



Law Council
OF AUSTRALIA

Climate-related financial disclosure—Consultation Paper

The Treasury

2 March 2023

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- 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
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- [REDACTED], President
- [REDACTED], President-elect
- [REDACTED], Treasurer
- [REDACTED], Executive Member
- [REDACTED], Executive Member
- [REDACTED], Executive Member

The Chief Executive Officer of the Law Council is [REDACTED]. The Secretariat serves the Law Council nationally and is based in Canberra.

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

Acknowledgement

The Law Council of Australia thanks the Corporations Committee of its Business Law Section (**Corporations Committee**), the Superannuation Committee of its Legal Practice Section (**Superannuation Committee**), its Climate Change Working Group, its Indigenous Legal Issues Committee, and the Law Society of New South Wales for their substantive input to this submission.

The New South Wales Bar Association (**NSW Bar**), a constituent body of the Law Council, has made a separate submission directly to the Treasury in response to the Climate-related financial disclosure Consultation paper. For completeness, the NSW Bar submission is **Attachment A**.

Executive Summary

1. The Law Council thanks the Treasury for the opportunity to make a submission to its Climate-related financial disclosure Consultation paper (**Consultation Paper**).
2. The Law Council supports the development in Australia of an appropriate regulatory framework to require Australian business entities with exposure to financial risks arising from the transition required to mitigate the effects of climate change to disclose that risk (which is consistent with the comprehensive global baseline of sustainability disclosure standards being developed by International Sustainability Standards Board (**ISSB**)).
3. International consensus is building in the adoption of the ISSB's standards, once ultimately determined, and in this context aligning with international reporting standards is critical to ensure the availability of capital, finance and insurance for Australian enterprises by providing investors and other stakeholders with consistent and internationally comparable information on climate-related impacts.
4. Further, the standards, as currently drafted, would impose obligations on an entity to report on its climate-related target by reference to targets created under the latest international agreement on climate change, currently the Paris Agreement.¹ As a result, adoption of a mandatory reporting framework may similarly assist Australia to meet the emissions reductions to which it has committed under that Agreement.
5. In circumstances in which Australian business entities are adopting an uneven approach to climate-related financial disclosures in the context of existing guidance, the Law Council supports the development of an appropriate framework to promote certainty, clarity and transparency within affected entities.
6. It is critical, however, that the development of a regulatory scheme is properly adapted to Australia's unique corporate regulatory settings. Challenges arise, for example, in relation to:
 - the reporting of forward-looking statements, in which uncertainty is inherent, given such uncertainty is not tolerated within current regulatory settings;
 - whether present domestic requirements for continuous reporting for material changes to reports can be adapted to forward-looking statements, given material changes may commonly arise; and
 - the unique exposure of company directors to personal liability should reporting standards be breached.
7. Care should be taken to consider how best to adapt current settings to the unique regulatory challenges arising from domestic application of the ISSB standards. Consideration may also (or alternatively) be given to a moratorium on penalties and exposure to damages for non-compliance, by the reporting entity and its directors and officers, for an introductory period while entity conduct adapts and new norms and principles solidify.

¹ Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016) (Paris Agreement). Australia ratified the Paris Agreement on 10 November 2016: Statement by the Hon Greg Hunt MP, 'National Statement, Signing of the Paris Climate Change Agreement' (New York, 22 April 2016) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4523504/upload_binary/4523504.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4523504%22>.

Current policy and regulatory environment

8. The Law Council has provided, below, responses to the majority of the 19 questions in the Consultation Paper. To assist to frame those responses, it is helpful to first set out an overview of the context in which this reform is taking place—the rationale for reporting climate-related financial risks; the developing international principles; and the response of Australian business entities and regulators, to date.

Climate-related financial risks

9. The impact of climate change on global and Australian economies arises from both physical risks stemming from the impacts caused directly by a changing climate, and from transition risks.²
10. As outlined in the Law Council's 'Legal implications of Climate Change—Background Paper' (**Climate Change Background Paper**), the G20 Financial Stability Board (**FSB**) characterises transition risks as 'risks that relate to the process of adjustment towards a low-carbon economy'.³ Such a transition would imply 'significant structural changes to the economy, including a major reallocation of investment'.⁴ This, the FSB states, would not only heavily impact organisations involved in producing fossil fuels, such as coal, oil and gas, but also other sectors whose business models rely upon using such fossil fuels, or are energy intensive.⁵
11. The financial impact of transition to a low-carbon economy is a key transition risk.
12. The Climate Change Background Paper identifies some of the transition risks to which the finance sector is exposed which have been identified by Treasury and the Reserve Bank of Australia. These include falling demand in some sectors prompting write-downs in the value of assets or asset fire sales, the risk of assets or businesses being rendered economically unviable through 'sudden or unexpected regulatory change' or through the entrance of low-emissions technologies to the market, reduced sovereign creditworthiness, possible reputational damage for financial institutions perceived as contributing to climate change, and legal risks based on possible director liability for addressing climate-related risk.⁶
13. The Climate Change Background Paper further identifies that the FSB's work on climate change risk indicates that there are significant information gaps relating to climate risk exposure. It notes that there is a 'shortage of data' available to regulators to measure the exposure of the financial institutions they regulate and that similarly, individual firms may lack data about their clients' exposure to climate change risk, undermining the efficacy of their efforts to mitigate climate change risk at an institutional level.⁷

² Law Council of Australia, 'Legal implications of Climate Change Background Paper' (November 2021) (**Climate Change Background Paper**) [1.71].

³ Financial Stability Board (**FSB**), 'The Implications of Climate Change for Financial Stability', Report, 23 November 2020 4 (**FSB Report**).

⁴ *Ibid* 12.

⁵ *Ibid*.

⁶ Climate Change Background Paper [1.112].

⁷ FSB Report 3, 28.

14. The Taskforce on Climate-related Financial Disclosures (**TCFD**) was established by the FSB, following a request by the G20 Finance Ministers and Central Bank Governors that it consider how issues regarding climate change could be taken into account in the financial sector.⁸
15. The TCFD recommendations address the disclosures that an organisation should make in identifying, measuring, addressing and incorporating climate change risks, under the headings of four key ‘themes’ for an organisation’s operations, being ‘governance, strategy, risk management, metrics and targets’.⁹
16. These recommendations range from ‘describ[ing] the board’s oversight of climate-related risks and opportunities’, to ‘disclos[ing] the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process’.¹⁰ They require companies to disclose qualitative data, including scenario analysis, which identify risks based on various climate change-drive scenarios.¹¹

Adoption of the TCFD recommendations

17. Despite their development as a voluntary framework, the TCFD recommendations have been recognised as ‘rapidly becoming mainstream by virtue of their endorsement by major investors, regulators and many major companies worldwide’.¹²
18. The scope of the endorsement is borne out by the TCFD’s 2022 status report, which recorded the support of more than 3,960 entities (3,723 companies and 237 other bodies, such as industry bodies and governments).¹³ At the time of writing, there were 169 companies in Australia which have formally conveyed support for the TCFD recommendations.¹⁴
19. Further, signatories to the United Nations Principles for Responsible Investment¹⁵ (**UNPRI**) undertook, from 2020, to adopt and report under the TCFD recommendations.¹⁶ At the time of writing, over 230 organisations headquartered in Australia are signatories to the UNPRI, including major banks, investment managers and asset owners.¹⁷

⁸ Task Force on Climate-related Disclosures (**TCFD**), ‘Overview’ (March 2020, Bloomberg) 7 <https://www.fsb-tcfd.org/about/>.

⁹ TCFD, ‘Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures’ (June 2017) 11 <<https://assets.bbhub.io/company/sites/60/2020/10/FINAL-TCFD-Annex-Amended-121517.pdf>>.

¹⁰ Ibid 12.

¹¹ See discussion in Allens Linklaters, ‘Targeting net zero: A climate change guide for legal and compliance teams in Australia’, May 2020 11 https://www.allens.com.au/globalassets/pdfs/campaigns/targeting_net_zero_climate_change_guide_may_2020.pdf.

¹² Allens Linklaters, ‘Disclosure of climate-related financial risk: major change is imminent’ (26 May 2020) <<https://www.allens.com.au/insights-news/insights/2020/05/climate-change-guide/disclosure-of-climate-related-financial-risk-major-change-is-imminent/>>.

¹³ TCFD, ‘2022 Status Report’ (October 2022) 98 <https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf> (TCFD 2022 Status Report).

¹⁴ TCFD, ‘Supporters’ (website, accessed 16 February 2023) <https://www.fsb-tcfd.org/supporters/>.

¹⁵ United Nations Environment Programme Finance Initiative and United Nations Global Compact, ‘[Principles for Responsible Investment](#)’ (2021).

¹⁶ United Nations Principles for Responsible Investment (**UNPRI**), ‘Climate reporting to the PRI’ (website, accessed 16 February 2023) <https://www.unpri.org/climate-change/climate-reporting-to-the-pri/7131.article>.

¹⁷ UNPRI, ‘Signatory Directory’ (website, accessed 16 February 2023) <<https://www.unpri.org/signatories/signatory-resources/signatory-directory>>. There is some cross-over between the entities who are UNPRI signatories and supporters of the TCFD, but also entities on one list but not the other.

20. The 2022 TCFD status report records that financial disclosure requirements that incorporated or drew from TCFD recommendations are imposed under regulatory schemes in Brazil, Egypt, New Zealand, Singapore, Switzerland and the United Kingdom, with such requirements proposed to be imposed in Canada, the European Union (EU) and the United States.¹⁸
21. In July 2021, G20 Finance Ministers and Central Governors committed to promoting disclosure that built on the TCFD recommendations.¹⁹ As well as welcoming and committing to address aspects of broader FSB reports regarding climate-related financial stability risks, they committed to promoting the implementation of disclosure requirements or guidance, building on the TCFD Framework, in line with domestic regulatory frameworks, to pave the way for future global coordination efforts, taking into account jurisdictions' circumstances, aimed at developing a baseline global reporting standard.

Establishment of the ISSB standards

22. In November 2021, the International Financial Reporting Standards Foundation (IFRSF) formed the ISSB 'to develop—in the public interest—a comprehensive global baseline of high-quality sustainability disclosure standards to meet investors' information needs'.²⁰ The standards are intended to cover environmental, social and governance topics on which investors wish to be informed, complementing the TCFD and other existing standards (and developed with input from representatives of the TCFD and other fora).²¹
23. In March 2022, the IFRSF published two Exposure Drafts of Sustainability Disclosure Standards, 'S1 General Requirements for Disclosure of Sustainability-related Financial Information' and (**draft ISSB S1**) 'S2 Climate-related Disclosures' (**draft ISSB S2**) (together the **ISSB Draft Standards**).²² The IFRSF website provides the following overview of these, which is helpful to extract for the purposes of the discussion in this submission.²³

IFRS S1: General Requirements for Disclosure of Sustainability-related Financial Information

- asks for disclosure of material information about sustainability-related risks and opportunities;
- sets out general reporting requirements;

¹⁸ TCFD 2022 Status Report 98-103.

¹⁹ G20 Finance Ministers and Central Bank Governors Meetings, *Communique*, Third Finance Ministers and Central Bank Governors Meeting, Venice, 10 July 2021.

²⁰ International Financial Reporting Standards, 'IFRS Foundation announces International Sustainability Standards Board, consolidation with CDSB and VRF, and publication of prototype disclosure requirements' (3 November 2021) (webpage, accessed on 16 February 2023) <<https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/>>.

²¹ International Financial Reporting Standards Foundation (IFRSF), 'ISSB: Frequently Asked Questions' (webpage, accessed on 22 February 2023) <<https://www.ifrs.org/groups/international-sustainability-standards-board/issb-frequently-asked-questions/>>; IFRSF, 'IFRS Foundation announces International Sustainability Standards Board, consolidation with CDSB and VRF, and publication of prototype disclosure requirements' (3 November 2021) <<https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/>>.

²² <https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf> and <https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf>.

²³ IFRSF, 'ISSB: Frequently Asked Questions' (webpage, accessed on 22 February 2023) <<https://www.ifrs.org/groups/international-sustainability-standards-board/issb-frequently-asked-questions/>>

- points to other standards and frameworks (for example, SASB Standards and CDSB Framework application guidance) in the absence of specific IFRS Standards; and
- emphasises the need for consistency and connections between financial statements and sustainability disclosures, requiring financial statements and sustainability disclosures to be published at the same time.

IFRS S2: *Climate-related Disclosures*

- sets out disclosure of material information about climate-related risks and opportunities;
 - incorporates TCFD Recommendations and includes SASB Standards' climate-related industry-specific topics and metrics as illustrative guidance;
 - requires disclosure of information, when material, about physical risks (for example, flood risk), transition risk (for example, regulatory change) and climate-related opportunities (for example, new technologies); and
 - sets out disclosure for transition planning, climate resilience, and Scope 1, 2 and 3 emissions.
24. At the time of writing, the ISSB was still deliberating on the draft standard, based on consideration of the submissions made to the exposure draft.²⁴
25. Once developed, the International Organization of Securities Commissions (**IOSCO**) will decide whether to endorse them.²⁵ IOSCO's membership regulates more than 95 per cent of the world's securities markets in more than 130 jurisdictions.²⁶
26. On 12 October 2022, G7 Finance Ministers and Central Bank Governors then issued a statement which endorsed the ISSB standards as providing a potentially underpinning for a globally-consistent baseline for mandatory climate-related financial disclosures.²⁷

Current state in Australia

27. In November 2021, the Australian Prudential Regulation Authority (**APRA**) published a practice guidance, 'CPG 229 Climate Change Financial Risks' for banks, insurers, and superannuation trustees on climate change financial risk management. The guidance represents 'APRA's view of sound practice in particular areas' but does not itself 'create enforceable requirements'.²⁸ The APRA guidance 'reflects the established framework for considering and managing climate risks developed by the [TCFD] as well as good practice observed through APRA's own analysis'.²⁹

²⁴ IFRSF, 'Climate related Disclosures – Current stage' (webpage), <https://www.ifrs.org/projects/work-plan/climate-related-disclosures/>.

²⁵ International Organization for Securities Commissions, 'IOSCO outlines regulatory priorities for sustainability disclosures, mitigating greenwashing and promoting integrity in carbon markets' (Media Release; 9 November 2022) <https://www.iosco.org/news/pdf/IOSCONEWS669.pdf>.

²⁶ Illona Millar, Andrew Hedges, David Hackett and Beatriz Araujo, 'International: COP26 – Mandatory climate risk disclosures announced amidst focus on finance' (4 November 2021) *Baker McKenzie*.

²⁷ G7 Finance Ministers and Central Bank Governors', Statement on Climate Issues (12 October 2022), https://www.bundesfinanzministerium.de/Content/DE/Downloads/Internationales-Finanzmarkt/G7/2022-10-12-g7-erklarung-klima.pdf?__blob=publicationFile&v=5.

²⁸ APRA, 'CPG 229 Climate Change Financial Risks' (November 2021) <https://www.apra.gov.au/sites/default/files/2021-11/Final%20Prudential%20Practice%20Guide%20CPG%20229%20Climate%20Change%20Financial%20Risks.pdf> 4.

²⁹ *Ibid* 5.

28. Australian Securities and Investments Commission (**ASIC**) and APRA have recently commented on the state of climate-related risk reporting in Australia.

29. ASIC stated in June 2022:³⁰

We have recently wrapped up another review of TCFD climate-related disclosures by our larger listed companies. Overall, the signs are positive; we observed continued improvement in the standard of governance and disclosure.

But we do continue to see a lack of consistency, comparability, and structure to the reporting, across the market as a whole. There remains a lack of consistency in the scenarios applied and timescales adopted in relation to climate resilience or scenario analysis disclosure. All of this compromises the utility of the information for investors.

30. In August 2022, APRA reported on the results of a voluntary survey of compliance with CPG 229:³¹

The responses to the survey from 64 medium to large institutions, suggest APRA-regulated entities are generally aligning well to APRA's guidance, especially in the areas of governance and disclosure. Climate risk, however, remains an emerging discipline compared to other traditional risk areas, with only a small portion of survey respondents indicating that they have fully embedded climate risk across their risk management framework.

Other key observations based on the entities' self-assessments include:

- *four out of five boards oversee climate risk on a regular basis, while just under two-thirds of institutions (63 per cent) have incorporated climate risk into their strategic planning process;*
- *almost 40 per cent of institutions said climate-related events could have a material or moderate impact on their direct operations;*
- *nearly three-quarters of institutions (73 per cent) said they had one or more climate-related targets in place, however 23 per cent of institutions do not have any metrics to measure and monitor climate risks; and*
- *over two-thirds of institutions (68 per cent) said they have publicly disclosed their approach to measuring and managing climate risks, with 90 per cent of those aligning their disclosure to the Taskforce for Climate-related Financial Disclosures¹ (TCFD) framework.*

31. The ASIC supports the work of the ISSB,³² indicating that the establishment of a baseline global climate and sustainability-related disclosure standards 'is needed to avoid prohibitively costly disclosure fragmentation across jurisdictions', noting the steps taken towards mandatory requirements in other jurisdictions.³³

³⁰ ASIC Deputy Chair Karen Chester ASIC update at the Financial Services Council member webinar (16 June 2022, <https://asic.gov.au/about-asic/news-centre/speeches/asic-update-at-the-financial-services-council-member-webinar/>)

³¹ APRA, 'ASIC update at the Financial Services Council member webinar' (media release, 4 August 2022) <https://www.apra.gov.au/news-and-publications/apra-publishes-findings-of-latest-climate-risk-self-assessment-survey>.

³² ASIC, '21-349MR ASIC welcomes new International Sustainability Standards Board and updated climate-related disclosure guidance' (media release; 14 December 2022), [https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-349mr-asic-welcomes-new-international-sustainability-standards-board-and-updated-climate-related-disclosure-guidance/#:~:text=On%203%20November%202021%2C%20at,Sustainability%20Standards%20Board%20\(IS%20SB\).](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-349mr-asic-welcomes-new-international-sustainability-standards-board-and-updated-climate-related-disclosure-guidance/#:~:text=On%203%20November%202021%2C%20at,Sustainability%20Standards%20Board%20(IS%20SB).)

³³ ASIC Deputy Chair Karen Chester, 'Playing the green card' (9 August 2022), <<https://asic.gov.au/about-asic/news-centre/articles/playing-the-green-card/>>.

32. Similarly, the Australian Council of Superannuation Investors (**ACSI**) released a statement in August 2022 welcoming the ISSB draft sustainability standards on the basis that ‘clear, transparent, comprehensive and comparable disclosure of sustainability-related information to be part of the foundation of a well-functioning global financial system’.³⁴
33. It is in this context that the Australian Government has committed to introducing standardised, internationally-aligned reporting requirements for disclosure of climate-related disclosures regarding governance, strategy, risk management, targets and metrics—including greenhouse gases, which will be mandatory for certain entities.³⁵
34. The Consultation Paper seeks views on key considerations for the design and implementation of these requirements, which will help shape the legislative and governance model which underpins them.

The Law Council’s Climate Change Policy

35. Under its Climate Change Policy,³⁶ Law Council of Australia has committed to assessing and advocating on federal law and policy reforms responding to climate change by reference to the following principles:
 - (a) Australia’s international law obligations with respect to climate change should be fully implemented domestically;³⁷
 - (b) Australia’s response to climate change should give effect to rule of law principles, including that new laws should promote certainty, clarity and transparent outcomes;³⁸ and
 - (c) Australia’s response to climate change should be fair and equitable.³⁹
36. This submission seeks to assist the Treasury by applying these principles in its response to the questions in the Consultation Paper.
37. Australia is a party to the Paris Agreement:⁴⁰ a treaty under which parties have agreed to long-term global temperature goals, and pursuing efforts to limit temperature gains, to significantly reduce the risks from and impacts of climate change.⁴¹

³⁴ ACSI, ‘Major consensus reached on Australian climate risk reporting (media release, August 1 2022), <https://acsi.org.au/media-releases/media-re/>.

³⁵ Consultation Paper 5-6 and 9.

³⁶ Law Council of Australia, ‘Climate Change Policy’ (27 November 2021) (**Climate Change Policy**) <<https://www.lawcouncil.asn.au/publicassets/4cc8f2e4-375d-ec11-9445-005056be13b5/2021%2011%2027%20-%20P%20-%20Climate%20Change%20Policy.pdf>>.

³⁷ Ibid [46]-[47].

³⁸ Ibid [48]-[50].

³⁹ Ibid [51]-[52].

⁴⁰ Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016) (Paris Agreement). Australia ratified the Paris Agreement on 10 November 2016: Statement by the Hon Greg Hunt MP, ‘National Statement, Signing of the Paris Climate Change Agreement’ (New York, 22 April 2016) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4523504/upload_binary/4523504.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4523504%22>.

⁴¹ Paris Agreement Article 2(1)(a) – the objective of the Paris Agreement includes holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change.

38. Relevantly, each party to the Paris Agreement is obliged to prepare, communicate, and maintain successive nationally determined contributions (**NDC**) (to the global response to climate change) that it intends to achieve for five-year periods.⁴² Each party is also obliged to adopt mitigation measures with the aim of achieving the objectives of its NDC.⁴³
39. The Law Council welcomed the passage of the *Climate Change Act 2022* (Cth), which sets Australia's greenhouse gas emissions targets⁴⁴ at a level that is consistent with the current NDC which Australia has communicated under the Paris Agreement.⁴⁵ Specifically, the Law Council recognised that a legislated target would provide increased certainty to policy makers, businesses, investors, and community sectors.⁴⁶
40. The Law Council's Climate Change Policy refers to the TFCD recommendations and the guidance provided by financial regulators in response, but notes that the next phase of Australia's regulatory response to climate change must offer long-term solutions with higher levels of ambition and predictability to achieve Australia's obligations under the Paris Agreement and enable government, business and civil society to best manage the physical and transition risks posed by climate change and take advantage of its emerging opportunities.⁴⁷

Questions

Question 1—costs and benefits of aligning with international practice

What are the costs and benefits of Australia aligning with international practice on climate-related financial risk disclosure (including mandatory reporting for certain entities)? In particular:

1.1 What are the costs and benefits of meeting existing climate reporting expectations?

1.2 What are the costs and benefits of Australia not aligning with international practice and in particular global baseline standards for climate reporting?

Response

41. The Law Council considers that it is critical that Australia's regulatory settings are consistent with internationally prescribed requirements relating to climate-related disclosures.
42. Non-alignment with international baseline reporting standards is likely to have a detrimental effect on the availability of capital, finance and insurance for Australian enterprises. Affected enterprises are likely to default to international baseline reporting in any event, meaning additional reporting obligations and additional compliance costs. It is clear from the discussion above that international consensus

⁴² Ibid, arts 4.2, 4.8-4.9.

⁴³ Ibid, art 4.2.

⁴⁴ *Climate Change Act 2022* (Cth) (**Climate Change Act**) section 10.

⁴⁵ Australian Government, 'Australia's Nationally Determined Contribution Communication 2022' 3 <<https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf>>.

⁴⁶ Law Council of Australia, Submission to Senate Environment and Communications Legislation Committee, 'Climate Change Bill 2022 and Climate Change (Consequential Amendments Bill) 2022' (10 August 2022) [5] <https://www.lawcouncil.asn.au/publicassets/2971ae63-391c-ed11-9460-005056be13b5/2022%2008%2010%20-%20S%20-%20Climate%20Change%20Bills%20-%20final.pdf>.

⁴⁷ Ibid [30].

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

43. As the Law Society of New South Wales points out, the ISSB's draft standards build on the framework provided by the TCFD to provide a more comprehensive baseline of climate-related disclosures. Derogation from this baseline would be contrary to Treasury's stated reform principles and impede Australia's integration into international markets.
44. As discussed in this submission, there are considerable challenges in adapting the standards being developed in draft ISSB S1 and draft ISSB S2 to Australia's unique regulatory settings, but those challenges should be addressed directly as they arise and should not be a basis for not adopting those standards.
45. It is important to note that draft ISSB S2 is drafted to be consistent with the Paris Agreement. Paragraph 23 of those standards requires an entity to 'disclose its climate-related targets' and for each target to disclose, amongst other things, 'how the target compares with those created in the latest international agreement on climate change and whether it has been validated by a third party'.⁴⁸ The term 'latest international agreement on climate change' is defined as:⁴⁹

... an agreement by states, as members of the United Nations Framework Convention on Climate Change to combat climate change. The agreements set norms and targets for a reduction in greenhouse gases.
46. As the draft ISSB S2 notes, this is currently, in effect, a reference to the Paris Agreement, which sits under the United Nations Framework Convention on Climate Change (**UNFCC**).⁵⁰
47. The Law Council has not performed an in-depth analysis of the extent to which the full performance of the standards within draft ISSBs S1 and S2 would reflect the ambition and objectives of the Paris Agreement. It notes that the NSW Bar has raised some reservations about certain aspects of the regime, discussed at [51]–[52] of its submission at Attachment A.
48. However, on their face, they would at least direct reporting entities to pursue targets consistent with the targets to which Australia has committed under that Agreement. This, in turn, suggests that a domestic regulatory framework to give effect to the ISSBs could be drafted in a manner which supports Australia's compliance with the Paris Agreement and is consistent with other laws imposing obligations upon the Commonwealth and Commonwealth entities⁵¹ to take actions to pursue Australia's greenhouse gas emissions targets, under its NDC and the Climate Change Act.⁵²

⁴⁸ Draft ISSB 2 paragraph 23(e).

⁴⁹ Ibid Appendix A.

⁵⁰ Ibid 24.

⁵¹ For example, Clean Energy Finance Corporation Act 2012 (Cth) section 3; 41 Australian Renewable Energy Agency Act 2011 (Cth) section 3;

⁵² Climate Change Act section 10.

Questions 2 and 3—entities covered by the scheme initially and going forward

Question 2

Should Australia adopt a phased approach to climate disclosure, with the first report for initially covered entities being financial year 2024–25?

2.1 What considerations should apply to determining the cohorts covered in subsequent phases of mandatory disclosure, and the timing of future phase?

To which entities should mandatory climate disclosures apply initially?

3.1 What size thresholds would be appropriate to determine a large, listed entity and a large financial institution, respectively?

3.2 Are there any other types of entities (that is, apart from large, listed entities and financial institutions) that should be included in the initial phase?

Response

Timing and design of a phased approach

49. Assuming that international standards have been settled, the Law Council has no issue with the first report for initially covered entities under a phased approach being required during the 2024–25 financial year.
50. As the Law Society of New South Wales notes, a carefully designed phase-in approach must recognise the considerable uplift in practice and capability which will be required by some disclosing entities.
51. As part of a phased approach, the Law Council also suggests there be a moratorium on penalties and exposure to damages for non-compliance with any new requirements imposed to give effect to the ISSB standards, by the reporting entity and its directors and officers, for an introductory period. This introductory period could, for example, extend for three years for each cohort, in which the only remedies for breach would be declarations and injunctions. The case for a moratorium is further developed in response to questions 5 and 15.
52. The Law Council suggests clarity be achieved in relation to the ultimate coverage, before consideration be applied to which entities should initially be required to report under a phased approach. It is also suggested that for clarity and simplicity, consideration be given to ultimately aligning the scheme with the coverage which applies to other schemes, such as financial reporting and the *Modern Slavery Act 2018* (Cth).
53. The Law Society of New South Wales emphasises that the timing of future phases should be clearly defined upfront to give smaller/lower-risk companies time to build capacity and should include a time bound roadmap for implementation across the economy over a maximum period of, for example, three years.
54. The Law Council notes that it is important to keep in mind that small and medium enterprises—even if not covered by mandatory disclosure—will need to produce information to feed into the reporting entities with which they transact. The Law Council emphasises the importance of this being costed as part of an impact analysis. The impact analysis requires time and specialist expertise, in addition to consulting with reporting entities about their expected costs.

Entities to whom the scheme should apply

55. The Law Council considers that the disclosure scheme should ultimately apply to all listed entities, all APRA-regulated entities, and all other enterprises (public sector and private sector) established or registered in Australia with revenue above a threshold, such as \$100m. It is important that unlisted entities are included, so as not to create delisting incentive. This threshold should take into account the costs of compliance for smaller entities. It notes it may be appropriate to exclude foreign-sourced income for foreign enterprises.
56. It is important to note that there is a constitutional limitation on the entities that the scheme may mandate to make disclosures, given the limitations of the corporations power in section 51(xx) of the Australian Constitution, which extends the Commonwealth's legislative power to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. As a result, it may not be possible to apply the scheme to unincorporated entities, such as partnerships or sole traders.

Approach to phasing entities in

57. The Law Council suggests consideration be given to initially subjecting the following kinds of entities to the mandatory reporting requirements:
 - large listed companies—an appropriate threshold may be ASX300 entities as at 1 January 2024;
 - large APRA-regulated entities (i.e. financial institutions)—it is suggested that these be 'significant financial institutions', as defined in paragraph (t) of clause 18 of the 'APRA Prudential Standard CPS 511 Remuneration';
 - large government business enterprises (**GBEs**); and
 - large enterprises not listed in Australia—a useful starting point may be businesses with revenue of over AUD \$1 billion in the 2023–24 financial year.⁵³
58. Beyond that the phase-in may be implemented by size and perhaps by sector.
59. The Law Society of New South Wales suggests that size is best measured by market capitalisation, rather than turnover or employee numbers. Market capitalisation is the best indicator of the ability of a company to absorb the additional cost of complying with new reporting standards.
60. The Law Society of New South Wales also suggests that there be consideration of thresholds relating to climate risk, not just the size of the reporting entity, so that companies within very high-risk sectors are required to report within the first phase. It notes that it is arguably more important for the new standards to apply to companies that are large emitters, rather than basing the consideration solely on capitalisation, as the disclosure will be more material for investors in those companies.
61. The Law Council agrees that this suggestion is worthy of consideration.

⁵³ The Law Society of New South Wales suggests \$100 million.

Question 4: Align with the ISSB baselines

Should Australia seek to align our climate reporting requirements with the global baseline envisaged by the International Sustainability Boards?

4.1 Are there particular considerations that should apply in the Australian context regarding the ISSB implementation of disclosures relating to: governance, strategy, risk management and/or metrics and targets?

4.2 Are the climate disclosure standards being issued by the ISSB the most appropriate for entities in Australia, or should alternative standards be considered?

Response

62. As indicated in response to question 1, Australia should seek to align its climate reporting requirements with the global baseline ultimately determined by the ISSB. The ISSB standards are the most appropriate to ensure international comity and to avoid detriment to Australian enterprises.
63. In relation to question 4.1, there are three Australia-specific material legal issues which arise and require consideration from a law reform perspective: personal liability of directors (addressed in the following question), forward-looking statements (addressed in the response to question 15) and continuous disclosure reporting obligations (addressed in the response to question 16).

Question 5—key design considerations

What are the key considerations that should inform the design of a new regulatory framework, in particular when setting overarching climate disclosure obligations (strategy, governance, risk management and targets)?

Response

Overview comments

64. The key consideration is that there needs to be flexibility to apply regulatory requirements and standards in a new area of regulatory compliance.
65. The overarching requirements could be included in primary legislation or regulations, preferably under the *Corporations Act 2001* (Cth) (**Corporations Act**) (although that will not catch GBEs, who may need separate applying legislation if they are to be included, as recommended above.)
66. The regulator (preferably ASIC) should also have power to exempt or modify the legislation, regulations and standards, by class order or individual instrument, where warranted to address particular circumstances, as is presently the case for many provisions of the *Corporations Act*.⁵⁴ The Law Council understands that this power has proved essential to address unforeseen circumstances or anomalies in the regulatory framework, and is considered a much more effective and efficient approach than (for example) the prescriptive regulatory framework for financial services under Chapter 7 of the *Corporations Act*.
67. The Law Council suggests care be taken in framing reporting obligations within the *Corporations Act*. Reporting obligations should be devised based on specialist expertise, carefully considering experience with other mandatory disclosure regimes

⁵⁴ *Corporations Act* 994L.

(for example—the reasons why prospectuses are too long, when they are supposed to be clear, concise and effective). The observation of practitioners is that in Australia, there is an ongoing tendency to over-particularisation and impose high liability settings that (rationally, from the point of view of regulated entities) produce defensive disclosure. The objective should be clarity and precision.

Governance

68. The need for clarity and precision is particularly important in the light of the risk of exposure to personal liability for directors under the scheme.
69. The draft ISSB standards reasonably require the reporting entity to identify the governance body (e.g. the board) and management that have oversight of climate-related risk management, including reporting obligations: see paragraphs 12 and 13 of draft ISSB S1.
70. If the ISSB standards are enshrined within Australian law, without further amendment to it, a failure by members of the responsible governance body or a senior manager to take available steps to ensure compliance with the standard, when they were or should have been aware of an actual or potential failure to comply, may lead to civil penalties, disqualification and personal exposure to damages for a breach of the duty of care and diligence: see subsection 180(1) of the Corporations Act.
71. The Law Council is not aware of any equivalent exposure to liability for individuals in any other major jurisdiction likely to adopt the ISSB standards.
72. The Law Council notes the view of the NSW Bar that the draft ISSB standards will 'have a significant capacity to assist entities and officers by identifying with clarity and particularity the things that Australian law may already require them to be doing, where those things are otherwise perhaps currently not very well appreciated' (see [61] of the NSW Bar submission at Attachment A).
73. The Law Council considers however that the substance of climate-related reporting under the ISSB standards includes matters that are so uncertain as to make compliance with the standards potentially difficult to achieve with certainty. It refers specifically, and solely, to the requirement to make forward-looking statements, which is discussed in greater detail in response to question 15.
74. In light of this, the Law Council suggests that in the design of the scheme to embed the standards within Australian law, close consideration should be given to the personal exposure to liability of directors to ensure that the obligations imposed on them which are directed towards securing compliance with the standard are clear, measurable, and achievable. The Law Council has expanded on this in relation to forward-looking statements in its response to question 15.
75. If it is not possible to draft the relevant laws in this way, one option is to consider a transitional period in which the remedies for breach be limited to declarations and injunctions, excluding civil penalties, disqualification and personal liability for damages, at least for a transitional period.

Question 6—where requirements should be situated

Where should new climate reporting requirements be situated in relation to other periodic reporting requirements? For instance, should they continue to be included in an operating and financial review, or in an alternative separate report included as part of the annual report?

Response

76. The Law Council suggests the climate reporting requirements be situated in a separate periodic report as part of an entity's annual report.
77. If the climate-related financial disclosures are incorporated into the finance report regime (Part 2M.2 of the Corporations Act)—for example, as an additional disclosure required in the directors' report or as a new report to be provided along with the annual financial report and directors' report—the liability setting in subsection 344(1) would apply. This imposes liability on directors who fail to take all reasonable steps to comply with, or to secure compliance with, Part 2M.2. Further, non-compliance with the Part 2M.2 regime could amount to false and misleading conduct under section 1041H of the Corporations Act.
78. This is different from other forms of mandatory corporate disclosure where the general negligence standard applies. This includes, for example, disclosures in takeover documents and fundraising documents, which are carved out of the section 1041H regime (see subparagraphs 1041H(3)(a)(i) and (ii)) and subject to their own respective stand-alone disclosure schemes.
79. The Law Council considers a stand-alone scheme for reporting climate-related financial disclosures may be warranted, outside of Part 2M.2 of the Corporations Act, which tailors the compliance standard to the specific obligations imposed by that scheme.
80. The Law Society of New South Wales, like the NSW Bar (see Attachment A), is of the view that climate disclosures should be made within the existing periodic reporting requirements, particularly where climate-related risks and opportunities are 'material'. It considers, however, that entities should be afforded flexibility in relation to how they report disclosures above and beyond existing requirements, such as the disclosure of greenhouse gas emissions and transition plans.

Question 7—materiality judgements

What considerations should apply to materiality judgements when undertaking climate reporting, and what should be the reference point for materiality (for instance, should it align with ISSB guidance on materiality and is enterprise value a useful consideration)?

Response

81. On this question, the Law Council offers the specific views of its constituent bodies.
82. The Law Society of New South Wales shares the same position as the NSW Bar on this question, as set out in Attachment A. Namely, that:
 - ISSB's definition of materiality should be used, *except* in relation to the inclusion of 'enterprise value', as that would create unnecessary inconsistencies with the definitions of materiality in the Corporations Act, ASX

Listing Rules, and the Australian Accounting Standards Board (AASB) Standard 101; and

- the EU concept of ‘double materiality’ may be helpful. While existing Australian materiality standards are directed to the impact of climate upon the company, ‘double materiality’ would also require them to disclose the material impact on the climate (except with regard to their emissions—these are disclosed regardless of materiality, as is contemplated by the ISSB draft standard)

Question 8—assurance

What level of assurance should be required for climate disclosures, who should provide assurance (for instance, auditor of the financial report or other expert), and should assurance providers be subject to independence and quality management standards?

Response

83. The Law Council suggests that assurance should be provided by an independent external auditor, not necessarily the external financial auditor.
84. These reports will need assurance, just as all reports need to be audited. However, legal practitioners have expressed an understanding that the assurance profession may not yet have the capacity or expertise to undertake assurance on these reports.
85. In these circumstances, the Law Council suggests a separate assurance requirement, with transitional arrangements, for a separate climate risks report, be introduced. Assurance providers can be subject to standards imposed by the AASB to start with, but ultimately a specialist sustainability standards board is required (see question 19).
86. The Law Council emphasises that assurance will require a significant capacity build. It suggests that thought be given now in relation to what works with the present regulatory scheme.
87. The **Law Society** of New South Wales considers that may be a case for extending auditing requirements to covered entities’ emissions disclosures, as will be the case in New Zealand, given concerns about significant under-reporting in some sectors. In that case, a phased approach and timeline to full verification and assurance should be provided. This will require the development of a robust assurance framework.
88. It considers, however, that if disclosure is required because it is financially material, then arguably there would be no need for a separate assurance. It also raises the practical concern that this will significantly increase compliance costs.

Question 9—emissions reporting requirements

What considerations should apply to requirements to report emissions (Scope 1, 2 and 3) including use of any relevant Australian emissions reporting frameworks?

Response

89. The Law Council suggests that reporting should include actual emission data for Scope 1, 2 and 3 emissions, with emissions reductions tethered to a common historical date (such as 2017, as proposed in the response to the previous question) and use of carbon credits or other offsets. That is, it suggests that Scope 3 should be

included to ensure alignment with developing international standards, as discussed in the Consultation Paper.

90. The Law Society of New South Wales shares this view, noting that Scope 3 reporting is critical to understanding underlying climate risk across capital markets. It suggests consideration of a phased approach given the existing data challenges including requiring only the following Scope 3 categories to be reported on initially: Use of Sold Products and Purchased Goods and Services. The Law Council considers this to be a sensible suggestion.
91. The Law Council notes that the necessary reliance on third parties to report Scope 3 emissions reduces the reliability of that information, especially as this will include third parties that are not themselves subject to any climate risk reporting requirement. It suggests that consideration be given to there being no breach or penalty for reporting incorrect information about Scope 3 emissions based on an estimation of Scope 3 emissions made in good faith and on a reasonable basis.
92. The same breach considerations should also apply to reporting by financiers and insurers concerning their clients (to comply with TCFD-type requirements) which also rely on third party information that may not be readily available.
93. As a general point, the Law Council notes the discussion in the Consultation Paper on the kind of details which may be required about how targets and goals are to be met and disclosed and in relation to the suit of greenhouse gas emissions offsets. The Paper refers to the TCFD and ISSB requiring certain details, but also refers to [other] 'initiatives underway to provide consensus about what must be demonstrated to make claims about being aligned with, for example, the Paris Agreement or net zero emissions by 2050'.⁵⁵
94. It is not clear whether the reference to these other 'initiatives' are to imply the possibility of postponing the imposition of any specific disclosure requirements until 'consensus' is achieved through those other 'initiatives'.
95. The Law Council does not have a view on whether the Australian disclosure rules should be postponed until after international initiatives are complete. It would note, as a point of principle, that disclosure requirements should be such to ensure that targets published by reporting entities are as credible as reasonably possible.

Question 10—metrics baseline

Should a common baseline of metrics be defined so that there is a degree of consistency between disclosures, including industry-specific metrics?

Response

96. In particular, the Law Council suggests a common start date be adopted as a baseline for the disclosure and reporting of net carbon emission reductions. Acknowledging difficulties of historical measurement, the start date could be reporting emissions reductions since the first financial year ending on or after 31 December 2017, the first full year after the commencement of the Paris Agreement. This would not preclude additional reporting based on other start dates.
97. The Law Council suggests there is a role for the Australian Government in developing and providing common or baseline data. The Law Council suggests the Australian

⁵⁵ Consultation Paper 13.

Government should consider maintaining responsibility for data governance into the future. The Law Council suggests that there is a public good in a single system applying, to avoid potential competition problems in cooperating as a sector.

Question 11—transparency of information

What considerations should apply to ensure covered entities provide transparent information about how they are managing climate related risks, including what transition plans they have in place and any use of greenhouse gas emissions offsets to meet their published targets?

Response:

Superannuation-industry specific comments

98. The Superannuation Committee emphasises that there is a need to provide certainty around the terminology used in mainstream marketing and member communications. It suggests that it would benefit consumers and provide much needed certainty to industry, if there were to be regulatory clarity around when a superannuation fund can safely utilise concepts like ‘Paris-aligned’, ‘sustainable’, ‘environmental’ and ‘net zero’ in connection with marketing their products.

Consistency with Paris Agreement commitments

99. The Law Council, NSW Bar and Law Society of New South Wales are all firmly of the view that the regulatory scheme should be designed in a manner which is consistent with meeting Australia’s obligations under the Paris Agreement, and other domestic legal frameworks directed towards the same objective.
100. As set out in the discussion in Attachment A, the NSW Bar notes the ISSB does not require entities to disclose transition plans consistent with the IPCC and IEA modelled pathways that limit warming to 1.5°C, but considers it should. The Law Council expresses caution about any obligation which requires every reporting entity to have a transition plan consistent with that aim, which results in liability if the plan fails.
101. The Law Council understands that currently the ISSB S2 does not contain an obligation which would give rise to a liability of that kind. Paragraph 13 of the draft ISSB S2 requires entities to ‘disclose information that enables users of general-purpose financial reporting to understand the effects of significant climate-related risks and opportunities on its strategy and decision-making, including its transition plans’. This includes, relevantly, how it is responding to significant climate-related risks and opportunities including how it plans to achieve any climate-related targets it has set, information regarding the climate-related targets for those plans and quantitative and qualitative information about the progress of plans disclosed in prior reporting periods. That is, the obligation relates to report actions, without requiring them to be achieved to a certain standard.
102. The Law Council would be pleased to give further consideration to this issue. Suffice to say for present purposes, to draw together key themes of the Law Council’s views in this submission, the obligations imposed upon entities should be consistent with Australia’s obligations under the Paris Agreement—that is, the pursuit of emissions reduction targets to which it has committed under that Agreement, while also setting clear, measurable and achievable obligations upon reporting entities.

Question 12—phased approach to requirements

Should particular disclosure requirements and/or assurance of those requirements commence in different phases, and why?

Response

103. The Law Council considers that it may be appropriate to defer the requirement to report Scope 3 emissions and emission reductions, especially as it is reliant on third-party information which will not be publicly available at all until after Scope 1 and 2 emissions are reported by third parties.

Question 13—data challenges

Are there any specific capability or data challenges in the Australian context that should be considered when implementing new requirements?

13.1 How and by whom might any data gaps be addressed?

13.2 Are there any specific initiatives in comparable jurisdictions that may assist users and preparers of this information in addressing these challenges?

104. No response.

Question 14—supporting information

Regarding any supporting information necessary to meet required disclosures (for instance, climate scenarios), is there a case for a particular entity or entities to provide that information and the governance of such information?

105. On this question, the Law Council offers the specific views of NSW Bar—see Attachment A.

Question 15—the reasonable grounds requirement

How suitable are the ‘reasonable grounds’ requirements and disclosures of uncertainties or assumptions in the context of climate reporting? Are there other tests or measures that could be considered to ensure liability is proportionate to inherent uncertainty within some required climate disclosures?

Response

General views

106. The draft ISSB standards require a range of forward-looking statements, including long-range projections. It will be very difficult for entities to do that with any meaningful degree of certainty, especially for longer-range impacts, which the draft ISSB standards acknowledge. See paragraphs 79–83 of ISSB S1, of which paragraph 79 provides a helpful summary (emphasis added):

*When metrics cannot be measured directly and can only be estimated, measurement uncertainty arises. **The use of reasonable estimates is an essential part of preparing sustainability-related metrics and does not undermine the usefulness of the information if the estimates are accurately described and explained. Even a high level of measurement uncertainty would not necessarily prevent such an estimate from providing useful information. An entity shall identify metrics it has disclosed that have significant estimation***

uncertainty, disclosing the sources and nature of the estimation uncertainties and the factors affecting the uncertainties.

107. See also, the adjustments and clarifications to paragraph 79 tentatively agreed in January 2023.⁵⁶
108. 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) (**ASIC Act**).
109. Section 1308 of the Corporations Act effectively renders directors who authorise the making or provision of a misleading document, in certain circumstances, liable to a civil penalty. Under this provision, if the document is defective, there is an intentional offence, a strict liability for failure to take reasonable steps offence, and a civil penalty for intentional (knowing or reckless) and a civil penalty for failure to take reasonable steps.
110. At present, the Law Council understands that if a financial forecast is inherently uncertain, it will not be published because the company does not have reasonable grounds for the forecast. Companies rarely publish forecasts for periods longer than 12 months for this reason. If the Chief Financial Officer of an ASX200 company was asked to publish a forward-looking statement about the financial position of a company in (say) five years' time, they would generally be advised not to do so, because of the uncertainty and therefore lack of reasonable grounds.⁵⁷
111. A view was expressed by the Corporations Committee that the disclosure required under the ISSB draft standards, for even longer periods, is no different.
112. The Law Society of New South Wales notes that many of the disclosures required involve particularly difficult future predictions based on complex and changing evaluative judgements. It notes that there is considerable variety in practice, as there is uncertainty and insufficient direction to guide companies to safely disclose in this space.
113. It suggests that moving from a general and amorphous obligation to very specific and detailed disclosure obligations would necessarily appear to change the risk profile and prospect of increased litigation exposure. It suggests that particular difficulties posed by the adoption of ISSB baseline standards concern how to set up systems to capture the relevant data, especially in relation to Scope 3 emissions, and how to analyse it or extrapolate from it for the purpose of making the required disclosures.
114. While it acknowledges that international practice and in particular global baseline standards for climate reporting are likely to be helpful in achieving greater consistency and development of standard practice, adoption of uniform standards needs to be approached having regard to the legal system where the standards will apply. It notes that strong safe harbour protections existing in some other jurisdictions that are adopting the ISSB standards do not exist in Australia.

⁵⁶ IFRSF, Climate-related disclosures – Current stage (website, accessed on 22 February 2023) <https://www.ifrs.org/projects/work-plan/climate-related-disclosures/>.

⁵⁷ See ASIC, 'Regulatory Guide 170 – Prospective Financial Information' (April 2011) <https://download.asic.gov.au/media/1240943/rg170-010411.pdf>.

115. The Law Society notes that some designs for implementation of a safe harbour regime could include:
- Safe harbour for forward looking information - possibly similar to the protections in the *Private Securities Litigation Reform Act 1995* in the United States (though it notes these only apply to private claims);
 - Safe harbour for Scope 3 disclosure - recognising reliance on estimation and third-party data (this is proposed in the Securities Exchange Commission climate reporting rule, but it requires a 'reasonable basis') or
 - Safe harbour from private claims—similar to continuous disclosure protections introduced in 2021, where private claims can be made only where representations are reckless or negligent.
116. It notes that some of its members were persuaded by the view that while the ISSB standards may require an evolution of processes and disclosures across industries, *'in practice [it] simply reflects the need for directors to adapt and respond to climate risk issues facing their companies.'*⁵⁸ This view is adopted in the NSW Bar submission, extracted below.
117. The Consultation Paper seeks views on 'mechanisms to address the balance between incentivising disclosure and penalising misconduct'.
118. There are a number of competing considerations here:
- the virtues of targets being credible—for investors such as superannuation trustees and for government policy makers and regulatory bodies, which are directed towards the objective, now enshrined in various Commonwealth laws, to achieve Australia's greenhouse gas emissions targets;
 - the virtues of targets being ambitious—from the perspective of reducing greenhouse gas emissions;
 - the objective of being consistent with the ISSB international reporting standards; and
 - the objective of setting reporting companies with a task under law which is reasonably capable of being achieved.
119. The Law Council received various views from its committees, Sections and constituent bodies on how this balance may be achieved and where the balance should lie.
120. The choice may be, at first instance, reduced to the following binary:
- require compliance with the ISSB, and provide a carve-out from the misleading conduct laws referred to at paragraphs 108-109 of this submission in relation to forward-looking statements; or

⁵⁸ Sebastian Hartford Davis has provided advice to the IGCC & Australian Council of Superannuation Investors: <https://acsi.org.au/media-releases/issb-standards-consistent-with-existing-requirements-for-company-directors-legal-opinion-confirms/>

- permit compliant reporting to be subject to current Australian law, thus limiting the usefulness of reporting that would otherwise have been made and providing a standard lower than that required by the ISSB.
121. However, more nuanced options are available. 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.
 122. Another option is to consider a modification to Australian laws to enable compliance with international reporting standards, to ensure the benefits both of consistency with international standards and the climate-related benefits which result from those future predictions. If this option is taken, the laws concerning misleading and deceptive conduct in relation to forward-looking statements in the Australian Consumer Law, the Corporations Act and the ASIC Act (and possibly others) would be modified to the extent that they apply to giving effect to the requirements of the ISSB standards.
 123. The Law Society of New South Wales reached a similar position. It noted that whether or not safe harbour exemptions are adopted, the unique settings of the Australian jurisdiction need to be considered in assessing the liability risk for directors. It suggests that the liability settings for the types of forward-looking statements contemplated by the ISSB standards will need careful calibration to avoid the risk of unhelpful and generalised disclosure that will not meet the expectations of investors.
 124. 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.

Superannuation specific considerations

125. 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.
126. The Committee would support further investigation into an appropriate 'safe harbour' regime, that may apply, for example, where a fund's disclosures are made in reliance upon the information given to them and on which it is reasonable for the trustee to rely.
127. The 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).

Question 16—interaction with other reporting obligations

Are there particular considerations for how other reporting obligations (including continuous disclosure and fundraising documents) would interact with new climate reporting requirements and how should these interactions be addressed?

Response

Disclosure in fund-raising documents

128. The Law Council considers that disclosure in fund-raising documents should proceed on the same basis as present, with no change to, for example, the rules concerning disclosure of risks and prospects. Many matters required to be disclosed in the ISSB standards are inherently uncertain and therefore unreliable, making them inappropriate to be included in disclosures for the specific purpose of raising equity and debt funding.

Continuous disclosure obligations

129. If these standards are enshrined within Australian law, without further amendment to Australian law, forward-looking statements made by listed entities to comply with ISSB standards would then need to be updated under the continuous disclosure obligation in rule 3.1 of the ASX Listing Rules (**ASX LR**). Specifically, ASX LR 3.1 requires the entity must immediately tell the ASX any information ‘that a reasonable person would expect to have a material effect on the price or value of the entity’s securities’.
130. This would be an effective extension to the ISSB reporting requirements, which do not require continuous updating for material changes. However, draft ISSB S1 does anticipate the possibility that domestic regulators may require the publication of interim reports, in which case paragraph 70 applies to permit a subset of the information ordinarily required to be provided.⁵⁹
131. The Law Council suggests that a decision should be made as to whether to oblige listed reporting entities to ‘live with’ this consequence, or to explicitly carve out any obligation to update a climate risks report before the next periodic report.
132. Given the inherent uncertainty of many of these disclosures, the Corporations Committee suggests that it may be preferable to carve out from ASX LR 3.1 any obligation to update a climate risks report before the next periodic report. It is important to note that any actual material short-term financial impact would have to be disclosed in any event, and the Law Council is not suggesting otherwise. The carve-out should be limited to changes in forward-looking statements in climate risk reports that would not otherwise be required to be disclosed (for example, a change in an uncertain long-term forward looking statement that is replaced by another uncertain statement should not require disclosure).

Superannuation specific considerations

133. 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

⁵⁹ ISSB 1 [69]-[70].

31 December to aggregate the data they might only receive on 30 June for the prior 31 December.

Question 17—other sustainability reporting

While the focus of this reform is on climate reporting, how much should flexibility to incorporate the growth of other sustainability reporting be considered in the practical design of these reforms?

Response

A note on design

134. Unique disclosure issues will arise for each separate sustainability domain or topic. Those topics are very diverse, and for example, many topics may not require disclosure of forward-looking statements (other than targets), which means that the issues relevant to disclosure of climate risks set out in these responses may not be relevant to those topics. Therefore, while the overarching legislative framework could be flexible, it should not seek to anticipate the requirements and consequences of future sustainability disclosure standards.

The need for clarity, consultation and planning with respect to the broader framework

135. Having said this, as a general point, the Law Council notes that the Consultation Paper indicates that Treasury is contemplating a broader sustainable finance framework of which climate disclosure is a part. It notes that ‘markets are increasingly seeking information about broader sustainability-related financial risks’ and in this context the ‘Taskforce on Nature-related Financial Disclosures (TNFD), of which Australia is a strategic funding partner, is working towards extending the TCFD approach to other domains of nature-related sustainability risks (such as biodiversity or water)’.⁶⁰
136. It further notes that consolidation of the SASB and Value Reporting Foundation into the ISSB ‘suggests that the ISSB’s global baseline for sustainability-related financial disclosures will eventually include social and governance disclosures (such as labour standards, tax transparency, diversity, relations with First Nations stakeholders)’.⁶¹
137. The Law Council considers that it would be helpful to have a more detailed understanding of what this broader framework will encompass, noting the complexities which arise in relation to environmental risk disclosure generally.
138. The Law Council emphasises that this framework should be developed consistently with international commitments which Australia has made.⁶² For example, some of the above issues will engage other environmental treaties that are inextricably linked to the UNFCCC, particularly, the UN Convention on Biological Diversity,⁶³ requiring a national biodiversity strategy and action plan; and the UN Convention to Combat Desertification,⁶⁴ requiring measures to address desertification. The Law Council notes that a broader range of international obligations will also be engaged.

⁶⁰ Consultation Paper 16.

⁶¹ Ibid.

⁶² Climate Change Policy [19]-[20].

⁶³ Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (**CBD**).

⁶⁴ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, opened for signature 14 October 1994, 1954 UNTS 3 (entered into

139. The Law Council notes the broader commitments which Australia has made under instruments regarding the environment, while not legally binding, are authoritative.⁶⁵ These include the Stockholm Declaration⁶⁶ and the Rio Declaration,⁶⁷ which reinforce the inextricable relationship between the environment and human rights, and the responsibility to protect and improve the environment for present and future generations.⁶⁸ Australia's commitments under the 2030 Agenda for Sustainable Development and Sustainable Development Goals (**SDGs**)⁶⁹ include taking 'urgent action to combat climate change and its impact', amongst several others ostensibly relevant to the development of this framework.⁷⁰
140. It is also critically important that consultation with First Nations people occur at an early stage in the design of any scheme to impose regulatory obligations on entities relating to climate-related disclosures and, in particular, a broader framework for sustainability-related financial disclosures.
141. The Australian Government's 2018 report on the implementation of the SDGs includes the following comment:⁷¹
- The Australian Government is committed to recognising Aboriginal and Torres Strait Islander peoples in our constitution. While there is no SDG specific to indigenous peoples, all 17 SDGs are significant for Aboriginal and Torres Strait Islander peoples. The Aboriginal and Torres Strait Islander concept of "caring for country" incorporates not just environmental and landscape management, but also the socio-political, cultural, economic, and physical and emotional wellbeing of Aboriginal and Torres Strait Islander peoples.*
142. The report also acknowledges the work of Indigenous rangers throughout Australia as instrumental in protecting and conserving Australia's environment and heritage assets⁷² (a program expanded in the October 2022 Federal Budget).⁷³ The report also refers to the importance of Indigenous procurement policies in supporting and growing Aboriginal and Torres Strait Islander businesses around the country and promote

force 26 December 1996) (**CCD**). The objective of the UNCCD is to: 'combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas.' See, art. 2. This is the only binding international agreement which makes the connections between sustainable land management on the one hand, and the environment and development on the other. See, United Nations Convention to Combat Desertification, 'About the Convention' <https://www.unccd.int/convention/about-convention>.

⁶⁵ For example, the principles in such instruments may crystallize into customary law over time, or may be subsequently adopted into binding agreements.

⁶⁶ The text of the Stockholm Declaration was developed at the first international conference on international environmental law (**IEL**), the United Nations Conference on the Human Environment on 5 June 1972. See, *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972) (**Stockholm Declaration**).

⁶⁷ *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I) (12 August 1992) annex I, principles 5, 7, 13, 24, 27, Principles 1 and 10.

⁶⁸ The Stockholm Declaration also recognised that '[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights [including] the right to life itself': Chapter 1, Preamble [1].

⁶⁹ *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (21 October 2015) (**SDGs**).

⁷⁰ See, SDGs Goal 13.

⁷¹ Australian Government, *Report on the Implementation of the Sustainable Development Goals (2018)* 7 <https://www.dfat.gov.au/sites/default/files/sdg-voluntary-national-review.pdf>.

⁷² *Ibid* 92.

⁷³ Hon Linda Burney MP. Minister for Indigenous Australians, 'Delivering a better future for Aboriginal and Torres Strait Islander Australians' (media release, 25 October 2022) <https://ministers.pmc.gov.au/burney/2022/delivering-better-future-aboriginal-and-torres-strait-islander-australians>.

economic inclusion and resilience in disadvantaged communities. The Law Council considers the relief from disadvantage in First Nations would be significantly enhanced if the Indigenous Procurement Policy⁷⁴ could be extended to climate change strategy and response.

143. It is suggested that the Treasury carefully consider applicable rights of First Nations peoples contained within the United Nations Declaration on the Rights of Indigenous Persons (**UNDRIP**)⁷⁵ and with consultation processes with First Nations people established in similar law reform contexts.
144. The UNDRIP is not itself a treaty which creates legally binding obligations but has been described as representing ‘an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples’.⁷⁶
145. The right of First Nations peoples to self-determination is the fundamental principle underpinning the UNDRIP. The right to self-determination is a principle of international law, to which Australia has committed as a signatory to the *International Covenant on Civil and Political Rights (ICCPR)*⁷⁷ and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁷⁸, as well as the UNDRIP. Article 1 of both treaties recognises that ‘all peoples have the right of self-determination’, by virtue of which ‘they freely determine their political status and freely pursue their economic, social and cultural development’.⁷⁹
146. In the context of environmental conservation, article 29 of the UNDRIP asserts that ‘Indigenous peoples have right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination’.
147. The rights of First Nations peoples to recognition and protection of their cultural heritage should also be considered. The Australian Government has accepted⁸⁰ the recommendations of a Joint Standing Committee on Northern Australia inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge to legislate a new framework for cultural heritage protection at the national level developed through a process of co-design with Aboriginal and Torres Strait Islander peoples.⁸¹ That inquiry recommended the new legislation should set out the minimum standards for state and

⁷⁴ Australian Government, Indigenous Procurement Policy (December 2020)

https://www.niaa.gov.au/sites/default/files/publications/ipp-guide_0.pdf.

⁷⁵ 1 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex.

⁷⁶ United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].

⁷⁷ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷⁸ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁷⁹ ICCPR art 1(1); ICESCR art 1(1).

⁸⁰ Australian Government, ‘Australian Government response to the Joint Standing Committee on Northern Australia’s: A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge and Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report’ (November 2022)

<https://www.dcceew.gov.au/sites/default/files/documents/australian-response-to-destruction-of-juukan-gorge.pdf>.

⁸¹ Joint Standing Committee on Northern Australia, ‘A Way Forward Final report into the destruction of Indigenous heritage sites at Juukan Gorge’ (October 2021) Recommendation 3, [7.77]-[7.78] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf>.

territory heritage protections consistent with relevant international law,⁸² including principles of self-determination.⁸³

148. The Law Council's submission to that inquiry contains a detailed discussion of the right to self-determination and the specific UNDRIP articles which articulate the rights of Indigenous peoples to the recognition and protection of their cultural heritage.⁸⁴
149. The Treasury should be planning for these matters now and beginning engagement with First Nations people both in relation to sustainability-related financial disclosures generally and the present climate-related financial risk disclosures framework. It may wish to consider how this consultation is being conducted, for example, by the Department of Climate Change, Energy, the Environment and Water for the purposes of that cultural heritage reform framework and its adoption of co-design approach.
150. On the issue of engagement, it is noted that the First Nations Clean Energy Network is developing best practice guidelines for engagement with First Nations⁸⁵ and, the Law Council is advised, is advocating for a regulatory framework for agreements with First Nations regardless of the tenure of the relevant land in relation to clean energy projects. Treasury may wish to consider these matters in its planning for the development of a broader sustainable finance framework.

Question 18—digital reporting

Should digital reporting be mandated for sustainability risk reporting? What are the barriers and costs for implementing digital reporting?

Response

151. The Law Council suggests that digital reporting should be introduced in a holistic way, which addresses all entity reporting requirements, rather than be introduced only for sustainability risk reporting.

Question 19—potential regulatory structures

Which of the potential structures presented (or any other) would best improve the effectiveness and efficiency of the financial reporting system, including to support introduction of climate related risk reporting? Why?

Response

152. A key theme of this submission is that a bespoke regulatory approach is required which adapts to the specific and unique required of climate-related financial disclosures.
153. The view of the Corporations Committee, consistent with this approach, is that structure 2 is preferred, establishing a separate sustainability standards board, with Financial Reporting Council oversight. Its view is that specialist expertise is required, and this position is consistent with the previous recommendations that there be a

⁸² *Ibid* [7.79]

⁸³ *Ibid* [7.80].

⁸⁴ Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, 'Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia' (21 August 2020 [40]-[46]) <<https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>>.

⁸⁵ See, for example, O'Neill, L., Riley, B., Hunt, J., & Maynard, G. (2021). Clean energy agreement making on First Nations land: What do strong agreements contain?, Centre for Aboriginal Economic Policy Research, Australian National University. <https://doi.org/10.25911/VHH3-F498>.

separate report and a separate assurance process from the financial report and financial audit.

Constituent body views

154. Both the NSW Bar (see Attachment A) and Law Society of New South Wales favour the first structure.
155. The Law Society of New South Wales prefers the first model on the basis that it would allow leveraging of the AASB's existing expertise in relation to climate-related disclosures, as well as its relationships with international standard-setting bodies.
156. It is also concerned that the second structure would cause further regulatory fragmentation, and that the third would risk further delaying the implementation of a mandatory framework at a time when Australia is already experiencing regulatory lag.