

## Australia: Mandatory climate reporting and directors' liability for life sciences companies

### In brief

This alert provides an overview of the Australian Government's proposed regime in respect of mandatory climate-related financial disclosure (**CRFD Regime**). It addresses potential liability for directors of life sciences and biotechnology companies in such disclosure.

### Key takeaways

- The proposed CRFD Regime is still in draft but is expected to be finalised in the near future following the Senate Economics Committee's (the **Committee**) recommendation that the Bill (as defined below) be passed.
- The proposed CRFD Regime will put in place further disclosure requirements to which directors of all Australian companies must adhere.
- There will be a phase-in for compliance, depending upon the size of the company.
- Once the CRFD Regime commences, directors of life sciences and biotechnology companies which would be 'reporting entities' under the CRFD Regime will need to specifically disclose climate-related risks and may face personal liability for misstatements or omissions.
- This will be a new area of exposure for life sciences and biotechnology companies.
- Directors should now consider the systems and procedures they will need to have in place to ensure sufficient reporting.

### In depth

#### Overview of the proposals for Australia's climate-related financial disclosure regime

On 12 January 2024, the Federal Government released an exposure draft of the *Treasury Laws Amendment Bill 2024: Climate-related financial disclosure* (**Exposure Draft**).<sup>1</sup> Upon further consultation, the Australian Government has now introduced the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth) to the House of Representatives (the **Bill**).<sup>2</sup>

Schedule 4 of the Bill outlines the framework for the new CRFD Regime. The Bill requires that all entities captured by the reporting and audit requirements of Chapter 2M of the *Corporations Act 2001* (Cth) (**Corporations Act**) or entities with existing emission reporting obligations under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) will need to

<sup>1</sup> Exposure draft of the *Treasury Laws Amendment Bill 2024: Climate-related financial disclosure* (12 January 2024): [Treasury Laws Amendment Bill 2024: Climate-related financial disclosure - Exposure draft](#).

<sup>2</sup> Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (27 March 2024): [Treasury Laws Amendment \(Financial Market Infrastructure and Other Measures\) Bill 2024 – Parliament of Australia \(aph.gov.au\)](#).

comply with the proposed CRFD Regime. Different from originally proposed in the Exposure Draft, the Bill delays commencement of the CRFD Regime to **1 January 2025**.

**Entities the CRFD Regime apply**

The entities to which the CRFD Regime will apply are proposed as follows (noting reporting periods are based on the assumption that the regime will start 1 January 2025):

Group 1 Entities	Group 2 Entities	All other entities meeting the reporting requirements
<i>First annual reporting periods starting on or after 1 January 2025</i>	<i>First annual reporting periods starting on or after 1 July 2026</i>	<i>First annual reporting periods starting on or after 1 July 2027</i>
Entities that: (i) meet at least two of the following three criteria at the end of the financial year: consolidated revenue of AUD 500 million or more; consolidated gross assets of AUD 1 billion or more; or 500 or more employees; or (ii) are currently registered corporations under the NGER Act, and that meet a publication threshold in s 13(1) of the NGER Act.  <b>Note:</b> an entity which is a registered scheme, registrable superannuation entity, or retail CCIV is not a Group 1 entity.	Entities that: (i) meet at least two of the following three criteria at the end of the financial year: consolidated revenue of AUD 200 million or more; consolidated gross assets of AUD 500 million or more; or 250 or more employees; (ii) are currently registered corporations under the NGER Act; or (iii) are asset owners where the value of assets at the end of the financial year is equal to or greater than AUD 5 billion.	All other entities that meet at least two of the following three criteria at the end of the financial year: (i) consolidated revenue of AUD 50 million or more; consolidated gross assets of AUD 25 million or more; or 100 or more employees.  <b>Note:</b> These entities that do not have any material climate-related risks or opportunities will only be required to disclose a statement reflecting this.

Accordingly, a number of companies across the life sciences and biotechnology industries in Australia may become subject to the CRFD Regime.

**What climate information must be reported?**

The Bill amends Part 2M.3 of the Corporations Act, requiring relevant entities to prepare a sustainability report in compliance with the 'sustainability standards' being developed by the Australian Accounting Standards Board (**AASB**) (as discussed further below). This report will supplement the existing requirement to prepare the directors' report, financial report and auditors' report.

The sustainability report is proposed to consist of a 'climate statement' and a 'directors' declaration' as to whether, in the directors' opinion, the substantive provisions of the sustainability report are in accordance with Section 296C (sustainability standards) and Section 296D (climate statement disclosures) of the Bill. However, for the first three years of the CRFD Regime, directors will only be required to provide an opinion that the entity has taken reasonable steps to ensure the substantive provisions of the sustainability report are in accordance with the Bill.

The Federal Government's second consultation paper provides that these 'sustainability standards' are to relate to *governance, strategy, transition planning and climate-related targets, risks and opportunities, greenhouse gas emissions and industry-based metrics* (these standards and their proposed timing for when such disclosure are to be required in the roll-out of the CRFD Regime are addressed in further detail in the [Climate-related financial disclosure - consultation paper \(treasury.gov.au\)](https://www.treasury.gov.au)).

The Bill also creates various offences and financial penalties, for noncompliance with the regime. Entities may be subject to enforcement action by the relevant regulating entity, which is proposed to be the Australian Securities and Investments Commission (**ASIC**).

**The Committee's report**

On 3 May 2024, the Committee provided its report on the Bill in which they recommended that the Bill be passed. The Committee expressed the view that the CRFD Regime is consistent with international standards and its introduction will support Australia to continue to attract international capital, guiding investors to maximise Australia's economic opportunities and "maintain and grow Australia's reputation as a destination for international capital that will be needed in the transition to net-zero".<sup>3</sup>

<sup>3</sup> See the Committee's report: [240410-Senate-inquiry-into-the-provisions-of-the-Treasury-Laws-Amendment-Bill-2024-EDO-submission.pdf](https://www.ato.gov.au/ato/content/240410-Senate-inquiry-into-the-provisions-of-the-Treasury-Laws-Amendment-Bill-2024-EDO-submission.pdf).

Importantly, the Committee's report acknowledged submissions regarding whether Australian-based local subsidiaries would be required to prepare reports separately from their parent companies that may already be completing sustainability reports in their home jurisdictions. The Committee acknowledged the Australian Financial Market Association and Insurance Council of Australia's views that Australian-based subsidiaries should be exempt from preparation of a sustainability report under the proposed regime and whether Australian companies with interests outside Australia would be allowed to align their sustainability reporting to global standards.

The Committee also acknowledged Baker McKenzie's views echoing the above, further noting that the Australian climate reporting standards and the reporting standards of other major jurisdictions will be very closely aligned. However, the Committee did not recommend making any changes to the Bill to address such concerns.

## Directors' duties

Subject to the passing of the Bill and the implementation of the CRFD Regime, there is currently no legislative requirement for companies to disclose climate-related risks.

Section 180 of the Corporations Act broadly provides that directors have a duty to exercise their powers and comply with their duties with a degree of care and diligence, which requires directors to consider *all foreseeable risks of harm to a corporation*. It has been suggested that failure to disclose any foreseeable climate-related risks to the company may constitute a breach of a director's duty of care, skill and diligence.<sup>4</sup>

Directors also have a general *duty to disclose financial risk*. Section 295 of the Corporations Act requires that a director must sign a declaration providing an opinion that the financial statements are in compliance with accounting standards and provide a true and fair view.

Section 299A of the Corporations Act further requires that the directors prepare an operating and financial review as part of their annual directors' report providing information that shareholders would reasonably require to make an informed assessment of the company's business strategies and prospects for future financial years.

It follows that ASIC and the Australian Securities Exchange have recognised the potential material impacts that climate-related risks may have on a company's future financial position, performance or prospects.<sup>5</sup>

## Directors' liability

Regardless of whether a company is deemed to be a reporting entity under the proposed CRFD Regime, the developing view is that directors must still consider material climate-related risks in the context of their financial reporting.

Currently, directors face personal liability risks where misleading statements (or omissions) in an annual report are deemed a result of a breach of a director's duty of due care and diligence by failing to appropriately prepare (with adequate systems in place) and review the report. For example, directors may be liable for civil penalties under Section 344 of the Corporations Act if they fail to take all reasonable steps to secure their company's compliance with its financial reporting obligations.

Notably, as climate disclosures under the CRFD Regime are proposed to be subject to existing liability frameworks in relation to director's duties, general disclosure obligations and misleading and deceptive conduct provisions, these liability risks will be all the more apparent for directors in light of increased disclosure requirements.

In the interim, the Bill proposes a 'modified liability' framework to protect entities from civil actions by private litigants. Specifically, only ASIC will be permitted to bring proceedings in relation to 'protected statements', being statements about scope 3 greenhouse gas emissions, scenario analysis or a transition plan contained in the sustainability report or auditor's report in the first three years of the CRFD Regime. The 'modified liability' framework also proposes to similarly cover all forward-looking statements related to climate and made for the purpose of complying with sustainability standards, if they are made in sustainability reports for financial

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<sup>4</sup> See for example, Mr Noel Hutley SC' Supplementary Memorandum Of Opinion, 29 March 2019: [Microsoft Word - CPB - Supplementary Opinion of Hutley and Hartford Davis 26.3.19 \(002\).docx \(cpd.org.au\)](#).

<sup>5</sup> ASIC Regulatory Guide 247 – Effective disclosure in an operating and financial review (August 2019): [Regulatory Guide RG 247 Effective disclosure in an operating and financial review \(asic.gov.au\)](#).

years commencing within the *first 12 months* of the CRFD Regime. However, the Bill does not propose to limit liability against criminal actions or modify existing continuous disclosure requirements.

### **'Stepping stone' claims**

ASIC regularly uses 'stepping stone' claims to bring actions against directors and officers for breaches of their statutory duty of care. The 'stepping stone' claim asserts that a director or officer who exposes a company to a breach of the law has breached their statutory duty of care and diligence under Section 180 of the Corporations Act. Liability results from the failure to prevent a reasonable foreseeable risk of harm to the company's interests from that breach of law. 'Stepping stone' claims continue to expand the horizon for director and officer liability.

## **Life sciences and biotechnology companies**

Encouragingly, AusBiotech's 2023 report 'A Practical Guide to ESG for Australian Life Sciences Companies' (the **Report**) highlights that Australia's life sciences and biotechnology industry is already acutely aware of the implications of the proposed CRFD Regime and the importance of having appropriate measures and practices in place.<sup>6</sup>

The Report highlights considerations for life sciences companies in light of their common operations in the industry such as reporting on energy and waste reduction, consumables and natural resource use, pharmaceuticals in the environment, sustainable workplace initiatives and emissions reduction. Notably, the wider the requirements of increased ESG reporting and transparency become, the greater the onus will be on companies to ensure any disclosed information is in compliance with their directors' duties.

### **Climate disclosure standards and sustainability standards**

It would be beneficial for life sciences and biotechnology companies to monitor the finalisation of the Australian climate disclosure standards and sustainability standards by the ASSB.

As an initial guide, on 23 October 2023 the AASB released exposure draft 'ED SR1 *Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information*' (**Draft Australian Sustainability Standards**).<sup>7</sup> The Draft Australian Sustainability Standards contain three standards, which closely align with the International Sustainability Standards Board's (**ISSB**) IFRS S1 and IFRS S2, namely ASRS 1 (General Requirements for Disclosure of Climate-related Financial Information standard), ASRS 2 (Climate-related Financial Disclosures) and ASRS 101 (References in Australian Sustainability Reporting Standards). Subject to further development by the ASSB, review and understanding of the Draft Australian Sustainability Standards against existing climate disclosures would assist companies with discerning potential gaps in disclosure/reporting practices, systems and processes.

In respect of industry-based metrics/disclosures, unlike the ISSB standards, the Draft Australian Sustainability Standards propose that reporting against industry-based metrics are to be optional. These disclosures can still be made voluntarily against well-established and understood industry-based metrics. The IFRS S2 may provide helpful ways to identify, measure and disclose information about climate-related risks and opportunities that are associated with particular business models, economic activities and other common features that characterise participation in various industries.<sup>8</sup> Specifically, the guide outlines various metrics related to the medical equipment and supplies industry, which may be a useful starting point for Australia's biotechnology companies to reconcile to what extent their reports and data may be lacking.

If the Bill is finalised and passed into law without any substantive changes, the new CRFD Regime will apply (at the earliest) in relation to financial years commencing from 1 January 2025. Please contact us to discuss how this change affects your company.

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<sup>6</sup> See AusBiotech's 2023 report 'A Practical Guide to ESG for Australian Life Sciences Companies': [774 \(ausbiotech.org\)](https://ausbiotech.org).

<sup>7</sup> See the ED SR1 *Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information*: [AASB ED SR1](#).

<sup>8</sup> See the IFRS S2 - Industry-based Guidance on implementing Climate-related Disclosures (June 2023): [IFRS-S2-IBG – Issued IFRS Standards](#)

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