THE UNIVERSITY OF MELBOURNE

Melbourne Law School

CORPORATE ENERGY TRANSITION

LEGAL TOOLS FOR SHIFTING COMPANIES TOWARDS CLEAN ENERGY PRACTICES

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ACKNOWLEDGMENTS

This report was prepared by Professor Jacqueline Peel (Melbourne Law School), Professor Brett McDonnell (University of Minnesota Law School), Dean Hari M. Osofsky (Penn State Law and School of International Affairs), Dr Anita Foerster (Senior Research Associate, Melbourne Law School) and Ms Rebekkah Markey-Towler (Research Assistant, Melbourne Law School). This research received funding support from an Australian Research Council Discovery Project grant on "Devising a Legal Blueprint for Corporate Energy Transition" (2016-2020). The team would like to thank Professor Ian Ramsay, Associate Professor Rosemary Teele Langford, Dr John Purcell, Mr David Barnden and Ms Sarah Barker for their helpful comments and feedback on the report. We would also like to thank interviewees in Australia and the United States for taking the time to share their insights with us.

SEPTEMBER 2020

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ABBREVIATIONS AND ACRONYMS

AASB	Australian Accounting Standards Board
ACCR	Australasian Centre for Corporate Responsibility
ACSI	Australian Council of Superannuation Investors
AGM	Annual General Meeting
AICD	Australian Institute of Company Directors
ARC	Australian Research Council
APRA	Australian Prudential Regulation Authority
ASFI	Australian Sustainable Finance Initiative
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
AUASB	Auditing and Assurance Standards Board
BIS	Bank for International Settlements
CSR	Corporate social responsibility
CDSB	Climate Disclosure Standards Board
ESG	Environmental, social, governance
FY	Financial year
GHG	Greenhouse gas
IGCC	Investor Group on Climate Change
IPCC	Intergovernmental Panel on Climate Change
OFR	Operating and financial review
RBA	Reserve Bank of Australia
SASB	Sustainability Accounting Standards Board
TCFD	Taskforce on Climate-related Financial Disclosures
UK	United Kingdom
US	United States

EXECUTIVE SUMMARY

ABOUT THIS REPORT

This report presents the findings of an ARC funded Discovery Project, DP160100225, *Devising a Legal Blueprint for Corporate Energy Transition* (Peel, Osofsky & McDonnell, 2016-2020). The project examined the potential and limitations of three specific corporate law tools – disclosure obligations, directors' duties and shareholder resolutions – to influence decision-making by listed companies, so as to improve climate risk management and allocate resources in ways which support clean energy transition. The focus of the report is on Australian law and practice. However, the report also includes an assessment of parallel developments in the United States, which is similarly placed to Australia in terms of its carbon-intensive economy and corporate/securities law requirements.

Exploring the potential for private sector actors to take the lead on clean energy transition is important in the context of strong partisan politics, ongoing policy uncertainty, and an absence of effective laws to tackle climate change mitigation and clean energy transition in Australia. In this regard, the project used a framework analysing internal pathways (company-driven) and external pathways (investor-driven) for corporate energy transition through divestment and reinvestment, and examined their relationship to the three corporate law tools.

SIGNIFICANT DEVELOPMENTS IN PRACTICE

Over the course of the project, 2016 to 2020, there were significant developments in the practice and application of these corporate law tools to climate change risks and opportunities. This continues to be a rapidly evolving space. Expectations of investors, regulators and other stakeholders that companies adequately disclose and manage climate-related business risks are rising, in line with a number of new frameworks and regulatory guides. Directors' duties, including the duty of care and diligence, have been strongly linked to the need to consider climate change risks. Indeed, litigation in this area is considered to be 'only a matter of time'. Shareholder resolutions seeking action on climate change are increasing in their sophistication and diversity, and securing increasing support at company AGMs. They are becoming an important tool for shareholders' engagement with companies.

IMPORTANT TOOLS BUT COMPLEMENTARY REGULATORY ACTION STILL REQUIRED

Disclosure obligations, new interpretations of directors' duties and shareholder resolutions on climate change, in concert, are contributing to mounting pressure on Australian companies to identify, assess and internalise climate risks. However, if the contribution of companies to broader climate change mitigation objectives is to be enhanced, the limits of procedurally-oriented corporate law tools must be recognised and more substantive regulation, situated within energy transition targets and aligned with Paris Agreement temperature goals, is required for broader environmental impacts. While there is increased awareness, investigation and engagement activity by investors on climate risks, the business case for capital divestment and re-allocation on climate grounds is not yet strong, although potentially at a pivotal turning point. Broader impact, again, will require complementary action to shift progress on energy transition in the private sector.

REFORM RECOMMENDATIONS

The report sets out a number of recommendations that may enhance the role of corporate laws in transitioning to clean energy practices. These include:

- Improving the quality and quantity of corporate disclosure of climate-related business risks, including considering requirements for companies and investors to report and quantify their performance in relation to targets and goals for transitioning to clean energy practices.
- Assisting directors to develop their climate competence to promote the effective internalisation and management of climate risks and opportunities, and enhance consideration of the longer-term interests of other stakeholders in company decision-making.
- Reforms to the existing framework for shareholder resolutions in Australia and strengthening emerging trends in these resolutions in order to further facilitate energy transition goals.

1. INTRODUCTION

1.1 PROJECT SCOPE

1. This report presents the findings of an ARC funded Discovery Project, DP160100225, *Devising a Legal Blueprint for Corporate Energy Transition* (Peel, Osofsky & McDonnell, 2016-2020).
2. The project examined the potential and limitations of three specific corporate law tools – disclosure obligations, directors' duties and shareholder resolutions – to influence decision-making by listed companies, so as to improve climate risk management and allocate resources in ways which support clean energy transition. Actions by companies that support clean energy transition may involve investing capital and resources in energy efficiency, switching to renewable and low-carbon energy sources, and developing business models that align with GHG emissions reduction targets.
3. While the focus of the research was on the Australian context, insights were drawn from the US experience given economic, socio-political, and corporate and securities law similarities. Where relevant, comparisons were also made with other jurisdictions, such as the UK and some European countries.
4. A combination of desktop research and interviews with relevant stakeholders was used for the research. Appendix A provides further detail of the project's research methodology for interviews.

1.2 CLIMATE RISK FOR BUSINESS AND THE RELEVANCE OF CORPORATE LAW TOOLS

5. Exploring the potential for private sector actors to take the lead on clean energy transition is important in the context of strong partisan politics, ongoing policy uncertainty, and an absence of effective laws to tackle climate change mitigation and clean energy transition in Australia (Osofsky & Peel 2016; APEEL 2017). The corporate sector can play a significant role in taking forward the 'rapid and far-reaching' transition of the energy system necessary to meet the Paris Agreement's goal of keeping warming well below 2°C, while pursuing efforts to limit increases to 1.5°C (Paris Agreement, art 2; IPCC 2018).
6. Since the conclusion of the Paris Agreement in 2015, business leaders, institutional investors and financial regulators have increasingly framed climate change as a financial risk to business, to investors and more systemically, to broader financial stability (see Box 1). This is a significant shift from viewing climate change as purely an ethical, corporate social responsibility issue relevant to maintaining companies' 'social licence' (Barker et al. 2016).
7. Collective awareness of climate risk is growing (KPMG 2020a; APRA 2019; APRA 2020). For example, in 2020, for the first time, climate change and environmental issues dominated the top-five risks in the World Economic Forum's Global Risks Report. PwC's 23rd 2019 CEO survey highlighted that 65% of Australian CEOs view climate change as a threat to business growth (PwC 2020) while KPMG's 2019 Global CEO Outlook reported that environmental/ climate change risk was seen as the number one threat to growth by Australian and global CEOs (KPMG 2019a, p. 6; KPMG 2019b).
8. At the same time, analysis by MinterEllison of FY19 annual reports indicated that only 21 (7%) of ASX300 companies had 'meaningful' climate change risk disclosures, compared with 137 (45.5%) of reports containing little or none (Barker et al. 2020).
9. If climate change poses material financial risks for a company, this may have the effect of enlivening a range of obligations under corporate law to disclose and manage those risks. It also opens up new tools for investors and civil society to engage with companies on issues of climate risk management and energy transition, and for companies to transition to clean energy practices.

BOX 1: CLIMATE CHANGE AS A FINANCIAL RISK (OR OPPORTUNITY)

The risks posed to businesses by climate change are generally categorised as (TCFD 2017):

1. **Physical Risks:** including risks posed by climate change impacts, e.g. risks of damage to company assets and disruption to operations or supply chains caused by extreme events or shifting climate patterns; or

2. **Transition Risks:** including the risks associated with the transition to a low-carbon economy, e.g., the need to comply with changing regulatory requirements, potential litigation risks, and business trends that include declining demand for carbon intensive products and new markets for climate friendly products. The risk of damage to a company's reputation and brand value stemming from association with a particular asset or company is another form of transition risk which will be relevant for many companies.

These risks can **impact a company's bottom line** – through lost revenue, reduced value of assets and investments, stranded assets and ultimately, reduced company value. Climate risks are increasingly seen as financially material for many businesses across different industry sectors.

Climate change also poses a significant risk of **broader financial instability.** A January 2020 report released by the Bank for International Settlements (BIS), the central bank for the world's central banks, warned members of 'green swan' events, which could cause the next financial crisis. These green swan events may force central banks to intervene as 'climate rescuers of last resort', buying up devalued assets in order to save the financial system (Bolton et al. 2020). This concern has been echoed by the Reserve Bank of Australia (RBA) (Reserve Bank of Australia 2019, p. 56; Debelle 2019; Durkin 2020).

On the flipside, there is a **range of potential business opportunities** associated with the transition to a low carbon economy, including the development of new clean energy markets and improved operating efficiencies.

1.3 STRUCTURE OF THE REPORT

10. The remainder of this report is divided into the following parts:

- Part 2: discusses internal (company-driven) and external (investor-driven) factors influencing corporate energy transition and their relationship to the corporate law tools investigated in the project.
- Part 3: examines Australian law and practice on disclosure of material business risks and the extension of those obligations to climate change risks.
- Part 4: outlines Australian law, legal opinion and practice on the legal duties of company directors as they apply to the disclosure and management of business risks, including those posed by climate change.
- Part 5: explores the rights of shareholders under Australian law to bring resolutions to companies' AGMs on matters relating to climate change, and institutional investors' engagement with this process.
- Part 6: draws comparisons with current approaches to climate risk and comparable corporate law tools in the US.
- Part 7: sets out conclusions on the potential and limitations of corporate tools to drive corporate energy transition and makes recommendations for potential reforms to fill remaining gaps.

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2. PATHWAYS FOR ENERGY TRANSITION

2.1 OVERVIEW

11. In June 2020, AGL, Australia's highest carbon emitter, confirmed its commitment to a net zero emissions target by 2050. AGL announced it would tie long-term pay bonus incentives for key management personnel to carbon transition metrics, such as the proportion of energy produced from renewable sources, and offer a carbon neutral option on all electricity plans (AGL 2020; Toscano 2020). This announcement followed increasing pressure from civil society and institutional investors, although AGL made no commitment to bring forward the closure of its coal plants (Toscano 2020; ACCR 2020a).

12. In January 2020, BlackRock, the world's largest asset manager, recognised that awareness of climate change-related risk was 'rapidly changing,' with the sector 'on the edge of a fundamental reshaping of finance' (Fink 2020a). Responding to calls for action, in two letters, one to shareholders and one to CEOs, Blackrock announced that it would put sustainability at the heart of its investment portfolio. It pledged to reduce climate risk exposure of its $1.8 trillion actively-managed assets through exiting thermal coal producers and to endorse the Task Force on Climate-related Financial Disclosures (TCFD) as a framework for climate-related risk disclosure (Fink 2020a; Fink 2020b).

13. These examples illustrate how pathways for corporate energy transition may be either internally driven by companies' own decision-making processes or externally facilitated through the actions of investors such as asset owners and asset managers. This report uses an analytical framework based on internal and external pathways (see Box 2 below; Osofsky et al. 2019; Peel et al 2019) to evaluate the role of corporate law tools in fostering corporate energy transition.

BOX 2: INTERNAL AND EXTERNAL PATHWAYS (ADAPTED FROM OSOFSKY ET AL. 2019)

	DIVESTMENT	REINVESTMENT
INTERNAL	**Goal:** Shifting existing investments away from fossil fuels. **Action:** Companies move internal resources away from fossil fuel investments (e.g. electricity company decommissions coal plant before end of economic life). **Legal tools:** Disclosure, focusing company attention on financial risks posed by energy transition. Interpretations of directors' duties that enable consideration of climate risk and/or shareholder suit claiming breach of directors' duty to manage climate risks to company. Shareholder resolution requesting enhanced risk disclosure and transition strategy development.	**Goal:** Shifting existing investments towards clean energy. **Action:** Companies move internal resources into clean energy practices (e.g. company invests in solar power farm). **Legal tools**: Shareholder resolution requesting enhanced risk disclosure and transition strategy development. Disclosure, focusing company attention on financial opportunities associated with energy transition. Interpretations of directors' duties that enable consideration of climate risk and opportunity.
EXTERNAL	**Goal:** Shifting existing investments away from fossil fuels. **Action:** External investors take money or other resources out of companies excessively exposed to climate change risk (e.g. University endowment divests from Exxon). **Legal tools:** Disclosure, which allows investors to determine risk exposure of potential divestment target companies. Interpretations of trustee duties that enable consideration of climate change.	**Goal:** Fostering new investments in clean energy. **Action:** External investors invest money or other resources in companies that are focused on using or developing clean energy practices **Legal tools:** New corporate forms focused on promoting public goals e.g. benefit corporations. Legal reforms to encourage clean energy investment e.g. crowdfunding. Interpretations of trustee duties that enable consideration of climate change.

2.2 INTERNAL PATHWAYS

14. Internal decision-making may involve choices by individual companies about how to deploy their financial and other resources, and what sort of product or service mix to produce. Choices which support clean energy transition may include:
    - *Asset divestment*: decisions to move money or resources away from assets or operations exposed to climate-related business risks (e.g. selling off or retiring fossil fuel-based assets, phasing out programs of fossil fuel exploration and development); and/or
    - *Asset reinvestment*: decisions to invest money or resources into clean energy practices that reduce exposure to climate-related business risks (e.g. investment in energy efficiency, switching to renewable and low-carbon energy sources, developing business models which align with GHG emissions reduction targets).
15. Internal pathways for clean energy transition may be activated through the use of corporate law tools by a range of external actors. These actors include:
    - Shareholders or institutional investors (asset owners and asset managers) seeking to influence the companies in which they invest. For example, investors may seek to engage with investee companies around clean energy issues through shareholder resolutions, or may bring legal claims against these companies (e.g. shareholder actions to recover losses suffered as a result of misleading disclosure of climate-related business risks);
    - Corporate regulators, such as the Australian Securities and Investments Commission (ASIC), bringing an enforcement action (e.g. relating to inadequate or misleading disclosures);
    - Civil society groups, often in partnership with shareholders or investors, seeking to enforce disclosure obligations and duties as they relate to climate risks to achieve strategic public interest goals.

2.3 EXTERNAL PATHWAYS

16. Corporate law tools may also facilitate energy transition through providing information to external stakeholders, such as investors, that guides their investment decision-making.
17. Investment decision-making by external actors may include decisions about the investment of capital in a business through buying or divesting shares. It also encompasses investor-company engagement activities where institutional investors continue to hold shares and use this ownership as a way to influence investee companies.
18. External decision-making which supports clean energy transition may involve:
    - *Capital divestment:* decisions to move money away from investments exposed to climate-related business transition risks (e.g. selling off shares in fossil fuel companies); and/or
    - *Capital reinvestment:* decisions to invest money in companies that adopt clean energy practices that reduce exposure to climate-related business transition risks.
19. Different types of legal tools and corporate governance structures may be necessary to facilitate capital reinvestment by external actors in ways that benefit clean energy transition. While not the focus of this report, emerging new tools in the US offer examples of how this external reinvestment pathway could be facilitated (see further Osofsky et al. 2019).

2.4 INTERACTION OF INTERNAL AND EXTERNAL PATHWAYS

20. A central question for the project was whether, and to what extent, the three corporate law tools investigated (disclosure, director's duties, shareholder resolutions) influence or facilitate internal and external pathways, and their interaction, to foster corporate energy transition.

21. Figure 1 below provides a schematic understanding of how internal and external pathways might interact to produce divestment and reinvestment that favours clean energy transition.

2.5 CONTEXT FOR OPERATION OF PATHWAYS

22. The socio-political context within which internal and external pathways combine to foster corporate energy transition is continually evolving.

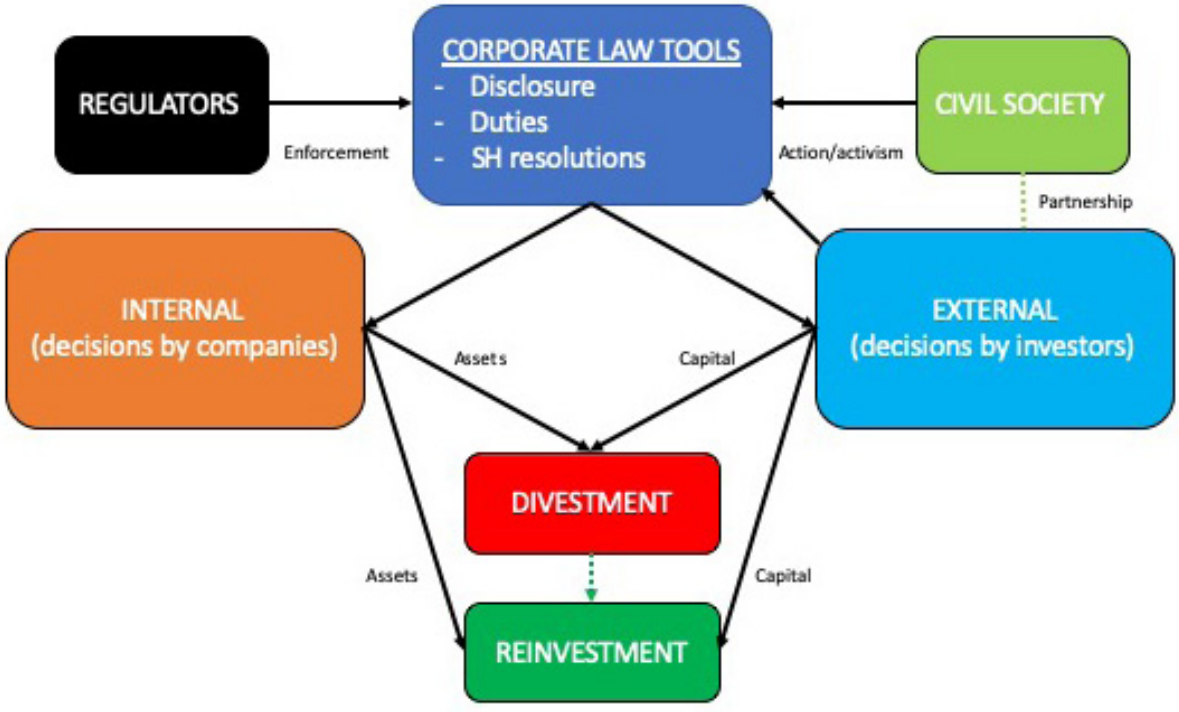
23. There is increasing pressure on governments, including the Australian Government, to set net zero emission targets by 2050, and to outline a clear trajectory for emissions reductions. For example, at COP25 in December 2019, 631 investors managing over US$37 trillion in assets signed a statement calling on governments to achieve the Paris Agreements' goals, commit to improving climate-related financial reporting and accelerate private sector investment.

24. All Australian States and territories have committed to net zero emissions, as well as many business groups, banks, mining companies, and institutional investors (Morton 2020; ClimateWorks Australia 2020). Recently, the Australian Energy Council, representing many of Australia's largest carbon emitters, endorsed a net zero emissions target by 2050 (Australian Energy Council 2020).

25. Developments at the federal level in Australia indicate some policy shifts on emissions policy. In March 2020, the Climate Change Authority produced an updated policy toolkit to transition Australia to a low-emissions future. In May 2020, the Australian Government issued its Technology Investment Roadmap discussion paper for stakeholder comment. The paper surveyed 140 technologies across all sectors of the Australian economy to transition to a 'low' emissions future, but notably lacked any reference to targets and emphasised gas as a 'transition' fuel (Department of Industry, Science, Energy and Resources 2020).

26. In this context, the future transition in Australia to net zero emissions remains unclear and potentially highly disruptive. Continuing emphasis on 'transition' technologies and the absence of clear strategies, ambitious targets and policies going forwards signals the key role corporate law tools can play to facilitate the transition to clean energy practices.

FIGURE 1: INTERACTION OF INTERNAL AND EXTERNAL PATHWAYS



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3. DISCLOSURE OF CLIMATE-RELATED BUSINESS RISKS

3.1 OVERVIEW

27. In February 2017, in a speech at the Insurance Council of Australia's Annual Forum, APRA Executive Board Member, Geoff Summerhayes, warned that while climate risks had previously been seen as a 'future problem or a non-financial problem' this was 'no longer the case'. APRA is Australia's prudential regulator of banks, insurance companies and most superannuation funds. According to Summerhayes, climate risks were 'foreseeable, material and actionable now' (Summerhayes 2017).

28. Regulators and standard setters have subsequently signalled their elevated expectations for companies' management and disclosure of climate-related risks. Following a baseline survey in 2019, in February 2020, APRA outlined plans to undertake a climate change financial risk vulnerability assessment, starting with the banks, and coordinated with ASIC and the RBA via the Council of Financial Regulators. This assessment is designed to 'ensure consistency in the application of scenario analysis, disclosure recommendations and to analyse the macro-economic impacts of climate change' (APRA 2020a; APRA 2020b; APRA 2019). APRA further outlined plans to issue and update its prudential guidelines on climate-related financial risks (APRA 2020a; APRA 2020b).

29. ASIC has also stepped up its regulatory oversight of climate-related financial risk disclosures. In a recent report outlining current areas of focus, ASIC specifically referred to its ongoing surveillance program into climate change risk disclosure practices by Australian listed companies (ASIC 2019a; ASIC 2020a; ASIC 2020b). ASIC also made disclosures of climate change risk a key focus area for FY19 financial reporting (ASIC 2019b). This follows updates to its regulatory guides in 2019. In addition, the ASX, AASB and AUASB have issued updated guidance for the disclosure of climate-related financial risks.

30. Although there have been some delays as a result of COVID-19, these latest developments signal an upward trend in regulatory and investor expectations for the disclosure of climate risks. This trend augments specific requirements under Australian company law and issued guidance, including soft-law frameworks, notably the 2017 recommendations of the TCFD.

31. There are two primary ways in which corporate law disclosure requirements may affect internal company decision-making or investment decision-making on issues of climate risk.

32. First, requirements to make disclosures can focus company attention on the financial risks posed by climate change and spur the development of business strategy to manage these risks. Enforcement activity by regulators or litigation brought by private parties (e.g. shareholders) and/or civil society can serve to heighten this pressure.

33. Second, disclosure of climate change-related business risks by companies allows investors to determine the risk exposure and transition strategy of investee companies. This information may then guide investment decisions, such as whether, and how long, to hold shares in the company, how to engage with the company on climate change strategy, and how to vote on climate change resolutions brought by shareholders.

34. The following sections provide a survey of the current legal landscape and regulatory guidance issued on climate change risk disclosure (3.2), emerging best practices (3.3), and key findings from qualitative interviews (3.4).

3.2 LEGAL FRAMEWORK AND REGULATORY GUIDANCE

35. In the past, climate change was not seen as posing financial risks for companies, resulting in fragmented or limited disclosure of such risks (ASIC 2018). However, with the rapidly evolving view that climate change can pose financial risks for companies, this situation is changing. Increasingly, it is seen as mandatory for companies to disclose climate-related risks as part of their mainstream reporting, where climate change poses material financial risks.

36. The *Corporations Act 2001* (Cth) contains requirements for companies to disclose material financial risks to the market. Materiality is to be assessed by each company in light of the nature of its business and business strategy.

37. Australian accounting and auditing standards bodies apply the following definition of materiality: 'Information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity' (AASB & AUASB 2019, p. 8; AASB 101, p.7; AASB Practice Statement 2).

38. One of the main sources of information available to the market about companies is their annual report (CPA Australia 2019). Annual reporting is therefore a key arena in which companies may disclose climate change-related risks. Information found in the annual report includes a directors' report and an annual financial report (Corporations Act, ss 292, 295, 299, 299A). For companies listed on the Australian Stock Exchange (ASX), additional requirements are specified for a part of the directors' report known as the operating and financial review (OFR) (s 299A).

3.2.1 DISCLOSURES IN DIRECTORS' REPORTS

39. For listed companies, the OFR must contain information that shareholders would reasonably require to make an informed assessment of the company's operations, financial position, and business strategies and prospects for future financial years (Corporations Act s 299A(1)). Recently-reviewed guidance and statements from regulators strongly suggests the need for disclosure of climate risks in the OFR where those risks are financially material for companies.

40. In its updated August 2019 Regulatory Guide 247, ASIC advised that the OFR should 'include a discussion of environmental, social and governance risks where those risks could affect the entity's achievement of its *financial* performance or outcomes disclosed, taking into account the nature and business of the entity and its business strategy' (ASIC 2019c, RG247.64, emphasis in original). ASIC went on to add: 'Climate change is a systemic risk that could have a material impact on the future financial position, performance or prospects of entities' (ASIC 2019c, RG247.66).

41. The ASIC Regulatory Guide advises that '[d]irectors may also consider whether it would be worthwhile to disclose additional information that would be relevant under integrated reporting, sustainability reporting or the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), where that information is not already required for the OFR' (ASIC 2019a, RG247.66). It further warns that '[c]limate-change-related risk disclosures in the OFR and in any voluntary disclosures (such as those recommended by the TCFD) should not be inconsistent' (ASIC 2019a, RG247.66).

42. Supplementing this, the fourth edition of the ASX *Corporate Governance Principles and Recommendations* issued in February 2019 included recommendation 7.4 that a listed entity 'should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks' (ASX Corporate Governance Council 2019, p. 27). Environmental risks, as defined in the glossary, encompass risks associated with the entity 'adding to the carbon levels in the atmosphere,' as well as 'the risks for the entity associated with climate change'.

43. Underscoring the importance of companies considering and disclosing climate risks where financially material, the commentary to recommendation 7.4 singles out climate change as a particular source of environmental risk. It notes that '[m]any listed entities will be exposed to these types of risks, even where they are not directly involved in mining or consuming fossil fuels' (ASX Corporate Governance Council 2019, p. 28). The Council encourages companies to follow the TCFD recommendations (see below) and cautions 'entities that believe they do not have any material exposure to environmental or social risks to consider carefully their basis for that belief and to benchmark their disclosures in this regard against those made by their peers' (ASX Corporate Governance Council 2019, p. 28).

44. While it is not mandatory for an ASX-listed company to follow these principles and recommendations, any departure must be explained and reported in a company's annual report (ASX Corporate Governance Council 2019, pp. 1-2). Practical guides for reporting against these latest regulatory developments have emerged, for example, the Governance Institute of Australia's guide issued in February 2020 (Governance Institute of Australia 2020).

3.2.2 DISCLOSURES IN FINANCIAL STATEMENTS

45. The financial report in an annual report provides information about a company's financial position and performance. It contains the financial statements for the year and notes (i.e. disclosures and other necessary information) to those statements (Corporations Act, s 295).

46. Company directors sign off on the financial statements and notes to attest that they accord with the prescribed accounting standards and present a 'true and fair representation' of the company's financial position and performance (Corporations Act, ss 295-297). External auditors also sign off on the financial report attesting that it complies with the Corporations Act, including the accounting standards and the true and fair representation requirement (Corporations Law, ss 307, 308). Consequently, signing off on financial statements that give an inaccurate picture of the company's financial position due to a failure to disclose, or disclose adequately, climate risks could amount to misleading conduct.

47. This conclusion is supported by a practice note, issued jointly by the AASB and AUASB in December 2018 and republished in April 2019. It advises reporting entities that climate-related risks can no longer be treated as merely a matter of CSR discussed outside the financial statements but should also be considered in the context of financial statements (AASB & AUASB 2019, p. 3). The practice note states that 'qualitative external factors such as the industry in which the entity operates, and investor expectations may make such risks 'material' and warrant disclosures when preparing financial statements, regardless of their numerical impact' (AASB & AUASB 2019, p. 3).

48. The AASB/AUASB practice note identifies several potential types of financial implications from climate risk, including asset impairment, changes in the useful life of assets, and changes in the fair valuation of assets due to climate-related risk (AASB & AUASB 2019, p. 11). For example, the note states that '[w]hen the fair value of a particular asset is impacted by climate-related risks, the entity may need to disclose how climate-related risk is factored into the calculations' (AASB & AUASB 2019, p. 13). Failure to write-down asset values by overlooking material climate considerations may give rise to unlawful or improper dividends (see, for example, investor letter to BP: Green & Jessop 2020).

49. Although the AASB/AUASB guidance is voluntary, a strong expectation exists that directors, preparers and auditors will consider the materiality of climate-related risks in preparing and auditing financial reports (AASB & AUASB 2019, p. 3; Peel, Barker & Mulholland 2020, p. 27). This guidance has also received broader support. In November 2019, Nick Anderson of the International Accounting Standards Board cited and endorsed the practice note (Anderson 2019). Moreover, in February 2020, Chartered Accountants Australia and New Zealand and CPA Australia were part of the 13 chief executives from 14 accounting bodies, representing 2.5 million accountants worldwide, who signed a call to action in response to climate change (Accounting for Sustainability 2020).

3.2.3 OTHER AVENUES FOR DISCLOSURE

50. Climate risk may be a relevant consideration for other disclosure obligations for listed companies. These include the following.

51. *Continuous reporting obligations*: companies are required to notify the ASX of any information (not already generally available) that a reasonable person would expect to have a material effect on the price or value of the entity's securities (Corporations Act, ss 674–77; ASX Listing Rules Chapter 3, especially Listing Rule 3.1). For example, particular circumstances may arise which give rise to a requirement to report on aspects of climate risk (e.g. a sudden drop in commodity value as a result of the introduction of stringent emissions controls in countries which are key trading partners).

52. *Additional reporting on mining and oil and gas production and exploration activities*: Mining, oil and gas companies have additional specific continuous reporting requirements, including requirements to report on proven and probable mineral resources and ore/oil/gas reserve holdings, and the material economic assumptions underpinning resource development feasibility studies, unless these assumptions are commercially sensitive (Corporations Act, ss 674–77; ASX Listing Rules, Chapter 5). Climate risk would be a relevant consideration when disclosing these factors, particularly the underlying economic assumptions for proposed resource developments.

53. *Regulated Fundraising Documents, such as Prospectus*: Companies seeking to raise funds via prospectuses are required to disclose all information that investors and their professional advisers would reasonably require to make an informed assessment of the prospects of the company. In situations where climate risk (or opportunity) will be material to a company's prospects, this must be disclosed in a prospectus in a clear, concise and effective way to ensure investors are able to make a fully informed investment decision (Corporations Act, s 710; ASIC 2019d, RG228).

54. *ESG reporting*: As part of the rise in ESG reporting over time, mapped by the Australian Council of Superannuation Investors (ACSI 2019a, p. 12), non-compulsory reporting through integrated and sustainability reports has emerged. The ASX Corporate Governance guidelines specifically note that disclosure under recommendation 7.4 may be made by cross-referring those reports, but publishing such reports is not a requirement (ASX Corporate Governance Council 2019, p. 27).

3.2.4 COMPLIANCE AND ENFORCEMENT

55. The disclosure obligations described above are principles-based, i.e. the law imposes general disclosure obligations to identify and disclose any material financial risks. This allows latitude for companies to take their own context into account and exercise business judgment in assessments of materiality and reporting of risks. An assessment of materiality will be company and context specific.

56. Nonetheless, climate change is increasingly recognised as posing material financial risks to companies in a range of different sectors. The Australian economy is dominated by highly climate change exposed sectors such as energy, resources, transport, food and agriculture (Barker 2018a, p. 56; Hutley & Hartford-Davis 2019). The Australian financial services sector (banks, insurers, superannuation funds) may also have significant exposure as a result of their asset holdings, as recognised by the RBA in its most recent Financial Stability Review from October 2019 (RBA 2019, pp. 57-61).

57. As recognition of the financial materiality of climate risk strengthens, the benchmark for compliance is rising. Numerous calls are emerging that '[w]ith growing investor and community expectations on companies to 'do the right thing', it is important that best practice be followed' (KPMG 2020b, p. 9). Investors – for example, the investor coalitions behind the Climate Action 100+ initiative, the Australian Council of Superannuation Investors (ACSI) and the Investor Group on Climate Change (IGCC) – may also encourage 'soft' compliance with disclosure obligations by putting pressure on companies to disclose climate risks in a way that is relevant and useful to the market. For example, in August 2020, the IGCC published a report drawing on the views of 50 investors from 22 organisations with more than $1.1 trillion in assets calling for improvements in the disclosure of corporate climate risk disclosure (IGCC 2020).

58. Where companies are not complying with disclosure obligations, there are two main avenues for enforcement in Australia: public avenues involving enforcement by regulators and private avenues involving enforcement by shareholders.

59. *Public enforcement*: ASIC has a range of powers and enforcement options available for pursuing a breach of disclosure obligations. The Corporations Act provides for serious penalties and sanctions for breaches of specific disclosure requirements (e.g. s 728 addresses fundraising documents) and more generally for misleading or deceptive conduct (e.g. ss 1041E and 1041H, s 1308). Disclosure breaches may also be pursued as part of broader claims for breach of directors' duties. While formal enforcement action has not yet been taken by regulators in Australia, increasing surveillance activities suggest this is only a matter of time (see also Hutley & Hartford Davies 2019, p. 2).

60. *Private enforcement*: Private enforcement of disclosure obligations by shareholders could take a variety of forms, including claims for compensation for losses suffered as a result of misleading disclosure (e.g. via securities class actions), or claims seeking to compel a company to disclose material climate risks (Barker 2018a). Shareholders and civil society are increasingly engaged in pursuing these enforcement avenues, both in Australia and in other jurisdictions such as the US and UK (for example, *Abrahams v Commonwealth Bank of Australia*, noting the shareholders' claim was withdrawn following the bank's commitment to improve disclosure practices).

3.3 EMERGING PRACTICE AND THE ROLE OF THE TCFD RECOMMENDATIONS

61. In late 2015, in the wake of the conclusion of the Paris Agreement, the Financial Stability Board of the G20 established the TCFD to 'develop voluntary, consistent climate-related financial risk disclosures for use by companies in providing information to lenders, insurers, investors and other stakeholders'. The final recommendations of the TCFD were released in 2017 (TCFD 2017). Practical guides for reporting against the TCFD framework have emerged, for example, those issued by the Climate Disclosure Standards Board and Sustainability Accounting Standards Board in May 2019 (CDSB & SASB 2019).

62. The TCFD recommendations, summarised in Box 3 below, represent a source of best practice guidelines for how companies can approach the disclosure of climate-related financial risks. In Australia, they have emerged as a widely accepted voluntary framework setting out the form that disclosures – required under principles-based reporting obligations – may take. For example, the TCFD recommendations are referred to in ASIC's regulatory guides and the ASX Corporate Governance Council's principles and recommendations as a framework for climate-risk disclosures, and APRA has encouraged the adoption of frameworks, such as the TCFD. Indeed, recent commentary suggests that the TCFD recommendations have moved from 'gold standard' to 'base expectation' with an increasing number of businesses using this reporting framework (Barker, Dellios & Mulholland 2020, p. 3).

BOX 3: RECOMMENDATIONS OF THE TCFD

The TCFD report recommends that organisations disclose against four particular themes: *governance, strategy, risk management and metrics and targets.*

Scenario analysis is a key tool the TCFD recommends for organisations to assess potential business, strategic, and financial implications of climate-related risks/opportunities and to disclose those in their financial filings.

Depending on their particular risk exposure, the TCFD recommends companies use *transition risk scenarios* (which lay out a pathway and an emissions trajectory consistent with the temperature goals of the Paris Agreement) and *physical climate-related scenarios* (to identify extreme weather threats of moderate or higher risk before 2030 and a larger number and range of physical threats between 2030 and 2050).

It is critical that the analysis includes a variety of *plausible scenarios,* both favourable and non-favourable to company interests e.g. a 2°C scenario in addition to two or three other scenarios relevant to the company's circumstances, such as scenarios related to Nationally Determined Contributions (NDCs) under the Paris Agreement and business-as-usual scenarios. Scenario analysis disclosures should be related to the company's financial information and should include disclosure of key inputs and assumptions to allow users to understand the process and its limitations.

63. According to the TCFD's 2019 status report, 785 companies and other organisations globally have committed to support the TCFD (TCFD 2019, p. 110). As of February 2020, support grew to over 1,027 organisations, representing a market capitalisation of over $12 trillion, including many Australian companies (TCFD 2020). However, the TCFD notes that the number of companies reporting under the TCFD framework, as well as the adequacy of disclosures, is still deficient. Consequently, 'regulators are increasingly questioning whether market-led action alone will produce an uptake in TCFD compliance at the scale and speed necessary to avert damaging financial consequences down the track' (Summerhayes 2019).

64. In Australia, a Senate Inquiry of the Federal Parliament, which reported in April 2017, recommended that the Australian Government commit to implementing the final recommendations of the TFCD, including considering potential law reform to give effect to these recommendations (Senate Economic References Committee 2017). While no legislative action has been taken to date to implement these recommendations (see the Government's response at Australian Government 2018), clear steps have been taken by regulators and standard setters alike that strongly reference the need to disclose climate risks, where they pose material financial risks to the company, including by using the TCFD framework. Moreover, regulatory oversight of such disclosures has been stepped up in 2019-20.

65. Parallel developments are evident in the financial sector. For example, in June 2020, the Network for Greening the Financial System (NGFS), whose members include the RBA, released its first set of climate scenarios and guide to climate scenario analysis for central banks (NGFS 2020). This provide a common starting point to analyse climate risks, such as in APRA's forthcoming climate risk vulnerability assessment.

66. The TCFD recommendations are central to the engagement strategies of many asset owners and managers who are requesting companies to commit to their implementation. For example, the ACSI, whose members manage AUD $2.2 trillion in assets, refers to an expectation that 'companies materially exposed to climate change risk to make substantive climate-related disclosures, by reference to the TCFD recommended disclosures' (ACSI 2019, p. 29). Globally, signatories to the UN Principles for Responsible Investment (UNPRI) are required to report under the TCFD from 2020. Further, more than 450 investors with over $39 trillion in assets under management have committed to engage the world's largest corporate GHG emitters to strengthen their climate-related disclosures by implementing the TCFD recommendations as part of Climate Action 100+.

3.3.1 CLIMATE RISK DISCLOSURE BY AUSTRALIAN COMPANIES

67. Empirical studies suggest climate risk disclosure by Australian companies has been slowly improving since 2015, though gaps remain.

68. A baseline review of the 2015-2016 reporting practices of a small group of large, highly exposed ASX-listed Australian resource and energy companies revealed that, at that point in time, climate risk disclosure was highly variable in terms of the nature, extent, quality and form of reporting (Foerster, Peel, Osofsky & McDonnell 2017). These findings were echoed in the first Hutley and Hartford Davis legal opinion on climate change and director's duties issued in 2016 (Hutley & Hartford Davis 2016, para. 47).

69. A follow up survey, completed in 2018, largely confirmed the earlier review (Peel et al 2019). This survey examined climate risk disclosures of a sample of Australian resource and energy companies, considering all available reporting since the release of the 2017 TCFD recommendations. Companies surveyed included: BHP Billiton, AGL Energy Ltd, Origin, National Australian Bank, Aurizon, Oil Search and South 32. These companies had committed to implement the TCFD recommendations and several had released scenario analyses.

70. An additional sample survey of reporting between 2017-19 from 6 mining/energy companies, 2 insurance companies, 4 banks and 2 superfunds was undertaken by the project team to examine changes in reporting practices over time. Figure 2 below draws attention to certain key features annual reports that have evolved over time, and more generally observes whether or not there have been improved disclosures, with increasing ambition (↑ or –).

FIGURE 2: ANNUAL REPORT DISCLOSURES 2017-2019

COMPANY	2017	2018	2019
MINING/ ENERGY SECTOR			
BHP (↑) Increasing ambition over time e.g. setting short, medium, long term targets; disclosure of scope 1+2+3 emissions; industry association membership; linking executive remuneration	**Annual Report 2017** TCFD-aligned; largely putting structures in place e.g. climate change specified as an area for Board experience; discloses scope 1+2+3 emissions; scenario analysis to examine resilience of portfolios in separate 2015 and 2016 reports	**Annual Report 2018** Short-term incentives linked to HSEC; industry association membership review; climate change identified as external, operational and sustainability risk (transition + physical); metrics & targets (sets five-year target and pathway to net zero for scope 1+2, methodology for measuring scope 3 emissions)	**Annual Report 2019** Details of how short-term incentives linked to climate change (shareholder increasing expectation); scenario analysis to be updated in FY20, including well-below 2 degrees; industry association review; climate + GHG emissions as its own category of risk (transition + physical); metrics + targets – operational emissions (five year target, long term target of net zero, intend to set medium target in 2020); scope 3 emissions (discloses performance, intend to set goals with supply chains FY20); Climate specified in key financial judgments/ estimates
Rio (↑) Increasing ambition over time e.g. industry association membership	**Sustainability Report 2017** Notes support for 2016 shareholder resolution to include more information about climate change summary on progress towards implementing TCFD	**Climate Change Report 2018** Three scenarios from IEA, two time frames (esp. transition risk); industry association guidelines; metrics & targets (discloses scope 1+2+3 emissions; target to reduce intensity of emissions; to set new targets)	**Climate Change Report 2019** Links remuneration + climate change; more discussion of IEA scenarios, resilience (transition risk, physical risks future work); industry associations membership; metrics & targets (2050 ambition; scope 1+2 emissions; scope 3 emissions, working across supply chains to reduce emissions)
Santos (–) Emphasis on the role of LNG over time as 'cleaner' alternative to carbon, lacking ambitious targets	**Climate Change Report 2018** Emphasises role of natural gas; uses IEA scenarios to determine portfolio resilient (transition risk); discloses emissions	**Climate Change Report 2019** Emphasises role of natural gas; scenario analysis of carbon emissions, resilient; reduce emissions through LNG growth; discloses emissions scope 1+2+3, fugitive emissions said to be low (long term net zero, medium term targets)	**Climate Change Report 2020** IEA scenarios + reflect Aus. carbon policy, portfolio resilient; executive remuneration; role of natural gas; more on role of CCS; aspiration of net zero, grow LNG to reduce emissions, reduce emissions from base operations; emissions intensity decreasing; scope 1+2+3, methane
Whitehaven (–) First report in 2019; emphasises role of coal	**Not TCFD-aligned**	**Not TCFD-aligned**	**Sustainability Report 2019** Future demand for coal; IEA scenarios (transition risks, said to be resilient)
Woodside (–) *First report in 2019	**Not TCFD-aligned**	**Not TCFD-aligned**	**Annual Report 2019** Two page summary of TCFD
Origin (↑) More detailed and less qualitative disclosure in 2019 report, esp. on metrics & targets	**Sustainability Report 2017** Review TCFD in FY2018, by 2017 aim to publish scenario analysis	**Annual Report 2018** Exit coal fired power by 2032; scenario analysis separate report; material strategic risk (transition risk); emissions reduction targets (long-term targets)	**Sustainability Report 2019** Risk management (transition + liability); scenario analysis; scope 1+2 targets; scope 3 target; reporting emissions intensity
AGL (↑) Further tailors scenario analysis in 2019 (largely transition risks), long-term target	**Not TCFD-aligned**	**Powering a Climate Resilient Economy – AGL's approach to climate-related financial risk** Scenario analysis based on NDC, 2 degrees and no carbon constraint (transition risk); discloses scope 1 & 2 emissions; long term targets e.g. renewables and exit coal by 2050	**2019 FY19 Carbon Scenario Analysis** Scenario analysis based on current policies in NEM (slow change, state targets & renewables + assumptions); closure of all coal-fired power stations by 2048 on track

COMPANY	2017	2018	2019
INSURANCE			
QBE (↑) Improved disclosure over time, esp. scenario analysis and targets	**Annual Report 2017** Welcomes TCFD and reviewing readiness to disclose in line with the recommendations	**Annual Report 2018** Disclose emissions; operational targets; to elaborate underwriting and investment targets in 2019	**Annual Report 2019** Remuneration tied to targets; scenario analysis focus on underwriting and investment (physical risks, transition); operational targets, next year investments and underwriting metrics
Suncorp (–) *First report in 2018/19, targets, to conduct scenario analysis	**Not TCFD-aligned**	**Suncorp Group Climate Change Action Plan 2018-2020** Timeframe which will complete TCFD	**2018-2019 Suncorp climate-related financial disclosures** Not finance fossil fuel projects; businesses do not directly invest in, finance or underwrite new thermal coal projects, phase out existing activities by 2025; reduce scope 1+2 emissions; 19-20 to conduct scenario analysis
BANKS			
CBA (↑) Consistent over time, FY18 and FY19 both have phased approach to climate-risk management outlined; phased approach to scenario analysis	**Not TCFD-aligned**	**Annual Report 2018** Three scenarios (physical & transition risk), analysis of physical risks and transition risks	**Annual Report 2019** FY19 scenario analysis of agriculture, phased approach
NAB (↑) Consistent over time, Work on scenario analysis & risk management	**Annual Financial Report 2017** Largely qualitative, setting up frameworks	**Annual Financial Report 2018** Details on climate change stress testing not available (gaps in data); key projects undertaken through year	**Annual Financial Report 2019** Transition risk analysis on coal sectors work in progress & physical risk analysis; key projects through the year; Sustainability report has targets – financing commitment, renewable energy, net zero 2050, capping exposures by 2035
Westpac (↑) Consistent over time, scenario analysis continuing	**Annual Report 2017** Commenced alignment with TCFD	**Annual Report 2018** Scenario analysis resilience of lending transition risks and physical risks on mortgage portfolio	**Annual Report 2019** Scenario analysis to assess how economy, electricity market and other industry sectors perform; scenario analysis physical risk
ANZ (↑) Consistent over time, 2019 put all data into one climate change report	**Annual Review 2017** 2 pg. outline of TCFD Corporate Sustainability Review 2017 Scenario analysis of thermal coal customers (transition risk), not much detail	**Annual Review 2018** Stress testing customers in mining and metals sectors, results in line with expectations, will inform customers; continued scenario analysis of thermal coal, some not prepared for transition risks; 2019 will look at mortgage portfolio Sustainability Review 2018 Scenario analysis & industry exposures/ emissions	**2019 Climate-related financial disclosures** Agricultural portfolio for physical risk under 2 warming scenarios; drought resilience; engaging customers on transition plans (reports on this progress); disclose industry exposures & financed emissions

COMPANY	2017	2018	2019
SUPERANNUATION			
Australian Super (–) Notes that TCFD designed for companies therefore not easily aligned with investors; maps portfolio transition	**Not TCFD-aligned**	**Annual Report 2018** Advocate for adoption of improved CC reporting, such as TCFD	**Climate Change Report 2020** ESG & Stewardship program, engagement agenda; portfolio physical risk assessment; map out how transitioning portfolio; four stage framework to manage CC risk; emissions
UniSuper (–) Similar to Australian Super, notes that TCFD not quite aligned to superfunds	**Not TCFD-aligned**	**First report published in 2018 but cannot locate on website**	**Climate risk and our investments 2019** ESG guiding principles; exposure of portfolio over time; no scenario analysis; emissions

3.3.2 GAPS AND QUALITY OF CLIMATE RISK DISCLOSURES

71. While a number of large Australian companies now disclose climate risks in accordance with the TCFD framework or have committed to phase in this approach over time, there are many companies not yet doing so. For instance, in their September 2018 Report 593, ASIC reported that very few listed companies outside of the ASX 200 are disclosing climate risks to their investors (ASIC 2018, p.4).

72. A Market Forces analysis from February 2019 of the public disclosures of 72 ASX100 companies that operate in sectors facing the highest levels of climate risk, found that climate risk disclosure across these companies remains 'largely superficial' (Market Forces 2019a). The Market Forces analysis highlighted that only 57% of the companies surveyed identified climate change as a material business risk; 32% detailed climate risks and opportunities in mainstream reporting; 14% disclosed detailed climate change scenario analysis; 24% disclosed an emissions reduction plan; and 22% had set an absolute emissions reduction target.

73. More broadly, there remain concerns about the quality and usefulness of climate risk disclosure by Australian companies. For example, findings from the EY Climate Risk Disclosure Barometer: Australia 2019, which surveyed 175 companies from the ASX200 and 20 largest super funds as at the end of March 2019, indicated that while 60% of surveyed companies had started to disclose climate-related risks in line with TCFD recommendations, the quality of disclosures sat at only 29% (EY 2019, p. 12). There is also a need to avoid 'greenwashing' in these reports, as highlighted at a recent business roundtable in November 2019 (CPD 2019, p. 2).

74. To examine the quality of reporting aligned with the TCFD from the most recent 2019 reporting period, a survey of reports from the same 6 mining/ energy companies, 2 insurance companies, 4 banks and 2 superfunds as outlined in Figure 2 was undertaken. Companies' reporting was assessed based on the site of reporting (annual report or other dedicated climate change or sustainability report), the strength of corporate governance structures for overseeing climate policy in the company, the sophistication of strategic and planning processes, extent of risk management, adoption of relevant metrics or targets and whether or not climate change was specifically covered in the companies' financial statements.

75. Overall, the survey identified that while there have been improvements, especially in terms of reporting governance structures, there remain high levels of variability both across sectors and within reports, particularly in terms of setting metrics and targets and broader strategy and use of scenario analysis (see Figure 3).

76. It is important to note that this sample only reflects the practices of some of the largest companies in Australia and does not reflect sectors and/or instances where the TCFD framework has not been adopted. For example, other analysis of FY19 annual reports has indicated that 45.5% of reports from ASX300 companies contained little or no meaningful disclosure of climate change risk (Barker et al. 2020).

77. Additionally, the 2019 EY survey highlighted that uptake of the TCFD reporting framework has been much slower amongst asset owners and managers (EY 2019, p. 10). This may change, for example, with APRA's announcement in February 2020 to develop a climate change financial risk prudential practice guide for banks, insurers and superannuation funds to supplement existing prudential requirements, including those found in Prudential Standard CPS 2020 Risk Management, and ongoing litigation against REST brought by Mark McVeigh, discussed further in the next Part.

FIGURE 3: ASSESSMENT OF AUSTRALIAN COMPANIES REPORTING PRACTICES

COMPANY	CLIMATE RISK REPORTING	GOVERNANCE	STRATEGY/ SCENARIO ANALYSIS	RISK MANAGEMENT	METRICS & TARGETS	CLIMATE RISK IN FINANCIAL STATEMENTS
MINING/ ENERGY						
BHP	Annual	High	Medium	High	Medium	Present
Rio	Other	High	Medium	Medium	Medium	Not present
Santos	Other	Medium	Medium	Medium	Low	Present
Whitehaven	Other	Low	Medium	Low	Low	Not present
Woodside	Annual	Low	Low	Low	Low	Present
Origin	Other	Medium	Medium	Medium	Medium	Not present
AGL	Annual/ Other	Medium	Medium	Medium	Medium	Present
INSURANCE						
QBE	Annual	High	Medium	High	Medium	Present
Suncorp	Other	Medium	Low	High	Medium	Not present
BANKS						
CBA	Annual	High	High	High	Medium	Present
NAB	Annual	High	Medium	High	Medium	Present
Westpac	Annual	High	High	High	Medium	Not present
ANZ	Other	High	Medium	High	Low/ medium	Present
SUPERFUNDS						
Australian Super	Other	Medium	High	Medium	Medium	Present
UniSuper	Other	Medium	High	Medium	Low/ medium	Not present

3.4 FINDINGS FROM INTERVIEWS

78. Empirical data derived from qualitative interviews with corporate officers, investors, regulators, industry groups and civil society provides further insights into how Australian companies perceive climate risks and approach disclosure obligations in relation to these risks. This qualitative data is an important basis from which to assess the potential and limitations of climate risk disclosure obligations to influence corporate adoption of clean energy business practices (Peel, Foerster, McDonnell & Osofsky 2019).

79. The views and opinions expressed by interviewees were grouped into prominent themes, held by a significant number of participants across the different respondent groups. The findings below reflect these themes and commonly held views, but also note the particular views and responses of individual participants or smaller groups where relevant. Key findings included the following.

80. *Good general understanding of legal obligations:* It was found that the application of current corporate legal obligations to climate risks, and the resulting obligation to disclose material business risks posed by climate change was generally well-understood at an overarching level by all respondent groups.

81. *Variable and largely inadequate practice:* Despite this strong understanding, the disclosure practices of Australian companies with regard to climate risks were seen as highly variable and, in many cases, significantly lacking in terms of coverage and quality, echoing the findings of surveys discussed above. While it was noted that some large companies, particularly those in sectors that are highly exposed to climate risks (e.g. energy and utilities) have begun to disclose these risks according to legal obligations and investor expectations, external investors described the disclosure practices of Australian companies in general as 'totally inadequate', 'under-developed', 'reactive and piecemeal', 'non-strategic', 'pretty poor' and 'deeply deficient' (Interviews, participants 3, 5, 6, 8).

82. *Materiality assessments focused on the short-term and transition risks:* There appeared to be a number of different explanations for this pattern of inadequate climate risk disclosure practices. One of the prominent themes to emerge in interviews was that the processes companies use to determine the materiality of business risks are not always picking up climate change. This is often due to the approach taken to the uncertainties and the longer timeframes associated with some climate-related risks. Although climate change may not pose material risks for some companies in the near term, many companies are not looking beyond this timeframe in their materiality assessments, or are not properly considering the full implications of climate change for their business. In addition, Australian companies are more likely to identify and disclose the transition risks associated with unstable and changing energy markets, technology advances and changing energy policy to be of material consequence to their businesses, and are less likely to identify and disclose physical climate-related risks (interviews, participant 4). With respect to transition risks, they are also more likely to focus narrowly on policy or regulatory risks (e.g. introduction of a carbon pricing regime) than the more substantive economic shifts associated with the energy transition (interviews, participant 8). Many respondents commented that Australian companies lag behind their international peers in this respect, particularly in relation to the identification and disclosure of physical risks.

83. *Reluctance to make forward-looking disclosures:* Another potential explanation for gaps and inadequacies in disclosure practices is that many companies are reluctant to make forward-looking disclosures for fear of potential legal liability associated with these representations. At the same time, a lack of compliance monitoring and enforcement activity by regulators, and a lack of regulatory guidance for companies on how to disclose climate-related risks, were also commonly identified as key factors (Interviews, participant 21, 23). This suggests that as regulatory guidance improves, and regulators step up monitoring and compliance activities, companies will feel pressure to engage in enhanced disclosure of climate risk.

84. *Shifting practice as a result of the TCFD recommendations:* Practice has shifted as a result of release of the TCFD recommendations and associated investor pressure to disclose in line with these recommendations (Interviews, participants 5, 6, 7, 8, 10, 12, 22). These improvements include experimentation with the disclosure of scenario analysis (Interviews, participants 10, 20). Announcements by regulators, such as ASIC and APRA, referencing the TCFD recommendations, were also identified as important drivers of improved disclosure practices (Interviews, participants 4, 7). This suggests companies' climate risk disclosure practices are sensitive to external factors, rather than being primarily driven by internal decision-making considerations.

85. Overall, interview respondents recognised that in this rapidly developing field, expectations around best practice climate risk disclosure are still evolving. Nonetheless, external stakeholders such as investors and civil society groups expressed serious concerns about the quality and usefulness of climate risk disclosure practices, such as scenario analysis, as currently being undertaken by many companies. For example, the value of scenario analysis is undermined where companies – especially in the resources sector – do not find any negative impact of climate change on their business, eroding investor confidence in the quality of the process (Interviews, participants 4, 8, 22). There remains a divergence of opinion about how best to achieve decision-useful, quality disclosures that allow for comparison between companies. In this respect, many interview respondents were alert to the 'danger of too much standardisation' and the potential for 'lowest common denominator metrics that do not really tell you much' (Interviews, participant 9).

86. A common theme of these interview findings was that there is increasing acceptance of climate risk as a material business risk, and evolving recognition of the need for disclosure by many companies. This is an important finding as it signals a shift in company attitudes from the pre-Paris period when climate risk as a matter of financial risk and potential liability for non-disclosure were not taken seriously in the business community. Perhaps reflecting this novelty, however, actual climate risk disclosure practice by companies remains variable and in need of refinement.

4. LEGAL DUTIES FOR COMPANY DIRECTORS

4.1 OVERVIEW

87. While Australian courts have not yet considered the application of company directors' duties to the disclosure and management of risks posed by climate change, leading legal opinion from barristers Noel Hutley SC and Sebastian Hartford Davies indicates that the standard of care expected of a reasonable director is rising and 'the exposure of individual directors to 'climate change litigation' is increasing, probably exponentially, with time' (2019, p. 9). Echoing this view, in a November 2019 speech, former High Court judge and royal commissioner Kenneth Hayne stated that: 'a director acting in the best interests of the company must take account of, and the board must report publicly on, climate-related risks and issues relevant to the entity' (Hayne 2019).

88. Legal duties binding on company directors may potentially affect internal company decision-making or investment decision-making by external actors on issues of climate risk in two main ways.

89. First, interpretations of duties that enable or require consideration of climate risk can focus directors' attention on the financial risks posed by climate change and spur the development of business strategy to manage these risks, including through asset divestment and reinvestment. The potential for directors to be found personally liable for breach of duty is a powerful driver for company decision-making and the development of company processes to identify and manage business risks.

90. Second, such interpretations also provide external parties, such as shareholders and civil society actors, with potential avenues to enforce directors' duties to consider and manage climate risks. For shareholders, this may be an avenue to hold directors accountable if they fail to act with due care and diligence and in the best interests of the company. For civil society, this may be an avenue to influence company decision-making on energy transition.

91. The following sections discuss the legal framework for directors' duties under Australian corporate law (4.2), legal opinion and enforcement actions indicating potential liability risk (4.3) and the findings of the project team's interviews (4.4).

4.2 LEGAL FRAMEWORK FOR DIRECTORS' DUTIES

92. In Australia, the Corporations Act sets out a number of directors' duties (ss 180-183) with general law duties continuing to apply concurrently (s 185). Legal opinion has suggested that the duty of care and diligence imposed on directors by s 180(1) of the Corporations Act and statutory obligations relating to disclosure are currently the most likely to lead to potential liability (Hutley & Hartford Davis 2019; Barker 2018a). Other duties – such as duties relating to acting in good faith in the best interests of the corporation and for a proper purpose (s 181), not to improperly use position or information (ss 182, 183), avoidance of conflicts of interest – could conceivably also give rise to liability on the part of directors but are seen as less likely to be pursued in litigation in Australia at this time (Barker 2018a).

4.2.1 DUTY OF CARE AND DILIGENCE

93. Section 180(1) of the Corporations Act sets out the primary duty of care and diligence. It requires company directors and other corporate officers to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person in their circumstances would exercise. Breach of this duty attracts a civil penalty under the Corporations Act.

94. Section 180(2) of the Corporations Act outlines the 'business judgment rule', which directors can raise to show compliance with the duty of care and diligence. However, to claim that business judgment applies a director must: (a) make the judgment in good faith for a proper purpose; (b) not have a material personal interest in the subject matter of the judgment; (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation. This formulation, especially the information requirement, poses a high threshold. Consequently, while the business judgment rule is routinely raised by defendant directors in Australia, it is very rarely successful (Barker 2018a, p. 14; Barker 2018b, p. 217).

95. The scope of the duty of care and diligence and its application to climate change risk has been considered in the widely-circulated Hutley and Hartford Davis opinion issued in 2016, and updated in 2019. ASIC Commissioner John Price has described the opinion as 'legally sound and … reflective of our understanding of the position under the prevailing case law in Australia in so far as directors' duties are concerned' (Price 2018; also favourably referred to by ASIC Commissioners Sean Hughes and Cathie Armour in 2019).

96. Hutley and Hartford Davis (2016) focused their consideration of directors' duties and climate change on this primary duty of care and diligence. Drawing on the relevant case law, they outlined the general expectations of directors under this duty and how this may apply to climate change. This includes the following requirements.

97. *Inform themselves of foreseeable risks*: Directors must inform themselves sufficiently to enable them to guide and monitor the management of the company, including considering and, in some cases, taking steps to address, any foreseeable risks posed to the interests of the company. Foreseeability is a key concept for the duty of care and diligence. A risk may be foreseeable if it is not far-fetched or fanciful, even if it is quite unlikely to occur. Hutley and Hartford Davis concurred that, generally speaking, there is ample evidence that climate change is likely to pose potentially foreseeable harm to company interests in many situations (paras. 14-33).

98. *Take proportionate measures*: The degree of care and diligence required, and the types of measures expected to be taken, will depend on the nature, extent and foreseeability of the risks, as well as potentially competing considerations, such as the expense and difficulty of taking measures to address the risk. Courts will balance these competing considerations. As a minimum, Hutley and Hartford Davis argued that 'directors should consider and, if it seems appropriate, take steps to inform themselves about climate-related risks to their business, when and how those risks might materialise, whether they will impact the business adversely or favourably, whether there is anything to be done to alter the risk, and otherwise to consider how the consequences of the risk can be met. In complex situations requiring specialist knowledge, a director is permitted to and should seek out expert or professional advice pursuant to s 189 of the Act' (paras. 36-37).

99. In their updated 2019 opinion, Hutley and Hartford Davies outlined five material developments since 2016 that add strength to their earlier opinion: (1) regulators have increased their focus on climate risk and disclosure; (2) there have been significant changes in reporting frameworks relating to disclosure of climate risks; (3) there is increasing pressure from investors and the community; (4) there are important developments in the state of scientific knowledge, particularly the IPCC 1.5°C 2018 report; and (5) developments in the context of climate change litigation (Hutley and Hartford Davies 2019).

100. The duty of care and diligence does not require directors to take a particular course of action, nor does it impose liability for an incorrect commercial judgement. Rather, the duty is focused on the robustness of the processes of information gathering and deliberation (Barker 2018a, pp. 14-15).

101. Barker (2018a, pp. 14-24) suggests that a director may be in breach of the duty of care and diligence in relation to climate risk where the following conditions are met.

102. *Lack of climate risk consideration*: 'A total failure to consider and govern for climate change risks in strategic planning and risk management: either in general or in relation to material projects or acquisitions that require board oversight or approval, due to honest ignorance, or blind or unquestioning reliance on the advice of delegates or advisors'; and/or

103. *Inadequate consideration of climate risk*: 'Inadequate or deficient consideration and/or governance of climate change-related risk exposures, due to (for example) lack of critical analysis, unreasonable reliance, lack of oversight or inadequate information'. This may include a failure to conduct scenario analysis / stress test business plans and transactional outcomes against a range of potential climate futures.

4.2.2 DISCLOSURE DUTIES

104. The obligations for listed companies to disclose business risks, including those posed by climate change, were introduced in Part 3. Disclosure obligations are relevant to a discussion about director's duties in a number of ways.

105. Directors may be directly liable for *misleading disclosure* in annual reports or in relation to specific disclosure requirements (e.g. s 728 provides for directorial liability for misleading disclosure in fundraising documents such as prospectuses; s 674(2A) provides similarly in relation to continuous disclosure obligations imposed by way of ASX Listing Rules).

106. Directors may be liable as an *accessory to their company's breach* of disclosure obligations in situations where they are 'involved' in the contravention as per s 79 of the Corporations Act.

107. Ensuring full and timely disclosure of business risks is an also *aspect of the duty of care and diligence* (Hutley & Hartford Davis 2016, paras. 43-44). Misleading corporate disclosures can be a 'stepping stone' to establishing liability for a breach of the director's duty of care and diligence (s 180(1)), including in situations where directors have caused, permitted or failed to take reasonable steps to prevent the corporation from making misleading statements (or omissions) to the market (Barker 2018a, pp. 37-8). Recent case law has confirmed that 'stepping stones' liability is a straightforward application of the duty of care, rather than a two-tiered model of liability: *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52; see also Langford 2020a.

108. As discussed in Part 3, company directors are required to sign off on financial accounts and reports as complying with accounting standards and amounting to a true and fair representation of the affairs of the company (ss 295-297). Further, the Director's Report must be adopted by a resolution of directors, dated and signed, and constitutes a representation made by directors (s 295(1)(c)). Representations of this nature made by directors in annual reports (or indeed non-disclosure of material information) will often become the focus of allegations of misleading and deceptive conduct in company litigation (Hutley & Hartford-Davis 2016, para. 12).

109. The threshold of liability for misleading disclosure under Australian law is considerably lower than comparable jurisdictions such as the U.K. (Barker 2018a, p. 27). It does not necessarily need to be established that a director knew of misleading conduct or intended to mislead to establish liability under the general prohibition against misleading or deceptive conduct (s 1041H). What must be established is that the representation would be likely to mislead or deceive a reasonable person in the audience class.

110. In this context, Barker (2018a, p. 32) suggests that directors could potentially be found liable where the company's accounts do not present a true and fair view of its financial position due to the failure to account for climate-related factors, and where directors either: failed to make proper inquiries as to whether climate-related risk factors had been accounted for; or failed to detect and assess properly and promptly climate-related issues that had an adverse impact on corporate financial position or performance.

4.3 ENFORCEMENT OF DIRECTORS' DUTIES IN RELATION TO CLIMATE RISKS

111. Breach of directors' duties may be enforced either by public and private parties. Potential remedies include either compensatory damages for associated losses or injunctive or declaratory relief.

112. *Public Enforcement*: ASIC can bring enforcement actions for breach of duty (or misleading disclosure). Both civil (e.g. disqualification, pecuniary penalty, compensation) and/or criminal (e.g. imprisonment and substantial fines but not for the duty of care outlined above) remedies are available (Part 9.4, Part 9.4B).

113. *Private Enforcement*: Shareholder plaintiffs have the option to seek the leave of the court to bring a derivative action against directors for breach of duty on behalf of the corporation (ss 236-7). Remedies sought may include an injunction or compensation payable to the corporation. Alternatively, a class of shareholders may bring a representative class action, for example, for an award of damages for breach of duty or misleading disclosure under Australia's securities class action regime (Part IVA of the *Federal Court of Australia Act 1974* (Cth)).

114. These different enforcement avenues entail different procedural and evidentiary hurdles which, in turn, will affect the likelihood of claims materialising. Key limitations include the requirement to obtain leave from the court to bring a derivative shareholder action, and evidentiary hurdles, such as proving loss and causation (Barker 2018a).

115. The Australian regime for securities class actions under Part IVA of the *Federal Court of Australia Act 1974* (Cth) offers shareholders in larger companies an opportunity to obtain redress more cheaply and efficiently than with individual actions), with a claim able to be filed by 7 or more persons arising from the same, similar or related circumstances (ss 33C-L). Shareholder class actions are particularly active in Australia, especially given their compatibility with the funding models of litigation funders, although recent reforms at the Federal level affecting the regulation of litigation funding and the class action industry may change this (Morabito 2019, p.9; Morabito 2020).

116. Regulatory enforcement actions by ASIC for declaratory or injunctive relief will not be constrained by the evidentiary hurdles noted above and ASIC regularly brings such proceedings for breach of duty and misleading disclosure. ASIC has recently signalled it will be focusing on compliance in relation to climate risk disclosure (ASIC 2019a).

117. Private parties can also pursue injunctive or declaratory remedies, and this may be an attractive option for civil society litigants seeking to enforce duties and disclosure obligations to drive changes in corporate decision making on energy transition (see e.g. *Abrahams v Commonwealth Bank of Australia* (2017)).

118. In 2016, Hutley and Hartford-Davis concluded their legal opinion with a phrase which has since been oft-quoted: 'It is likely to be only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company (including, perhaps, reputational harm)' (para. 51).

119. Since then, statements of Australian regulators have reinforced this opinion. For instance, in August 2019, ASIC commissioner John Price said: 'Directors should be able to demonstrate that they have met their legal obligations in considering, managing and disclosing all material risks that may affect their companies. This includes any risks arising from climate change, be they physical or transitional risks' (ASIC 2019a).

120. The Australian Institute for Company Directors (AICD) have also subsequently published a number of discussion pieces addressing climate change and directors' duties, and have indicated that they are preparing a practical guide for members on how to oversee climate change risks and opportunities (AICD 2020). An April 2020 article noted the '[r]ising bar for directors', stating that: 'Companies need to be thinking carefully about climate-related performance, opportunities and exposures of suppliers, customers and clients. Even more urgently, they should be closely reviewing how they engage on climate policy — both directly and through membership industry and the peak groups who lobby in their name or on their behalf' (McLeod & Hurley 2020). 2019 surveys from the AICD indicate that directors rank climate change as the top long-term priority the Federal Government should address (AICD 2019, p. 10).

121. Asset owners and asset managers have increasingly called for company directors to demonstrate their climate competency. For example, in January 2020, Blackrock's chairman and CEO, Larry Fink, said in his letter to CEOs that, '[w]e believe that when a company is not effectively addressing a material issue, its directors should be held accountable' (Fink 2020b).

122. While there has not yet been a claim made in Australia for breach of directors' duties in relation to climate change, recent litigation in Europe, as well as a breach of duty claims against a superfund trustee in Australia[1] and against officials in the Australian government, highlights the growing focus on corporate liability in this area (see Box 4 below).

BOX 4: EMERGING LIABILITY RISKS – LITIGATION ON CLIMATE CHANGE

Australia: In October 2018, Mark McVeigh, filed a claim against the corporate trustee of his superfund, REST, for breaching its duties on climate change. The claim alleged that REST's corporate trustee failed to act with care, skill and diligence when investing for Mark, and failed to act in his best interests, by not properly considering the risks climate change poses to the fund's investments. The claim is seeking a declaration that climate change risks must be taken into account by corporate trustees for superfunds like REST in the management of investments for their beneficiaries. The claim alleges that to satisfy the corporate trustees' duties, REST must seek information from its investment managers about climate risks and comply with the recommendations of the TCFD (EJA 2018). In an interim ruling, Perram J described the case as being of a 'public interest nature' raising 'a socially significant issue about the role of superannuation trusts and trustees in the current public controversy about climate change' (*McVeigh v Retail Employees Superannuation Pty Ltd [2019] FCA 14 at [9]).* Trial proceedings in the case are scheduled for November 2020.

In July 2020, Kathleen O'Donnell filed a claim against the Australian government, including named officials in the Australian Office of Financial Management and Treasury, relating to disclosures in information documents for investors in Australian government bonds. The claim alleges that officials breached their statutory duty of care and diligence (similar to the duty under the Corporations Act) and that the Commonwealth engaged in misleading and deceptive conduct for failing to disclose climate change risks to investors in information documents.

Germany: In November 2015, a Peruvian farmer brought a case against RWE, Germany's energy producer, filing claims for declaratory judgment and damages. Lawyers for Mr Lliuya have argued that RWE's greenhouse gas emissions have contributed to increases in global temperatures and giving rise to some responsibility for melting the glaciers near his town in Peru. The case remains in the evidentiary phase, indicating the German court has accepted the case is plausible and its outcome dependent on scientific evidence (*Lliuya v RWE AG*; Setzer & Byrnes 2020, p. 20).

Poland: In October 2018, ClientEarth, a non-profit environmental law organisation and shareholder in the Polish utility Enea SA, sued the company, seeking the annulment of a resolution consenting to construction of the €1.2bn 1GW Ostrołęka C coal-fired power plant. ClientEarth argued that the proposed resolution was harmful to the interests of Enea and its shareholders and could risk breaching board members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders. On 1 August 2019, the Regional Court in Poznań found the company resolution authorising construction of the power plant to be legally invalid.

International trends: As at the end of May 2020, a total of 1,587 cases of climate litigation had brought, with 1,213 cases in the US and 374 in other regions, including 98 in Australia (Setzer & Byrnes 2020, p. 3). There are at least 40 ongoing climate cases worldwide against carbon majors, brought on a number of grounds including: (a) claims companies have misled shareholders and misrepresented the impacts of climate change on their business; (b) 'greenwashing' claims through misleading advertisements; (c) claims relating to inadequate environmental assessment of projects; (d) claims dealing with violating human rights obligations; and (e) suits seeking damages resulting from climate change (Setzer & Byrnes 2020, p. 19).

1 In Australia, superfund trustees are bound by similar duties to company directors (care and diligence, acting in the best interests of beneficiaries). The content of corporate trustees' duties is informed by both the *Corporations Act 2001* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth). For a detailed consideration of the relevant legal framework and how these duties apply to climate risk, see Hutley & Mack 2017 and Barker 2018a at 40-43.

4.4 FINDINGS FROM INTERVIEWS

123. Data derived from qualitative interviews with companies, investors, regulators, industry groups and civil society provides further insights into how directors of Australian companies perceive their legal obligations in relation to climate risks. It also provides information about the internal governance processes used by companies to ensure board oversight of these risks.

124. While the project team sought interviews with company directors, no directors accepted the team's invitation to participate. As such, the data presented below draws on the views and opinions expressed by other respondents, including internal company personnel (e.g. company secretaries, investment relations and sustainability personnel) and those external to companies (e.g. personnel within asset owners and asset managers and industry groups that interact with companies and their directors).

125. These views and opinions were grouped into prominent themes, held by a significant number of participants across the different participant groups. The findings below reflect these themes and commonly held views, but also note the particular views and responses of individual participants or smaller groups thereof where this is relevant to the analysis (see Appendix A for further details). Findings included the following.

126. *Variable but increasing understanding of how directors' duties relate to climate change*: The general application of directors' duties to the new class of business risks posed by climate change was increasingly well understood at an overarching, conceptual level. Most respondents said that if climate change poses material risks to a company, then it falls within directors' duties to identify and manage those risks, although this does not necessarily mean taking a particular course of action, but rather requires a thorough consideration and assessment of the risks and appropriate courses of action. However, respondents emphasised that there is great divergence in the approach taken by individual companies and their directors to recognising the materiality of climate risks, and, as a consequence, understanding the implications for company directors.

127. *Differences explained by nature of company, sector, as well as personal characteristics of directors*: Directors of large listed companies, especially those in sectors where climate risks are perceived to be material in the immediate and near term (e.g. utilities, energy companies) were increasingly likely to be very well-informed and active on climate change. In contrast, the broader directorship of Australian companies was less likely to be fully aware of climate risk and how it plays out in terms of duties, particularly for those companies where climate risks are perceived as more remote. Many respondents noted the role of the particular personal characteristics of directors (e.g. age/generation, gender, ethnicity, values) in determining the approach taken to climate risks. Respondents also expressed the opinion that scepticism of climate science remains a prevalent attitude on boards of ASX100 companies (Interviews, participants 4, 5, 8, 16, 17, 18).

128. *Focus on short-term and profit-related interests*: Many respondents noted that the debate about climate change and directors' duties reflects the longer-running discussion over corporate purpose and the proper focus of directors' duties to the company in Australia. In essence, this debate relates to whether directors should focus exclusively on the interests of shareholders who provide financial capital to the company (which tends to bring attention to short term risks) or whether they should take a broader view of the long term interests of the company, including all different sources of capital and the range of stakeholders who make the company successful (see Sjåfjell at al. 2015, pp. 79-147). Given the nature of climate risks (e.g. complexities, uncertainties and long time frames) and the tendency to focus materiality assessments on the short term, many respondents were of the view that Australian company directors focused foremost on shareholder-related interests and did not necessarily perceive that these interests were affected by climate risks (Interviews, participants 6, 15, 16, 17, 20, 24). As such, climate change was more likely to be viewed by directors as a longer-term concern, which did not fall squarely within their consideration of the company's best interests.

129. *Shifts linked to prominent legal opinion and thought leadership*: The Hutley and Hartford Davis opinions, as well as the thought-leadership work of practitioners such as Sarah Barker (e.g. 2018a, 2018b), are widely recognised as significant influences on shifting norms in this area. These legal interpretations and arguments are increasingly seen as non-controversial (Interviews, participants 3, 4, 5, 6, 7, 8). Reinforcement by regulators and prominent industry associations such as the Australian Institute for Company Directors has further strengthened their influence and is leading to 'a slow broadening [of] understanding of what those duties and expectations are, and how current law would be applied if it was … tested' (Interviews, participant 6). These matters are also central to the efforts of the International Integrated Reporting Council (IIRC) and its current revision of its integrated reporting framework (IIRC 2020).

130. *Threat of personal liability is a significant driver*: At the time of data collection, there had been no claims for breach of directors' duty made in relation to climate risks in Australia or comparable jurisdictions (cf. McVeigh action above). However, respondents concurred that as soon as litigation, regulatory investigation or shareholder reaction around potential breach of duty to manage climate risks does emerge, the pressure on directors to ensure they are fulfilling their legal obligations in this area will heighten considerably.

131. *Internal governance practices vary and depend on recognition of materiality*: The processes employed by different companies to ensure board oversight of business risks differ according to company size, organisational culture and structure, as well as the nature of decision making (e.g. approval of large capital expenditure decisions, endorsement of company policies or position statements, business strategy development). The company respondents interviewed provided various examples of governance processes relevant to ensuring board oversight of climate risks. For most companies in the sample, climate change was treated as a core strategic consideration, and, as such, comprehensively integrated into a range of different internal governance processes. One of the most important channels through which boards are considering and assessing climate risk is through risk management governance processes (e.g. regular materiality assessments and reporting to the board by risk and audit committees) (Interviews, participants 9, 10, 12). This channel relies on climate change being recognised as a material financial risk, something that differs considerably between companies as noted above. Sustainability committees (or equivalents) also play an important role in many of the companies in channelling regular analysis of climate risks to the board, as well as for developing company policy and position statements on these issues for board endorsement (Interviews, participants 9, 11, 14). Some companies have developed formal processes for the board to obtain external perspectives on climate risk (e.g. appointing expert climate change advisors and meeting regularly with civil society leaders for input on emerging risks and responses) (Interviews, participants 9, 11, 15).

4.5 CONCLUSION

132. The findings from interviews, in conjunction with those on climate risk disclosure practices, demonstrate increasing acceptance that climate change poses material business risks and an evolving understanding that company directors therefore have legal duties to identify, assess and manage such risks.
133. This view may be limited to larger, listed companies, with particularly high-risk exposure in the near term.
134. More generally, there appears to be great divergence in the approach taken by individual companies and their directors to recognising the materiality of climate risks, and, as a consequence, understanding the implications for the potential liability of company directors.

5. SHAREHOLDER RESOLUTIONS

5.1 OVERVIEW

135. At AGMs in early 2020, shareholders strongly signalled their shift in expectations regarding climate change risks and opportunities. 50.16% of Woodside shareholders voted in favour of a resolution that the Board disclose details of how business strategy and emissions would be aligned with Paris Agreement goals, with 43.39% of Santos shareholders voting in a favour of a similar resolution (ACCR 2020b).

136. Although these resolutions remain non-binding given restrictions on shareholders bringing binding resolutions in Australia (discussed below), these strong levels of support are significant. As one interviewee observed, 'even… five per cent of shareholders voting against management is significant…when you start getting up around that 10 to 15 per cent mark, things get very serious for a board' (Interviews, participant 3).

137. Shareholder resolutions have the potential to drive corporate energy transition via internal and external pathways in two main ways.

138. First, shareholder resolutions (e.g. requesting alignment with Paris Agreement goals, climate-related lobbying or transition strategy development) can focus company attention internally on climate risks and help to spur companies to develop, disclose and defend their approach to climate risks more fully. The impact of a resolution internally within a company will depend on a range of factors such as the history of engagement on the issue, the nature of the parties filing the resolution (e.g. activist shareholders), voting results or media coverage.

139. Second, shareholder resolutions are a public engagement tool for investors to pressure companies to disclose and manage climate risks. Decisions to engage behind-the-scenes with companies on the subject matter of a resolution, to vote in favour of a resolution (even if it is not supported by company management), or to take the lead in filing a resolution, are an important part of investment decision-making. This is a form of engagement reliant on continuing shareholding in a company, however, depending on the outcome, it may be a precursor to capital divestment decisions. Asset managers and other investment service providers, such as proxy advisors, play an important role in this form of investment decision-making, as does civil society in partnering with investors to facilitate resolutions.

140. While shareholder resolutions may support internal asset divestment decisions by companies, this tool should be distinguished from decisions by shareholders to divest outright of stocks in fossil fuel companies (capital divestment) and as such relinquish their ownership rights and restrict opportunities for continuing engagement.

141. Compared to the US, where shareholder activism on environmental, social and governance matters has a long history, the engagement culture in Australia is quite different, and shareholder resolutions are only recently beginning to take hold as a tool for shareholder activism. There are also important differences between the legal frameworks governing shareholder resolutions in Australia and the United States (and indeed other comparable jurisdictions like the U.K), which affect the use and impact of these tools.

5.2 LEGAL FRAMEWORK GOVERNING SHAREHOLDER RESOLUTIONS

142. Under Australian law, the distribution of decision-making rights between directors and shareholders is governed by various provisions in the Corporations Act, the ASX Listing Rules, and the company's constitution (Austin & Ramsay 2018, pp. 248-252; Sheehan 2017, pp. 10-12). These rules make a clear distinction made between two particular avenues for company decision-making: resolutions by the board of directors and resolutions by the members (shareholders) in the general meeting.

143. By default, decisions that relate to management of the affairs of the company fall to company directors, whereas decisions that affect control of the company fall to shareholders, although this can be varied to some extent within the constitution of an individual company (ss 134, 136(2), 141, 198A). Decisions relating to management may include, e.g., decisions about staffing, finance, trading operations and how to use surplus funds (e.g. invest, purchase new assets, distribute as dividends). Control decisions include, e.g., decisions to appoint or remove directors and decisions to change the company constitution (Austin & Ramsay 2018, p. 256).

144. Shareholders have specific statutory rights to requisition a general meeting (ss 249D, 249F) and to bring a resolution to the general meeting. Members with at least 5% of the votes or a group of at least 100 members may bring a member's resolution (s 249N). Provided all procedural requirements have been met, a company must consider the resolution at the next general meeting (s 249O).[2]

145. Members' resolutions (s 249N) are known as *ordinary resolutions* and require a simple majority vote to pass. *Special resolutions,* required for matters such as changing the company constitution (s 136(2)), must secure a 75% majority of the vote in order to be binding on the company (s 9). However, these shareholder rights are constrained by the distribution of decision-making power described above. As such, a member's resolution cannot usurp the management powers vested in the board by directing the board on management issues.

146. Australian case law has upheld this strict division of powers between the board of directors and the powers of the general meeting. In particular, members cannot use their statutory powers to requisition a general meeting (ss 249D, 249F) or demand a motion be put to a general meeting (s 249N) if the subject is a matter of management exclusively vested in the board (Austin & Ramsay 2018, p. 256).

2 Additional member's rights include the right to move a resolution to remove a director (s 203D); and the right to vote on director's remuneration (if at two consecutive meetings over 25% of shareholders vote against the directors' remuneration package, the directors have to stand for election again in 90 days, ss 250R(2), 250U-V).

147. This position was reinforced in 2016 in a decision of the Full Federal Court concerning shareholder resolutions that were put to the Commonwealth Bank of Australia (CBA) on matters relating to climate risk disclosure and management. The Full Court held that advisory resolutions which are not grounded in powers granted by statute or the company's constitution are legally ineffective and do not have to be put to shareholders at a general meeting. If shareholders wish to propose resolutions, they must do so under an authorised power, see: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2015) 325 ALR 736; [2015] FCA 785 (Jul. 31, 2015); upheld on appeal in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280; [2016] FCAFC 80 (Jun. 10, 2016).

148. The decision significantly constrained the way in which shareholder resolutions can be used in Australia. Compared to the US and UK, shareholders in Australia have more limited rights to bring resolutions to the AGM expressing their views or requesting certain actions be undertaken by company management (Hey 2015; Sheehan 2017).

5.3 EMERGING PRACTICES IN SHAREHOLDER RESOLUTIONS

149. Australia is widely seen to have a strong culture of institutional investor engagement with company boards (Sheehan 2017, p. 18; Hey 2015). The focus on behind-the-scenes engagement and generally very good access for investors to company directors means that shareholder resolutions have, in the past, been viewed as more extreme measures and the purview of activist organisations. They were previously been used very sparingly, especially on ESG issues.

150. Over the last decade, however, there has been a steady increase in the number of resolutions brought to Australian companies that address ESG issues, and a particular, more recent surge in resolutions addressing climate change specifically.

151. A survey of shareholder resolutions for the period 2010 to July 2020 was conducted for this report.[3] It identified 54 substantive resolutions addressing climate change brought to Australian listed companies in the energy, materials, utilities, insurance and finance sectors since 2010 and 24 special resolutions to amend the company constitution to allow for non-binding advisory resolutions.

152. Resolutions identified in the survey were largely brought (or coordinated) by civil society groups, particularly the Australasian Centre for Corporate Responsibility (ACCR) and Market Forces. Some resolutions have also been co-filed with ethical investment funds. For example, in 2020, a resolution was co-filed by Market Forces and Australian Ethical at QBE's AGM. In 2019, the ACCR co-filed resolutions at BHP's AGMs in London and Sydney with Australian-based Vision Super and Grok Ventures, and Danish pension fund MP Pension, Church of England Pensions Board and Dutch fund ACTIAM. In 2018, resolutions put to Rio Tinto were co-filed by a medium sized Australian superannuation fund – Local Government Super – in conjunction with the Church of England Pensions Board and the Swedish National Pension Fund.

153. One of the key trends identified in the survey was the increasing sophistication and diversity in the content of the resolutions brought over time. Earlier resolutions were generally framed as requests for disclosure of the company's GHG emissions, as well as broader exposure to climate risks (e.g. Oil Search, Woodside, Aquila Resources and Paladin, 2010; ANZ 2011, 2014 and 2015; CBA 2014). Disclosure was also tied to more substantive requests, for example, resolutions requesting annual reporting on power generation and supply chain emissions management, the company prepare a business model to ensure profitability under pathways that limit warming to 2°C (Origin 2015; AGL 2015).

154. Since 2017 and post ACCR v CBA, the text of resolutions has often been mirrored across like-company to like-company and like-issue to like-issue (e.g. resolutions put to banks on disclosure of transition planning: NAB 2019, ANZ 2019, Westpac 2019; resolutions put to insurers on transition planning: IAG 2019, Suncorp 2019 and QBE 2019; resolutions put to mining/ energy companies requesting review of climate related lobbying: Santos 2019, Rio 2018, Origin 2018, BHP 2017). Resolutions are also tailored to reflect the individual commitments of, and issues posed by, certain companies (e.g. resolution requesting suspension of membership of industry organisations, BHP 2019; resolutions relating to fracking Origin 2018, 2019). Although still a relatively new tool in Australia, it is possible to observe 'learning' in the text of these resolutions across time, with refinement of requests and consideration of changing circumstances.

155. Following ACCR v CBA, some resolutions were put exclusively as an amendment to the company constitution requesting that the company be managed in a way consistent with holding global warming below 2°C above pre-industrial levels (e.g. Wagners Holding Company 2018; Downer EDI 2017; CBA 2017). However, the majority of resolutions surveyed have been brought in two parts: (1) a special resolution to change the company constitution to allow shareholders to put forward non-binding advisory resolutions; and (2) an ordinary resolution, contingent on the special resolution, which includes the substantive subject matter such as climate change. This approach means that the board is legally required to put the special resolution to the general meeting, but not the ordinary resolution. Nevertheless, in practice, boards have allowed voting on the ordinary resolution as well and recorded the vote.

156. Concentrating on 2017 to July 2020, where consistency has especially emerged, six key themes can be identified in resolutions as illustrated in Figure 4 below.

3 *This information was compiled from the following sources: ACCR website - overview of resolutions https://accr.org.au/shareholder-action/resolution-voting-history/; ASX announcements search engine - https://www.asx.com.au/asx/statistics/announcements.do; Market Forces webpage – SH resolutions - https://www.marketforces.org.au/?s=shareholder+resolutions*

FIGURE 4: TRENDS IN RECENT CLIMATE-RELATED SHAREHOLDER RESOLUTIONS

TRENDS	MINING/ ENERGY	BANKS	INSURANCE
Amend company constitution to permit non-binding advisory resolutions	Proposed amendment similar across sectors, for example: 'The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised. However, such a resolution must relate to an issue of material relevance to the company or the company's business as identified by the company, and cannot either advocate action which would violate any law or relate to any personal claim or grievance. Such a resolution is advisory only and does not bind the directors or the company' (Woodside 2020)		
Requests for disclosure of targets/ transition planning	Disclose short-, medium-, long-term targets to reduce scope 1+2+3 emissions in line with Paris Agreement temperature goals; How exploration/ expenditure aligned with Paris Agreement goals; How remuneration will incentivise progress towards targets	Disclose strategies & targets to reduce exposure to fossil fuel assets in line with the Paris Agreement's goals, including eliminating exposure to thermal coal in OECD countries by no later than 2030	Disclose short-, medium-, long-term targets to reduce investment/ underwriting exposure to fossil fuel assets; Disclose plans and progress to achieve these targets, in line with the Paris Agreement's temperature goals.
Climate-related lobbying *NB: several lobbying resolutions have been withdrawn prior to the AGM, where public commitments were made by the company	Review and report on direct and indirect lobbying activities relating to climate, energy and/or resources New iteration: Suspend membership of industry associations where history of climate/ energy lobbying inconsistent with Paris Agreement's goals (BHP 2019)	Suspend membership of industry associations where history of lobbying re climate/ energy policy inconsistent with Paris Agreement's goals (NAB, ANZ 2019)	No resolutions filed
Disclosure in line with TCFD	Disclose risks and opportunities in line with TCFD	No resolutions filed	Disclose risks and opportunities in line with TCFD
Non-GHG related emissions	Disclose strategy to accurately measure, report and reduce fugitive methane emissions; Review processes to obtain native title owners' consent for fracking in NT	No resolutions filed	No resolutions filed
Public health risks of coal operations	Disclose assessment of expenditure required for pollution controls at certain coal-fired power stations to mitigate health risks	No resolutions filed	No resolutions filed

157. Recent resolutions announced by civil society groups ahead of AGMs in the second half of 2020 are expected to continue extending shareholder focus beyond primarily calling for disclosure/ information to requests for companies to take action (Slezak 2020). For example, resolutions calling for fossil fuel wind-up plans are expected to be put to Whitehaven Coal, New Hope Group, Beach Energy and Cooper Energy (Market Forces 2020a). Other resolutions that will be put include requesting AGL to bring forward the closure dates for its Bayswater and Loy Yang A coal-fired power stations, and calls for BHP and Origin to suspend membership of industry associations advocating for a gas-led recovery from COVID-19 (ACCR 2020e; ACCR 2020f; ACCR 2020g).

158. The first climate resolutions, lodged as ordinary resolutions in 2010 and 2011, were not voted on as the boards of the companies refused to put the resolutions to a vote, stating that they addressed matters for management and not shareholders. Since then, and in the wake of the ACCR v CBA decision, most resolutions have been framed as constitutional amendments. While voting on the constitutional amendment resolutions themselves has remained reasonably low over time (generally around 5% but some resolutions pushing to 10%), companies have largely allowed shareholders to vote on the accompanying substantive resolution and disclosed voting rates.

159. Voting on substantive climate resolutions has increased significantly over time. In 2020, new highs were been reached, for example, 36.93% (Rio, transition planning disclosure, significant especially as a similar resolution the previous year only attracted 6% of the vote), 43.39% (Santos, Paris goals and targets), 46.35% (Santos, climate related lobbying), 42.66% (Woodside, climate related lobbying) and 50.16% (Woodside, Paris goals and targets). Nevertheless, research by the ACCR published in June 2020 signalled that some major superfunds supported less than 50% of climate-related shareholder proposals between 2017-2019 (ACCR 2020c, p. 5).

160. It is difficult to draw causal links between changes in corporate practices and shareholder resolutions, especially given the strong culture of behind the scenes engagement in Australia and in the context of wider civil society and shareholder activism, and more general corporate ESG responsibility. With this in mind, Box 5 highlights some recent shifts in corporate behaviour that correlate with the trends in gathering sophistication of shareholder resolutions discussed above.

BOX 5: CHANGING PRACTICES AMONG COMPANIES

BHP: In 2017, a resolution was filed by the ACCR to be heard at BHP's November AGM, requesting a review of industry associations and termination of membership where a pattern of inconsistency with company policy positions was identified. In September, BHP committed to publishing a review by the end of the year (ACCR 2017; BHP 2020). The published review found material differences in position in the Minerals Council of Australia (MCA, representing the mining industry including many of Australia's carbon majors), US Chamber of Commerce (the Chamber) and the World Coal Association (WCA). The company decided to exit the WCA but conditionally continued engagement with the MCA and Chamber (BHP 2017; BHP 2018).

In 2019, a subsequent shareholder resolution was co-filed with institutional investors. Going beyond the requests of conventional climate lobbying resolutions to that date, shareholders asked that BHP suspend memberships of industry associations where their history of climate advocacy was inconsistent with the goals of the Paris Agreement. The resolution received 29.58% of the vote in Australia and 22.16% in London. In December 2019, BHP published its latest industry association review, identifying material differences amongst four associations, including the NSW Minerals Council (BHP 2019, 2020). BHP identified that it was 'mostly aligned' with the MCA and Coal21 but pledged to keep engaging with these associations (BHP 2019). The MCA recently released its Climate Action Plan stated it was committed to the goal of net zero emissions, but negated any reference to specific targets or transition dates (Minerals Council of Australia 2020).

Most recently in August 2020, BHP published a set of expectations for industry lobby groups, such as the MCA, including that advocacy be directed towards emissions reduction targets which increase in ambition over time in line with the goals of the Paris Agreement. A resolution filed by the ACCR will also be put to the October AGM requesting that the company suspend membership of Industry Associations where there is advocacy for a gas-led recovery in response to the COVID-19 pandemic, inconsistent with the goals of the Paris Agreement (ACCR 2020f).

Rio: In 2018, a resolution was co-filed by the ACCR and institutional investors requesting that the Board commission a comprehensive review of direct and indirect public policy advocacy, including through industry associations of which it was a member. Another resolution on climate-lobbying filed in 2019 was withdrawn in April prior to the AGM, with the ACCR reporting on months of private engagement with Rio and welcoming specific guidance for industry associations on expectations for climate change and energy policy advocacy (ACCR 2019). A further resolution filed in 2020 was also withdrawn by the ACCR, following private engagement with Rio (ACCR 2020d).

Rio has reported on the top five industry groups they engage with by membership fees, how they have engaged with industry associations to ensure their advocacy is consistent with Rio's public position and the Paris Agreement, and put associations on notice that they will consider their membership where associations fail to partner with Rio to advance a policy agenda consistent with Rio's policies, including the temperature goals of the Paris Agreement. For example, in 2020, Rio reported on areas of 'misalignment' of advocacy of the MCA, inconsistent with the goals of the Paris Agreement. Rio did not terminate membership but pledged to continue working with the MCA (Rio 2020; Burton 2020). In August 2020, a major Nordic hedge fund divested from Rio Tinto citing its corporate lobbying activity (Ambrose 2020).

QBE: In early 2018, Market Forces and Local Government Super co-filed a shareholder resolution requesting disclosure by QBE in accordance with the TCFD. In March, QBE signed the statement of support for the TCFD (TCFD 2020). At the May AGM, the disclosure resolution secured 18.6% of the vote, with 9.12% voting in favour of amending the constitution. Shareholders also lodged a 'first strike' against the company's remuneration report (under Australian company law, the benchmark is 25% or more; 45.57% of shareholders voted against the report). Subsequently QBE published an action plan to implement the recommendations as part of its half-year results announcement (QBE 2019a).

Civil society and shareholders have also called upon QBE to end investment in and underwriting of fossil fuel assets. As part of the long-running campaign, in March 2019 Market Forces and Australian Ethical lodged a shareholder resolution calling on QBE to set targets to reduce investment and underwriting exposure to fossil fuels in line with the Paris Agreement (Market Forces 2019b). On 30 March 2019, QBE published its new Energy Policy committing to phasing out insurance for thermal coal by 2030 (QBE 2019b). Civil society has continued to place pressure on QBE to exit oil and gas and to set targets consistent with the Paris Agreement, such as the resolution co-filed by Market Forces and Australian Ethical 2020 (Market Forces 2020b).

AGL: A 2019 resolution, which secured 30.33% of the vote, sought disclosure of strategies to reduce scope 1 and 2 emissions. In June 2020, AGL announced measures to tie executive pay to carbon transition metrics such as the proportion of energy generated by renewable sources (AGL 2020; Toscano 2020). This has echoes of resolutions brought to other companies requesting details of how remuneration policies will incentivise progress towards targets in line with the Paris Agreement's goals (see resolutions put to Woodside 2020; Santos 2020; Rio 2019; Origin 2019).

Woodside: At Woodside's AGM in April 2020, resolutions on lobbying and Paris goals and targets received 42.66% and 50.16% of the vote respectively, with proxy advisors ACSI, Glass Lewis, ISS, PIRC (UK) and Regnan reported as recommending voting in favour. BlackRock did not vote in favour of either resolution, citing engagement with the company on issues such as TCFD disclosures and board composition and responsiveness to investor concerns (Mooney 2020; BlackRock 2020). 19.49% of shareholders also voted against the adoption of the company's remuneration report ('first strike' if 25% or more of shareholders vote down the remuneration report).

In a media release on 22 June 2020, Woodside announced key management changes to 'steer its future growth and its role in contributing to the achievement of global Paris Agreement goals'. These included the creation of a new role of 'Senior Vice President Climate', which was said to demonstrate 'the strength of Woodside's commitment to addressing climate change' (Woodside 2020).

5.4 FINDINGS FROM INTERVIEWS

161. Data derived from qualitative interviews with companies, investors, regulators, industry groups and civil society provides additional important insights into how institutional investors and civil society are using shareholder resolutions as tools to influence company decision-making on climate risks, and what impact these activities may have on target companies and the broader market.

162. The views and opinions of participants were grouped into prominent themes, held by a significant number of participants across the different participant groups. The findings below reflect these themes and commonly held views, but also note the particular views and responses of individual participants or smaller groups thereof where this is relevant to the analysis (see Appendix A for further details). Findings included the following.

163. *Climate Change is a significant focus for investor engagement in Australia*: Investors and companies both highlighted that climate change has become one of the primary themes for engagement activity in Australia, especially within sectors that are highly exposed to climate-related risks in the near to medium term.

164. *Shifting approaches to investor/company engagement*: Investors, companies and civil society alike reported significant shifts in the approaches being taken to company engagement in Australia with 'investors … much more willing to use every tool available to them in the toolkit' (Interviews, participant 6). There is a recognition of the limits, slow progress and lack of transparency associated with traditional, behind-the-scenes engagement between companies and their investor body on matters such as climate change. There is also an emerging willingness to divest where companies prove unwilling to respond or make changes (Interviews, participants 5, 6, 8).

165. *Shareholder resolutions are increasingly viewed by investors as an important escalation tool for engagement with companies on climate risks*: Along the spectrum from private behind-the-scenes engagement to outright capital divestment, shareholder resolutions are seen as an important way of escalating engagement on a particular issue, such as climate risk, and achieving more transparency. Unlike other decision-making options available to shareholders to influence indirectly the direction a company may take (e.g. voting against remuneration reports or to remove a director), shareholder resolutions offer a direct opportunity to gauge shareholder opinion on a particular issue such as climate change. Shareholder resolutions are understood to have the greatest impact in conjunction with behind-the-scenes engagement and also, within the context of a threat of potential divestment. When a resolution is on the table, this opens up the space for more constructive behind-the-scenes engagement.

166. *Partnerships between civil society and investors, and investor coalitions, are increasingly influential*: Although civil society groups leading on climate resolutions may be seen to lack legitimacy and influence with target companies, emerging partnerships between civil society and investors are increasingly seen as credible. Similarly, new coalitions of investors forming to address climate risks (such as the Investor Group on Climate Change) are seen as having enhanced potential to influence companies due to the breadth and scale of their constituents. Potential influence is also increased when international investors are involved. Shareholder resolutions, and other targeted engagement activities are serving as forums or opportunities to build these multi-level partnerships and open up companies to this broader scrutiny.

167. *Shareholder resolutions have a meaningful impact on company decision-making*: Civil society advocates and investors considered that shareholder resolutions on climate change in Australia had led to tangible changes in the approaches taken by target companies to climate risks (Interviews, participants 3, 4, 5, 6, 7, 8). They noted a number of prominent examples where a climate resolution had been instrumental in securing a particular substantive outcome, such as driving laggard companies to produce more comprehensive climate risk disclosure or enhancing scrutiny of indirect political advocacy. Climate resolutions have also prompted companies to engage more constructively and extensively with their investors on the issues raised.

168. *The impact of resolutions on company decision-making depends on context-specific factors*: Such factors include the history of engagement on the issue and company-specific factors, e.g. company culture, materiality of climate risks for the particular company and sector. The particular constellations of shareholders filing the resolution (e.g. activist groups acting alone or with broader investor backing) and the levels of support for the resolution (either expressed publicly through a vote or behind-the-scenes through associated engagement) are also important determinants of a company's response (Interviews, participants 9, 11). This echoes comments of ACSI's Louise Davidson who was reported as saying: 'If you see those big votes on the day, they do lead to changes in behaviour' (Grieve 2020). The novelty of shareholder resolutions in an Australian context is also often put forward as an explanation for its effectiveness to date, with the proviso that this effectiveness may diminish over time.

169. *Companies often defensive, although approaches are shifting*: The reaction of Australian companies to the lodging of shareholder resolutions on climate change was described by investors and civil society as generally defensive, often quite adversarial or dismissive (Interviews, participants 3, 4, 9, 22, 23). Investors, on the other hand, viewed the use of resolutions as an important way to express views and opinions to management while continuing to support the company (Interviews, participants 18-24). Over time, as more climate resolutions have been brought and have received higher levels of voting, companies have reported shifts in their approach, including increased emphasis on engagement with investors on climate risk (Interviews, participants 9, 11, 13).

170. *Patterns of investor voting on climate resolutions are complex and evolving*: Even among the small group of institutional investors interviewed for this project, approaches to voting on climate resolutions differed significantly. Some funds remain committed to more traditional engagement approaches and would be unlikely to vote against management except in extreme situations (Interviews, participants 18, 24). Further, they would be particularly uncomfortable with supporting constitutional amendments as a way to effect change on climate risks. Others assess each case on its merits and then make a decision to engage behind the scenes on the resolution or to vote in a certain way (Interviews, participants 19, 20, 21, 22). Some Australian funds have taken the lead in co-filing climate resolutions. Some funds also noted that their approach to voting shares differs between jurisdictions: in Australia where they perceive good access to boards and a strong engagement culture, as well as opportunity for shareholders to influence companies through voting on remuneration or appointment of directors, these funds are more likely to vote with management and not support a resolution, even though they may vote in favour of an almost identical resolution in other jurisdictions such as the US (Interviews, participant 22, 24). The governance arrangements around these issues are complex and evolving. Many funds outsource voting to fund managers (for large proportions of their portfolio) or rely heavily on service providers to advise on voting resolutions. Others have more in-house capacity to develop their own positions. Generally, however, Australian institutional investors are increasingly active in exercising their ownership rights in relation to shareholder resolutions (Interviews, participants 5, 6, 8).

171. *Law reform is widely supported, including by some companies*: Support for law reform to make it easier for shareholders to bring non-binding advisory resolutions on matters such as climate risk management was strong among investors and civil society respondents who expressed their frustration with current limits and their support for recent law reform proposals (e.g. Sheehan 2017 and ASA 2019, but cf. Governance Institute of Australia 2018). There was also support for these proposals among some of the companies interviewed, who expressed the view that there was merit in allowing advisory resolutions, provided safeguards were in place to prevent abuse of these tools.

5.5 CONCLUSION

172. The above findings from the interview research suggest that there are important shifts taking place in investor engagement culture in Australia, including the development of influential partnerships and coalitions between investors and civil society focused on climate risk, and experimentation with shareholder resolutions as part of a suite of activities that can influence a company's approach to these risks.

6

6. US EXPERIENCE WITH USING CORPORATE LAW TOOLS FOR ENERGY TRANSITION

173. This Part compares the US experience using corporate and securities law tools with the Australian experience discussed in the three previous Parts. It discusses in turn the US experience with disclosure, director duties, and shareholder proposals and engagement.

6.1 DISCLOSURE OF CLIMATE-RELATED BUSINESS RISKS

6.1.1 LEGAL OBLIGATIONS AND CURRENT PRACTICES

174. U.S. companies that either have their shares sold on a stock exchange, or that have enough shareholders, are subject to a variety of periodic reporting requirements. They must file both annual and quarterly reports, and also proxy statements as part of soliciting shareholder proxies before their annual shareholder meetings. There are no specific requirements concerning climate change-related disclosure, but a variety of required disclosures may be implicated where climate change threatens to have a material impact on the financial performance of a company.

175. The U.S. Securities and Exchange Commission (SEC) issued guidance on how disclosure requirements apply to climate change matters in 2010 (SEC 2010). This guidance analysed the various elements of required disclosure which may relate to climate change. These include risk factors, management's discussion and analysis of financial position and results of operation, litigation, and a description of the company's business. The guidance also analysed various ways in which climate change may materially affect a company. These include the need to comply with changing climate change regulatory requirements, as well a business trends such as declining demand for carbon intensive products. Disclosure is required where such trends may have a material effect on the company's performance. In this regard, materiality is defined in a way similar to that in Australian law.

176. Early analysis of disclosure by U.S. companies suggested that disclosure concerning climate change did increase noticeably following the 2010 guidance but that much of the new disclosure that did result was generally vague or boilerplate (Coburn & Cook 2014). A more recent 2018 study found that 92% of S&P 500 companies offered sustainability information on their websites, with 78% issuing sustainability reports (IRRC Institute 2018). However, a lack of mandatory rules has allowed companies to selectively pick what they want to disclose and makes it difficult to compare developments across companies (McDonnell et al 2020).

177. Enforcement of U.S. securities regulation can occur outside of enforcement by the SEC. Private shareholders may sue under a variety of circumstances if companies violate the disclosure requirements. In addition, each state has its own securities regulation, and state regulators may also pursue enforcement action.

178. Several lawsuits have argued that companies are misleading investors/ consumers on climate risks (Setzer & Byrnes 2020, p. 20). For example, while regulatory action brought by New York's state Attorney General against Exxon was recently dismissed (*State of New York v Exxon Mobil Corporation*), a similar Massachusetts suit filed in October 2019 remains on foot (*Commonwealth v Exxon Mobil Corp*). In mid-2020, Minnesota and Washington, D.C. also filed similar lawsuits. A shareholder class action alleges that Exxon made misleading statements to investors, including overstating the value of its oil and gas reserves (*Ramirez v Exxon Mobil Corporation*).

179. Companies may choose to make climate change disclosures outside of their required securities disclosure documents. A variety of initiatives by coalitions of non-governmental actors have proliferated which prescribe standards for disclosure related to climate change. Discussed above, the TCFD is influential within the U.S. as well, but a variety of other standards are in play as well. As yet, none of these competing approaches has achieved market dominance (McDonnell et al 2020). These include:

- *CDP (formerly the Carbon Disclosure Project)*, is a consortium of businesses and environmental NGOs which provides detailed guidelines for measures reporting environmental impact;
- *Global Reporting Initiative (GRI)*, which provides reporting standards on a variety of sustainability questions, including not just climate change, but also a variety of other environmental matters, human rights, social impacts, and governance;
- *Sustainability Accounting Standards Board (SASB)*, which also provides reporting standards on a variety of sustainability topics, with a particular focus on conforming those standards to the model of U.S. financial reporting requirements; and
- *Various ratings companies, such as MSCI and Sustainalytics*, which rate the performance of businesses along a variety of dimensions.

180. The proliferation of standards both creates dilemmas for companies in deciding which of them to follow, and also hurts investors using disclosure, because the resulting disclosure is less uniform and consistent across companies, making cross-company comparisons more difficult.

181. An ongoing issue is the extent to which disclosure occurs within documents required under federal securities regulation or outside of it. In 2016, the SEC invited comments on a range of disclosure issues, including climate change. But so far, no new rules have been proposed. Proposed amendments in early 2020 do not pertain to climate change related disclosures.

182. Many have argued that best practice should involve disclosure within securities documents, for the reasons discussed below (see, for example, Lipton 2020, Ho 2020, Fisch 2019, Ceres 2020a). SASB has particularly focused on moving climate change disclosure into securities documents. However, most disclosure by U.S. companies has, to date, occurred in unregulated documents, typically annual sustainability reports.

6.1.2 FINDINGS FROM INTERVIEWS

183. The interviews conducted included questions as to how U.S. corporations approach disclosure related to climate change. Findings included the following.

184. *Extent and quality of climate change disclosure by U.S. corporations is quite variable and evolving*: Much disclosure is still limited, vague, and imprecise, making it hard for investors to have a clear understanding about how corporations are responding to climate change. However, some corporations do engage in more valuable disclosure. Better disclosure is more likely in larger corporations, and in corporations located in industries that are more materially exposed to climate change-related risks and opportunities, such as energy companies and utilities.

185. *Best practices in disclosure focus on specific metrics and targets*: Specific metrics and targets allow better comparison across companies, and they make it harder for companies to paint a flattering picture. Specific targets may also provide companies with a stronger incentive to change underlying behaviour to be able to report progress on those targets. One particular piece of guidance from the TCFD for best practice that received a mixed reception from interviewees is 2℃ scenario analysis. Some investors were critical of the lack of such analysis in most corporations' disclosures. Some company interviewees, however, thought that there was not enough guidance as to how a 2℃ scenario would affect individual industries and companies.

186. *Both companies and investors expressed frustration with the proliferation of disclosure standards and guidance*: This frustration was particularly strong on the part of company representatives. The various standards promulgated are overlapping but different, and companies are not sure with which they should attempt to comply. They also report being bombarded with requests from various entities, including rating organisations, which each have their own focus for what they want disclosed. A move to a single common standard would reduce the costs of generating disclosure. Some investors also expressed frustration, saying that the proliferation of standards is contributing to the lack of uniformity in disclosure across companies, making comparisons harder. Even investors from entities that were involved in several different competing efforts at formulating disclosure standards were uncertain as to which standard is likely to prevail, and how one standard might ultimately come to dominate the others.

187. *Worry about reputation is a main driver of voluntary disclosure*: A concern about corporate reputation drives much voluntary disclosure surrounding climate change. Interestingly, several company representatives noted that it is not just reputation with investors that matters to their companies. Indeed, reputation with consumers, and sometimes also employees, was cited as often a more important concern.

188. *It is hard to see that climate change disclosure has yet had much impact on substantive corporate decisions*: As noted above, one potential path for disclosure to drive corporate energy transition is that it may focus company attention on the risks posed by climate change, and thereby change business strategy. U.S. interviewees saw little evidence that this has happened so far. Answers on this point varied somewhat between company and investor representatives. Company representatives were more forceful in asserting that disclosure has not had substantive effects in their company. One interviewee specifically asserted that this theory of change is incorrect. More interviewees said that their companies were already engaged with climate change-related risk, so that disclosure obligations simply affected how they were communicating what they were already doing. The one company interviewee who believed that disclosure had on a few occasions changed his company's behaviour said that it did so because of concerns about the reactions of their customers. Investor interviewees were generally less sure about whether disclosure has changed company behaviour. They could not point to specific instances of an effect, but noted that change in business strategies surrounding climate change is being driven by a variety of factors, so that it is hard to disentangle the independent effect of disclosure. Several pointed to the idea that 'you can't manage what you don't measure'. Several also argued that though disclosure may not have affected strategy yet, it may do so in the future as disclosure becomes more specific and thorough, with a greater emphasis on metrics and targets.

189. *Disclosure within documents required under securities regulation is more likely to affect corporate strategy and decision-making*: Companies put much more internal focus on disclosure that appears within SEC-required documents than in voluntary disclosure documents such as sustainability reports. SEC-required disclosure is reviewed by a wider range of persons and departments within the corporation. In particular, high-level officers devote much more attention to SEC-required disclosure. Furthermore, such disclosure receives much more attention from the board of directors. Another explanation for why the internal decision-making pathway for disclosure's effect does not yet appear to have materialised is that most disclosure in the U.S. has appeared in sustainability reports and similar documents, not in SEC-required disclosure. Moving climate change disclosure into the latter would increase the chances that the process of generating that disclosure would affect substantive strategic and risk management decisions.

6.2 LEGAL DUTIES FOR COMPANY DIRECTORS

6.2.1 LEGAL OBLIGATIONS AND CURRENT PRACTICES

190. As in Australia, the directors and officers of U.S. corporations have both a duty of loyalty and a duty of care to the corporation (Hill & McDonnell 2012). However, broader interpretations and a 'public interest' orientation of enforcement in Australia arguably creates a more permissive environment for a breach of directors' duties suit (Hill 2020a). In the U.S., the duty of care focuses primarily on the degree to which managers inform themselves before making a decision. However, directors are protected by the business judgment rule, under which they would need to be found grossly negligent in informing themselves before being held liable. Moreover, most U.S. public corporations have an exculpation clause which absolves their directors of personal liability even for gross negligence. The protection offered to directors in Australia is far less generous, with a narrow interpretation of the business judgment rule and express prohibitions on exculpation clauses in the Corporations Act (Hill 2020b, p. 173).

191. The duty of loyalty has more bite. Although the duty of loyalty primarily proscribes managers from taking actions in which their personal interests are in conflict with the interests of the corporation, in Delaware the duty of loyalty has been held to include an obligation to act in good faith (Hill & McDonnell 2007). Included in this is an obligation for the board to have in place a system to monitor the corporation's compliance with its legal obligation, under the well-known *Caremark* case in Delaware. Attempts have been made to argue-extending *Caremark* - that the obligation to act in good faith includes an obligation to monitor material business risks, such as climate change poses to many companies. Some attempts go further, arguing that there is a duty to monitor strong harms that corporate behaviour may impose on society (Hill & McDonnell 2013). However, Delaware courts have been extremely hesitant to find a duty to monitor business risk. Even if such a duty were found to exist, the chances of any director ever being held liable under it would appear exceedingly slim (Miller 2010).

192. To our knowledge, there has been no visible, extended analysis of the prospects for liability under U.S. corporate fiduciary duty rules if a board were to fail utterly to monitor the financial risks posed by climate change, comparable to those discussed above for Australia. However, given the framework discussed in the previous paragraph, such liability would seem highly unlikely in the U.S., at least under Delaware law.

193. Despite the low probability of liability under state corporate law for failure to monitor risk adequately, large U.S. public corporations have developed quite elaborate systems for monitoring a wide variety of risks to which they are subject. This system sometimes goes under the label 'enterprise risk management' (Bainbridge 2009; Johnson 2011; Simkins & Ramirez 2008).

194. At least for corporations with a material exposure to climate-related risk of any kind, the principles of enterprise risk management would generally entail that a corporation attempt to account for and manage that risk. Many U.S. corporations now do so, in a variety of ways. This happens both at the board level, and also with responsibilities for officers and departments below the board level. One sign of this is the rise of chief sustainability officers at many corporations.

6.2.2 FINDINGS FROM INTERVIEWS

195. Further insight comes from qualitative interviews with companies, investors, consultants, lawyers, and groups focused on corporate actions related to climate change. The interviews included questions as to how directors and officers in U.S. corporations understand their fiduciary duties in relationship to the risks posed by climate change. Findings include the following.

196. *U.S. directors and officers are well aware of their duty to monitor risk, including risks related to climate change where material*: As noted, risk monitoring is an important role for the directors and high-level officers of public corporation. All company representative interviewees pointed to board-level committees with responsibility to consider climate change. They also pointed to officers, often chief sustainability officers, and departments which engaged in monitoring related risks.

197. *Highly variable allocation of responsibility for monitoring climate risk at the board level and below*: There is much variation in the relevant committee structure of boards, and in which committees bear responsibility for considering the impact of climate change on company risks. In some companies there is a specific committee with responsibility for environmental and related risks. In other companies, different committees are responsible for different elements of risk related to climate change. There is a similar variation in risk monitoring structures at the officer and departmental level. Interviewees identified competing advantages to focusing attention on climate change within one committee and department versus spreading attention across a number of committees and departments.

198. *Risks related to climate change are conceptualised as risks to the financial performance of the corporation*: Respondents, on both the company and the investor side, universally focused on the potential effects of climate change on company financial performance, not on corporate social responsibility concerns outside of financial performance. This is in keeping with the prevailing legal conception in Delaware, although not in the many U.S. states that have adopted corporate constituency statutes. Several respondents also noted that the focus is mostly on financial performance over a relatively short time horizon. They commented that it is hard for most companies to yet pay too much attention to climate change, given that its major likely effects are still, in general, several decades away for many companies.

199. *Several interviewees said that a fiduciary suit alleging a failure to consider climate change risk would capture considerable attention within a corporation*: At the time of interviews, no such suits had been brought, or even visibly threatened, against any U.S. corporation. Thus, there was no attention being paid to the threat of such a suit. However, when asked about what would happen at their corporation should such a suit be brought, several interviews responded that such a suit would be an effective way to attract considerable attention, including at the board level. They said this was so even though they did not have any sense as to the likely legal outcome of such a suit.

200. *There is a significant emerging focus on director expertise concerning climate change, and the environment and sustainability more generally*: In discussing company engagement with shareholders (see below), a number of respondents, particularly on the investor side, noted an emphasis on attempting to ensure that at least one director has significant expertise and experience in dealing with environmental matters.

6.3 SHAREHOLDER PROPOSALS AND ENGAGEMENT

6.3.1 LEGAL REGULATION AND CURRENT PRACTICES

201. The use of shareholder resolutions as a form of shareholder activism has a long history in the United States, where shareholders have exercised their rights to put forward resolutions as a strategy to engage with management and influence company policy and practice in a wide range of areas such as executive remuneration, labour rights and environmental responsibility (Goranova & Ryan 2014).

202. Rule 14a-8, promulgated by the SEC, allows shareholders who meet relatively minimal shareholding and procedural requirements to submit shareholder proposals to be included in the proxy form distributed by the company and thereby to be voted on by shareholders. Inclusion in the company proxy allows shareholder proponents to avoid the high costs of creating and circulating their own proxy solicitation. Such shareholder proposals are generally non-binding even if approved by a majority of the shareholders voting, although shareholders do occasionally propose amendments to the bylaws that are binding upon the company if passed. Although most proposals are not binding, companies will typically choose to comply with proposals that receive majority support.

203. Companies that object to a proposal may attempt to exclude them from the corporate proxy on the basis of one or more of the thirteen bases for exclusion provided for in Rule 14a-8. The most relevant basis for exclusion for climate-change related proposals concerns proposals that relate to a matter of the company's ordinary business operations. SEC application of this basis for exclusion has been highly fact-dependent, variable, and often hard to predict. As is apparent from the large number of climate change proposals which have received votes in recent years, the SEC has allowed many proposals requiring reports on issues related to climate change. However, there have been several instances where the SEC allowed companies to exclude proposals asking companies to set and report on emissions targets. If this represents a growing trend, it is significant, since a point made by a number of interviewees was that efforts to make disclosure focus on more specific targets are an important trend.

204. There is some sentiment that the procedural elements of Rule 14a-8 make it too easy for even persons with a tiny stake in a company to make a proposal. Proponents only need to own $2,000 worth of shares, which is an incredibly small fraction of the market value for a public corporation. Some advocate raising the share ownership threshold for being allowed to submit a proposal. Such a rule change was included in the Financial CHOICE Act, a major Republican Party attempt to deregulate financial regulation in a variety of respects. The Act passed the House of Representatives, but not the Senate.

205. ESG proposals have become quite widespread, with climate change resolutions forming a major part of this growth. In the United States, shareholder resolutions on climate change began emerging over 20 years ago and are now very prevalent (see Climate and Sustainability Shareholder Resolutions Database at Ceres).

206. Parallel to the growth of shareholder proposals has been a growing emphasis on companies engaging with their shareholders outside of the formal proposal and shareholder meeting process. Shareholders, individually or in groups, will increasingly ask to meet with (in person, or more frequently by phone) representatives of companies to discuss issues of concern with them. ESG issues, including climate change, are among the common topics of discussion. Companies are under pressure to have procedures in place to respond to such meeting requests, and they will also sometimes proactively reach out to their largest shareholders to discuss matters they think will be of concern.

207. The growth in both shareholder proposals and engagement is linked to fundamental changes in share ownership that have occurred in the U.S. in recent decades. Whereas individual retail investors once used to own a majority of the shares of public U.S. corporations, now institutional investors own most shares. There are a variety of types of institutional investors. Several types play unique roles in the area of shareholder proposals and engagement. Activist hedge funds identify under-performing companies, suggest strategies to increase share value, and threaten proxy contests if target boards resist. Such activism is arguably a source of pressure to focus on short-term financial returns. Pension funds and socially responsible investment funds are leading proponents of ESG proposals, including climate change proposals. The so-called Big Three family of funds (BlackRock, Vanguard, and State Street Bank) own increasingly large blocks of shares in public corporations. The Big Three do not themselves submit shareholder proposals, but their votes are often crucial to the success or failure of shareholder proposals. The Big Three are increasingly focusing on share stewardship, and have expressed commitment to support a focus on long term returns that consider various ESG factors that may affect such returns, although there is much controversy as to how active or effective this turn to stewardship has been so far (Bebchuk & Hirst 2019; Fisch, Hamdani & Davidoff Solomon 2019).

6.3.2 FINDINGS FROM INTERVIEWS

208. The interviews included questions as to how companies are responding to shareholder proposals and engagement around climate change, and whether such shareholder involvement is affecting company strategy and risk management. Findings include the following.

209. *ESG issues in general, and climate change in particular, are receiving a great deal of attention from shareholders*: This is evident in the large number of shareholder proposals, and the significant support that they now typically garner. But beyond that, persons on both the company and investor side reported that climate change is a common topic in discussions between shareholders and corporate representatives.

210. *Shareholder proposals both reflect and help drive greater engagement*: The introduction of a proposal will often cause a company to engage not only with the proposers, but also with other major shareholders as well. Companies are also reaching out to major shareholders proactively, in part to forestall more aggressive shareholder activism.

211. *Company response to shareholder proposals varies and is evolving*: Some companies still respond defensively, refusing to negotiate with proponents and including the proposal in the corporate proxy with a strong statement in opposition. But many companies often try to engage in a more positive way. They will discuss the proposal with its proponents and attempt to explain actions the company is already taking that are responsive to the concerns. Often they will reach a compromise, or simply agree to adopt the proposal, leading to proposals being withdrawn before a vote.

212. *There is little sense that shareholder proposals and engagement are yet significantly changing underlying company strategy and risk management surrounding climate change*: Climate change proposals often do result in more extensive disclosure, the typical focus of most proposals. But as noted above, interviewees saw little evidence that disclosure so far has had much effect on company behaviour. The proposal and engagement process could themselves affect behaviour by focusing internal attention on climate change. Directors will see proposals that make their way into the corporate proxy. However, most engagement with shareholders on climate change does not usually seem to involve any directors. The company representatives present at such meetings are typically a mix of persons responsible for dealing with shareholders, such as employees of the corporate secretary or investor relations office, corporate counsel, and employees involved in the unit charged with sustainability matters. No interviewee reported any clear instances where a shareholder proposal or engagement had noticeably affected underlying strategy or risk management. However, investors expressed hope that the ongoing high level of attention, in conjunction with a variety of economic and organizational factors pushing companies to react more to risks and opportunities related to climate change, would eventually have an effect on underlying behaviour, even if it is hard to disentangle the effect of shareholder engagement from other factors.

213. *Proxy access and political spending and lobbying proposals are also important to climate change, even when not directly mentioning climate change*: Proxy access gives shareholders the ability to threaten to replace current directors if they are unhappy with current corporate strategy. The activists who have managed to make proxy access a common feature in U.S. corporations, in just a few years, initially targeted in part companies that were suspect or vulnerable on sustainability matters, including climate change.

214. *Political spending or lobbying proposals require companies to disclosure their spending on political campaigns and/or lobbying*: Sometimes these proposals focus specifically on lobbying surrounding climate change, but sometimes they are more general. Several investors said that a motivation for these proposals is that some companies will publicly talk a good game around climate change, but then funnel resources to persons and organizations that oppose attempts to address it through legislation or regulation. Thus, the hope is that such proposals may help ease the way for future efforts to enact tougher rules encouraging a transition to clean energy.

6.4 CONCLUSION

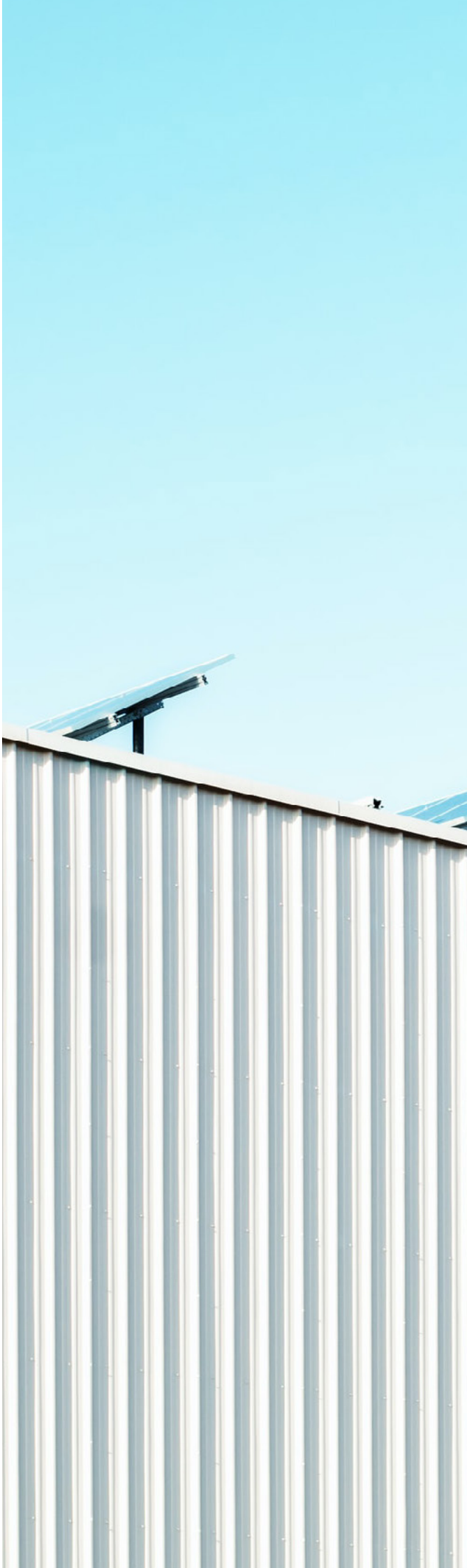
215. There has been an explosion of attention to climate change among investors and within companies. This has led to much more disclosure concerning risks and opportunities surrounding climate change, mostly in annual sustainability reports rather than in required securities disclosure documents. It has also led to a large number of shareholder proposals related to climate change, and much informal engagement of investors with companies on the issue.

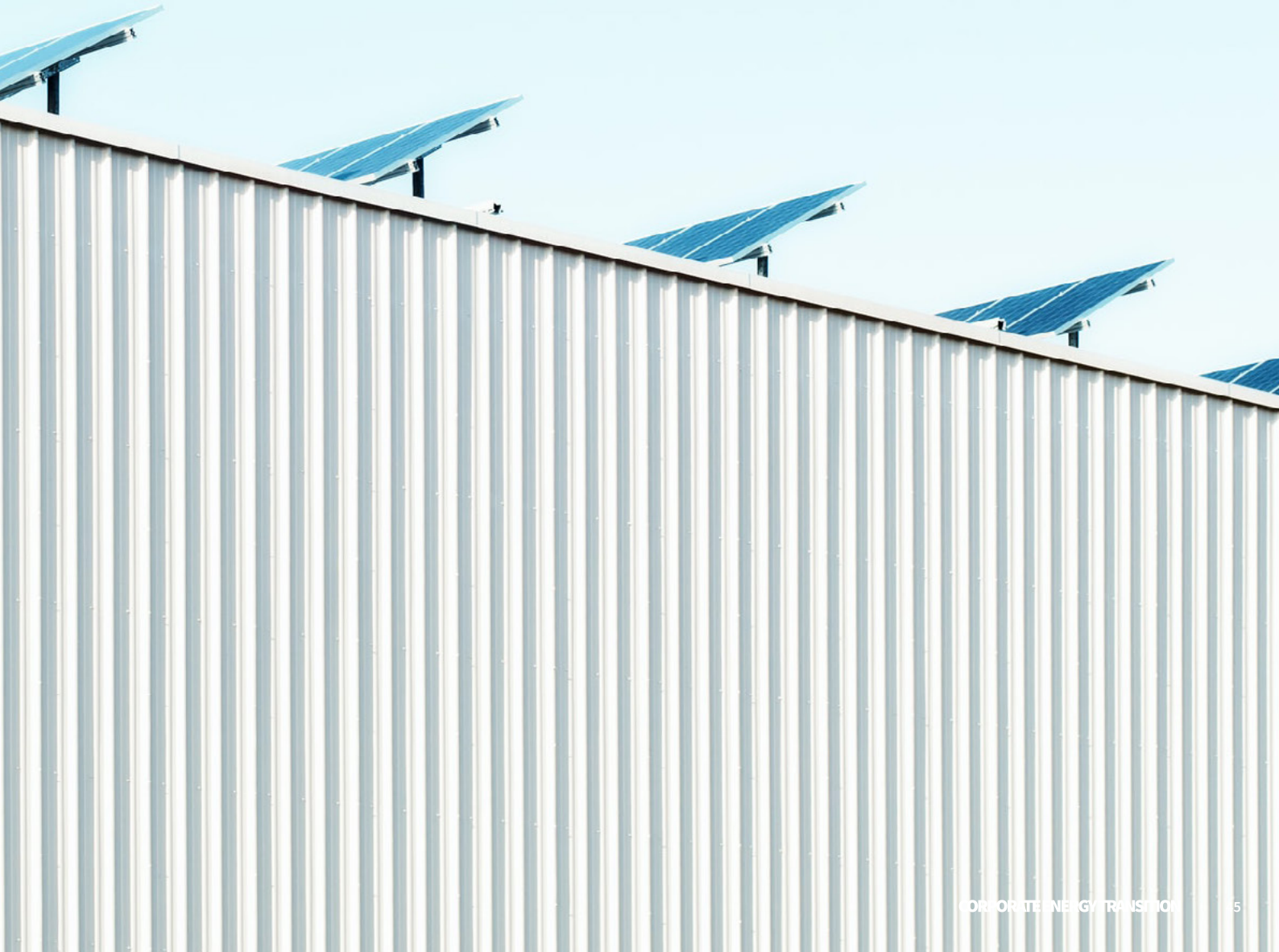
216. However, none of this yet seems to have had any clear, direct effect on underlying corporate strategy and risk management related to climate change in the US. That said, certainly many companies are responding to climate change in a variety of ways. It is hard to disentangle various factors that are driving such change - disclosure and shareholder engagement may be among them. But underlying, immediate economic risks and opportunities seem more important. None of our U.S. interviewees could point to large effects of the various efforts discussed here to date, and few if any seemed to think there have been such large effects yet.

217. But the heavy attention to climate change in disclosure and shareholder engagement is still a recent phenomenon. Responses are rapidly evolving. As disclosure practices become more detailed and targeted, and as investors become more knowledgeable in general and about specific companies, all of this attention may start having more effect. Fiduciary duty suits, so far an untested strategy, could also have an effect, even if their prospects for victory in court are low.

218. How likely is it that the future effects will be significantly stronger than the current effects? Good arguments can be made in either direction. The influence of short-term economic pressure to earn profits is quite strong, often swamping motivation to improve the world where doing so does not demonstrably help the bottom line. Moreover, disclosure, proposals, and engagement are relatively soft tools-corporate decisionmakers are not generally much threatened by them.

219. On the other hand, investors do have the ability to remove directors, or to disinvest from a business, putting some downward pressure on stock price (which will lower the compensation of directors and officers). Disclosure also affects customers and employees. Thus, better, more targeted and inter-comparable disclosure that clearly marks poor performers could have some effect. If disclosure and engagement become more time-intensive tasks at higher levels of the company, particularly if they become an important part of the job of the very top officers and directors, they could change internal decision-making.





7. CONCLUSIONS AND RECOMMENDATIONS

7.1 OVERVIEW

220. This part summarises the report's conclusions regarding the potential and limitations of the three corporate law tools examined in the research – business risk disclosure obligations, directors' duties and shareholder actions – to drive corporate energy transition via the internal (company-driven) and external (investor-driven) pathways described in Part 2.

221. We also put forward a series of recommendations for policymakers regarding law reform options to enhance the utility of corporate law avenues as a basis for promoting private sector clean energy practices.

7.2 CONCLUSIONS ON THE POTENTIAL AND LIMITS OF CORPORATE LAW TOOLS

222. Qualitative interview data gathered in the project provided insights into the overall potential and limitations of the three corporate law tools examined in the research to influence corporate decision-making on energy transition. Broader research has indicated that there have been significant shifts over the past few years and rising interest in the role of these tools to govern the energy transition.

223. Key conclusions from the Australian interviews, supplemented by broader research, regarding the effects of these tools on internal and external pathways towards corporate energy transition are summarised below.

7.2.1 CORPORATE TOOLS AND EFFECTS ON INTERNAL DECISION-MAKING

224. *Disclosure obligations, new interpretations of directors' duties and shareholder resolutions on climate change, in concert, contribute to mounting pressure on Australian companies to identify, assess and internalise climate risks:* Investors are demanding improved practice in this area and new coalitions of like-minded investors and investor partnerships with civil society are increasingly important influences on company decision-making. Many large Australian companies have committed to adopt the TCFD recommendations and are developing best practice approaches to produce more decision-useful disclosures which outline how climate risks have been integrated into business strategy. While there remain many gaps in practice (both relating to the quality of disclosures and the number and breadth of companies disclosing, see Parts 3 and 4), the available evidence suggests that Australian companies are on a trajectory to identifying, assessing and disclosing the climate risks facing their businesses more effectively.

225. *Corporate tools are indirect and procedural in nature, with their impact contingent on materiality determinations and evolving climate risks*: Risk disclosure obligations and associated director's duties are an indirect, procedural tool. Their impact on internal decision-making will depend very much on how climate risks related to technology, market, policy and regulatory developments evolve over time and the approaches companies take to assessing their materiality, including the timeframes adopted. Disclosure obligations merely act as a framing device to ensure that these risks are identified, considered, assessed and disclosed as appropriate. Similarly, directors' duties are enlivened if and when climate change is deemed to be a material financial risk and if so, impose largely procedural obligations on directors. Identifying, assessing and disclosing climate risk does not automatically translate to changed internal decision-making on energy transition along the timeframes that may be required to meet climate change mitigation and energy transition objectives associated with the global temperature goals of the Paris Agreement.

226. *The business case for asset divestment or re-allocation is highly variable and often weak*: While some companies are integrating climate risks into core decision-making, which may contribute to asset divestment or re-allocation decisions, interview data indicated that many continue to invest capital and resources in fossil fuel projects (Interviews, participants 4, 22). This suggests that the business case for these activities remains strong over the timeframes companies are employing in their strategic planning and risk management processes, and/or that the approach taken by these companies to determining materiality does not properly account for climate risks.

227. *Increased enforcement activity - both public and private – is likely to assist in crystallising understandings around the financial materiality of climate risks and the application of legal obligations*: Australian cases, such as the CBA case claiming misleading disclosure of climate risks, the McVeigh claim alleging breach of trustee duties to manage climate risks, and the O'Donnell case against the Australian government for failure to disclose risks to sovereign bonds, as well as litigation trends overseas, underscore that climate change can pose financial material risks which must be disclosed and managed and provide tangible examples of failures to do so. Similarly, increased scrutiny by regulators, currently underway, is viewed as critical to drive changes in company decision-making. Pressure from investors also contributes to the case for change.

228. *More substantive regulation is required for broader environmental impacts*: If the contribution of companies to broader climate change mitigation and energy transition objectives is to be enhanced, indirect and procedurally-oriented corporate law tools have significant limitations. To this end, several interview participants expressed their support for integrating more substantive targets and expectations into legal obligations around climate risk disclosure and management. While some leading companies are beginning to set targets to reduce emissions or to demonstrate how they contribute to achieving global temperature goals as part of their scenario analysis and broader climate risk disclosure and management processes, the lack of consistency, slow pace of change and its uneven nature are of concern to asset owners and managers and civil society (interviews, participants 4, 20, 22). Some interview participants drew comparisons to the legal approaches of other jurisdictions, such as France, (see below) which have directly linked risk disclosure obligations to more substantive commitments on energy transition as models.

7.2.2 CORPORATE TOOLS AND EFFECTS ON EXTERNAL INVESTOR DECISION-MAKING

229. *There is increased awareness, investigation and engagement activity by investors on climate risks:* Asset owners and managers in Australia are increasingly aware of and concerned about the implications of climate risk for their investments. Leading asset owners are assessing the exposure of their portfolios as part of their broader ESG integration activities and engaging with targeted companies on these issues, both behind-the-scenes and through shareholder resolutions, which are increasingly seen as an important tool to escalate engagement activities and influence companies' decision-making on energy transition.
230. *Capital divestment and re-allocation is in its infancy*: Some Australian funds (though numbers are larger in the US) have introduced targeted divestment initiatives designed to reduce climate risk exposure and respond to member pressure on this issue, such as actively screening out companies that make a certain proportion of their profit from fossil fuels or from certain asset classes. Some funds screen fossil-fuel investments from their socially responsible investment options, which are available for members to select voluntarily. Yet the uptake of socially responsible options by members remains very modest and the risk of 'greenwashing' in these investment options is becoming apparent. While an increased willingness to divest is emerging among asset owners and managers, there remains an ongoing debate about the impact of capital divestment on company decision-making and therefore energy transition and climate change mitigation outcomes (interviews, participant 5).
231. *The business case for capital divestment and re-allocation on climate grounds is not yet strong though arguably at a pivotal turning point*: Interview data indicated that in the main, capital divestment/re-allocation on climate grounds appear to be small changes on the margins of investment decision-making, which have been driven by pressure from fund members to reflect their ethics and values as much as by imperatives to manage the potential financial impacts of climate risks. Several participants emphasised that the investment case for change is not yet strong enough. Profits are still being made with business as usual, and short-term considerations dominate investment decision-making (interviews, participants 4, 8, 17). Even for carbon-intensive assets, such as coal, the investment case remains equivocal for many investors, and short-term benefits remain attractive (interviews, participants 16, 18, 24). There is an opportunity to adopt a green-led recovery from COVID-19 but the risk of a 'gas-led' recovery is also increasing.
232. *Broader impact requires complementary action*: The conclusions above underscore the limitations of relying on investment decision-making to shift progress on energy transition by companies, without other more substantive regulatory drivers acting in concert. That said, lobbying/association expenditure proposals - which are an increasing part of the shareholder resolution profile - may help shift the political environment, making other more substantive regulatory changes more achievable.

7.3 REFORM RECOMMENDATIONS

233. Given the limits of corporate law tools to drive private sector energy transition, several recommendations are proposed in the following sections as ways of strengthening the effectiveness of these tools to contribute to broader climate mitigation goals.

7.3.1 DISCLOSURE REFORMS

234. Broadly speaking, awareness of climate-related risks is growing and there is increasing momentum towards the use of voluntary reporting frameworks, especially the TCFD recommendations in Australia, to disclose and manage climate-related risks. Yet, as desktop research, survey and interview data indicated, the disclosure practices of Australian companies with regards to climate risks are seen as highly variable and lacking in terms of coverage and quality in some cases.
235. In this regard, there is a need to ensure that there is both adequate coverage of reporting across companies with material exposure to climate-related financial risks and that the information disclosed is of sufficient quality to understand companies' exposure to and management of climate-related risks and the impacts on broader financial stability, noting as well, the need to be aware of the risk of over-standardisation and lowest common denominator metrics.

236. Inadequacies in terms of coverage and quality also signal the limitations of disclosure as a tool to accelerate the transition to clean energy practices, for example, while it may focus internal company decision-making on material risks, it may not necessarily lead to divestment and/ or re-investment. For instance, some companies in highly exposed sectors may use scenario analysis and find that climate change will have no negative impact on their business.

237. Nevertheless, some steps may be taken to improve disclosure practices and use this as a tool to support corporate energy transition. Regulatory guidance and standard setting, including adequate oversight, can play an important role in improving companies' reporting and disclosing material climate-related financial risks. During the course of this project, regulators and standard setters in Australia, including ASIC, the ASX, AASB, AUASB and APRA, have issued updated guidance as discussed in previous parts.

238. The TCFD framework has also received support as a framework for such disclosure. For example, ASIC 'strongly encourage(s) listed companies with material exposure to climate change to consider reporting voluntarily under the TCFD framework' (ASIC 2019a). This statement was echoed by APRA in 2020: 'APRA therefore continues to encourage the adoption of voluntary frameworks to assist entities with assessing, managing and disclosing their financial risks associated with climate change, such as the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) recommendations' (APRA 2020b).

239. Both ASIC and APRA have stepped up their regulatory oversight of climate risk disclosures in 2019-20 and the results of these surveillances, especially from the FY19 reporting period, may assist in determining whether companies are broadly adapting their practices to reflect these changing expectations. Indeed, formal endorsement, including from the Australian Government, for the **widespread adoption of the TCFD framework within a set timeframe** is a clear way to encourage companies to consistently meet existing principles-based requirements for climate risk reporting and management under Australian corporate law.

240. This would be similar to the approach taken in the UK. For example, in July 2019 the UK Government issued a *Green Finance Strategy: Transforming Finance for a Greener Future* setting out actions it is taking, inter-alia (UK Government 2019, p. 7):

- An expectation that 'all listed companies and large asset owners…disclose in line with the TCFD recommendations by 2022'.
- 'Establishing a joint taskforce with UK regulators, chaired by Government, which will examine the most effective way to approach disclosure, including exploring the appropriateness of mandatory reporting'.
- 'Supporting quality disclosures through data and guidance, such as that being prepared for occupational pensions schemes by a new Government and regulator sponsored working group'.

241. Consideration may also be given to **mandating elements of the TCFD's disclosure framework for listed companies in Australian corporation law,** potentially working through a joint taskforce as in the UK (for example, through the existing Council of Financial Regulators Working Group on Climate Risk). This could involve changes to the Corporations Act, supplemented with best practice guidelines, and would also have to be coupled with sufficient supervisory powers and oversight from Australian regulators to ensure the quality of disclosures.

242. A key theme emphasised by interviewee participants was the indirect and procedural nature of existing risk disclosure obligations which limits the influence of these requirements on internal company decision-making on energy transition. Effectively, the law encourages companies to demonstrate how they have internalised climate risk and how they will continue to prosper in a climate changed future. It does not require them to set targets to reduce emissions or to demonstrate how they contribute to achieving global temperature goals.

243. Reforms introduced in France (Article 173) have put in place climate risk disclosure obligations for companies and investors that are integrated within a broader legislative program for clean energy transition and the level of specificity and substantive reach of these obligations. **Requiring companies and investors to report and quantify their performance in transitioning to clean energy,** for example, through targets for fossil fuel divestment or clean energy investment, extends significantly beyond requiring companies to disclose material business risks as part of their regular financial reporting. This could be coupled in tandem with ambitious policies, including through the Government's technology investment roadmap and increasing the ambition of Australia's NDC under the Paris Agreement, targeting net zero emissions and supporting investment in renewable technologies.

244. In a more general sense, recommendations made at the Centre for Policy Development's roundtable on climate and sustainability in Sydney, November 2019, which brought together members of the business, finance, superannuation, government and regulator communities, are pertinent. Participants identified that there was a need for regulators, governments and sectors to **establish consistent scenarios and common standards, share data and commit to targets,** including net-zero emissions in line with the Paris Agreement (CDP 2019). As an example of this, APRA is undertaking a climate change financial risk vulnerability assessment of ADIs, coordinated with ASIC and the RBA through the Council of Financial Regulators, drawing on input from CSIRO and the BOM (APRA 2020b).

245. Participants at the CPD workshop also identified the need for collaboration across the public and private sector. For example, financial regulators work through the Council on Financial Regulators Working Group on Climate Risk and those in financial industry work through the ASFI and IGCC (CDP 2019). Recently, the Australian Government has coordinated the response to the COVID-19 pandemic through the National Cabinet, at the centre of the National Federation Reform Council. In this regard, consideration could be given to establishing a **government and economy-wide body** to share and develop information to understand climate-change financial risks and ways forward.

7.3.2 DIRECTORS' DUTIES REFORMS

246. Interview data indicated that while there was a slow broadening of understandings of the links between directors' duties and climate risks, actual practice within companies remained highly variable. Expectations of the standard of care required of directors in this respect have continued to strengthen over time. The two Hutley and Hartford Davis opinions have been highly influential, with the 2019 updated guidance indicating that recent developments 'elevate the standard of care that will be expected of a reasonable director' (para. 4).

247. Possible law reform can be situated within the long-running debate over corporate purpose and **the extent to which corporations should consider the interests of other stakeholders and the public, beyond focusing on enhancing value for shareholders** (McDonnell, Osofsky, Peel & Foerster 2020). In this regard, Australian interview participants noted the challenge for directors to move beyond a short-term focus on the interests of shareholders and a tendency to see climate change as a long-term issue, rather than posing foreseeable and material risks to the company in the near term (McDonnell, Osofsky, Peel & Foerster 2020, p. 69).

248. Consideration of whether reform to existing obligations is warranted, or whether they are already sufficiently broad to accommodate consideration of long-term stakeholder interests in the context of climate change, may follow resolution of the test case in *McVeigh v REST*, and pending whether ASIC seeks to enforce any regulatory action undertaken as a result of its increased climate surveillances in the FY19 reporting period. The general perception amongst interview participants was that litigation, regulatory investigation and/or shareholder responses would increase pressure on directors (Peel, Foerster, McDonnell & Osofsky 2019, p. 469).

249. Other jurisdictions, for example Canada, have included legislative provisions encouraging directors to consider broader stakeholder interests (including the environment) when in acting in the best interests of the corporation (*Canada Business Corporations Act*, *RSC 1985* s 122). However, it has been argued that directors' duties alone cannot reflect a stakeholder model of corporate law and more fundamental reform of company law, potentially to understandings of corporate purpose, may be warranted (see Langford 2019; Langford 2020b).

250. A more modest approach is to support the development of best practice amongst Australian directors to develop their 'climate competence'. As indicated in interview data and from the survey of disclosure practices through TCFD reporting, some companies are putting in place governance structures to consider climate risk. However, even amongst those companies who are integrating climate-related risks into broader company governance, practices vary considerably. Consideration could therefore be given to developing **best practice guidelines to assist directors in establishing oversight practices of climate-related risks.** Such processes could be disclosed in line with the TCFD recommendations, noting however the danger of 'greenwashing' and high-level qualitative description.

7.3.3 SHAREHOLDER RESOLUTIONS REFORMS

251. Formal and informal engagement with shareholders on climate change has increased significantly, with a notable shift in Australia from 2017 onwards in terms of using shareholder resolutions as a tool for engagement. It is difficult to draw causal links between changing corporate practices and shareholder resolutions/ engagement generally but there have been at least some shifts in practices. As engagement continues and evolves in sophistication, its impact in supporting the clean energy transition could grow.

252. In Australia, a law reform option recommended by the ACSI in 2017 would be to **allow for shareholders to propose non-binding shareholder resolutions** to company meetings, similar to the position in the US and the UK (Sheehan 2017; reform also supported by the Australian Shareholders' Association (ASA) 2019). Substantive resolutions on climate change are already being brought to company meetings and in some cases attracting a large percentage of the vote (with levels of support for constitutional change remaining comparatively low). Reform could remove the requirement to bring resolutions in two parts (a constitutional amendment and the conditional substantive resolution) but consultation around appropriate thresholds would be needed.

253. Interview data indicated that law reform is supported, even among some of the companies interviewed, provided that safeguards were in place to prevent abuse of these tools. The 'clunky' nature of a two part resolution and the requirement to vote on constitutional change had been a factor in some investor decisions to vote against the resolution (interviews, participant 24). External research by the Governance Institute of Australia in 2018 presented a mixed picture of the case for change. 63% of governance and risk professionals surveyed did not support shareholders being given a greater voice on ESG issues but most participants at a roundtable discussion agreed that the constitutional amendment requirement could be removed, provided that the threshold for bringing these resolutions was higher (2018, pp.11-15). However, as higher votes are now being recorded and there is pressure on investors to vote on these types of resolutions, the case for change may be increasing. (Governance Institute of Australia 2018, p. 15).

254. Some of the concerns raised for and against law reform include the need for long-term consideration of shareholder/ stakeholder interests, the division between management and control powers within a company, the need to protect against more general 'social' activism, and more behind the scenes engagement with shareholders (Governance Institute of Australia 2018, p. 7). There is also a question about the role of investors focused on the financial best interests of beneficiaries and whether this equates with swift and comprehensive action on climate change. Nevertheless, as time goes on, the role of this tool will likely continue to evolve and law reform would seem to formalise an existing and emerging way in which companies are engaging on climate-change risks.

255. As identified from the survey of recent shareholder resolutions in Australia, and drawing on the experience in the US, there are emerging trends in practice that might be further developed to strengthen the contribution of shareholder resolutions to energy transition goals. These include the use of resolutions seeking:

- Reporting on **short-, medium- and long-term targets** to reduce scope 1, 2 and 3 emissions in line with the Paris Agreement's temperature goals and how exploration/ expenditure is aligned with the Paris Agreement (especially in the mining and energy sectors), and disclosure of strategies and targets to reduce exposure to fossil fuel assets, in line with the Paris Agreement (especially in the banking and insurance sectors). This would include reporting on progress over time.
- Review and disclosure of **direct and indirect lobbying activities** relating to climate, energy and/or resources, as well as suspension of membership of industry associations where there is a history of lobbying inconsistent with the Paris Agreement's goals.
- Linking **executive remuneration and director pay to climate targets to incentive progress** towards these targets. Several companies have already linked executive pay to such targets, and, in the case of BHP, committed to further disclosing the weighting and mechanisms behind these incentives (see Annual Report 2019).
- Targeting **specific issues raised by the practices of certain companies** such as strategies to accurately measure, report and reduce fugitive methane emissions, disclose assessments of expenditure required to install and maintain pollution controls at certain coal-fired power stations, and resolutions calling for fossil fuel wind-up plans and the closure of certain coal-fired power stations.
- Requiring **climate competence** for a director or directors on a company board, and/ or creating an environmental and/or sustainability advisory council.

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APPENDIX A – METHODOLOGY

This project employed a mixed methodology:

- A desktop review of relevant legislation, case law and secondary literature was conducted to establish an understanding of legal frameworks and their application to climate risks.
- Three staggered studies of climate risk disclosure by a selection of Australian companies were undertaken in 2016, 2018 and 2019 to observe disclosure practices and their evolution over time. The first exploratory study was published independently (see Foerster et al, 2017); the second and third studies provided input for the analysis in Part 3 of this report.
- A study of shareholder resolutions addressing climate change from 2010 to 2020 to observe which parties are using this tool to address climate risks and how it is being used, as well as the levels of support among shareholders expressed through voting on the resolution. This study is reported in Part 5 of the report.
- Australian Interviews – 24 interviews with representatives of key stakeholder groups were conducted to obtain qualitative data on the way in which Australian companies and investors approach climate risk and the impact of corporate law tools in shaping their decision-making on these risks. Interview data was analysed using nVivo software to identify themes in the views, opinions and descriptions offered by interview participants. In this report, the empirical data is used particularly to observe current practices and approaches to climate risk and to draw conclusions on the role of legal drivers for corporate energy transition, their potential and limits.
- U.S. Interviews – 14 interviews with representatives of key stakeholder groups were conducted to obtain qualitative data on the way in which U.S. companies and investors approach climate risk and the impact of corporate law tools in shaping their decision-making on these risks.

A.1 QUALITATIVE INTERVIEWS

Australian interviews were conducted in person, by telephone or video conference, from February – August 2018, with the following stakeholders:

- **Corporate and Financial Sector Regulators –** Personnel working on climate risk disclosure and management (2 interviews)
- **Civil Society Advocacy Groups –** prominent NGOs engaging with corporate law tools to influence company decision-making on energy transition (2 interviews)
- **Investor Groups / Associations –** subject matter coalitions or associations focused on climate risk and responsible investing (2 interviews)
- **Investor Service Providers –** providers of ESG analysis, proxy voting, engagement and representation services (2 interviews)
- **Companies –** a small sample of 7 listed companies in the ASX50, drawn from the industry sectors of energy, utilities and materials. Interviews were undertaken with various company officers including company secretaries, investment relations and sustainability staff (7 interviews with 9 people)
- **Asset Owners –** a small sample of leading Australian superfunds by market share and ESG profile, predominantly industry superfunds. Interviews were conducted with in-house ESG and investment analysts (7 interviews with 8 people)
- **Asset Managers –** a small sample of Australian fund managers associated with the asset owners interviewed for the project. Interviews were conducted with in-house ESG and investment analysts (2 interviews with 3 people)

Participants were identified using publicly available contact information for targeted organisations. A snowball approach was then used to identify additional participants using the suggestions of the initial round of subjects. This was particularly helpful in obtaining contacts within companies.

Interviews were semi-structured, based on a core set of questions, which were adapted to the various groups of participants and administered flexibly to allow various participants to contribute their knowledge and opinions.

U.S. interviews were conducted in person or by telephone, from August – November 2018, with the following stakeholders:

- **Companies –** a sample of 5 listed companies, drawn from the industry sectors of utilities, financial, food, retail, and materials. Interviews were undertaken with a corporate director, in-house counsel with a securities law focus, and sustainability staff (5 interviews with 5 people)
- **Asset Owners –** a sample of 3 owners, including a public employee pension fund, a union pension fund, and a charitable foundation (3 interviews with 3 people)
- **Asset Managers –** a sample of 4 investment funds, two with a focus on socially responsible investing and two with a focus on index funds (4 interviews with 4 people, one of those currently a consultant formerly employed with a mutual fund)
- **Investor and Company Service Providers –** one consultant and one securities law lawyer (2 interviews with 2 people)
- **Investor Associations –** one association of investors and others focused on environmental disclosure issues (1 interview with 1 person)

A.2 PARTICIPANT SAMPLE – STRENGTHS AND LIMITATIONS

The participant sample described above has a number of strengths and limitations which were taken into account in the analysis of the interview material and its presentation in this report.

A.2.1 AUSTRALIAN INTERVIEWS

Companies: Companies were selected if they fell within an industry sector highly exposed to climate risks (utilities, energy, materials) and within the ASX50 (an index of the 50 largest ASX listed stocks, with a cut-off of $5billion (AUD) market capitalisation. Constituents account for approx. 62% of Australia's share market capitalisation). Due to their size and their potential exposure to climate risks, these companies can reasonably be taken to represent leading approaches to climate risk disclosure and management and therefore are unlikely to be representative of the broader market or of other industry sectors. A total of 7 companies agreed to participate.

A variety of personnel from these companies participated in interviews including company secretaries, investment relations and sustainability personnel. No company directors were interviewed for this project. This is important to take into account when considering the views and opinions expressed on matters such as director's duties to assess, disclose and manage climate risks. Without data obtained directly from company directors, the analysis of the interview data was limited to discussing the views and opinions expressed by other participants, including those internal to companies and those external to companies (e.g. personnel within asset owners and asset managers and industry groups that interact with companies and their directors).

Asset Owners and Managers: As for companies included in the Australian sample, there was only a small number of assets owners and asset managers who participated 7 asset owners and 2 associated asset managers). The majority of asset owners participating were industry superfunds. Only one retail fund participated, and no corporate or public sector funds participated. Industry and retail funds differ in their history and structure. Retail super funds are publicly listed companies, generally developed by financial institutions and insurance companies, which return their profits to shareholders and investors. In contrast, industry super funds were predominantly developed by trade union and industry bodies to provide for their members in retirement and generally return all profits to their members. As a result of these differences, industry superfunds are widely viewed as more likely to take a longer term view of investment imperatives, which may lead to a more active approach on climate and other ESG risks, many of which will materialise over a range of timeframes.

Given the relatively small sample size and the predominance of industry superfunds and their associated asset managers, it is reasonable to assume that this sample is not broadly representative of the superannuation market. Rather, it is most likely to represent leading actors which are particularly active on climate risk. Research by other parties has highlighted the diversity of approaches taken among Australian superfunds to climate risk disclosure and management see, for example, database compiled by Market Forces sets out share investments (Market Forces 2020c; earlier report available here: Market Forces 2017) and ACCR research paper on voting practices of superfunds for ESG resolutions (ACCR 2020c).

Further, the personnel who participated in interviews were generally ESG specialists. We did not interview more general investment managers or trustees themselves. As such, the views and opinions provided may not necessarily be reflective of the organisations as a whole.

A.2.2 U.S. INTERVIEWS

Companies: Only 5 companies participated, and only one of those, a utility, were in the energy field. Several other industries with important exposure to climate change were included, including financial, food, retail, and materials. One of the interviewees was a director (for the utility company). The other interviewees were equally split between securities lawyers focused on disclosure and shareholder engagement and sustainability staff.

Asset Owners and Managers: Only a total of 7 owners and managers participated, and there a wide range of types of owners and managers in the U.S. industry. Within that constraint, the sample did include both owners and managers that are significantly involved in shareholder activism as well as managers with large holdings that make them important targets as potential supporters for shareholder voting campaigns.

No regulators participated in the U.S. interviews. With the exception of the corporate director, all of the U.S. participants were ESG specialists.

A.3 ANALYSIS OF INTERVIEW MATERIAL

The Australian interview data was analysed using nVivo, a qualitative data analysis software programme that helps to organise data so that analysis and conclusions are robust and transparent. The interview data was coded using analytic coding based on key research questions and themes (Table below). Once the data was coded, a series of queries were used to group together all relevant data on particular themes. For example, queries were used to explore how different participants groups perceived legal obligations relating to climate risk disclosure and management and associated director's duties. Queries were also used to compile various perspective on current practice and the role of corporate law tools in driving changed company decision-making on climate risks.

TABLE – ANALYTIC CODING FOR *nVivo* ANALYSIS

RESEARCH QUESTIONS/THEMES PURSUED IN INTERVIEWS	NVIVO CODING
Perception of climate change as a financial risk to business and investments • clear recognition as financial risk? • conditional (on sector, business, nature of company)? • slow progress (remote, uncertain)?	**Climate risk = Financial risk** • physical risks • transition risks • remote / uncertain risks
Shifts in business practice as a result of climate risks: • risk analysis & disclosure • development of business strategy • substantive outcomes – e.g. divestment of FF assets/ planned exit from potential stranded assets, investment in renewables, energy efficiency etc	**Shifts in business practice** • risk assessment • risk disclosure • integration in business strategy • substantive change • drivers • barriers
Shifts in investment practice as a result of climate risks: • risk analysis & disclosure • engagement & voting • substantive outcomes – e.g. composition of investment portfolio (including screening, exclusions, divestment)	**Shifts in investment practice** • risk assessment • risk disclosure • integration in investment thesis / strategy • substantive change • drivers • barriers
Legal Driver 1 - Climate Risk Disclosure: • understanding of legal obligations • quality of disclosure (for end-users) • impact on internal decision-making - risk analysis and strategy development • use by external stakeholders – engagement, voting, investment decisions • law & policy reform options	**Climate Risk Disclosure** • understanding legal obligations • quality of disclosure • impact on internal decision-making • impact on external decision-making • reform options
Legal Driver 3 - Director's duties • understanding of duties by Directors • evidence of Board oversight • understanding of duties by Trustees • evidence of Trustee oversight • law & policy reform options	**Director's Duties** • understanding legal obligations • impact on internal decision-making • reform options
Legal Driver 2 - Shareholder Resolutions: • role & use by investors (in the context of broader engagement) • impact on internal (company) decision-making • law & policy reform options	**Shareholder Resolutions** • use by external stakeholders • impact on internal decision-making • reform options

A.4 REPRESENTATION OF INTERVIEW DATA

Qualitative data from interviews is used in Parts 3, 4, and 5 to make observations about current approaches to the identification, assessment, disclosure and management of climate risks, and how key stakeholders view their legal obligations in this area. In Part 7, the qualitative data was used to develop conclusions on the limits and potential of corporate law tools to drive company decision-making on energy transition. The views and opinions of participants were grouped into prominent themes, that were held by a significant number of participants across the different participant groups. Where these views differed significantly between participant groups this is noted explicitly in the text. Occasional direct quotes are used to highlight particular views and opinions. Where direct quotes are used, these are attributed to an anonymous interview marker.

A.5 SHAREHOLDER RESOLUTIONS

Further detail on key themes that have emerged in the substantive content of shareholder resolutions is included below.

Amend constitution to permit non-binding advisory resolutions: Since ACCR v CBA in 2016, the majority of climate-related ordinary resolutions have been contingent on the passing of a special resolution to amend the company constitution. The wording of these special resolutions is generally along the following lines: "Shareholders request that the following new clause 43A be inserted into our company's constitution Member resolutions at general meeting The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised. However, such a resolution must relate to an issue of material relevance to the company or the company's business as identified by the company, and cannot either advocate action which would violate any law or relate to any personal claim or grievance. Such a resolution is advisory only and does not bind the directors or the company" (Woodside 2020).

Requests for disclosure of targets/ transition planning: These resolutions have been variously named, 'Transition planning disclosure', 'Paris goals and targets', 'Interim Emission Targets', 'Disclose transition planning', 'Disclosure of targets to reduce investment exposure in fossil fuels', 'Exposure reduction targets'.

- Energy/ mining: Recent resolutions have requested company disclosure of short, medium and long term targets to reduce scope 1, 2 and 3 emissions in line with Paris Agreement temperature goals (Rio 2020; Woodside 2020; Santos 2020; Rio 2019; Origin 2019; earlier iterations of this request in Origin 2018-2017). These also request details of how the company's remuneration policy will incentivise progress towards these targets and how exploration/ expenditure is aligned with the Paris Agreement goals (Woodside 2020; Santos 2020; Rio 2019; Origin 2019). A handful of resolutions refer to the Global Investor Statement to Governments on Climate Change (Origin 2019; AGL 2019), request disclosure of scope 1 and 2 emissions for Australia's largest emitter of scope 1/2 GHG (AGL 2019) and request that the company disclose plans to phase out coal power generation (Origin 2019).
- Banks: Shareholders have requested banks disclose in annual reporting strategies and targets to reduce exposure to fossil fuel assets in line with the Paris Agreement's goals, including eliminating exposure to thermal coal in OECD countries by no later than 2030 (NAB 2019; ANZ 2019; Westpac 2019).
- Insurers: Resolutions have also been put to insurance companies requesting disclosure of short, medium and long term targets to reduce investment/ underwriting exposure to fossil fuel assets, along with plans and progress to achieve these targets, in line with the Paris Agreement's temperature goals (IAG 2019; Suncorp 2019; QBE 2019, 2020).

Climate-related lobbying: These resolutions have been variously named, 'Climate related lobbying', 'Public policy advocacy on climate change and energy by Relevant Industry Associations', 'Review political lobbying through trade associations', 'Lobbying inconsistent with the goals of the Paris Agreement'.

- Energy/ mining: Resolutions put to vote have requested companies review and report on their direct and indirect lobbying activities relating to climate, energy and/or resources (BHP 2017; Origin 2018; Rio Tinto 2018; Santos 2019; Woodside 2020). Most recently, these requests have been framed as requests for disclosure of a strategy to any prevent future direct lobbying inconsistent with the Paris Agreement goals, where identified by the review. And where industry associations of which the company is a member have a history of lobbying inconsistent with the Paris Agreement goals, shareholders request the board disclose an agreed upon remediation plan and recommend suspension of membership where this cannot be agreed (Santos 2019; Woodside 2020). Representing a new iteration of these type of resolutions, in 2019 shareholders of BHP recommended suspension of membership of industry associations where there is a history of climate/ energy lobbying inconsistent with the Paris Agreement's goals (BHP 2019).
- Banks: Similar to the 2019 BHP resolution, shareholders recommended that the company suspend membership of industry associations where their history of lobbying in relation to climate/ energy policy is inconsistent with the Paris Agreement's goals (NAB 2019; ANZ 2019).
- It is notable that several lobbying resolutions have been withdrawn prior to the AGM, where public commitments were made by the company (Westpac 2018; Rio Tinto 2019, 2020; Origin 2019).

Disclosure in line with TCFD: These resolutions have been variously named, 'Climate Risk Disclosure', 'Task Force on Climate-related Financial Disclosures', 'Strategic Resilience'.

- Several resolutions between 2017-2018 requested that companies disclose risks and opportunities in accordance with the TCFD recommendations (Santos 2017; Origin 2017; Oil Search 2017; Whitehaven 2018; QBE 2018). Indicative of changing business practices with disclosure in line with the TCFD becoming more mainstream, the survey did not identify any resolutions subsequent to 2018 that included a recommendation to disclose in line with TCFD.

Non-GHG related emissions: Variously named, 'Free, Prior and Informed Consent', 'Methane', 'Disclose management of methane emissions', some resolutions have been brought to address specific issues relating to non-GHG emissions. For example, shareholders have requested disclosure in annual reporting of the company's strategy to accurately measure, report and reduce fugitive methane emissions (Origin 2017; Santos 2018). As a further example, shareholders requested a review of processes used to obtain consent from native title holders for permits to undertake fracking activities in the Northern Territory (Origin 2018, 2019).

Public health risks of coal operations: Two resolutions have recently been brought requesting that boards prepare and disclose an assessment of capital and operating expenditure required to install and maintain pollution controls at certain coal-fired power stations, sufficient to mitigate the public health risks associated with non-carbon air pollution at those facilities (Origin 2019; AGL 2019).

Voting patterns over time: A break down of the % votes secured for resolutions, thematically grouped as above, is included below. The voting percentages were drawn from the ACCR's database.

	RIO	WOODSIDE	SANTOS	BHP	ORIGIN		AGL	WHITEHAVEN	NAB	ANZ	WESTPAC	IAG	SUNCORP	QBE	AVG.
Amend company constitution															
2020	8.79%	6.28%	6.68%											12.68%	8.61%
2019	2.36%			9.54%	6.79%		6.57%		5.84%	5.37%	8.04%	5.51%	4.19%	2.31%	4.85%
2018	10.66%		4.00%		9.71%			9.71%						9.12%	6.82%
2017			6.97%	7%	4.67%										6.21%
Disclose targets / transition planning															
2020	36.93%	50.16%	43.39%											13.16%	35.91%
2019	6%				5.35%	7.90%	30.33%		12.89%	14.69%	16.9%	11.50%	8.70%	7.83%	10%
2018					11.83%										11.83%
2017					3.43%										3.43%
Climate-related lobbying															
2020		42.66%	46.35%												44.51%
2019				29.58%					15.07%	16.53%					20.39%
2018	18.03%				46.32%										32.18%
2017				10%											10%
Non-GHG															
2019					5.52%										5.52%
2018			9.82%		7.73%										8.78%
2017					4.84%										4.84%
TCFD															
2018								40.14%						18.60%	29.37%
2017					13.77%										13.77%
Public Health															
2019					6.56%		10.85%								8.71%

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