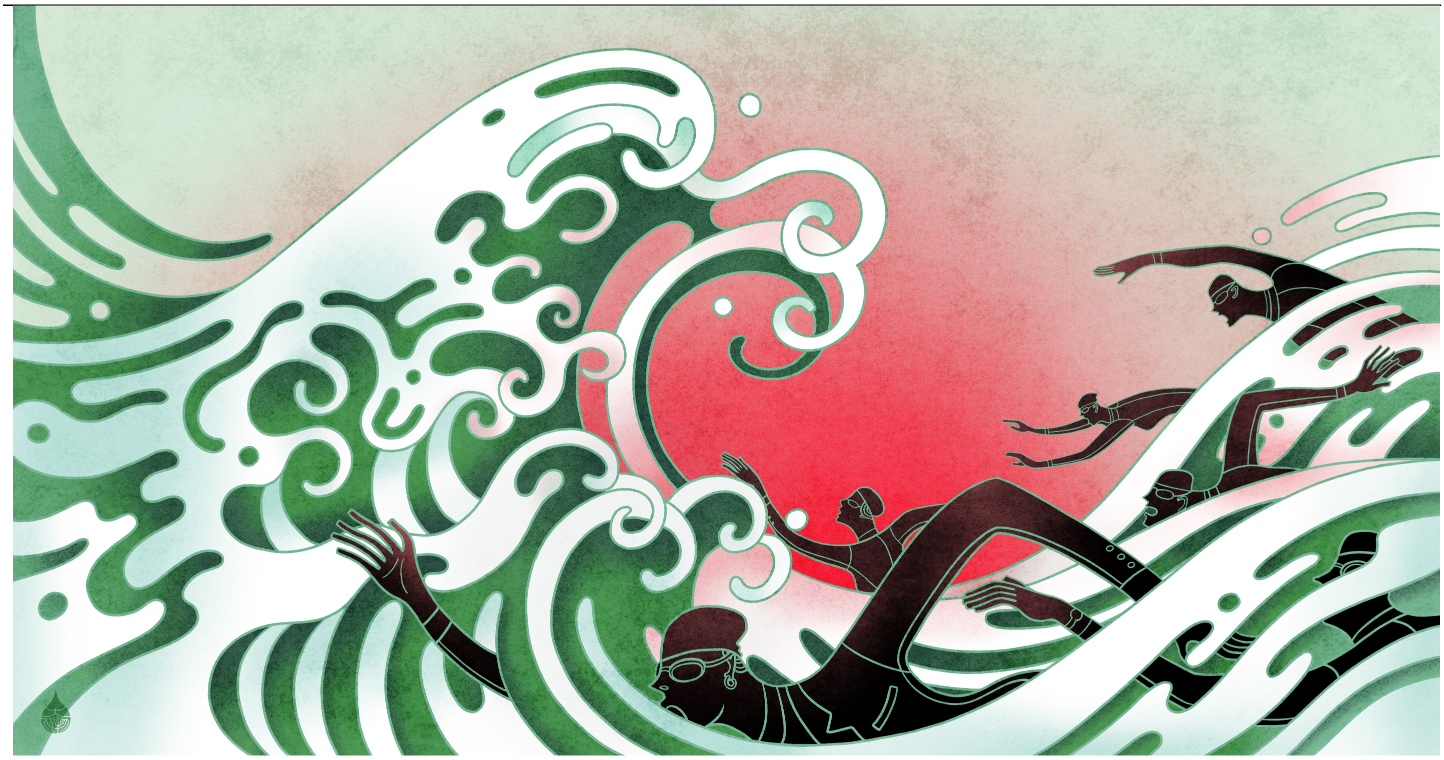
How the GC Empowers the Board to Govern the Green Wave

Compliance and Ethics



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Cheat Sheet

- **Climate change is global.** Boards around the world are facing increased scrutiny for their companies' environmental impact.
- **Good starting point.** The World Economic Forum's Climate Governance Principles provide guidance for boards to effectively govern against greenwashing.
- **GC's unique position.** The GC navigates the equation between the board, C-suite, and management, and is well-positioned to help integrate climate considerations.
- **Golden compass.** A GC can help guide a company through a legal and regulatory landscape that often involves guidelines and other soft law.

Joanne Moss, Disputes Partner at Gadens, speaks with Rebekah Cheney, head of climate governance at Deloitte, Courtenay Zajicek, chief counsel of Nando's ANZ, Annaliese Eames, general counsel of Australian Strategic Materials Limited and Jacqueline Scarlett, group general counsel of Bega Group, about the general counsel's unique position within the company. The GC's position empowers the board to integrate climate into its strategic decisions, financial and business model planning, operational execution and risk considerations in order to effectively govern against greenwashing.


Joanne Moss, disputes partner, Gadens


Rebekah Cheney, climate governance lead, Deloitte


Courtenay Zajicek, chief counsel, Nando's

 Annaliese Eames, general counsel, Australian Strategic Materials Limited

 Jacqueline Scarlett, group general counsel, Bega Group

The issue of climate change has burgeoned into an urgent global movement, and companies are subject to greater scrutiny for their contribution to greenhouse gas emissions and other environmental impacts. A company's board of directors is responsible for the overall governance and management of the organization, including its social and environmental impact.

Stakeholders, whether shareholders, employees, consumers, activists, industry bodies, or the global community, now look to the board to take a more proactive role in addressing climate change.

> Good climate governance includes frameworks, policies, and procedures that record, track, and report on these climate initiatives.

Currently, responsible climate initiatives involve the establishment of targets for reducing greenhouse gas emissions, investment in renewable energy or other low-carbon technologies, and engagement with stakeholders to promote sustainable practices throughout the value chain. Good climate governance includes frameworks, policies, and procedures that record, track, and report on these climate initiatives.

It is imperative as a GC to be transparent with stakeholders about environmental goals. Golden Sikorka / *Shutterstock.com*

The board's fiduciary duty to act in the best interests of the company, and its stakeholders, includes ensuring that the company is transparent and honest in its communications about its environmental performance, including the environmental targets and benefits of its products, services, and practices. If these are found to be false or exaggerated, the board may be held liable for any harm caused to stakeholders for engaging in "greenwashing." This could include lawsuits from consumers or investors, regulatory fines or penalties, and damage to the company's reputation.

> "The role of stakeholder activists in influencing the board direction and consequent company strategy on climate is only going to increase. The cycle of change often is prompted by scientific development, then through the role of activists becomes a 'fringe idea' that gathers momentum until it results in mainstream pressure from investors resulting in the introduction of voluntary guidance. Many jurisdictions already have regulatory guidance on climate governance and are on the cusp of hard law in the form of mandatory climate reporting."
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> According to Deloitte's Climate Governance Lead Rebekah Cheney

The "green wave" is here, and the general counsel is uniquely placed to ensure that the board and the company as a whole are aware of both the opportunities it brings as well as "the adverse consequences of maximising the short-term financial interests of shareholders at the expense of… environmental considerations (and of longer-term shareholder value)," according to *Corporate Law* by Elizabeth Boros and Juhn Duns.

However, in a legal and regulatory landscape that largely involves guiding principles and other soft law, it is challenging for a board to determine best practice.

Joanne Moss

To minimize the risk of liability for greenwashing, the board should ensure that the company's environmental claims are accurate and supported by evidence. However, in a legal and regulatory landscape that largely involves guiding principles and other soft law, it is challenging for a board to determine best practice.

International guiding principles

The World Economic Forum has formulated a set of Climate Governance Principles intended for boards of directors (Guiding Principles). These principles aim to equip non-executive directors (NEDs) with the knowledge and competencies necessary to comprehend climate issues, integrate climate considerations into board decision-making, and effectively address the risks and opportunities associated with the climate emergency. The principles emphasize the significance of considering all stakeholders while ensuring the long-term resilience and success of their organizations.

Recognizing the pivotal role played by boards of directors in navigating the climate emergency, it is essential for businesses to proactively address these challenges. Boards must fulfill their fiduciary responsibilities by having a comprehensive understanding of climate change implications, possessing the requisite skills, resources, processes, and information to act while demonstrating a commitment to guide their companies through the complexities of climate change by integrating it into their strategic planning.

The Guiding Principles are a good starting place for the general counsel looking to empower their board to effectively govern against greenwashing, providing eight principles:

1. Climate accountability of the board
2. Command of the climate subject
3. Board structure
4. Material risk and opportunity assessment
5. Strategic integration
6. Incentivization
7. Reporting and disclosure
8. Exchange

Additionally, from a reporting and disclosure perspective, the International Sustainability Standards Board (ISSB) and the reporting through the TCFD Framework, which for some organisations is voluntary and for others mandatory, are also relevant to boards. The ISSB builds on the TCFD framework.

The unique role of the general counsel

The GC is uniquely placed to provide guidance to the board on climate initiatives and obligations, as the GC frequently navigates the equation between the board, C-suite, and management departments.

Often the GC holds a broader executive portfolio within the company beyond legal, such as corporate affairs, company secretarial, and risk.

The GC of Australian Strategic Materials Limited (ASM), Annaliese Eames, states:

"As GC, you engage with all departments within the company and often attend cross-functional team meetings to provide legal strategy and advice. You quickly develop an understanding of the commercial practicalities of running the company — to look at the strategy, operational execution, commercialization, financial requirements to determine the best course. You have a holistic understanding of the company, its products and services, social license, stakeholders, and the industry in which it operates. As you view the company from a wide lens, you develop a strong legal intuition that helps you look around corners, particularly relating to social and environmental movements that will likely impact the company in the future."

Annaliese Eames

Often the GC holds a broader executive portfolio within the company beyond legal, such as corporate affairs, company secretarial, and risk. It may also be a member, or invited to observe the meetings, of the board and its subcommittees. This equips the GC even further in their holistic and cross-functional understanding of the company.

As GC, being cross functional with different departments plays an important role in mitigating green washing risks. Vector Point Studio / *Shutterstock.com*

Nevertheless, engagement with other parts of the company is crucial. For example, the CEO, CHRO, CFO, Risk Officer, and internal audit department, if the company has one, will all play a crucial role in collaborating with the GC to assess the available opportunities available to improve climate initiatives, the risks involved, and mitigations to avoid green washing.

Climate accountability of the board

An experienced GC can quickly digest international and local discourse around current or emerging legal and regulatory initiatives relevant to the company’s industry, and the potential ramifications, long before hard law is established.

"Determining the changing responsibilities of directors that may translate into changes of directors' fiduciary duties is a complex process that involves legal analysis, industry knowledge, and consideration of evolving standards. Coupled with a holistic understanding of the company and access to third party external advisers, the GC becomes a valuable source to the board as they determine how new developments apply to the company's specific industry, business model, and governance structure."

Joanne Moss

Undertaking this process underpinned Annaliese Eames' understanding of the evolving legal expectations for directors around climate accountability and board responsibility to shareholders for corporate stewardship. This includes the ability to adapt and withstand potential changes in the business environment caused by climate change which echoes Principle 1 of the Guiding Principles, she stated.

The next step, Eames says, is to then ensure the board fully comprehends the extent to which climate risks and opportunities form part of their directors' duties.

Command of the climate subject

The ability to understand a complex topic, unpack the issues, and translate it into simple terms is a talent that many experienced general counsel possess. They can play a crucial part in ensuring the board is provided with the requisite knowledge and skills regarding the subject to determine climate strategy, make climate initiative assessments, and mitigate risks.

The general counsel can provide education and training sessions for the board to enhance their understanding of fiduciary duties and emerging responsibilities. This includes staying abreast of legal and regulatory changes, industry trends, and best practices. Additionally, the general counsel may also facilitate additional board training sessions by professional advisers on climate areas outside the general counsel's remit: awareness of the current climate position, scientific developments, emerging trends, and how these may affect the future of the company and its industry.

Educating the board on climate areas ensures they are knowledgeable and aware of upcoming duties. RIbi2609 / *Shutterstock.com*

A recommendation for a gap-analysis on board climate competence may also be required to influence future training sessions. In addition, this may enliven discussion about a review of the board’s skills matrix to determine whether an additional director is required or for succession purposes.

Board structure

Ensuring that the board's governance structure adheres to applicable laws, regulations, and governance best practices is an important role of the general counsel. They review the company's bylaws, articles of incorporation, and other governing documents to ensure compliance with climate governance best practice, and current and emerging legal requirements.

The general counsel can also provide insights on board composition, qualifications, and succession planning to meet regulatory expectations. They can assist the board in identifying the skills, expertise, and diversity needed for effective climate governance. Due to the general counsel’s obligation to act in the best interests of the company, it is the general counsel (rather than a chief HR officer or CEO) who should instigate and then participate in discussions about board nominations, director evaluations, and board refreshment strategies to ensure a well-rounded and high-performing board in this regard. This should be done in close collaboration with the board chair and the chair of the nominations committee.

Advisory to the board on the establishment and structure of board committees is an additional task that the general counsel can assume to empower the board. The general counsel can provide guidance on committee charters, roles, responsibilities, and reporting lines to ensure effective climate governance oversight.

Nando's ANZ's Chief Counsel Courtenay Zajicek states that her understanding of board governance and the dynamics around the board table, board reporting practices, and the workings of the board meant that she was the adviser best placed to assist Nando's ANZ with the transformation of its corporate governance structure towards climate best practice.

Zajicek states:

> "For Nando's ANZ, this has included establishing a sustainability subcommittee to continue bringing sustainability, climate initiatives, and recommendations to life. I also have visibility across several other subcommittees to ensure that sufficient attention is provided to climate issues by our audit and risk committee for fulsome reporting on climate up to the board."
>
> Courtenay Zajicek

Material risk and opportunity assessment

The general counsel's understanding of best practice board governance, overall company strategy, the workings of the board and its subcommittees, and senior management's relationship with the board, provides the GC with insight into the commercial drivers and pain points that often shape the company's actions. The ability to acknowledge the commercial drivers and pain points while formulating governance and legal strategy provides the GC with gravitas at the board and leadership tables and reduces barriers to achieving climate accountability objectives and recommendations.

The general counsel ought to review the board pack before each meeting to ensure it includes quality materials and recommendations from committees and management to allow for robust debate and informed decision making at the board table.

Zajicek states:

"Awareness is key — of what is happening in the market, legal landscape, around the board table, subcommittees and within the management team. This allows the GC, when drafting their own board paper, reviewing the draft board pack and subsequently presenting recommendations at the board table, to integrate this awareness into the proposed climate initiatives and associated governing regulatory requirements, guidance principles and case law."

Coupled with the GC's legal expertise, risk management skills, compliance responsibilities, and reputation management, the GC is well-suited to identify and address the behaviours likely to lead to greenwashing. Similar to Zajicek, the GC typically serves as a member or observer of the board's risk subcommittee and participates in conducting risk workshops throughout different departments. In this case, short- and long-term material risk assessments are completed, and contributions made towards the risk register along with associated mitigating actions. As a member or observer of the subcommittee, the GC is well placed to report the findings up to the board, including any greenwashing risks.

The involvement of the general counsel across all, or most, areas of the company positions them to work closely with the CFO and CHRO to determine appropriate resourcing for climate initiatives and obligations.

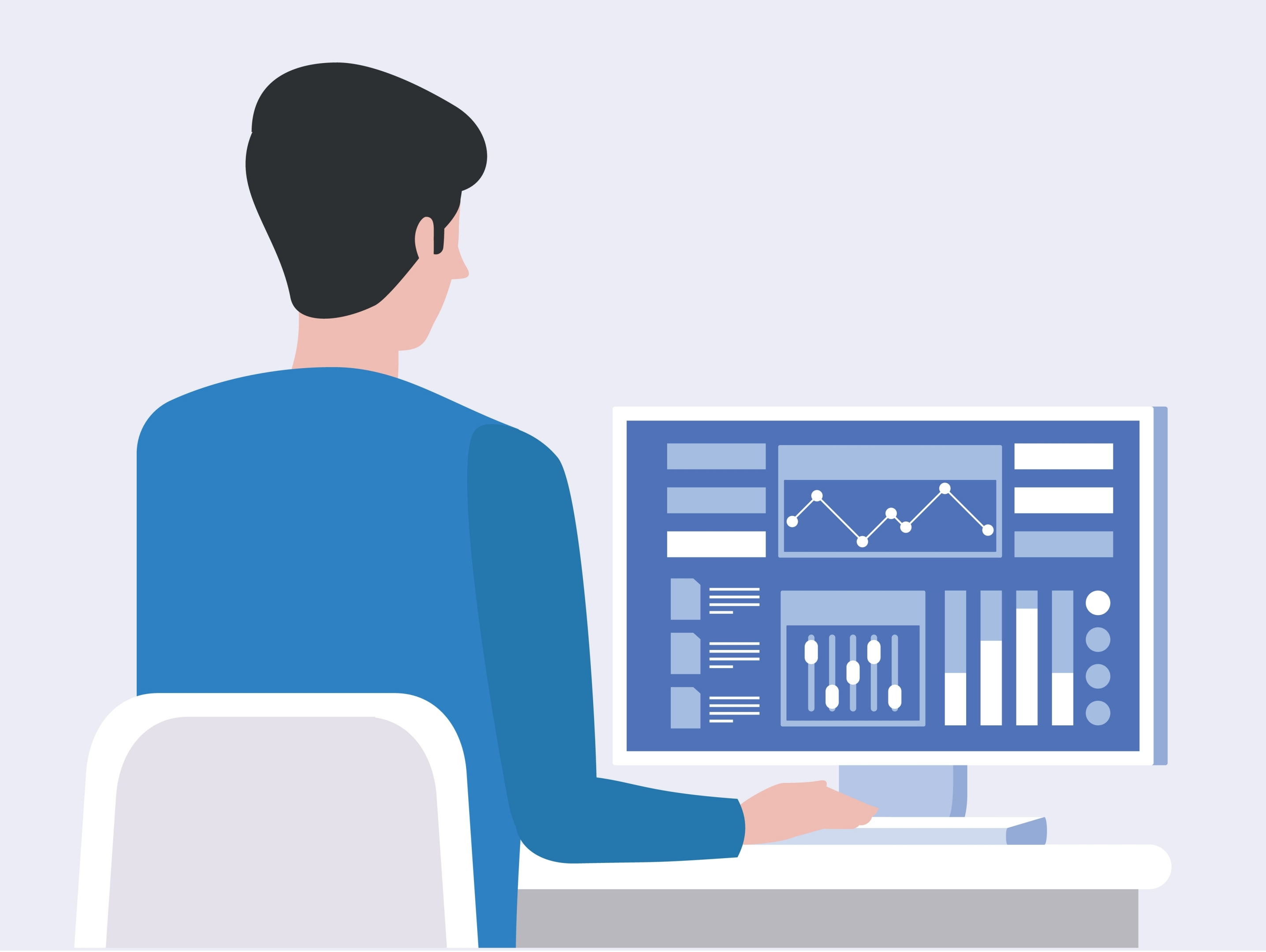
Deloitte's Cheney says:

"The GC will have an important role in making sure there is sufficient allocation of resources so when climate reporting is undertaken, there is the sufficient evidence base to substantiate it…the pendulum is swinging away from narrative reporting towards metric-based reporting based on a single source of truth controlled by the CFO."

Rebekah Cheney

ASM's Eames is ensuring that the targets and indicators the company is reporting against can be measured against something that is factual. When a climate claim is to be made, ASM look to determine whether it is verifiable against an independent resource.

Looking to the longer-term, ASM is engaging with a third-party research and data analytics provider that rates the sustainability of companies based on their environmental, social, and corporate governance performance. This provider has conducted an ESG review and prepared a report for the company — including a comparison between ASM and other companies within the industry. The report provides the bench post of where the company currently ranks in comparison, what its risks are, what it can do to improve, and what recommendations are feasible. ASM has also joined the UN Global Compact to support a similar process and gain another independent viewpoint.



Consider a third-party research and data analytics provider to supply a ESG review for the company. fihusainh / *Shutterstock.com*

Strategic integration

The GC can provide strategic advice to the board on how to align company practices with the Guiding Principles.

Relating climate initiatives and regulatory requirements back to the company's purpose is the crucial starting point, states Zajicek of Nando's ANZ. In building awareness of what these issues are, [she turned to a Pfizer framework] can be distilled into answering the following key questions:

1. Does the issue relate to our purpose?
2. How does the matter impact our stakeholders?
3. What are our choices for engagement?
4. What is the price of silence?

5. How does the issue relate to our values?

The above framework is a good starting point to facilitate a board discussion and ensure that the board asks these and broader questions as part of the fulsome debate required to understand its climate strategy, the opportunities and challenges raised by climate initiatives, and associated responsibilities and risks relating to performance and disclosure.

The subsequent step necessitates a more specific discussion with the board as to its climate-related decisions and the integration of climate into the overall corporate strategy.

According to Deloitte’s Cheney:

“It is important to determine whether the board sees climate reporting as fundamentally a compliance issue and a risk to be managed, or whether the board has taken the next step forward to see climate as a strategic opportunity. If GCs are able to help the board to see it as a strategic opportunity to be integrated into all aspects of the company, then the company will be well on the path to combatting greenwashing. This is because there is an authentic voice from the board aligned with a deeply embedded climate strategy, as opposed to a reactive response to climate regulations. Best practice is dictating a shift towards strategic integration of climate matters so that sustainability strategy is synonymous with good business strategy."

The general counsel can assist the board in reviewing its governance framework, policies, and procedures to ensure they holistically integrate climate matters. This includes codes of conduct, ethics policies, and conflicts of interest policies. The general counsel can ensure that the framework aligns with legal requirements and industry standards, promoting transparency, accountability, and ethical behavior within the company. However, to be truly integrated, the board needs to consciously decide that climate considerations must be included within the strategic planning workshops, financial planning and metrics, business models, operational execution, and company-wide incentivisation strategies.

Incentivization

As mentioned earlier, the evolving application of fiduciary duties for directors around climate accountability and board responsibility to shareholders is tied to the long-term stewardship of the company. To do so, it makes good sense to incentivize executive management with climate-related targets that reflect and reward sustainable value tied to the company’s climate initiatives and responsibilities. This could involve tying a portion of executive pay to the company's performance on environmental metrics, like how some companies link pay to financial performance.

It is in the best interest of the company to think about incentivizing executives, making certain that climate subject targets will be met. eamesBot / *Shutterstock.com*

When executives are incentivized to consider the environmental impact of their decisions, climate becomes a core component of the company's strategy, not just a peripheral concern.

Further, investors are increasingly looking to support companies that are committed to climate initiatives. Incentivizing executives based on climate-related targets can send a strong signal to investors that the company is serious about its environmental responsibilities.

As governments around the world tighten their climate regulations, companies that fail to adapt may face significant penalties. By incentivizing executives to meet climate-related targets, companies can ensure they stay ahead of the regulatory curve.

Typically, incentivization models that feed into executive management incentives are considered outside the remit of the general counsel. However, considering the reporting and disclosure obligations in some jurisdictions around executive and key personnel remuneration, the general counsel ought to be involved in the assessment of the incentives. In particular, the GC should consider the suitability and relevance of climate-related targets, as this will differ between companies, influenced by elements such as the materiality of climate change to the company's operations and interests. Other considerations for the general counsel include appropriateness and proportionality of the incentive tied to a target.

> When executives are incentivized to consider the environmental impact of their decisions, climate becomes a core component of the company's strategy, not just a peripheral concern.

Reporting and disclosure

There is no consensus as to how companies should report on climate change, and, therefore, one company's level of disclosure is likely to be different from the approach adopted by another, even when operating in the same industry. A guide for what the future holds, and what regulation may eventually look like, is the International Sustainability Standards Board (ISSB) and the voluntary reporting through the TCFD Framework. It is expected, at this stage, that the final standards will be released shortly, and they are anticipated to be effective internationally from January 1, 2024.

The ISSB has so far proposed two standards, building on from the TCFD, which would require companies to disclose sufficient information to enable investors to assess the impact of sustainability-related risks and opportunities on that company (IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information*)*, and establish disclosure requirements specifically directed at climate change risks and opportunities (IFRS S2 Climate-related Disclosures*).*

Building on AMS's Eames' insight above, the general counsel's holistic understanding of the company, its products and services, social licence, stakeholders, and the industry in which it operates should provide the general counsel with a wide enough lens to develop a strong legal intuition on reporting and disclosure in an unclear environment. The general counsel is uniquely placed to advise the board and other senior executives on what ought to be disclosed, how it should be disclosed, and when.

The general counsel helps the company manage the legal and reputational risks associated with climate disclosures. They advise on how to present information in a way that is truthful and fair and does not expose the company to unnecessary liability. They also help the company respond to any greenwashing legal challenges or disputes that may arise from its disclosures.

Bega Group's Group General Counsel, Jacqueline Scarlett states:

“The general counsel has a key role in ensuring that claims made about the company's climate change initiatives are able to be substantiated and accurately reflect the initiatives and outcomes achieved.”

Jacqueline Scarlett

For example, the marketing department of the Bega Group is required to submit a completed and signed form to the legal department which confirms that verification has been undertaken for climate-related claims relating to their products and provides supporting evidence. Training provided to the marketing department assists them to understand why verification is a necessity for all climate-related claims they endeavour to make.

Preparing the board to engage with stakeholders on disclosure-related issues is another action the general counsel can take to empower its board. This might involve preparing the board for questions at shareholder meetings, advising on how to respond to inquiries from regulators or the media, or developing strategies for communicating with customers and employees about the company's climate activities.

Eames, of AMS, states:

“The GC plays a pivotal role in ensuring all stakeholders, including employees, investors, customers, regulators, and the general public are kept informed in an accurate and appropriate manner by the company. This helps to build trust and transparency with stakeholders and supports informed decision-making.”

Exchange with stakeholders

The general counsel plays an instrumental role in assisting the board to engage in dialogue with stakeholders about best practice climate governance, climate relevant risks, and regulations. An expert in information dissemination, the GC can quickly digest international and local discourse around current or emerging climate policy and provide the board with necessary background and context.

Piece together a communication strategy with stakeholders in order to report back any insightful information to the board. VectorMine / *Shutterstock.com*

Where legal and governance arrangements allow, the general counsel can assist in developing or reviewing a communication strategy for exchange and dialogue with stakeholders on climate initiatives and risks. This might involve preparing questions and talking points for interactions with policy makers or peers to progress the board's awareness on climate methodologies. It might also involve the general counsel helping navigate the board through complex discussions and responding to questions, concerns, or priorities raised by shareholders during interactive roundtables meant to progress best practice climate governance.

A company's social license to operate depends on its ability to provide current and potential investors with accurate and appropriate information to foster an understanding of the emerging methodologies, initiatives, and opportunities so that investors may continue to support such companies and see them as a sustainable long-term investment. Institutional investors wield particularly immense power. This is evident in the recent decision of NGS Super, an education sector funder with around US$9 billion in investments, to dump US$191 million in oil and gas investments, including US$75 million in Woodside shares and US$50 million in Santos shares.

General counsel as a golden compass

It is crucial that the board and its directors consider climate opportunities during decision making and the impact these have on the long-term stewardship of the company. Accuracy, transparency, and honesty are imperative in communications about environmental performance, including the targets and benefits of products, services, and practices. False or exaggerated claims may expose the board to legal, financial, and reputational risks associated with greenwashing. — Joanne Moss

In a legal and regulatory landscape that largely involves guiding principles and other soft law, it is challenging for a board to determine best practice.

With a holistic understanding of best practice board governance, overall company strategy, the workings of the board and its subcommittees, senior management's relationship with the board and its employees, company operations, its products and services, social licence, stakeholders, and the industry in which it operates, the general counsel is uniquely placed to empower the board to effectively govern against greenwashing.

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