Law Council
OF AUSTRALIA

Office of the President

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Senator Jess Walsh
Chair
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Senator

Inquiry into the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024

1. The Law Council appreciates the opportunity to make this submission, which relates to the Climate Related Financial Disclosures (**CRFD**) regime in Schedule 4 to the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (the **Bill**).

2. Given the extremely short timeframe for this inquiry, our comments are limited to the inquiry process, and improvements that can be made to strengthen the Bill to meet its policy objectives. We welcome the Bill and its role in providing transparency to investors for climate-related risks and opportunities in companies.[1] As noted in the Law Council's Climate Change Policy, it is important that developments in this area promote certainty and clarity in the law.[2]

3. However, there are some issues with the transitional arrangements and scope of the Bill that require further attention.

Timeframe for inquiry

4. Significant concern has been expressed from all corners of the legal profession about the extraordinarily short timeframe for this inquiry. Regrettably, the inquiry period has overlapped with the Easter public holiday period, and the due date for submissions was not published by the Committee on its website until a week prior to the deadline. Compressed inquiry timeframes undermine the democratic parliamentary process for the proper scrutiny of bills. This is particularly concerning given—to borrow the words of Australian Securities and Investments Commission (**ASIC**) Chair Joe Longo—that Schedule 4 to the Bill is the "*biggest change in the financial services sector in a generation*"[3] resulting in a "*seismic shift*" for corporates and investors;[4] and the substantial changes made to the Bill since the Exposure Draft was released by the

[1] Explanatory Memorandum at [4.6]-[4.12].
[2] Law Council of Australia, Climate Change Policy Statement, 21 November 2021, 10.
[3] Speech by ASIC Chair Joe Longo at the AFR environmental, social, and governance Summit, 5 June 2023.
[4] Australian Financial Review, 'ASIC's warning to lawyers and accountants on seismic climate shift' (online, 13 June 2023).

Department of the **Treasury**, and the limited time available to comment on the Exposure Draft (4 weeks, overlapping with the Christmas and January school holiday period).

5. The Law Council encourages the Committee to consider an extended hearing timetable to allow for proper public consultation prior to arriving at its conclusions on the Bill. Parliament may, in turn, need to provide an extended reporting date to the Committee to enable this to occur.

Assurance gap

6. The auditing standards to be developed by the Auditing and Assurance Standards Board (**AUASB**) are not contemplated to operate until 1 July 2030.[5] This 7-year delay is problematic because it misaligns with the transitional provisions contained in the proposed subsection 1707C for the directors' declaration.[6]

7. Under the transitional provisions, the directors' declaration comprises an opinion as to whether the entity has taken 'reasonable steps' to ensure the substance of the sustainability report complies with legislation, including sustainability standards.[7] This formulation acknowledges the difficulty for a director to form an opinion based on reasonable grounds about the accuracy of a sustainability report, when the systems and processes within an entity that form this basis are still developing.[8]

8. However, this transitional provision will not apply from the 2027–28 FY—and directors will not have recourse to auditor's reports until 1 July 2030. While directors do not and cannot rely solely on auditor's reports to form a view,[9] they do rely on the same underlying systems and processes in an entity that auditors and assurance providers use to produce their reports. If the auditing standards are not available during this period then, by implication, the systems and processes of entities economy-wide have not sufficiently matured to support an unqualified director declaration either. Yet, these directors will be subjected to the threat of private litigation over this period due to the expiry of the transitional provisions regarding limited immunity from liability.[10] The Law Council considers this to be a highly undesirable result.

9. The Bill should, therefore, align the timing of transitional provisions for the directors' declaration and the commencement of applicable AUASB auditing standards. The release of the AUASB auditing standards should be brought forward to at least 1 January 2027, to apply from the 2027–28 FY. The Law Council considers this timing to be workable. For comparison, the auditing standards associated with the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) for greenhouse gas emissions, energy production and consumption came into force 6 months after the disclosure standards commenced.[11]

[5] Bill, Schedule 4, Part 2, s 94 (inserting the new s 301A into the *Corporations Act 2001*); Explanatory Memorandum, [4.128].
[6] Bill, Schedule 4, Part 4, s 145 (inserting the new s 1707C into the *Corporations Act 2001*); Explanatory Memorandum, [4.188].
[7] Ibid.
[8] Law Council of Australia, Submission To Treasury, Submission, *Climate related financial disclosure: exposure draft legislation* (online, 9 February 2024), [15]-[20].
[9] See for example *ASIC v Healey* [2011] FCA 717 at [174]-[175], [222] (Middleton J), which makes clear that directors cannot blindly rely on external auditor reports.
[10] Bill, Schedule 4, Part 4, s 145 (inserting the new s 1707D into the *Corporations Act 2001*).
[11] See the *National Greenhouse and Energy Reporting Regulations 2008* (Cth) which incorporated the reporting requirement from 15 March 2009, and the *National Greenhouse and Energy Reporting (Audit) Determination 2009* (Cth) which set the auditing standards that came into force on 17 December 2009.

Protected statements limited immunity

Law Council position on the inclusion of a limited immunity

10. The Law Council has received a range of views from the legal profession about the appropriateness of a limited immunity. Some members of our Climate Change Working Group (**CCWG**) have raised strong concerns about a 3-year moratorium on private litigation, given it provides an important accountability mechanism that incentivises transparency in climate-related disclosures. Members of the CCWG also highlighted the urgency of effective action on climate change, and the need for the CRFD regime to come into full force as soon as practicable.

11. At the same time, some members of the Law Council's Business Law Section have highlighted the significance of the changes proposed to corporate disclosures. ASIC's Chair Joe Longo has foreshadowed the 'seismic' shift that both the accounting and legal professions will need to make, let alone businesses themselves to support these reforms, with heavy reliance on experts for guidance in the early years of the regime.[12]

12. Having regard to the range of views received, on balance, the Law Council supports the inclusion of transitional provisions that provide reporting entities with a limited immunity from private litigation. The policy objective of the reform is to support Australia's reputation as an attractive destination for international capital, including investments that promote the transition to net zero—which is to be achieved through a CRFD regime.[13] This promotes information transparency and allows for the more efficient allocation of capital. Bearing this in mind, we consider it important that there be a transitional period in which businesses can recalibrate their systems and processes to meet the new reporting requirements, including seeking appropriate guidance on reporting obligations and how to meet them.

13. Treasury's Policy Impact Analysis already notes that Group 2 and 3 entities are less likely to already be voluntarily disclosing against the Task Force on Climate-related Financial Disclosures (**TCRD**) framework.[14] There will thus need to be an adjustment period for these entities in particular.

14. While private litigation is an important accountability mechanism for corporate disclosures, the Law Council considers it preferable that compliance is promoted in the early years of the regime through education and redirection by the regulator.[15] Reserving legal action for ASIC over the transitional period has the added advantage of utilising less expensive and/or time-consuming compliance and enforcement tools prior to considering legal proceedings (including the redirection power in the proposed section 296E in the Bill)—whereas private litigation can be a more blunt compliance tool by comparison. The threat of private litigation may also result in conservative, bare minimum disclosures by reporting entities out of fear of getting it wrong in the early years of the regime. Given that the overriding policy objective is transparency through expanded, high-quality disclosures, this would be an undesirable result—noting that affected entities will likely be in the process of understanding their reporting obligations and how to best discharge them.

[12] Australian Financial Review, 'ASIC's warning to lawyers and accountants on seismic climate shift' (online, 13 June 2023).
[13] See p 1 of Treasury's Policy Position Statement.
[14] See p 6 of Treasury's Policy Impact Analysis for the Bill, which notes that only 67.5% of ASX200 companies are voluntarily reporting against the TCFD, and that "*this figure drops even further beyond the ASX 200*".
[15] See the proposed s 296E in the Bill which enables ASIC to give various directions to reporting entities. The Explanatory Memorandum at [4.196] also notes that "*the policy intention is to ensure during the transitional period, ASIC can undertake a role that promotes education about compliance with the new reporting regime and deter poor behaviours and reporting practices that are contrary to the objectives of the new reporting regime*."

15. As the Australian Law Reform Commission (**ALRC**) has previously noted, immunity provisions are not unusual in Commonwealth legislation where justification exists for their inclusion.[16] In the circumstances, and in particular the desirability of an educative and re-directive approach in the early years of the CRFD regime to promote high-quality disclosure, we consider a limited immunity to be appropriate and justified.

Recommended improvements to the limited immunity provisions

16. To improve the efficacy of the limited immunity, the Law Council recommends the following changes to broaden the scope of the immunity:

    (a) Forward-looking statements should have 3-year coverage: under the proposed subsection 1707D(4), the immunity only applies to forward-looking climate-related statements in the first 12 months of the regime. These statements should also be afforded the 3-year limited immunity available under subsection 1707D(3) for statements in the sustainability report about scope 3 greenhouse gas emissions, scenario analysis, and a transition plan. Forward-looking statements are inherently uncertain—and rely on information that entities are not presently equipped to assure.[17] For the reasons set out above (about directors' declarations), the limited immunity for forward-looking climate statements should align with the timing of the commencement of AUASB auditing standards.

    The Explanatory Memorandum to the Bill does not explain the reason for its different approach to forward-looking climate statements. The Bill should follow the recommendation made in Treasury's Policy Impact Analysis (a 3-year limited immunity for forward-looking statements),[18] which acknowledges that this timeframe reflects a balance between competing stakeholder views.

    (b) Voluntary public explanations of the sustainability report should be protected: The limited immunity does not apply to public statements made voluntarily in summaries and explanations of an entity's annual report: e.g. on their website or in a CEO or Chair address. This disincentivises entities from engaging in explanation of statements in their sustainability reports about scope 3 emissions, scenario analysis, transition plans, or forward-looking climate statements—which is unhelpful to investors and leads to the unintended consequence of 'green hushing'.[19] The Law Council recommends broadening the immunity to include explanations of matters disclosed in the sustainability report, to cultivate a culture of broad and high-quality climate disclosure.

    (c) The immunity should cover the first 3 reporting years for Groups 1, 2 and 3: the limited immunity should cover the first 3 reporting years of Groups 1, 2 and 3 rather than just the first 3 years of the reporting regime. The current approach disadvantages in particular Group 3 entities, who will not benefit from any of the limited immunity by the time their reporting obligations commence on 1 July 2027. Group 3 entities may also experience different reporting challenges from other cohorts due to their relative smaller size which may need time to work through with guidance from the regulator and experts.

    (d) ASIC proceedings should be limited to injunctive or declaratory relief: the Explanatory Memorandum to the Bill describes ASIC's role during the transitional

[16] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report No. 129), ch 16.
[17] Treasury's Policy Impact Analysis for the Bill, pp36 and 38.
[18] Treasury's Policy Impact Analysis for the Bill, p 29.
[19] See also Law Council of Australia, Submission To Treasury, Submission, *Climate related financial disclosure: exposure draft legislation* (online, 9 February 2024).

period (alongside deterrence) as one of promoting education about compliance with the new regime.[20] This policy objective would be disproportionately sidelined if ASIC were able to bring civil penalty proceedings during the limited immunity period. The cost involved in responding to ASIC proceedings seeking injunctive or declaratory relief, coupled with the reputational costs to an entity, acts as a deterrent for non-compliance, and prioritises corrective (rather than punitive) actions.

(e) Strict liability offences should be covered by the limited immunity: the Bill does not apply the limited immunity to criminal offences.[21] A strict liability criminal offence does not require proof of the fault element: intention, knowledge, recklessness or negligence is not necessary to be proved. The physical elements of the offence are sufficient. This leaves open the possibility of disproportionate punishment for entities that make good faith attempts to comply with the new reporting obligations but make a mistake. For example, an entity that does not 'correctly' explain and record its preparation of the substantive provisions of the sustainability report will have committed a strict liability offence.[22] The limited immunity should therefore extend to strict liability offences also.

Unintended consequences—other reporting regimes

17. The Bill can be strengthened by clarifying how the regime sits alongside existing reporting regimes. The proposed subsection 1707D(1) only applies the limited immunity to disclosures made under other regimes if the statement is required under Commonwealth law, and the statement 'is the same' as that within the sustainability report, or 'contains updates or corrections' to the statements in the sustainability report. This 'same' requirement incentivises entities to shift their disclosures under other reporting regimes into the sustainability report, even if they are not directly relevant, to benefit from the limited immunity.

18. Rather than encouraging this artificial exercise, the Bill should clarify whether entities can satisfy other reporting requirements by referring to the sustainability report, or whether the limited immunity can extend to parallel or similar disclosures under other regimes. It is worth noting that ASIC's Regulatory Guide 247 recommends that overlapping information across different reporting regimes should be complementary and consistent, with inconsistencies adequately explained.[23]

'Environmental sustainability' disclosures

19. The Bill requires sustainability reports to include 'other matters relating to environmental sustainability', and gives the Minister the power to, by legislative instrument, require a sustainability report to include environmental sustainability matters. It is concerning that no further details are provided in the text of the Bill, nor the Explanatory Memorandum, other than to note that there may be international developments in environmental sustainability in the future.

20. As a matter of principle, changes to the law that substantially alter the rights and obligations of persons should be addressed in primary legislation. This position is also reflected in the Department of the Prime Minister and Cabinet's *Legislation Handbook*, which notes that "*significant questions of policy including significant new policy or*

[20] Explanatory Memorandum, [4.196].
[21] Bill, Schedule 4, Part 4, s 145 (inserting the new s 1707D(2) into the *Corporations Act 2001*).
[22] Bill, Schedule 4, Part 1, s 16 (inserting new s 286A into the *Corporations Act 2001*).
[23] ASIC Regulatory Guide 247, p 27.

fundamental changes to existing policy" should be implemented "*only through Acts of Parliament*".[24]

21. This aspect of the Bill leaves many significant policy questions unanswered, including the scope of 'environmental sustainability' disclosures, what it will be measured against and from whose perspective, whether it is to be measured with respect to the entity's activities alone, or whether it will be a cumulative impact assessment, and so on. Significant policy changes should go through the proper channels for the development and scrutiny of primary legislation to enable appropriate public engagement and feedback. Pre-empting international developments does not satisfy the rule of law requirement for certainty in the law. The references to 'environmental sustainability' should therefore be deleted from the Bill.

Other miscellaneous improvements to the Explanatory Memorandum and Bill

22. The Law Council assumes that 'sustainability records'[25] will form a part of the 'books' of a company, either through the proposed amendment to the definition of 'books' (sustainability reports or sustainability records, however compiled, recorded or stored),[26] or through the existing definition of 'books' (any other record of information).[27] This is worth clarifying in the Explanatory Memorandum, as various obligations are attached to the books (including inspection).[28]

23. The Law Council also assumes that the amendments proposed by the Bill can apply to Commonwealth companies (i.e. a company established under the *Corporations Act 2001* (Cth), that the Commonwealth controls) if the relevant thresholds for sustainability reporting are met. As such, consequential amendments to Chapter 3 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) should be considered, for coherence and consistency.[29] For example, subsection 97(1) of the PGPA Act requires the directors of a Commonwealth company to provide to the responsible Minister a copy of the company's financial report, directors' report and auditor's report—this ought to also include the sustainability report.

Thank you again for the opportunity to comment on the Bill. Please contact [redacted] should the Committee wish to discuss any aspect of this submission.

Yours sincerely

Greg McIntyre SC
President

[24] The Department of the Prime Minister and Cabinet Legislation Handbook (2017), p 2.
[25] Bill, Schedule 4, Part 1, s 3 (inserting new definition for 'sustainability records' in s 9 of the *Corporations Act 2001* (Cth).
[26] See the new subsections proposed by the Bill: s 9(ca) for the *Corporations Act 2001* (Cth) and s 5(ca) for the *ASIC Act 2001* (Cth).
[27] *Corporations Act 2001* (Cth), s 9(b).
[28] For example, see the *Corporations Act 2001* (Cth), s 1300.
[29] Note that the Department of Finance's PGPA Flipchart indicates that there are currently 16 Commonwealth Companies in operation.