

SUSTAINABLE FINANCE AND CORPORATE SUSTAINABILITY DUE DILIGENCE: INTERACTIONS, COMPLEMENTARITIES AND ACCOUNTABILITY LOGICS

ANITA FOERSTER,* INGRID LANDAU** AND MAYLEAH HOUSE***

This article examines accountability logics in two prominent regulatory interventions designed to integrate sustainability into corporate governance frameworks: sustainable finance and mandatory human rights and environmental due diligence. Having emerged in Europe, these interventions are now being considered and/or introduced in other jurisdictions, including Australia, as part of policy responses to global sustainability challenges such as climate change, biodiversity loss and human rights abuses in supply chains. Analysing these reforms through an accountability lens helps capture relationships and power dynamics that may otherwise be overlooked or under-appreciated and contributes to understandings of the likely impacts of these reforms. It also helps reveal differences, convergences, and potential complementarities between these two interventions, as well as variations in their design and implementation, which can inform law and policymaking processes. Drawing on early experiences in Europe, this article offers insights to inform the nature and trajectory of Australia's nascent corporate sustainability project.

I INTRODUCTION

Integrating sustainability into corporate governance frameworks is widely seen to be an essential step in the transition to a sustainable, low-carbon economy,¹ and there is considerable global law and policy reform momentum directed to this end. In the Global North in particular, two distinct but related regulatory approaches have gained prominence: sustainable finance reforms which seek to manage sustainability-related financial risks to business and align private capital flows to

* BA/LLB (Hons) (ANU), PhD (UMelb), Associate Professor, Department of Business Law and Taxation, Monash Business School. Director of Green Lab, Monash Business School.

** BA/LLB (Hons) (ANU), PhD (UMelb), Associate Professor, Department of Business Law and Taxation, Monash Business School.

*** BPsych/LLB (Hons) (QUT), MEnv&Sust (Monash), Research Assistant at Monash University, Former Head of Stewardship at Ethical Partners Funds Management.

1 OECD, *Global Corporate Sustainability Report 2024* (Report, 14 March 2024) <<https://doi.org/10.1787/8416b635-en>>.

address global sustainability challenges such as climate change, biodiversity loss and social inequity; and human rights and environmental due diligence ('HREDD') which seeks to ensure large companies take steps to identify, prevent and mitigate adverse impacts on people and the environment arising from their own activities, the activities of subsidiaries and within supply chains.

The European Union ('EU') is at the forefront of these corporate sustainability governance reforms. It has implemented a raft of ambitious sustainable finance initiatives, including corporate sustainability reporting and a sustainable finance taxonomy designed to support the allocation of private capital to sustainable business activities.² Following the introduction of mandatory HREDD ('mHREDD') in a handful of European jurisdictions,³ the EU has also recently adopted the *CSDDD* that requires member states to establish, monitor and enforce corporate HREDD obligations.⁴ Australia too has begun to take steps to better align the interests of companies and their shareholders with the environment and society. It has initiated its own sustainable finance agenda directed at improving the management of financial risks posed to business entities by climate change and aligning private capital to the goals of the international *Paris Agreement*.⁵ The Australian Government has yet to embrace other elements of the EU's corporate sustainability project, including mHREDD. However, there are rising calls from civil society for it to do so.⁶

These developments reflect evolving societal debates about corporate accountability for social and environmental harms – more specifically, the extent to which, and how, national lawmakers and policymakers should intervene to shape corporate responses to global environmental and social challenges. Both

2 For an overview, see 'Overview of Sustainable Finance', *European Commission* (Web Page) <https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en>.

3 See, eg, *Lov om Virksomhetens Åpenhet og Arbeid med Grunnleggende Menneskerettigheter og Anstendige Arbeidsforhold (Åpenhetsloven)* [Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act)] (Norway) 1 July 2022; *Gesetz über die Unternehmerischen Sorgfaltspflichten in Lieferketten* [Act on Corporate Due Diligence Obligations in Supply Chains] (Germany) 16 July 2021, BGBl I, 2021, 2959; *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)* [Law No 2017-399 of 27 March 2017 Relating to the Duty of Care of Parent Companies and Contracting Companies (1)] (France) JO, 28 March 2017 ('*French Corporate Duty of Vigilance Law*').

4 *Directive (EU) 2024/1760 of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859* [2024] OJ L 2024/1760 ('*CSDDD*'). On 26 February 2025, the European Commission proposed an 'Omnibus' package to simplify EU legislation in the field of sustainability. This package proposes changes to EU corporate sustainable finance reporting obligations and the *CSDDD* (n 4) with respect to scope and substantive requirements. At the time of writing this article, these reforms are still being debated within the EU legislative system. As the precise nature of these changes remains unclear, this article focuses on the original text of the relevant EU instruments.

5 Treasury (Cth), *Sustainable Finance Roadmap* (Report, 19 June 2024) ('*Treasury Roadmap*'); *Paris Agreement*, opened for signature 22 April 2016, 3156 UNTS 79 (entered into force 4 November 2016).

6 Be Slavery Free, Submission No 21 to Attorney-General's Department (Cth), *Review of Australia's Modern Slavery Act 2018* (2022); 'Australian Government Must Introduce Human Rights Due Diligence Obligations for Businesses', *Walk Free* (online, 24 April 2024) <<https://www.walkfree.org/news/2024/australian-government-must-introduce-human-rights-due-diligence-obligations-for-businesses/>> ('*Government Must Introduce Due Diligence Obligations*').

sustainable finance and mHREDD are directed at reorienting corporate decision-making towards more socially and environmentally responsible behaviour. Yet to date, examination of the two regulatory approaches has tended to play out in different bodies of academic literature and different areas of policy and practice.⁷ Sustainable finance has been an object of debate and analysis in the climate law and regulation literature,⁸ and in the context of critical corporate law and governance.⁹ On the other hand, HREDD has largely been discussed within business and human rights¹⁰ and, more recently, regulation and governance literature.¹¹

-
- 7 Cf Charlotte Villiers, 'New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity' (2022) 13(4) *European Journal of Risk Regulation* 548 <<https://doi.org/10.1017/err.2022.25>>.
- 8 See, eg, Megan Bowman, 'Sustainable Finance and Implementing the *Paris Agreement*: The Key Role of Jurisdictional Legal and Regulatory Architecture' in René Smits (ed), *Sustainable Finance and Climate Change: Law and Regulation* (Edward Elgar Publishing, 2024) 19 <<https://doi.org/10.4337/9781800377288.00012>>; Megan Bowman and Daniel Wiseman, 'Finance Actors and Climate-Related Disclosure Regulation: Logic, Limits, and Emerging Accountability' in Cameron Holley, Liam Phelan and Clifford Shearing (eds), *Criminology and Climate: Insurance, Finance and the Regulation of Harmscapes* (Routledge, 2021) 153 <<https://doi.org/10.4324/9780429201172-10>>; Darren Sinclair, 'Speak Loudly and Carry a Small Stick: Prudential Regulation and the Climate, Energy, and Finance Nexus' in Cameron Holley, Liam Phelan and Clifford Shearing (eds), *Criminology and Climate: Insurance, Finance and the Regulation of Harmscapes* (Routledge, 2021) 47 <<https://doi.org/10.4324/9780429201172-5>>; Neil Gunningham, 'Roadmaps and Regulation: Sustainable Finance in Australia' (2020) 37(4) *Environmental and Planning Law Journal* 459 ('Roadmaps and Regulation'); Neil Gunningham, 'Sustainable Finance in Australia: Compliance, Enforcement and Surrogate Regulation' (2020) 37(5) *Environmental and Planning Law Journal* 585.
- 9 Christine Parker and Fiona Haines, 'Reconstituting the Contemporary Corporation through Ecologically Responsive Regulation' (2023) 39(6) *Company and Securities Law Journal* 316 ('Reconstituting the Contemporary Corporation'); Christine Parker, 'From Corporate Governance to Ecological Regulation: Flipping the Regulatory Story on Climate Change' (UCL Research Paper Series No 10/2022, Faculty of Laws, University College London, 2022) <<https://doi.org/10.2139/ssrn.4184911>>; Andrew Johnston and Beate Sjøfjell, 'The EU's Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing, 2020) 396 <<https://doi.org/10.4337/9781788970679.00036>>.
- 10 See, eg, Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36(2) *Leiden Journal of International Law* 389 <<https://doi.org/10.1017/S0922156522000802>>; Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68(3) *Netherlands International Law Review* 455 <<https://doi.org/10.1007/s40802-021-00201-x>>; Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6(2) *Business and Human Rights Journal* 241 <<https://doi.org/10.1017/bhj.2021.7>>; Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges since Its Adoption' (2021) 6(1) *Business and Human Rights Journal* 141 <<https://doi.org/10.1017/bhj.2020.30>>; Nicolas Bueno and Christine Kaufmann, 'The Swiss Human Rights Due Diligence Legislation: Between Law and Politics' (2021) 6(3) *Business and Human Rights Journal* 542 <<https://doi.org/10.1017/bhj.2021.42>>; Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6(3) *Business and Human Rights Journal* 550 <<https://doi.org/10.1017/bhj.2021.43>>.
- 11 See, eg, Maria-Therese Gustafsson, Almut Schilling-Vacaflor and Andrea Lenschow, 'The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?' (2023) 17(4) *Regulation and Governance* 853 <<https://doi.org/10.1111/rego.12526>> ('Supply Chain Regulation Politics') and other articles in that special issue.

This article seeks to bridge this different literature and, in so doing, contribute new perspectives to law, policymaking and scholarship on corporate sustainability governance. It also seeks to contextualise and evaluate Australia's nascent corporate sustainability project in light of European developments. It does this by examining how sustainable finance and mHREDD conceptualise and operationalise corporate accountability for social and environmental harms. This is important for several reasons.

First and most simply, the absence of sufficient accountability of corporate actors for harmful environmental and social impacts is widely identified as a key contributor to global environmental and social problems like climate change, biodiversity loss and human rights abuses in international supply chains.¹² National climate and environmental law and human rights protection regimes struggle to effectively address the cumulative, complex nature of these problems, and political realities mean that these regimes are often compromised, procedural, reactive and poorly implemented, resulting in weak accountability.¹³ It is also widely recognised that national regulatory regimes lack adequate mechanisms through which to hold companies to account for the negative impacts caused by their subsidiaries or suppliers in other jurisdictions.¹⁴ The language of 'accountability'¹⁵ has featured increasingly prominently in calls for sustainability governance reforms both within Australia and globally.¹⁶ In this context, sustainable finance (and to a lesser extent, mHREDD) appear to have captured the attention of lawmakers and policymakers as they constitute relatively politically palatable approaches that steer, rather than constrain, the exercise of corporate power. These approaches are also seen as largely compatible with economic objectives.

-
- 12 Richard Welford, *Environmental Strategy and Sustainable Development: The Corporate Challenge for the Twenty-First Century* (Routledge, 1995); Elisa Morgera, *Corporate Environmental Accountability in International Law* (Oxford University Press, 2nd ed, 2020) ch 1 <<https://doi.org/10.1093/oso/9780198738046.001.0001>>.
 - 13 The recent independent statutory review of Australia's primary environmental law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), provides a salient example: Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020). More broadly, on the failings of environmental regulation, see, eg, Christine Parker and Fiona Haines, 'An Ecological Approach to Regulatory Studies?' (2018) 45(1) *Journal of Law and Society* 136 <<https://doi.org/10.1111/jols.12083>>; Fiona Haines and Christine Parker, 'Moving towards Ecological Regulation: The Role of Criminalisation' in Cameron Holley and Clifford Shearing (eds), *Criminology and the Anthropocene* (Routledge, 2018) 81 <<https://doi.org/10.4324/9781315541938-4>>. On the limits of corporate accountability for adverse human rights impacts in the Australian context, see, eg, Lauren Zanetti, Sarah McGrath and Justine Nolan, Australian Human Rights Commission and UNSW Australian Human Rights Institute, *At the Crossroads: 10 Years of Implementing the UN Guiding Principles on Business and Human Rights in Australia* (Report, September 2021); Nia Emmanouil and Carla Chan Unger, RMIT Business and Human Rights Centre, *First Peoples and Land Justice Issues in Australia: Addressing Deficits in Corporate Accountability* (Report, 17 March 2021).
 - 14 Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11) 855. In the Australian context, see, eg, Human Rights Law Centre, *Nowhere to Turn: Addressing Australian Corporate Abuses Overseas* (Report, 3 January 2019) ('*Nowhere to Turn*').
 - 15 Mathias Koenig-Archibugi, 'Accountability in Transnational Relations: How Distinctive Is It?' (2010) 33(5) *West European Politics* 1142, 1142 <<https://doi.org/10.1080/01402382.2010.486142>>.
 - 16 See, eg, World Benchmarking Alliance, 'Corporate Accountability: Closing the Gap in Pursuit of Sustainable Development' (White Paper, September 2023).

Second, accountability is a helpful analytical lens through which to capture relationships and power dynamics that may otherwise be overlooked or underappreciated when undertaking legal and policy analysis of these types of reforms, but which are critical in understanding their potential contribution to achieving sustainability objectives. For example, sustainable finance reforms build on well-established accountability mechanisms housed in corporate law, intended to protect the financial interests of shareholders and other market participants, and to foster stable and efficient markets. Yet depending on their design, these reforms can also prompt companies to address the social and environmental impacts of their direct operations and value chains as part of their risk management. They can also open pathways to allocate forward-looking responsibility to business entities to contribute their fair share to society's response to climate change and other sustainability challenges in line with global goals.¹⁷ In contrast, HREDD focuses on preventing and minimising social and environmental harms caused, or contributed to, by businesses through their supply chains. As such, business entities are potentially accountable not only to shareholders and other market participants, but to a diverse body of stakeholders including those in other jurisdictions. While mHREDD laws are intended to incentivise the prevention and minimisation of future harms, they can also provide accountability mechanisms to redress actual harms, including via civil liability claims for victims. Initial steps have been taken to consider corporate accountability dynamics inherent in mHREDD¹⁸ and sustainable finance.¹⁹ However, as these reforms take shape and gain prominence, their underpinning assumptions deserve further interrogation.

Finally, from a practical perspective, using an accountability lens helps to uncover the differences, the convergences and the potential complementarity between sustainable finance reforms and mHREDD, as well as different approaches to their design and implementation which can inform future lawmaking and policymaking in this area. As noted above, with a few exceptions, discussions of these interventions have tended to run on parallel tracks. We argue that there is value in analysing these interventions in tandem, as complementary and related parts of a multifaceted strategy to strengthen corporate sustainability governance. To this end, given recent European leadership on both regulatory fronts, there is also an opportunity to draw on European approaches to inform ongoing developments in Australia.

This article is organised in six Parts. Part II introduces the conceptual lens that will be used to analyse sustainable finance and mHREDD, which considers how accountability relationships are scoped and allocated, and how accountability is secured through the articulation of standards and their enforcement. Parts III and IV explore the key instruments and regulatory approaches within sustainable

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

18 See, eg, Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11); Almut Schilling-Vacaflor and Maria-Therese Gustafsson, 'Towards More Sustainable Global Supply Chains? Company Compliance with New Human Rights and Environmental Due Diligence Laws' (2024) 33(3) *Environmental Politics* 422 <<https://doi.org/10.1080/09644016.2023.2221983>>.

19 See, eg, Bowman and Wiseman (n 8).

finance reforms and HREDD laws and their underpinning theories of change, as implemented in the EU and Australia. The intent is to provide a macro-scale overview as a foundation for applying the corporate accountability lens in Part V to identify strengths, weaknesses and key areas of convergence and divergence between sustainable finance and mHREDD. Drawing on Europe's experience to date, we highlight measures which could strengthen Australia's nascent corporate sustainability project. In Part VI, we offer concluding observations as to the interaction and complementarity of sustainable finance and mHREDD as regulatory interventions to strengthen corporate sustainability governance.

II CORPORATE ACCOUNTABILITY IN SUSTAINABILITY GOVERNANCE

Before proceeding to explore the corporate accountability dynamics inherent in sustainable finance and mHREDD, it is necessary to distil some foundational concepts associated with accountability. At its core, the term denotes a moral or institutional relationship between different actors, in which one actor or group of actors (commonly referred to as 'power wielders') has an obligation to explain and justify its conduct, and another actor or group of actors (commonly referred to as 'accountability holders') has the power or authority to pose questions, pass judgement and impose consequences.²⁰ Accountability mechanisms are ostensibly designed for the protection and advancement of the interests of certain groups (commonly referred to as 'beneficiaries') or to meet related policy objectives. The beneficiaries of an accountability mechanism are often primary accountability holders. However other actors (for example, regulators and civil society) may also be empowered to hold power wielders to account on behalf of purported beneficiaries. This latter type of accountability holders are referred to by Mathias Koenig-Archibugi and Kate Macdonald as 'proxies' or 'surrogate accountability' holders.²¹

Accountability can be understood as a normative concept and as a social mechanism.²² As a normative concept, it is used to evaluate actors' behaviour, with being answerable for those behaviours seen as a desirable outcome and virtue. As a social mechanism, accountability refers to the institutional arrangements through which one actor is held accountable to others for their decisions and actions. Accountability mechanisms can take different forms and involve public and private actors in different ways.²³ In a corporate sustainability context:

- supervisory accountability mechanisms may involve state agencies overseeing the risk management activities of companies;

20 Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450 <<https://doi.org/10.1111/j.1468-0386.2007.00378.x>>.

21 Mathias Koenig-Archibugi and Kate Macdonald, 'Accountability-by-Proxy in Transnational Non-state Governance' (2013) 26(3) *Governance* 499, 500–2 <<https://doi.org/10.1111/j.1468-0491.2012.01609.x>>.

22 Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33(5) *Western European Politics* 946 <<https://doi.org/10.1080/01402382.2010.486119>>.

23 Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29, 35–7 <<https://doi.org/10.1017/S0003055405051476>>.

- fiscal accountability mechanisms may tie public funds to certain social and environmental standards;
- legal accountability mechanisms establish formal rules for corporate behaviour, with sanctions for breach, and may include liability for adverse social and environmental impacts;
- market accountability mechanisms involve market participants such as investors making capital allocation or stewardship decisions based on corporate sustainability performance; and
- reputational accountability mechanisms involve civil society and other actors exerting pressure on company behaviour through public advocacy and other strategies.²⁴

Elucidating accountability relationships and dynamics in specific contexts can be challenging. Accountability norms infuse, and indeed may drive, many regulatory interventions. Yet, law and policymakers often do not directly use accountability frames or language, thus leaving it open to interpretation as to, for example, who is accountable to whom and for what, and/or who (or what) is intended to be the ultimate beneficiary of the intervention. It is also the case that accountability categories and terms are fluid and do not neatly map onto the messy and complex relationships that arise in practice.²⁵

To help unpack how sustainable finance and mHREDD conceptualise and operationalise corporate accountability for social and environmental harms, the analysis that follows draws on Jerry Mashaw's six basic accountability questions:

*[W]ho is liable or accountable to whom; what are they liable to be called to account for; through what processes accountability is to be assured; by what standards the putatively accountable behaviour is to be judged; and, what the potential effects are of finding that those standards have been breached.*²⁶

We use these questions to explore if and how sustainable finance and mHREDD hold companies (as power wielders) to account for social and environmental harms. However, in this article we also seek to prompt reflection on the choices that policymakers face when selecting and designing sustainability governance interventions. To draw on the language of accountability, this involves going beyond consideration of the extent to which power wielders are answerable for their actions within the context of a specific accountability regime ('second-tier' accountability) to also consider the policymaking processes that shape the meaning, purpose and institutional design of the accountability regime in the first place ('first-tier' accountability).²⁷ Lawmakers and policymakers make design choices

24 This example draws on the seven types of accountability mechanisms identified by Ruth Grant and Robert Keohane: *ibid.*

25 Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation and Governance* 137, 150–1 <<https://doi.org/10.1111/j.1748-5991.2008.00034.x>>; Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11) 857–8.

26 Jerry L Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in Michael W Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115, 118 (emphasis in original).

27 Teresa Kramarz and Susan Park, 'Accountability in Global Environmental Governance: A Meaningful Tool for Action?' (2016) 16(2) *Global Environmental Politics* 1 <https://doi.org/10.1162/GLEP_a_00349>.

that are shaped by biases, politics and societal power dynamics.²⁸ They choose, for example, the extent to which they privilege or subordinate collective social and environmental goals vis-a-vis competing economic goals and powerful private interests.²⁹ The two tiers of accountability are intrinsically linked as the scope and institutional design of a regulatory intervention will shape its impact in practice. Recognition of both accountability tiers reminds us that accountability is a deeply political process, and that the hardening of corporate social and environmental accountability through new regulatory mechanisms is a dynamic process that occurs through power struggles within society.³⁰

III SUSTAINABLE FINANCE REFORMS

A International Developments in Sustainable Finance

Sustainable finance agendas have emerged internationally as a package of reforms targeting two overarching objectives: managing the financial risks posed to companies and other market actors from climate change, biodiversity loss and other sustainability issues; and aligning private capital with relevant international sustainability goals to help manage the broader systemic risks posed by these problems. As such, these reform agendas typically reference the goals of the international *Paris Agreement*: to hold global warming 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,³¹ and to achieve net-zero emissions globally by 2050.³² Increasingly, they also reference other key international instruments such as the 2023 *Kunming-Montreal Global Biodiversity Framework* (negotiated under the international *Convention on Biological Diversity*), through which nation states have committed inter alia to halt species extinctions to ensure at least 30% of terrestrial, inland water and coastal and marine ecosystems are effectively conserved and managed, and at least 30% of degraded systems are under effective restoration.³³ While social sustainability issues like inequality, inclusiveness, labour relations and human rights are certainly

28 Ibid. See also Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11); Maria-Therese Gustafsson, Almut Schilling-Vacaflor and Andrea Lenschow, 'Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany' (2023) 17(4) *Regulation and Governance* 891 <<https://doi.org/10.1111/rego.12498>>; Genevieve LeBaron and Andreas Rühmkorf, 'The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK *Modern Slavery Act*' (2019) 17(3) *Socio-Economic Review* 709 <<https://doi.org/10.1093/ser/mwx047>>.

29 Kramarz and Park (n 27).

30 Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11) 855.

31 *Paris Agreement* (n 5) art 2(1)(a).

32 Ibid art 4(1). This article provides that state parties will aim to rapidly reduce greenhouse gas emissions to reach 'a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century'.

33 *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity*, UN Doc CBD/COP/DEC/15/4 (19 December 2022) annex ('*Kunming-Montreal Global Biodiversity Framework*') para 12–13.

covered in sustainable finance measures, these tend to be less developed or less prominent than environmental issues.³⁴

The core measures within sustainable finance reforms are directed at enhancing transparency and market accountability. They build on underlying and well-established mechanisms of corporate law – namely risk disclosure obligations and the fiduciary duties of company directors – which serve to hold companies and their directors legally accountable to select market stakeholders for the robust and transparent management of material financial risks to company interests. The underpinning theory of change is that by clarifying the financial materiality of sustainability risks and enhancing transparency about corporate risk exposure and management, companies will be incentivised to implement robust risk management practices internally, and market stakeholders – particularly investors – can allocate private capital to companies which undertake their business activities in line with relevant global and national sustainability goals. This, in turn, should help to shift business practices away from socially and environmentally harmful activities and harness private sector resources to help address climate change, biodiversity loss and other sustainability challenges.

Introduced in 2021, the EU's sustainable finance package³⁵ represents the first comprehensive, and in many ways, the most ambitious globally, sustainable finance agenda. The EU reform package, which has been developed alongside the mHREDD framework (discussed further in Part IV), includes the following core measures:

- *mandatory corporate sustainability reporting* addressing a range of sustainability issues including climate change, biodiversity and ecosystems, workers in the value chain, and resource use and a circular economy;³⁶
- *mandatory corporate transition planning* requiring select companies to align their risk management with relevant international and EU climate change and biodiversity targets;³⁷

34 For example, the United Kingdom ('UK') approach prioritises 'Green Finance' with a focus on addressing climate change and biodiversity risks whilst Canada's approach is currently limited in scope to climate change: see HM Government (UK), 'Mobilising Green Investment: 2023 Green Finance Strategy' (Strategy Paper, 2023) ('Mobilising Green Investment'); Sustainable Finance Action Council, *Taxonomy Roadmap Report: Mobilizing Finance for Sustainable Growth by Defining Green and Transition Investments* (Report, September 2022) ('*Taxonomy Roadmap Report*').

35 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties' (Communication No COM(2021) 188 Final, 21 April 2021).

36 The standards developed by the European Financial Reporting Advisory Group and adopted in July 2023 include the ESRS 1 (General Requirements), ESRS 2 (General Disclosures), ESRS E1 (Climate Change), ESRS E2 (Pollution), ESRS E3 (Water and Marine Resources), ESRS E4 (Biodiversity and Ecosystems), ESRS E5 (Resource Use and Circular Economy), ESRS S1 (Own Workforce), ESRS S2 (Workers in the Value Chain), ESRS S3 (Affected Communities), ESRS S4 (Consumers and End-Users), and ESRS G1 (Business Conduct): *Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 Supplementing Directive 2013/34/EU of the European Parliament and of the Council as Regards Sustainability Reporting Standards* [2023] OJ L 2023/2772, annex I ('*EU Regulation 2023/2772 Annex*').

37 Ibid 75–6 (ESRS E1-1), 135–6 (ESRS E4-1); *CSDDD* (n 4) art 22.

- a *sustainable finance taxonomy* to classify the extent to which business activities align with sustainability criteria so as to guide investment decisions, with associated reporting obligations on investors and companies;³⁸ and
- *financial product labelling* rules designed to substantiate claims of sustainability and alignment to global sustainability goals for financial products such as superannuation and green bonds.³⁹

The EU agenda has paved the way for similar reforms in other states and unions such as the United Kingdom ('UK'), Canada, the Association of Southeast Asian Nations, and most recently, Australia.⁴⁰ As explored further below, compared to the EU, Australia's reform agenda is less comprehensively scoped and less ambitious in its approach to corporate accountability.

B Australia's Sustainable Finance Agenda

Australia's sustainable finance roadmap was released by the Commonwealth Government in June 2024.⁴¹ It is organised around three pillars: pillar 1 aims to improve transparency on climate and sustainability;⁴² pillar 2 seeks to build financial system capabilities;⁴³ and pillar 3 demonstrates government leadership and engagement.⁴⁴ The roadmap takes a climate-first approach, but signals that the agenda will be broadened to encompass other sustainability issues like biodiversity loss in the future.⁴⁵

In this section, we explore how the transparency measures, set out under pillar 1, build on underlying market accountability mechanisms in corporate law (risk disclosure obligations and directors' duties), reflecting on their potential to enhance corporate accountability for social and environmental harms.

38 *Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment and Amending Regulation (EU) 2019/2088* [2020] OJ L 198/13 ('Sustainable Taxonomy Regulation').

39 *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector* [2019] OJ L 317/1, arts 8–9.

40 'Mobilising Green Investment' (n 34); *Taxonomy Roadmap Report* (n 34); ASEAN Taxonomy Board, 'ASEAN Taxonomy for Sustainable Finance: Version 3' (Policy Paper, 20 December 2024).

41 *Treasury Roadmap* (n 5).

42 The government's priorities under this pillar include: (1) implementing climate-related financial disclosures; (2) developing the Australian Sustainable Finance Taxonomy; (3) supporting credible net zero transition planning; and (4) developing sustainable investment product labels: *ibid* 2–8.

43 The priorities for the Council of Financial Regulators under this pillar include: (1) enhancing market supervision and enforcement; (2) identifying and responding to systemic financial risks; (3) addressing data and analytical challenges; and (4) ensuring fit for purpose regulatory frameworks: *ibid* 9–12.

44 The government's priorities under this pillar include: (1) issuing Australian sovereign green bonds; and (2) stepping up Australia's international engagement: *ibid* 13–14.

45 *Ibid* 1, 5.

1 Underlying Corporate Law Accountability Mechanisms in Australia

(a) Risk Disclosure

One of the central functions of corporate law is to ensure that adequate information on the financial position of companies is provided to market stakeholders to inform their decision-making and capital allocation. The *Corporations Act 2001* (Cth) (*‘Corporations Act’*) requires that all publicly listed companies and large proprietary companies⁴⁶ disclose financial information material to existing and potential investors, lenders and other creditors in the annual report.⁴⁷ Company directors (and auditors) must attest that the financial statements accord with prescribed accounting standards, including that no material information is omitted or misstated, and that they present a true and fair representation of the company’s financial position and performance.⁴⁸ Directors must also include a report reviewing the company’s operations and financial results, details of significant changes in its state of affairs and any other matter or circumstance that has arisen that has or may significantly affect the company’s operations, results or state of affairs in future financial years.⁴⁹

Conduct which is misleading or deceptive, or which is likely to mislead or deceive, is expressly prohibited.⁵⁰ Any representations made about future matters which lack a reasonable basis will be taken to be misleading.⁵¹ Where there has been a failure to disclose, or misleading or deceptive disclosure, the Australian Securities and Investment Commission (*‘ASIC’*) has a range of powers and enforcement options available, and serious penalties and sanctions can apply to companies, their directors and auditors.⁵² Company shareholders can also seek a declaration that a breach has occurred and/or an injunction to prevent future breaches.⁵³

Prior to the introduction of Australia’s sustainable finance reforms, the *Corporations Act* did not explicitly mandate reporting on sustainability matters and

46 A proprietary company is considered large if the company and any of the entities it controls satisfy two of the following criteria: (1) they have a consolidated revenue of \$25 million or more in the relevant financial year; (2) the value of their consolidated gross assets is \$12.5 million or more at the end of the financial year; or (3) they have 50 or more employees at the end of the financial year: see *Corporations Act 2001* (Cth) s 45A(3) (*‘Corporations Act’*).

47 Ibid ss 292, 295; Australian Accounting Standards Board, ‘Amendments to Australian Accounting Standards: Definition of Material’ (AASB Standard No AASB 2018–7, December 2018) (*‘AASB Definition of Material’*); Australian Accounting Standards Board, ‘Presentation of Financial Statements’ (Compiled AASB Standard No AASB 101, 30 June 2021) 6–8 [7].

48 *Corporations Act* (n 46) ss 295–7.

49 Ibid s 299(1). Listed companies have a further obligation to disclose an operating and financial review containing information that would enable shareholders to make informed assessments of the company’s operations, financial position, business strategies and prospects in future financial years: at s 299A(1).

50 Ibid s 1041H. There are similar provisions under the *Australian Consumer Law: Competition and Consumer Act 2010* (Cth) sch 2 s 18 (*‘Australian Consumer Law’*).

51 *Corporations Act* (n 46) s 769C.

52 Ibid ss 674, 1311, 1317E.

53 See, eg, Guy Abrahams, ‘Concise Statement’, Submission in *Abrahams v Commonwealth Bank of Australia*, VID879/2017, 8 August 2017, 5 [20] (*‘Abrahams Submission’*). Shareholders can also bring claims for compensation from the company for losses suffered because of misleading disclosure, either as individuals or as a class of shareholders under Australia’s securities class action regime: *Federal Court of Australia Act 1976* (Cth) pt IVA.

there were no explicit legal requirements to provide sustainability disclosures in a particular format.⁵⁴ However, regulatory guidance recognised that environmental and social matters (particularly climate change) *could* pose material risks to companies' financial performance, and therefore, companies may need to report on how climate change impacted their business model and financial position.⁵⁵ Further, regulators urged companies to follow the recommendations of the Taskforce on Climate-Related Financial Disclosures ('TCFD'),⁵⁶ a voluntary framework for climate risk disclosure and management.⁵⁷ While there was wide uptake of the TCFD standard across the Australian market,⁵⁸ the quality of reporting against this standard was highly variable,⁵⁹ with persistent problems of under-reporting of climate risk in the financial statements,⁶⁰ and inconsistent use of metrics and targets inhibiting monitoring of climate risk management over time and between comparable entities.⁶¹

In recent years, activist shareholders and corporate regulators have brought actions to enforce disclosure obligations as they apply to sustainability risks. For example, *Abrahams v Commonwealth Bank of Australia* involved retail investors seeking a declaration that the Commonwealth Bank of Australia had failed to disclose information about climate-related financial risks relevant to the bank's business, and an injunction to restrain continual reporting failures.⁶² Even though

54 Note, however, that the Australian Securities Exchange ('ASX') Corporate Governance Principles and Recommendations recommended that listed companies should disclose material exposures to environmental and social risks (being negative consequences to the business if its activities adversely affect the environment or society, or are affected by such environmental and societal changes) and how it manages or intends to manage such risk in its annual report and a separate cross-reference sustainability report: see ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations: 4th Edition' (Recommendations, February 2019).

55 Australian Accounting Standards Board and Auditing and Assurance Standards Board, *Climate-Related and Other Emerging Risks Disclosures: Assessing Financial Statement Materiality Using AASB/IASB Practice Statement 2* (Report, April 2019) ('*Assessing Financial Statement Materiality*'); Australian Securities & Investments Commission, 'Effective Disclosure in an Operating and Financial Review' (Regulatory Guide No 247, August 2019) 20 [RG 247.64]–[RG247.66] ('Effective Disclosure').

56 Task Force on Climate-Related Financial Disclosures, *Recommendations of the Taskforce on Climate-Related Financial Disclosures* (Final Report, June 2017) ('*Taskforce Recommendations*').

57 See, eg, 'Effective Disclosure' (n 55) 20 [RG 247.66].

58 KPMG, 'Status of Australian Sustainability Reporting Trends' (Reporting Survey Update, June 2023); Australian Council of Superannuation Investors, *Promises, Pathways and Performance: Climate Change Disclosure in the ASX200* (Report, July 2022) 6 ('*Promises, Pathways and Performance*').

59 Task Force on Climate-Related Financial Disclosures, *Task Force on Climate-Related Financial Disclosures: 2021 Status Report* (Report, October 2021); Investor Group on Climate Change, CDP and Principles for Responsible Investment, 'Confusion to Clarity: A Plan for Mandatory TCFD-Aligned Disclosure in Australia' (Paper, June 2021) ('Confusion to Clarity'); Luisa Unda and Anita Foerster, 'Climate Risk Disclosure, Compliance and Regulatory Drivers: A Textual Tone Analysis' (2022) 39(1) *Company and Securities Law Journal* 47; Anita Foerster and Michael Spencer, 'Corporate Net Zero Pledges: A Triumph of Private Climate Regulation or More Greenwash?' (2023) 32(1) *Griffith Law Review* 110 <<https://doi.org/10.1080/10383441.2023.2210450>>.

60 *Assessing Financial Statement Materiality* (n 55).

61 *Promises, Pathways and Performance* (n 58); 'Confusion to Clarity' (n 59) 4.

62 *Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, VID879/2017, commenced 8 August 2017). The matter was settled before trial, but see the substance of the requested declaration: 'Abrahams Submission' (n 53) 4–5.

it was settled before trial, this case helped to establish the potential materiality of climate change and the resulting legal obligation to disclose. More recently, ASIC, shareholders and customers have sought to hold companies accountable for sustainability disclosures that are misleading or deceptive, or likely to mislead or deceive.⁶³ Increasing their supervision of sustainability risk disclosures, ASIC has issued infringement notices to energy companies over allegedly factually incorrect net zero and carbon neutrality statements, and raised concerns with mining companies over statements in their prospectuses, websites, investor presentations and other disclosures that their projects were ‘low carbon’.⁶⁴ Meanwhile, shareholder groups and customers have begun litigation to challenge alleged greenwashing by electricity providers and oil producers over claims in their marketing and climate change reports.⁶⁵ For example, in the ongoing matter of *Australasian Centre for Corporate Responsibility v Santos*,⁶⁶ the Australasian Centre for Corporate Responsibility (‘ACCR’) alleges that statements made by Santos in their 2020 annual report, 2020 ‘Investor Day’ briefing and 2021 *Climate Change Report* are misleading and deceptive and lack a reasonable basis.⁶⁷ At issue are statements that Santos has a clear and credible pathway to achieve its emissions reduction targets, and that natural gas and hydrogen produced from natural gas with carbon capture and storage (‘CCS’) are ‘clean’ and ‘zero emissions’.⁶⁸ ACCR argues that Santos failed to disclose that its planned expansion of oil and gas extraction beyond 2025 will increase its overall emissions and that its net-zero plans depend on a range of undisclosed, unreasonable assumptions, including in relation to the viability of CCS technology.⁶⁹

With their focus on financial risks posed to companies, the disclosure obligations outlined here create weak and indirect incentives for companies to address harmful social and environmental practices.⁷⁰ Where companies have

63 *Corporations Act* (n 46) s 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA (‘ASIC Act’); *Australian Consumer Law* (n 50).

64 Australian Securities & Investments Commission, *ASIC’s Recent Greenwashing Interventions* (Report No 763, May 2023).

65 Australasian Centre for Corporate Responsibility, ‘Australasian Centre for Corporate Responsibility Updates Case against Santos in Federal Court’ (Media Release, 26 June 2023) <<https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-updates-case-against-santos-in-federal-court/>> (‘ACCR Santos Case Update’); Parents for Climate, ‘Further Amended Statement of Claim’, Submission in *Parents for Climate Ltd v Energy Australia Pty Ltd*, NSD833/2023, 6 June 2024.

66 *Australasian Centre for Corporate Responsibility v Santos* (Federal Court of Australia, NSD858/2021, 25 August 2021); ‘ACCR Santos Case Update’ (n 65).

67 ‘World-First Federal Court Case over Santos’ ‘Clean Energy’ and Net Zero Claims’, *Environmental Defenders Office* (Web Page, 26 August 2021) <<https://www.edo.org.au/2021/08/26/world-first-federal-court-case-over-santos-clean-energy-net-zero-claims/>>; Australasian Centre for Corporate Responsibility, ‘Australasian Centre for Corporate Responsibility Expands Landmark Federal Court Case against Santos’ (Media Release, 25 August 2022) <<https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-expands-landmark-federal-court-case-against-santos/>> (‘ACCR Expands Case against Santos’).

68 ‘ACCR Expands Case against Santos’ (n 67).

69 ‘ACCR Santos Case Update’ (n 65).

70 Charlotte Villiers and Jukka Mähönen, ‘Accounting, Auditing, and Reporting: Supporting or Obstructing the Sustainable Companies Objectives?’ in Beate Sjäffell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 175, 213–14 <<https://doi.org/10.1017/CBO9781107337978.007>>.

already set environmental or social objectives (eg, net zero emissions targets), the threat of potential enforcement over misleading and deceptive conduct might motivate certain company directors to adjust resourcing and accelerate their strategies and actions to achieve those targets. Conversely, there is a demonstrated risk that companies will avoid setting or communicating environmental or social objectives to minimise the likelihood of being subject to enforcement action.⁷¹

(b) *Directors' Duties*

Company directors bear ultimate responsibility and authority for their companies' strategic direction and business activities,⁷² and their decisions can have profound consequences not only for shareholders, employees and creditors, but for broader society.⁷³ The *Corporations Act* sets out the legal duties that apply to their office, powers and functions, including a duty for directors to exercise their powers with due care and diligence,⁷⁴ as well as to act in good faith in the best interests of the corporation and for a proper purpose.⁷⁵

These fiduciary duties do not explicitly require directors to prevent or otherwise address adverse social and environmental impacts associated with their business activities. The duty of care and diligence requires directors to be adequately informed of foreseeable risks to their company and to take reasonable steps to address these risks.⁷⁶ Although not tested in court, there is broad consensus that as part of this duty, directors must inform themselves of how risks to the company stemming from climate change could materialise.⁷⁷ Similar consensus

71 Joe Longo, 'ASIC Chair's AFR ESG Summit Speech' (Speech, AFR Environmental, Social, and Governance Summit, 5 June 2023) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-chair-s-af-eg-summit-speech/>>.

72 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ); Marco Minciullo, *Corporate Governance and Sustainability: The Role of the Board of Directors* (Palgrave Macmillan, 2019) 14, 29–30 <<https://doi.org/10.1007/978-3-030-18885-6>>.

73 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 297 (Middleton J).

74 *Corporations Act* (n 46) s 180(1). This duty is also derived from common law.

75 *Ibid* s 181(1). This duty is also derived from common law.

76 For a review of the relevant case law see Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Memorandum of Opinion, Centre for Policy Development and Future Business Council, 7 October 2016) 6–16 ('Hutley Legal Opinion 2016'); Sarah Barker, 'Directors' Liability and Climate Risk: Australia' (Country Paper, Commonwealth Climate and Law Initiative, April 2018).

77 Hutley and Hartford-Davis, 'Hutley Legal Opinion 2016' (n 76); Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties' (Supplementary Memorandum of Opinion, Centre for Policy Development, 26 March 2019); Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties' (Further Supplementary Memorandum of Opinion, Centre for Policy Development, 23 April 2021); Sarah Barker and Kurt Winter, 'Temperatures Rise in the Boardroom: Climate Litigation in the Commercial Arena' (2017) 32(3) *Australian Environment Review* 62; Sebastian Hartford-Davis and Zoe Bush, 'Nature-Related Risks and Directors' Duties' (Joint Memorandum of Opinion, Pollination and Commonwealth Climate and Law Initiative, 24 October 2023); Australian Securities & Investments Commission, *Climate Risk Disclosure by Australia's Listed Companies* (Report No 593, September 2018) 3; Cathie Armour, 'Managing Climate Risk for Directors', *Australian Institute of Company Directors* (Web Page, 1 February 2021) <<https://www.aicd.com.au/risk-management/framework/climate/managing-climate-risk-for-directors.html>>; 'Coming to Terms with the Global Climate Crisis', *Australian Institute of Company Directors* (Web Page, 1 April 2020) <<https://www.aicd.com.au/risk-management/framework/climate/coming-to-terms-with-climate-change.html>>.

is developing around directors' duties to inform themselves of the risks posed by biodiversity loss.⁷⁸ Where these sustainability risks are deemed material (due to shareholder expectations, physical impacts or potential reputational risks, or as a result of emerging policy and regulatory developments which restrict harmful practices), the duty of care and diligence may warrant that directors take steps to manage the effect of those risks on the business.⁷⁹ Importantly, this does not compel directors to take specific actions to address these risks (such as reducing emissions or preventing adverse impacts on nature). Instead, directors are afforded considerable discretion in their response and can potentially justify continuing harmful business practices based on the expense and difficulties of alleviating social and environmental harms, or any conflicting responsibilities they owe, including the best interests duty.⁸⁰

At law, the best interests of the company has been held to mean the best interests of the shareholders as a general body.⁸¹ However, courts have also recognised that the company's best interests can be broader than the interests of shareholders. For example, when a company is insolvent or sliding into insolvency, the interests of creditors, not shareholders, are relevant to determining its best interests.⁸² Further, directors are permitted (and may be advised) to consider the interests of non-shareholder stakeholders and related social and environmental considerations, if this is undertaken in the context of acting in the company's long term interests, including with a view of avoiding reputational harm.⁸³

Directors' duties can be directly enforced by ASIC bringing an action for civil remedies, civil penalties or criminal sanctions;⁸⁴ by the company itself (or its liquidators) applying for a compensation order;⁸⁵ or by shareholders bringing a derivative action for breach of duty.⁸⁶ Currently, there is no record of public enforcement actions, taken by corporate regulators, to enforce directors' duties as they relate to climate change or other sustainability risks in Australia. However, strategic litigants have initiated directors' duties claims in the UK. In 2023, public

78 Hartford-Davis and Bush (n 77).

79 Hutley and Hartford-Davis, 'Hutley Legal Opinion 2016' (n 76) 16–17; Chapman Tripp, 'New Zealand Director Duties to Manage Nature-Related Risk and Impact on Natural Capital' (Legal Opinion, 2023) 10–16.

80 Hutley and Hartford-Davis, 'Hutley Legal Opinion 2016' (n 76) 17; *Corporations Act* (n 46) s 180(2); *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451.

81 *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438 (Williams ACJ, Fullagar and Kitto JJ), citing *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291 (Evershed MR); *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, 135 (Latham CJ); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 178 [18] (McHugh, Gummow, Hayne and Callinan JJ).

82 *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1 ('*Bell Group [No 9]*').

83 Bret Walker and Gerald Ng, 'The Content of Directors' "Best Interest" Duty' (Memorandum of Advice, Australian Institute of Company Directors, 24 February 2022); *Bell Group [No 9]* (n 82) 534 [4394]–[4395] (Owen J) (note this decision was ultimately overturned on separate grounds); Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, June 2006).

84 *Corporations Act* (n 46) pts 9.4, 9.4B.

85 *Ibid* s 1317J.

86 *Ibid* ss 236–7.

interest law firm, ClientEarth, acquired shares in major oil and gas company, Shell, and filed a derivative action against the company board for breach of directors' duties. ClientEarth argued that the board had failed to adopt a credible climate transition strategy in line with the international *Paris Agreement*, and therefore the directors were in breach of their duties to act with due care and diligence in the best interests of the company under UK company law.⁸⁷ The claim specified that Shell's ongoing allocation of capital to new oil and gas projects, as well as high reliance (and lack of transparency) on controversial strategies such as carbon capture and storage and carbon offsets, did not establish a reasonable basis for achieving its long term net-zero climate target.⁸⁸ The UK High Court dismissed the case on the grounds that, regardless of whether the strategy was unreasonable, Shell had a plan to manage climate-related risks and it is ultimately for the company directors to consider and promote what is in the best interests of the company and its shareholders as a whole.⁸⁹ Important to the Court's reasoning was the fact that ClientEarth was a minority shareholder, holding only 27 shares in Shell, and that the majority of members had supported the directors' strategic approach to climate change risk at recent annual meetings.⁹⁰

The case between ClientEarth and Shell represents an attempt to use directors' duties to allocate forward-looking responsibility to a company to align their business activities with global climate change goals. Yet the outcome underscores that, within corporate law, directors are granted considerable discretion to determine how to manage financial risks posed by climate change in the best interests of the company. It also suggests that prevailing interpretations of directors' duties prioritise the shorter-term, profit-focused interests of current shareholders above the interests of non-shareholder stakeholders and indeed longer-term or even future shareholders.⁹¹

87 ClientEarth, 'ClientEarth v Board of Directors of Shell plc' (Legal Briefing, January 2024).

88 The case also argued that Shell's targets and transition strategy were inconsistent with an order issued by the Hague District Court in the Netherlands against Royal Dutch Shell in 2021 which required the company to reduce their greenhouse gas emissions by a net 45% by 2030 across its own operations and Scope 3 emissions: *ibid* 3 [16]–[17].

89 *ClientEarth v Shell Plc* [2023] EWHC 1897 (Ch); *ClientEarth v Shell Plc* [2023] EWHC 1137 (Ch) ('*ClientEarth May Oral Order*').

90 *ClientEarth May Oral Order* (n 89) [68] (Trower J) notes that 88.4% of the votes cast by members at the 2021 annual general meeting ('AGM') and 80% at the 2022 AGM were in support of the directors' approach to climate change risk. These factors suggested to the Court that ClientEarth's 'real interest is not in how best to promote the success of Shell for the benefit of its members as a whole': at [65]. Instead, 'it is that [membership] constituency as a whole whose views should carry very considerable weight when determining how Shell can best manage the climate change risk with these proceedings are concerned': at [69].

91 This is consistent with a growing body of critical corporate law and governance scholarship that highlights how current articulations of directors' duties incentivise shareholder primacy and limit corporations from shifting to truly sustainable business models. See, eg, Beate Sjøfjell et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjøfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 79 <<https://doi.org/10.1017/CBO9781107337978.005>>; Lynn Buckley, 'The Foundations of Governance: Implications of Entity Theory for Directors' Duties and Corporate Sustainability' (2022) 26(1) *Journal of Management and Governance* 29 <<https://doi.org/10.1007/s10997-021-09580-y>>; Sarah E Light, 'The Law of the Corporation as Environmental Law' (2019) 71(1) *Stanford Law Review* 137; John Quinn, 'The

2 Sustainable Finance: New Transparency Measures

As outlined above, Australia's existing corporate law framework does not inherently restrict companies from proactively mitigating adverse social and environmental impacts. Yet the way that corporate accountability is scoped with reference to financial risks to the company, and the way in which it is allocated and realised (with companies and their directors principally accountable to shareholders for robust management of material financial risks), does not create strong incentives for companies to do so. We turn now to consider whether and how Australia's proposed sustainable finance reforms might strengthen these incentives, drawing comparisons to the EU regulatory approach as relevant.

(a) Mandatory Climate Risk Disclosure

Mandatory climate risk disclosure is the most developed of the proposed new transparency measures set out in Australia's sustainable finance strategy. The reform aims to deliver clearer and comparable information to investors on companies' climate-related financial risks so that they can make informed decisions about the prospects and the resilience of investee companies.⁹²

Following recent amendments, the *Corporations Act*⁹³ now explicitly requires a select group of large Australian companies and financial institutions⁹⁴ to provide a sustainability report in their annual report.⁹⁵ This must include a climate statement prepared in accordance with reporting standards.⁹⁶ The reporting standards⁹⁷ are based on the International Sustainability Standards Board sustainability standards,⁹⁸ which in turn draw on the voluntary TCFD framework.⁹⁹ These focus largely on reporting climate-related financially material risks and opportunities expected to affect the operations and prospects of a company as determined by the company itself. Under the proposed standards, companies are required to disclose the metrics and targets they use to track climate risk management, and to report comprehensively on their greenhouse gas emissions.¹⁰⁰

Sustainable Corporate Objective: Rethinking Directors' Duties' (2019) 11(23) *Sustainability* 6734:1–12 <<https://doi.org/10.3390/su11236734>>.

92 Treasury (Cth), *Climate-Related Financial Disclosure* (Consultation Paper, June 2023) ('*Government Climate Financial Disclosure*'); Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2024, 2419–20 (Jim Chalmers, Treasurer).

93 The Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (Cth) sch 4 ('Sustainability Reporting Bill') introduced amendments to the *ASIC Act* (n 63) and the *Corporations Act* (n 46). This Bill was passed by Parliament on 9 September 2024. The regime commenced in January 2025.

94 Including registrable superannuation entities, registered schemes and retail corporate collective investment vehicles: *Corporations Act* (n 46) s 292A(6)(a).

95 *Ibid* ss 292A, 296A–296D.

96 Sustainability Reporting Bill (n 93) sch 4 pt 1 item 26, inserting *Corporations Act* (n 46) s 296C.

97 Australian Accounting Standards Board, 'Climate-Related Disclosures' (Australian Sustainability Reporting Standard No AASB S2, September 2024) ('AASB S2').

98 International Sustainability Standards Board, 'General Requirements for Disclosure of Sustainability-Related Financial Information' (IFRS Sustainability Disclosure Standard No IFRS S1, IFRS Foundation, June 2023); International Sustainability Standards Board, 'Climate-Related Disclosures' (IFRS Sustainability Disclosure Standard No IFRS S2, IFRS Foundation, June 2023).

99 *Taskforce Recommendations* (n 56).

100 'AASB S2' (n 97) 12–13 [29].

The introduction of mandatory standards is an important step to address persistent problems with the quality and comparability of climate risk reporting. Yet the Australian approach, with its focus on financially material risks at the entity scale, does not markedly change the current legal position in terms of corporate accountability for social and environmental harms (the limits of which have been noted above). In contrast, the approach taken to sustainability reporting under EU sustainable finance reforms explicitly moves beyond the reporting of financial risk at the entity scale. The EU's revised *CSRD*¹⁰¹ requires companies to report sustainability information in line with European Sustainability Reporting Standards ('ESRS'), which address not only climate change but a wide range of other environmental and social issues.¹⁰² These standards adopt the concept of *double materiality*, requiring companies to disclose not only the material financial risks posed to company interests by sustainability issues, but also the material *impacts* of company activities on people or the environment. These include impacts directly caused or contributed to by the company in its own operations, products, or services, as well as impacts which are otherwise directly linked to the company's upstream and downstream value chain.¹⁰³

(b) *Climate Transition Planning*

A climate transition plan is essentially a corporate strategy to decarbonise and contribute to a net-zero economy as well as enhance resilience to the physical impacts of climate change.¹⁰⁴ Transition plans set out a company's climate targets, a forward-looking roadmap of the actions it will pursue to achieve those targets, and associated capital expenditure and investments. This is intended to centre climate change in company strategy and decision-making, and provide stakeholders with qualitative information about forward-looking climate risks and impacts.

Australia's Sustainable Finance Roadmap does not propose mandatory disclosure of climate transition plans. Rather, it foreshadows the development of

101 *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting* [2022] OJ L 322/15 ('*CSRD*'). Obligations on financial sector actors are imposed separately.

102 The standards developed and adopted have been discussed prior: see above n 36.

103 Sections 3.3 and 3.4 of ESRS 1 (General Requirements) call this 'impact materiality': *EU Regulation 2023/2772 Annex* (n 36) 9–10.

104 *Treasury Roadmap* (n 5); Transition Plan Taskforce, 'Disclosure Framework' (Framework, October 2023); Investor Group on Climate Change, *Corporate Climate Transition Plans: A Guide to Investor Expectations* (Report, March 2022); United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-state Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, November 2022); CDP, Investor Group on Climate Change and Principles for Responsible Investment, 'Joint Investor Statement: Corporate Climate Transition Plans Are an Essential Building Block on Global Reporting Baseline' (Statement); CDP, 'Climate Transition Plan' (Discussion Paper, 12 November 2021); Alison Atherton et al, UTS Institute for Sustainable Futures, *Net Zero Integrity: Assessment of Net Zero Pledges of Australian Companies* (Report, February 2024); Robyn Parkin and Mayleah House, 'Ethical Partners Credible Transition Plan Framework' (Framework, Ethical Partners Funds Management, March 2024).

best practice guidance to support credible net-zero transition plans.¹⁰⁵ This will not require transition plans to align with the goals of the *Paris Agreement*.¹⁰⁶ The lack of clear direction and the lack of a requirement to align transition measures to global climate goals weakens the potential impact of this reform. In contrast, the EU *CSRD* explicitly requires that corporate climate transition plans demonstrate how the company's business model and strategy is, or will become, compatible with the most ambitious temperature goals of the *Paris Agreement*, including through Paris-aligned greenhouse gas emissions targets and associated investments and capital expenditure.¹⁰⁷ Transition planning aligning to global and EU goals and targets for biodiversity is also recommended.¹⁰⁸

(c) Sustainable Finance Taxonomy and Investment Product Labelling

Sustainable finance taxonomies are classification schemes intended to support investors and broader stakeholders to understand whether economic activities undertaken by a company are environmentally and socially sustainable.¹⁰⁹ Economic activities are categorised according to their contribution to relevant environmental or social objectives, typically referencing the *Paris Agreement* and other relevant international sustainability instruments. The rationale is to direct investment capital towards economic activities that substantially contribute to climate change mitigation and other sustainability objectives. Investment product labelling complements and operationalises this classification by setting out rules to substantiate claims that financial products are sustainable with reference to taxonomy categories.

The development of an Australian taxonomy is being coordinated by a government-supported industry alliance – the Australian Sustainable Finance Institute ('ASFI') – and has also taken a climate-first approach. The immediate focus is to set out credible definitions of 'green' or 'transition' business activities.¹¹⁰ Over time, ASFI intends to move beyond climate change and incorporate broader environmental and social criteria including in relation to:

105 *Treasury Roadmap* (n 5) 6. This approach aligns more closely with the UK. In the UK, listed companies are also required to disclose climate transition plans as part of mandatory TCFD reporting on a comply-or-explain basis and the UK Transition Plan Taskforce has developed a sector-neutral framework and implementation guide for transition planning: Financial Conduct Authority, 'Enhancing Climate-Related Disclosures by Standard Listed Companies' (Policy Statement No PS21/23, December 2021); Transition Plan Taskforce, *The Transition Plan Taskforce Disclosure Framework* (Consultation Paper, November 2022) 8.

106 *Government Climate Financial Disclosure* (n 92) 15.

107 See paragraphs 14–17 of ESRS E1-1: *EU Regulation 2023/2772 Annex* (n 36) 75–6 (ESRS E1-1). Although the form of the transition plan is clearly set out, paragraph 17 does indicate that this is not mandatory but expected (if not, why not), by providing '[i]n case the undertaking does not have a transition plan in place, it shall indicate whether and, if so, when it will adopt a transition plan'. Transition planning aligning to global and EU goals and targets for biodiversity is also recommended by paragraphs 11–15 of ESRS E4: at 135–6 (ESRS E4).

108 See paragraphs 11–15 of ESRS E4: *ibid* 135–6 (ESRS E4).

109 Principles for Responsible Investment, World Bank Group and Chronos, 'How Policy Makers Can Implement Reforms for a Sustainable Financial System: Part II' (Guide, 2022).

110 Australian Sustainable Finance Initiative, *Australian Sustainable Finance Taxonomy* (Public Consultation Paper, May 2024) 10–12.

- environmental management, ie, protection and restoration of healthy ecosystems, sustainable use and protection of water, and pollution prevention and control;
- resource resilience;
- the circular economy transition; and
- social objectives, eg, First Nations rights, participation and reconciliation.¹¹¹

Use of Australia's taxonomy will be voluntary for investors and companies once finalised.¹¹²

In contrast, the EU taxonomy is mandatory and supported by targeted reporting obligations. Companies that are required to report under the EU *CSRD* are also required to disclose the proportion of their turnover derived from 'sustainable' economic activities (as set out in the taxonomy) as well as their capital operational expenditure aligned with the EU taxonomy.¹¹³ Investment funds that have sustainable investment objectives or promote social or environmental characteristics must substantiate those claims by reporting their portfolio alignment with the EU taxonomy.¹¹⁴

Compared to the EU reforms, the transparency measures set out in Australia's sustainable finance agenda are relatively weak. The Australian reforms maintain a narrow focus on financial risks posed to the company, rather than requiring reporting of company impacts on social and environmental matters, and alignment of company risk management to global goals. Sustainability disclosures will therefore only address a company's social and environmental performance where it is relevant to investor returns or financial considerations for creditors. While still heavily reliant on transparency measures,¹¹⁵ the EU has implemented a more comprehensive, outward-looking, long-term oriented reporting regime, which is explicitly directed to aligning business activities with sustainability objectives.

IV MHREDD

HREDD has emerged as a regulatory response to rising concerns in the Global North (consumer countries) over social and environmental conditions in global supply chains.¹¹⁶ Importantly, and in contrast to existing risk disclosure obligations and directors' duties under corporations law discussed above, HREDD involves companies identifying, mitigating, tracking and accounting for their actual and potential negative impacts *on people and the environment*, not on the associated financial risks posed to the company or the best interests of the company. In addition,

111 Ibid. See also recommendation 3 of Australian Sustainable Finance Institute, *Designing Australia's Sustainable Finance Taxonomy: Australian Sustainable Finance Institute Taxonomy Project* (Report, March 2023) 7.

112 *Treasury Roadmap* (n 5) 4.

113 *Sustainable Taxonomy Regulation* (n 38) art 8.

114 Ibid arts 5–6; *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector* [2019] OJ L 317/1, arts 8–9.

115 For discussion, see Johnston and Sjäfjell (n 9).

116 Teresa Kramarz, 'Extractive Industry Disasters and Community Responses: A Typology of Vulnerable Subjects' (2022) 31(1) *Environmental Politics* 89 <<https://doi.org/10.1080/09644016.2021.1978198>>.

in principle, HREDD requires companies to identify and address not only those negative impacts which it has caused, but also those to which it has contributed or to which it is directly linked through business relationships. Following a similar structure to above, this Part starts with an overview of HREDD in an international context, then discusses the EU's *CSDDD* as the most recent and comprehensive manifestation of the 'hardening' of HREDD. The discussion then briefly addresses its (limited) reception in Australia.

A International Developments in MHREDD

MHREDD is intended to secure greater corporate accountability for social and environmental harms. The regulatory approach has its roots in the concept of human rights due diligence ('HRDD') set out in the United Nations ('UN') Guiding Principles on Business and Human Rights ('UNGPs').¹¹⁷ The UNGPs, endorsed by the UN Human Rights Council in 2011, purport to clarify the respective roles of states and businesses with respect to corporate-related human rights harms and constitute an authoritative international statement of the global standard of conduct for all businesses. According to the UNGPs, all business enterprises have a responsibility to respect human rights, which means avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur; and seeking to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even where they have not contributed to those impacts.¹¹⁸ To meet this responsibility, all businesses should have in place a policy commitment to meet their responsibility to respect human rights; a HRDD process to identify, prevent, mitigate and account for how they address their actual and potential negative impacts on human rights; and processes to enable the remediation of adverse human rights impacts they cause or to which they contribute.¹¹⁹

In the UNGPs, HRDD involves companies considering their actual and potential adverse impacts on internationally recognised human rights. These include, at a minimum, those rights recognised in the International Bill of Human Rights and the *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*.¹²⁰ However, other authoritative international instruments and statements on responsible business conduct have subsequently recognised various forms of environmental due diligence, largely in response to the consolidating

117 United Nations Human Rights Office of the High Commissioner, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc HR/PUB/11/04 (2011) ('UNGPs').

118 Ibid guiding principle 13.

119 Ibid guiding principle 16.

120 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, International Labour Conference, 86th sess, amended 110th sess, 2022.

consensus in the international community to treat environmental and climate change issues as human rights issues.¹²¹ For example, the OECD's Guidelines for Multinational Enterprises on Responsible Business Conduct ('OECD Guidelines') have been recently revised to integrate 'risk-based due diligence' throughout, including with respect to human rights and the environment.¹²²

Both the UNGPs and the OECD Guidelines frame corporate due diligence on social (and environmental) matters in global supply chains as state and societal expectations on business rather than as legal obligations. This approach assumes that these standards will be 'enforced' through market and reputational accountability mechanisms. However, concerns over the pace at which HREDD has been voluntarily embraced, as well as with the patchy and superficial nature of its adoption by many businesses, has fuelled calls for mandatory approaches and led to a hardening of HREDD in a number of European jurisdictions.¹²³

In recent years, France, Germany, the Netherlands, Norway, the UK and Switzerland have all passed laws that draw on the concept of HRDD in the UNGPs.¹²⁴ In 2017, France adopted the first comprehensive HREDD law, requiring companies to undertake due diligence on both environmental and social issues. The *French Corporate Duty of Vigilance Law* imposes an obligation on large French companies to adopt 'vigilance plans' that establish effective measures to identify risks and prevent severe impacts on human rights, health and safety and the environment (including climate change) resulting from their own activities or those of companies under their control, as well as the activities of subcontractors or suppliers with whom there is an established business relationship.¹²⁵ Specific liability provisions apply where a company fails to adopt such a plan and where specific harm occurs as a consequence. In 2021, both Germany and Norway also adopted laws that impose due diligence obligations on companies with respect to their actual and potential human rights and environmental impacts.¹²⁶

In April 2024, following a protracted and highly contested lawmaking process, the European Parliament adopted its own law that seeks to embed HREDD into the corporate governance of very large companies. The *CSDDD* is intended to

121 See, eg, 'Climate Change and the UNGPs', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/en/special-procedures/wg-business/climate-change-and-ungps>>; Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6(1) *Business and Human Rights Journal* 93 <<https://doi.org/10.1017/bhj.2020.25>>.

122 OECD, 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (Guidelines, 2023) <<https://doi.org/10.1787/81f92357-en>> ('OECD Guidelines').

123 Surya Deva, 'Business and Human Rights: Alternative Approaches to Transnational Regulation' (2021) 17 *Annual Review of Law and Social Science* 139, 143 <<https://doi.org/10.1146/annurev-lawsocsci-113020-074527>>.

124 For an overview of these laws, see Claire Bright and Nicolas Bueno, 'Mandatory Human Rights Due Diligence' in Anthony Ewing (ed), *Teaching Business and Human Rights* (Edward Elgar Publishing, 2023) 144 <<https://doi.org/10.4337/9781802201130.00022>>.

125 *French Corporate Duty of Vigilance Law* (n 3).

126 For an overview and comparison of these laws, see Fatimazahra Dehbi and Olga Martin-Ortega, 'An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective' (2023) 17(4) *Regulation and Governance* 927 <<https://doi.org/10.1111/rego.12538>>.

address the fragmentation of HREDD regulation across Europe and provide greater legal certainty to businesses. It is also framed as complementary to other EU-wide sustainable finance measures, recently introduced or proposed, to foster sustainable corporate governance (eg, the *CSRD*, discussed above in Part II) and as a key component of the EU's broader environmental and social sustainability agenda.¹²⁷

The *CSDDD* applies to very large EU companies (those employing more than 1,000 employees and generating a net worldwide annual turnover of €450 million) and non-EU companies generating a net turnover of more than €450 million.¹²⁸ These companies are required to undertake due diligence with respect to potential and actual adverse human rights and environmental impacts. An 'adverse human rights impact' is defined as an impact resulting from the abuse of certain human rights listed in an annex; and other human rights enshrined in a list of international instruments (also listed in the annex), provided that certain conditions are met.¹²⁹ An 'adverse environmental impact' is defined as an adverse impact on the environment resulting from the breach of the prohibitions and obligations listed in part I, section 1, points 15 and 16, and part II of the annex to the Directive.¹³⁰ The former covers measurable environmental damage (eg, harmful soil change, water or air pollution, or excessive water consumption) that impairs human rights or substantially affects ecosystem services that contribute to human wellbeing. The latter list's specific prohibitions draw from international environmental agreements.

Companies that fall within the scope of the *CSDDD* are required to: (i) integrate due diligence into corporate policies and management systems; (ii) identify the impacts they may have on human rights and the environment; (iii) take appropriate measures to prevent or bring impacts to an end; (iv) provide remediation in case of actual adverse impacts; (v) carry out meaningful engagement with stakeholders; (vi) maintain a notification and complaints procedure; (vii) monitor the effectiveness of due diligence; and (viii) communicate on their due diligence.¹³¹ Companies must undertake due diligence with respect to their own operations, the operations of their subsidiaries, and business partners in their 'chain of activities'. The term 'chain of activities' is defined to include the activities of upstream and downstream business partners.¹³² However, the activities of downstream business partners are limited to those relating to the distribution, transport and storage of products provided that these activities are carried out for the company or on its behalf.¹³³

127 See the recitals in *CSDDD* (n 4), which precede the Directive.

128 Ibid arts 2(1)–(2). The Directive will be phased in, applying to EU companies with €1.5 billion global turnover and more than 5,000 employees from mid-2027, and to EU companies with a global turnover of €450 million and more than 1,000 employees by mid-2029.

129 Ibid art 3(1)(c). The annex is divided into two parts: annex I, part I section 1, which lists rights the subject of the Directive; and annex I, part I section 2, which lists the international instruments from which those rights derive.

130 Ibid art 3(1)(b).

131 Ibid arts 7–16.

132 Business partners include entities with whom the company has a commercial agreement (direct business partners) and other entities which perform business operations related to the operations, products or services of the company (indirect business partners): ibid art 3(1)(f).

133 Ibid art 3(1)(g). This formulation is significantly narrower than provided in the *UNGPs* (n 117) and 'OECD Guidelines' (n 122), under which businesses are expected to conduct due diligence along their

The *CSDDD* requires that companies take ‘appropriate measures’ to identify and address their impacts, defined as measures

capable of achieving the objectives of due diligence by effectively addressing adverse impacts in a manner commensurate to the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including the nature and extent of [their] adverse impact and relevant risk factors.¹³⁴

Where it is not possible for a company to address all its identified impacts at once, it may prioritise impacts based on the severity and likelihood of the impact.¹³⁵

The *CSDDD* builds upon the reporting obligations in the revised *CSRD* (discussed in Part III above) by requiring companies to

adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the *Paris Agreement* and the objective of achieving climate neutrality.¹³⁶

This climate change obligation is separate and distinct from the environmental due diligence obligations enumerated in the Directive, and member states are only required to supervise the adoption, design and regular updating of such plans.¹³⁷

Enforcement of the HREDD obligations is achieved in two main ways. First, EU member states are required to designate supervisory authorities to supervise compliance. These authorities must have the power to require information from companies and to conduct investigations of non-compliance on their own initiative or in response to ‘substantiated concerns’ communicated by natural and legal persons.¹³⁸ Authorities should also be empowered to take administrative action against companies that fail to comply, including issuing injunctions and applying ‘effective, proportionate and dissuasive’ pecuniary penalties (including fines up to 5% of the worldwide net turnover of the company).¹³⁹ Non-compliance with the obligations in the Directive may also be taken into account by contracting authorities when awarding public contracts.¹⁴⁰ Second, member states must provide for a civil liability regime through which victims of adverse impacts may seek remedy. Companies should be held liable where they intentionally or negligently fail to comply with their due diligence duties and this failure causes or contributes to damage.¹⁴¹ This regime is limited to the recovery of damages arising from an

entire value chains. It also has the effect of significantly limiting the due diligence obligations on financial undertakings as they are not required to undertake due diligence on business partners receiving their products and services.

134 *CSDDD* (n 4) art 3(1)(o).

135 *Ibid* art 9.

136 *Ibid* art 22(1). This article makes clear that companies that report a transition plan for climate change mitigation under the *CSRD* (n 101) shall be deemed to have complied with the *CSDDD*'s (n 4) obligation to adopt such a plan. However, companies are still obliged to put that transition plan into effect and to update it every 12 months to assess progress made towards its targets.

137 *CSDDD* (n 4) art 22. See also at recital 73.

138 *Ibid* arts 25–6.

139 *Ibid* arts 24–7.

140 *Ibid* art 31.

141 *Ibid* art 29.

adverse impact to a ‘person’, thus excluding purely environmental damage. The Directive provides that injured parties may authorise a third party such as a trade union or a non-government organisation (‘NGO’) based in a member state to bring actions on their behalf.¹⁴²

B Towards MHREDD in Australia?

In Australia, as in many other jurisdictions, foundational principles of corporate law – including separate legal personality and limited liability – have long proven effective in shielding businesses and corporate officers from liability for human rights and environmental harms in the context of corporate groups and supply chains.¹⁴³ As is the case in other common law jurisdictions, tort law has proven the primary legal means through which individuals and communities have sought to hold Australian-based companies to account for human rights and environmental harms linked to their subsidiaries or supply chains abroad. However, such efforts have proven largely unsuccessful, with plaintiffs facing significant legal, procedural and practical obstacles.¹⁴⁴ In practice, this has meant that corporate accountability remains subject to the vagaries and limitations of market-based forms of accountability.

To date, the Australian Government’s engagement with HREDD has been tentative and piecemeal. These efforts include promotion of the OECD Guidelines, and the adoption of two pieces of legislation that draw on HREDD to regulate discrete issues in transnational supply chains.

As a member state adhering to the OECD *Declaration on International Investment and Multinational Enterprises*, Australia is legally bound to establish a National Contact Point (‘NCP’) to promote the OECD Guidelines and to receive complaints concerning corporate non-compliance with its provisions.¹⁴⁵ In recent years, and in response to sustained advocacy by civil society groups and a 2017 independent review, the Australian Government has taken important steps to improve the structure and operation of its NCP.¹⁴⁶ These reforms have resulted in improved visibility and use of the mechanism within Australia, including in relation to corporate HREDD obligations.¹⁴⁷ However, the capacity of the OECD

142 Ibid art 29(3)(d).

143 Hassan M Ahmad, ‘The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States’ (2022) 70(2) *American Journal of Comparative Law* 227 <<https://doi.org/10.1093/ajcl/avac036>>.

144 Sarah Joseph and Joanna Kyriakakis, ‘Australia: Tort Law Filling a Human Rights Void’ in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing, 2022) 43; *Nowhere to Turn* (n 14).

145 OECD, *Declaration on International Investment and Multinational Enterprises*, Doc No OECD/LEGAL/0144, 27 October 2023, annex 1, ch 1 [11].

146 These reforms have included the appointment of an independent examiner to investigate complaints, the establishment of a multi-stakeholder governance and advisory board, and revision of procedural guidance.

147 Natalie Bugalski and David Pred, ‘Lessons from the ANZ-Phnom Penh Sugar Case for the OECD National Contact Point System of Corporate Accountability’ (2023) 8(3) *Business and Human Rights Journal* 448 <<https://doi.org/10.1017/bhj.2023.24>>; Anita Foerster and Ingrid Landau, ‘A New Tool to Address Corporate Climate Wrongdoing: OECD Complaint against ANZ Fossil Fuel Financing’ (2020) 35(1) *Australian Environment Review* 26.

Guidelines and its dispute resolution mechanism to secure corporate accountability for human and environmental harms in Australia remains limited, not least because participation in dispute resolution under the Guidelines, and adherence to any resulting NCP decision, remains voluntary.

The *Illegal Logging Prohibition Act 2012* (Cth) draws on the concept of corporate due diligence to address the harmful environmental, social and economic impacts of illegal logging. The Act makes it a criminal offence to import illegally logged timber and timber products into Australia or to process domestically grown raw logs that have been illegally logged. The Act requires businesses to adopt certain due diligence procedures before importing a ‘regulated timber product’ into Australia or before processing domestically grown raw logs.¹⁴⁸ There is also a civil penalty regime for minor contraventions of the Act or its regulations.¹⁴⁹ Several reviews of the Act and its accompanying regulations have been undertaken in recent years, but these have not led to any significant changes to the regime to date.¹⁵⁰

Australia’s *Modern Slavery Act 2018* (Cth) (‘*MSA*’) constitutes the most direct engagement with HRDD to date by the Australian Government. The *MSA* requires large organisations (entities with consolidated annual revenues of at least AUD100 million) to report annually on due diligence undertaken on modern slavery in their domestic and global operations and supply chains. The *MSA* draws on the UNGPs to the extent that it requires businesses to consider risks to rights-holders (rather than to the business itself) and to report on due diligence undertaken.¹⁵¹ Entities within the scope of the Act must produce Modern Slavery Statements that address certain reporting criteria, and that have been approved by the principal governing body of the reporting entity. The *MSA* does not include civil penalty provisions. Compliance is secured through market-based forms of accountability, with Modern Slavery Statements made publicly available through an online register and a requirement on the Minister to table an annual report in Parliament each year outlining the implementation of the Act including compliance by entities and best practice reporting. The government also seeks to support entities to comply, raises awareness of best practice responses and operates the online registry.

While welcomed as an important step in fostering greater awareness and responsibility among Australian companies for extreme forms of labour exploitation in their corporate groups and supply chains, the *MSA* has come under growing criticism for its exclusive reliance on reporting and lack of adequate regulatory infrastructure.¹⁵² An independent statutory review of this Act undertaken

148 *Illegal Logging Prohibition Act 2012* (Cth) ss 14, 18 (‘*Illegal Logging Prohibition Act*’). Specific due diligence requirements are set out in the *Illegal Logging Prohibition Rules 2024* (Cth) rr 7–8, 10–11.

149 *Illegal Logging Prohibition Act* (n 148) ss 23–6.

150 See, eg, Department of Agriculture and Water Resources (Cth), *Statutory Review of the Illegal Logging Prohibition Act 2012* (Review Report, November 2018); Department of Agriculture, Fisheries and Forestry (Cth), ‘Sunsetting Review of the *Illegal Logging Prohibition Regulation 2012*’ (Regulation Impact Statement, 2022).

151 See also Commonwealth Government, ‘Commonwealth *Modern Slavery Act 2018*: Guidance for Reporting Entities’ (Guide, May 2023).

152 See, eg, Freya Dinshaw et al, *Broken Promises: Two Years of Corporate Reporting under Australia’s Modern Slavery Act* (Report, 17 November 2022); Amy Sinclair and Freya Dinshaw, *Paper Promises?*

in 2022–23 by Professor John McMillan concluded that the Act has not ‘yet caused meaningful change for people living in conditions of modern slavery’ and made 30 recommendations to strengthen corporate modern slavery responses and regulatory oversight.¹⁵³ Among these recommendations is amendment of the Act to impose mandatory due diligence obligations on companies.¹⁵⁴ Since the review, the Australian Government has established a federal Modern Slavery Commissioner.¹⁵⁵ In its formal response to the independent review’s final report, released over 18 months after the report’s publication, the government has agreed, or agreed in principle, to implement 25 of the 30 recommendations following further consultation with stakeholders.¹⁵⁶ These reforms include the introduction of civil penalties for non-compliance with the reporting obligations and more detailed reporting requirements.

Leveraging recent developments in Europe, a range of different actors, including civil society groups and UN special rapporteurs, have called on the Australian Government to adopt mHREDD.¹⁵⁷ It is argued that such a measure would help address the longstanding absence of sufficient accountability structures for human rights and environmental harms linked to Australian-based businesses, and ensure Australia’s adherence to international human rights standards. Such reform would also help to maintain international competitiveness and level the playing field for Australian businesses, particularly given that many Australian companies will face increased scrutiny of their human rights and environmental risk management as a result of the *CSDDD*.¹⁵⁸

Evaluating the Early Impact of Australia’s Modern Slavery Act (Report, 6 February 2022); Shelley Marshall et al, *Australia’s Modern Slavery Act: Is It Fit for Purpose?* (Report, 3 April 2023).

153 John McMillan, *Report of the Statutory Review of the Modern Slavery Act 2018 (Cth): The First Three Years* (Report, 2023) 8.

154 See recommendation 11: *ibid*.

155 See *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Act 2024* (Cth).

156 Australian Government, *Australian Government Response to the Review Report of the Modern Slavery Act 2018 (Cth)* (Report, 2 December 2024).

157 See, eg, Human Rights Law Centre, ‘Landmark EU Law Highlights Need for Stronger Australian Corporate Accountability Laws’ (Press Release, 24 April 2024) <<https://www.hrlc.org.au/news/2024/4/24/landmark-eu-law-highlights-need-for-stronger-australian-corporate-accountability-laws>>; Marcos Orellana, *Visit to Australia: Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, Marcos Orellana, UN Doc A/HRC/57/52/Add.2 (18 July 2024) 21; Tomoya Obokata, *Visit to Australia: Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences*, Tomoya Obokata, UN Doc A/HRC/60/28/Add.1 (16 July 2025) 16–17 [63].

158 See, eg, ‘Government Must Introduce Due Diligence Obligations’ (n 6). Australian businesses may be impacted by the *CSDDD* (n 4) in one of three ways: where they fall directly in-scope; where they are majority owned by an in-scope EU-based parent company; or where they supply goods or services to an in-scope entity or its subsidiary.

V CONVERGENCE AND DIVERGENCE: CORPORATE ACCOUNTABILITY WITHIN SUSTAINABLE FINANCE AND MHREDD

Having explored the key objectives and features of sustainable finance and HREDD reforms as implemented in Australia and the EU, this Part further interrogates the accountability logics within these two interventions. This analysis helps to highlight key areas of convergence, divergence and complementarity, as well as the potential implications of variations in design and implementation. To structure this discussion, we group Mashaw's six basic accountability questions into three themes: scoping accountability relationships (*who is liable or accountable to whom; what they are liable to be called to account for?*); standards for accountability (*by what standards is the putatively accountable behaviour to be judged?*); and securing accountability (*through what processes is accountability to be assured; what are the potential effects of finding that those standards have been breached?*).¹⁵⁹ The discussion below is summarised in Table 1.

A Scoping Accountability Relationships

There are notable differences in the way that accountability relationships are scoped within sustainable finance and mHREDD, which relate to (i) the actors involved; (ii) the substantive matters to which accountability is attached; and (iii) the temporal direction of the accountability relationship.

In terms of actors involved, sustainable finance measures do not depart markedly from underlying accountability relationships set out in corporate law, whereby companies and their directors are accountable principally to shareholders for the robust management of material financial risks to the business, and shareholders have powers to hold companies and directors accountable.¹⁶⁰ By clarifying the financial materiality of sustainability risks and setting standards for reporting on these risks, sustainable finance reforms reinforce the relevance of social and environmental considerations for companies and their directors. Public disclosure also, to some degree at least, empowers other actors (such as NGOs and consumers) to hold companies to account. Nonetheless, these reforms do not clearly position people and the environment as primary accountability holders, nor provide novel channels through which these actors may pursue greater corporate accountability. Rather, they rely heavily on investors to drive improved social and environmental performance by companies (the risks of which are discussed further below in the context of securing accountability). Within this regime, corporate regulators as accountability holders also have powers to enforce legal obligations to disclose sustainability risks and directors' duties to take reasonable steps to manage these risks.¹⁶¹ While sustainable finance reforms certainly involve an

159 Mashaw (n 26) 118.

160 Pathways for shareholders (and regulators) to enforce breach of disclosure obligations and directors' duties under Australian corporations law are outlined above in Part III(B)(1): see, eg, text commentary above at nn 47–9 on disclosure, and above at nn 73–91 on directors' duties.

161 Ibid.

enhanced supervisory role for regulators, particularly in relation to sustainability disclosure, it is important to recognise that this role is fundamentally still aimed at achieving stable, efficient and transparent markets in the interests of market stakeholders.¹⁶² It does not aim to reorient these markets to effectively address climate change and other challenges in the interests of people and the environment.

MHREDD involves broader, more complex accountability relationships.¹⁶³ The extent to which the *CSDDD* recognises corporate actors as power wielders and subjects them to new accountability arrangements is determined by the Directive's personal scope, as well as by the way in which key terms in the Directive are defined. For example, the way in which 'chain of activities' is defined under the *CSDDD* will effectively preclude other actors from holding financial undertakings accountable for adverse impacts connected to their investments, loans, insurance products or other services.¹⁶⁴ Individuals and communities who suffer harms because of a business' failure to prevent violations of international human rights and environmental standards connected to its business activities, as well as national supervisory authorities, can be characterised as primary accountability holders.¹⁶⁵ However, a range of other actors are also proxy accountability holders under the EU *CSDDD* to the extent that they are empowered to hold companies to account on behalf of its purported beneficiaries. Affected communities may authorise trade unions and NGOs to pursue civil liability claims on their behalf, and natural or legal persons (including presumably investors and consumers) may submit concerns of corporate non-compliance with national supervisory authorities. Through its regulation of certain aspects of the relationship between large firms and their suppliers, and large firms and third parties engaged in due diligence (such as multi-stakeholder initiatives), the *CSDDD* can also be understood as creating certain accountability relationships between various types of commercial actors.¹⁶⁶

In terms of the substantive matters to which accountability is attached, it is notable that sustainable finance reforms in Europe have, from the outset, encompassed a wide range of social and environmental sustainability matters.¹⁶⁷ In contrast, the initial focus in Australia has been on environmental matters, particularly climate change. It remains unclear whether this will broaden over time to include biodiversity and other social sustainability matters, despite an expressed policy intent. The narrow focus within Australian sustainable finance reforms on financial materiality (rather than broader *double materiality* framings employed in Europe

162 Sinclair (n 8) 59–60.

163 The precise nature of these relationships will depend upon the provisions of the specific mHREDD law, as well as on how these provisions are interpreted and enforced. See Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11). For a detailed consideration of evolving accountability dynamics in the context of the *French Corporate Duty of Vigilance Law* (n 3), see Schilling-Vacaflor and Gustafsson (n 18).

164 See above Part IV.

165 Enforcement of the EU *CSDDD* (n 4) by way of civil liability and national supervisory authorities is briefly outlined above in Part IV(A).

166 On the role of commercial contracts under the *CSDDD* (n 4), see Sarah Dadush, Daniel Schönfelder and Michaela Streibelt, 'What the EU Corporate Sustainability Due Diligence Directive Says about Contracts' (Policy Brief, Responsible Contracting Project, July 2024).

167 For example, the broad scope of the ESRS is noted above at n 107.

discussed further below) may also slow down or mitigate against broadening the Australian sustainable finance agenda. Indeed, while the financial materiality of climate change is now widely understood,¹⁶⁸ there are challenges in understanding the materiality of other systemic environmental and social challenges – such as biodiversity loss or social inequality – and quantifying their financial impacts, particularly at the entity scale.¹⁶⁹ While some of the earlier HREDD laws in Europe (and indeed the Australian *MSA*) have also been narrowly targeted to particularly egregious human rights abuses, the *CSDDD* is more broadly scoped, covering a wide range of internationally protected human rights and environmental harms. The approach to scoping environmental harms has however been criticised as overly narrow and human-focused, with its reference to a small set of international environmental agreements and environmental harms that impair human rights or substantially affect ecosystem services that contribute to human wellbeing.¹⁷⁰

The temporal elements of the accountability relationships within sustainable finance and mHREDD are also divergent. Sustainable finance reforms, particularly where they encompass mandatory transition planning aligned to global goals, are essentially forward-looking. They seek to embed some level of prospective responsibility to companies to contribute to addressing social and environmental harms in line with global goals. MHREDD, in contrast, imposes responsibilities on companies that are both prospective (through the requirement for proactive due diligence) and remedial in nature. By enabling companies to be held to account for failure to prevent causing or contributing to harm to people and the environment, and for failure to remediate harms, mHREDD also incorporates a more retrospective accountability. When it comes to climate change, however, the EU *CSDDD* adopts a forward-looking only approach (mandatory climate transition plans) that does not grapple with the complexity and political barriers to attributing historical corporate responsibility for climate change harms.¹⁷¹

B Standards for Accountability

Considering the standards by which the accountability of corporate actors is to be judged is critical to understanding the potential effect of sustainable finance and mHREDD. Sustainable finance reforms are based on well-established expectations or standards of conduct for companies and their directors which derive from corporations law. As discussed in Part III in an Australian context, these are based on the concept of *materiality* which informs risk disclosure and management

168 For an overview, see *Taskforce Recommendations* (n 56) 5–10.

169 Elena Almeida, Chiara Colesanti Senni and Nepomuk Dunz, 'Building Blocks for Central Banks to Develop Nature Scenarios' (Policy Briefing Paper No 11, International Network for Sustainable Financial Policy Insights, Research and Exchange, January 2023).

170 See, eg, David R Boyd and Stephanie Keene, 'Essential Elements of Effective and Equitable Human Rights and Environmental Due Diligence Legislation' (Policy Brief No 3, United Nations Human Rights Special Procedures, June 2022).

171 See above n 136 and accompanying text.

obligations,¹⁷² the concept of *best interests of the company* which underpins directors' duties,¹⁷³ and standards of *reasonableness* which guide the exercise of discretion by company directors to undertake appropriate risk management to protect these interests, and the disclosures of future matters.¹⁷⁴ These operate as principles-based standards of conduct, intended to guide robust risk management and decision-making, rather than standards of outcome.¹⁷⁵ They do not preclude companies and directors considering social and environmental matters. Indeed, as the financial materiality of these risks increases, what is considered reasonable and what is in a company's best interests is also shifting. Yet as recent UK litigation illustrates in Part III above, company directors are granted considerable discretion in determining appropriate responses to climate-related risks. Indeed, the outcome in the Shell case suggests that in the near to medium term, corporate law standards may serve to legitimise the continued corporate pursuit of climate-damaging activities such as fossil fuel extraction – despite their contribution to broader systemic risks posed by climate change – as long as the financial risks to the company associated with these activities can be appropriately managed (eg, through sufficient diversification of business activities and investment in developing alternatives over time).

While Australian sustainable finance reforms do not depart significantly from these underlying standards, the EU sustainable finance agenda has strengthened them in important ways. For example, the EU's *double materiality* standard explicitly requires reporting not only on sustainability risks to company interests, but also on a company's social and environmental impacts.¹⁷⁶ This is important as the adverse impacts of a company's activities contribute to systemic risks posed by climate change and biodiversity loss, but do not always lead to material financial risks to the company's business (at least in the short-medium term) and can therefore be overlooked and ignored within the strict financial materiality lens. Financial materiality at the entity scale depends on how these impacts are regulated and treated by the market and the relevance of physical impacts of climate change and biodiversity loss to a company's operations (eg, extreme climate events, loss of pollinator species associated with biodiversity loss, or decline in water quality associated with deforestation). However, as these problems worsen, these systemic risks will become increasingly relevant at the company scale for a wider range of companies, both through physical impacts on supply chains and operations, and through the evolving regulatory and market responses to these issues which (should be expected to) further constrain business practices with harmful impacts. The *double materiality* standard acknowledges this complex relationship between

172 The standard definition that applies in Australia is:

Information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity.

'AASB Definition of Material' (n 47) 6. The primary users of general purpose financial statements are understood to be existing and potential investors, lenders and other creditors.

173 *Corporations Act* (n 46) s 181.

174 See discussion above on risk disclosure and directors' duties, specifically at nn 46–52, 76–80.

175 Gunningham, 'Roadmaps and Regulation' (n 8) 460–2.

176 See discussion of the double materiality standard in the EU *CSRD* (n 101) above at n 103.

risks and impacts at different scales and over different timeframes, even though it does not direct companies on how adverse impacts should be mitigated.

Within reporting standards and transition planning requirements, the EU reforms also incorporate stronger requirements for companies to align their risk management with international sustainability goals such as those set out in the *Paris Agreement*.¹⁷⁷ This has the effect of shifting the standard of behaviour expected beyond a narrow focus on managing financial risks posed by sustainability issues at the entity scale, to also address the way in which individual entities contribute to managing systemic, economy-wide risks posed by climate change, biodiversity loss and other sustainability challenges. These types of requirements may therefore serve to build towards more forward-looking accountability for companies to reduce their adverse social and environmental impacts in line with global goals.

Drawing on international standards of responsible business conduct and innovative regulatory initiatives in the EU, the *CSDDD* constitutes a significant elevation of the minimum standards of due diligence expected of large businesses when it comes to identifying and responding to their actual and potential adverse impacts on human rights and the environment. This is particularly the case with respect to businesses' transnational operations and supply chains, with the due diligence obligations (potentially) having the effect of transcending some of the legal and conceptual barriers that have long insulated businesses from accountability claims. Critically, the *CSDDD* not only imposes process-oriented requirements on companies (for example, to adopt, implement and communicate HREDD) but also requirements to *effectively* prevent, address and remediate harms. Through its use of the term 'appropriate measures',¹⁷⁸ the *CSDDD* also goes to considerable lengths to articulate the standard of due diligence that is required, and factors that should be taken into account (by companies, regulators and others) when evaluating the adequacy of due diligence undertaken. However, what constitutes 'appropriate measures' in specific circumstances remains unclear and subject to broad interpretation. The extent to which national regulators and courts will defer to managerial prerogative when it comes to important questions around resourcing, designing and implementing due diligence measures remains to be seen.¹⁷⁹ It is also important to recognise that these standards of accountability – both with respect to how they are formulated within the *CSDDD* and how they will be operationalised at the company level – are largely determined by actors in the Global North.¹⁸⁰

177 See discussion of climate transition plan requirements in the EU *CSRD* (n 101) above, specifically above at n 107–8.

178 *CSDDD* (n 4) art 3(1)(o).

179 For an indication of the approach that French courts will take to these types of questions under the *French Corporate Duty of Vigilance Law* (n 3), see Tribunal Judiciaire de Paris [Paris Judicial Court], RG 21/15827, 5 December 2023.

180 The EU *CSDDD* (n 4) and other mHREDD laws have been criticised for failing to adequately take into account the views of states and communities in the Global South. Many commentators have also emphasised the limited nature of corporate-stakeholder engagement required under these regulatory initiatives. See, eg, Dehbi and Martin-Ortega (n 126); Michael Mason, Lena Partzsch and Teresa Kramarz, 'The Devil Is in the Detail: The Need for a Decolonizing Turn and Better Environmental

Operationalising due diligence obligations in the *CSDDD* in relation to climate change impacts has proven challenging. This is partly because the causal complexities and nature of the climate change problem, which is the result of the cumulative effects of acts (and omissions) carried out by a large number of public and private actors over decades, render it difficult to fit into the conceptual framework of HREDD laws that require a clear causal relationship between corporate action or inaction and harm.¹⁸¹ As a result, the *CSDDD* adopts a similar approach to the EU's sustainable finance reforms by requiring covered entities to prepare and disclose climate transition plans that include emissions reduction targets that align with the *Paris Agreement* goals.¹⁸²

C Securing Accountability

Both sustainable finance and mHREDD require detailed information disclosure, relying heavily on market and reputational accountability modalities of enforcement. These regulatory approaches are underpinned by an assumption that the information disclosed by companies will empower investors, consumers and civil society to make informed decisions as to where to invest or purchase and, where necessary, to 'sanction' certain companies by refraining from doing so, thereby contributing to improved corporate social and environmental sustainability.¹⁸³

This reliance on information disclosure as a regulatory tool is consistent with, and indeed a manifestation of, a broader 'transparency turn' in sustainability governance.¹⁸⁴ However, there is considerable evidence suggesting that the relationship between transparency and accountability is more complex than often presumed by policymakers, and that while transparency may be a necessary condition for accountability, it is rarely sufficient on its own to achieve this objective. For example, while such disclosure schemes may reduce informational asymmetries and thus increase the answerability of power wielders to accountability holders, there is little evidence to suggest that this alone is capable of empowering accountability holders to sanction or otherwise steer power wielders' behaviour.¹⁸⁵ In addition, even the notion that disclosure reduces informational asymmetries is itself questionable where regulatory interventions do not sufficiently guard against virtue signalling or 'greenwashing' and other forms of cosmetic compliance,¹⁸⁶ which are acknowledged problems in both the sustainable finance and HREDD contexts.

Accountability in Global Supply Chain Regulations' (2023) 17(4) *Regulation and Governance* 970 <<https://doi.org/10.1111/rego.12539>>.

181 For discussion, see Macchi (n 121) 110–12.

182 *CSDDD* (n 4) art 22(1).

183 For a detailed discussion of the relationship between transparency and accountability in sustainability governance, see Michael Mason, 'Transparency, Accountability and Empowerment in Sustainability Governance: A Conceptual Review' (2020) 22(1) *Journal of Environmental Policy and Planning* 98 <<https://doi.org/10.1080/1523908X.2019.1661231>>.

184 *Ibid* 99.

185 *Ibid* 100.

186 Ian Cochran, Craig Mackenzie and Matthew Brander, 'EU's Sustainable Finance Disclosure Regulation: Does the Hybrid Reporting Regime Undermine the Goal to Reorient Capital to Climate Action?' (2025) 25(1) *Climate Policy* 76 <<https://doi.org/10.1080/14693062.2024.2353115>>; Ingrid Landau, 'Human

In the context of sustainable finance, it is also important to interrogate the underpinning theory of change that enhanced transparency will drive investors to allocate capital to sustainable business activities and to steward high-emitting, high-impact companies towards global sustainability goals, especially in circumstances where this might inhibit their projected financial performance. Indeed, within the broader financial system, there are considerable legal and practical barriers that inhibit investors playing this role, which are not effectively addressed through sustainable finance reforms. One key barrier in Australia is ambiguity concerning the legal duties of investors. It is now broadly accepted that environmental and social factors pose financial and non-financial risks and opportunities that can be considered by investors.¹⁸⁷ Yet there remain concerns about whether investors can and should actively drive improved corporate sustainability outcomes.¹⁸⁸

Legislation governing institutional investors, such as superannuation funds, does not set out an explicit duty for them to pursue sustainability outcomes – investors are therefore not required to unless failure to do so could have an adverse effect on returns.¹⁸⁹ Yet recent reforms to prudential regulation do specify that superannuation trustees can set environmental and social impact objectives provided doing so is consistent with outcomes for beneficiaries.¹⁹⁰ Legal opinion has also postulated that investors may be required to pursue sustainability outcomes through their investment decisions and stewardship to mitigate the impacts of systemic risks, like climate change and nature loss, to their portfolio.¹⁹¹ Universal owners (being diversified, long-term investors like superannuation funds) are the primary example of institutional investors who are likely to be exposed to systemic risks that could adversely affect portfolio returns,¹⁹² corresponding to a legal imperative to steward investee companies to improve their management of sustainability risks in line with global goals. Yet, the ambiguity surrounding

Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20(1) *Melbourne Journal of International Law* 221 ('Cosmetic Compliance').

- 187 Pam McAlister, 'ESG Investing: The Legal Case' (2017) 29(5) *Australian Superannuation Law Bulletin* 75, 77–9; United Nations Environment Programme Finance Initiative and Principles for Responsible Investment, *Fiduciary Duty in the 21st Century* (Final Report, 21 October 2019).
- 188 For example, in *Australian Securities Investment Commission v LGSS Pty Ltd* [2024] FCA 587, [63], quoting Employee Benefits Security Administration, US Department of Labour, 'Interpretive Bulletins 2016-01 and 2015-01' (Field Assistance Bulletin No 2018-01, 23 April 2018) 2, O'Callaghan J cautioned superannuation trustees from pursuing environmental and social objectives without regard to financial performance: 'Fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision.' While this view is not inconsistent with current law, the direction to avoid readily equating environmental and social factors to financial performance arguably sends a signal that investors should precisely quantify the financial impacts of a sustainability risk to an individual stock, rather than pursuing sustainability outcomes based on the investment thesis that systemic risks threaten financial performance across diversified portfolios.
- 189 Arjuna Dibley and Lauren Fidler, 'How the *Superannuation Industry (Supervision) Act 1993* Impacts the Global Climate Financing Gap' (2024) 38(4) *Australian Environment Review* 76, 78.
- 190 Australian Prudential Regulation Authority, 'Prudential Practice Guide: SPG 530 Investment Governance' (Guide, July 2023) 18 [49]–[50].
- 191 Freshfields Bruckhaus Deringer et al, *A Legal Framework for Impact: Sustainability Impact in Investor Decision-Making* (Report, July 2021) 154–92.
- 192 Principles for Responsible Investment, Generation Foundation and United Nations Environment Programme Finance Initiative, *A Legal Framework for Impact: Australia* (Report, September 2022).

investors' fiduciary duties may constrain them from stewarding a company to avoid or mitigate their adverse sustainability impacts where the company's environmental or social externalities could negatively affect the financial returns of the collective investment portfolio.¹⁹³ Indeed, while investor stewardship activities¹⁹⁴ (including shareholder resolutions)¹⁹⁵ targeting improved sustainability risk management in line with global goals have proliferated in Australia in recent years, investor voting practice remains highly variable.¹⁹⁶ Further, investors appear hesitant to vote against executive remuneration and director appointments to amplify pressure on investee companies to improve their sustainability risk management.¹⁹⁷ Signatories to the Principles for Responsible Investment have highlighted that clearer guidance on investors' fiduciary duties to address sustainability outcomes is needed for investors to actively steward companies to avoid adverse human rights impacts, address nature loss, and align business activities with *Paris Agreement* goals.¹⁹⁸

The *CSDDD* supplements market and reputational accountability with other enforcement modalities that, in theory at least, go a significant way in empowering accountability holders to seek redress for social and environmental harms.¹⁹⁹ Supervisory accountability is a key feature of the Directive, with EU Member States required to designate 'supervisory authorities', to ensure these authorities meet certain criteria (eg, to be independent and adequately resourced), and to empower these actors with significant powers and responsibilities for administrative enforcement of the law.²⁰⁰ Importantly, it also establishes legal accountability by requiring member states to implement a civil liability regime under which a company may be held liable where it fails to comply with the law and, as a result, causes harm.²⁰¹ It recognises the rights of other actors (such as trade unions and NGOs) to initiate legal action on behalf of individuals and communities.²⁰² It also includes important provisions directed at improving access to remedy for victims

193 Frederick H Alexander, 'The Benefit Stance: Responsible Ownership in the Twenty-First Century' (2020) 36(2) *Oxford Review of Economic Policy* 341, 349 <<https://doi.org/10.1093/oxrep/graa002>>.

194 Stewardship activities include direct calls and meetings with company teams, executive and boards, private and public letters to the company, collaborative engagements, voting against directors and nominating new directors, and shareholder resolutions: see Niall Considine, Susanna Hudson and Danielle Vrubleviskis, ShareAction, 'Introducing a Standardised Framework for Escalating Engagement with Companies: Responsible Investment Standards and Expectations (RISE)' (Guidance Paper No 2, December 2023).

195 'Australian ESG Shareholder Resolutions', *ACCR* (Web Page) <<https://www.accr.org.au/research/australian-esg-resolution-voting-history/>>.

196 *Ibid.*

197 'Woodside Suffers World Record-Breaking Vote against Climate Plan, Embarrassingly Large Vote against Chair', *Market Forces* (online, 24 April 2024) <<https://www.marketforces.org.au/woodside-suffers-world-record-breaking-vote-against-climate-plan-embarrassingly-large-vote-against-chair/>>; Adam Morton, 'How Do We Define Climate Responsibility? Woodside Has No Answer', *The Guardian* (online, 30 April 2024) <<https://www.theguardian.com/environment/commentisfree/2024/apr/30/how-do-we-define-climate-responsibility-woodside-has-no-answer>>; Ben Potter, 'Grok Wiels Carrot and Stick on AGL Pay, Climate Ambition', *Australian Financial Review* (online, 20 November 2023) <<https://www.afr.com/policy/energy-and-climate/grok-wields-carrot-and-stick-on-agl-pay-climate-ambition-20231120-p5elfu>>.

198 Principles for Responsible Investment, *Strengthening Effective Stewardship in Australia: Understanding Barriers and Opportunities for Investor Stewardship on Sustainability Outcomes* (Report, June 2023) 14–15.

199 See also Gustafsson, Schilling-Vacaflor and Lenschow, 'Supply Chain Regulation Politics' (n 11) 863.

200 *CSDDD* (n 4) arts 24–8.

201 *Ibid* art 29.

202 *Ibid* art 29(3)(d).

of corporate-related human rights harms (for example, in relation to the disclosure of information by companies or statutory limitation periods).²⁰³ Finally, fiscal accountability is facilitated by provisions that recognise that member states may use their power as commercial actors to encourage corporate compliance with the substantive requirements of the Directive.²⁰⁴ It is important to emphasise, however, that the extent to which these various accountability mechanisms will be used in practice remains to be seen. For example, it remains unclear to what extent victims will be able to surmount the still significant legal and practical obstacles to secure legal remedy,²⁰⁵ or to what extent national courts will be willing to apply the new rules in a way that challenges prevailing corporate practice.²⁰⁶ It is also unclear to what extent national supervisory authorities will prove willing and able to use the significant investigative and sanctioning powers entrusted to them.

Table 1: Accountability Logics in Sustainable Finance and MHREDD

Sustainable finance			
Primary objectives (and associated beneficiaries)	Accountability relationships	Accountability standards	Securing accountability – mechanisms and consequences
To promote and enable robust management of sustainability-related financial risks to business.	Power wielders – large companies and financial institutions. Primary accountability-holders – shareholders, other market stakeholders. Corporate regulators play a role in enforcing accountability.	Comprehensive disclosure of financially material risks to the company. Disclosures on future matters must have a reasonable basis. In the EU, the double materiality standard also requires disclosure of adverse impacts on people and the environment.	Market accountability. Supervisory accountability. Legal accountability – including civil liability regimes for misleading disclosure and breach of directors' duties.

203 Ibid art 29.

204 See above Part IV.

205 See, eg, Ingrid Landau and Shelley Marshall, 'Will Remedy Remain Rare? The Potential of Mandatory Human Rights Due Diligence to Redress Modern Slavery' in Hila Shamir et al (eds), *Modern Slavery and the Governance of Global Value Chains* 124 (unpublished, copy on file with authors). On the difficulties encountered by plaintiffs located in the Global South in using the *French Corporate Duty of Vigilance Law* (n 3) to advance accountability for environmental harm, see Alejandra Ancheita, 'Promoting Climate Justice in Transnational Fora: The Case of *Unión Hidalgo vs Électricité de France* and the *French Corporate Duty of Vigilance Law*' in Tobias Wuttke et al, 'Human Rights and Environmental Due Diligence in Global Value Chains: Perspectives from the Global South' (Working Paper No 2, Research Division Africa and Middle East, Network Sustainable Global Supply Chains, August 2022) 18 <<http://dx.doi.org/10.18449/2022WP06>>.

206 See Ingrid Landau, *Human Rights Due Diligence and Labour Governance* (Oxford University Press, 2023) 146–9 <<https://doi.org/10.1093/oso/9780198876069.001.0001>>. For a discussion of the impact of litigation under the *French Corporate Duty of Vigilance Law* (n 3), see Schilling-Vacaflor and Gustafsson (n 18).

Sustainable finance			
Primary objectives (and associated beneficiaries)	Accountability relationships	Accountability standards	Securing accountability – mechanisms and consequences
To align private capital flows to address global sustainability challenges (and thereby manage systemic risks posed by climate change, biodiversity loss and other sustainability issues).	Civil society groups (when shareholders) may also play a role through strategic litigation.	Reasonable standard of risk management, in the best interests of the company. In the EU, risk management should align to global goals.	Non-compliance may result in civil and criminal penalties for companies and their directors (and officers).
MHREDD			
Primary objectives (and associated beneficiaries)	Accountability relationships	Accountability standards	Securing accountability – mechanisms and consequences
To promote sustainable and responsible corporate behaviour. To secure greater access to remedy for victims of corporate-related human rights harms.	Power wielders – very large EU and non-EU based companies. Primary accountability holders – individuals and communities impacted adversely. Proxy accountability holders – trade unions and civil society groups. National regulators play a role in enforcing accountability.	Duty to undertake due diligence to identify and address potential and actual adverse human rights and environmental impacts in company's operations, subsidiaries and business partners in value chain. Due diligence standard of 'appropriate measures' capable of achieving the objectives of due diligence, commensurate to degree of severity and likelihood of adverse impact. Duty to adopt climate change transition plan. Duty to remediate certain harms.	Market accountability. Supervisory accountability. Legal accountability – including civil liability regimes for victims of harm caused by non-compliance. Non-compliance may result in injunctions and significant monetary penalties for companies. Non-compliance may also be taken into account by contracting authorities when awarding public contracts (fiscal accountability).

VI CONCLUSION

This article has juxtaposed, considered and compared sustainable finance and mHREDD as two distinct but increasingly prominent regulatory approaches to integrate sustainability into corporate governance. By exploring the accountability logics in the two approaches, it sought to provide insight into their potential and their limitations to enhance corporate social and environmental accountability as part of societal responses to climate change, biodiversity loss and human rights abuses in international supply chains. Drawing on European experiences to date, it also considered opportunities to strengthen Australia's nascent corporate sustainability project.

Australian sustainable finance reforms, as currently proposed, only minimally depart from the existing accountability relationships, standards and processes embedded in corporations law. While these increasingly require some integration of sustainability issues in corporate governance, the way that corporate accountability is scoped with reference to financial risks to the company, and the way in which it is allocated and secured (with companies principally accountable to shareholders), does not create strong incentives for companies and their directors to address social and environmental harms in a timely way. Further, relying heavily on transparency and market accountability, without also addressing the mixed incentives of key accountability holders like institutional investors, is unlikely to drive the timely and comprehensive reallocation of private capital away from harmful activities and towards more sustainable activities envisaged by these reforms. The accountability relationships and standards within the European sustainable finance initiative appear to create stronger incentives and a clearer realignment of corporate governance towards sustainability goals. As Australia moves forward with its reform agenda, there are opportunities to strengthen this through explicit adoption of a *double materiality* standard, comprehensive coverage of social and environmental issues, mandatory corporate transition planning aligning company risk management with global goals, and mandatory reporting against the sustainable finance taxonomy.

HREDD laws like the *CSDDD* adopt richer and more diverse accountability logics than sustainable finance. Indeed, this analysis suggests that mHREDD has the potential to deepen and broaden corporate accountability for social and environmental harms beyond what is possible with sustainable finance measures. Of course, formal rules alone do not tell the whole story, and the capacity of these laws to deliver significant improvements in accountability remains to be seen.²⁰⁷ It is also the case, as Michael Mason, Lena Partzsch and Teresa Kramarz emphasise, that 'the devil is in the detail'.²⁰⁸ Questions of scope, application, the nature of due diligence duty, and compliance and enforcement infrastructures are central to determining the capacity of such a law to contribute to meaningful change, and the way in which such laws are designed will inevitably reflect domestic political and

207 On the potential for HREDD to become an instrument of corporate legitimacy rather than corporate accountability, see Galit A Sarfaty and Raphael Deberdt, 'Supply Chain Governance at a Distance' (2024) 49(2) *Law and Social Inquiry* 1036 <<https://doi.org/10.1017/lsi.2023.17>>.

208 Mason, Partzsch and Kramarz (n 180). See also Landau, 'Cosmetic Compliance' (n 186).

institutional environments, especially legacies in state-market relations. However, in a world where corporate accountability remains elusive, and formulating effective regulatory interventions to address complex and intertwined social and environmental challenges that transcend national borders remains challenging for policymakers, such laws merit serious consideration, including in Australia.

While this analysis has focused largely on the accountability logics *within* sustainable finance and mHREDD (second-tier accountability), we conclude with some broader reflection on first-tier accountability and sustainability governance, and particularly the relative prominence of these two interventions in Australia and their framing as viable solutions to global sustainability challenges.

This article has confirmed that Australia's nascent corporate sustainability project is overwhelmingly relying on market-based modalities of accountability. Given the gravity and urgency of the problems that the regulatory interventions are purporting to address and the voluminous literature suggesting that accountability through transparency alone is often incapable of achieving the regulatory objectives to which it is brought to bear,²⁰⁹ this trajectory is of concern. A basic but important commonality between sustainable finance and mHREDD is that both reflect and align with, rather than interrogate, dominant market-based logics and configurations of authority and power.²¹⁰ Neither involves fundamental reforms to what are deeply unsustainable business models and institutions.²¹¹ While sustainable finance, particularly when accompanied by mHREDD, can certainly help to reorient business towards sustainability objectives, we suggest that more fundamental reforms – which dismantle and rearrange prevailing accountability logics – are needed.²¹²

209 Aarti Gupta and Michael Mason (eds), *Transparency in Global Environmental Governance: Critical Perspectives* (MIT Press, 2014) <<https://doi.org/10.7551/mitpress/9780262027410.001.0001>>; Mason (n 183); David Hess, 'The Transparency Trap: Non-financial Disclosure and the Responsibility of Business to Respect Human Rights' (2019) 56(1) *American Business Law Journal* 5 <<https://doi.org/10.1111/ablj.12134>>.

210 Mason (n 183) 108.

211 See Susan Park and Teresa Kramarz (eds), *Global Environmental Governance and the Accountability Trap* (MIT Press, 2019) <<https://doi.org/10.7551/mitpress/11709.001.0001>>.

212 On applying theories of ecologically rational regulation to corporate law, see, eg, Parker and Haines, 'Reconstituting the Contemporary Corporation' (n 9). On novel sustainability duties in corporate law, see, eg, Quinn (n 91); Nick Grant, 'Mandating Corporate Environmental Responsibility by Creating a New Directors' Duty' (2015) 17(4) *Environmental Law Review* 252 <<https://doi.org/10.1177/1461452915611772>>; Julia Maskill, 'Extending Directors' Duties to the Natural Environment: Perfect Timing for Greener Companies in Aotearoa New Zealand?' (2016) 22 *Auckland University Law Review* 281.