the reporting requirements of other best practice guides such as the ASX Corporate Governance Principles and Recommendations.

Boards should engage seriously with shareholder proposals regarding climate change, particularly where investor support through proxy votes is high.
Pressure for climate change proposals applied by shareholders at a company's annual general meetings (AGMs) is driving greater levels of ESG-linked reporting amongst boards and directors. For example, shareholders can apply pressure by using a special resolution to amend the company's constitution regarding the way in which a power vested in the directors has or should be exercised. Shareholders can then propose resolutions (contingent on the passing of the special resolution) regarding a specific matter, for example the reporting of climate change management. Details of these 'proposed contingent resolutions' are later released on the company's ASX AGM results announcement.

Directors' duties

Directors' exposure to personal liability for climate change inaction is a live issue that has received endorsement by the Australian Securities and Investments Commission (ASIC) and the legal profession.

Climate risk and disclosure have become a shared focus of Australian financial regulators and investor groups, engaging questions over directors' personal liability for associated corporate inaction. Following the "Climate Change and Directors' Duties Memorandum of Opinion" (7 October 2016) and "Climate Change and Directors' Duties Supplementary Memorandum of Opinion" (26 March 2019) by The Centre for Policy Development (the **Opinion** and **Supplementary Opinion** respectively), there is an emerging view that a director's duty to act with reasonable care and diligence under section 180 of the Corporations Act 2001 (Cth) positively mandates the active identification, proper disclosure and appropriate response to foreseeable climate change risks. In predicting the "exponential" increase of individual directors' personal exposure to climate change litigation, the Supplementary Opinion rejects any scenario going forward whereby "climate change will ***not*** intersect with the interests of [their] firms", citing relevant advances in "event attribution science" capable of identifying the link between climate change and individual extreme weather events.

Companies should also consider the derivative risks for directors arising from ASX Guidelines on ESG-linked reporting.

From a practical standpoint, the issues of directors' personal liability for climate change impacts upon business operations and the maintenance of strong effective corporate governance have received endorsement by both the ASIC Commissioners and former Australian High Court Justice Kenneth Hayne SC.

Anti-bribery and corruption

Australia's anti-bribery and corruption regime turns on the promotion of early detection and strong deterrence of corporate wrongdoing.

Against a backdrop of high-stakes corporate misconduct cases in recent years involving some of Australia's largest organisations, particularly financial institutions, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) (**Bill**) looks set to make its way into law in 2021, following a series of delays after the introduction of the original draft legislation in 2017.

If enacted, the Bill will (amongst other amendments) introduce a new offence of failure of a body corporate to prevent the bribery of a foreign public official by an associate. Similar to the equivalent offence under the UK's Bribery Act, a defence to a charge of failure to prevent bribery of a foreign public official may be available to body corporates who can demonstrate they have "adequate procedures" in place to prevent the offence.

The Bill will also implement, for the first time in Australia, a deferred prosecution agreement (**DPA**) scheme to enable the Commonwealth Director of Public Prosecutions to invite a person that has engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions. The ability to negotiate outcomes under the newly introduced DPA scheme would incentivise corporations to self-report serious corporate crimes which are otherwise subject to complex investigations and prosecutions under the traditional process.

Australian companies should ensure that their bribery and corruption risk policies comply with the requirements of the amended anti-bribery and corruption legal framework. Draft guidance on navigating the new "adequate procedures" requirement has already been issued by the Attorney-General's Department entitled ''Draft Guidance on the Steps a Body Corporate Can Take to Prevent an Associate from Bribing Foreign Public Officials" (Consultation Draft, November 2019). New ASX Guidelines effective from 1 January 2020 also include a recommendation that listed entities both have and disclose an anti-bribery and corruption policy (e.g. see ASX Corporate Governance Council (n 12) 18 (Recommendation 3.4)).

Whistleblower protections

Australian companies and superannuation trustees are now required to comply with significantly enhanced statutory whistleblower protections, designed to protect those who come forward with concerns of misconduct in the corporate and financial sectors.

Following the commencement of the enhanced regime pursuant to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth) on 1 July 2019, whistleblower protections are available to a broader range of people who make a "qualifying disclosure" to an "eligible recipient" (which includes senior officers and senior managers of a company, as well as third parties including ASIC, the Australian Prudential Regulation Authority (**APRA**), a company's actuary or auditors, or a person authorised by the company to receive whistleblowing complaints such as an independent whistleblowing hotline), including those who make disclosures on an anonymous basis. These protections apply regardless of whether the entity is required to have a whistleblowing policy. The motivations of the whistleblower are considered irrelevant, with no requirement that the report be made in good faith so long as the whistleblower has "reasonable grounds" to suspect wrongdoing. Unauthorized disclosure of a whistleblower's identity may result in a criminal or civil offence, or a fine of up to A$1,110,000 for an individual and up to A$11,100,000 for a company.

Since 1 January 2020, both public companies and large private companies, as well as corporate trustees of registrable superannuation entities, are required to have a whistleblowing policy, and to make that policy available to officers and employees of the company. The policy must include information about the protections available to whistleblowers, the process by which disclosures should be made and how they will be investigated, how the company will support whistleblowers and protect the whistleblower and other employees from detriment or unfair treatment in connection with the disclosure. Breach of these requirements is a strict liability offence for both individuals and companies.

ASIC is closely monitoring compliance with the enhanced regime, including through a survey of the whistleblower policies of certain entities throughout 2020-21 to better understand how companies and trustees are responding to their obligations. Organisations are therefore strongly encouraged to refer to ASIC's regulatory guides and information sheets on whistleblowing to adopt good practice measures consistent with the nature of the organisation, such as making their whistleblower policies available on their external website since whistleblowers both "inside" and "outside" an organisation can qualify for protection.

GLOBAL UPDATE

ESG global trends to watch in 2021

We have recently published a briefing on **ESG trends to watch in 2021**. These include COP26, a renewed push from China on climate change and a focus on how we build back better post COVID-19.

ESG developments

Our ESG newsletter assist banks, financial investors and corporates in keeping up to date with ESG developments

Click **here** to sign up to receive our publications, insights and event invitations. You can sign up for the Sustainability: recent ESG developments newsletter under the 'Briefings and regular newsletters' heading.

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C H A N C E

2103-001712