Law Council
OF AUSTRALIA

Climate-Related Financial Disclosure: Second Consultation—Consultation Paper

The Treasury

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Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia thanks the Corporations Committee and the Financial Services Committee of its Business Law Section, the Superannuation Committee of its Legal Practice Section, and its Climate Change Working Group, for assistance in the preparation of this submission.

Executive Summary

1. The Law Council appreciates the opportunity to make a submission to Treasury's Climate-Related Financial Disclosure: Second Consultation (the **consultation**), in response to the consultation paper dated June 2023.[1]

2. Consistent with its Climate Change Policy adopted in 2021, the Law Council of Australia supports the development of a mandatory climate-related financial disclosure (**CRFD**) regime for Australia, drafted to reflect the IFRS S2 *Climate-related Disclosures* (**IFRS S2**) as issued by the International Sustainability Standards Board (**ISSB**).[2]

3. Inserting and incorporating CRFD into Australia's existing corporate disclosure laws though will be challenging. The challenges are caused by the complexity of the existing legal framework for corporate disclosure (including annual reporting, continuance disclosure, fundraising disclosure, and voluntary corporate disclosure) that already applies to the diverse corporations, superannuation funds and investment funds to which the proposed CRFD regime will apply.

4. This submission makes the following key points:

   - On the proposal for disclosure of climate resilience assessments against at least two possible future states—the global temperature goal set out in the *Climate Change Act 2022* (Cth) or a different climate future—it may be preferable for Treasury to be more prescriptive as to the alternative 'possible future state'.
   - Requiring superannuation fund trustees to disclose details of transition plans that foreshadow divestments by milestone dates may become price-sensitive information; its disclosure may be detrimental to superannuation fund members.
   - For superannuation funds, reporting thresholds based on the number of employees and revenue will need to be tailored to ensure sensible and consistent outcomes.
   - If the proposal to require CRFD in an entity's annual report is adopted, it matters where—i.e., in the financial report, the directors' report, or a separate report—the information appears. This design choice has implications for what forms of directors' resolutions and external assurance are required, and for the legal consequences for the entity and its directors of defective disclosure.
   - Treasury should consider creating a discrete climate report, as part of the annual report and issued by a directors' resolution similar to section 298 of the *Corporations Act 2001* (Cth), that contains CRFD. Otherwise, the short timeline for implementing the reform risks unforeseen flow-on effects for the rest of the disclosure law framework.
   - The civil penalty liability of entities and their officers for defective CRFD should reflect where the disclosure appears, and be carefully mapped.

[1] Australian Government, Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (June 2023) <https://treasury.gov.au/sites/default/files/2023-06/c2023-402245.pdf>.
[2] International Sustainability Standards Board, *IFRS S2 Climate-related Disclosures* (IFRS Foundation, 26 June 2023) <https://www.ifrs.org/projects/completed-projects/2023/climate-related-disclosures/#published-documents>.

- The infringement notice regime should not be extended.
- If the 'modified liability approach' is adopted, it should extend to all legislative provisions that allow civil claims for unintentional defective disclosure, not just the general misleading or deceptive conduct provisions.
- Sections 1317S and 1318 of the Corporations Act do not provide the legal 'protection' to entities or their officers suggested by the consultation paper.
- The interaction between CRFD and continuous disclosure laws in Chapter 6CA of the Corporations Act, will need to be carefully considered, including in the forthcoming review of the operation of the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (Cth).
- In fundraising documents, CRFD is already required if it is material to potential investors. Until the mandatory CRFD framework matures, specific additional disclosure requirements in fundraising documents will be unhelpful.
- As superannuation funds and their trustees will rely upon the disclosures of other entities in order to meet their own CRFD requirements, their reporting date should be appropriately delayed or staggered to allow time for aggregation of this information. CRFD requirements could be included in their existing financial reports, rather than by requiring climate-related disclosures to be included in product disclosure statements.

5. The legal and policy settings of these reforms must be carefully calibrated to achieve their important and urgent purpose of supporting a just transition to a low-carbon economy, which will be necessary to effectively mitigate the effects of climate change. Ensuring that changes to Australia's corporate and financial services laws are robust, certain and clear, and readily known and available ahead of application, will limit implementation risk for government in this necessary reform, and compliance risk and cost for reporting entities.

6. The Law Council reiterates its previous submission to Treasury that aligning an appropriate domestic regulatory framework for CRFDs with international reporting standards is critical to ensure the availability of capital, finance and insurance for Australian enterprises.[3] The Law Council, therefore, supports in principle the Treasury's objective of establishing a regulatory framework with commencement from 1 July 2024, noting the ISSB standards commence from 1 January 2024.[4] However, the timeline is ambitious and, in light of the significant number of unresolved policy and technical details, Treasury should make contingency plans in the event that a sound and effective framework is unable to be established within that timeframe.

[3] Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> [3].
[4] Ibid, C1 (Appendix C, Effective Date and Transition).

Introduction

7. The Law Council supports the development in Australia of a legislative regime that mandates CRFD according to standards drafted to reflect the IFRS S2.[5]

8. There are significant challenges in integrating CRFD into Australia's existing corporate disclosure laws. These challenges are caused by the complexity of the existing legal frameworks for annual reporting, continuous disclosure, fundraising disclosure, and voluntary corporate disclosure.

9. Under existing disclosure laws, legal liability for (and the legal consequences of) defective CRFD will vary significantly depending on how the disclosure obligation is expressed in the law and where—that is, in which corporate documents—the disclosure is required.

10. The proposals in the consultation paper as to how the CRFD obligation is expressed and where disclosure is to be made are still very high-level. The Law Council urges Treasury, in further developing the proposals, to carefully consider the existing legal framework for corporate disclosure, and to consult disclosure law experts before, not after, drafting instructions are prepared.

11. Several additional considerations will need to be addressed to account for the superannuation context, given the nature and structure of registrable superannuation entities (**RSEs**) and the holders of RSE licences (**RSE licensees**) and how their emissions arise.[6]

12. Treasury should closely coordinate with the ongoing work of the Australian Law Reform Commission (**ALRC**) on the design and structure of Australia's corporations and financial services legislation.[7] The ALRC's Interim Report B provides important context.[8]

13. How the Australian Accounting Standards Board (**AASB**) frames the Australian standards for CRFD will determine the legal character of the required disclosure (for example, as quantitative or qualitative, forward-looking, opinion or intention, empirical or opinion-based). This in turn drives where the disclosure should be made and which liability regime (among the different ones that apply to different corporate disclosures) should apply. The AASB's work is ongoing.

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[5] International Sustainability Standards Board, *IFRS S2 Climate-related Disclosures* (IFRS Foundation, 26 June 2023) <https://www.ifrs.org/projects/completed-projects/2023/climate-related-disclosures/#published-documents>.

[6] Particular issues were identified in the Law Council's submission to the first phase of the consultation: see Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> at [98], [125]-[127] and [138]. Additional concerns are identified in this further submission.

[7] Australian Law Reform Commission, *Review of the Legislative Framework for Corporations and Financial Services Regulation* (Web Page, 11 September 2020) <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>.

[8] Australian Law Reform Commission, *Financial Services Legislation: Interim Report B* (ALRC Report No 139, September 2022) <https://www.alrc.gov.au/publication/fsl-report-139/>.

Response to Consultation Paper Proposals

Overview

14. Treasury seeks views on whether the proposed positions outlined in its consultation paper are workable.[9] These relate to the coverage, content, framework, and enforcement of requirements to make CRFD.

15. This submission, which builds on the Law Council's response to the first phase of this consultation,[10] is necessarily high-level given the broad framing of the proposals and the short timeframe provided for response. It is guided by the principles set out in the Climate Change Policy approved by its Directors on 27 November 2021.[11] These principles include that:

    (a) Australia's international law obligations with respect to climate change should be fully implemented domestically;[12]

    (b) new laws must be both readily known and available, and should promote certainty and clarity for those affected by climate change mitigation and adaptation measures;[13]

    (c) Australia's mitigation and adaptation measures should be fair and equitable and promote public confidence, including by being both environmentally effective and economically efficient, and promoting the long-term interest of households, workers and communities with respect to effective action to the physical risks of climate change and the principles of a just transition;[14] and

    (d) decisions about mitigation and adaptation measures should be:

        (i) predictable, with policy and decision makers explaining clearly in advance when climate change related considerations should, or will, be taken into account; and

        (ii) transparent, and to that end should be supported by analysis to explain the economic costs and benefits and the environmental outcomes to be achieved, and information about who will bear the burden and who will enjoy the benefits.[15]

16. The Law Council recognises that:

    (a) Australian CRFD is appropriate and necessary, having regard to the global directions regarding the disclosure of financial information and international reporting standards;

    (b) providing Australian investors and other stakeholders with consistent and internationally comparable information on climate-related risks and opportunities

[9] Consultation Paper, 5.
[10] Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure>.
[11] Law Council of Australia, *Climate Change Policy* (Policy Statement, 27 November 2021) <https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-climate-change-policy>.
[12] Ibid 10.
[13] Ibid [48].
[14] Ibid [51].
[15] Ibid [52].

is critical to ensuring the availability of capital, finance and insurance of Australian enterprises and supporting their place in a competitive global market;[16]

(c) it is crucial that the development and implementation of a standardised regime is appropriate and adapted to suit the intricacies of the domestic legal framework in which it will operate; and

(d) proposed changes in Australia must account for a corporations and financial services legislative scheme that is highly technical and complex and has become increasingly unwieldy, particularly as regards the Corporations Act.[17]

17. The Law Council considers that clear and workable CRFD laws are urgently required to keep Australia on track to meet global goals and commitments. Treasury has available to it considerable legal and policy knowledge and legislative design expertise, including external expertise in the legal profession, the academy and civil society organisations, to get the settings right on this important regulatory reform. The Law Council recommends that proper and sufficient resources, including corporate disclosure and environmental legal expertise, be committed to this important work as a matter of priority.

Coverage

Reporting Entities

Proposal: That all entities that are required to lodge financial reports under Chapter 2M of the Corporations Act and that either meet prescribed size thresholds or are registered as a 'Controlling Corporation' reporting under the *National Greenhouse and Energy Reporting Act 2007* (Cth), would be required to make climate-related financial disclosures.

18. The Law Council addressed the issue of coverage in its submission to the first consultation phase,[18] and retains the views expressed there.

19. For superannuation, thresholds based on the number of employees and revenue will need to be tailored to ensure sensible and consistent coverage.

20. In Australia, superannuation funds that are RSEs (as defined in the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**)) are structured as trusts and are not bodies corporate. They do not (and cannot) themselves have any employees. An employee threshold applied to the RSE, rather than the RSE licensee that is its trustee, will be irrelevant. If it is applied to the RSE licensee, which often has very few employees given the prevalent use of arms-length outsourced service providers, the number of employees is not necessarily correlated to fund size.

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[16] See Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure>. See also Brendan Bateman et al, 'Attention directors: investors call for climate change management and disclosure', *Clayton Utz* (Blog Post, 11 March 2021) <https://www.claytonutz.com/knowledge/2021/march/attention-directors-investors-call-for-climate-change-management-and-disclosure>.

[17] See, eg, Australian Law Reform Commission, 'Summary Report', *Financial Services Legislation: Interim Report B* (ALRC Report No 139, September 2022) <https://www.alrc.gov.au/publication/fsl-report-139/>.

[18] Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure>.

21. Similarly, a revenue threshold for RSEs will need to take into account, and appropriately specify, whether the revenue of the RSE should be interpreted as comprising:

    (a) the revenue generated by the superannuation fund by charging fees to members; and/or

    (b) the income and capital gains generated through the superannuation fund's investments; and/or

    (c) the contributions paid into the superannuation fund by its members and their employers.

22. The Superannuation Committee also notes that recent changes have brought RSE licensees (and other trustees, such as responsible entities of significant managed investment schemes) within the requirements of Chapter 2M of the Corporations Act, meaning most, if not all, public offer RSEs and their licensees will be captured by CRFD reporting obligations on two or more of the threshold criteria.

23. The Superannuation Committee suggests Treasury consider a phased approach for RSE licensees, so that all RSE licensees subject to Chapter 2M are phased into the mandatory reporting regime at the same time, and after Phase 1. This would support consistency and transparency, and recognise the fact that RSE licensees (irrespective of superannuation fund size) will have a high reliance on the CRFD reporting of the entities in which they invest.

24. Emissions associated with investments of an RSE and its licensee are likely to be reportable by other service providers—for example, by the custodians who hold those investments, by the investment managers who select and purchase those investments, and possibly the administration companies that service those superannuation funds.

25. The Superannuation Committee recommends Treasury carefully consider the particular nature of the superannuation industry, how its emissions arise and the risk of overlap and duplicated reporting.

Content

International Alignment

Proposal: The AASB will be responsible for developing Australian climate disclosure standards, which are envisaged to closely align to the requirements in IFRS S2 *Climate-related Disclosures*.

26. The Law Council strongly supports the proposal for the ISSB's new global standard for CRFD to apply in the Australian context. As stated in its response to the first stage of this consultation:

> *The Law Council considers that it is critical that Australia's regulatory settings are consistent with internationally prescribed requirements relating to climate-related disclosures … international consensus is*

moving towards adoption of the ISSBs, and that is where Australia's focus should be.[19]

27. With the publication of the final IFRS S2 in June 2023, the AASB will shortly begin a consultation process as to the detailed content of Australian standards for CRFD.

28. The Law Council notes the very short timeframe that has been set between the date for issuance of the Australian standards—the second quarter of 2024, subject to the passage of legislation—and the first reporting period proposed being 2024–25.[20]

29. The Law Council considers it is important to provide certainty as soon as possible regarding the Australian obligations. This is necessary to enable reporting entities to begin to put in place internal processes and resources, and develop capabilities to meet the disclosure requirements. Uncertainty may amplify mitigation and adaptation risks.

30. Multinational corporations already operate within the international reporting context, including interacting with existing standards on environment and climate, and may face fewer transitional issues than large Australian companies.

Scenario Analysis, Transition Planning, Metrics and Targets

31. Noting that the detailed content of the Australian standards will be a matter for the AASB, and given the limited time available under the present consultation phase, the Law Council does not address all the proposals provided in the consultation paper relating to reporting content. At this stage, it raises for further consideration the following discrete comments under three of the specific proposals.

Proposal: From commencement, reporting entities would be required to disclose climate resilience assessments against at least two possible future states, one of which must be consistent with the global temperature goal set out in the Climate Change Act 2022.

32. In relation to the second possible future state, the consultation paper provides that this would be a 'scenario that reflects different climate future(s)', which 'could include a scenario reflecting the Government's commitment to reduce emissions by 43 per cent by 2030 and to net zero by 2050', with the aim being 'to help investors understand resilience of the reporting entity's business strategy in a scenario where the world is decarbonising at a different speed'.[21]

33. This proposal does not, *prima facie,* preclude the situation of a reporting entity selecting a scenario that is improbable (such as a scenario requiring a much less ambitious target) or that is otherwise self-serving. Such selections would undermine the usefulness of the climate resilience assessment for investors.

34. The Law Council recommends that Treasury reconsider the specific settings of this proposal—that is, whether additional criteria for the selection of the second scenario

[19] Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> [41]-[42].
[20] Consultation Paper, 11.
[21] Ibid 13.

might be prescribed, in order to ensure the objective inherent in mandating the disclosure of climate resilience assessments is achieved.

35. To this end, it may be useful for Treasury to outline in greater detail the purpose of allowing for self-selection of a second scenario (if that is what is intended), in order that any proposed regulation is suitably drafted to achieve this purpose.

Proposal: From commencement, transition plans would need to be disclosed, including information about offsets, target setting and mitigation strategies.

36. The proposal for disclosure of transition plans raises issues in the superannuation context. In this sector, most emissions attributable to an RSE and its licensee will arise in connection with its investments. While a reduction in emissions may be an objective, so that particular emission targets are reached by particular dates, ultimately the achievement of those targets will depend on:

    (a) the companies (in which an RSE invests) reducing their emissions; and/or

    (b) divestment of holdings by RSEs in high-emission companies and diversion of their investing to lower-emission companies.

37. The Superannuation Committee recommends that caution be exercised before requiring RSE licensees to disclose details of any transition plans that would foreshadow divestments by milestone dates. This could become price-sensitive information, enabling other market participants to exploit that information to the detriment of Australian superannuation fund members as those milestone dates approach, since this could reveal that certain RSE licensees had become forced-sellers of the relevant assets.

Proposal: Disclosure of material scope 3 emissions would be required for all reporting entities from their second reporting year onwards.

38. The National Greenhouse and Energy Reporting scheme, established under the *National Greenhouse and Energy Reporting Act 2007* (Cth), is based on the GHG Protocol, and largely consistent with this standard for scope 1 and 2 emissions. The GHG Protocol is the standard applied under IFRS S2 for all greenhouse gas emissions as the most used standard globally.[22] It would likely be the default in the absence of Australia-specific guidance; in the consultation paper, Treasury encourages its use as an accounting framework for disclosure of material scope 3 emissions in the Australian standards context, with 'Australia-specific emissions factors', being the National Greenhouse Accounts Factors, to be drawn on 'where relevant'.[23] The Law Council suggests the Australian Government give consideration to more prescriptive greenhouse and energy reporting guidance for scope 3 emissions reporting in due course, to better support the application of the GHG Protocol in the Australian reporting context.

[22] International Sustainability Standards Board, *Basis for Conclusions on IFRS S2 Climate-related Disclosures* (IFRS Foundation, 26 June 2023) <https://www.ifrs.org/projects/completed-projects/2023/climate-related-disclosures/#published-documents>.
[23] Consultation Paper, 16.

39. The Law Council also suggests that the GHG Protocol could provide more content to the concept of 'reasonable grounds', discussed below at 'Time-Limited Protection for Scope 3-Reporting and Forward-Looking Statements'.

Framework

Reporting Location

Proposal: Climate disclosures would be required to be published in an entity's annual report, as part of both the directors' report and the financial report.

Treasury's proposal

40. The consultation paper proposes that CRFD be published in an entity's annual report, and that therefore 'the requirement to comply with climate disclosure standards would be contained in Part 2M.3' of the Corporations Act.[24]

The existing periodic reporting requirements

41. Part 2M.3 of the Corporations Act presently sets out the requirements for periodic reporting. Section 292 of the Corporations Act requires entities to provide a financial report and a directors' report for each financial year. In addition, section 301 of the Corporations Act requires a financial report to be audited in accordance with Division 3 and an auditor's report obtained.

42. A reference to an annual report is therefore more accurately a reference to three separate reports: the financial report, the directors' report and the auditor's report.

43. Each of these three separate reports has different requirements set out in separate provisions of Part 2M.3 of the Corporations Act.

44. The consultation paper states that 'climate disclosures would be required as part of both the directors' report and the financial report'.[25] But these reports are different.

45. The financial report and directors' report are distinct. The financial report has particular declaratory and auditing requirements attached to it under Part 2M.3 of the Corporations Act. Exactly what is required as part of a financial report in terms of climate disclosures will therefore have implications for Treasury's ability to implement the approach to the content and assurance of climate disclosures (and liability and enforcement) being proposed in other sections of the consultation paper.

[24] Ibid, 19.
[25] Ibid, 19.

46. That is, section 295 of the Corporations Act provides that a financial report, which as a whole is subject to the auditing requirement in section 301, consists of the following parts:

    (a) 'financial statements' (paragraph 295(1)(a));

    (b) 'notes to the financial statements' (paragraph 295(1)(b)), which in turn are defined as:

        (i) 'disclosures required by the regulations' (paragraph 295(3)(a));

        (ii) 'notes required by the accounting standards' (paragraph 295(3)(b)); and

        (iii) 'any other information necessary to give a true and fair view' (paragraph 295(3)(c)); and

    (c) 'the directors' declaration about the statements and notes' (paragraph 295(1)(c)), which is a declaration addressing (among other points), whether, in the directors' opinion:

        (i) there are reasonable grounds to believe that the entity is solvent (paragraph 295(4)(c));

        (ii) the rest of the financial report (the statements and notes) are in accordance with the Corporations Act (paragraph 295(4)(d))—in particular, whether the statements and notes:

            (a) comply with the accounting standards, including any further requirements in the regulations, per section 296; and

            (b) give a true and fair view of the financial position and performance of an entity, per section 297;

    and must be made in accordance with a resolution of the directors, specify the date on which the declaration is made, and be signed by a director (subsection 295(5)).

47. It is not clear in the consultation paper whether Treasury intends to make an amendment to section 295 of the Corporations Act. On one reading, Treasury seems to propose that climate disclosures would be required in the directors' report, and only climate risks and opportunities that have a material impact on the financial position of an entity would be included in the financial report, consistent with the existing law.

48. However, the subsequent statement in the consultation paper that existing annual report requirements would be adapted 'where appropriate', such as 'the addition of compliance with climate disclosure standards in a directors' declaration [in a financial report]' lends itself to confusion.[26]

49. The Law Council recommends Treasury clarify its proposal.

[26] Consultation Paper, 19.

The Law Council's view

50. The Law Council recommends CRFD is not expressly inserted into section 295 of the Corporations Act, which relates to financial report requirements.

51. As the framework in that section currently stands, climate information relevant to the accounting standards and to giving a true and fair view of financial position and performance is already required to be included in the financial report, and directors and auditors must attest that this requirement has been met.

52. If section 295 were to be amended to expressly refer to the climate standards in the same manner in which the accounting standards are presently referred, then all climate information relevant to compliance with the climate standards (as opposed to only the climate information relevant to compliance with the accounting standards and to giving a true and fair view of financial position and performance) would be caught as part of the financial report and the assurance process of declaration and sign-off it entails. This could include climate information on governance, strategy, risks and opportunities, and metrics and targets, as proposed at pages 10 to 18 of the consultation paper. This would be a suboptimal outcome.

53. Further, amending section 295 to include compliance with climate disclosure standards within a financial report would create obligations inconsistent with the phased and scaled approach envisaged by Treasury. In particular, Treasury anticipates phasing in reporting of quantitative scenario analysis and material scope 3 emissions, associated assurance standards (given that 'capability uplift is needed to meet growing demand for climate-related assurance services'), and enforcement through a time-limited modified liability approach.[27]

54. For these reasons, the broader climate reporting content described at pages 10 to 18 of the consultation paper should be located expressly in the directors' report, not the financial report, of the annual report. The directors' report does not require the same declarations of directors and auditors as the financial report. The requirements for the financial report should remain the same.

55. Ultimately, the Law Council maintains its alternative preference that climate reporting requirements should be included in an additional fourth report of the annual report (i.e., neither the financial report nor the directors' report).[28] This option could mitigate against unforeseen flow-on effects for the rest of the disclosure framework arising from the short timeline for reform.

[27] Consultation Paper, 13, 16, 22, 27. See also Consultation Paper, 11: 'The proposed requirements would be phased-in over three years, with full application of the mandatory reporting for all groups of reporting entities from the 2027-28 reporting year onwards (end state). A transitional period from 2024-5 to 2026-7 would involve relatively less onerous disclosure requirements and aims to provide reporting entities with time to develop internal capabilities and internal capacity to meet the disclosure requirements. This would be supported by the proposed modified liability settings over the same period.'

[28] Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> at [76].

Liability and Enforcement

56. The discussion of liability at pages 27 to 28 of the consultation paper does not engage fully with the existing liability settings for corporate disclosure, which will determine the liability of entities and their officers if the mandatory CRFD requirements are not met.

57. Different liability settings for defective disclosure apply in different contexts—such as whether the disclosure is made in an annual report,[29] a continuous disclosure announcement,[30] or a fundraising disclosure document,[31] or is a voluntary disclosure on a website or in an advertisement.

58. The specific operation of each existing corporate disclosure provision must be carefully considered in the context of bringing CRFD within the legislative scheme.[32]

Civil Penalty Provisions

Proposal: Climate-related financial disclosure requirements would be drafted as civil penalty provisions in the Corporations Act.

59. The consultation paper does not provide further detail as to how climate disclosure requirements would be drafted as civil penalty provisions in the Corporations Act. If CRFD is to be woven into the existing disclosure requirements in the Corporations Act in Chapters 2M, 6CA, 6D, 7, and so on, then the civil penalty provisions dealing with defective disclosures in these contexts will apply. These include civil penalty provisions for defective disclosures in:[33]

    (a) section 344 of the Corporations Act—imposing personal liability on directors who fail to take all reasonable steps to secure compliance with Part 2M.3;

    (b) section 674A and section 675A of the Corporations Act—imposing liability for contravention of continuous disclosure obligations, on listed and unlisted entities respectively;

    (c) subsection 728(4) of the Corporations Act—relating to misleading or deceptive statements or omissions in fundraising disclosure documents for securities;

    (d) subsection 1021E(8) of the Corporations Act—imposing liability where a preparer of a defective disclosure document (for financial products other than securities) gives or makes this available to another person;

    (e) subsections 1308(4) and 1308(5) of the Corporations Act—imposing liability in circumstances where a person makes a statement or omission in a document

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[29] *Corporations Act 2001* (Cth), ch 2M.
[30] *Corporations Act 2001* (Cth), ch 6C.
[31] *Corporations Act 2001* (Cth), ch 6D or pt 7.9.
[32] See Australian Law Reform Commission, 'Summary Report', *Financial Services Legislation: Interim Report B* (ALRC Report No 139, September 2022) <https://www.alrc.gov.au/publication/fsl-report-139/> [16]: 'Many stakeholders have identified navigability of the law as a key concern — it is too difficult to locate relevant parts of the law, and even experienced lawyers cannot always be confident that they are taking into account all relevant provisions and instruments on a particular issue without 'missing something'.'
[33] See Australian Law Reform Commission, 'Offences and Penalties Related to Defective Disclosure', *Additional Resources – Interim Report B: Financial Services Legislation* (June 2022) <https://www.alrc.gov.au/publication/fsl-report-139/> and <https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Offences-and-penalties-defective-disclosure.xlsx>.

required by the Corporations Act that makes the document materially false or misleading; and

(f) subsection 1309(12) of the Corporations Act—imposing liability on an officer or employee who makes available or gives information to members or the market (among others) that is false or misleading in a material particular.

60. Mapping and understanding the exact implications of these provisions is important. They are not uniform. Some involve a fault element (others do not), some have defences (others do not), and some are dual liability provisions (others are not).[34] Some are classified as a 'corporation/scheme' and some as a 'financial services' civil penalty provision under section 1317G of the Corporations Act (and others are neither), which affects the maximum pecuniary penalties that are applicable.[35] Further, civil penalty provisions in other statutes, including the *Australian Securities and Investments Commission Act* 2001 (Cth) (**ASIC Act**), apply.

61. It is also unclear whether, in addition or in the alternative to the above, Treasury anticipates drafting new standalone civil penalty provisions specific to CRFD requirements.

62. In considering the inclusion of safe harbours and defences, as canvassed later in this submission,[36] the Superannuation Committee notes the effect that amendments to subsections 56(2) and 57(2) of the SIS Act, effective January 2022, have had within the superannuation industry and on fund members.

63. Those amendments meant that a trustee or a director of trustee cannot use trust assets to pay a criminal, civil or administrative penalty incurred in relation to a contravention of a Commonwealth law. Relevantly, this includes a penalty that they incur for the contravention of a provision of the Corporations Act or ASIC Act.[37] The Australian Prudential Regulation Authority has previously noted that the penalties and infringement notices to which sections 56 and 57 of the SIS Act apply will arise in a broad range of circumstances, including where the trustee has not engaged in criminal conduct and has not acted dishonestly.[38] The consultation paper does not state whether those amendments will extend to preclude recourse to fund assets to meet any fine or penalty from CRFD contraventions.

64. In response to the previous legislative amendments, most (if not all) RSE licensees have charged additional fees, assessed by reference to their potential penalty liability risk, effectively transferring assets out of the protected superannuation fund environment into reserves on the RSE licensee's personal balance sheets. Those assets would otherwise have continued to be held on trust for members. The Superannuation Committee would anticipate that RSE licensees will respond to a

[34] Ibid. See also Professor Michael A Adams, 'Whether to protect or punish: legal consequences of contravening the Corporations Act' (November 2004) *Key Issues: Company Secretary* 592 <https://opus.lib.uts.edu.au/bitstream/10453/3283/1/2004001544.pdf>.
[35] Ibid.
[36] Safe harbours in a superannuation context were also discussed in the Law Council's submission to the first phase of this consultation: see Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> at [125]-[126].
[37] Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020, at [9.166].
[38] See *Re QSuper Board* [2021] QSC 276 at [30], adopting the submission of the Australian Prudential Regulation Authority.

CRFD regime (and any associated civil penalty provisions) by adjusting their fees to account for that increased penalty liability risk. The size of those adjustments will be informed by the safe harbours and defences incorporated into the new regime, at least insofar as they apply to RSE licensees.

Application of Relief Provisions

Proposal: Climate-related financial disclosure requirements would attract the protection of sections 1317S and 1318 of the Corporations Act for entities and company officers.

65. Treasury suggests that 'the protection of sections 1317S and 1318 of the Corporations Act for entities and company officers' would attach to the climate disclosure requirements (drafted as civil penalty provisions).[39]

66. These sections, known as 'relief provisions', confer judicial discretion to grant relief from liability for contravention of a civil penalty provision or in certain civil proceedings. In full, Treasury states that:

> *New climate reporting requirements would be drafted as civil penalty provisions, attracting the protection of sections 1317S and 1318 of the Corporations Act for entities and company officers respectively. In practice, this would protect company officers and entities in civil proceedings where they have acted honestly and ought fairly to be excused for the breach. This is a threshold that has been tested in court and does not diminish the impact of the mandatory climate disclosure regime. Additionally, infringement notices will be available for breaches to enable flexibility in regulator responses to non-compliance with the obligations.*[40]

67. The Law Council queries whether this characterisation of sections 1317S and 1318 is accurate.

68. Sections 1317S and 1318 of the Corporations Act confer judicial discretion to grant relief from liability in proceedings for a contravention of a civil penalty provision or in any civil proceeding against a person for negligence, default, breach of trust or breach of duty. However, the 'protection' offered by these 'relief provisions' is limited.

69. The courts have said that these relief provisions 'do not exonerate' the applicant-for-relief but operate as a 'dispensing power' to excuse the applicant-for-relief.[41] The effect of sections 1317S and 1318 is to allow a court to consider whether a person to whom liability attaches should nevertheless be excused or relieved from such liability.

70. That is, these sections operate as a possible source of discretionary relief from liability after a trial has been run and a finding of liability has been made. It is imprecise, therefore, to describe these sections as a 'threshold', as they are not a hurdle in the legal sense to bringing proceedings or establishing liability. Given the public stigma, reputational damage and risks that may attach to entities and company officers that

[39] Consultation Paper, 27.
[40] Consultation Paper, 27.
[41] *Deputy Commissioner of Taxation v Dick* (2007) 242 ALR 152, cited in *ASIC v Healey [No 2]* (2011) 284 ALR 734, 735.

are the subject of court proceedings, not to mention findings of liability, the existence of these sections is likely to offer little comfort as a 'protection'.

71. The Law Council has been unable to find evidence that the prospect of a successful use of section 1317S or 1318 would deter ASIC from bringing proceedings in the first place. Even if this were the case, the Law Council takes a general position that requiring legal entities to act in reliance on a convention of the regulator to avoid enforcement action, rather than a practice or procedure that is enshrined in law, provides no certainty or reliability of outcome.

72. The Law Council further notes that the courts have taken a strict approach to the interpretation and application of relief provisions. To invoke the protection of the provisions, directors must be able to show they have acted honestly. That is, there must be a positive finding of honesty; simply failing to find evidence of dishonesty is not sufficient.[42] Factors that have been found by the courts to preclude a positive finding of honesty have included: 'if a director has a financial interest in the outcome of any decision … gross neglect, lack of candour, concealment or even keeping 'a safe distance' from a transaction the director had reason to suspect was questionable'.[43]

73. Members of the Corporations Committee have found in practice that 'delay' is typically raised as a reason why 'honesty' cannot be put forward, even though delay may be unavoidable because of the complexity of identifying and fixing the systems issues or incidence of human error that have caused the breach.

74. Drawing on their practising experience, these members also raise that, as a matter of how litigation is approached, if a regulator decides to commence investigation and court proceedings, that regulator will expect respondents to co-operate, including making admissions and agreed facts, and potentially agreeing to a level of penalty. In an agreed settlement, as a practical matter, mitigating facts may not be put before the court. This can include mitigating facts that would establish the honesty necessary to invoke reliance on the relief provisions.

75. General deterrence principles are also considerations for the courts in deciding whether to apply relief provisions in a case. The courts have stated that the protective purpose behind such provisions:

> *… does not authorise the Court to lightly set aside the requirements of the Act where they have not been observed. Each application for the exercise of the Court's relieving power will require consideration of all the circumstances of the case to ensure that the indulgence sought is appropriate and does not undermine the requirements of the Act.*[44]

76. The courts have a broad discretion—conveyed through the wording in sections 1317S and 1318 of 'ought fairly to be excused' and 'having regard to all the circumstances'—in deciding whether to grant or refuse relief. Relief is more likely in situations where

[42] *ASIC v Adler* (2002) 42 ACSR 80, [166]-[169] (Santow J).
[43] Bruce Cowley, Directorship in Context (Australian Institute of Company Directors, 2023) 28. See also Professor Pamela Hanrahan, *Directors' Legal Responsibilities* (Australian Institute of Company Directors, September 2022) 304-309.
[44] *Wave Capital Limited* [2003] FCA 969, [29].

the outcome of the conduct is trivial.[45] Even in circumstances of trivial conduct, the courts may decide it appropriate for other factors—such as a person's role, responsibilities, and degree of control, where significant—to weigh against the granting of relief.[46]

77. For these reasons, where liability is sought or imposed inappropriately, the Law Council suggests the existence of sections 1317S and 1318 is not an adequate response. It recommends that Treasury review this proposal as appropriate.

78. Members of the Corporations Committee have suggested Treasury consider whether a fairer approach would be either to introduce a defence applying across all civil penalty provisions where there has been no intentional, dishonest or reckless conduct, or a statutory proportionality principle that higher penalties can only be sought or imposed where intention, dishonesty or recklessness has been established.

Infringement Notices

Proposal: Additionally, infringement notices will be available for breaches to enable flexibility in regulator responses to non-compliance with the obligations.

79. The Corporations Committee and Financial Services Committee 'have a well-documented position of opposing the use of infringement notices'.[47] This is on the basis that:

    (a) as a general principle, in civil penalty schemes, an infringement notice should apply only to minor contraventions in which no proof of a fault element or state of mind is required; and

    (b) it is not appropriate for an infringement notice to be issued in circumstances where a complex assessment of facts is required to evaluate whether the alleged misconduct contravened the law. In such circumstances, there should be an opportunity for the court to properly consider the evidence.

80. The Committees retain this view in relation to the present proposals; the infringement notice regime should not be extended.

Time-Limited Protection for Scope 3 Reporting and Forward-Looking Statements

Proposal: The application of misleading and deceptive conduct provisions to scope 3 emissions and forward-looking statements would be limited to regulator-only actions for a period of three years.

81. The Law Council refers to its views provided in response to the first phase of this consultation. This proposal likely reflects Treasury's stated objective to reach a compromise between competing stakeholder views on the issue of the litigation risk

[45] See Professor Pamela Hanrahan, *Directors' Legal Responsibilities* (Australian Institute of Company Directors, September 2022) 304-309.
[46] Bruce Cowley, Directorship in Context (Australian Institute of Company Directors, 2023) 28. See also Professor Pamela Hanrahan, *Directors' Legal Responsibilities* (Australian Institute of Company Directors, September 2022) 304-309.
[47] Business Law Section of the Law Council of Australia, Submission to Treasury, *Breach Reporting Regulations* (13 April 2021) <https://lawcouncil.au/publicassets/8d72273c-889d-eb11-943a-005056be13b5/3989%20-%20Breach%20Reporting%20Regulations.pdf> 13.

related to forward-looking statements and particularly for scope 3 emissions disclosures. In its submission of March 2023, the Law Council suggested:

> *One option is to consider a transitional period in which the only remedies for breach are declarations and injunctions—no penalties, disqualification or damages. So, the law applicable to forward-looking statements would still apply but can be tested without draconian consequences that discourage compliance with international climate risk reporting standards. … The Law Council is, at this stage, agnostic, as to what that bespoke scheme may look like. The lightest touch approach may be to clarify the meaning of 'reasonable grounds' as it relates to specific kinds of climate-related disclosures. It further stresses that a bespoke scheme created for the purpose of addressing forward-looking statements required by ISSB S1 should be designed in a way which ensures, to the greatest extent possible, credible reporting and the setting of ambitious targets. The Law Council would be pleased to work with the Treasury and the Australian Government on how such provisions may be drafted.*[48]

82. A three-year period will be challenging in terms of achieving the capability uplift required in relation to issues such as scope 3 emissions reporting, and to allow for adequate testing of uncertainties in the law and the regulatory response to forward-looking statements.

83. Under the current proposal, the protection 'would apply for three years from the commencement of the regime',[49] which means only reports published before 30 June 2027 would be protected. This also interacts with the separate proposal that 'companies would receive … a temporary one-year exemption from reporting scope 3 emissions, following the commencement of mandatory disclosure requirements for that entity'.[50] Accordingly, Group 1 entities (reporting from 2024–25 onwards), would have their 2025–26 and 2026–27 scope 3 reporting protected within the three-year moratorium period, while the second and third reporting cohorts would have no protected period for their mandatory disclosures relating to scope 3 emissions.

84. Members of the Corporations Committee recommend that the three-year moratorium period apply to each reporting cohort from the date it is first required to report, in order that each cohort receives protection for a certain number of annual reports while they are testing their capabilities.

85. The Superannuation Committee notes that superannuation trustees will be reliant for their climate-related reporting on information provided by companies in which the fund is invested, generally as compiled by the fund's investment managers. Trustees will normally not be in a position to query or verify information supplied, or to require that information is provided if companies are not obliged to disclose that information in the jurisdiction in which they are listed or traded.

86. The Superannuation Committee supports further investigation into an appropriate 'safe harbour' regime, that may apply, for example, where a fund's disclosures are

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[48] Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> [121] and [124].
[49] Consultation Paper, 27.
[50] Ibid 16.

made in reliance upon the information given to it, and on which it is reasonable for the trustee to rely.[51]

87. The Law Council maintains its earlier position that the neatest approach may be to consider adjustments to the concept of 'reasonable grounds' as it relates to specific kinds of climate disclosures.[52]

Continuous Disclosure

Proposal: Continuous disclosure obligations would apply as they do presently.

88. The continuous disclosure obligations are set out in Chapter 6CA of the Corporations Act.

89. If the two-year review of the operation of the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (Cth) is not undertaken,[53] the amendments that restrict civil liability for continuous disclosure breaches to conduct involving a fault element will cease to have effect (see section 1683C of the Corporations Act).[54] It is unclear whether Treasury proposes, in this circumstance, that the previous continuous disclosure provisions of strict liability would apply to CRFD. This issue must be addressed, to ensure that the proposals are transparent for potential reporting entities.

90. In either event, it is unclear how continuous disclosure obligations would interact with the above proposal for a time-limited protection of three years against claims of misleading or deceptive conduct.

91. For example, a failure to subsequently correct a misstatement can, in and of itself, constitute a breach of the continuous disclosure obligation under subsection 674(2) of the Corporations Act where it was likely to influence investor decisions.[55] This raises the issue of whether misleading statements made during the moratorium period

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[51] This was discussed in the Law Council's submission to the first phase of this consultation. See Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> at [125]-[126]. This submission further stated, at [127], that:

> *The* [Superannuation] *Committee would also support a regime for climate-related reporting which 'covers the field' in relation to providing information on climate-related matters—this would be to protect trustees from the risk of claims by members that the trustee's climate-related disclosures are not compliant with more general reporting obligations (such as McVeigh v Retail Employees Superannuation Pty Ltd [2019] FCA 14, where a member asserted that the trustee's climate-related disclosures were insufficient to meet the trustee's general obligation to provide all information reasonably required for members to understand their interest in the fund).*

[52] Section 769C of the Corporations Act operates to deem conduct that may or may not otherwise constitute misleading conduct to be misleading conduct if a representation about a future matter is made without reasonable grounds. Similar provisions apply in cl 4 of the Australian Consumer Law (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) and section 12BB of the *Australian Securities and Investments Commission Act 2001* (Cth).

[53] The review is required to be undertaken within 6 months from the second anniversary of commencement, which means six months from 14 August 2023, with the Schedule 2 amendments having commenced on 14 August 2021: *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (Cth). The latest date for the review would be in February 2024.

[54] See also Darren Pereira, 'Striking the right balance: Permanent changes to Australia's continuous disclosure laws', *Holding Redlich* (Blog Post, 25 August 2021) <https://www.holdingredlich.com/striking-the-right-balance-permanent-changes-to-australia-s-continuous-disclosure-laws>.

[55] *ASIC v Fortescue Metals Group and Forrest* (2011) 190 FCR 364. See also Chloe Donjerkovich, 'Case Note on ASIC v Fortescue Metals Group and Forrest: Misleading Conduct, Continuous Disclosure and Directors' Duties' (2011) 13 *University of Notre Dame Australia Law Review* 223 <http://www5.austlii.edu.au/au/journals/UNDAULawRw/2011/8.pdf>.

could give rise to litigation should they stand uncorrected once the three-year period ends.

92. The Law Council further suggests that it may be helpful for the Australian Securities Exchange (and ASIC, for unlisted disclosing entities) to update the relevant guidance to make it clear when developments relating to CRFD are likely to be price-sensitive and therefore trigger the continuous disclosure obligations.

Fundraising Disclosure Documents

Proposal: Climate-related disclosure obligations would extend to fundraising disclosure documents, such as prospectuses.

93. Treasury proposes in the consultation paper that CRFD be included in fundraising disclosure documents.

94. The content requirements and liability settings for disclosures in different types of fundraising documents are highly specific.

95. There is insufficient detail in the consultation paper to ascertain whether the proposal would involve amending the law at the level of provision prescribing the general disclosure tests for a particular fundraising disclosure document, or at the level of provision setting out the content requirements (i.e., specific disclosures) for a particular fundraising document.[56] This has liability implications.

96. A fundraising disclosure document must be updated for material changes during the whole of the period in which the entity is offering securities for sale (see sections 719 and 730 of the Corporations Act). Some entities, such as superannuation funds, are essentially in a constant offer period, although typically the relevant disclosure document (a product disclosure statement) is updated annually due to other regulatory requirements and expectations. It would be costly and burdensome for RSE licensees (and by extension their existing members) if updates were to occur more often than presently required.

97. Further, RSEs and their licensees will rely on disclosures of other Australian entities, and international entities (where, as is typical, the superannuation fund's assets are invested internationally), to meet their own disclosure requirements. Therefore, there needs to be an appropriately delayed or staggered reporting date for RSE licensees and RSEs so that the disclosures of other entities can be aggregated in order to meet their own disclosure obligations.[57]

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[56] See *Corporations Act 2001* (Cth), Ch 6D, Pt 6D.2, Div 4, ss 710-716. Compare, for example, section 710 ('Prospectus content – general disclosure test') with section 711 ('Prospectus content – specific disclosures'). See also *Corporations Act 2001* (Cth), Ch 7, Pt 7.9, Div 2, Sub-Div C. Compare, for example, section 1013A and section 1013C.

[57] This was discussed in the Law Council's submission to the first phase of this consultation. See Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure> at [138]:

> *The Superannuation Committee suggests that the dates as at which climate-related reports are required to be compiled, and the dates climate-related disclosures are required to be published, should be appropriately staggered, reflecting that superannuation funds have to aggregate the data given to them by the entities in which they invest. If Australian listed entities have until 30 June to publish data as at (say) the prior 31 December, super funds should have until (say) the following 31 December to aggregate the data they might only receive on 30 June for the prior 31 December.*

98. For these reasons, the Superannuation Committee considers RSE licensees could meet the disclosure requirements through their existing financial reports (which may be incorporated by reference) rather than by requiring climate-related disclosures to be included in product disclosure statements.

99. The Law Council remains of the view that the law in relation to disclosure in documents for the specific purpose of raising equity and debt funding should not be changed.[58]

[58] See Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023), 27 <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure>.