



Environmental  
Defenders Office

**Submission to the Senate Economic Legislation  
Committee inquiry into the provisions of the Treasury  
Laws Amendment (Financial Market Infrastructure and  
Other Measures) Bill 2024**

**10 April 2024**

## About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

**Submitted electronically via** <https://www.aasb.gov.au/current-projects/open-for-comment/submit-comment-letter/?id=2801>

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## EXECUTIVE SUMMARY

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The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (**the Bill**).

A significant amount of the work of the EDO Safe Climate (Corporate and Commercial) lawyers relates to the analysis of company transition plans, in particular whether a company's climate transition plan contradicts its business practices. The EDO is concerned by the prevalence of transition plans that are not aligned with the scientific consensus of what is required to achieve the 1.5°C temperature goal of the Paris Agreement and Australia's legislated net zero emissions by 2050 target,<sup>1</sup> and consider this a key deficiency that the climate-related disclosure framework should seek to rectify.

As such, with confirmation that 2023 was the warmest year on record,<sup>2</sup> EDO is concerned that Treasury's decision to include transition plans in the proposed modified liability regime will carry the unintended consequence of facilitating greenwashing at a time when urgent action is critical if the worst impacts of climate change are to be avoided.

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### Introduction

Climate change is internationally recognised as presenting material risks to the global financial system in the form of physical risks of climate change and transition risks associated with market, regulatory and technological changes to mitigate climate change.

The Explanatory Memorandum to the Bill states that the amendments intend to "improve the quality and comparability of disclosures of material climate-related financial risks and opportunities within the financial reporting framework."<sup>3</sup> It is therefore essential that these reporting requirements "ensure investors are provided with greater transparency of an entity's climate-related plans and strategies ... [and] support regulators to assess and manage systemic climate-related risks to the financial system".<sup>4</sup>

EDO welcomes a mandatory, transparent, and consistent approach to climate-related financial disclosures which allows comparable reporting, incorporating internationally recognised standards which are aligned with the 1.5°C temperature goal of the Paris Agreement.

We set out below two key issues with the Bill, the Commencement date of 1 January 2025 for Group 1 entities; and most notably, the inclusion of transition plans in the modified liability regime.

### Commencement date of 1 January 2025 for Group 1 entities

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<sup>1</sup> Climate Change Act 2022 (Cth) s 10(1)(b).

<sup>2</sup> World Meteorological Organisation (12 January 2024) available at [WMO confirms that 2023 smashes global temperature record](#).

<sup>3</sup> Explanatory Memorandum, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 4.29.

<sup>4</sup> Ibid.

Schedule 4 to the Bill proposes the commencement date for Group 1 entities, being the largest entities and those with reporting obligations under the *National Greenhouse and Energy Reporting Act 2007* (Cth), to be the first financial year that commences after 1 January 2025. This is a departure from the date proposed for Group 1 entities in the Treasury Laws Amendment Bil 2024: Climate-related financial disclosure Exposure Draft (**Exposure Draft**), being 1 July 2024.

The **EDO opposes the proposed delay of the commencement date for Group 1 entities**. Any delay in the commencement date further compounds the material climate-related risks to the financial system. Further, any delay will ensure that Australia falls further behind other comparable jurisdictions which have already implemented equivalent reporting requirements.

There is already a sound understanding of climate-related financial disclosure requirements within the Group 1 entities, with a submission from KPMG noting 90% of ASX100 companies recognise climate as a financial risk while 74% are reporting against the Task Force on Climate-Related Financial Disclosures (**TCFD**) framework. Further, reporting on social risks to business is up to 90% which, ahead of any government mandate, demonstrates the value of, and capacity for disclosure by many organisations.<sup>5</sup>

In addition to the TCFD which was released in 2017, the standards which form the basis of the reporting requirements have been available to all entities for some time. The Greenhouse Gas Protocol (**GHG Protocol**) has been in existence since 2001. More recently, the International Sustainability Standards Board released International Finance Reporting Standards S1 and S2 in June 2023, which build on the TCFD, and the Australian Accounting Standards Board (**AASB**) Exposure Draft ED SR1 Australian Sustainability Reporting Standards released in October 2023 which are generally aligned with the ISSB standards.

As noted above, a significant proportion of Australia's largest entities have already adopted the practice of making voluntary disclosures against the TCFD framework and are familiar with the GHG Protocol which inform the Bill. Given the familiarity and experience with the disclosure requirements, there is no reason to delay the commencement of the Bill.

Additionally, the Bill already contemplates significant relief for entities through the transition, such as disclosure of Scope 3 emissions, modified liability and limited assurance of disclosures until 30 June 2030. This would alleviate the compliance burden for Group 1 entities, ensuring they are well-positioned to commence reporting from 1 July 2024.

EDO considers that the benefits of commencing on 1 July 2024, far outweigh any minor detrimental impacts, which have been contemplated and addressed by the Bill.

### Three year modified liability for claims relating to transition plans

Schedule 4 to the Bill proposes a modified liability regime which, if enacted, will provide entities immunity from claims in respect of "protected statements". The Explanatory Memorandum describes protected statements as "the most uncertain parts of a climate statement"<sup>6</sup> which are disclosures about:

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<sup>5</sup> KPMG February 2023, Submission in response to Climate-related financial disclosure, available at <https://treasury.gov.au/sites/default/files/2023-04/c2022-314397-kpmg.pdf>.

<sup>6</sup> Explanatory Memorandum, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 4.189.

- Scope 3 emissions;
- scenario analysis; and
- transition plans.

The immunity applies to entities for the first three financial years commencing on or after 1 January 2025 in respect of civil claims brought by third parties, including investors. Crucially, those claims include that an entity has engaged in misleading or deceptive conduct in contravention of relevant provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**), *Australian Consumer Law (ACL)* and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).<sup>7</sup>

The modified liability regime proposed in the Bill is a significant departure from that proposed in the Exposure Draft which did **not** prevent third parties from bringing claims in relation to disclosures about transition plans, including for making misleading or deceptive disclosures. It is also a significant departure from the general application of misleading or deceptive conduct provisions in the Corporations Act, ACL and ASIC Act to all representations made in trade or commerce or in relation to a financial product.

A transition plan is defined in the exposure draft of the AASB's ED SR1 Australian Sustainability Reporting Standards Exposure Draft as an "entity's targets, actions or resources for its transition towards a lower-carbon economy, including actions such as reducing its greenhouse gas emissions." Statements about an entity's interim and long-term emissions reductions targets and a strategy on how it will meet those targets, such as a net zero plan, would fall within the scope of "transition plan" as defined. As such, the Bill, if enacted, will protect entities from third party claims in relation to disclosures about transition plans, including misleading or deceptive conduct.

As noted above, there is already a sound understanding of climate-related financial disclosure requirements within the Group 1 entities, especially in relation to transition plans. The largest and highest-emitting entities (being Group 1 entities under the Bill) are already making voluntary disclosures about transition plans. As at 31 March 2023, 78% of the ASX200's collective market capitalisation had made a net zero commitment.<sup>8</sup> These entities are already susceptible to claims by third parties if their net zero commitments are not based on reasonable grounds. ACCR's claim against Santos and Greenpeace's claim against Woodside are examples of such claims brought by third parties in Australia, both alleging that Santos and Woodside respectively made misleading statements in respect of their net zero claims.<sup>9</sup> In France, a group of NGOs have taken legal action against TotalEnergies that it misled consumers because its claims to be aiming for net zero by 2050 are false.<sup>10</sup>

The effect of the modified liability regime proposed in the Bill would be to prevent third parties from bringing such claims in relation to misleading statements in transition plans. Indeed, had the proposed legislation been in force at the time that the applicants sought to commence proceedings against Santos and Woodside respectively, it would have prevented them from doing so. As such, the **EDO considers that the proposal is a regressive step that removes important accountability mechanisms that incentivise accuracy and transparency and ensure accountability.**

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<sup>7</sup> *Corporations Act 2001* (Cth) s 1041H; ACL s 18; ASIC Act s 12DA.

<sup>8</sup> ACSI, 'Promises, Pathways & Performance': Climate Change Disclosure in the ASX200' (August 2023), p8.

<sup>9</sup> ACCR (26 August 2021) available at: [Australasian Centre for Corporate Responsibility files landmark case against Santos in Federal Court - ACCR](#); Greenpeace Australia Pacific (14 December 2023) available at: [Greenpeace Australia Pacific Takes Woodside To Court Alleging Misleading Climate Claims - Greenpeace Australia Pacific](#)

<sup>10</sup> Climate Litigation Database, accessed 9 April 2024, available at: [Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France - Climate Change Litigation \(climatecasechart.com\)](#)

Investors require accurate information about the ways in which the global transition to a low carbon economy may impact entities' future financial prospects to make informed investment decisions. Misleading transition plans distorts that information so that investors cannot make accurate assessments of the viability of their investment and the extent of their financial exposure. Ensuring that entities make accurate disclosures in relation to their emissions reductions plans is crucial because of the significant uptick in entities making net zero commitments at a time when greenwashing is prolific.<sup>11</sup>

The EDO understands the need to ensure that liability is proportionate to “the most uncertain parts of a climate statement” and that entities should not be deterred from making decision-useful disclosures. However, our position is that the “reasonable grounds” requirements in the Corporations Act, the ACL and the ASIC Act are appropriate and sufficiently flexible to accommodate any uncertainties or assumptions that may be inherent in transition plans.<sup>12</sup> Under those provisions, where a representation is made about a “future matter” – a disclosure about a net zero plan being an example – it is taken to be misleading unless the person making it had “reasonable grounds” for doing so. Where an entity has disclosed any assumptions, methodologies or uncertainties, the assessment of whether the disclosure was made on “reasonable grounds” will take those into account. Crucially, a forward-looking statement is not misleading merely because it later turns out to be wrong.<sup>13</sup> As long as entities are adequately disclosing the assumptions, methodologies and uncertainties that underpin their disclosures, and had a reasonable basis for making those assumptions, the risk of being found liable for forward-looking statements should be minimal.

It is crucial that third parties retain the right to take legal action against entities for making misleading statements about their climate transition plans to ensure immediate accountability and that entities set decision-useful, science-based emissions reductions plans.

*Thank you for the opportunity to make this submission.  
Please do not hesitate to contact our office should you have further enquiries.*

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<sup>11</sup> See for example, analysis of problems with all the major net zero plans of top ASX listed companies- [https://static1.squarespace.com/static/657654bd58d85f1af6083b13/t/65d29a8de72f8b0e75339696/1708300954251/Net\\_Zero\\_Integrity\\_Report\\_2024.pdf](https://static1.squarespace.com/static/657654bd58d85f1af6083b13/t/65d29a8de72f8b0e75339696/1708300954251/Net_Zero_Integrity_Report_2024.pdf); and in the mining area- <https://www.edo.org.au/publication/unearting-the-truth-assessing-climate-related-claims-and-net-zero-plans-in-the-mining-industry/>

<sup>12</sup> *Corporations Act 2001* (Cth) s 796C; ACL s 4(1); ASIC Act s 12BB(1).

<sup>13</sup> *Bonham atf Aucham Super Fund v Iluka Resources Ltd* (2022) 404 ALR 15 at [698].

