FEBRUARY 2024

NEXT

PROACTIVE RISK MANAGEMENT

DRIVING ESG ACCOUNTABILITY

MEASURING SOCIAL IMPACT

MERGER REFORM

Tidal Marks 1 by Marilyn Wallace-Mitchell

EDITION SEVEN

BUSINESS. PURPOSE. FUTURE.

KING&WOOD MALLESONS
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FOREWORD

As the year begins, it's a time when many of us reflect on what we have seen, heard, been involved in over the past 12 months, and of course, what's on the horizon for the months ahead. For many of us, a key reflection is the increasing focus on, and conversation about, how we work together for a fairer and more sustainable future.

Last year highlighted many challenges facing people and planet, underscoring the need to connect, look after each other and to work even more collaboratively to drive meaningful change.

The role of law and lawyers in achieving a net-zero economy has become increasingly pivotal. Climate change presents an existential threat, necessitating immediate and decisive action. Legal frameworks play a central role in shaping policies, regulations, and strategies to facilitate the transition to a more sustainable future.

Lawyers are increasingly being asked to apply a sustainability lens to their advice. We are committed to building our capabilities and leveraging our legal expertise and experience to drive transformative change.

In addition, businesses increasingly recognise the importance of purpose as a guiding principle for critical decision making, aiming for positive societal impact alongside strong financial success. In doing so, authenticity has become paramount.

Authenticity in purpose driven businesses requires genuine alignment between words and actions. It demands transparency, accountability and a steadfast commitment to addressing societal and environmental issues in a holistic way. I think it also means enhanced stakeholder engagement, seeking broader feedback on plans and adapting strategies to ensure robustness.

It's been said that 2024 will be another big year for ESG, responsible business and sustainability. I couldn't agree more. From new reporting and disclosure requirements to even more spotlights on greenwashing and greenhushing, to deeper integration with profit and loss statements and an enhanced focus on scope 3 emissions, I think it is already clear that the year ahead will be one where ESG folds deeper into governance and away from a risk and compliance exercise - more core to the strategy of a business, more intersectional, more deliberate.

We hope you find this edition of NEXT to be thought provoking and we very much look forward to continuing the conversation with you across the year.

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DIRECTOR OF RESPONSIBLE BUSINESS

PROACTIVE RISK MANAGEMENT

A CULTURE AND STRATEGY IMPERATIVE BEYOND THE CRISIS MOMENT

FEW WOULD SUGGEST THE AFTERMATH OF A CRISIS AS A GOOD TIME TO ANALYSE RISK MANAGEMENT FLAWS.

Too often, it is only while organisations are mopping up mess that they see the importance of investing time and money in proactive risk management. However visceral, these realisations are also costly. Risk mitigation and cultural reviews become a reactionary measure – often hastily commissioned at great expense to explain the inexplicable, tell us what we should already have known and salvage what is left.

We wonder how things might be different. What might be possible by making the leap from reactive to proactive; from minimising liability and repairing reputational damage, to putting organisational purpose and stakeholder interests first? What might be possible if we ask 'how can we be prepared for the known unknowns' or even, 'what might a "market-leading" program look like to guard against "x" risk'?

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Done right, risk management can be a foundational building block for resilient and sustainable growth in the longer term - strengthening an organisation's defences against the foreseeable challenges of today and tomorrow. Building a strong risk culture is a strategic and cultural imperative to empower people, develop organisational capability and bring sophisticated, values-aligned responses to challenges well before they turn into crises.

'Risk culture' and 'risk management' are terms the Banking Royal Commission firmly entrenched in the Australian corporate vernacular. Our experience is that sophisticated market participants understand that they are required to develop and document risk management processes addressing both financial and non-financial risk and that at various levels they will be held accountable for not managing those risks effectively.

In the financial services sector this has been driven by stakeholder expectations (both shareholder and regulators) but also the statutory accountability regimes that have been imposed on the sector. The Banking Executive Accountability Regime (**BEAR**) has applied to the largest Authorised Deposit Taking Institutions (**ADIs**) since 1 July 2018. It requires ADIs to map accountability across their operations and assign accountability for key responsibilities (including risk management) to accountable individual executives. The legislation imposes statutory obligations on both the ADI and accountable individuals - to exercise due skill, care and diligence in the conduct of their business and responsibilities and to take reasonable steps to prevent matters arising that would adversely affect the ADI's prudential standing or reputation. These statutory obligations extend to maintaining sound risk management practices and risk culture and taking a proactive approach to these issues, as is typically reflected in the mandatory individual accountability statements agreed with executives under the regime. Failure to comply with the statutory accountability obligation requires a mandatory remuneration adjustment and potentially banning orders from Australian Prudential Regulation Authority (**APRA**). This is also reflected in regulatory expectations with APRA consistently looking to understand who is accountable for material risk and compliance incidents in the industry and what proactive steps accountable executives took to prevent these risks.

This statutory obligation for enhanced risk management will soon extend beyond banks to other financial services companies. Over the next 18 months the Financial Accountability Regime (**FAR**) will extend the BEAR to all APRA regulated entities (e.g. insurers and superannuation entities). Significantly, this will include a new statutory obligation for an accountable person to take reasonable steps to prevent a material contravention of specified financial services laws, which should focus attention on risk and compliance frameworks. ASIC will also be a co-regulator under the FAR and can be expected to be an active regulator of conduct in the industry.

The APRA remuneration standard (CPS511) also requires remuneration frameworks to support the sound management of non-financial risks. This includes providing material weight to non-financial performance metrics and the downward adjustment of remuneration for significant risk management or accountability failures. APRA guidance indicates that a prudent entity should be able to demonstrate how non-financial performance measures incentivise risk management. Illustrative examples of non-financial performance measures include control effectiveness, regulatory and audit findings, risk culture surveys and conduct risk measures including incidents and customer complaints (see CPG 511). The underlying theme of APRA's regulation of remuneration is that remuneration should be used as a tool to drive effective risk management including both as an incentive for positive risk performance and as a consequence for material risk management failures.

In a different context, under the model work health and safety laws that now apply in every Australian jurisdiction except Victoria, officers are required to take reasonable steps to undertake due diligence to ensure the organisation complies with its obligations under those laws (in other words, to proactively manage the risk of non-compliance with the primary health and safety duty). The positive duty to eliminate sexual harassment and related unlawful conduct, now enforceable by the Australian Human Rights Commission (**AHRC**) under the *Sex Discrimination Act* 1984 (Cth), similarly requires the taking of reasonable and proportionate measures: demonstrable actions that are aimed at preventing the conduct or related harms, from occurring in the first place. Indeed, in identifying in its Guidelines that risk management is 1 of the 7 'standards' organisations are expected to meet to comply with the positive duty, the AHRC notes that organisations should take a risk-based approach to prevention and response, expressly acknowledging that risk management is a standard part of running any organisation or business.

But effective risk management is more than a compliance exercise.

PROACTIVE RISK MANAGEMENT IN PRACTICE

What can organisations be doing to elevate their risk management practices from a compliance posture to a proactive, market-differentiating resilience tool?

A fundamental aspect of proactive risk management is scenario planning. It is not uncommon for boards in 2023 to be 'war-gaming' cyber incidents, using hypothetical cyber crises to establish the guard rails for how real-life decisions might be made about the most challenging issues, such as whether the organisation will be willing to pay a ransom to a cybercriminal, under which circumstances if so and with a nuanced appreciation of the implications for compliance with various complex laws and stakeholder expectations. This is proactive risk management at work.

We observe that effectively managing risk also bakes a valuable level of literacy, capability and confidence into the organisation's DNA. This is because practical features of a risk-aware culture include things like transparency, open communication and a shared (rather than siloed or function-driven) commitment to identifying and eliminating risks. It means fostering an environment where employees are not only permitted and encouraged to address challenges and speak up about concerns, but are equipped with (and regularly trained in) the necessary skills to do so and similarly, where they are trained to listen to others. On the flip side, an organisation that downplays the importance of risk as an integral part of its culture may implicitly encourage or permit silence or complacency and render ineffective even the most sophisticated risk management systems. As convincing as the 'tone from the top' might sound in an echo chamber, the Board and the Executive will not create an effective risk culture if nobody else understands what it means in practice or knows what it feels like to operate safely within one.

In discussing risk management, the AHRC Guidelines for complying with the positive duty to prevent sexual harassment call out the importance of meaningful engagement and consultation with workers. These people are an organisation's eyes and ears - they understand the practical risks of their workplaces because they live with them every day. And remember, most large organisations are not monocultural, but are comprised of several heterogenous cultures each adapted to the particular contexts of their environment and composition. Effective risk management includes considering how you can tap into those mini-cultures' rich veins of on the ground knowledge to fully understand the risks they present. It is also about acknowledging the positive impacts of doing so on an organisation's risk culture.

NEXT STEPS

Legislators' and regulators' heightened focus on effective risk management is the 'stick' to encourage thinking critically about what kind of risk management culture an organisation has and whether it meets the minimum required standards. The carrot is the precious opportunity you have outside of crisis moments, to undertake a richer analysis of where your organisational risks truly lie and what that might enable you to do. Both in terms of preparedness for unforeseen events and the building of a genuinely risk-aware culture. One of continuous improvement, where leaders actively encourage and value open communication and feedback. One where people at all levels are trained in the identification and mitigation of potential risks and how to speak up about them effectively and with impact. One where leaders lead by example, exhibiting and valuing transparency, accountability and adaptability. One which is ultimately resilient and equipped for sustainable success. These goals are not only not achievable in a crisis when the toothpaste will not get back in the tube and someone has to be to blame – their absence will be what has led to the environment in which the crisis could occur in the first place. The hard work has to be done beyond the crisis moment, when we have the clear air to ask 'what if…?' and are empowered and committed to imagine the answer.

DRIVING ESG ACCOUNTABILITY

REGULAR REASSESSMENT IS CRUCIAL

HOWEVER BEAUTIFUL THE ESG STRATEGY, EVERY ORGANISATION SHOULD BE REGULARLY REVIEWING ITS RESULTS AND COMMITMENTS.

In the rapidly changing environmental, social and governance (ESG) landscape, regularly reassessing commitments and practices is critical. Regular review is vital for ensuring commitments remain aligned with the company's activities and future trajectory and companies maintain their credibility and reputation in the market.

In this article we explore recent updates in the ESG landscape, including the phasing out of certain environmental claims, continued regulator scrutiny, fast approaching interim climate target deadlines and disclosure requirements, which may trigger a need to reassess ESG commitments and practices.

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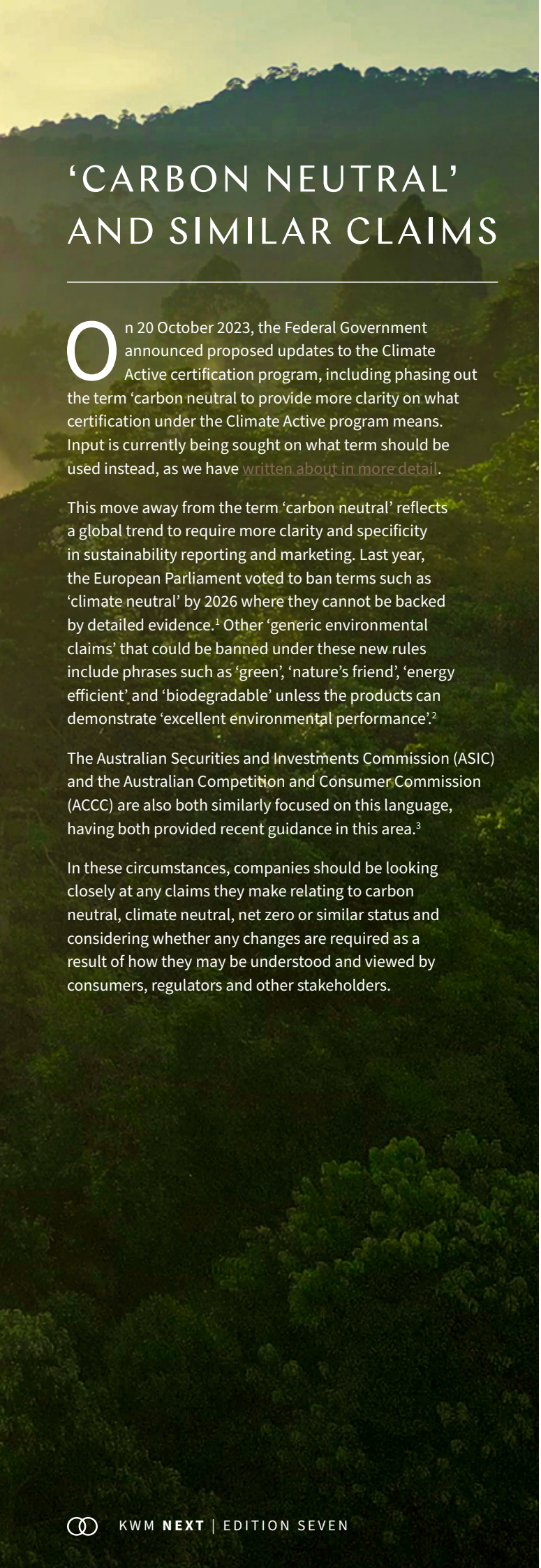


‘CARBON NEUTRAL’ AND SIMILAR CLAIMS

On 20 October 2023, the Federal Government announced proposed updates to the Climate Active certification program, including phasing out the term ‘carbon neutral to provide more clarity on what certification under the Climate Active program means. Input is currently being sought on what term should be used instead, as we have written about in more detail.

This move away from the term ‘carbon neutral’ reflects a global trend to require more clarity and specificity in sustainability reporting and marketing. Last year, the European Parliament voted to ban terms such as ‘climate neutral’ by 2026 where they cannot be backed by detailed evidence.[1] Other ‘generic environmental claims’ that could be banned under these new rules include phrases such as ‘green’, ‘nature’s friend’, ‘energy efficient’ and ‘biodegradable’ unless the products can demonstrate ‘excellent environmental performance’.[2]

The Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) are also both similarly focused on this language, having both provided recent guidance in this area.[3]

In these circumstances, companies should be looking closely at any claims they make relating to carbon neutral, climate neutral, net zero or similar status and considering whether any changes are required as a result of how they may be understood and viewed by consumers, regulators and other stakeholders.

GREENWASHING ENFORCEMENT ACTION

ASIC has announced that it would retain its enforcement priority relating to greenwashing for 2024, as well as its enduring priorities relating to governance and directors’ duties failures.[4]

ASIC has previously taken a number of actions for greenwashing, with most cases based on alleged misleading and deceptive conduct in relation to ESG matters.

Notably, ASIC has also signalled that future cases may move beyond misleading and deceptive conduct to licence obligations, directors’ and officers’ duties and a range of other obligations.[5]

Ongoing areas of interest for ASIC include:

(a) net zero targets made without a reasonable basis;

(b) use of environmental claims such as ‘carbon neutral’ (as discussed above), ‘clean’ or ‘green’ that are not founded on reasonable grounds; and

(c) the scope and application of investment exclusions and screens.[6]

The ACCC likewise also has ‘consumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability’ as an enforcement and compliance priority for 2024.[7]

In our 2023 Directions Report, we were interested to understand whether companies have reassessed or ‘walked back’ public ESG-related commitments or disclosures given the hardened regulatory focus on greenwashing. We found that only 12% of respondents had done so. Given ASIC and the ACCC have confirmed their ongoing focus in this area, we expect to see many more companies regularly reassessing their commitments and disclosures going forwards.

1 See EU to ban ‘climate neutral’ claims by 2026 (ft.com)

2 See further EU to ban greenwashing and improve consumer information on product durability | News | European Parliament (europa.eu)

3 See 23-121MR Update on ASIC’s recent greenwashing actions | ASIC and Making environmental claims: A guide for business | ACCC

4 See ASIC enforcement priorities | ASIC

5 See Red light for greenwashing | ASIC

6 See Red light for greenwashing | ASIC

7 See Compliance and enforcement policy and priorities | ACCC

CONCLUSION

In summary, it is simply not enough to make bold promises for a greener future. Community and regulatory expectations are evolving. For companies and organisations to hold themselves out as responsible, it is essential to stay up-to-date on regulatory and other global developments, actively check in on and reassess commitments as required, ensure commitments are supported by reasonable grounds and take action to meet commitments by integrating sustainable practices into their companies.

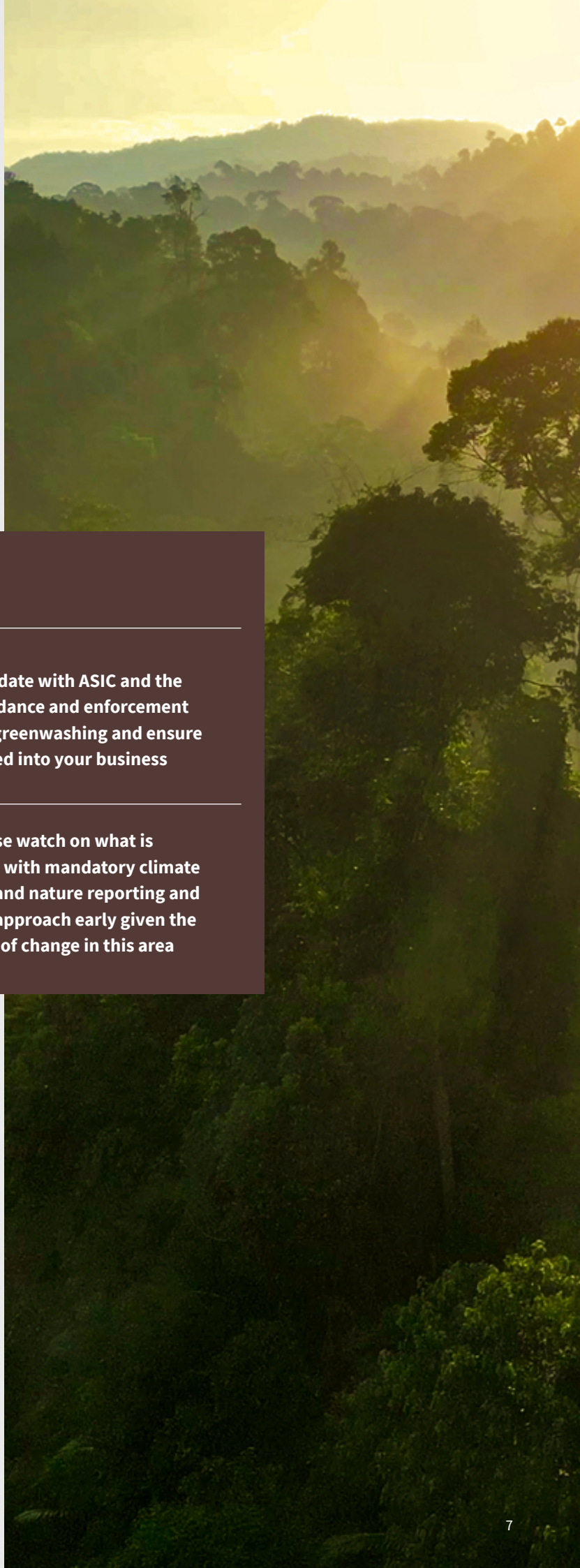
KEY TAKEAWAYS

Carefully consider whether changes should be made to to carbon neutral, climate neutral, net zero or similar claims

Stay up to date with ASIC and the ACCC's guidance and enforcement action on greenwashing and ensure it is factored into your business

Closely track progress against commitments as interim target deadlines draw near

Keep a close watch on what is happening with mandatory climate reporting and nature reporting and plan your approach early given the rapid pace of change in this area



MEASURING SOCIAL IMPACT

BEYOND QUANTITATIVE TO THE QUALITATIVE

Most of us will be familiar with the '*what gets measured gets managed*' adage. For financial metrics like profit, revenue and costs, there are well established frameworks and numbers that can speak for themselves. But what about social impact, where qualitative results matter?

The 2023 State of Social Impact Report from the Impact Institute calls out 4 significant social trends influencing corporate Australia. These are: rising inequality awareness; the wellbeing economy; corporate efforts in ESG; and building constructive dialogues. These trends indicate an appetite from stakeholders for businesses to look much more deeply at the role they perform in society, examine how they maintain relationships and reflect on their impact.

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For law firms and other businesses aiming to contribute meaningfully, measuring and maximising social impact is central to achieving their purpose. More and more businesses are exploring why and how they can measure social impact, both positive and negative and are increasingly setting out the short, medium and long-term goals of their work. They are more clearly defining the transformative impact they seek, through thought-leadership opportunities, pro bono work, deep and genuine community partnerships, access and opportunity programs and broader social impact initiatives, including the networks they hold.

Measuring impact is more than a trend - it is a strategic priority for businesses committed to making a meaningful difference and being authentic about it. By consistently collecting and demonstrating the difference (whether small or large) made through their collective work, businesses gain valuable insights into the effectiveness of their efforts, the needs of their communities and how their own people are engaging with both the work and the issues they have chosen to engage with. This not only helps in ensuring accountability, but also allows for continuous improvement and the refinement of strategies for more sustainable impact.

SHORT-TERM GOALS: IMMEDIATE IMPACT AND ENGAGEMENT

Businesses can measure inputs such as the number of hours dedicated to volunteering or pro bono or the relief provided to communities, to start to build a picture of the resources they dedicate and the causes they align to. Many organisations are using the United Nations Sustainable Development Goals (**UN SDG**) framework for consistency and to layer up into broader and more consistently understood themes. In the short term, asking about the immediate benefit of support to individuals' lives is a powerful way to demonstrate commitment and build trust within the community.

Additionally, businesses can benefit from measuring the engagement of their own employees in pro bono and volunteering activities. Tracking volunteer hours, participation in community events through platforms and employee engagement surveys can provide insights into the immediate advantages of participation reaped by both the business and its people.

MEDIUM-TERM GOALS: SUSTAINABLE COMMUNITY PARTNERSHIPS AND EMPOWERMENT

Moving beyond inputs and short-term impact, businesses can set medium-term goals which often focus on building sustainable community partnerships and contributing to empowerment. This involves assessing the lasting effects of volunteering or pro bono work and access and opportunity programs on the communities, organisations or individuals supported. Metrics could include the establishment of relevant and lasting resources, the success of access and opportunity programs on the business's definition and recruitment of talent and the empowerment of marginalised groups through advocacy.

To measure medium-term impact, businesses can conduct assessments of their community partnerships, seeking feedback from organisations and individuals who have been part of their initiatives.

LONG-TERM GOALS: SYSTEMIC CHANGE AND LEGAL ADVOCACY

In the long term, businesses can aim for systemic and transformational change through initiatives that address underlying social issues and complex problems. By strategically aligning with issues that match their expertise and sphere of influence, businesses can measure the impact of their contributions on laws, policies, specific cohorts, targeted geographic areas and/or societal transformations. Long-term success is not just about individual cases but about contributing to a landscape that is more equitable and just.

For a firm like KWM, we are working to capture and track the long-term outcomes of legal empowerment programs, which aim to increase access to justice and/or improvement in community legal literacy more consistently. We want to see how we contribute to long-lasting change by using the law as an instrument for fairness and positive change. Likewise, we are committed to tracking the long-term impact of access and opportunity programs delivered by our firm (and the sector more broadly), through collecting and reflecting on the diversity of who gets into the profession and who succeeds. What we have learned is we need to have robust systems to routinely capture feedback and look for trends to course correct and dial up what is working. Additionally, we have learned that big ideas to promote lasting change take a long time and an ongoing commitment to gathering feedback, reflecting on what is going well and being honest about what works and what does not.

Measuring long-term impact is hard work – it involves tracking changes in legislation, policy outcomes, the overall societal shift towards accessible justice for all and shifting attitudes. Collaboration with other businesses, firms, NGOs and governmental bodies can amplify the impact of long-term goals, creating a network of professionals working towards systemic change and being courageous about the role we all play in creating and solving the challenges.

CAPTURING IMPACT BEYOND NUMBERS: STORIES AND STAKEHOLDER FEEDBACK

While metrics are crucial, businesses should not overlook the power of storytelling and stakeholder feedback in capturing the full scope of their social impact. Personal narratives of individuals positively affected by pro bono work, feedback from community partners and qualitative assessments of the firm's evolving talent pool offer a more comprehensive understanding of the impact generated.

Law firms and lawyers have a unique opportunity to be catalysts for positive social change. By setting short, medium and long-term goals and being thoughtful about tracking the impact of their social impact activities, businesses can make a significant contribution in the present and build a legacy of trust and confidence in the legal system across the communities they serve.

Albert Einstein was supposed to have said 'everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted'. The quote is frequently cited because it goes to *thinking beyond what we can see and easily capture and think about the experience of people and change over time in attitude, norms and beliefs.* The feedback we at KWM have captured has been invaluable – sometimes humbling – but always incredibly useful to hear and understand.

MERGER REFORM

WHAT HAPPENS NOW?

2024 is shaping up as a significant year for potential reform of Australia's merger regime, as the ACCC ramps up its campaign for wholesale changes to the competition merger control laws.

While the reform options proposed in the consultation paper released by Treasury in late 2023 were high level ideas (with details to follow), the proposals would be likely to give the ACCC more scope to block proposed transactions and could limit the avenues for merger parties to appeal. This is a significant shift.

We lay out the state of play, next steps and analyse what they could mean for everyone involved in – or considering – an M&A deal.

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STATE OF PLAY

An overhaul of Australia's merger regime has been high on the agenda of Australia's competition watchdog for more than 2 years. Former ACCC Chair, Rod Sims, began the push for a mandatory approval merger regime back in 2021, arguing that the existing voluntary system did not allow the regulator to effectively scrutinise prospective deals' impact on competition. Following her appointment in early 2022, Sims' successor, Gina Cass-Gottlieb has continued to press for change. Then, with the support of the newly-minted Competition Taskforce (**Taskforce**) in November 2023 the Treasury released a consultation paper which outlined several high-level options for potential change to Australia's merger regime.

As we begin 2024, the ACCC continues to publicly press its case for reform by focusing on the need for a 'mandatory' notification regime to ensure deals are brought before it and to bring Australia into line with other jurisdictions. But the options in the Treasury paper show that the proposed changes would involve much more than just a procedural switch to mandatory notification.

AUSTRALIA'S CURRENT REGIME

Seeking ACCC approval is currently voluntary (although if a mandatory foreign investment filing is required, Foreign Investment Review Board (**FIRB**) will not recommend the Treasurer approve a deal unless and until, the ACCC confirms the transaction doesn't raise competition concerns). In addition, the ACCC cannot block a deal that it considers anti-competitive without commencing proceedings in the Federal Court.

There are also no penalties for completing a transaction before the ACCC reviews it. But the ACCC can investigate a transaction after closing; and can bring Court proceedings against merger parties if it believes the transaction will (or is likely to) 'substantially lessen competition' (**SLC**) in a market..

This contrasts with many overseas merger control regimes which are 'mandatory and suspensory' - meaning transactions which meet specified thresholds must be notified to the regulator; and cannot be completed until clearance is received.

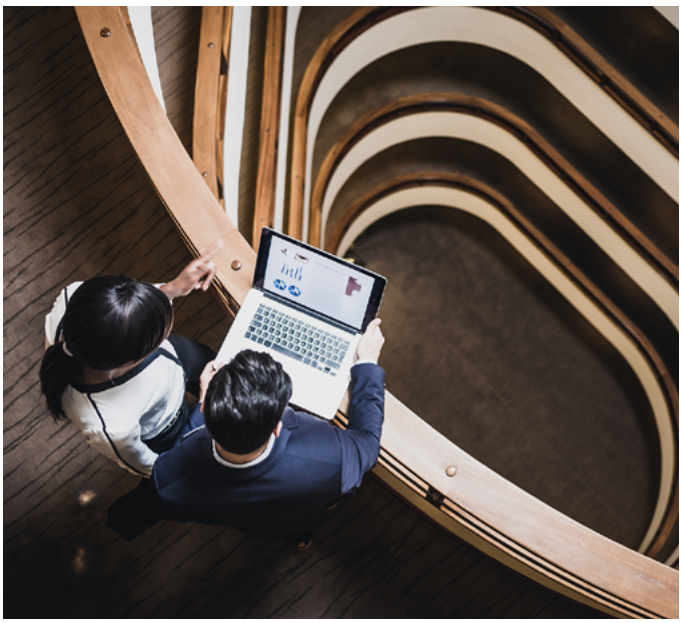
Informal clearance vs authorisation

Currently in Australia, merger parties voluntarily seeking clearance (or requiring it, if FIRB is involved) can take one of two pathways: (1) seek informal merger clearance from the ACCC; or (2) apply for merger authorisation.

The informal merger clearance process is a non-statutory, administrative process which involves the ACCC providing its view of whether a merger would (or would be 'likely' to) SLC. There are no formal timelines or filing requirements under the informal process and clearance is also not legally binding. Nevertheless, the vast majority of transactions use informal clearance in Australia and the process is generally considered to work well.

By contrast, merger authorisation involves a formal statutory and public approval process with specific timeframes, prescribed information requirements and filing fees. An applicant for authorisation must undertake not to complete a transaction until clearance is received (i.e., the regime is suspensory), and the legal test changes so that clearance may only be granted if the ACCC is satisfied that either the merger would not (or would not be likely to) SLC, or the public benefits of the transaction outweigh its detriments.

Because of the onerous and public nature of the application process, formal authorisation has been only sparingly used since it was introduced (there have only been 7 merger authorisation applications since July 2019), but there has been a spike in applications recently including for high-profile transactions such as ANZ's proposed acquisition of Suncorp and the proposed acquisition of Origin by Brookfield.



PROPOSALS FOR REFORM

The ACCC has argued that Australia's merger clearance regime is a global outlier and that reform is needed to - at least - bring Australia into line with other equivalent jurisdictions.

The Treasury consultation paper released late last year lays out 3 options for replacing the existing informal regime. Significantly, all of the options would involve legislative change and the prospect of retaining the existing informal regime is not even canvassed in the paper.

Each of the options would involve moving to a 'suspensory' regime with mandatory types of information that applicants seeking clearance would need to provide the ACCC. Each option would also prescribe the legal test to be applied for clearance and the appeal rights available for parties. And 2 of the options – including the ACCC's preferred path – would introduce mandatory notification requirements (although the "threshold" tests that would trigger notification are yet to be specified).

A visual overview is a helpful way to break down the options and how they compare to existing rules:

	EXISTING INFORMAL REGIME (VOLUNTARY NOTICATION)	OPTION 1 (VOLUNTARY CLEARANCE)	OPTION 2 (MANDATORY NOTIFICATION)	OPTION 3 (MANDATORY CLEARANCE)
NOTIFICATION	Voluntary. Merger parties are not required to seek ACCC clearance. The ACCC can initiate its own review at any time.	Voluntary. Merger parties not required to seek ACCC clearance. The ACCC would have 'call in powers' to review mergers and there would be 'procedural features' to encourage notification.	Mandatory. Mergers above specified thresholds would need to be notified to the ACCC. The ACCC would have 'call in powers' to review mergers below the specified thresholds.	Mandatory. Mergers above specified thresholds would need to be notified to the ACCC. The ACCC would have 'call in powers' to review mergers below the specified thresholds.
NOTIFICATION REQUIREMENTS	No prescribed information requirements for notifications.	Prescribed information requirements for notifications.	Prescribed information requirements for notifications.	Prescribed information requirements for notifications.
SUSPENSION	Non-suspensory. Merger parties are not prohibited from completing acquisition while ACCC completes review.	Suspensory. If merger parties apply for clearance, the acquisition cannot be completed until the ACCC review is completed.	Suspensory. If the thresholds are met, the acquisition cannot be completed until the ACCC review is completed.	Suspensory. If the thresholds are met, the acquisition cannot be completed until the ACCC review is completed.
TEST	Prohibited if likely to substantially lessen competition.	Clearance granted if satisfied that the merger is not likely to substantially lessen competition.	Prohibited if likely to substantially lessen competition.	Clearance granted if satisfied that the merger is not likely to substantially lessen competition or the merger is likely to result in net public benefits.
PRIMARY DECISION	ACCC indicates its views on whether it considers a merger would breach the legal test.	ACCC either grants or refuses clearance.	ACCC indicates its views on whether it considers a merger would breach the legal test.	ACCC either grants or refuses clearance.
EFFECT OF PRIMARY DECISION	No binding legal effect (ACCC or parties need to apply to the Federal Court).	If clearance granted, merger parties receive legal immunity. If clearance denied, merger parties can appeal (see below) or seek to complete the acquisition without ACCC clearance (in which case the ACCC can apply to the Federal Court for an injunction).	No binding legal effect (ACCC or parties need to apply to the Federal Court).	If clearance granted, merger parties receive legal immunity. If clearance denied, the merger is prohibited (subject to appeal rights).
APPEAL RIGHTS	Federal Court. If the ACCC indicates opposition to a merger, parties can either seek a declaration from the Federal Court or seek to complete the acquisition without ACCC clearance (in which case the ACCC can apply to the Federal Court for an injunction).	Australian Competition Tribunal or Federal Court. An ACCC decision to grant or deny clearance would be subject to review by the Australian Competition Tribunal. If clearance was denied, the merger could only be prohibited by a decision of the Federal Court.	Federal Court. If the ACCC indicates opposition to a merger, parties can either seek a declaration from the Federal Court or seek to complete the acquisition without ACCC clearance (in which case the ACCC can apply to the Federal Court for an injunction).	Australian Competition Tribunal. An ACCC decision to grant or deny clearance would be subject to review by the Australian Competition Tribunal.

CHANGES TO THE COMPETITION ASSESSMENT

Aside from the wholesale process reforms, the Treasury consultation paper also includes 3 options to amend the legal test for assessing whether a merger would lead to competitive concerns. Briefly summarised, the options are:

- Option A (Amend the merger factors): Modernise or remove the list of matters that the ACCC may and the court must, consider when assessing the impact of mergers on competition (known as the 'merger factors' in the *Competition and Consumer Act 2010* (Cth).
- Option B (Expand the prohibition): Expand the legal SLC test to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.
- Option C (Include related agreements in assessment): Allow consideration of related agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) to be considered as part of the consideration of the effect of the merger on competition.

All of these options are expected to give the ACCC more grounds to oppose a deal than it can under the current SLC test.

POTENTIAL IMPACTS

These are significant reforms

Each of the proposed reform options would fundamentally change Australia's merger control regime.

To varying degrees, each option would increase the number of mergers that need to be notified (potentially by a great deal under either mandatory option). Each option will also increase the amount of information that clearance applicants need to provide and formally prevent applicants from closing unless and until clearance has been received.

But more fundamentally than just the process changes – in combination with the proposed changes to the assessment of SLC – each of the options would give the ACCC more scope to block proposed transactions, while at the same time limiting the avenues for merger parties to appeal.

How small a deal would have to notify?

The move to a mandatory and suspensory regime would certainly address the ACCC's public concerns about deals not being notified. The question becomes which transactions should be caught up in the regime, which is essentially a question about thresholds that we have not yet seen (see below).

The Assistant Minister for Competition, the Hon Dr Andrew Leigh MP, recently cited research by the Taskforce that analysed 'microdata' which indicated that potentially only 1 in every 3 or 4 mergers in Australia are notified to the ACCC each year.

This is thoughtful research but it should not be surprising or controversial, given the number of small M&A transactions every year that would have no impact on competition. It might even suggest the law works. However, the Minister's citation of this data in the context of merger reform does raise a question about where the line for notification might be drawn under a new regime.

What about broader implications?

There are critical questions about the impact these reforms could have on the level of M&A activity in Australia, to say nothing of the inevitable increase in transaction costs from such deals that will flow from a more regimented regime – especially for transactions that could otherwise self-assess against the need for merger clearance.

Perhaps more importantly though, it is unclear why a new merger control law is the type of microeconomic reform needed to address any of the key issues in the Australian economy at the moment.

KEY DETAILS ARE STILL MISSING

The Treasury consultation paper is the clearest articulation of the potential options for reform that has been released so far, but there is still a lack of important detail about what might be implemented. Looking at mandatory and suspensory clearance regimes overseas, this detail includes:

- The prescribed thresholds for the options with mandatory and suspensory regimes. Typically in overseas jurisdictions, these thresholds are based on the merger parties' turnover/assets and/or the value of the transaction. The actual value of such thresholds – if adopted in Australia – will have a material impact on the number of transactions caught by the new regime.
- What circumstances the ACCC can use any 'call-in powers', which will determine what certainty (if any) merger parties will have in relation to possible ACCC reviews.
- The prescribed timelines for ACCC review, including the consequences if the ACCC fails to make a decision within a timeline and the ability for timelines to be paused or extended.
- The type of information required in a notification and the extent to which the ACCC can reject a notification as incomplete (thereby delaying review timeframes).
- Any simplified procedures for mergers that meet prescribed thresholds but are unlikely to have any competitive effects.
- The level of transparency that will be afforded to submissions to the ACCC (by merger parties and third parties) and to ACCC decisions to grant or deny clearance.
- The extent of appeal processes, including the role of the Australian Competition Tribunal and the ability to rely on new evidence during a review by the Tribunal.

WHAT HAPPENS NEXT?

Treasury is currently reviewing submissions made in response to its consultation paper. The submissions are expected to inform the advice that the recently established Taskforce will provide to Government on whether any changes should be made to Australia's merger rules and processes.

In formulating this advice, the Taskforce will receive detailed input from the Expert Panel that the Government appointed to assist the Taskforce with competition policy reforms over the next 2 years. The Expert Panel is chaired by Dr Kerry Schott and also comprises Productivity Commission Chair Danielle Wood, former UK Office of Fair Trading Chief John Fingleton, antitrust economist John Asker, former ACCC chair Rod Sims, business leader David Gonski and competition lawyer Sharon Henrick.

More generally, the speed and significance of legal change will ultimately come to rest on the Albanese Government's prioritisation of merger reform among the many issues competing for legislative priority.

In announcing the Taskforce, the Federal Treasurer, Dr Jim Chalmers MP, noted that existing competition laws are 'holding Australia back'. But if that is the Government's view, then almost certainly more pressing competition law reforms than a new merger regime are required.

In this context, it is worth noting that issues linked to the cost of living pressures in Australia have continued to dominate the headlines in 2024, with concerns about costs ranging from housing, energy, childcare and even food prices. Such was the concern about the latter that the Government recently announced it has directed the ACCC to conduct a new year-long inquiry into pricing and competition in the supermarket sector. To the extent there are competition (or other) policy reforms that can be explored to address these cost of living issues, it is unlikely that merger reform would (or should) top the list of options.

That said, the case for merger reform seems to be gaining momentum amongst some stakeholders, even with key details yet to be fleshed out and it is fair to expect the questions 'what?', 'when?' and 'why?' to continue to emanate from the competition community, dealmakers and the public. However, what is evident already is that any of the options currently on the table would involve some of the most significant changes ever made to Australia's merger control regime and herald a new clearance landscape for dealmakers and advisors to navigate.

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