



## AUSTRALIAN CLIMATE-RELATED FINANCIAL DISCLOSURE (CRFD) – UPDATE

In common with other jurisdictions around the world, there is an increasing amount of sustainability related regulation in Australia. The CRFD establishes the climate-related reporting requirements for ‘applicable entities’ and reinforces the need for organisations to substantiate disclosures made in respect of climate change to avoid greenwashing.



In January 2024, HFW published an overview of the Exposure Draft legislation on the CRFD which was released by the Australian Treasury for consultation (**Overview**).

On 27 March 2024, an amendment to the draft legislation was introduced in the Australian House of Representatives and read for the first time (**the CRFD Bill**).<sup>1</sup>

On the same day, the Senate referred the provisions of the CRFD Bill to the Senate Economics Legislation Committee (**Committee**). The Committee, following a period of consultation, submitted its report on 3 May 2024 and recommended that the CRFD Bill be passed (**Inquiry Report**).<sup>2</sup> Coalition Senators submitted a Dissenting Report.

Most recently on 15 May 2024, the draft bill was debated before the Australian House of Representatives and has been referred to the Federation Chamber. For the CRFD Bill to be made into law, it must be passed by both the House of Representatives and the Senate and assented to by the Australian Governor-General.

In the interim, given the level of continued interest in this draft bill within Australia and abroad, we have updated our previous summary to reflect key changes to the CRFD Bill since our Overview. This update also suggests action entities should undertake now, notwithstanding the CRFD Bill has yet to pass into law. We discuss the absence of requirements in respect of nature-related reporting and provide more information on the

amendments to the CRFD Bill in the Further Details section.

#### In summary, the key amendments comprise:

- the deferral of the start date to an earliest date of 1 January 2025 depending on the commencement date of the CRFD Bill (if passed);
- clarification of the applicable entities within the first reporting period (which presently would exclude, for instance, registrable superannuation entities);
- amendment of the definition of Scope 3 greenhouse gas (GHG) emissions;
- simplification of the drafting of the directors' declaration and qualifying the opinion required to be formed by directors during the first three years; and
- introduction of the concept of a 'protected statement' during the initial three-year limited immunity against third party claims (excluding proceedings brought by the Australian Securities & Investments Commission (ASIC) or otherwise criminal in nature).

Please note this update of the status of the CRFD Bill is not intended to be exhaustive, nor is it a substitute for obtaining legal advice on the issues raised in this article.

#### What should you do now?

Notwithstanding that the CRFD Bill has yet to be formalised into law - to the extent that they have not already done so, businesses will need to determine:

- Whether they trigger the reporting threshold.
- Which reporting group they fall within.
- When the reporting process is to commence, including the deadline for submission.
- What is their governance process, strategy and risk management plan regarding how to identify, manage and report on climate-related risks and opportunities.
- Whether their existing processes and governance will enable them to collect and document the necessary data and assessments to be able to prepare the sustainability report.
- Any gaps in their governance, strategy, processes and data, and how to address those gaps.
- That their Board is appropriately briefed and understands how the new regime will impact the business, including understanding the requirements of the directors' declaration, the liability framework and penalties for non-compliance.
- That their audit and assurance team have sufficient climate and sustainability expertise where appropriate, both internal and external.

<sup>1</sup> Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024

<sup>2</sup> Economic Legislation Committee, 'Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 [Provisions] Report', Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 [Provisions] (aph.gov.au), (accessed 21 May 2024)

- Their processes for legal sign off in respect of the sustainability report and to the extent external legal sign off is obtained, that the legal team has relevant experience and expertise on sustainability disclosures.

### What is the status of nature-related reporting?

Whilst the CRFD Bill is framed in terms of 'sustainability reporting', the report itself is focused on climate-related reporting, not nature-related reporting. This is despite the increasing understanding of the significance of the interrelationship between climate and nature, as demonstrated on 'Biodiversity Day' at COP27 in Sharm el-Sheikh, Egypt.<sup>3</sup>

The Explanatory Memorandum to the CRFD Bill introduces a novel concept of 'international environmental sustainability-related disclosure standards and frameworks'. The Australian Government is seeking the flexibility to respond to such

standards and frameworks via the power of the Minister to make legislative instruments setting requirements for inclusion in the sustainability report in respect of 'financial matters concerning environmental sustainability'.<sup>4</sup> In our Overview, we raised the need for a definition of 'environmental sustainability' given the lack of clarity in respect of its meaning. While the CRFD Bill has slightly narrowed the requirement from 'other matters concerning environmental sustainability' to 'financial matters', it remains a broad power to introduce additional reporting requirements into the CRFD.

We note as an aside that the type of amendments required to address nature-related risks and opportunities would likely warrant amendment to the *Corporations Act 2001* (Cth) (**Corporations Act**) itself for equivalency with climate-related disclosures. However, if the intention is for the Minister to incorporate

such amendments over time via legislative instruments, that would warrant clarification now rather than by reference to the unclear proposal to respond to 'international environmental sustainability-related disclosure standards and frameworks'.

### Further details on the amendments to the CRFD Bill

#### What are 'applicable entities'?

The proposed new legislation mandates disclosure of sustainability reports by 'applicable entities'. To recap, applicable entities are reporting entities under Chapter 2M of the Corporations Act which meet at least one of three threshold criteria as set out in the table below. We have updated the table from our Overview to reflect the changes to the reporting periods for these thresholds (noting further changes to the reporting periods are possible). The table is a modified version of the table prepared by Treasury.<sup>5</sup>

3 United Nations, COP27: Protecting biodiversity is protecting the Paris Agreement, 16 November 2022 (COP27: Protecting biodiversity is protecting the Paris Agreement | UN News) (accessed 17 May 2024)

4 Explanatory Memorandum, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (EM) at [4.94]

5 Australian Treasury, Mandatory climate-related financial disclosures, Policy Position Statement, Mandatory climate-related financial disclosures - Policy position statement (treasury.gov.au) (Policy Position Statement) (accessed 20 May 2024) at [2]; See also Parliament of Australia, Bills Digest No 68, 2023-24, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024, 14 May 2024, Bills Digest 68, 2023-24 - Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (aph.gov.au) (accessed 20 May 2024) (Bills Digest) at p 12

6 If the start date occurs on either of these dates, the 'first transitional period' is the period that (a) starts on the start date; and (b) ends on 30 June 2026. Otherwise there is no first transitional period (s1707 of the CRFD Bill)

THREE THRESHOLDS FOR SUSTAINABILITY REPORTING <sup>i</sup>					
First annual reporting periods starting on or after	Large entities and their controlled entities meeting at least two of three criteria:			National Greenhouse and Energy Reporting (NGER) reporters	Asset Owners (registered scheme, registrable superannuation entity or retail CCIV)
	Consolidated revenue <sup>ii</sup>	EOFY <sup>iii</sup> consolidated gross assets	EOFY employees		
<b>1 January 2025 or 1 July 2025<sup>6</sup></b> Group 1	\$500 million or more	\$1 billion or more	500 or more	Above the NGER publication threshold <sup>4</sup>	Expressly excluded
<b>1 July 2026</b> Group 2	\$200 million or more	\$500 million or more	250 or more	All other NGER reporters	\$5 billion assets under management or more <sup>v</sup>
<b>1 July 2027</b> Group 3	\$50 million or more	\$25 million or more	100 or more	N/A	N/A

Transitional Period	Start Date	End Date	Commencement date of the applicable section of the CRFD Bill
<b>First Transitional Period;</b>	<ul style="list-style-type: none"> <li>a. 1 January 2025; or</li> <li>b. 1 July 2025</li> </ul>	30 June 2026	<ul style="list-style-type: none"> <li>a. On or before 2 December 2024</li> <li>b. Between 3 December 2024 and 1 June 2025</li> </ul>
<b>Second Transitional Period</b>	1 July 2026	30 June 2027	

Group 1 is expected to comprise the largest companies listed on the Australian Stock Exchange (**ASX**). For example, ‘...the thresholds for inclusion in Group 1 are broadly equivalent to the characteristics of the 200th company in the ASX200...’. Whereas Group 2 ‘...are broadly equivalent to the characteristics of the 300th company in the ASX300...’.<sup>7</sup> Furthermore, the CRFD Bill now expressly excludes a registered scheme, registrable superannuation entity or retail Corporate Collective Investment Vehicle (**CCIV**) from Group 1.

### What is the current proposed start date?

As foreshadowed in our Overview, the current draft of the bill has extended the pending start date for the ‘first transitional period’ from 1 July 2024 to **1 January 2025** (if the applicable section of the CRFD Bill commences on or before 2 December 2024). The table below summarises the current key potential start dates.<sup>8</sup>

### What are sustainability reports?

The sustainability reports are to include ‘**climate statements**’ based on Australia’s proposed adoption of the International Sustainability Standards Board (**ISSB**) IFRS S2 *Climate-related disclosures and IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information* (modified for

Australian purposes by the Australian Accounting Standards Board (**AASB**) (**Sustainability Standards**).

As at the date of this article, the Sustainability Standards are not expected to be finalised until August 2024.<sup>9</sup>

The Explanatory Memorandum accompanying the CRFD Bill clarifies that entities will be expected to report on:

- ‘*material financial risks and financial opportunities relating to climate*;
- *any climate-related metrics and targets (including scope 1, 2 and 3 GHG emissions)*;
- *governance, strategy and risk management processes in relation to the above risks, opportunities, metrics and targets*.<sup>10</sup>

The definition of ‘Scope 3 GHG’ emissions continues to evolve and it is now proposed to incorporate the definition from the Sustainability Standards. The concept of ‘financed emissions’ from the Sustainability Standards has also been introduced in the context of disclosing any metrics and targets of an entity relating to Scope 3 GHG emissions.<sup>11</sup>

Currently, an exemption from the reporting requirements is provided for Group 3 entities that can

demonstrate there are **no material financial risks or opportunities** relating to climate as determined in accordance with the Sustainability Standards.<sup>12</sup>

### What must a sustainability report address?

As above, the sustainability report for a financial year will consist of:

- a. the **climate statements** for the year (as required by the Sustainability Standards);
- b. any notes to the climate statements;
- c. any statements required by the Minister pursuant to a legislative instrument on **financial matters concerning environmental sustainability**; and
- d. the **directors’ declaration** about the statements and notes.

The sustainability report will be subject to mandatory auditing and assurance requirements. The assurance requirements will form part of the Australian assurance standards for climate disclosures which are still to be developed by the Auditing and Assurance Standards Board (**AUASB**). It remains expected that the assurance requirements will be transitioned, with ‘full reasonable assurance’ proposed by 1 July 2030.<sup>13</sup>

<sup>7</sup> Bills Digest at p 12

<sup>8</sup> s1707 of the CRFD Bill; Note if this section of the CRFD Bill commences on or after 2 June 2025, then the start date will be ‘...the first 1 January or 1 July to occur 29 days or more after the date this section commences’.

<sup>9</sup> Inquiry Report at [2.35]

<sup>10</sup> EM at [4.76]

<sup>11</sup> ‘Financed Emissions’ are ‘the portion of emissions of an investee or counterparty attributed to the loans and investments made by an entity to the investee or counterparty’ (EM at [4.25])

<sup>12</sup> EM at [4.82 - 4.86]

<sup>13</sup> Bills Digest at p 11 and 15; EM at [4.128]



## What must a directors' declaration address?

The directors' declaration is:

*'...a declaration by the directors as to whether, in the directors' opinion, the substantive provisions of the sustainability report are in accordance with [the Corporations Act], including:*

- a. *section 296C (compliance with [Sustainability Standards] etc.); and*
- b. *section 296D (climate statement disclosures).<sup>14</sup>*

The declaration must be made in accordance with a resolution of the directors, specify the date on which the declaration is made and be signed by a director (s296A(7), Corporations Act).

While the drafting of the declaration has been simplified, directors nonetheless need to be satisfied that the 'substantive provisions' of the sustainability report are in accordance with the Corporations Act. A 'substantive provision' is defined to mean *'...anything required to be included in the sustainability report under s296A(1), other than the director's declaration...'*

The current proposed concession is within the first three years the requisite opinion to be formed by the directors will be satisfied if the directors form the opinion that *'...the entity has taken **reasonable steps to ensure** the substantive provisions of the sustainability report are in accordance with [the Corporations Act].<sup>15</sup>*

Directors will therefore be seeking to rely upon the auditor's findings on whether the sustainability report is in accordance with the Corporations Act. It will also be important for directors to obtain internal and external legal sign off on the sustainability report for the purposes of this declaration. In addition to obtaining training from practitioners with experience and expertise on what is required to form the requisite opinion for the purposes of the declaration both during the transitional phase and beyond.

<sup>14</sup> s296A(6) CRFD Bill

<sup>15</sup> EM at [4.188]

## What is the liability framework?

ASIC will have an express power to issue directions to test the veracity of statements made by companies in their sustainability reports. The proposed amendments clarify that any hearing before ASIC under its new powers would be held in private. We note as an aside that the CRFD Bill coincides with ASIC's first civil penalty action against Vanguard regarding statements made in respect of its exclusions from an index in the context of an absence of process around its research and screening in respect of ESG criteria. There will be a further hearing on 1 August 2024 before the Australian Federal Court to determine the applicable penalty.<sup>16</sup>

Once the CRFD Bill comes into force, breaches in respect of climate-related financial disclosures may result in civil and/or criminal legal proceedings. There will be a transitional period in relation to some breaches, for the first three years of the requirements (excluding proceedings brought by ASIC or otherwise criminal in nature).

A new concept of a **'protected statement'** during this transitional period has been introduced. A protected statement means:

*'...a statement in a sustainability report prepared for a financial year commencing during the three years starting on the start date, or an auditor's report of audits or reviews of such sustainability reports that is also about any of the following:*

- *scope 3 GHG emissions (including financed emissions);*
- *scenario analysis made in those sustainability reports; or*
- *a transition plan (within the meaning [of the Sustainability Standards]'.<sup>17</sup>*

The effect of this is that an entity making a protected statement is temporarily shielded from liability for misleading, deceptive and other conduct in relation to uncertain parts of the climate statement within the sustainability report.<sup>18</sup> As above, making a protected statement will not prevent ASIC from taking action during this time or other criminal proceedings being brought.<sup>19</sup>

### Forward looking statements

relating to climate will also be a protected statement if it is made in a sustainability report for a financial year commencing during the 12 months starting on the start date for the purpose of complying with the Sustainability Standards (or in the associated auditor's report).<sup>20</sup>

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The author extends thanks to Lea Hiltenkamp for her assistance on the article.

<sup>16</sup> Australian Securities and Investments Commission v Vanguard Investments Australia Ltd [2024] FCA 308; ASIC Media Release, ASIC wins first greenwashing civil penalty action against Vanguard, 28 March 2024 (24-061MR ASIC wins first greenwashing civil penalty action against Vanguard | ASIC) (accessed 17 May 2024)

<sup>17</sup> EM at [4.192]

<sup>18</sup> Inquiry Report at [1.79]; EM at [4.189]

<sup>19</sup> Inquiry Report at [1.80]; EM at [4.190] and [4.191]

<sup>20</sup> EM at [4.197] and [4.198]

i Small and medium size business below the size thresholds are exempt. Entities that are already exempt from lodging a financial report under Chapter 2M of the Corporations Act are also exempt from preparing the sustainability report (eg. an entity registered with the Australian Charities and Not-for-profits Commission)

ii For the financial year, determined in accordance with accounting standards in force at the relevant time.

iii End of Financial Year determined in accordance with the accounting standards.

iv The applicable entity is (1) a registered corporation under the National Greenhouse and Energy Report Act 2007 (Cth) (NGER Act) at the end of the financial year or required to make an application to be registered in relation to meeting a threshold under s12(1) of the NGER Act; and (2) its group meets a threshold for the financial year within the meaning of s13(1) of the NGER Act. The thresholds in s13(1) for a controlling corporations group relate to (a) the total amount of GHG emitted from the operation of facilities under the operational control of entities that are members of the group with a specified carbon dioxide equivalent; or (b) the total amount of energy produced from the operation of facilities under the operational control of entities that are members of the group which meets specified levels; or (c) the total amount of energy consumed from the operation of facilities under the operational control of entities that are members of the group which meets specified levels.

v Or such other amount prescribed by the regulations.

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