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Submission to the consultation on Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 [Provisions]

The Australian Conservation Foundation (ACF) is grateful for the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry into the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 [Provisions]*.

ACF is Australia's national environment organisation. We are over half a million people who speak out for the air we breathe, the water we drink, and the places and wildlife we love. We are proudly independent, non-partisan and funded by donations from our community.

ACF commends the Department of Treasury on the substantive body of work that has gone into the design of the requirement for climate-related financial disclosures, which will help to align Australia with comparable international jurisdictions and attract investment from the substantial and growing share of global capital seeking out zero-emission investment opportunities. The Government's proposed legislation is part of a set of policies required to achieve domestic emission reductions consistent with Australia's obligations under the Paris Agreement.

Whilst the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 [Provisions]* covers several amendment schedules, this submission will focus solely on the proposed amendments in Schedule 4 – Sustainability reporting. We also refer to our submissions to the prior phases of consultation.

Summary of Key Recommendations

- 1. Commencement of the scheme:** Phase one of the scheme should commence no later than January 1, 2025.
- 2. Modified liability:** The modified liability provisions in s1707D of the bill should be removed, or alternately reverted to cover Scope 3 emissions and scenario analysis only, and for a period of only three years.

Date of commencement of the scheme



ACF notes that the commencement date for Group 1 entities has been delayed by six months from July 1, 2024, to January 1, 2025. ACF understands that this delay is required to allow sufficient time for the Australian Accounting Standards Board to prepare the relevant sustainability standards for reporting entities.

ACF strongly recommends that the commencement of the scheme should not be delayed beyond January 1, 2025. We agree with the observation made by Treasury and many stakeholders that large companies are already reporting against voluntary frameworks such as the Taskforce on Climate-Related Disclosures (TCFD) or International Sustainability Standards Board (ISSB), and that the introduction of mandatory disclosures would not create much additional regulatory burden for these entities. Furthermore, considering that consultation on the introduction of mandatory climate-related financial disclosure began in December 2022, covered entities have had more than sufficient notice to prepare. There is also a substantial number of expert consultancies that are available to assist companies that do not have relevant in-house expertise.

It is necessary to retain the commencement date of January 1, 2025, given the narrowing period in which Australia and the world must make deep emission reductions prior to 2030 to keep the Paris Agreement goals within reach and the urgent need to attract investment to support Australia's pathway to decarbonisation.

Recommendation 1: Phase one of the scheme should commence no later than January 1, 2025.

Modified Liability Amendment

ACF notes that the Exposure Draft initially included a three-year modified liability period, during which only the regulator would be able to take civil action in relation to false and misleading statements relating to Scope 3 emissions or scenario analysis, and that civil compliance action by the regulator would be limited to declarations and injunctions.

ACF would like to reiterate our recommendation to the Exposure Draft consultation, which was: "The modified liability for false and misleading statements should not extend further than statements regarding Scope 3 emissions and scenario analysis, and for no longer than three years".

It is evident that following a period of public consultation on the Exposure Draft, two amendments have been included which significantly broaden the scope of the immunity provisions in s1707D. In fact, the modified liability for false and misleading statements has been extended beyond Scope 3 emissions and scenario analysis to include transition plans, as well as to protect all forward looking statements related to climate for 12-month period. In doing so, the Government has strengthened entities' protection against liability for greenwashing.

ACF believes that the modified liability measures originally proposed in the Exposure Draft could already be considered superfluous, given that entities making disclosures on a reasonable basis would be protected by the existing regulatory framework, specifically Section 189 of the Corporations Act. This section states that a director's reliance on the information or advice prepared by an employee or expert advisor is taken to be reasonable, so long



as the reliance was made in good faith and the information is subject to an independent assessment, as discussed in a legal opinion by Sebastian Hartford-Davis for Australia's major investor groups.^{1,2}

Moreover, ACF notes that the modified liability measures originally proposed in the Exposure Draft could conceal greenwashing activity and therefore risks undermining Australia's emission reduction goals and misallocation of capital that would leave our economy behind as the global race to zero emissions accelerates. This is because ASIC applies an enforcement hierarchy to triage its compliance activities, and we would therefore expect that criminal proceedings or civil court proceedings would only likely arise due to the most egregious examples of false and misleading conduct. This, combined with the increasing incentive to engage in misleading or deceptive conduct as demand for climate-aligned goods and services grows, has the potential to conceal greenwashing activity in Australia.

As a matter of principle, the ability of any party to take action to ensure compliance with legislation is fundamental to the rule of law. The departure from this general principle contained in the modified liability provisions in s1707D of the bill therefore requires a solid rationale. Given that companies are already well versed in the requirement to ensure that forward-looking statements and other material disclosures are made on a reasonable basis, ACF does not accept that that bar has been met.

In conclusion, the proposed immunity measures are therefore not only unneeded based on existing capabilities of large reporting entities *and* the existing regulatory protection under the Corporations Act, but could also conceal greenwashing as companies' disclosures are shielded from action other than by ASIC until 2028. The addition of further immunity provisions such as the inclusion of transition plans within the three-year immunity period and the addition of a 12-month "safe harbour" is therefore unwise.

Recommendation 2: The modified liability provisions in s1707D of the bill should be removed, or alternately reverted to cover Scope 3 emissions and scenario analysis only, and for a period of only three years.

¹ Australian Legal Information Institute, *CORPORATIONS ACT 2001 - SECT 189 Reliance on information or advice provided by others*, n.d., at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s189.html

² Hartford-Davis, *Legal Opinion on ISSB Draft Standards*, 6 February 2023, at: <http://acsi.org.au/wp-content/uploads/2023/02/Legal-opinion-on-ISSB-Draft-Standards.Feb23.pdf>

