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11 April 2024

Lodged online

Dear Senate Standing Committees on Economics

Submission on Schedule 4 to the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024

Scope of this submission

This submission is made by Herbert Smith Freehills (**HSF**) in relation to Schedule 4 to the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth) (**Legislation**). Schedule 4 to the Legislation seeks to amend parts of the *Corporations Act 2001* (Cth) (**Corporations Act**) and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) to require corporations to disclose their climate-related financial risks and opportunities in a sustainability report.

Key submissions in response to the Legislation

We continue to welcome the introduction of a mandatory climate reporting regime in Australia, which aligns to the International Sustainability Standards Board (**ISSB**) standards on climate-related disclosure, as adapted by the Australian Accounting Standards Board (**AASB**) for the Australian context. While the Legislation addresses a number of issues raised in our previous submissions to Treasury, there are a number of areas that we consider would benefit from additional consideration and clarity. We make the following key submissions.

1 The modified liability regime should be expanded to include disclosures made outside of the sustainability report

We welcome the expansion of the modified liability regime under the Legislation to cover statements in relation to Scope 3 GHG emissions, scenario analysis and transition plans for three years from the start date. We recognise that the scope of the protection is for statements made within the sustainability report or statements required under a Commonwealth law that are “substantively protected statements”.

We submit that the scope should extend to all substantively protected statements, whether required by law or otherwise. For instance, this expansion would cover related disclosures on an entity’s website, investor presentations or other voluntary disclosures, where statements made in the sustainability report are reasonably reproduced to meaningfully engage with stakeholders. As drafted, the modified liability regime could prevent entities from communicating effectively with stakeholders about their Scope 3 emissions, scenario analysis and transition plans, risk distorting market information flows and create legal risks when entities are discussing their climate strategies in different forums (which is typical practice and expected by external stakeholders).

2 Australian subsidiaries of an overseas parent company should be able to rely on a group sustainability report under an equivalent climate reporting regime



The Legislation does not allow for an Australian subsidiary to rely on a sustainability report (or similar) prepared by a foreign parent where that report covers the Australian subsidiary (**Foreign Parent Report**). Consolidated reporting is only facilitated for the Australian regional group.

Recognising that there are various international climate reporting regimes that will soon be introduced, we submit that the Legislation should permit an Australian subsidiary that would otherwise be captured by the Australian climate reporting requirements to be able to rely on a Foreign Parent Report without needing to produce its own sustainability report. Where a reporting regime is approximately equivalent, global reporting on a consolidated basis should be permitted to reduce duplication and minimise the costs incurred in the preparation of separate reports (with limited additional benefit to stakeholders).

3 Cross-referencing should be permitted

It is unclear from the Legislation the extent to which the sustainability report can cross-refer to sections of the broader annual report or a separate document outside of the annual report (e.g. a sustainability databook or a corporate governance statement that is not included in the body of the annual report).

The ISSB IFRS S1 and S2 Standards do not prescribe the format for disclosure and the proposed approach of a standalone sustainability report, which does not include an express allowance for cross-referencing, could result in duplication and limit an entity's ability to move towards integrated reporting practices. Existing relief for cross-referencing does not apply to the sustainability report.

In our view, to facilitate an effective implementation of the climate reporting regime in Australia, the Legislation should be updated to clarify that cross-referencing is permitted to other public documents, whether in the Annual Report or otherwise provided the content is clearly sign-posted in the sustainability report (e.g. through a compliance table or similar).

4 Voluntary statements should not be separated from mandated climate disclosures

The Explanatory Memorandum confirms that reporting entities may voluntarily disclose information in the sustainability report. While this is not expressly recognised in the Legislation, the Explanatory Memorandum provides that this information must be clearly distinguished as a "separate voluntary statement (or statements) and state that it is not included in the statements or notes because of a requirement of the legislation".

The need to distinguish between mandatory and voluntary disclosures will likely increase complexity for reporting entities looking to (or eventually, which are required to) move towards broader sustainability reporting. It will also be particularly onerous for Australian companies with international sustainability-related reporting obligations to separate its voluntary statements (i.e. not required under the Australian regime) from a consolidated sustainability report intended for multi-jurisdictional compliance (recognising that a number of overseas jurisdictions are proposing to cover both climate and broader sustainability topics in sustainability reports from the outset).

We submit that the Explanatory Memorandum is amended to remove the requirement for voluntary disclosures to be separately identified and for this to be expressly recognised in the Legislation.

5 Reporting entities should have flexibility around the labelling of the "sustainability report" given the implications for broader reporting on sustainability-related matters

The requirement for a separate, identifiable "sustainability report" implies that the report would include all information related to an entity's sustainability-related



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disclosures. The “sustainability report” label risks confusing the scope of the content, which initially is only required to cover climate-related financial disclosures.

We submit there should be flexibility for reporting entities to choose to label the report as a “climate report” or similar instead of only a “sustainability report”. This will mitigate the risk of confusion and avoid duplication for larger entities that already prepare voluntary disclosures in the form of a “sustainability report” which sits outside of the annual report.

6 Safeguards should be included with respect to the Minister’s ability to expand the regime, most relevantly to ensure appropriate industry consultation and due process

The Legislation allows for the Minister to make legislative instruments to require a sustainability report to include statements and notes relating to financial matters concerning environmental sustainability. Although the Explanatory Memorandum recognises that any such legislative instruments would be subject to disallowance and sunset after 10 years, the regime could nonetheless be broadened significantly without due consultative processes or fulsome legislative oversight.

We submit that, at a minimum, the Minister’s ability to expand the regime should require industry consultation more expressly.

Further questions and clarifications

For further details, please refer to our previous submission to Treasury on 9 February 2024.

If you have any questions or comments about our submissions, please do not hesitate to contact us using the details below.

Yours sincerely



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