

CLIMATE CHANGE AND PROFESSIONAL LIABILITY RISK FOR AUDITORS: A COMPARATIVE UNITED KINGDOM/ AUSTRALIA ANALYSIS

PAPER 1 **AUDITORS' LEGAL DUTIES AND CLIMATE RISK IN ANNUAL ACCOUNTS: TIME FOR A RETHINK OF THE 'OLD CHESTNUT' OF TRUE AND FAIR VIEW?**

BE HEARD.
BE RECOGNISED.



CLIMATE CHANGE AND PROFESSIONAL LIABILITY RISK FOR AUDITORS

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September 2018

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1. Introduction

The TCFD in its final report noted the following:

As part of its work, the Task Force considered the interconnectivity of its recommendations with existing financial statements and disclosure requirements. The Task Force determined that the two primary accounting standard setting bodies, the International Accounting Standards Board (IASB) and the Financial Accounting Standards Board (FASB), have issued standards to address risks and uncertainties affecting companies.

And further

The disclosures of both contingencies and management's assessment of and evaluation of long-lived assets for potential impairment are critically important to assisting stakeholders in understanding an organization's ability to meet future reported earnings and cash flow goals.¹

Aside from mention of potentially relevant financial accounting standards², little is stated as to the mechanics and processes of interconnection, other than to suggest that potentially in G20 countries more can be expected by way of quantitative financial disclosures, particularly in the realms of asset impairment and accounting for regulatory fines and penalties. Significant also is Figure 1³ of the final report which illustrates distinct connections between climate-related risks and opportunities, strategic planning and management, in turn financial impact, and then ultimately reflection in financial statements.

Taking up the mantle, the Climate Disclosure Standards Board (CDSB) in March released ***Uncharted waters*** *How can companies use financial accounting standards to deliver on the Task Force on Climate-related Financial Disclosures' recommendations?*⁴

Aside from the specific financial accounting standards analysed, CDSB provides some worthwhile suggestions for further research including dealing with the recommendations' and financial accounting standards' contrasting time horizons, addressing behavioural attributes of internal finance departments engagement with the recommendations and the impact from overarching conceptual⁵ and content guidance⁶.

The CDSB paper has provoked within CPA Australia curiosity as to if, and how, the concept of 'true and fair view' applies or adapts to the dynamics of both financial accounting's and auditing's response to emerging governance and disclosure around climate change risk. Neither TCFD or

¹ E Key Issues Considered and Areas for Future Work 7. Accounting Considerations p 37.

² ISA 37 "Provisions, Contingent Liabilities and Contingent Assets" and ISA 36 "Impairment of Assets"

³ Page 8

⁴ www.cdsb.net/uncharted-waters

⁵ IFRS Conceptual Framework

⁶ IAS 1 "Presentation of Financial Statements"

CDSB directly allude to ‘true and fair’ and it is thus considered a worthwhile additional dimension to pursue as part of this *Comparative analysis*.

2. Legal framework for the audit opinion – the UK and Australian approaches

Given that the UK and Australia both adopt IFRS and ISAs, the relevant auditing standards identified in the first column of Table 3 of *Risky business* and the corresponding suggested climate risk implication identified in the second column, are each plausible and similar relationships in auditor consideration and evaluation against accounting standard-based expectations of adjusting for climate risk are likely.

Table 3 of *Risk business* is reproduced here (with permission) with minor adjustment for Australian audit and accounting standards references.

Auditors’ duties and annual accounts: examples of climate risk implications	
Relevant standards (paraphrased)	Suggested climate risk implications
<p>The auditor shall evaluate whether the financial statements are prepared, in all material respects, in accordance with the requirements of the applicable financial reporting framework.</p> <p>This evaluation shall include consideration of the qualitative aspects of the entity’s accounting practices, including indicators of possible bias in management’s judgments.</p> <p><i>ASA 700 Forming an Opinion and Reporting on the Financial Report [A1] – [A2], [12]</i></p>	<p>Auditors may need to consider the implications of climate risk for assumptions and estimates used in preparing annual accounts, including in relation to:</p> <ul style="list-style-type: none"> • recognition of mineral resources and reserves (AASB 6); • fair value measurement of PP&E (AASB 13) • impairments of PP&E, goodwill, mineral resources, and agriculture (AASB 136, AASB 6, AASB 141); • depreciation method and assumptions for PP&E (AASB 116); and • asset retirement obligations (AASB 116, AASB 137).
<p>The auditor is required to evaluate, based on the audit evidence, whether the accounting estimates in the financial statements are either reasonable in the context of the applicable financial reporting framework, or are misstated.</p> <p><i>ASA 540 Accounting Estimates and Related Disclosures [18]</i></p>	<p>Where the auditor identifies that climate risk may be relevant for significant assumptions is in making accounting estimates, the auditor may need to:</p> <ul style="list-style-type: none"> • Obtain written representations from management (ASA 540 [37]); and • Include in the audit documentation the basis for the auditors’ conclusion about the reasonableness of accounting estimates and indicators of possible management bias (ASA 540 [18]).
<p>In order to identify and assess the risks of material misstatement, the auditor must obtain an understanding of the company and its environment, including the company’s internal control. The auditor must understand among other things:</p> <ul style="list-style-type: none"> • Relevant industry, regulatory, and other external factors; • The nature of the entity, its operations, ownership and governance structures; 	<p>Auditors may need to consider the implications of climate risk when obtaining an understanding of the company and its environment, in light of its objectives, strategies and other business risks and the adequacy of its internal controls and risk management systems. This may include having an understanding of:</p> <ul style="list-style-type: none"> • regulatory climate risk implications; • climate-related market risk implications;

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<ul style="list-style-type: none">• The type of investments that the entity is making and plans to make; and• The entity's objectives and strategies, and related business risks that may result in risks of material misstatement. <p><i>ASA 315 Identifying and Assessing the Risk of Material Misstatement [11] and [12]</i></p>	<ul style="list-style-type: none">• climate risk implications for committed and propose capex; and• climate risk implications for the entities objectives and strategies.
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A number of attributes of the Australian regulatory setting governing audit under the *Corporations Act 2001* are worthy of highlight. It is not concluded that the auditing standards and expectation of their application are either more, or less, onerous in Australia, rather there are related practical elements in the formal nature of the audit opinion which may have some bearing on how liability risk might be assessed.

Australia recognises in corporate legislation the legally binding application of accounting standards (Corporations Act s 296) and, in turn, establishes a statutory mechanism for promulgation of both accounting (s 334) and audit (s 336) standards. The respective bodies empowered to make statutory instruments which give this effect – the Australian Accounting Standards Board (AASB) and the Auditing and Assurance Standard Board (AUASB) – are each established under the *Australian Corporations & Securities and Investments Commission (ASIC) Act 2001*.⁷

CORPORATIONS ACT 2001 - SECT 296

Compliance with accounting standards and regulations

(1) The financial report for a financial year must comply with the accounting standards.

CORPORATIONS ACT 2001 - SECT 334

Accounting standards

AASB's power to make accounting standards

(1) The AASB may, by legislative instrument, make accounting standards for the purposes of this Act. The standards must not be inconsistent with this Act or the regulations.

⁷ Refer generally Part 12 – The Australian Financial Reporting System

CORPORATIONS ACT 2001 - SECT 336

Auditing standards

AUASB's power to make auditing standards

(1) The AUASB may, by legislative instrument, make auditing standards for the purposes of this Act. The standards must not be inconsistent with this Act or the regulations.

As remarked above, this formalised approach to the recognition in statute of accounting and audit standards⁸ which, it is understood, differs from the UK, does not of itself make for a more onerous standard of expectation as to the auditor's role in ensuring the accuracy of financial reports. Rather, it is significant in explaining the character and breadth of the audit opinion required by s 308 of *Corporations Act 2001*.

CORPORATIONS ACT 2001 - SECT 308

Auditor's report on annual financial report

(1) An auditor who audits the financial report for a financial year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Act, including:

- (a) section 296 (compliance with accounting standards); and
- (b) section 297 (true and fair view).

If not of that opinion, the auditor's report must say why.

The required content of annual financial reports is set out in s 295. Significantly, the directors' declaration compels in relation to compliance with accounting standards and the true and fair view, opinion supported by resolution that the financial statements and notes are thus in accordance (s295(4)(d)(i) and (ii)).⁹ The *CCH Australian company law commentary (CCH Commentary)* reiterates the views of both ASIC and the AUASB that the directors' declaration on the financial statements forms part of the annual financial report and thus should be audited.¹⁰ With some

⁸ The policy intent in making AUASB standards as legislative instruments was to render them readily enforceable and auditors more easily prosecuted for non-compliance.

⁹ It is worth highlighting that the various obligations under Part 2M.3 (Financial Reporting) along with the underlying obligation to keep and maintain financial records (Part 2M.2) falls upon the company, with directors required through s 344 (Part 2M.7 – Sanctions for contravention of Chapter) to take all reasonable steps to ensure compliance. A good explanation of the impact and development towards this treatment is provided by Middleton J in *ASIC v Healey* [2011] FCA 717 at 126 – 129. A quick comparison with the UK Companies Act 2006 indicates that the duty to keep falls also on the company (s 386), whilst the obligations to prepare falls upon directors (s 394 individual accounts and s 399 group accounts).

¹⁰ [104-020] Auditor duty to form an opinion on financial report: s 307

degree of circularity then, the process involves for the auditor both the forming of an opinion as to compliance with accounting standards and true and fair view, and an examination of the directors' declaration as to the same. Naturally, much of the commentary and guidance which has emerged around the audit opinion/ directors' declaration relationship deals with the solvency declaration (s 295(4)(c)). Nevertheless, the level of formalised understanding of the auditors' obligation around directors' responsibility as to the preparation of the financial report, suggests that emerging climate change risk would be a matter upon which they might in the future be expected to critically scrutinize the judgment of directors.

3.1 True and fair view – its central role but contentious meaning

I turn now to that ubiquitous concept in accounting and audit; 'true and fair view'. In Australia, this is addressed in statutory terms in the following:

CORPORATIONS ACT 2001 - SECT 297

True and fair view

The financial statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the company, registered scheme or disclosing entity; and
- (b) if consolidated financial statements are required--the financial position and performance of the consolidated entity.

This section does not affect the obligation under [section 296](#) for a financial report to comply with accounting standards.

Note: If the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under [paragraph 295\(3\)\(c\)](#).

Significant differences in drafting style aside, both s 297, in conjunction with ss 295 and 308, and UK Companies Act 2006 s 393(1) and (2) emphasise the pivotal function of the true and fair view concept to directors' financial accounting duties and the performance of external audit thereon. It is a moot point as to whether the controversy around interaction of the true and fair view and IFRS accounting standards¹¹ falls entirely away in Australia because of the very explicit statement in s

¹¹ Significant here are the sequence of opinions sought by the UK Financial Reporting Council (Lord Hoffman and Dame Mary Arden in 1983 and 1984, George Bompas QC in April 2013 and Martin Moore QC in 2008 and October 2013) and

296 that the obligation relating to accounting standards still applies. The primacy given to accounting standards is further reflected in s 297 where the complementary “Note” reference to s 295(3)(c) states that notes to the financial statements must include necessary information to give a true and fair view. Relatedly, under s 308 there is required an audit opinion (s 308(3B)) on the information presented under s 295(3)(c), and further, audit statement of the effect, where practical in quantified terms, of non-compliance with accounting standards (s 308(2)).

What is common in Australia and the UK, is both judicial and extra-judicial acknowledgement and comment on the effect of an absence of either concise or expanded statutory definition of ‘true and fair view’.

The Australian perspective on this definitional limitation is encapsulated in the *CCH Commentary*¹²:

The exact meaning of “true and fair view” is an elusive concept. On one view, it is an alternative way of expressing the requirement that the financial statements must not be **misleading or deceptive**. Subjecting the financial statements to an over-arching requirement that the reports not be misleading or deceptive is perhaps the better test for no other reason than the phrase (“misleading or deceptive”) is well understood judicially, which may aid in the enforcement of the requirement. In contrast, the notion of “true and fair view” is less definite and arguably more difficult to enforce from a regulatory perspective.

The lack of a definition (even a partial or inclusive definition) of “true and fair” means that there is no explicit link between the phrase and the **fundamental purpose of financial statements**, that being to provide users of the financial report (principally investors or prospective investors) to make decisions about whether to **sell or hold securities**. (Emphasis added)

I deal in the following, first with matters around the fundamental purposes of financial statements and how evolving developments may, aside from informing the nature of “true and fair”, point to shifting expectations as to the scope of information contained in annual financial reports, and in turn, the audit implications.

Secondly, I address the suggested perspective of “true and fair” from the legal notion of misleading and deceptive. Given the breadth of prohibitions in relation to misleading and deceptive conduct spanning numerous areas of corporate disclosure regulation, the opportunity is taken to speculate at a very preliminary level on auditor liability risk in areas of professional engagements other than in relation to annual accounts.

a highly informative analysis by Edward Walker-Arnott “A true and fair view: the difficulties for company directors and the case for reform” (2017) *Journal of Business Law* 499. The extent to which these might inform auditor professional liability risk for Australian auditors, explored in this *Comparative analysis* at 3.5

¹² [102-095] Financial reports – what is a “true and fair view”? s 297

3.2 Perspectives from accounting's fundamental purpose

Whilst there seems merit in the idea of addressing the meaning of “true and fair view” from the perspective of accounting's fundamental purpose, I suggest that the purpose presented in the *CCH Commentary* is too narrowly stated, both from the standpoint of the present status quo of formal articulated objectives and, more particularly, once regard is given to the pressure on wider corporate reporting likely to impinge from sources such as the Financial Stability Board's Taskforce on Climate-related Financial Disclosures (TCFD). Even if it were accepted that the paramount purpose of financial reporting was to give the essential underpinning to sell or hold decisions, developments in understanding of the financial and economic character of climate change risk should, from a reasonable director perspective, heighten awareness of fair value and impairment considerations.

The most authoritative articulation of the objectives of financial reporting in Australia is contained in the Appendix (Chapter 1) to the *Framework for the Preparation and Presentation of Financial Statements* (the *Framework*) issued by the AASB which incorporates the International Accounting Standards Board's *Conceptual Framework for Financial Reporting*¹³. Paragraph OB2 is the first item appearing under the heading “Objective, usefulness and limitation of general purpose financial report” and which, on a plain-English reading, would seem to align with the *CCH Commentary's* assertion:

The objective of general purpose financial reporting is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders and creditors in making decisions about providing resources to the entity. Those decisions involve buying, selling or holding equity and debt instruments, and providing or settling loans and other forms of credit.

Adopting a narrow reading of these words would, I urge, be foolhardy missing the implications of further paragraphs within this part of the *Framework* which go more to the heart of the intended information utility of financial reporting.

Paragraph OB4 states:

To assess an entity's prospects for future net cash flows [users] need information about the resources of the entity - - - how efficiently and effectively the entity's management and governing board have discharged their responsibilities to use the entity's resources. Examples of such responsibilities include protecting the entity's resources from unfavourable effects of economic factors - - - and ensuring that the entity complies with

¹³ Though correct at the time of writing this *Comparative analysis*, it is noted that the expectation is for Australia to adopt into its guidance the March 2018 IFRS Conceptual Framework effective from the 1st of January 2020. Though not here analysed, the language of the new IFRS Conceptual Framework is arguably broader and more future oriented in nature. See for example para 1.4(b) reference to “how efficiently and effectively the entity's management discharged their responsibilities” and the corresponding elaboration in paras. 1.22 and 1.23 dealing respectively with stewardship of resources and protecting the entity's economic resources.

applicable laws, regulations and contractual provisions. Information about management's discharge of its responsibilities is also useful for decisions by existing investors, lenders and other creditors who have the right to vote or otherwise influence management's actions.

The above, read in conjunction with OB12¹⁴, illustrates the idea that accounting numbers illuminate user understanding of the economic characteristics and effect of transactions from a whole of entity perspective. Likewise, they show that users of financial reports have a legitimate interest in management's performance¹⁵ in relation to the effective economic utilisation of the entity's resources. Here also we find authoritative acknowledgement that investors' engagement occurs in a manner more complex than a mere sell/ hold bipolar decision.

The *Framework* goes on to state in OB6:

However, general purpose financial reports do not and cannot provide all of the information that existing and potential investors, lenders and other creditors need. Those users need to consider pertinent information from other sources, for example, general economic conditions and expectations, political events and political climate, and industry and company outlook.

The significance of this acknowledged limitation and the need for users to draw on other sources is examined in the next section of this *Comparative analysis*.

As will be apparent from the foregoing discussion, development of Australia's financial reporting rules and guidance is highly cognisant of evolving international pronouncements, particularly, of course, those emanating from the International Accounting Standards Board (IASB), the organisation responsible for developing and maintaining IFRS. Significant to present considerations are the foreshadowed Exposure Draft updating the 2010 IFRS Practice Statement *Management Commentary* and the Principles of Disclosure project.

Developments such as these may nevertheless not deliver the transformation sought by some critics or address the argued need to more forthrightly incorporate material from, or reference to, wider developments such as the FSB TCFD recommendations. Yet, importantly, they point to the fact that the conceptual underpinnings of financial reporting are not static. The slow pace of reform, however, may attract accusation of recalcitrance inviting agitation against a range of parties including regulators, standard setters, companies themselves, and indeed, auditors. As to whether

¹⁴ OB12 is the introductory paragraph to a section of Chapter 1 titled *Information about a reporting entity's economic resources, claims against the entity and changes in resources and claims* and reads: "General purpose financial reports provide information about the financial position of a reporting entity, which is information about the entity's economic resources and claims against the reporting entity. **Financial reports also provide information about the effects of transactions and other events that change a reporting entity's economic resources and claims.** Both types of information provide useful input for decisions about providing resources to an entity." (Emphasis added)

¹⁵ It may seem self-evident and trite to observe, but the objectives of financial reporting are cognisant of the division of corporate powers in which powers of management are typically vested in directors (s 198A) which is likewise reflected in the character of the general duties provisions (Division 1 of Part 2D.1).

this becomes a feature of the litigation and class action environment in Australia, or as a serious feature of public policy and law reform debate, is a matter of speculation.

Elsewhere stated in the *CCH Commentary* concerning the s 297 true and fair view requirement is the following:

The suggestion has been put that the directors, in forming their opinion on whether the financial statements give a true and fair view, must consider the objectives stated in s 224(a) of the ASIC Act: Report of the Parliamentary Joint Committee into the CLERP 9 Bill (15 June 2004). - - - The government has yet to consider [this] recommendation.

ASIC Act s 224 is repeated in full as Appendix 1 to this *Comparative analysis* as it, being an expression of the legislature's intentions underlying the drafting of the referred to provisions, provides salutary insight into how government (at that time) perceived the purposes and character of the Australian financial reporting system. Dealing first with the suggestion in the *CCH Commentary* for aligning director true and fair view opinions (and by inference also auditors' assessments of the same and the directors' opinion thereon) with the objects set out in s 224(a) of the ASIC Act 2001. Were law reform, or merely guidance to directors, to go boldly down this path, we could more confidently speculate how quickly the financial reporting system might adapt to external influences and provide a more certain platform of disclosure against which a director's failure to allow for, and disclose, climate change risk could be determined. This on the basis that s 224(a) uses expressions such as "allows users to make and evaluate decisions"¹⁶ and "is relevant to assessing performance, - - - financing and investment"¹⁷. Any financial report which impedes or obscures these utilities would, by inference, not be true and fair. Moreover, were s 224, further subsection (b) and (c) which deal respectively with facilitating the Australian economy and maintaining investor confidence in Australian capital markets, more directly referenced as a source of overarching guidance in financial reporting system reform, it would, I conjecture, be more readily responsive to significant international trends.

Underlying each of the assertions made here is the question as to whether the Australian Government and regulators regard climate change as sufficiently certain, imminent and directly connected to economic and market performance, either overall, sectorally or at a firm specific level, as to warrant special regard as a basis of financial reporting law reform or guidance development thereon.

3.3 Annual financial reports and fundraising disclosures: "Misleading and deceptive" and the contrasting implications for directors and auditors

This section addresses the reference in the *CCH Commentary* to aligning the meaning of "true and fair view" to the evolving judicial understanding of the phrase "misleading or deceptive". On the

¹⁶ Section 224(a)(i)

¹⁷ Section 224(a)(iii)

face of it, this may be an appealing solution, however, I believe, there are practical impediments to the law, or associated guidance, evolving in this direction. These impediments are moreover, as will be discussed further, relevant to current understanding of auditor's duty to third parties. Over and above issues of injecting meaning into the "true and fair view" concept, it is considered worthwhile from an Australian perspective to give at least some preliminary consideration to where the statutory prohibition on misleading and deceptive conduct has been developed to apply variously across the spectrum of corporate disclosure obligations. Such line of inquiry assists identification of corporate activities in which there might be a significant underlying climate change implication. that, in turn, have an audit involvement outside of reporting to shareholders on annual financial reports, though nevertheless presenting challenges for professional judgment, client and other party relationships, application of existing audit standards, and thus in turn, liability risk.

The authors of the *CCH Commentary* were unlikely in their analysis and writing to have had in contemplation, true and fair view from contrasting director and auditor perspectives. However, the task at hand in developing this *Comparative analysis*, I believe, compels us to do so. This need arises partly, as has been shown, because both parties separately and relatedly, form such an opinion. More particularly, it is relevant to present perspectives on the dichotomy between respective party's liability risk around the same subject matter – that is, the preparation and content of annual financial reports.

Addressing first the obligations and potential liability of auditors with regards to forming an opinion as to the truth and fairness of financial reports which might be illuminated through reference to "misleading or deceptive". Robert Austin and Ian Ramsay the learned authors of the authoritative practitioner text *Ford, Austin and Ramsay's Principles of Corporate Law (Ford's)*¹⁸, state the following:

So far as the annual auditor's report on the company's accounts is addressed to shareholders the auditor would not ordinarily know that the report was required for the specific purposes of a decision whether to sell shares or not, although the accounts and auditor's report could obviously provoke a decision to sell. Parliament has imposed no sanction in favour of shareholders comparable with ss 729 and 1041H.

Over and above the limitation of reasonable foreseeability and proximity of relationship succinctly identified in this statement¹⁹, it is important to delve briefly into where the referred to sections sit within the overall scheme of the Corporations Act.

¹⁸ 16th edition LexisNexis Butterworths, Australia, 2015, [11.630] p 896.

¹⁹ In *Risky business* reference is made to the legal principles arising out of the decision in *Caparo Industries v Dickman* [1990] 2 WLR 358 stating: "As the law stands currently [auditors' duty of care] will usually be owed to the company directly, in the interests of its existing shareholders. - - - In special circumstances, auditors may also owe duties to a range of third parties". (page 19 footnotes omitted). Although an important line of inquiry, the scope of this *Comparative analysis* (at least in its current iteration) has precluded a comparison with Australia's leading authority on these matters – *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, suffice to say though that the strong tendency has been away from recognising a duty of care extending beyond the company, unless as these are often cases of pure economic loss, there are distinctive characteristics of proximity, reliance or inducement.

Corporations Act s 729 is both substantive and instrumental in nature inasmuch as it, as its title states, establishes a right to compensation for loss or damage because of an offer of securities made under a defective disclosure document. Section 729 identifies a range of persons potentially liable on a disclosure document and cross-references to the operative s 728 which establishes the prohibition on misleading or deceptive statements, omissions and new matters relating to disclosure documents, and accompanying forms pertaining to the offer of securities.²⁰ Structurally, these sections come within Chapter 6D (Fundraising) of the Corporations Act. Significantly Part 6D.3 goes on in sections 731, 732 and 733 to provide respective defences of due diligence, reasonable lack of knowledge, and notably, reasonable reliance on information given by someone else. Pertinent also for present purposes is s 728(2) which brings forecasts and other forward-looking statements within the ambit of the misleading statement prohibition and the specific identification as Item 5 in s 729, persons named with their consent as providing a statement included in the disclosure document. Relevantly then, as fundraising occurs against the backdrop of emerging understanding of climate-related risk, or indeed, where positive statements are made as to a fundraising availing of a climate-related opportunity, heightened attention can be expected to be given to the cogency of specific accompanying auditor opinions.

Applicable in terms of professional guidance will be the specific standards on assurance engagement ASAE 3420 *Assurance Engagements to Report on the Compilation of Pro Forma Historical Financial Information included in a Prospectus or other Document* and ASAE 3450 *Assurance Engagements involving Corporate Fundraising and/ or Prospective Financial Information*.²¹ As the titles infer, ASAE 3420 is narrower in its application and is primarily addressed to the issue of securities offers by way of a prospectus, though within the body of the standard there can be found distinct statements giving effect to a wider scope within the Australian capital market.²² In contrast, ASAE 3450 appears to have in its development a far wider contemplated range of forms of investor/ public offerings deliberately designed to span the breath of the Corporations Act financial services rules, though with a particular emphasis on assurance where the dealing involves a prospective financial information disclosure. Similarly, ASAE 3420 deals with a relatively distinct form of disclosure that can reasonably be expected to be found, or be required, in prospectus documents. This comparative narrowness is identifiable in critical introductory parts to the standard where it is stated for example that:

²⁰ Division 3 of Part 6D.2 in s 709 identifies types of disclosure document, the most prominent and common of which are prospectuses and short-form prospectuses, the content of which is specified in Division 4 with Division 2 having dealt extensively with identifying the type of offers that need disclosure to investors.

²¹ The ASAE assurance engagement standards whilst developed pursuant to the AUASB's powers under s 227B of the ASIC Act 2001, do not come within the ambit of s 336 of the Corporations Act 2001 which give binding effect to the ASA audit standards.

²² In particular, see the first dot point of the Conformity with ISAE statement extending application to assurance engagements pertaining to public documents, in turn: para. Aus 11.2 "Public document – a disclosure document, product disclosure statement or other documentation provided to shareholders, unit holders, or holders of a relevant interest in an entity (or which is provided to management of any entity) in relation to a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*, or a takeover or compulsory acquisition under Chapter 6 of the *Corporations Act 2001*."

The purpose of pro forma financial information [compiled by the responsible party, that is, the offeror of securities] included in a prospectus is solely to illustrate the impact of significant event(s) or transaction(s) on unadjusted financial information of the entity as if the event had occurred or the transaction had been undertaken at an earlier date selected for purposes of the illustration.²³

The objective or statutory underpinning to this purpose can be found in legislative words such as “[t]he prospectus must contain all the information investors and their professional advisers would reasonably require to make an informed assessment of the effect of the offer on the body.”²⁴ The broader scope and orientation of ASEA 3450 may lend itself to being a more suitable avenue for examining the role, and potential liability exposure, of assurance opinions accompanying fundraising and other investment offerings where climate change may be a factor affecting future outcomes. This, of course, is a matter for investigation beyond the scope of the *Comparative analysis*.

The further section mentioned by the authors of *Ford’s* is s 1041H, the prohibition in which is expressed in broader terms that: “A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or service, that is misleading or deceptive or is likely to mislead or deceive.” Section 1041H is contained within Chapter 7 of the Corporation Act which provides very extensive rules around financial services and products. An entire part of the chapter – Part 7.1 – is devoted to definitions of financial products (Div. 3) and identification of when a person provides financial services (Div. 4), along with other key concepts, with other Parts spanning licensing, product disclosure requirements, rules of compensation, to identify but a few. Bearing in mind the breath of Chapter 7, 1041(2)²⁵ goes on then to identify characteristics of misleading or deceptive conduct pertaining to certain financial products. More directly relevant to our considerations is s 1041(3). This section, along with s 12DA²⁶ of the ASIC Act, provides that conduct contravening the statutory provisions dealing with misleading or deceptive takeover²⁷ and fundraising documents, does not also contravene these consumer protection provisions. The authors of *Ford’s* succinctly explain the rationale:

- - - the intention underlying these provisions is that misleading or deceptive disclosure documents in takeovers and fundraising should be governed by special statutory liability regimes in which “due diligence” defences are available.²⁸

²³ Para. 4. Elsewhere in ASAE 3420 is expression that pro forma financial information should be presented in columnar format showing historical information (say, balance sheet numbers), quantified pro forma transaction (say for example, an issue of shares) and the pro forma effect. (Aus 11.1)

²⁴ Subsection 2 of s 713 Special prospectus content rules for continuously quoted securities.

²⁵ Section 1041 comes within Part 7.10 which deals extensively with market misconduct and other prohibited conduct relating to financial products and services.

²⁶ First section within Subdivision D – Consumer protection

²⁷ The specific section referred to in s 1041H(3)(a)(i) and s 12DA(1A)(a)(i) is s 670A which is the first section in Corporations Act Chapter 6B – Rights and liabilities in relation to Chapter 6 (Takeovers) and Chapter 6A (compulsory acquisitions and buy-outs)

²⁸ R P Austin and I M Ford, *Ford, Austin and Ramsay’s Principles of Corporations Law* 16th edition LexisNexis Butterworths, Australia, 2015, [11.030] p 782.

Two further matters stem from the foregoing discussion. First, the implications and liability risks stemming from environment related statements in product disclosure statements required under Part 7.9²⁹ of Chapter 7. Second, the manner in which the false and misleading statement provision contained separately in Part 9.4 (Offences) has been used to describe the character of directors' annual statutory narrative and review disclosures, against which there may be growing valid expectation of greater articulation around matters of climate change risk and opportunity. I deal with the first of these immediately below and consider the second as part of the broader discussion of auditors' legal duties in relation to other annual information disclosures.

Section 1013D sets out extensive requirements as to the content of product disclosure statements. Significant to our considerations is s 1013D(1)(l) which states:

if the product has an investment component – the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment;

Section 1013D(2A) goes on to specify for this paragraph's purposes that products having an investment component include superannuation products, managed investments and investment life insurance products – indeed a wide scope. Further to this, s 1013DA provides for ASIC developing guidelines that must be complied with for products disclosure statements coming within the ambit of s 1013D(1)(l).

Space here does not permit an in-depth evaluation of the relevant ASIC regulatory guide (RG 65) in terms of evolving expectations as to the impact of climate-related risk and opportunities, and the manner of assessment, and in turn, disclosures made by investment managers. Briefly though, in the context of growing investor expectation, and indeed potential activism, RG 65 does provide salutatory caution:

Clients who wish to purchase investment products on the basis of the issuer's consideration of labour standard, or environmental, social or ethical considerations should be able to easily determine the extent of the focus on these matters. An impression should not be created that there is a greater focus than exists in reality.³⁰

Further layers of complexity in the product disclosure statement regime are introduced by provisions such as s 1013I. This section compels extra disclosures alerting potential investors of the reporting entity's additional regular reporting obligations and their rights to gain access to annual financial reports lodged with ASIC where the investment product comes under the umbrella of a managed investment and meets the definition of ED (enhanced disclosure) securities. Understanding of the full effect of this section requires cross-referencing to other parts of the Act and is beyond the immediate scope of this *Comparative analysis*. Briefly though, ED Securities are addressed through a series of definitional provisions (ss 111AD to 111AJ) and include quoted securities, prospectus-related securities, debentures issued under a trust and securities in

²⁹ Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

³⁰ RG 65.62

consideration for a takeover or under a scheme of arrangement.³¹ In turn, management investment products are defined within Chapter 7 which has its own definitions section (s 761A) pointing then to s 764A(1)(b) and covers in relation to a registered scheme, any interest in the scheme, or a legal or equitable right thereto, or option to acquire, such right. Registered scheme (per the s 9 Dictionary) means a managed investment scheme, which itself is defined in section 9 as having features such as money contribution, the pooling of contributions and the vesting by members of day-to-day control with others, and to which registration is specified by s 601EB.³²

Regardless of whether or not UK equivalent fundraising and investment product provisions are equally labyrinthine, it is asserted that where issues of consumer protection are given prominence by virtue of an assumed reliance on adequate and suitably targeted disclosures, it may be that auditor interaction with offeror's assertions around climate change related risk and opportunity could emerge as a discrete area of liability risk presenting its own uncertainties and complexities.

A further important future line of inquiry would be to ascertain the strengths and weaknesses of any interacting with relevant assurance pronouncements from both the International and Australian Boards, which were briefly identified above. ASAE 3420 does, with additions and modifications, conform with an equivalent IAASB standard, whereas ASAE 3450 is a stand-alone Australian standard. In terms of this *Comparative analysis* of contrasting UK and Australia professional liability risk for auditors, a comprehensive understanding of exposure stemming from the giving of non-audit (assurance) service opinions, particularly in relation to fundraising and investment product and service offers, would necessarily have to contend with these jurisdictional differences.

Whilst able to draw some level of commonality between UK and Australian professional liability risks for auditors in relation to disclosures within annual financial reporting, the situation with non-audit (assurance) services provided against various forms of fundraising and other securities marketing is far less certain. The future direction will potentially be determined by how, and if, the numerous dimension of climate change risk and opportunity come to be addressed within respective jurisdiction specific rules covering this critical aspect of corporate operation. Predicting the speed and source of these rules through either statutory or judicial development is a major challenge. Set though in the context of the above quoted passage from *Ford's* (refer page 13) concerning the contrast in sanction in favour of shareholders, it can be tentatively predicted that climate change-based cause of action targeting auditor professional liability would manifest between company and auditor where the disclosures are within annual accounts³³, and between investors and auditor where the disclosure is within a statutory-based investment invitations. Each, of course, overlaid by complexity around contributory negligence.³⁴ Finally, possibly divergent

³¹ The further relevant of the ED Securities definition is its interaction with the definition of Disclosing Entity (s 111AC) which, in brief, is used to expand the ambit of entities coming within the accounts and audit provisions, thus we see, for example s 297 "true and fair view" requirement is addressed to "company, registered scheme or disclosing entity."

³² Is within Chapter 5C – Managed investment schemes

³³ This said in recognition of the possible avenue of redress sought by shareholders under derivative action provisions (Part 2F.1A).

³⁴ From the Australian standpoint, one relevant line of inquiry would be in relation to Part 7.10 – Division 2A – Proportionate liability for misleading and deceptive conduct, which sets out rules around apportionable claims (both economic loss and damage to property) and the recognition of concurrent wrongdoers.

focus and specificity within applicable UK and Australian assurance engagement standards, likely adds a further level of complexity.

3.4. “True” and “fair”: Are they parts of one concept?

Stated in the *CCH Commentary* is the following:

“True and fair” is not a composite expression. Rather it reflects the reality that financial accounts not only deal with ascertainable facts but also with matters of opinion and impression. A financial statement will not be “true” when it contains facts which are incorrect or where material facts are omitted. It will not be “fair” where the opinions it contains are not reasonable in the context in which they appear. What is material in the former inquiry or contextual in the latter will usually include issues of accountancy but they are not determinative.

Applying this somewhat speculatively to the interaction of directors and auditors around a contentious matter of climate change-related impact on the application of accounting standards, or where such matters ought to be addressed by way of ‘other information’ disclosure, professional judgment as to the timeliness of such recognition could be pivotal. Inferred in this is the prospect that auditors may increasingly pass assessment and opine on the impact of climate change risk. Potentially this will involve both assessment of the ‘material facts’ associated with the application of accounting standards within the threshold requirement of *truthfulness*, coupled with passing assessments on opinions formed, or more problematically, not formed, by directors in relation to the penumbra of contextual factors that may undermine *fairness*. Aside from the very real issue of the adequacy of the audit profession’s literacy about climate change science and associated economic impact, there may emerge some prospect of unreasonable expectation of the substitution of audit opinion for that of directors’ professional judgment within the broad sweep of management responsibilities and associated duties.

3.5. Judicial consideration of “true and fair”

Direct and detailed judicial consideration of s 297 specifically, or ‘true and fair view’ generally, appears scarce. One significant example of reasonably in-depth analysis and application of the statutory requirement is provided by Middleton J in *Australian Securities and Investment Commission v Healey*.³⁵ This, the Centro litigation, is of particular prominence giving clarity under Australian law to the expected standard of director skill relating to financial statements, specifically in terms of the statutory requirements of Part 2M.3³⁶, addressing also the manner of interaction

³⁵ [2011] FCA717

³⁶ In terms of the penalties regime under the Corporations Act 2001, it is perhaps worthwhile pointing out that the key operative provision is s 344 which provides that directors contravenes this section if they fail to take reasonable steps to comply with Part 2M.3 - Financial reporting, along with other interrelated parts. Section 334(1) is then referenced as Item 5 of s 1317E Declaration of contravention, s 1317E, in turn, providing for pecuniary penalty orders. Section 334(2) goes further to address the circumstances where the contravention is dishonest, and this in turn, identified as

with other significant attributes of directors' duties, including the general duty of care and diligence³⁷ and reliance on others. A detailed outline and analysis of these substantive matters is nevertheless beyond the scope of this *Comparative analysis*. Relevant, however, to the considerations at hand are remarks such as those approving ASIC's summary of the law relating to financial reporting as applicable, both generally, and specifically to the Centro facts, such that:

It is useful to briefly describe the special treatment given to financial statements over a period of time. - - - Key elements of the developments were - - - :

- a) the publication of financial statements certified by the directors to be correct, or true and correct, or true and fair, has been part of company law for at least 115 years;³⁸

His Honour does not address in specific terms the meaning of true and fair at either a linguistic or philosophical level decoupled from the accompanying responsibility in relation to accounting standards and the positive obligation as to the forming of an opinion. Discernable from His Honour's analysis is the idea that the obligations as to accounting standards and true and fair view apply within an integrated scheme of expectation. In para. 139 it is stated, "Part 2M.3 provides a regime of checks and balances to ensure the integrity of annual financial statements." Again, I would urge, integrity in and of itself compels an integrated treatment of applicable accounting standards and true and fair view, each whilst distinctive in nature is integral to the integrity of financial statements; each alone not being sufficient. His Honour continued:

Indeed, there is very little that those Parts require directors to do so directly themselves. However, s 295(4) speaks directly to directors requiring them to form an opinion. The regime of checks and balances incorporates reliance upon management in the context of the directors' opinion to the extent that they may not opine until they receive the s 259A [295A³⁹] declaration from the CFO and CEO.

Elsewhere it is relatedly stated:

In the case of s 295(4), the directors themselves must form an opinion. They must form an opinion with all due care and diligence. At a minimum, the directors must inform themselves as to the financial affairs [of the] company to the extent necessary to form each year the opinion required.⁴⁰

Whilst much of the case law around s 295(4) deals with the s 295(4)(c) solvency declaration, given of course corporate failure being a frequently litigated event, I believe it not unreasonable to conjecture that the 'due care and diligence' requirements in relation to opinions duly formed, would

Item 117 in the Schedule 3 list of criminal penalties. Criminal liability at no point entered into consideration in the Centro litigation with His Honour noting that "There has been no suggestion that each director did not honestly carry out his responsibilities as a director." As a final point of clarification, the directors of Centro also breach s 601FD(3) under Managed Investment Scheme provisions (Chapter 5C).

³⁷ Section 180

³⁸ Paras. 105 and 112.

³⁹ Declaration in relation to listed entity's financial statements by chief executive officer and chief financial officer

⁴⁰ Para. 146

extend to considering the operating and strategic affairs of the company to which emergent risks can reasonably be expected to impinge. In turn, this is relevant to both compliance with accounting standards, and the giving a true and fair view within financial statements and notes.

Given the emphasis placed by Middleton J on the active engagement of directors in forming s 295(4) opinions, what further does this signify for resolving director uncertainty, and in turn auditor professional liability risk, around the impact of climate change on accounting measurement reflected through IFRS standards and the parallel consideration of achieving truth and fairness? Here it is beneficial to briefly step outside of judicial analysis and consider what authoritative guidance issued by the AASB might suggest, particularly as 'financial position and performance' is the term used in s 297 to which the true and fair view pertains. Pivotal to such examination is para. 15 of AASB 101 *Presentation of Financial Statements*, which under the heading 'Fair presentation and compliance with Standards' states:

Financial statements shall present fairly the **financial position, financial performance** and cash flows of an entity. Fair presentation requires the faithful representation of the effects of transactions, other events and conditions and conditions in accordance with the definitions and recognition criteria for assets, liabilities, income and expenses set out in the *Framework*⁴¹. **The application of Australian Accounting Standards, with additional disclosure when necessary, is presumed to result in financial statements that achieve a fair presentation.** (Emphasis added and footnote omitted).

This paragraph appears under the heading of **General features** and should be regarded as essential context within which the detailed parts under **Structure and content** is set to define the mandated components and form of financial statements.

Returning now to matters at the heart of the Centro case. Justice Middleton at para. 24 introduces seven main issues, and a series of sub-matters, dealt with in the Centro proceeding, the first of which:

Whether CNP [Centro Properties Group] had current interest bearing liabilities of \$2.611 billion and CER [Centro Retail Group] had current interest bearing liabilities of \$598 million which were required to be classified as current liabilities.

Space and the scope of this *Comparative analysis* do not permit any detailed recounting of His Honour's analysis of the current and non-current liability distinction, suffice to say that the wording of AASB 101, current paragraphs 60/61 and 69, though subject to transition at the relevant times against the backdrop of Australia adopting IFRS, was sufficiently unambiguous and expressed in such a manner as to compel the active attention of directors. Thus, His Honour was able to conclude:

I accept that to form a final and proper view of the correct classification may involve an investigation of the facilities themselves and whether agreement had been reached

⁴¹ The *Framework* referred to is the compiled Framework for the Preparation and Presentation of Financial Statements (AASB 2016), some discussion of which is presented in part 3.2 of this *Comparative analysis*.

regarding any extension, roll over or refinancing. However, this is not what is being asked of the directors in this proceeding. They must have known or at least thought simply because negotiations were taking place to refinance or extend, that the expiry or maturity date of the facilities was short-term.⁴²

And,

This is all they needed to know, along with a general or basic understanding of the classification requirement, to raise the question as to the appropriateness of the classification.⁴³

Ultimately, the conclusion drawn by His Honour: “- - - there has been a failure to comply with the relevant AASB’s and a failure to give a true and fair view, contrary to the provisions of s 296 and 297 and a failure to disclose information in the terms of s 299 and 299A so as not to comply with s 298.”⁴⁴

His Honour’s analysis, as indicated, concentrated on the technical attributes of the accounting standard and its application, the specific failure against which, directly translatable to a failure to give a true and fair view. Towards the end of this section, I speculate on how areas of potential disclosure controversy less certain than the classification of current and non-current liabilities might be addressed from a true and fair stance, though still closely aligned with accounting standards. Rather ambitiously, this might assist development in disclosure and at the same time point to vulnerabilities that could attract litigation.

The above passage from AASB 101 necessarily leads into consideration of the wording, and what might be discerned as the intent, of key parts of the *Framework* and their interaction with AASB 101. And it is in these terms that it is possible to tentatively speculate how Middleton J’s reasoning in relation to one discrete part of AASB 101 might extend to compel a sharper focus on climate risk within financial statements.

Extracts from the *Framework for the Preparation and Presentation of Financial Statements*:

Financial Position

49 *The elements directly related to the measurement of financial position are assets, liabilities and equity. These are defined as follows:*

- (a) *An asset is a resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity.*

The Probability of Future Economic Benefit

⁴² Para. 391

⁴³ Para. 392

⁴⁴ Para. 574

- 85 *The concept of probability is used in the recognition criteria to refer to the degree of uncertainty that the future economic benefits associated with the item will flow to or from the entity. The concept is in keeping with the uncertainty that characterises, the environment in which an entity operates.*

Recognition of Assets

- 89 *An asset is recognised in the balance sheet when it is probable that the future economic benefits will flow to the entity and the asset has a cost or value that can be measured reliably.*

And finally, from Chapter 3 to the *Framework* which addresses the qualitative characteristics of useful financial information:

- QC6 *Relevant financial information is capable of making a difference to the decisions made by users. Information may be capable of making a difference in a decision even if some users choose not to take advantage of it or are already aware of it from other sources.*

- QC7 *Financial information is capable of making a difference in decisions if it has predictive value, confirmatory value or both.*

Definitions are one thing, the other attribute around achieving and maintaining the efficacy of financial statements, is inducing active engagement in applying critical professional judgment. It is on this basis that a reasonable case can be made to assert that climate change is events or conditions within the scope of AASB 101.15, and thus relevant to fair presentation, and to which assessment ought to be made in terms of impact on future economic benefits, undertaken in a manner mindful of decision-relevance to users. The argument for compelling proactive assessment of climate change impact on financial disclosures is made at a principle-based level in the context of the fundamental accounting standard dealing with presentation along with the associated framework which provides conceptual underpinning.⁴⁵ This without need for reference to potentially relevant technical standards such as those dealing with impairment.⁴⁶

⁴⁵ The discussion here has dealt primarily with AASB 101 *Presentation of Financial Statements* as I have sought to present what can reasonably be inferred from Justice Middleton's specific considerations. Reporting practices which might evolve around climate change impacts would likely be influenced by additional principle oriented accounting standards, foremost being AASB 108 and, in particular, the parts dealing with the treatment and disclosure of changes in accounting estimates (paras. 32 to 38).

⁴⁶ AASB 13 Fair Value Measurement and AASB 136 Impairment of Assets. The scope of this *Comparative Analysis* does not permit an exploration of the specifics by which IFRS standards will apply to address climate change related factors. Such development is of course foreshadowed in the TCFD Final Report (Section E Key Issues and Areas for Further Work, 7. Accounting Considerations p 37) and an initial foray into this subject is the Climate Disclosure Standards Board's *Uncharted waters: How can companies use financial accounting standards to deliver on the Task Force on Climate-related Financial Disclosure's recommendations?* (March 2018).

On the matter of uncertainty which has permeated much of the discourse around the financial impact of climate change, the learned words of Middleton J are drawn on one last time, though, of course, made in circumstances remote from the more speculative considerations of ClientEarth's analysis and this corresponding Australian commentary:

- - - the standard requires, at a minimum, that directors take a diligent and intelligent interest in the information either available to them or which they might appropriately demand from the executives or other employees and agents of the company.⁴⁷

Such strong statements indicate that there will not be countenanced passivity, and at worst willful blindness, around matters critical to the fair presentation of financial position. Advancements in understanding achieved by groups such as the TCFD and the broad momentum from the execution of the UNFCCC⁴⁸ by the majority of Nations, would, quite reasonably, place climate change as a critical component of diligent and intelligent inquiry by directors of companies in now well-defined industrial sectors. Addressing also in our context, it would seem fair to contend that, as with the directors of Centro, it would not be expected that the directors must apply a greater degree of technical expertise than those upon whom they rely. Rather the duty around the efficacy of financial statement concerns matters of active inquiry of management⁴⁹ and applying an accumulated knowledge of the fundamentals of the business the company is engaged in.⁵⁰

Nevertheless, with deference to the risk of speculating beyond the realms of reasonableness, it is important to acknowledge that the decisions around current liability recognition at the core of the Centro case communicate very directly "consideration of the ability of CNP and CER to pay their debts as and when they fall due."⁵¹ It is a matter of some conjecture therefore as to whether a court at some future time might be prepared to recognise what ought to be a 'reasonable director' assessment of a climate-change related threat to business model viability, the impact of which ought, in turn, be reflected in the fair presentation of financial position.

In the following part of this *Comparative analysis*, I will examine respective UK and Australian auditor responsibility in relation to statutory and other regulated narrative disclosures required of directors, again somewhat speculatively, applying some consideration to the implication of the TCFD recommendations for both narrative content and potential friction between the narrative and the fair presentation of financial statements. Before this though, two final points with respect to the wording of AASB 101.15 are considered.

⁴⁷ Para. 143. Though derived from the context of insolvency, His Honour regarded the referred cases as instructive in an objective determination of reasonable steps relevant to particular circumstances.

⁴⁸ United Nations Framework Convention on Climate Change was ratified by Australia on 30 December 1992, under the umbrella of which the Paris Agreement (21st Conference of Parties of 12 December 2015) entered into force on 4 November 2016 intended to set through national action a pathway towards de-carbonisation (Nationally Determined Contributions), Australia's ratification of which by way of international treaty occurred on 9 November 2016.

⁴⁹ Refer for example in His Honour's Conclusions paras. 577 and 579.

⁵⁰ Refer for example His Honour's introductory remarks in para. 17.

⁵¹ Para. 411

First, the reader will note that the language used is that financial statements “shall present fairly” rather than adopting the statutory words in relation to financial statements that the financial statements “give a true and fair view”. Drawing on UK extra-judicial authority, the following is relevant to the substance or otherwise of the distinction:

I add that given the similarity of the subject matter and scope of each of the Framework and the Statement dealing as they do with reliability, comparability, fundamental accounting concepts and principal elements of financial statements in very similar ways, the conclusion would be that “true and fair” and “present fairly” were synonymous, even if it were left unexpressed in the Framework.⁵²

This perspective is likewise reflected in audit standards with para. A24 of ASA 700⁵³ stating:

The phrases “present fairly, in all material respects” and “give a true and fair view” are regarded as being equivalent. Whether the phrase “present fairly, in all material respects”, or the phrase “give a true and fair view” is used in any particular jurisdiction is determined by the law or regulation governing the audit of a financial report in that jurisdiction, or by generally accepted practice in that jurisdiction.

Thus, illustrated audit opinions in ASA 700 for entities covered by the Corporation Act 2001 draw on the statutory wording to say: “In our opinion, the accompanying financial report - - - is in accordance - - - giving a true and fair view”.

I refer back now to the immediately prior sub-section of this *Comparative analysis* in which there is presented and examined a perspective that “true” and “fair” are not part of a compound expression, and with respect, suggest that, whilst not reaching a firm conclusion, a mindfulness of a distinction can be applied to emphasise that financial statements are an abstraction and do not deal with absolute certainties. These are matters of particular significance when corporate disclosure necessarily evolves to contend with emergent forms of risk and underlying economic transformation affecting a large body of entities, or is of market-wide consequence. As the *Framework* states in its introductory passages:

Financial statements portray the financial effects of transactions and other events by grouping them into broad classes according to their economic characteristics.⁵⁴

As a portrayal, rigorous though it may be in preparation, financial statements comprise an aggregation of a vast multiplicity of transactions do not deal with absolute certainties. It may seem trite to observe, but we are dealing with opinions and views. Holding to a duality in the requirement does at least, in our view, stress technical rigor through the term ‘true’ accompanied by significant demands on judgment conveyed in the term ‘fair’.

⁵² Martin Moore QC October 2013 *International accounting standards and the true and fair view* (para. 71 p. 22) quoting from his earlier April 2008 Opinion to the UK FRC “The true and Fair Requirement Revisited”.

⁵³ Forming an Opinion and Reporting on a Financial Report

⁵⁴ Para. 47

Second and relatedly, is the relationship between fair presentation and compliance with accounting standards. Para. 17 of AASB 101 states:

In virtually all circumstances, an entity achieves a fair presentation by compliance with applicable Australian Accounting Standards.

This of course should not be interpreted to suggest that a slavish adherence to accounting standards is the ultimate objective and a watertight safeguard against risk of liability for both directors and auditors. Para. 17 itself goes on to explain that fair presentation may warrant additional disclosures to enable users “to understand the impact of particular transactions, other events and conditions”. This is consistent with the Note explanation to s 297 requiring additional information as explained in 3.1 of this *Comparative analysis*. Continuing the above line of argument, both statute and professional pronouncements demand of financial statements in a qualitative sense, that they are more than mere accumulations and cumulative effects of accounting standards. Although I give particular regard to Middleton J’s judgment as pointing to a logical coherence in the treatment of ss 296 and 297, the strong contextual basis of director engagement in disclosure decisions potentially lays open in the climate change context, greater regard being given to the manner in which Notes disclosures are used to effectively convey the context and impact of transactions, events and conditions.

3.6 Conclusion

We conclude here with one further reference to Martin Moore QC’s UK FRC Opinion:

‘Prudence’ is an abstract concept – like ‘true and fair’ – and its content is capable of variation and evolution; its meaning will change and develop over time. What is important is the concept and behaviour that the language used is seeking to describe and mandate.⁵⁵

So, again engaging in speculation, the manner in which harms-based or regulator initiated climate change derived litigation targeted at the adequacy and timeliness of financial disclosures, could signal a period of flux where such matters as the equivalence or otherwise of ‘fair presentation’ and ‘true and fair view’ are open to judicial development. At a minimum, the Centro litigation points to both a willingness on the part of ASIC to litigate on corporate disclosure matters and the court’s capacity to look at technical accounting matters from the perspective of context and a probing of, in Moore QC’s terms, the behaviours that should be encouraged or mandated through financial disclosure. Similarly, the nature of the Centro litigation could be seen to support the idea that climate change impact and its current uncertain reflection in measurement-related IFRS standards, will place distinct demands on the professional judgment of both directors and auditors, potentially addressed within the framework of communicating key audit matter.⁵⁶

⁵⁵ Martin Moore QC October 2013 *International accounting standards and the true and fair view* para. 56 p 18.

⁵⁶ Auditing Standard ASA 701 *Communicating Key Audit Matters in the Independent Auditor’s Report*

APPENDIX

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 224

Main objects of this Part

The main objects of this Part are:

(a) to facilitate the development of accounting standards that require the provision of financial information that:

(i) allows users to make and evaluate decisions about allocating scarce resources; and

(ii) assists directors to discharge their obligations in relation to financial reporting; and

(iii) is relevant to assessing performance, financial position, financing and investment; and

(iv) is relevant and reliable; and

(v) facilitates comparability; and

(vi) is readily understandable; and

(aa) to facilitate the development of auditing and assurance standards and related guidance materials that:

(i) provide Australian auditors with relevant and comprehensive guidance in forming an opinion about, and reporting on, whether financial reports comply with the requirements of the [Corporations Act](#); and

(ii) require the preparation of auditors' reports that are reliable and readily understandable by the users of the financial reports to which they relate; and

(b) to facilitate the Australian economy by:

(i) reducing the cost of capital; and

(ii) enabling Australian entities to compete effectively overseas; and

(iii) having accounting and auditing standards that are clearly stated and easy to understand; and

(c) to maintain investor confidence in the Australian economy (including its capital markets).