Law Council
OF AUSTRALIA

Business Law Section

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Dear Ms LaBouchardiere

Consultation Paper 380: Sustainability Reporting

Thank you for the opportunity to respond to your Consultation Paper 380 on sustainability reporting, released on 7 November 2024. Unfortunately, at this very busy time of year, our committees have not had the chance to undertake a detailed review of the documents. However, we offer the following high-level comments on the draft Regulatory Guide attached to Consultation Paper 380, which may be helpful.

1. As RG 000.48 explains, the record-keeping obligation runs from the beginning of the relevant financial year. This paragraph states that "[e]ntities should establish adequate systems to assess whether they may be required to prepare a sustainability report at the end of a financial year, even if they do not meet the sustainability reporting thresholds at the commencement of the financial year". This points to the practical difficulties (which we raised as part of the legislative consultation) that entities face. ASIC's guidance is appreciated, but it is impractical to expect that all entities (even SMEs who are unlikely to consider themselves in scope or to have consulted this Regulatory Guide) will establish such a system. It might be better to say that entities that might foreseeably become subject to the reporting requirement in that year (for example, because they have tentative M&A plans or are close to the corporate size or assets under management thresholds) should have a system to assess that likelihood.

2. Of course, if an entity does have such a system and decides that it may be required to prepare a sustainability report and incurs costs in record-keeping—but then discovers at the end of the year it is not required to do so—those costs are wasted. If an entity does have such a system and decides it is unlikely to be required to prepare a sustainability report and does not commence record-keeping—but unforeseen events do result in a requirement to report—it has breached the law and following this ASIC guidance will not protect it from liability. It would be open to ASIC instead to say, in the section on enforcement, that it is unlikely to take action against an entity that becomes subject to the record-keeping obligation during the year in circumstances that were not reasonably foreseeable to the entity at the beginning of the year.

3. The brief comment on directors' duties in RG 000.49 to RG 000.54 is only concerned with the duty of care. We are concerned that it gives an incomplete picture of directors' applicable responsibilities, including under Corporations Act ss 344, 1308 and 1309. If ASIC decides to provide guidance on what the law requires of directors, it should be complete, and it may be helpful to include some commentary on the meaning of reasonable steps on the part of the director in the context of these provisions.

4. In RG 000.55, the word "only" is unhelpful and should be deleted. Directors are being asked to form a view as to whether the steps taken by the entity to ensure that the sustainability report complies with the law are reasonable. It may be helpful to include some guidance on what reasonable steps the entity can take, perhaps linked to the discussion in RG 000.92 and RG 000.93 on proportionality mechanisms and exceptions under AASB S2.

5. In the section dealing with directors' declarations, it might be helpful to include some guidance on what directors should do if they are unable to make the declaration (for example, because records were not kept for the reasons identified in paragraph 2).

6. At RG 000.64, it would be helpful for ASIC to state that it considers the modified liability arrangement to apply to information that appears in any form of mandatory corporate disclosure—for example, mirroring the language in s 1308 of the Corporations Act that refers to a document that is required under or for the purpose of the Act, or that is lodged with or submitted to ASIC. This overcomes the problem of an entity having to establish whether the content requirements for those documents did or did not extend to climate-related financial disclosure, which is a matter of judgment for the entity.

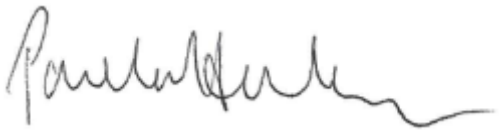
7. In RG 000.94, it might be helpful to expand this guidance. For example, how would an entity keep records substantiating that it does not have the necessary skills, capacity or resources?

8. Section D, which deals with sustainability-related financial disclosures outside the sustainability report, suggests in several places that entities should have regard to AASB S1. However, this is a voluntary standard and the guidance is unhelpful to the extent that it suggests that not following AASB S1 would result in defective disclosure.

9. In the part dealing with compliance with a direction from ASIC, it would be helpful to state that an entity that complies with a direction from ASIC and its officers are not liable for any resulting defect in their sustainability report (acknowledging that some form of relief from ASIC may be required to achieve that immunity).

If you would like to discuss these comments further, please contact Pamela Hanrahan, Chair of the Business Law Section, [redacted].

Yours faithfully



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