

Synopsis

The federal government's proposed *Treasury Laws Amendment Bill 2024* (Cth) (*TLA Bill*), if passed, will require large listed and unlisted Australian corporations to publish a "climate statement" (in addition to preexisting annual reporting and financial statement obligations). This "climate statement" must be audited like other financial statements.

The *Australian Financial Review* has described the proposed changes to the corporate reporting regime as "the biggest change in corporate reporting in a generation"¹

When and if passed, the legislative amendments will expose companies and their directors to potential regulatory and shareholder actions, which could result in significant damages.

Specifically, in relation to directors, directors will be required to submit a declaration for inclusion in the 'climate statement' that the statement complies with the relevant sustainability standards. This declaration has the potential to expose directors to actions for (among other things) breach of directors' duties.

The authors discuss the proposed legislative amendments below, what risks they may pose to businesses that are captured by the proposed changes to the law, and advise on the practical preparatory steps boards can take now (assuming the legislative change is passed).

Executive Summary

In summary:

At present, Australian companies are not generally required to publish information regarding their climate risks and emissions reduction targets.

The *TLA Bill* proposes to alter this general situation, and to require certain corporations to publish a sustainability report.

The sustainability report will have to be published annually and accompany the reporting entity's annual report (i.e. described as the "fourth report" required as part of a relevant entity's annual financial reporting obligations).

The sustainability report will, at its most basic level, comprise (a) the entity's climate statements for a financial year; (b) the entity's notes to the climate statements; and (c) a declaration provided by the entity's directors.

Compliance with *TLA Bill's* amendments will be sought by exposing eligible companies, and their directors, to legal liability.

Below we propose a number of proactive steps that company boards can take now to "get ahead of the curve," assuming the *TLA Bill* is passed and the legislative amendments take effect.

Proposed Change to the Law

The Current State of the Law

At present, Australian companies are not generally required to publish information regarding their climate risks and emissions reduction targets.² That said, if they do publish such information, that information must be fair and accurate (in accordance with the general laws pertaining to corporate disclosures).

The *TLA Bill* proposes to alter this general situation and require certain corporations to publish "climate statements." This is discussed below.

Object of Amendments

The Australian federal government Department of the Treasury's three reasons for pursuing the amendments are:

- To improve climate disclosures to support preexisting Australian regulators to assess and manage systemic risks to the financial system caused by climate change
- Supporting Australia's reputation as an attractive destination for the investment of international capital
- Helping to draw the financial investment required for the Australian federal government's commitment to reduce emissions by 43% by 2030 and achieve net zero emissions by 2050

In effect, the Australian federal government recognises that Australia's commitment to "net zero" will require significant private and public investment. As such, the amendments are proposed to make climate disclosures clearer and standardised between corporations, so that financiers and members of the public can ensure that they compare corporates' climate risks and targets on an equal and fair footing (i.e. comparing apples with apples).

The *TLA Bill* proposes amendments to Chapter 2M of the *Corporations Act 2001* (Cth) (*Corporations Act*) (that chapter being titled, "Financial reports and audit").

Specifically, new sections will be inserted into Chapter 2M of the *Corporations Act* to require entities that meet the new criteria to publish "sustainability reports" in the annual reports. These criteria are discussed below.

¹ Mark Rigotti, [Australian Financial Review](#), 28 January 2024.

² Unless they are captured under specific legislation, such as the *National Greenhouse and Energy Reporting Act 2007* (Cth).

Groups 1-3 Phase-in Criteria

The *TLA Bill* proposes that the reporting requirements be phased in according to criteria applying to 3 separate groups. The table below captures each such group and criteria:

Group No. and Timing	Criteria
Group 1: 2024-25 onwards	<ul style="list-style-type: none"> • Entities required to report under Chapter 2M of the <i>Corporations Act</i> and that fulfil two of the three following thresholds: <ul style="list-style-type: none"> – Have over 500 employees – The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is AU\$1 billion or more – The consolidated revenue for the financial year of the company and any entities it controls is AU\$500 million or more • Entities required to report under Chapter 2M of the <i>Corporations Act</i> that are a “controlling corporation” under the <i>National Greenhouse and Energy Reporting Act 2007</i> (Cth) (<i>NGER Act</i>) and meet the <i>NGER</i> publication threshold.
Group 2: 2026-27 onwards	<ul style="list-style-type: none"> • Entities required to report under Chapter 2M of the <i>Corporations Act</i> and that fulfil two of the three following thresholds: <ul style="list-style-type: none"> – Have over 250 employees – The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is AU\$500 million or more – The consolidated revenue for the financial year of the company and any entities it controls is AU\$200 million or more • Entities required to report under Chapter 2M of the <i>Corporations Act</i> that are a “controlling corporation” under the <i>NGER Act</i> and meet the <i>NGER</i> publication threshold.
Group 3: 2027-28 onwards	<ul style="list-style-type: none"> • Entities required to report under Chapter 2M of the <i>Corporations Act</i> and that fulfil two of the three following thresholds: <ul style="list-style-type: none"> – Have over 100 employees – The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is AU\$25 million or more – The consolidated revenue for the financial year of the company and any entities it controls is AU\$50 million or more • Entities required to report under Chapter 2M of the <i>Corporations Act</i> that are a “controlling corporation” under the <i>NGER Act</i>.

The following entities are captured by the criteria:

- Large entities (that are both listed and unlisted, and financial institutions and others)³
- Large asset owners (including registrable superannuation entities and registered schemes), if their funds under management are more than AU\$5 billion
- Entities that are subject to both the annual reporting obligations under the *Corporations Act* and emissions reporting obligations under the *NGER Act*

The following entities are not captured by the criteria:

- Small and medium-sized entities below the relevant size thresholds (assuming they are not subject to the *NGER Act*)
- Entities exempt from compliance with Chapter 2M of the *Corporations Act*

³ E.g. financial institutions, registrable superannuation entities, and registered investment schemes.

Sustainability Report's Contents

The sustainability report is to be prepared in accordance with the applicable Australian Accounting Standards Board's (AASB) sustainability standards.⁴ At the date of publication, the AASB has published its draft standard *SR1 Australian Sustainability Reporting Standards – Disclosure of Climate-related Information* (October 2023) (AASB SR1).

AASB SR1 largely mirrors *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information* – a standard published by the [International Financial Standards Board](#), and is currently released in exposure draft for comment.

A significant part of the sustainability report's contents will involve "the devil in the detail" of (a) the AASB standards that are settled, finalised and published;⁵ and (b) additional specified disclosures – given that the minister responsible is proposed to have powers to require that the sustainability report include specified statements relating to environmental sustainability matters.⁶

That said, at present, the following is relatively clear from the *TLA Bill* and associated documents:

- The sustainability report will have to be published annually and accompany the reporting entity's annual report (i.e. described as the 'fourth report' required as part of a relevant entity's annual financial reporting obligations).
- The sustainability report will, at its most basic level, comprise (a) the entity's climate statements for a financial year; (b) the entity's notes to the climate statements; and (c) a declaration provided by the entity's directors.⁷
- The "climate statements" will be a disclosure of matters contained in the applicable AASB standards, which will likely include:
 - Material climate-related financial risks and opportunities
 - The entity's metrics and targets related to climate, including Scope 1, 2 and 3 emissions of greenhouse gas (GHG) (with Scope 1 and 2 GHG emissions only initially required, and Scope 1, 2 and 3 GHG emissions required after the entity's second reporting year onwards)
 - Any governance and/or risk management processes, controls and procedures related to the above matters
- The sustainability report will be required to be audited by auditors like other financial reports under Chapter 2M of the *Corporations Act*, and an auditor's assurance report will be required to accompany the sustainability report.
- The Australian federal government Department of the Treasury will expect the entity's auditors to engage sustainability experts, who will use technical climate information in formulating the assurance report.

Liability framework

The mandatory climate disclosures will be subject to the existing liability framework under the *Corporations Act* and *Australian Securities and Investments Act 2001* (Cth) in relation to directors' duties, misleading or deceptive conduct provisions, and general disclosure obligations.

However, the proposed amendments will limit some of these liabilities by modifying the statutory liability regime for a limited period. For sustainability reports issued between 1 July 2025 and 30 June 2028, the application of misleading or deceptive conduct provisions to Scope 3 GHG emissions and forward-looking statements are limited to regulator-only actions for a fixed period of three years. This limitation of liability will provide immunity from any action, suit or proceeding. However, it does not apply to a civil action brought by the Australian Securities and Investments Commission (ASIC), which relates to either an alleged contravention of a provision that has a fault element and/or where an injunctive or declaratory remedy is sought.

The liability limitation does also not apply to an action, suit or proceeding if it is criminal in nature.

Beyond 30 June 2028, the existing liability framework will apply.

Practical Preparatory Steps for Board Members

Our brief suggestions for companies and/or boards that may be subject to the *TLA Bill's* amendments to consider:

- Corporations that will be subject to the legislative change should firstly identify if, and when, the obligation will apply to their business – it could be as early as the annual report due after 1 July 2024. Businesses need to also be considering in the immediate term their climate risks and opportunities moving forward. This is to ensure that if, and when, the legislative change occurs – the board has proactively taken steps to prepare to draft and issue the "climate statement" as part of its annual reporting, and systems are in place to prepare and retain the required sustainability records.
- Boards should proactively consider what preexisting legal obligations their corporation may have to meet GHG targets (i.e. under other commonwealth legislation).
- Given the "climate statement" will require (when fully phased in) statements regarding a corporation's Scope 1, 2, and 3 GHG emissions, corporations ought to consider now how these emissions can be accurately measured and reported.
- Boards may wish to consider proactively engaging with qualified experts to assist them in developing, and in measuring, their current GHG emissions and any future GHG emission targets.
- Boards should consider what, if any, financial and cash flow requirements will be required in the future to meet their new climate reporting obligations if and when the *TLA Bill* is passed.

4 By virtue of proposed new *Corporations Act* section, S.336A.

5 Noting that *AASB SR1* is only in exposure draft form at the date of publication.

6 By virtue of proposed new *Corporations Act* section, S.296A(5).

7 By virtue of proposed new *Corporations Act* section, S.296A(1).

Key Takeaways

Consultation for the *TLA Bill* has now closed (as of 9 February 2024).

Sustainability reporting is relatively new, and most Australian businesses will need to invest resources in understanding the various elements of climate reporting and developing systems to collect and analyse data to make effective disclosures. That said, capability and capacity in the professional services industry for sustainability reporting is limited. In light of this, the government has stated that it will monitor whether the professional services industry is sufficiently upskilling and developing in order to implement these reforms.

Organisations should review the proposed regime and consider whether they will be covered by the reporting framework. Those captured should implement the necessary steps and seek the appropriate professional advice on governance, transition planning and strategy.

We will continue to watch this space with interest.

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