



Aligning Private Climate Risk Management to Paris Climate Goals: An Australian Perspective

COLLECTION:
MANAGING
RESPONSIBILITIES
FOR CLIMATE
CHANGE RISKS

ARTICLE

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ABSTRACT

Climate change is now clearly recognised as a source of financial risk for private sector actors. In Anglo-American jurisdictions like Australia, corporate law and prudential regulatory frameworks contain obligations to identify, disclose and manage material financial risks that can be applied to climate-related risks. These legal frameworks have served as a foundation for the emergence of a range of private regulatory initiatives which seek to develop and apply best practice standards for climate risk disclosure and management, and which involve a range of different actors in driving the uptake of, and seeking to enforce, these standards. This paper explores the body of emerging private climate risk regulation, focusing particularly on the central organising theme of these initiatives: aligning private climate risk management to the climate mitigation goals of the international Paris Agreement. It outlines the way in which Paris-alignment and net-zero emissions are emerging as new norms guiding private sector approaches to climate change and explores how this interacts with and builds on essentially climate-neutral, risk-based corporate law and prudential regulatory frameworks. While there is considerable potential in Australia for Paris-aligned private risk management to contribute meaningfully to achieving international climate mitigation goals, there are also well-founded concerns about the effectiveness of these private measures that require further investigation.

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KEYWORDS:

climate risk governance; paris agreement; private climate regulation

TO CITE THIS ARTICLE:

Foerster, Anita, 'Aligning Private Climate Risk Management to Paris Climate Goals: An Australian Perspective' (2022) 18(2) Utrecht Law Review 107–126. DOI: <https://doi.org/10.36633/ulr.802>

The 2015 Paris Agreement on Climate Change¹ marked a very significant turning point for private sector approaches to climate change.² Its central climate change mitigation objective is to hold global average temperature rise to ‘well below 2°C’ above pre-industrial temperatures, and pursue efforts to limit temperature rise to no more than 1.5°C, so as to significantly reduce the risks and impacts of climate change.³ In order to achieve this ‘long-term temperature goal’, the Agreement provides that parties should aim to ‘reach global peaking of greenhouse gas emissions as soon as possible... and undertake rapid reductions thereafter... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’.⁴ The latest Intergovernmental Panel on Climate Change (IPCC) reports show that limiting global warming to below 2°C will require net zero emissions globally in the second half of the century, or indeed earlier to meet the more ambitious 1.5°C goal.⁵ The Paris temperature goals and associated emissions reduction pathways have provided the private sector with a clear signal regarding likely future operating environments and regulatory constraints and accelerated a shift from approaching climate change as a matter of corporate social responsibility, to framing climate change as a source of material financial risk.⁶

Climate-related financial risks fall into two general categories:⁷ risks associated with the physical impacts of climate change (e.g. damage to assets and disruptions to operations) and risks associated with the clean energy transition (e.g. new laws and policies, market and technology shifts, reputational and litigation risks).⁸ These risks can result in lower revenue, reduced asset value or stranded assets for operating companies. They can also have flow-on implications for finance sector actors – banks, insurers and institutional investors. For example, institutional investors, such as pension funds and fund managers, which hold equity in companies as well as a range of other assets such as property and infrastructure, are potentially exposed to reduced asset values and investment returns.⁹

An emerging body of legal research investigates the way in which corporate law and prudential regulation govern these risks and drive climate risk management by private sector actors, particularly listed companies.¹⁰ Similar to other Anglo-American jurisdictions, Australian legal frameworks are principles-based and climate-neutral: for example, they oblige companies to identify, disclose and manage *any* material risks to their strategy and operations;¹¹ and they

1 United Nations Framework Convention on Climate Change, ‘Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015’ UN Doc FCCC/CP/2015/10/Add.1, Annex – Paris Agreement (Paris Agreement).

2 Lisa Benjamin, ‘Institutional Investors in the UK and Carbon-Major Companies: Private environmental governance post-Paris’ (2018) 9(1) *Washington Journal of Energy and Environmental Law* 5, 15–16.

3 Paris Agreement (n 1) art 2.1(a).

4 Paris Agreement (n 1) art 4.1.

5 Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change – Summary for Policy Makers* (Intergovernmental Panel on Climate Change 2022) C; Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis, Summary for Policy Makers: Working Group 1 contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Intergovernmental Panel on Climate Change 2021), B1; Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: Summary for Policy Makers* (Intergovernmental Panel on Climate Change 2018), C.

6 For example, following the conclusion of the Paris Agreement in 2015, in recognition of the financial risks posed by climate change, the Financial Stability Board of the G20 established the Taskforce on Climate-Related Financial Disclosures (TCFD), to develop recommendations for more effective climate-related disclosures to support more informed financial decision-making and help safeguard financial system stability. TCFD, ‘About – Our Goal’ (TCFD) <<https://www.fsb-tcfid.org/about/>> accessed 31 July 2022.

7 Liability risks are also sometimes noted as a third category of climate-related financial risks and stem from the potential for litigation if institutions and boards do not adequately respond to the impacts of climate change. This may include stakeholder litigation or regulatory enforcement, leading to potential business disruption and penalties.

8 TCFD, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (TCFD, June 2017) 7–12.

9 *ibid.*

10 Jacqueline Peel, Brett McDonnell, Hari Osofsky, Anita Foerster, *Corporate Energy Transition: Legal Tools for shifting companies to clean energy practices* (The University of Melbourne Law School, 2020); Hari Osofsky and others, ‘Energy Re-investment’ (2019) 94(2) *Indiana Law Journal* 595; Lisa Benjamin, *Companies and Climate Change: Theory and Law in the United Kingdom* (Cambridge University Press, 2021).

11 Jacqueline Peel, Anita Foerster, Brett McDonnell and Hari Osofsky, ‘Governing the Energy Transition: the role of corporate law tools’ (2019) 36(5) *Environmental and Planning Law Journal* 459. See further discussion in Part 2.1.

require financial sector actors such as banks, insurers and institutional investors to integrate risk considerations into decisions about lending, underwriting and investment.¹² Where climate change poses such risks, these legal obligations are enlivened, resulting in requirements to identify, disclose and manage climate-related risks.¹³ Importantly, these legal regimes focus on protecting the private interests of companies and other market stakeholders, and are underpinned by objectives of maintaining financial stability. They are not prescriptive, but rather leave considerable discretion for risk assessment and the development of context-relevant climate risk management approaches.

Alongside these formal legal frameworks, many private regulatory activities and initiatives¹⁴ have emerged to guide, support, and pressure companies to identify and disclose climate-related risks to the market and demonstrate best practice risk management. These include voluntary industry standards;¹⁵ investor engagement;¹⁶ and strategic litigation.¹⁷ These activities and initiatives take the form of ‘private regulation’: they do not directly rely on the coercive powers of the State; and involve private sector and other non-governmental actors, such as civil society, in the development of standards and associated activities to drive their uptake and enforcement.¹⁸ Like much private environmental regulation, they do, however, operate against a backdrop of formal law: corporate law and prudential regulatory frameworks underpin and provide pathways for private actors to engage and pressure companies on their approach to climate risk management. Private regulatory activities have sought to engage companies in addressing climate change in Australia for many years.¹⁹ However, in the wake of the Paris Agreement, there has been a proliferation of new initiatives which are specifically organised around aligning private climate risk management to the Paris Agreement and pursuing net zero emissions.

The aim of this paper is to explore the developing body of private climate risk regulation in Australia and how this intersects with, and builds on, essentially climate-neutral legal obligations to disclose and manage material financial risks. Contributing to the private climate governance literature,²⁰ the paper offers a timely perspective on the potential for private climate regulation to contribute meaningfully to achieving Paris climate mitigation goals. It reflects on

¹² Anita Foerster, Kym Sheehan and Daniel Parris, ‘Investing for a Safe Climate?’ (2021) 44(4) UNSW Law Journal 1409. See further discussion in Part 2.2.

¹³ Sarah Barker, ‘Directors’ personal liability for corporate inaction on climate change’ (2015) 67(1) Governance Directions 21; Sarah Barker, Mark Baker-Jones, Emilie Barton, Emma Fagan, ‘Climate change and the fiduciary duties of pension fund trustees – lessons from Australian law’ (2016) 16(3) Journal of Sustainable Finance & Investment 211.

¹⁴ In categorising these activities as private regulation, this paper draws on theories of decentralised or polycentric regulation and governance, for example: Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 Australian Journal of Legal Philosophy 1–36; Christine Parker, *The Open Corporation: effective self-regulation and democracy* (Cambridge University Press, 2002). It also engages with theories of private environmental governance, which recognise the regulatory role played by private actors in domains typically reserved for public actors, such as the management of negative environmental externalities and access to common pool resources through standard-setting and other actions driven by pressure from non-governmental third parties: see for example, Sarah Light and Michael Vandenburgh, ‘Private Environmental Governance’ in LeRoy Paddock, Robert Glicksman and Nichols Bryner (eds) *Decision-making in Environmental Law, Encyclopedia of Environmental Law*, vol 2 (Edward Elgar 2016).

¹⁵ See further discussion in Part 3.

¹⁶ See further discussion in Part 3.

¹⁷ Joana Setzer and Rebecca Byrnes, *Global trends in climate change litigation: 2020 snapshot* (The London School of Economics and Political Science and Grantham Research Institute on Climate Change and the Environment, July 2020), 19.

¹⁸ For useful general conceptualisations of private climate governance involving non-state actors, see Maria L Banda ‘The Bottom-up Alternative: The Mitigation Potential of Private Climate Governance after the Paris Agreement’ (2018) 42 Harvard Environmental Law Review 325, 343–345; Jayme Walenta, ‘Climate risk assessments and science-based targets: A review of emerging private sector climate action tools’ (2020) 11 WIREs Climate Change 1, 3; Angel Hsu and others, ‘A research roadmap for quantifying non-state and subnational climate mitigation action’ (2019) 9 Nature Climate Change 11; Louis G Leonard II, ‘Under the Radar: A Coherent System of Climate Governance Driven by Business’ (2020) 50 Environmental Law Reporter 10546; Julie Ayling and Neil Gunningham, ‘Non-state governance and climate policy: the fossil fuel divestment movement’ (2017) 17(2) Climate Policy 131–149. More generally on private environmental regulation and governance, see, Lee Godden and others, *Environmental Law* (Oxford University Press, 2019) 247–257.

¹⁹ For example, the Australian Government launched the Greenhouse Challenge in 1995 to facilitate cooperation with industry to reduce greenhouse gas (GHG) emissions. See, R Taplin and X Yu, ‘Climate Change Policy Formation in Australia: 1995–1998’ in A Gillespie and WCG Burns (eds) *Climate Change in the South Pacific: Impacts and Responses in Australia, New Zealand, and Small Island States* (Springer 2000).

²⁰ Text to n 18.

whether private regulatory activities and initiatives are shifting the focus of risk management from a narrow view of financial risks posed to private sector actors by climate change, to a broader framing which recognises the collective, longer-term interests of the private sector in addressing climate change, and which seeks to foster meaningful private contributions to reducing emissions in line with Paris Agreement objectives. Australia provides a particularly well-suited context to explore these questions. In Australia, climate change has been a highly partisan, unsettled political issue for decades.²¹ National emissions reduction targets have been widely assessed as not well-aligned to the Paris Agreement goals, and regulation of climate-damaging private sector activities, through substantive measures such as taxation, emissions trading, project approvals or emissions standards, is weak.²² In this context, private regulatory activity, which aligns the private management of climate risks to public interest, collective climate change mitigation goals, has the potential to be quite impactful in filling a regulatory gap and potentially also eroding political roadblocks to the introduction of more ambitious substantive climate law and policy.²³

As a foundation for this discussion, Part 2 outlines the way in which corporate law and prudential regulation govern climate risk management in Australia, focusing on two categories of private sector actors which play significant roles in private climate regulation – public, listed companies and institutional investors such as pension funds.²⁴ Part 3 explores the emerging body of private regulation addressing climate risk disclosure and management, highlighting the central organising theme of Paris-alignment and illustrating how this intersects with and builds on essentially climate-neutral legal obligations to disclose and manage financial risks. Part 4 considers the potential impact of this private regulatory activity in driving meaningful private contributions to meeting Paris Agreement goals, including well-founded concerns about the effectiveness of these private measures. Part 5 concludes the paper.

2. CORPORATE LAW, PRUDENTIAL REGULATION AND CLIMATE CHANGE IN AUSTRALIA

This part outlines how corporate law and prudential regulatory frameworks govern the management of financial risks posed by climate change. The discussion illustrates that these legal frameworks are designed to protect the private financial interests of companies and other market stakeholders such as investors, lenders and insurers, with underpinning objectives to maintain a stable, efficient and competitive financial system.²⁵ Within these frameworks, there is a heavy reliance on process-based risk regulation (or meta-regulation)²⁶ and informational

21 Thad Kousser and Bruce Tranter, 'The Influence of Political Leaders on Climate Change Attitudes' (2018) 50 *Global Environmental Change* 100; Hari Osofsky and Jacqueline Peel, 'Energy Partisanship' (2016) 16 *Emory Law Journal* 695.

22 The targets and policy measures in Australia's previous Nationally Determined Contribution (NDC) (until recently amended in 2022) were widely assessed to be low and unambitious, even taking into account the October 2021 announcement of a net-zero 2050 target. See e.g., Climate Action Tracker, 'Australia: Country summary (Update 15 September 2021)' (*Climate Action Tracker*) <<https://climateactiontracker.org/countries/australia/>> accessed 20 December 2021, and Climate Change Performance Index, 'Australia' (*Climate Change Performance Index*) <<https://ccpi.org/country/aus/>> accessed 20 December 2021. On 22 June 2022, the new Albanese government submitted a new Nationally Determined Contribution to the UNFCCC with an updated 2030 target of 45% reduction on 2005 levels: Australian Government, *Australia's Nationally Determined Contribution Communication 2022*, <<https://www.industry.gov.au/sites/default/files/2022-06/australias-ndc-communication-2022.pdf>> accessed 26 July 2022.

23 Banda (n 18) 340, notes that 'where public authorities have been unable, unwilling or too slow to act, private actors have at times filled the regulatory gap by assuming the basic functions of government, for instance through standard-setting, coordination and dispute settlement'.

24 As equity holders in public companies, institutional investors have well-established pathways to influence investee companies, including through investor engagement activities and shareholder resolutions. Similarly, civil society groups engage with the risk disclosure and reporting obligations of public companies (which require extensive public reporting and are typically more stringent than for private, unlisted companies), as well as purchasing shares in companies to allow for raising shareholder resolutions.

25 Neil Gunningham, 'Roadmaps and Regulation: Sustainable Finance in Australia' (2020) 37 *Environmental and Planning Law Journal* 459, 460–62; Julia Black, *The Development of Risk Based Regulation in Financial Services: Canada, the UK and Australia* (Research Report, ESRC Centre for the Analysis of Risk and Regulation, London School of Economics and Political Science, September 2004).

26 For a discussion of process-based interventions which characterise risk-based regulation, see Robert Baldwin and Julia Black, 'Driving Priorities in Risk-based Regulation: What is the Problem' (2016) 43(4) *Journal of Law and Society*, 565. See also, Darren Sinclair, 'Speak Loudly and Carry a Small Stick: Prudential Regulation and the Climate, Energy and Finance Nexus' (2019) 59 *Jurimetrics* 141, 154–58.

regulation.²⁷ These regulatory approaches aim to raise awareness about risks, ensure transparent sharing of risk information, and oversee risk management activities, in order to ensure that material risks are considered and priced in financial decisions.²⁸

These legal and regulatory regimes are essentially climate-neutral: their application to climate-related financial risks will depend on whether these risks are material and foreseeable for individual entities, and there is considerable scope for entities to develop context-relevant risk management approaches. While Australian regulators are increasingly emphasising that climate-related risks extend to all sectors of the economy and warning of regulatory action should entities fail to comply with relevant rules, formal regulatory guidance on how to treat climate-related risks, and compliance monitoring and enforcement activity by regulators, has not been extensive to date.²⁹ Regulators frame their role as ensuring well-informed decision-making and appropriate risk management practices, not as seeking to determine the financial decisions of regulated entities.³⁰

2.1. CORPORATE LAW OBLIGATIONS TO IDENTIFY, DISCLOSE AND MANAGE CLIMATE-RELATED FINANCIAL RISKS

Australian corporate law frameworks rely heavily on a regime of periodic risk disclosures as part of financial reporting to facilitate the consideration and pricing of risk in decisions made by market stakeholders.³¹ Public-listed companies are required to prepare annual reports which include financial statements which provide a ‘true and fair view’ of the company’s financial position and performance;³² as well as a Directors’ Report (known in some jurisdictions as the management commentary or narrative report) which contains an Operating and Financial Review (OFR), discussing the operations of the entity, its financial position, its business strategies and prospects for future financial years.³³ Serious penalties apply for false or misleading disclosure in either the financial statements or the Directors’ Report.³⁴ In regard to the latter, regulatory guidance provides that ‘it is likely to be misleading to discuss prospects for future financial years without referring to the material business risks that could adversely affect the achievement of the financial prospects described for those years’.³⁵

Regulators and standard-setting bodies have recently updated their guidance to confirm the application of these disclosure obligations to climate-related risks.³⁶ For example, Australian accounting and audit standard setting bodies³⁷ issued a practice note explaining how existing standards and materiality thresholds apply to the treatment of climate-related financial risks in

²⁷ Sinclair (n 26); Gunningham (n 25) 468.

²⁸ For a discussion of the potential mismatch between regulators’ objectives to promote a stable, efficient financial system, and the objectives of publicly listed companies including maximising shareholder returns, see Julia Black and Robert Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32 *Law and Policy* 181, 202. On the limits of information regulation, see also Gunningham (n 25) 468.

²⁹ Sinclair (n 26).

³⁰ For example, APRA, *Prudential Practice Guide CPG 229 Climate Change Financial Risks* (November 2021), 5.

³¹ Brett Christophers, ‘Climate Change and Financial Instability: Risk Disclosure and the Problematics of Neoliberal Governance’ (2017) 107 *Annals of the American Association of Geographers* 1108. See also Anita Foerster and others, ‘Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia’ (2017) 35(3) *Company & Securities Law Journal* 154.

³² Corporations Act 2001 (Cth) ss 295–7, 307, 308.

³³ *ibid* s 299A(1).

³⁴ The Australian Securities and Investment Commission (ASIC) has a range of powers and enforcement options available for pursuing breach of disclosure obligations and the Corporations Act 2001 (Cth) provides for serious penalties and sanctions for breaches (ss 674, 1311, 1317E). Disclosure breaches may also be pursued as part of broader claims for breach of directors’ duties. Private enforcement by shareholders is also possible and could include claims for compensation for losses suffered as a result of misleading disclosure (e.g. via securities class actions).

³⁵ Australian Securities and Investment Commission (ASIC), *Effective disclosure in an operating and financial review - Regulatory Guide 247* (August 2019), RG247.62.

³⁶ Peel and others (n 10), 13–21.

³⁷ The Australian Accounting Standards Board (AASB) is an Australian Government agency established under the Australian Securities and Investments Commission Act 2001 (Cth) with statutory functions including the making of accounting standards under section 334 of the Corporations Act 2001. The Auditing and Assurance Standards Board (AUASB) is an independent, non-corporate Commonwealth entity of the Australian Government, responsible for developing, issuing and maintaining auditing and assurance standards.

financial statements.³⁸ This clarifies that a range of potential financial implications from climate change may need to be disclosed in the financial statements, including asset impairment,³⁹ changes in the useful life of assets, and changes in the fair valuation of assets.⁴⁰ While the practice note is not mandatory, there is a strong expectation that company directors, preparers of the financial report and auditors will consider the materiality of climate risks in preparing and auditing financial reports.⁴¹ The practice note reiterates that directors and auditors who sign off on financial statements that provide an inaccurate picture of the company's financial position, due to a failure to adequately disclose climate risks, could be liable for misleading disclosure.⁴²

Regulatory guidance issued by the Australian Securities and Investments Commission (ASIC), addressing risk disclosures in the Directors' Report, defines material business risks as 'the most significant areas of uncertainty or exposure, at a whole-of-entity level, that could have an adverse impact on the achievement of the financial performance or outcomes disclosed'.⁴³ As a result of recent amendments, there is now explicit reference to climate-related risks in this guidance.⁴⁴ Furthermore, ASIC has advised company directors that they will consider enforcement action in the case of serious failures,⁴⁵ and in June 2021, it was reported that ASIC cautioned a number of Australian fossil fuel companies regarding non-disclosure of climate risks in annual reports.⁴⁶

In addition to their legal obligations to ensure accurate and adequate disclosure of material business risks in the annual report,⁴⁷ company directors are subject to a number of core legal duties which govern their role guiding the operation of the company.⁴⁸ Of particular relevance to this discussion is the duty of due care and diligence,⁴⁹ which requires that company directors exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person in their circumstances would exercise. Although this has not yet been directly tested in court, there is consensus among leading commercial lawyers,⁵⁰

³⁸ AASB and AUASB, *Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB* (Practice Statement 2, AASB and AUASB, April 2019). Specifically, the practice statement provides guidance on how the AASB *Practice Statement 2 Making Materiality Judgements* (best practice guidance for making materiality judgements) applies to disclosing climate-related and other emerging risks in financial statements.

³⁹ AASB and AUASB (n 38) 12. The guidance provides: 'where climate-related risks could have a significant impact on the entity's operations, information about how this has been factored into the recoverable amount calculations would be relevant for users of the financial statements. This would be particularly the case for long-lived assets and assets recognised in relation to mineral resources. In the extractive industries, investors may look for explanations as to whether an entity has considered the impact of climate-related risks in determining whether exploration or evaluation of certain areas should continue'.

⁴⁰ AASB and AUASB (n 38) 9–13. The guidance also notes potential financial impacts associated with increased costs and/or reduced demand for products and services, potential provisions and contingent liabilities associated with fines and penalties, and changes in expected credit losses for loans and other financial assets. For example, climate-related risks could result in an increase in provisions recognised for decommissioning a plant or rehabilitating environmental damage in extractive industries due to regulatory changes or shortened project lives. For banks investing in projects or lending money to businesses impacted by climate risk, they will need to consider how this exposure affects the expected credit losses of these loans and investments.

⁴¹ AASB and AUASB (n 38) 3, 15–16.

⁴² AASB and AUASB (n 38).

⁴³ ASIC (n 35).

⁴⁴ ASIC (n 35) RG 247.64 and RG 247.66.

⁴⁵ Cathie Armour, 'Managing Climate Risks for Directors' (*Australian Institute of Company Directors*, 1 February 2021), <<https://aicd.companydirectors.com.au/membership/company-director-magazine/2021-back-editions/february/managing-climate-risk-for-directors>> accessed 31 July 2022.

⁴⁶ Michael Roddan, 'ASIC targets fossil fuel companies over climate change' *Australian Financial Review* (Online, 1 June 2021) <<https://www.afr.com/companies/financial-services/asic-targets-fossil-fuel-companies-over-climate-change-20210531-p57wq4>> accessed 31 July 2022.

⁴⁷ Company directors and external auditors sign off on the financial report to confirm it accords with prescribed accounting standards and presents a 'true and fair view' of the company's financial position and performance: Corporations Act 2001 (Cth), ss 295–7, 307, 308.

⁴⁸ *ibid* ss 180 and 181.

⁴⁹ *ibid* ss 180(1).

⁵⁰ Noel Hutley and Sebastian Hartford-Davis, *Climate Change and Directors' Duties* (Memorandum of Opinion, Centre for Policy Development, 7 October 2016) <<http://cpd.org.au/2016/10/directorsduties>> accessed 31 July 2022; Noel Hutley and Sebastian Hartford-Davis, *Climate change and directors' duties* (Supplementary Memorandum of Opinion, Centre for Policy Development, 26 March 2019) <https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf> accessed 31 July 2022; Noel Hutley and Sebastian Hartford-Davis, *Climate Change and Directors' Duties* (Further Supplementary Memorandum of Opinion, 23 April 2021) <<https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>> accessed 31 July 2022.

academics,⁵¹ regulators⁵² and industry bodies,⁵³ on the general point that company directors, as part of their duty of due care and diligence, are required to inform themselves of foreseeable risks posed to company interests by climate change and must take proportionate measures to manage these risks.⁵⁴ A failure to do so could expose directors to liability for breach of duty.⁵⁵

Much recent debate has centred on the standard of care required of a reasonable director considering evolving market expectations which reinforce the foreseeability and materiality of financial impacts of climate change. For example, in a recent legal opinion, high profile commercial law barrister Noel Hutley and colleagues concluded, 'it is no longer safe to assume that directors adequately discharge their duties simply by considering and disclosing climate-related trends and risks; in relevant sectors, directors of listed companies must also take reasonable steps to see that positive action is being taken: to identify and manage risks, to design and implement strategies, to select and use appropriate standards, to make accurate assessments and disclosures, and to deliver on their company's public commitments and targets'.⁵⁶ In particular, directors should take care to carefully align any public commitments on climate change (including net zero emissions targets) with the company's operational strategy, as a failure to do so may expose directors for liability for misleading and deceptive conduct.⁵⁷

2.2. PRUDENTIAL REGULATION OF CLIMATE-RELATED RISK MANAGEMENT FOR FINANCIAL SECTOR ENTITIES

An additional layer of prudential regulation applies to financial sector entities such as banks, insurers and institutional investors (e.g. pension funds and fund managers). The central function of the prudential regime is to supervise the risk management activities of regulated entities, to ensure that they are able to meet their obligations to policy and deposit holders and beneficiaries.⁵⁸ As such, the regime mandates and oversees certain risk management processes and activities. To illustrate this, the relevant obligations relating to pension funds are outlined below.⁵⁹

In Australia, pension funds – which exist to accumulate assets to enable their beneficiaries to earn an income upon retirement – are constituted as trusts, administered by 'corporate trustees' with 'trustee directors'.⁶⁰ Trustee directors are subject to a number of core legal duties to govern their fiduciary relationship with beneficiaries, including: an obligation to exercise their powers in the best interests of the fund's beneficiaries;⁶¹ and to exercise due care, skill and diligence in carrying out their duties and functions.⁶² To satisfy this duty of care, trustee directors must obtain and critically analyse relevant information and use this information appropriately to make decisions in the best interests of beneficiaries.⁶³

⁵¹ See e.g. Barker (2015) (n 13); and Peel and others (n 10) 24–29.

⁵² See e.g. Australian Securities and Investment Commission (ASIC), *Climate risk disclosure by Australia's listed companies* (Report 593, 20 September 2018) 3; Armour (n 45).

⁵³ See e.g. Australian Institute of Company Directors (AICD), 'Coming to terms with the global climate crisis' (*Company Director Magazine*, AICD, 1 April 2020) <https://aicd.companymagazine.com.au/membership/company-director-magazine/2020-back-editions/april/coming-to-terms-with-climate-change>, accessed 31 July 2022.

⁵⁴ For further discussion, see Peel and others (n 10) 24–29.

⁵⁵ Hutley and Hartford-Davis (2016) (n 50).

⁵⁶ Hutley and Hartford-Davis (2021) (n 50) 2–3.

⁵⁷ See Hutley and Hartford-Davis (2021) (n 57) 11–15. ASIC has also alerted company directors to their potential liability exposure for greenwashing: Cathie Armour (ASIC Commissioner), 'What is greenwashing? and what are its potential threats?' (News article) <https://asic.gov.au/about-asic/news-centre/articles/what-is-greenwashing-and-what-are-its-potential-threats/> accessed 26 July 2022.

⁵⁸ Black (n 25); Gunningham (n 25).

⁵⁹ While banks and insurance companies are also subject to the prudential regulatory regime, this discussion focuses specifically on institutional investors because these actors are particularly active in relation to the private regulatory initiatives explored here.

⁶⁰ Pamela Hanrahan, 'Legal Framework Governing Aspects of the Australian Superannuation System' (Background Paper 25, Royal Commission into Misconduct in the Banking, Superannuation and Insurance Industry, 2019) 4 ff.

⁶¹ Superannuation Industry Supervision Act 1993 (Cth) ('SIS Act'), s 52(2)(c) (trustee) and s 52A(2)(c) (trustee directors).

⁶² *ibid* s 52(2)(b) (trustee) and s 52A(2)(b) (trustee directors).

⁶³ Noel Hutley and James Mack, *Superfund Trustee Duties and Climate Change Risk* (Memorandum of Opinion, Market Forces, 15 June 2017) 7–8.

Governing legislation mandates a range of risk governance activities to support the discharge of these duties. For example, pension funds must formulate, regularly review and give effect to an investment strategy having regard to a range of factors including the level of risk, likely return, diversification and availability of reliable information.⁶⁴ They must develop and maintain a risk management strategy to address risks that may have a material impact on their operations.⁶⁵ There is also a requirement for a comprehensive stress-testing programme that assesses the performance of each investment option against prescribed scenarios covering a range of factors that could lead to extraordinary losses.⁶⁶

Similar to the corporate law context discussed above, there is consensus among leading commercial lawyers,⁶⁷ academics,⁶⁸ regulators⁶⁹ and industry bodies,⁷⁰ on the general point that climate-related financial risks can and should be considered by corporate trustees and trustee directors in the exercise of their duties and functions to the extent that those risks intersect with the financial interests of beneficiaries.⁷¹ The Australian Prudential Regulatory Authority (APRA) has also increasingly underscored the relevance of climate change to the fiduciary duties of pension fund trustees, cautioning against disregarding climate risks due to their long-term and uncertain nature.⁷² APRA has recently developed new practice guidelines to assist regulated entities in complying with existing standards for risk management and investment governance, with a focus on best practice climate risk management.⁷³ Consistent with the emphasis on process-based and informational regulation, APRA states: ‘this guidance does not seek to determine an institution’s individual investment, lending or underwriting decisions, but does aim to ensure that these decisions are well-informed’.⁷⁴

3. PARIS-ALIGNED PRIVATE CLIMATE-RISK REGULATION

Alongside the formal legal frameworks and activities of government regulators outlined above, many private regulatory initiatives have emerged to address climate risk disclosure and management. These initiatives involve private sector and other non-government actors (particularly civil society) directly in developing best practice standards for risk disclosure and management, and engaging in activities to drive their uptake, including seeking to enforce these standards via strategic litigation.⁷⁵

While many of these initiatives are international in nature, the discussion here focuses largely on their application, uptake and implications in Australia. Using examples of industry best practice standards, investor engagement coalitions, shareholder resolutions and strategic

⁶⁴ SIS Act, s 52(6); *Superannuation (Prudential Standard) Determination No. 8 of 2012, Prudential Standard SPS 530 Investment Governance, Superannuation Industry (Supervision) Act 1993* (Cth) (2012), [17]–[21] (investment strategy); [22]–[23] (investment selection process) [24]–[26] (monitoring investments); and [27]–[28] (reviewing the investment strategy) (hereinafter *Prudential Standard SPS 530*)

⁶⁵ SIS Act s 52(8); *Superannuation (Prudential Standard) Determination No. 2 of 2012, Prudential Standard SPS 220, Superannuation Industry (Supervision) Act 1993* (Cth) (2012) has been recently replaced by APRA, *Prudential Standard SPS 220 – Risk Management* (January 2020) pursuant to *Superannuation (prudential standard) determination No. 3 of 2019* (Cth).

⁶⁶ *Prudential Standard SPS 530*, [29]–[31].

⁶⁷ See e.g. Hutley and Mack (n 63).

⁶⁸ See e.g. Barker and others (2016) (n 13); Foerster and others (n 12).

⁶⁹ Australian Prudential Regulation Authority (APRA), *Information Paper: Climate Change – Awareness to Action* (Information Paper, March 2019); APRA, *Understanding and Managing the Financial Risks of Climate Change* (Letter to APRA-regulated entities, 24 February 2020) <<https://www.apra.gov.au/understanding-and-managing-financial-risks-of-climate-change>> accessed 31 July 2022; APRA, *Prudential Practice Guide CPG 229 Climate Change Financial Risks* (November 2021).

⁷⁰ See e.g. Australian Council of Superannuation Investors, *Submission to the Inquiry into the prudential regulation of investment in Australia’s export industries* (30 April 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Trade_and_Investment_Growth/ExportIndustries/Submissions> accessed 23 August 2021; Australian Council of Superannuation Investors, ‘Climate Change Policy’ (*Australian Council of Superannuation Investors*, 26 April 2021) <https://acsi.org.au/policies/climate-change/> accessed 31 July 2022.

⁷¹ Hutley and Mack (n 63) 2. See also, Geoff Summerhayes, ‘Australia’s New Horizon: Climate Change Challenges and Prudential Risk’ (Speech, Insurance Council of Australia Annual Forum, Sydney, 17 February 2017).

⁷² APRA (2019) (n 69) 7.

⁷³ APRA (2021) (n 69).

⁷⁴ *ibid.*, 5.

⁷⁵ See Banda (n 18) 343–345 and Walenta (n 18) 3.

litigation, the discussion illustrates emerging norms of Paris-alignment and net-zero emissions and explores how this regulatory activity intersects with and builds on essentially climate-neutral legal obligations to disclose and manage financial risks.

3.1. INDUSTRY STANDARDS FOR CLIMATE RISK DISCLOSURE

Voluntary, industry best practice standards for climate risk reporting have become an important supplement to the climate-neutral disclosure obligations discussed in Part 2. While there are other prominent reporting frameworks globally,⁷⁶ in Australia, the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD) have emerged as the leading standard. Over time, the TCFD has provided increasingly detailed, substantive guidance on climate risk disclosure and management, with a strong articulation of Paris-alignment as a relevant parameter for private climate risk management.

The TCFD was established in 2015 by the international Financial Stability Board,⁷⁷ and brought together representatives from leading global businesses, to develop recommendations for climate disclosures to underpin more informed investment, credit, and insurance underwriting decisions. The initial 2017 recommendations provide a framework for entities to disclose their exposure to climate-related risks and the way in which they are managing these risks, using four key indicators: governance (the organisation's governance around climate risks and opportunities); strategy (the actual and potential impacts of climate-related risks on the organisation's businesses, strategy and financial planning); risk management (the processes used by the organisation to identify, assess and manage climate-related risks) and metrics and targets (used to assess and manage climate-related risks and opportunities).⁷⁸ Subsequent guidance has encouraged disclosing entities to provide detailed information on the direction and ranges of potential financial implications under different climate-related scenarios,⁷⁹ including emissions reduction scenarios that align with the Paris Agreement.⁸⁰ To assist entities in improving the quality and robustness of these disclosures, the TCFD has also now set out climate-relevant metrics to track risk exposure over time,⁸¹ and urged entities to set quantified targets which align with these metrics, to set out comprehensive business transition strategies to meet targets, and to report regularly on progress.⁸²

While the recommendations are entirely voluntary in Australia, corporate and prudential regulators have referenced the TCFD as a best practice standard in recent updates to regulatory guidance,⁸³ and called for a consistent approach to its adoption.⁸⁴ As further discussed in Part 3.2 and 3.4, the engagement and advocacy activities of investor groups and civil society have also focused on this best practice standard. Endorsement from regulators, and investor engagement activities, both serve to buttress what are otherwise voluntary standards, increasing pressure on companies to adopt and fulfil these standards.

⁷⁶ For example, in the United States, there is a range of standards for climate risk reporting in use including those developed by the Sustainability Accounting Standards Board (SASB): Brett McDonnell, Hari Osofsky, Jacqueline Peel and Anita Foerster, 'Green Boardrooms?' (2021) 53(2) Connecticut Law Review 335, 356–368. At COP26 in Glasgow, a new standard-setting board was launched by the International Financial Reporting Standards Foundation (IFRS) to develop global disclosure standards against which companies will report the impact of climate change on their businesses: 'About the International Sustainability Standards Board' (IFRS) <<https://www.ifrs.org/groups/international-sustainability-standards-board/>>, accessed 31 July 2022.

⁷⁷ The Financial Stability Board is an international body that monitors and makes recommendations about the global financial system and aims to promote international financial stability. Financial Stability Board (FSB), 'About the FSB' (FSB) <<https://www.fsb.org/about/>> accessed 31 July 2022.

⁷⁸ TCFD (n 8). The TCFD has since developed numerous supplementary guidance documents. For example, *Guidance on Metrics, Targets and Transition Plans* (TCFD, October 2021); *Implementing the Recommendations of the Taskforce for Climate-related Financial Disclosures* (TCFD, Oct 2021).

⁷⁹ TCFD *Guidance on Metrics, Targets and Transition Plans* (n 78).

⁸⁰ TCFD (n 8) 25–32; see also *Technical Supplement: The Use of Scenario Analysis in Disclosure of Climate-Related Risks and Opportunities* (TCFD, June 2017).

⁸¹ See, TCFD *Guidance on Metrics, Targets and Transition Plans* (n 78) 16–17.

⁸² TCFD *Guidance on Metrics, Targets and Transition Plans* (n 78).

⁸³ ASIC (n 35); APRA (2021) (n 69). For an overview of current disclosure practice against TCFD standards for APRA regulated entities, see APRA (2019) (n 69). See also Market Forces, 'Risky Business – The majority of Australia's largest super funds disclose no consideration of climate risk' (Report, August 2017) <https://www.marketforces.org.au/wp-content/uploads/2018/06/Market-Forces-Risky-Business-FINAL-1.pdf> accessed 31 July 2022.

⁸⁴ See e.g. Armour (n 45); APRA (2020) (n 69).

Climate change has become a key topic for corporate engagement for institutional investors in Australia,⁸⁵ particularly industry pension funds that operate on a profit-to-members basis.⁸⁶ Australian pension funds report that they are engaging with the companies in which they invest on their approaches to climate risk disclosure and management, so as to mitigate their own exposure to climate risk and safeguard sustainable returns for their beneficiaries.⁸⁷ This engagement takes various forms, ranging from behind-the-scenes meetings with companies, to more public interventions such as asking questions and making statements at company meetings and voting in favour of shareholder resolutions addressing climate change (discussed further in Part 3.4). Increasingly, institutional investors are working together in coalitions to amplify their influence over investee companies,⁸⁸ with the focus of engagement expanding from requests for better climate risk disclosure, to urging companies to cut emissions in line with Paris Agreement goals.

For example, Climate Action 100+ is a coalition of large-scale institutional investors from all over the world which is now backed by 700 investors across 33 markets, representing USD \$68 trillion in assets under management,⁸⁹ including a number of large Australian institutional investors.⁹⁰ This initiative is delivering a 5-year engagement programme with a targeted group of 166 companies that have been selected because they are high greenhouse gas (GHG) emitters, are highly exposed to climate risk, or have significant opportunities to drive the clean energy transition.⁹¹ Together these companies account for over 80% of corporate industrial GHG emissions globally. Participating investors are responsible for direct engagement with targeted companies, individually or collaboratively, and are calling on companies to improve climate governance, reduce emissions across the value chain (consistent with Paris temperature goals), and strengthen climate-related financial disclosures by implementing TCFD recommendations.

A recent initiative of Climate Action 100+ which demonstrates the expanding regulatory focus on Paris-alignment, is the Net Zero Company Benchmark.⁹² Targeted companies are assessed against a range of climate-related indicators, with reports on their performance publicly available on the website.⁹³ Indicators address whether corporate emissions reduction targets are aligned to Paris goals using agreed methodologies (discussed in Part 3.3);⁹⁴ whether the company has disclosed a decarbonisation strategy to deliver on targets; whether the company demonstrates capital allocation alignment to targets; whether the company board has clear oversight of climate-related risks as well as sufficient competencies to assess and manage these risks; and whether the company's executive remuneration scheme incorporates climate performance.⁹⁵

⁸⁵ Anita Foerster and others (n 12).

⁸⁶ In Australia, shareholder-owned companies also provide superannuation services to clients, and are known as retail superfunds.

⁸⁷ See e.g., Australian Council of Superannuation Investors, *Climate Change Policy* (n 70).

⁸⁸ Relevant investor networks include: the Asia Investor Group on Climate Change, Ceres (North America), Investor Group of Climate Change (Australia and New Zealand), Institutional Investor Group on Climate Change (EU) and the UN-supported Principles for Responsible Investment. See, Michael Macleod, 'Emerging Investor Networks and the Construction of Corporate Social Responsibility' (2009) 34 *Journal of Corporate Citizenship*, 69–98; Charlotte Villiers, 'The role of investor networks in transnational corporate governance' in M Fenwick, S Van Uytzel and S Wrba (eds) *Networked Governance, Transnational Business and the Law* (Springer, Berlin 2014), 7–13.

⁸⁹ Climate Action 100+, 'About Climate Action 100+' (*Climate Action 100+*) <https://www.climateaction100.org/about/> accessed 31 July 2022.

⁹⁰ Climate Action 100+, 'Investor Signatories' (*Climate Action 100+*) https://www.climateaction100.org/whos-involved/investors/?investor_topic=australia accessed 31 July 2022.

⁹¹ Climate Action 100+, 'Global Investors Driving Business' (*Climate Action 100+*) <http://www.climateaction100.org> accessed 31 July 2022.

⁹² Climate Action 100+, 'Net Zero Company Benchmark' (*Climate Action 100+*) <https://www.climateaction100.org/progress/net-zero-company-benchmark/> accessed 31 July 2022.

⁹³ Climate Action 100+ 'Companies' (*Climate Action 100+*) <<https://www.climateaction100.org/whos-involved/companies/>> accessed 31 July 2022.

⁹⁴ This includes an assessment of whether a company has set a long-term net zero target, whether this is backed up by short-, medium- and long-term targets that align with Paris temperature goals, and an assessment of the target scope (e.g. covering direct operational scope 1 and 2 emissions, as well as the most material upstream and downstream scope 3 emissions).

⁹⁵ Climate Action 100+, 'Climate Action 100+ Net Zero Company Benchmark' (*Climate Action 100+*) <https://www.climateaction100.org/wp-content/uploads/2021/03/Climate-Action-100-Benchmark-Indicators-FINAL-3.12.pdf>, accessed 31 July 2022.

This initiative is still in the early stages. Recent progress reports find that while many companies have now set Paris-aligned long-term emissions reduction targets, there are clear gaps in target coverage and associated capital expenditure, strategy and planning does not align well with long-term targets.⁹⁶

3.3. INDUSTRY STANDARDS FOR EMISSIONS TARGETS

Another important element of recent private climate risk management activity which intersects in important ways with the initiatives described above, is the emergence of platforms, supported by industry bodies and civil society, to guide companies and institutional investors in setting Paris-aligned emissions reduction targets. By providing a common standard, a process of certification against that standard, and in some cases, a central performance reporting function, these initiatives address many of the well-documented problems with voluntary corporate emissions targets, which undermine credibility and impede comparison on emissions reductions between entities.⁹⁷

As noted in Part 1, the Paris Agreement sets global temperature goals, which allow for the calculation of global emissions budgets and emissions reduction trajectories that are consistent with these goals.⁹⁸ Transposing these collective global temperature goals to emissions reduction budgets and targets at the scale of individual corporate entities or investors is complex and involves a range of assumptions about the timing and magnitude of emissions reduction and how this should be allocated to companies and sectors.⁹⁹ These platforms are pioneering rigorous and transparent methods and approaches to help calculate a company's 'fair share' of allowable emissions.¹⁰⁰

For example, the Science-Based Target Setting Initiative (SBTi), established by civil society groups with a history of supporting private sector environmental governance,¹⁰¹ provides an accreditation platform to certify corporate targets aligned with the Paris Agreement.¹⁰² The SBTi has recently set out a Net-Zero Standard which guides entities on setting targets which align with the more ambitious 1.5°C temperature goal.¹⁰³ To be accredited under this standard, companies must commit to reducing their scope 1, scope 2 and (where relevant scope 3) emissions¹⁰⁴ to zero or to a residual level that is consistent with Paris-aligned pathways and set near-term (5–10 years) and long-term (2050 or earlier) targets to achieve this.¹⁰⁵ There is a clear focus on direct emissions reduction and an expectation that most companies should reduce emissions directly by at least 90%, with any residual emissions to be neutralised

⁹⁶ Climate Action 100+, 'Progress Report 2020' (*Climate Action 100+*) 11–12, <<https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf>> accessed 31 July 2022.

⁹⁷ Concerns about voluntary corporate climate emissions targets include: wide variations in scope, baseline and nature of targets (e.g. absolute emissions or emissions intensity), as well as gaps in reporting on historical emissions and future projections: Simon Dietz and others, 'An assessment of climate action by high-carbon global corporations' (2018) 8 *Nature Climate Change* 1072–1075.

⁹⁸ A global emissions budget is an estimate of the total cumulative amount of GHG that could be emitted consistent with a certain likelihood of keeping global temperature rise within a set limit above pre-industrial levels by 2100 (e.g. 1.5°C or 2°C). See IPCC 'Summary for Policy Makers' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development and Efforts to Eradicate Poverty* (IPCC, 2018) 24.

⁹⁹ Oskar Krabbe and others, 'Aligning corporate greenhouse-gas emissions targets with climate goals' 5 (2015) *Nature Climate Change*, 1057–1061.

¹⁰⁰ *ibid.* See also, Dietz and others (n 97).

¹⁰¹ Founded in 2015, the Science Based Target Setting Initiative (SBTi) is a partnership between CDP (formerly called the Carbon Disclosure Project), the United Nations Global Compact, World Resources Institute (WRI) and the World Wide Fund for Nature (WWF).

¹⁰² SBTi, 'About Us' <<https://sciencebasedtargets.org/about-us>> accessed 31 July 2022.

¹⁰³ SBTi, *SBTi Corporate Net Zero Standard* (Version 1.0, Oct 2021), <<https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf>> accessed 31 July 2022.

¹⁰⁴ Scope 1 refers to direct emissions from owned or controlled sources; scope 2 refers to indirect emissions from the generation of purchased electricity, steam, heat and cooling consumed; scope 3 refers to all other indirect emissions that occur in a company's value chain. The SBTi recommends setting scope 3 targets where value chain emissions are significant and a company has significant influence over its value chain and visibility of value chain emissions.

¹⁰⁵ SBTi (n 103) 20–32.

through purchasing carbon offsets or investing in negative emissions technologies such as carbon capture and storage.¹⁰⁶

Signatory companies commit to reporting company-wide emissions and disclose progress annually against targets; and the SBTi prepares an annual progress report tracking company emissions reductions over time,¹⁰⁷ with early reports providing evidence of growing uptake and impact.¹⁰⁸ For example, in 2021 there were more than 1,000 companies with approved targets including companies from the highest emitting sectors such as cement, power generation and steel.¹⁰⁹ Most were setting targets which cover their direct operational emissions (scope 1 and 2), as well as emissions in the value chain, including emissions associated with the use of products and services (scope 3).¹¹⁰ The vast majority had publicly reported progress against these goals.¹¹¹ While the report identified a need for further standardisation and comparability in publicly available data,¹¹² it was possible to track progress from 2015–2019 for 338 companies. This group of companies had reduced annual emissions by 25% between 2015 and 2019, with the typical SBTi company reducing scope 1 and 2 emissions at a significantly faster rate than recommended to align with the 1.5°C goal.¹¹³

For institutional investors, initiatives to establish standards for Paris-aligned targets and supporting activities at the investment portfolio scale are also developing. These include a finance-sector specific SBTi framework aimed at banks, insurers and investors,¹¹⁴ as well as the more broadly framed Net Zero Investment Framework¹¹⁵ developed by the European Institutional Investors Group on Climate Change and the United Nations convened Net Zero Asset Owner's Alliance Target Setting Protocol.¹¹⁶ These initiatives emphasise the need to decarbonise investment portfolios while concurrently increasing investment in climate solutions, and underscore that net zero strategies must be designed to drive emissions reductions in the real economy, not only shift emissions from a particular portfolio to other asset owners via divestment. As such, they recommend setting science-based targets (aligned to 1.5°C emissions reduction pathways)¹¹⁷ for decarbonisation across the portfolio and for each asset class with an initial focus on the highest emitting sectors,¹¹⁸ targets for financing the energy transition,¹¹⁹ as well as targets for corporate engagement¹²⁰ and policy engagement.¹²¹ Signatories to the Net Zero Asset Owner Alliance commit to publishing interim targets every five years and report regularly on progress.¹²²

¹⁰⁶ SBTi (n 103) 42.

¹⁰⁷ SBTi, *From Ambition to Impact: How companies are reducing emissions at scale with science-based targets – Science-based Targets Initiatives Annual Progress Report 2020* (Progress Report, SBTi, Jan 2021).

¹⁰⁸ *ibid* 7–22.

¹⁰⁹ *ibid* 7. In 16 countries in the Organisation for Economic Co-operation and Development, at least 20% of companies that have a high impact on global emissions are now part of SBTi. There are 33 Australian companies which have signed up including a number of large banks, utilities, supermarkets, property and transport, freight and logistics companies. See, SBTi, 'Companies taking action' (SBTi) <<https://sciencebasedtargets.org/companies-taking-action>> accessed 31 July 2022.

¹¹⁰ *ibid* 7. 94% of companies with targets approved by the SBTi have included scope 3 emissions.

¹¹¹ *ibid* 21.

¹¹² *ibid* 21.

¹¹³ *ibid* 6, 18–22.

¹¹⁴ SBTi, 'Financial Institutions' (SBTi) <<https://sciencebasedtargets.org/sectors/financial-institutions>> accessed 31 July 2022.

¹¹⁵ Institutional Investors Group on Climate Change, *Net Zero Investment Framework: Implementation Guide* (2021).

¹¹⁶ Net Zero Asset Owners Alliance, *Inaugural 2025 Target-setting Protocol* (2021).

¹¹⁷ These initiatives specifically reference the SBTi and provide compatible methodologies.

¹¹⁸ Net Zero Asset Owners Alliance (n 116) 27–55.

¹¹⁹ *ibid* 60–64.

¹²⁰ For example, the Net Zero Asset Owners Alliance (n 116) 9, 55–60 provides that signatories should identify the top 20 emitters or those responsible for 65% of portfolio emissions which do not already have Paris-aligned commitments and set direct, collective or asset management action targets to engage with this group.

¹²¹ For example, the Net Zero Asset Owners Alliance (n 116) 11, 64–67 provides that signatories should engage with governments on important policy settings including embedding net zero by 2050 in post Covid recovery frameworks, NDCs and national emissions plans, developing sectoral policies to accelerate the energy transition, and promoting mandatory climate reporting and business transition plans.

¹²² Net Zero Asset Owners Alliance (n 116) 8.

Civil society in Australia, like their counterparts in other countries, are also using shareholder resolutions as a climate advocacy tool.¹²³ Early climate resolutions focused on climate risk disclosure, seeking to drive the uptake of TCFD standards by Australian companies. More recently, resolutions are requesting that companies set Paris-aligned emissions reduction targets and set out decarbonisation plans that demonstrate alignment of company strategy and capital allocation to these targets. Significantly, these resolutions are now receiving a much higher level of the shareholder vote as larger institutional investors are becoming more active in their engagement on climate change.¹²⁴

For example, in 2020, a proposal was put to the annual meeting of one of Australia's largest oil and gas companies, Woodside Petroleum. This called for the company to set Paris-aligned emissions reduction targets, not only for its operational emissions (scope 1 and 2) but also for the indirect (scope 3) emissions associated with the use of its products. Further, the resolution asked the company to explain how its planned investments in expanding gas output in coming years were consistent with Paris Agreement goals, and to provide details of how the company's executive remuneration policy incentivised progress against emissions reduction targets.¹²⁵ This resolution won the support of more than 50% of shareholders, despite the company board urging shareholders not to support the proposal. Similar resolutions received similarly high votes at other Australian companies in 2020 and 2021.¹²⁶

A new international shareholder advocacy initiative – Say on Climate – is also taking root in Australia. Instead of activist NGOs lodging climate change resolutions, which have typically not been supported by company boards, this initiative calls on company boards to voluntarily put forward advisory resolutions that seek shareholder approval of the company's climate transition plan. The Say on Climate initiative calls for companies to make annual disclosures of GHG emissions, develop a strategy to reduce emissions, and allow an annual shareholder vote on the strategy and progress against it.¹²⁷ The climate change report should be based on TCFD best practice standards as well as referencing the indicators assessed through the Climate Action 100+ Net-Zero Company Benchmark.

In Australia, the representative body for pension funds has expressed its support for Say on Climate, noting also its intention to vote against company directors where companies do not meet expectations on key climate performance indicators.¹²⁸ Further, a number of fossil fuel and energy companies, including Woodside Petroleum, have adopted the Say on Climate initiative, proactively committing to providing shareholders with a non-binding vote on their climate change report at subsequent annual meetings.¹²⁹ For oil and gas companies like Woodside that have set long-term aspirational emission reduction targets, but are continuing to invest in major new fossil fuel projects,¹³⁰ this can potentially be an avenue to drive further near-term ambition, as well as greater accountability around capital allocation plans.¹³¹

¹²³ Jacqueline Peel and others (n 10) 31–37. See also, Lloyd Freeburn and Ian Ramsay, 'An analysis of ESG shareholder resolutions in Australia' (2021) 44(3) University of New South Wales Law Journal, 1142–1179.

¹²⁴ Jacqueline Peel and others (n 10) 31–37. See also, Australasian Centre for Corporate Responsibility, *Vote Like You Mean It: A Study of the Proxy Voting Records of Australia's Largest Super Funds in 2018* (Australasian Centre for Corporate Responsibility May 2019).

¹²⁵ Nick Toscano, 'Breakthrough moment: Woodside Investors revolt on climate change' *Sydney Morning Herald* (online 30 April 2020) <<https://www.smh.com.au/business/companies/breakthrough-moment-woodside-investors-revolt-on-climate-change-20200429-p54oe8.html>> accessed 31 July 2022.

¹²⁶ For example, Nick Toscano, 'Climate revolt rocks Santos as shareholder fire up emissions push' *Sydney Morning Herald* (online 3 April 2020) <<https://www.smh.com.au/business/companies/climate-revolt-rocks-santos-as-shareholders-fire-up-emissions-push-20200403-p54gt2.html>> accessed 31 July 2022.

¹²⁷ This initiative is supported by the Children's Investment Fund Foundation, CDP, Share Action and the Australasian Centre for Corporate Social Responsibility (ACCR). For an overview, see Say on Climate, 'Shareholder Voting on Climate Transition Action Plans' <<https://www.sayonclimate.org>> accessed 31 July 2022.

¹²⁸ See ACSI, Climate Change Policy (n 70).

¹²⁹ Australasian Centre for Corporate Responsibility (ACCR), 'Say on Climate' <https://www.accr.org.au/topics/say-on-climate/> accessed 31 July 2022.

¹³⁰ Nicolas Perpetch and Rhiannon Shine, 'WA's Environment Minister gives approval for key component of Woodside's proposed \$16 billion Scarborough LNG Project' *ABC News* (11 August 2021) <<https://www.abc.net.au/news/2021-08-11/woodside-scarborough-lng-project-wa-pipeline-approval/100369710>> accessed 31 July 2022.

¹³¹ ACCR, 'Woodside adopts 'Say on Climate'' (Press Release, 19 March 2021) <<https://www.accr.org.au/news/woodside-adopts-%E2%80%98say-on-climate%E2%80%99/>> accessed 31 July 2022.

Another strand of private climate regulation involves civil society pressuring companies and investors on their approach to climate change, via strategic litigation. Strategic climate litigation targeting the private sector is on the rise around the world,¹³² with a growing number of cases seeking to enforce legal obligations to disclose and manage climate-related risks as a strategy to drive companies and investors to shift capital and resources to the clean energy transition.¹³³ Over time, these cases have evolved from the initial legal claims which helped establish that underlying risk management and disclosure obligations apply to climate risks, to more broadly framed claims which also address the substance of private approaches to climate risk management and seek to hold entities accountable for delivering on their climate commitments and targets. Significant Australian cases are noted below, with reference also made to developments overseas that may herald litigation trends in Australia.

One of the first examples of strategic litigation targeting private actors using corporate law tools was the claim brought in 2017 against the Commonwealth Bank of Australia (CBA), one of Australia's largest banks. This claim was brought by shareholders of the CBA (represented by public interest environmental lawyers Environmental Justice Australia). The claim alleged that the bank had failed to disclose the risks associated with climate change that might impact on its lending and investment activities, strategies and prospects in its 2016 Annual Report and therefore failed to present a 'true and fair view' of the company's financial position and prospects, and to provide a Directors' Report that allowed shareholders to make an informed assessment of the company's operations, financial position, business strategies and prospects, as required by governing law.¹³⁴ The claimants sought a declaration that the CBA was in breach of its legal obligations. The case was withdrawn before trial when the bank committed to improve disclosure practices.¹³⁵ Even without formal judgement, the bank's response suggests that the case has helped clarify that corporate disclosure obligations apply to climate change risks where they are financially material.

In 2018, Environmental Justice Australia was once again involved in a claim lodged by Mark McVeigh against the trustee of McVeigh's pension fund, REST, one of Australia's largest industry pension funds. This claim alleged that REST's trustee directors failed to act with care, skill and diligence when investing for McVeigh, and failed to act in his best interests, by not properly considering the risks which climate change poses to the fund's investments.¹³⁶ The claim did not allege financial loss, but sought a declaration that climate risks must be considered by pension fund trustee directors in the management of investments for their beneficiaries and that REST had breached its legal duties by failing to do so. Like the CBA case, this claim was also settled out of court, with REST releasing a statement recognising its legal duties to identify and manage material risks posed by climate change, and committing to a number of actions to implement best practice climate risk disclosure and management,¹³⁷ including aligning its investment portfolio with the net-zero emissions goals of the Paris Agreement, and advocating for investee companies to act similarly.¹³⁸ As such, the REST case helped to consolidate the emerging norm of Paris-alignment as central to best practice climate risk management expectations.

In late 2021, the Australasian Centre for Corporate Responsibility (ACCR) commenced a case alleging that climate representations made in the 2020 annual report of Santos, one of Australia's largest oil and gas companies, constitute misleading or deceptive conduct under corporate and

¹³² Setzer and Byrnes (n 17). See also, Rebekah Markey-Tower and Jacqueline Peel, Trends in Australian Climate Litigation 2021 (University of Melbourne, 2021), <<https://law.app.unimelb.edu.au/climate-change/assets/Trends-in-Australian-Climate-Litigation-2021.pdf>> accessed 31 July 2022.

¹³³ Setzer and Byrnes (n 17). See also, Anita Foerster, 'Corporate Climate Justice' (2019) 30(2) King's Law Journal, 305.

¹³⁴ *Guy Abrahams v Commonwealth Bank of Australia* (2017) VID879/2017.

¹³⁵ Gareth Hutchens, 'Commonwealth Bank shareholders drop suit over nondisclosure of climate risks' *The Guardian* (London, 21 September 2017) <<https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks>> accessed 31 July 2022.

¹³⁶ *Mark McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 (Concise Statement, filed 24 July 2018).

¹³⁷ REST, 'Statement from Rest' (Media Release, 2 November 2020), <https://equitygenerationlawyers.com/wp/wp-content/uploads/2020/11/Statement-from-Rest-2-November-2020.pdf> accessed 31 July 2022.

¹³⁸ REST, 'Rest reaches settlement with Mark McVeigh' (REST, 2 Nov 2020) <https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh> accessed 31 July 2022.

consumer law.¹³⁹ The claim alleges that it is misleading for the company to describe itself as a ‘clean energy’ provider, and to state that natural gas is a ‘clean fuel’ given the extensive GHG emissions associated with its extraction in Australia and end-use combustion in Australia and overseas. Furthermore, it is alleged that it is misleading for the company to claim that it has a ‘clear and credible’ plan to meet its 2040 net zero emissions target, when the company has not disclosed the increase in emissions that will accompany the numerous major new oil and gas projects it is developing around Australia and where the company purports to rely on carbon capture and storage and the production of blue hydrogen¹⁴⁰ to achieve emissions reductions, both controversial technologies with serious questions remaining about their role in emissions reduction.

In jurisdictions beyond Australia, private climate litigation is breaking new ground in recognising the substantive climate obligations of private sectors actors. For example, in 2019, using a similar line of argument to the *Urgenda* case,¹⁴¹ a group of environmental and human rights NGOs in the Netherlands brought a claim against oil and gas multinational Royal Dutch Shell. The claim alleged that the company was in violation of its duty of care (based on Dutch negligence law and human rights obligations)¹⁴² as a result of its inadequate action to reduce emissions. The Hague District Court upheld the claim in May 2021, noting that while the company had set an ambitious long-term target, this was not supported by a 2030 target and its associated strategy was not clear, tangible and binding. The court ordered the company to reduce the GHG emissions across all its activities (direct operational emissions and scope 3 emissions associated with product use) by 45% by 2030 (relative to a 2019 baseline).¹⁴³ This is the first time that a court has ordered a private entity to reduce its emissions in line with the international Paris Agreement.¹⁴⁴ Royal Dutch Shell has appealed the decision.¹⁴⁵ Although this claim did not engage with the corporate law risk management obligations discussed in this paper, and may not be easily replicated in other jurisdictions with very different legal systems, such as Australia,¹⁴⁶ it can nonetheless generate indirect impacts,¹⁴⁷ further reinforcing incentives for companies to align their businesses to Paris goals.

4. PRIVATE CLIMATE RISK MANAGEMENT AND PUBLIC CLIMATE CHANGE MITIGATION GOALS

The initiatives outlined above are just some examples of a rapidly developing body of private regulatory activity in which considerable momentum is coalescing around the theme of Paris alignment.¹⁴⁸ These initiatives are increasingly inter-connected, compounding with and

¹³⁹ Environmental Defender’s Office, ‘World-first Federal Court case over Santos’ “clean energy” & net zero claims’ (26 August 2021), <https://www.edo.org.au/2021/08/26/world-first-federal-court-case-over-santos-clean-energy-net-zero-claims/> accessed 31 July 2022.

¹⁴⁰ *ibid.*

¹⁴¹ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag [Hague District Court], C/09/456689/HA ZA 13–1396 (24 June 2015); *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* [Supreme Court of the Netherlands], 19/00135 (20 Dec 2019).

¹⁴² The case is based on Article 6:162 of the Dutch Civil Code as further informed by Articles 2 and 8 of the European Convention on Human Rights which guarantee rights to life (Article 2) and rights to a private life, family life, home, and correspondence (Article 8).

¹⁴³ *Milieudefensie et al. v Royal Dutch Shell plc*, Rechtbank Den Haag [Hague District Court], C/09/571932/HA ZA 19–379 (26 May 2021).

¹⁴⁴ Carlo Vittorio Giabardo, ‘Climate Change Litigation and Corporate Responsibility: A comment on Milieudefensie and others v Royal Dutch Shell (2021)’ (*Global Law Initiatives for Sustainable Development*, Blog Post, June 2021), <<http://www.glawcal.org.uk/stories/climate-change-litigation-corporate-responsibility-a-comment-on-milieudefensie-and-others-vs-shell-2021>>, accessed 31 July 2022.

¹⁴⁵ Royal Dutch Shell, ‘Shell confirms decision to appeal court ruling in Netherlands climate case’ (Press Release 20 July 2021), <https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html> accessed 31 July 2022.

¹⁴⁶ See e.g. Tim Baxter, ‘Urgenda-style Climate Litigation has promise in Australia’ (2017) 32(3) *Australian Environment Review* 70; Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the next generation of climate change litigation in Australia’ (2017) 41(2) *Melbourne University Law Review* 793.

¹⁴⁷ Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 1, 47.

¹⁴⁸ Other relevant initiatives include UN Global Compact Business Ambition for 1.5°C <<https://www.unglobalcompact.org/take-action/events/climate-action-summit-2019/business-ambition>> accessed 31 July 2022; the We Mean Business Coalition, <https://www.wemeanbusinesscoalition.org/> accessed 31 July 2022; and the Investor Agenda, Investor Climate Action Plans <https://theinvestoragenda.org/icaps/> accessed 31 July 2022.

complementing each other to form a web of standards, benchmarking and legal interventions that expand upon formal legal obligations to disclose and manage climate related financial risks in significant ways.

In this section, the discussion turns to consider the potential for this regulatory activity to drive meaningful private contributions to meeting Paris Agreement goals, particularly in an Australian context, where substantive climate law and policy has been lacking and where there are few direct regulatory drivers for companies to reduce emissions. Drawing on the private climate governance literature,¹⁴⁹ the discussion raises a range of factors relevant to understanding the mitigation potential of private climate risk regulation, including the overlap of private and public interests, measures to boost accountability, the extent and nature of uptake, and the durability of initiatives.¹⁵⁰

4.1. AN OVERLAP OF PRIVATE AND PUBLIC INTERESTS?

As many commentators point out, self-regulation and voluntarism typically only deliver public interest outcomes where public and private interests substantially collide: private sector actors will pursue climate action not out of altruism, but to deliver a return on their investment.¹⁵¹ Climate change is now widely recognised as posing financial risks to private interests, and risk disclosure and management are clearly required by law. However, for many entities, private climate risk management may contribute, but does not necessarily lead to reducing emissions at a pace and scale which aligns with Paris Agreement goals. Similar to the international climate negotiations between nation states, climate risk management at the corporate and investor scale poses complex, collective action challenges and there are pervasive short-term interests that impede early action.

For example, while allocating capital to new fossil fuel investments, including gas, is now seen as inconsistent with global emissions reduction trajectories required to achieve Paris goals,¹⁵² for many individual companies and investors, risk assessments may still come out in favour of allocating capital to and expanding climate damaging activities. In jurisdictions like Australia, there are a number of major new oil and gas projects being developed,¹⁵³ and many large Australian pension funds remain heavily invested in companies pursuing new fossil fuel projects.¹⁵⁴ These projects still make business sense on the timescales that companies and investors are using to assess risks, including risks that governments will introduce meaningful legal restrictions on such climate-harmful activities, and risks that fossil fuel markets will decline around the world as more and more nations (and trading partners) set net-zero emissions targets. This underscores the limits of relying on regulation of financial risks posed to private actors to address the myriad risks that climate change poses to society.

The investor engagement initiatives described above evidence a growing recognition, at least among institutional investors, of the collective, long-term interests of business and investors in addressing climate change, and a nascent willingness to act together in this collective interest. Importantly for universal investors, like pension funds, the business case to address climate change impacts emanating from some investments in the portfolio (fossil fuel companies, utilities) is strengthened by the fact that other investments in the portfolio (agriculture, food, property) stand to be negatively impacted by dangerous climate change.¹⁵⁵ Further, while there are many incentives for pension funds to focus on short- and medium-

¹⁴⁹ Above n 18.

¹⁵⁰ These factors are drawn from discussions of the potential and limitations of private environmental governance generally, and in a climate change context, by a range of authors including, Banda (n 18); Leonard (n 18) and Gunningham (n 25) 468.

¹⁵¹ Gunningham (n 25) 466; Walenta (n 18) 3; Benjamin (n 2) 19.

¹⁵² International Energy Agency, *Net Zero by 2050: A Roadmap for the Energy Sector* (2021) 100–105.

¹⁵³ Market Forces, 'Out of Time, Out of Line: the 23 Australian Companies undermining Climate Action' (Feb 2021).

¹⁵⁴ See e.g. Charlotte Grieve, 'Ethical Superfunds invest in coal, oil, gas' *The Sydney Morning Herald* (online 3 March 2020) <<https://www.smh.com.au/business/banking-and-finance/ethical-super-funds-invest-in-coal-oil-gas-20200228-p545ja.html>> accessed 31 July 2022.

¹⁵⁵ UNEP Finance Initiative and PRI, *Universal Ownership: why environmental externalities matter to institutional investors* (2011).

term returns,¹⁵⁶ there is also a longer term imperative given their underlying purpose to provide a retirement income for members.¹⁵⁷ Reputational risks and social licence to operate undoubtedly also play a part in shifting the risk calculation for individual investors and companies, and the strategic litigation described above can play an important role in driving corporate ambition and publicly spotlighting poor performers.

4.2. TRANSPARENCY AND ACCOUNTABILITY

Like many private regulatory initiatives, one of the main weaknesses of the initiatives discussed in Part 3 is their susceptibility to industry capture, and the challenges in holding participating entities accountable for delivering on their commitments.¹⁵⁸ Concerns about greenwashing have been raised recently with the proliferation of companies and institutional investors making public commitments to net-zero emissions.¹⁵⁹ While corporate and portfolio net-zero targets provide important positive signalling to the market, given their long-term nature, it is easy to see them as empty promises, unless they are backed up by short- to medium-term targets, strategies to deliver on targets and an ability to track and verify commitments and compare entities on their progress.

Early climate risk disclosure practices are also illustrative. While an increasing number of companies are committing to disclose according to the TCFD, their engagement with one of the key recommendations – scenario analysis – appears to have been highly variable in practice, with concerns raised by investors and civil society about the quality and usefulness of disclosures provided.¹⁶⁰ In particular, there is a temptation for companies to report favourable scenarios, or to bend scenarios to existing corporate strategy, leading to many highly exposed fossil fuel companies claiming alignment with Paris goals while increasing their production.¹⁶¹ While scenario analysis can be a useful strategic tool to understand the financial implications of different climate futures, as a disclosure requirement it can be easily corrupted if not subject to rigorous oversight.

Despite these challenges, in some of the initiatives described above, there is an increasing focus on standardisation against accredited, rigorous science-based methodologies (e.g. SBTi), as well as public benchmarking not only on voluntary commitments, but also on company performance against a range of climate indicators (e.g. Net Zero Company Benchmark). Recent guidance issued by the TCFD also contributes to the development of more standardised and rigorous approaches to using metrics to assess risk exposure and to track risk management activities against quantified targets.¹⁶² The Say on Climate initiative also establishes a process by which the shareholder body can monitor and vote on the annual climate performance of companies. While the fact remains that there are no real sanctions (other than reputational) for failing to meet voluntary climate targets, there is certainly a strong commitment to transparency and a clear set of expectations emerging through these initiatives, which in turn can facilitate more effective third-party scrutiny.

The strategic climate litigation described above has also laid a foundation for the development of future legal action by third parties to hold private actors accountable for both the ambition of their commitments and their subsequent performance against them. As noted in Part 2 above, serious penalties apply for misleading and deceptive conduct or breach of disclosure obligations, including personal liability for company directors.¹⁶³

¹⁵⁶ Neil Gunningham, 'A Quiet Revolution: Central Banks, Financial Regulators, and Climate Finance' (2020) 12 (9596) Sustainability, 1, 6–8; Gunningham (n 25) 472; Benjamin (n 10) 19.

¹⁵⁷ UNEP Finance Initiative and PRI (n 155).

¹⁵⁸ Banda (n 18) 341.

¹⁵⁹ For example, see Pablo Berrutti, 'We need to talk about Net Zero bullsh*t' *Responsible Investor*, (2 August 2021), <<https://www.responsible-investor.com/articles/we-need-to-talk-about-net-zero-bullsh-t>> accessed 23 August 2021. See also Armour (above n 57).

¹⁶⁰ Peel and others (n 10) 20–22.

¹⁶¹ Berrutti (n 159).

¹⁶² TCFD *Guidance on Metrics, Targets and Transition Plans* (n 78).

¹⁶³ Above n 34.

Private regulatory environmental initiatives typically engage mostly with large, leading, reputation-sensitive entities. For example, companies with the resources and capacity to respond to emerging regulatory risks, or those that are most targeted by civil society and others in their corporate advocacy campaigns are, generally speaking, more likely to participate in voluntary environmental initiatives.¹⁶⁴ The experience thus far with the initiatives described above, suggests this is also likely to be the case in a climate context. There are risks that the uptake is insufficient to shift market behaviour more broadly. For example, while an increasing number of companies listed on the Australian Stock Exchange disclose according to the TCFD, this varies widely between sectors, and the uptake is likely to be much lower beyond the ASX 200.¹⁶⁵

Yet, initiatives such as Climate Action 100+ are supported by a large, growing base of high-profile institutional investors representing very significant amounts of capital under management. They are also strategically targeting their engagement activities at a small group of companies which account for over 80% of corporate industrial GHG emissions globally and which are therefore critical to meeting Paris goals.¹⁶⁶ The combination of significant investor leverage and a targeted, strategic focus on materially relevant companies adds considerable promise to this initiative. Drawing on theories about the diffusion of innovations within a system,¹⁶⁷ the SBTi also asserts that once 20% of companies in key sectors and geographies have adopted science-based targets, this will act as a tipping point or ‘critical mass’ to drive broader uptake.¹⁶⁸ The 2021 progress report finds that this critical mass has been achieved in over half of OECD countries and in a growing number of industry sectors including paper and forest products, real estate, and cement and concrete.¹⁶⁹

Strategic litigation initiatives are also targeting high profile companies and investors with significant market share, often in conjunction with public media campaigns, seeking to maximise the direct impacts on the targeted entity as well as broader market impacts from these interventions.

4.4. COORDINATION AND DURABILITY

The private initiatives described in Part 3 form part of an emerging body of private regulation, where different initiatives with often overlapping objectives and coverage are proliferating and evolving over time. For example, while the TCFD has emerged as the dominant best practice standard for climate risk disclosure in Australia, in other jurisdictions there is a range of other climate reporting standards which also have high uptake.¹⁷⁰ If companies can select from a number of different climate initiatives to have their approach to climate risk management assessed, validated and accredited, and if these initiatives are continually shifting the goal posts on best practice expectations or indeed being replaced by new initiatives, it becomes more difficult to track and compare progress over time.

What is, however, evident in the examples discussed above, is the unifying theme of Paris-alignment, and the emergence of transparent and rigorous science-based approaches to support this. In particular, the SBTi provides a central standard that is used in a range of initiatives, including the Net Zero Company Benchmark and the new Say on Climate initiative, providing evidence of some degree of coordination as well as common unifying standards.

¹⁶⁴ Banda (n 18) 351.

¹⁶⁵ Australian Council of Superannuation Investors, *Promises, Pathways and Performance: Climate Change Disclosure in the ASX200* (ACSI, Oct 2020) <<https://acsi.org.au/wp-content/uploads/2020/10/Climate-Change-disclosure-in-ASX200.-ACSI-REPORT-October-2020.pdf>> accessed 31 July 2022. See also, KPMG Australia, *Towards Net Zero, Australian Supplement* (November 2020), <<https://assets.kpmg/content/dam/kpmg/au/pdf/2020/towards-net-zero-climate-risk-au-supplement.pdf>> accessed 31 July 2022.

¹⁶⁶ Climate Action 100+, ‘Global Investors Driving Business’ (*Climate Action 100+*) <<http://www.climateaction100.org>> accessed 31 July 2022.

¹⁶⁷ E M Rogers, *Diffusion of Innovations* (3rd edn, NY Free Press 2003) 1.

¹⁶⁸ SBTi (n 107) 22–30.

¹⁶⁹ *ibid* 24. To measure progress towards a 20% threshold within key sectors and geographies, the SBTi used a sample of 1,840 high impact companies based on their potential contribution to climate mitigation (determined by a combination of their GHG emissions and market capitalisation).

¹⁷⁰ McDonnell and others (n 76).

To ensure ongoing relevance and durability, it will also be important for these initiatives to respond to evolving scientific understanding of what is needed to avert dangerous climate change. The latest IPCC report makes clear that meeting the more ambitious 1.5°C Paris goal will require a concerted focus on reducing emissions to net zero in the next 10–15 years.¹⁷¹ In this context, a key measure of the impact of private regulatory initiatives will be their ability to catalyse early emissions reductions in line with longer term net-zero goals. Initiatives such as the Net Zero Asset Owners Alliance Target Setting Protocol described above are certainly emphasising the importance of immediate Paris-aligned emissions reductions.

5. CONCLUSION

There are myriad ways in which governments can directly regulate the private sector to reduce emissions and achieve climate change mitigation outcomes consistent with the goals of the Paris Agreement. This analysis of private climate risk management does not suggest that direct, substantive climate laws to address the serious risks posed by climate-damaging activities are not needed. On the contrary, in jurisdictions like Australia there is an urgent need for a coordinated, strengthened legal and policy response to climate change. However, this analysis does highlight that the interconnected web of industry best practice standards, benchmarking initiatives and strategic legal interventions – which are underpinned by formal legal obligations to identify, disclose and manage material financial risks – have considerable potential to help drive meaningful private sector contributions to reducing emissions. In this way, private climate risk management can help to fill a regulatory gap. Further, these initiatives, particularly if they reach a critical mass, can also build political support and momentum for governments to introduce substantive climate law and policy.¹⁷² Indeed, many of the initiatives discussed specifically commit participants to engage in policy engagement activities in support of Paris-alignment,¹⁷³ or target corporate lobbying activities which are contrary to Paris-alignment.¹⁷⁴

The mitigation potential of private climate risk regulation will depend on a range of factors including: the strength of the business or investment case to align with public interest climate mitigation goals; the level of accountability that can be achieved through transparency and third-party scrutiny; the extent and nature of uptake among investors and companies; and the way in which multiple initiatives can coordinate through common standards and respond to emerging climate science. It is clear that better disclosure and risk management are not enough to drive meaningful private sector contributions to climate change mitigation,¹⁷⁵ and there are well-founded concerns about relying on voluntarism alone. However, there are increasingly promising signs that this inter-connected, mutually reinforcing private regulatory activity, underpinned as it is by increased compliance and enforcement activity on the part of corporate and prudential government regulators and strategic climate litigants, may be reaching a critical mass. As these private initiatives mature, further empirical research is needed to probe their real-world impact on emissions reductions over time.¹⁷⁶

COMPETING INTERESTS

The author has no competing interests to declare.

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¹⁷¹ Above n 5.

¹⁷² See discussion in Banda (n 18) 379, Leonard (n 18) 10548.

¹⁷³ Net Zero Asset Owners Alliance (n 116) 11, 64–67.

¹⁷⁴ A distinct strand of shareholder resolutions on climate change requests companies to disclose industry body memberships and suspend any memberships that are involved in government lobbying activities which are contrary to Paris Agreement goals. See Peel and others (n 10) 32.

¹⁷⁵ Gunningham (n 156) 6–8; Gunningham (n 25) 472; Benjamin (n 10) 19.

¹⁷⁶ Banda (n 18) 348.

TO CITE THIS ARTICLE:

Foerster, Anita, 'Aligning Private Climate Risk Management to Paris Climate Goals: An Australian Perspective' (2022) 18(2) *Utrecht Law Review* 107–126. DOI: <https://doi.org/10.36633/ulr.802>

Published: 28 November 2022

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