Governance Institute of Australia

T +61 2 23 5744 **F** +61 2 9232 7174
E info@governanceinstitute.com.au
Level 11, 10 Carrington Street,
Sydney NSW 2000
GPO Box 1594, Sydney NSW 2001
W governanceinstitute.com.au

8 December 2023

The Treasury
Langton Crescent
Parkes ACT 2600

Via: sustainablefinanceconsultation@treasury.gov.au

Dear Sirs,

RE: Australian Sustainable Finance Strategy

Who we are

Governance Institute of Australia (GIA) is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public, and not-for profit sectors. As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates, and postgraduate study.

Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society. Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors.

We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group.

Introduction

Governance Institute welcomes the opportunity to comment on the Australian Sustainable Finance Strategy. Our members support the overarching objectives that aim to mobilise private sector investment whilst ensuring climate and sustainability-related opportunities and risks are well understood and managed by corporate entities. The three key pillars aimed to deliver on these objectives, namely, the objective of improving transparency on climate and sustainability are critical to this ambition. Access to credible, accurate and actionable information on climate and sustainability is becoming an increasingly necessary requirement for the effective operation of business activities and capital allocation across the economy.

Sustainability and climate issues have moved from the periphery to become part of core business strategy. We have observed an emerging need for sustainability governance and compliance frameworks, measures for sustainability and climate risks on business models and investor decision making. These issues are becoming increasingly integrated into business models and are driving strategic decision making on future investment decisions.

It is critical that the ambitions outlined in this strategy align with Australia's net zero transition plan and in the process support the consistency and interoperability of emerging global transparency frameworks. An important aspect of the transition to a net zero economy will be a socially just transition. The social equity aspects of a just transition will be important considerations. How to achieve financial investments that allow for a just transition will be a consideration for policy makers.[1]

Our members support the four key priorities as the critical building blocks for improving transparency, by ensuring standardised disclosure of climate and other sustainability-related financial opportunities and risks, the criticality of an Australian sustainable finance taxonomy, support for credible climate transition planning and target setting and improving sustainability labelling for investment products.

Pillar 1 – Improve transparency on climate and sustainability

Priority 1: Establishing a framework for sustainability-related financial disclosures

What are the opportunities for Government, regulators, and industry to support companies to develop the required skills, resources, and capabilities to make climate disclosures under the proposed new obligations?

Governance Institute supports the government's effort to establish a framework for sustainability-related financial disclosures. Financial markets require comprehensive and transparent information related to financially material sustainability-related opportunities and risks as this enables effective investor decision making.

We acknowledge the work that has progressed internationally with the release of the ISSB new global baseline for sustainability and climate-related disclosure standards for for-profit companies and financial institutions. International alignment with ISSB standards is required to avoid the burden of reporting duplication and allow for comparative investment analysis across jurisdictions, particularly for large multi-nationals based in Australia.

We expressed some concerns in our submissions to Treasury's consultation in February and June this year, on the design proposals for the new mandatory climate disclosure requirements, particularly in regard to the pace and scale of regulatory change taking place. The new framework which is anticipated to initially impact only the largest entities will eventually impact a larger cohort of SMEs that do not currently possess the skill and capability to accurately report on their sustainability and climate footprint.

The impact of the proposed regulatory framework and the uplift required, particularly for SMEs, in the years ahead will be significant and our members consider they may have challenges reporting meaningful accurate information within the timeframes proposed.

There is a need for Government to assist in building capability to support the implementation of climate-related disclosures over the short-to-medium term. Encouraging and enabling group 2 and group 3 reporting entities to invest early in preparation of mandatory reporting disclosures should be part of this capability building. There is a further opportunity to help improve how data is captured and measured to ensure that the existing margins of error in estimating Scope 3 emissions is eventually minimised and reduced as much as possible.

Our members consider there is a general overestimation of the speed at which the audit and assurance community will be able to build the capability and knowledge to effectively audit corporate reporting and disclosure. Government will need to work with established industry bodies to support them in developing and delivering effective professional training. It is also critical that public bodies and regulators are adequately resourced to support regulatory implementation and capability uplift, that includes additional funding and resources for the AASB, ASIC and APRA to deliver on their expanded scope of work.

---

[1] https://theconversation.com/the-human-factor-why-australias-net-zero-transition-risks-failing-unless-it-is-fair-214064

How should the Government, regulators and industry prepare for global developments in sustainability-related financial disclosure frameworks and standards, including the TNFD?

GIA supports the Strategy's proposed approach to adopt global sustainability reporting standards as they are developed. This will ensure Australia keeps pace with global developments and support Australian businesses to manage sustainability related risks and opportunities that may be driven by international investors.

We note the Taskforce on Nature related financial disclosure's (TNFD) recent publication of recommendations to assist organisation's with their assessment, management and disclosure of nature-related issues. There has been considerable momentum in this area following the 2022 Global Biodiversity Framework that nearly 200 countries have adopted. Several high-profile companies, asset managers and civil society organisations globally have endorsed TNFD which is likely to speed adoption of the recommendations. It is anticipated that this will follow a similar path as the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD) took with climate.

Governance Institute and other industry bodies have been active in raising early awareness of the developments on nature-related reporting and have encouraged early consideration for the proposed LEAP approach (locate, evaluate, assess, and prepare) to better manage risk and impact and strategic forward planning. The proposed framework is more relevant to nature-exposed sectors such as agriculture, building and construction and manufacturing. Government should consider a targeted approach to ensure that these sectors are reporting clearly on the nature-related impacts.

Priority 2: Develop a sustainable finance taxonomy

What are the most important policy priorities and use cases for an Australian sustainable finance taxonomy? What are the key insights from international experience to date?

In our members' experience the term sustainability can cause confusion as individuals, firms, governments, and international bodies define it in different ways. The taxonomy may face challenges as different expectations are placed on what should be in and out of scope of sustainability. A clear working definition of what sustainability is and how it will be defined when assessing material financial risk will be necessary.

Greenwashing is a cause for concern for corporate boards and governance professionals. The complexities of sustainability-related reporting and associated marketing activities mean that boards require accurate and timely guidance and input that allows for appropriate disclosure of targets, actions and metrics used.

A focus on greenwashing is necessary to avoid the growing trend of green-hushing – corporations that avoid publicising communications about ESG and environmental activity to avoid scrutiny to defend against the risk of greenwashing accusations or to hide insufficient progress. Green-hushing can have negative consequences for transparency and stifles climate goal setting.

A sustainable finance taxonomy can provide a foundation for further regulatory measures to address greenwashing and aid in promoting effective transparency of climate and sustainability goal setting. Current efforts in developing a taxonomy should aim to act as a robust and credible information tool for the financial services sector to identify and classify sustainable activities to assist with the effective allocation of capital.

The development of a taxonomy is also useful in ensuring governance professionals and entities understand regulatory posture and activities and where possible provide industry with the practical guidance to assess the validity of sustainability-related claims to assist in the legitimation of climate and sustainability claims. Once finalised, adoption and use of the taxonomy should be encouraged as voluntary 'best practice'.

What are priorities for expanding taxonomy coverage after the initial focus on climate mitigation objectives in key sectors?

The Australian taxonomy could be practically expanded to cover other sustainability objectives of climate mitigation, adaptation and resilience, and the transition to a circular economy. The taxonomy should focus on hard to abate sectors, in particular, mining, manufacturing, building and construction and intensive agriculture sectors.

What are appropriate long-term governance arrangements to ensure that the taxonomy is effectively embedded in Australia's financial and regulatory architecture?

The nature of long-term governance arrangements will partly depend on the decisions made by Government about how the taxonomy will be embedded into the Australian regulatory framework. Once the taxonomy moves from voluntary to mandatory disclosure, it will be appropriate to establish permanent governance arrangements.

Priority 3: Support credible net zero transition planning

To what extent will ISSB-aligned corporate disclosure requirements improve the transparency and credibility of corporate transition planning? What additional transition disclosure requirements or guidance would be most useful in the medium-term?

The ISSB-aligned corporate disclosure requirements require critical capacity building and support for their effective implementation as significant gaps in knowledge, data, capacity, and methodologies remain. There is a need to drive certainty to limit the potential for costly and complex legal actions.

GIA supports the proposed approach for ASIC to inform the market of its key expectations and supervisory priorities relating to the disclosure of transition-related targets, plans and claims and where necessary informed by emerging international standards and practices. Further consultation with industry to consider broader priorities and options for strengthening transition planning to develop high quality, internationally aligned transition planning practices and reporting requirements will be necessary. This should help to inform markets and the flow of finance to support the transition.

Are there related priorities and opportunities for supporting enhanced target setting and transition planning for nature and other sustainability issues?

There is scope for Government to set targets and transition plans to reduce nature-related impacts, through national level targets with an initial focus on high-impact sectors such as mining, manufacturing, and agriculture. This will require certainty in the form of legislative reform and require policy planning with scope for data capture to understand the risks, dependencies, and direct and indirect impacts on nature.

Priority 4: Develop a labelling system for investment products marketed as sustainable.

What should be the key considerations for the design of a sustainable investment product labelling regime?

The introduction of sustainable investment product labelling should be globally aligned and not act to confuse investors. This will require credibility and integrity of the scheme to build consumer and investor confidence, awareness, and recognition of sustainable investment product labelling. Sustainable investment product labelling should have clear guidelines where asset class specific considerations are materially nuanced including for varying levels of sustainability integration.

What key sustainability data gaps or uncertainties faced by financial institutions in Australia should be prioritised by the CFR?

Mandatory sustainability-related disclosure data should be credible, accessible, and comparable to be useful to market participants. Government has an important role to play in assisting entities to ensure the integrity, availability and appropriate management and use of data assists in the disclosure of high-quality information.

Data and analytics firms also have an important role to play in driving high standards of data integrity. Government certification scheme of data providers may assist with industry players and the market in recognising data houses that meet advanced criteria. This will ensure that financial institutions, regulators and corporate entities and other uses of sustainable finance taxonomy can appropriately rely on data provided and used.

Pillar 2: Financial system capabilities

Priority 5: Enhancing market supervision and enforcement

Are Australia's existing corporations and financial services laws sufficiently flexible to address greenwashing? What are the priorities for addressing greenwashing?

Our members consider that the existing corporations and financial services laws are sufficiently flexible to address greenwashing. The Australian Securities and Investments Commission (ASIC)'s role in relation to greenwashing arises in the context of its role as the regulator of corporate entities and due to obligations under Australian Consumer Law, specifically the Corporations Act and the ASIC Act. This legislation contains general prohibitions that directors and officers should take precautions to comply with when offering or promoting sustainability-related products, namely –

- making statements (or disseminating information) that are false or misleading; or
- engaging in dishonest, misleading or deceptive conduct in relation to a financial product or financial service.[2]

Further, companies need to be aware of the importance of acting consistently with statements where they *are* made.

ASIC also has regulatory oversight over corporate disclosure obligations under:

- s 1013D(1)(l) of the Corporations Act, which states that where a financial product has an investment component, its issuer must include in the Product Disclosure Statement (PDS) the extent to which labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment, and
- the guidelines in Regulatory Guide 65 *Section 1013DA disclosure guidelines* (RG 65).[3]

Where an entity is listed on the Australian Securities Exchange (ASX) it may also breach its continuous disclosure obligations, which ASIC may enforce.

ASIC has undertaken reviews of disclosures and has indicated that greenwashing is a regulatory priority in 2024. Additional funds were allocated to ASIC for surveillance and enforcement activities in the 2023 Federal Budget to increase activity in relation to businesses making misleading claims about the sustainability or efficiency of their products.[4]

The Australian Competition and Consumer Commission (ACCC) also has a role to administer and enforce the Competition and Consumer Act 2010 (CCA), Australian Consumer Law, and other legislation. In relation to greenwashing, the ACCC regulates the obligation of businesses not to engage in any conduct that is likely to mislead or deceive consumers. In 2022 in a highly publicised internet sweep, the ACCC took action to identify 'misleading environmental and sustainability marketing claims' as part of its enforcement priorities being consumer and fair-trading issues in relation to environmental and

[2] See ss 1041E, 1041G and 1041H of the Corporations Act, and sections 12DA and 12DB of the ASIC Act

[3] 3.1 and 3.1A of the ASX Listing Rules and section 674(2) of the Corporations Act, ASX, 'Corporate Governance Principles and Recommendations' (Fourth Edition), recommendation 7.4

[4] Investor Roundtable aligns efforts to deliver cleaner, cheaper energy | Treasury Ministers.

sustainability claims.[5] Subsequently, the ACCC reported on 2 March 2023 that it will investigate several businesses for potential greenwashing following the internet sweep.[6] The ACCC reported that the sweep had identified that 57 per cent of companies investigated had made concerning claims about their environmental credentials. Following the release of the report, the ACCC is also investigating complaints made by third parties in relation to greenwashing claims.[7]

In addition by regulators, a 2016 Opinion by Hutley SC and Hartford-Davis considered the extent to which the duty of care and diligence imposed upon company directors by s 180(1) of the *Corporations Act* permitted or required Australian company directors to respond to climate change risks. Since this time, the Centre for Policy Development published a second opinion which, in summary, suggests that directors' exposure to the risk of climate change litigation has in fact increased.[8] Board governance focus has shifted from consideration and disclosure of risks towards planning and action to manage risks and opportunities in the transition to a zero carbon economy – the focus is increasingly on how the duty is discharged and disclosure alone is no longer sufficient.

Overall while lawsuits based upon an accusation of greenwashing remain relatively rare outside the USA, their numbers are steadily increasing.[9] Across Australia, the US, France, and the Netherlands, there have been at least 20 greenwashing cases filed between 2016 and 2021, and a further 27 cases before non-judicial oversight bodies.[10] In recent years Australia has been one of the most active jurisdictions globally for climate related litigation after the US.[11] These cases have variously accused organisations of misleading communications about: the environmental impacts of their products; their environmental commitments and targets; their climate investments and the financial risks posed by climate change; and the amount of environmental damage they cause.

While the sector which has so far faced the largest share of such cases is the energy sector. Other sectors, including transport, finance, fast-moving consumer goods (FMCG), fashion, agriculture, and mining, have also faced these actions. The legal and regulatory mechanisms for arguing such cases are varied and include securities regulation, advertising standards and consumer protection legislation.[12] In some cases, these actions are brought not by regulators but by social pressure groups and NGOs for the purpose of generating public debate and securing changes in company policies and positions, which means that actions that might traditionally have been considered 'novel' or carried a low prospect of success are nonetheless pursued.

---

[5] https://www.accc.gov.au/media-release/accc-internet-sweeps-target-greenwashing-fake-online-reviews.

[6] https://www.accc.gov.au/media-release/accc-greenwashing-internet-sweep-unearths-widespread-concerning-claims

[7] On 3 March 2023, Greenpeace lodged a greenwashing claim with the ACCC against Toyota. The claim alleges that Toyota's advertising gives the false impression that the company is leading the transition to clean cars, while Toyota is allegedly rather acting globally to block the take-up of electric vehicles; On 23 March 2023, Flight Free Australia lodged a greenwashing claim with the ACCC against Etihad Airways. The claim alleges that certain Etihad advertisements implied that flying with Etihad does not have a significant environmental impact and that Etihad either intends or reasonably expects to achieve net zero emissions by 2050. Flight Free Australia alleges that Etihad has no credible path to net zero, and that its own sustainability report forecasts an increase in carbon dioxide emissions to 2026 due to increased services, while its emissions reduction initiatives are un-modelled and rely on speculative technology and offsetting.

[8] https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf

[9] Global trends in climate change litigation: 2022 snapshot - Grantham Research Institute on climate change and the environment (lse.ac.uk)

[10] CSSN Research Report 2022:1: Climate-Washing Litigation: Legal Liability for Misleading Climate Communications.docx

[11] See article Australia tops world in climate litigation, AFR 3 August 2023.

[12] Climate greenwashing liability: Key risks for boards in the transition to net zero | United Kingdom | Global law firm | Norton Rose Fulbright

For these reasons our members consider the existing corporations and financial services laws are sufficiently flexible to address greenwashing.

Pillar 3: Australian Government leadership and engagement

Priority 10: Catalysing sustainable finance flows and markets.
What are the key barriers and opportunities for the CEFC to support financing and market development in areas with significant climate co-benefits, including nature and biodiversity?

The CEFC has proven effective in allowing for Government funds to be used to build and catalyse markets to achieve public interest objectives as well as strong financial returns. GIA supports expanding the CEFC's mandate to incorporate climate adaptation and resilience to drive sector transitions. The CEFC could also play a role in supporting sectors for nature and biodiversity conservation and restoration. Where some markets are emerging, the CEFC may need to adopt a higher level of risk tolerance than usual. This should be reflected in how the Government sets expectations, including through the CEFC's mandate, and required rate of return. Ideally, longer-term investments should be considered even where short-term returns may not be realised.

Priority 12: Position Australia as a global sustainability leader
What are other means to mobilise private sector finance toward sustainability solutions in the Indo-Pacific region?

As Australia moves rapidly from 'laggard' to 'early follower' on sustainable finance there is an opportunity to take a leadership role on the international stage through bilateral, regional, and multi-lateral engagement. The Government can build green export markets by developing a sustainability strategy that incorporates the Southeast Asia Economic Strategy to 2040. The Australian Sustainable Finance Institute has identified that the lack of agreed, robust definitions for transition finance has acted as a key barrier to supporting the acceleration of the net zero transition in the Asia-Pacific region. Australia may have a key role in assisting Asia-Pacific nations in

Expanding Australia's international development finance capabilities would reinforce Australia's position as a key partner on climate, and support Australia's bid to host the United Nations Climate conference COP31.

Please contact me or Daniel Popovski, Senior Manager, Policy and Advocacy if you have any questions in connection with this submission.

Yours faithfully,

Megan Motto

CEO