

9 February 2024

Director
Climate Disclosure Unit
Climate & Energy Division
Treasury
Langton Cres
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Via email: climatereportingconsultation@treasury.gov.au

Dear Treasury

Climate-related financial disclosure: exposure draft legislation

Thank you for the opportunity to provide a submission on the climate-related financial disclosure exposure draft legislation (**Draft Legislation**).

The Australian Institute of Company Directors (**AICD**) welcomes the opportunity to comment on the development of this important policy. The AICD's mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 51,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits, large and small businesses and the government sector.

The AICD supports the introduction of a mandatory climate-related financial disclosure regime which is internationally aligned and that meets the policy objectives of high-quality, comparable and useful climate disclosures.

The complexity and potential impacts of this reform are, however, significant, necessitating material changes to the *Corporations Act 2001 (Cth)* (**Corporations Act**) and Australia's financial reporting framework.

Ensuring the legal settings and liability approach is proportionate and practical is crucial to achieving these policy aims.

Executive Summary

While supportive of the intent and purpose of the climate reporting regime, the AICD has some serious concerns with several aspects of the Draft Legislation. This includes areas where the Draft Legislation clearly differs from the policy intent set out in the Policy Statement and Policy Impact Analysis. In summary, our key comments are as follows:

1. **The omission of forward-looking representations, including transition plans, from the three-year regulatory only immunity period (Limited Immunity)** is of utmost concern. This omission is a significant and unexplained deviation from both the Policy Statement and Treasury's June 2023 Proposal (**June Proposal**) and will leave companies vulnerable to private litigation in a disclosure area marred by significant uncertainty and high litigation risk.

2. To give effect to the policy intent of “*encourag[ing] best practice disclosures while assuaging concerns in areas of the disclosure regime that are more uncertain,*”¹ **the Limited Immunity must cover all-forward-looking disclosures required under the Australian Sustainability Reporting Standards (Sustainability Standards), including transition plans.**
3. We strongly recommend that Government **extend the Limited Immunity to cover substantially similar disclosures made outside of the Sustainability Report that were originally made in the Sustainability Report. Protection should also cover any legally required updates** to material contained in the Sustainability Report, for example by virtue of continuous disclosure laws, by way of a Supplementary Sustainability Report if required.
4. Given reasonable assurance over all disclosures will not be required from the commencement of the regime (and is only mandated from 1 July 2030), **director declarations should be suitably qualified.** The Draft Legislation should make clear that **directors are only required to opine that they have ‘reasonable grounds to believe that’ the climate disclosures are in accordance with the Sustainability Standards and Corporations Act.** The Explanatory Memorandum should also acknowledge the current market limitations which prevents an unqualified directors’ declaration.
5. **The thresholds for Group 3 entities are too low. The compliance burden for these entities is not commensurate with their climate impact or the expected benefit of climate reporting for their users.** The proposed ‘additional’ entity-level materiality threshold does not relieve the regulatory burden for Group 3 entities. It risks confusing (or even potentially undermining) the application of materiality (particular for Group 1 and 2 entities) under the Sustainability Standards.
6. We recommend that Government **increase the revenue threshold for Group 3 entities from \$50 million to \$100 million and the gross assets threshold from \$25m to \$50m and/or that Group 3 entities be subject to a simplified climate reporting standard** (similar to the simplified financial accounting standards that apply to Tier 2 entities.)²
7. **We are concerned about the inclusion of Not-for-Profits (NFPs) that are reporting entities under Chapter 2M of the Corporations Act in the regime in the absence of specific consultation with the sector,** particularly given the acceptance that charities registered with the Australian Charities and Not-for-Profits Commission (**ACNC**) be excluded.
8. **Additional minor timing relief mechanisms would support entities manage the transition to mandatory climate reporting, particularly in their first reporting year.** These include: allowing entities, in their reporting year, to submit their Sustainability Reports a maximum of two months following the issue of their Financial and Directors’ Reports (provided it is issued at least three weeks prior to the AGM); and setting out in the Explanatory Memorandum that ASIC can use its discretionary powers to provide an extension of time for entities to prepare, lodge and/or distribute a Sustainability Report, upon application.

¹ Page 29 of the [Policy Impact Analysis](#).

² See [AASB 1060 General Purpose Financial Statements - Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 entities](#).

9. **The broad, unfettered nature of the Minister's powers under sections 292A(4) and (8), sections 296A(3), (4)(b)(ii) and (5), and section 296C(2) should be reconsidered.**

We set out our detailed views on the Draft Legislation below on the basis of engagement with AICD members, legal experts, and other peak bodies.

We also enclose:

1. a summary of our key recommendations (**Annexure A**);
2. legal advice obtained from King & Wood Mallesons (**KWM**) (**Annexure B**); and
3. a table setting out minor technical drafting issues and some suggested amendments (**Annexure C**).

If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au or Anna Gudkov, Senior Policy Adviser at agudkov@aicd.com.au.

Yours sincerely,



Louise Petschler GAICD
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Detailed comments on the Draft Legislation

1. Limited Immunity

The AICD strongly supports a three-year regulator only enforcement period (**Limited Immunity**). A Limited Immunity period is critical to incentivising comprehensive and high-quality disclosures without undue fear of litigation risk which may otherwise encourage limited reporting.

However, the Limited Immunity, as drafted, does not meet the Policy Statement's intent of *"encourag[ing] best practice disclosures while assuaging concerns in areas of the disclosure regime that are more uncertain."*³

Our comments below provide detail on each of the following issues and recommendations for resolution:

1. the need for the Limited Immunity to extend to all forward-looking disclosures required under the Sustainability Standards, including transition plans;
2. ensuring that the Limited Immunity extends to all applicable disclosures irrespective of location for consistency and to avoid unintended consequences;
3. the need for the criminal proceeding carve-out to exclude the criminal prosecution of strict liability offences;
4. the need for the Limited Immunity to cover omissions in disclosures; and
5. ensuring the three-year Limited Immunity period applies to each reporting group. As drafted, the Limited Immunity is of little utility to Group 2 and wholly inapplicable to Group 3 entities.

1.1 All forward-looking disclosures, including transition plan disclosures, to be covered by Limited Immunity

To achieve the policy intent, in addition to Scope 3 disclosures, *all* forward-looking disclosures required by the Sustainability Standards, including transition plan disclosures, need to be covered by the Limited Immunity. The forward-looking disclosures required under the Sustainability Standards will include the following (many of which relate to transition plans):

- anticipated effects of climate-related risks and opportunities on the entity's business model and value chain;⁴
- anticipated changes to the entity's business model, including its resource allocation;⁵
- how the entity expects its financial position to change over the short, medium and long term given its strategy to manage climate-related risks and opportunities, taking into consideration its investment and disposal plans and its planned sources of funding to implement its strategy;⁶ and
- how the entity expects its financial performance and cash flows to change over the short, medium and long term, given its strategy to manage climate-related risks and opportunities;⁷

³ Page 30, [Policy Impact Analysis](#) (Jan 2024).

⁴ Paragraph 13 IFRS S2.

⁵ Paragraph 14(a)(i) IFRS S2.

⁶ Paragraph 16(c) IFRS S2.

⁷ Paragraph 169(d) IFRS S2.

- how the entity plans to respond to climate-related risks and opportunities in its strategy and decision-making, and how it plans to resource this;
- anticipated direct and indirect mitigation and adaptation efforts;
- any climate-related transition plan the entity has; and
- how the entity plans to achieve any climate-related targets, including any greenhouse gas emissions targets.

All forward-looking disclosures, not just scenario analysis disclosures, suffer from a high degree of measurement and outcome uncertainty and are highly novel in the Australian market. The uncertainties that underpin scenario analysis disclosures similarly apply to a disclosure of (for instance) how, in 15 years' time, an entity expects that climate change will impact its financial performance or cash flows. These uncertainties relate to the requirement to make projections many years or even decades into the future, on the basis of incomplete or unknown information and assumptions. Assumptions and data, which are fed into models, are imprecise and subject to quality and access issues. There is no policy rationale for the Limited Immunity to apply to scenario analysis but not related forward-looking climate disclosures which also suffer from the same considerable uncertainty and are far more likely to be targeted by litigation.

It is a serious flaw in the Draft Legislation that transition plans are excluded from the Limited Immunity. In addition to being subject to the same heightened levels of uncertainty as the other forward-looking disclosures required under the Sustainability Standards, transition plan disclosures have historically had the highest litigation risk. The KWM Advice at **Annexure B** notes that no activist litigation has been brought on the basis of scenario analysis alone.⁸ This is because scenario analysis is a tool to assess climate risk and opportunity exposure. The purpose of undertaking scenario analysis is to understand climate risks and impact on the financial viability of the company and to then incorporate those results into a transition plan. Excluding transition plans from the Limited Immunity runs contrary to the policy intent of the immunity to “encourage best practice disclosures while assuaging concerns in areas of the disclosure regime that are more uncertain.”⁹

Further, the interconnection between scenario analysis, transition plans and other forward-looking disclosures will make it very difficult to apply the Limited Immunity to some forward-looking disclosures and not others. Because of this, linking the Limited Immunity to scenario analysis alone will be of limited to no practical value to reporting entities and their directors. This could attract legal challenges (with arguments as to what disclosures could reasonably be made on the basis of scenario analysis) and could limit what many organisations are willing to say in respect of future matters.

Extending the Limited Immunity to cover all forward-looking disclosures will create stronger and clearer regulatory incentives for entities to make fulsome disclosures during the initial years of this complex new reporting regime.

⁸ See section 2.1 on page 5 of the KWM Advice.

⁹ Page 29 of the [Policy Impact Analysis](#).

A failure to include transition plans in the Limited Immunity risks reducing the quality of disclosures and will undermine the policy intent underpinning the Limited Immunity.

Recommendation: Section 1705B(2) of the Draft Legislation should be amended, drawing on the current section 728(2) which deals with forward looking statements, to explicitly cover *“statements made about a future matter in order to comply with the substance or intent of the sustainability standards, including such statements made as part of a transition plan.”*

1.2 Limited Immunity to apply to relevant disclosures irrespective of location

The note to section 1705B (1) of the Draft Legislation provides that the Limited Immunity will not apply to any applicable disclosure made other than in a Sustainability Report, even if such a disclosure is also made in a Sustainability Report. No policy rationale is offered for such a narrow application.

Limiting the immunity to Sustainability Report disclosures only will have major unintended consequences.

First, the likely practical effect of this limitation will be for entities to avoid public disclosure on critical issues covered by the Limited Immunity outside of the (likely long and complex) Sustainability Report for fear of private litigation. Entities are likely to be advised that it would be prudent to avoid discussion of their transition plan, scope 3 emissions or climate resilience assessment in any other forum, such as at an investor briefing, public speaking engagements or even a simple statement on their website. Given the narrow application of the Limited Immunity, entities producing additional ESG-related reports may take the approach of limiting scope 3 and all forward-looking disclosures even where such disclosures replicate the Sustainability Report. This will be a counter-productive outcome – rather than encouraging fulsome, easily navigable disclosure on these critical issues, the provision is likely to lead to limited, less accessible reporting.

Second, we are particularly concerned about the impact of confining the Limited Immunity to the Sustainability Report will have on market disclosures in satisfaction of continuous disclosure obligations. A listed entity will be legally required to update a disclosure made in the Sustainability Report if, for example, there is a policy or economic change that materially impacts the corporation's transition plan and directors are of the view that such an amendment has a material impact on the price or value of that entity's securities. In these circumstances any communication setting out the updated transition plan should also be covered by the Limited Immunity.

Given the above, where an entity is required to update a disclosure in the Sustainability Report to maintain compliance with continuous disclosure obligation (e.g. a significant part of transition plan no longer being viable), we consider there are two potential solutions:

1. **Option 1:** Reissue the Sustainability Report together with the updated information. However, the issue with this approach is that liability could arise where information not the subject of continuous disclosure obligation has changed. This is because users expect that the reissued Sustainability Report is accurate as at the reissued publication date, such that any information that is superseded could be the subject of a misleading or deceptive conduct claim.
2. **Option 2 (preferred option):** Make the update via a Supplementary Sustainability Report that is also covered by the Limited Immunity, provided the updated information in the Supplementary Sustainability Report directly relates to a matter mandated in the (original) Sustainability Report. It should be made clear that reporting entities do not

have to reconsider the accuracy of any other material in the (original) Sustainability Report. Requiring this would undermine the policy intent of requiring only **annual** consideration and disclosure of climate-related matters.

Third, another unintended consequence of this drafting may be to stifle international and domestic efforts to encourage the linkage between climate disclosures and disclosures in the Financial Report¹⁰ and the Directors' Report, with entities concerned that any references to scenario analysis, transition plans or scope 3 emissions outside of the Sustainability Report may trigger liability. Indeed, ASIC's current guidance in [Regulatory Guide 247](#) to disclose climate information in the Operating and Financial Review (**OFR**) where climate risks could affect the entity's achievement of its financial performance or outcomes would be largely ignored, with entities concerned that following such guidance would expose them to private litigation risk. A similar concern arises in respect of climate disclosures that entities may wish to make in a prospectus or other fundraising document. We urge Treasury and ASIC to take a coordinated approach that ensures the policy intent is carried through the various parts of legislation and regulatory guidance relevant to climate related disclosure.

Fourth, tying the Limited Immunity to the location or medium of publication, rather than the content of the statement is problematic from a legal design and coherence perspective. This is because it will create a situation where the exact same representation made in two different mediums (one in the Sustainability Report and one made elsewhere, such as on the website, or an investor briefing) will have two different legal consequences.

Recommendation:

1. Disclosures covered by the Limited Immunity which are made in the Sustainability Report and are subsequently substantially reproduced (in whole or in part) elsewhere will also be subject to the Limited Immunity.
2. Limited Immunity should cover any legally required updates to material contained in the Sustainability Report - for example under continuous disclosure laws - by way of a Supplementary Sustainability Report.
3. For policy coherency and consistency, the Limited Immunity should extend to relevant climate-related matters also disclosed in the Directors' Report or Financial Report.

1.3 Criminal proceedings carve-out to exclude strict liability offences

The KWM Advice confirms that a breach of a strict liability offence can be criminally prosecuted.¹¹ Given the significant (punitive) consequences of a successful criminal prosecution, we consider the Limited Immunity should apply to criminal prosecutions of no-fault strict liability offences.

Recommendation: The criminal proceedings carveout should exclude the criminal prosecution of strict liability offences.

¹⁰ [IASB project](#) exploring whether and how companies' financial statements can provide better information on climate-related risks; AASB and AUSB April 2019 Joint Bulletin [Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB Practice Statement 2](#).

¹¹ See section 1.1 on page 1 and section 2.1 on pages 3 and 5 of the KWM Advice. See also the 15 new or modified strict liability offences created by the Draft Legislation set out at Annexure 2 of the KWM Advice.

1.4 Immunity should cover omissions in disclosures

KWM is of the view that as currently drafted, the Limited Immunity does not apply to omissions in disclosures.¹² This does not accord with the policy intent of the Limited Immunity and should be addressed.

Recommendation: The Limited Immunity should apply to both statements and omissions in disclosures.

1.5 Three-year immunity to apply to each reporting Group

As currently drafted, only Group 1 and Group 2 will have any benefit from the Limited Immunity. Further, because organisations are not required to make scope 3 disclosures in their first year of reporting, Group 2 will not have the benefit of the Limited Immunity as it relates to scope 3 disclosures. Group 3 entities will not have any recourse to the Limited Immunity.

We consider that the fixed approach creates an uneven policy outcome where Group 1 entities would be the only cohort subject to the full period of liability relief, whereas the smaller Group 2 and Group 3 companies will be provided with limited or no relief.

Recommendation: A three-year immunity period should apply to each Group.

2. Directors' Declaration

Section 296A(6)(b) of the Draft Legislation requires that directors declare that the Sustainability Report is in accordance with the Sustainability Standards and the Corporations Act. While we understand the policy rationale for requiring directors to attest to compliance with the Sustainability Standards, **such a declaration must be suitably qualified. In particular, it should reflect the uncertainty inherent in implementing such complex new reporting, and the lack of reasonable assurance that will be available in the market.**

Boards cannot be expected to provide unqualified sign-offs at a time when detailed disclosures are highly novel; no entities here or globally are currently producing a report which would satisfy the International Sustainability Standards Board (ISSB) standards; there are well-recognised skills shortages; and where reasonable assurance over all mandated disclosures is not required (and we understand is likely to be broadly unobtainable on a voluntary basis) from commencement and is not mandated until the financial year commencing 1 July 2030 (presumably due to capacity and skill constraints).

It is not clear why auditors have been given until 1 July 2030 to attest to whether all disclosures comply with the Sustainability Standards when directors are required to do so from commencement.

The provision of an unqualified sign-off in the absence of reasonable assurance creates significant liability risk, exposing directors to a broad range of causes of action (as set out in section 3.1 on pages 9 and 10 of the KWM Advice), most of which will be outside the scope of the Limited Immunity.

Of course, directors and entities must make an independent assessment and have robust due diligence processes in place to verify the accuracy and completeness of corporate reporting. However, in the absence of reasonable assurance requirements, directors may turn to their auditors for advice on how to obtain suitable evidence that the information and disclosures

¹² See section 2.1 on page 3 of the KWM Advice.

have been compiled in a rigorous and systematic way. Further, as noted in the KWM advice,¹³ this advice, and whether assurance has been obtained, will also be relevant to a director or entity seeking to establish that they had “reasonable grounds” for making forward-looking statements required by the Sustainability Standards.

We understand that the reference to “an explicit and unreserved statement of compliance” in section 296A(6)(a) only applies to entities voluntarily disclosing against the ISSB standards and will **not** apply to entities applying the Australian Sustainability Standards. However, the inclusion of this section is confusing and could be read to imply that such a statement is mandatory. In any event, for the reasons set out above, and reiterated in the KWM advice,¹⁴ the provision of an “explicit and unreserved statement of compliance” is not possible given the nascent nature of climate disclosures and in the absence of reasonable assurance. To avoid any confusion, we therefore suggest deleting this section.

Recommendation:

1. **Delete section 296A(6)(a).**
2. **Option 1: The Directors’ Declaration is confined only to disclosures over which reasonable assurance has been obtained.**¹⁵
3. **Option 2: The Directors Declaration is amended so that directors are required to declare that, in their opinion there are reasonable grounds to believe that the climate disclosures comply with the Sustainability Standards and the Corporations Act.**¹⁶ While the “reasonable grounds” standard may already be implied into the legislation, stating this explicitly will remove ambiguity. Such wording is also consistent with the language of the directors’ solvency declaration for the Financial Report, as set out in section 295(4)(c) of the Corporations Act. If this option is adopted, guidance from ASIC as to what constitutes “reasonable grounds” in the climate disclosure context would be necessary. Alternatively, directors could provide a qualified sign-off for sustainability reporting on a transitional interim, rather than permanent basis – for example, to align with the three-year Limited Immunity period.

The Explanatory Memorandum should also clearly recognise that Directors’ Declarations need to be read in a context where disclosures are nascent and novel, there is significant uncertainty regarding many climate disclosures (particularly forward-looking disclosures), and for the first six years, there is no reasonable assurance mandated for most disclosures.

3. Breadth of Group 3 reporting entities

The AICD continues to have concerns with the breadth of Group 3 entities. As submitted in response to Treasury’s June 2023 Climate Reporting Consultation, we consider that the compliance burden for these entities is not commensurate with their climate impact or the expected benefit of climate reporting for their users (whose information needs are different to the ‘users’ for which the ISSB standards were drafted).

¹³ Section 2.4(d) on page 8 of the KWM Advice: “While directors must make an independent assessment of the matters the subject of the declaration, they do derive assistance from external assurance or audit **especially in relation to matters requiring reasonable grounds.**”

¹⁴ See section 2.4(c) of page 7 of the KWM Advice.

¹⁵ We note that KWM has suggested similar amendments to s 296A(6)(b) – see section 1.2 on page 2 and section 2.4(d) on pages 7 and 8 of the KWM Advice.

¹⁶ We note that KWM has suggested similar amendments to s 296A(6)(b) – see section 1.2 on page 2 and section 2.4(d) on pages 7 and 8 of the KWM Advice.

This is particularly the case where such entities, if caught, will still be required to report against the full gamut of climate disclosures and are not subject to a simplified reporting regime. For instance, it is unclear why a relatively small private company or Not-for-Profit (NFP) must measure and disclose scope 3 emissions.

We do not consider that the new materiality threshold proposed for Group 3 entities will relieve the compliance burden. We say this for four reasons.

First, we are concerned that its introduction will complicate how directors, report preparers and users understand materiality. While we understand that it is not the intention to remove the application of materiality to Group 1 and 2 entities, the Draft Legislation fails to make this clear. In feedback to the AICD, we note that many in the market have construed the legislation as deeming materiality of climate-related matters for Groups 1 and 2. Such an interpretation is supported by the Treasury [June 2023 Consultation Paper](#) which states that:

“relying on judgements about materiality would not provide the level of certainty and clarity to all businesses about their obligations that comes with clear quantitative thresholds”¹⁷, that “climate-related risks, either physical or transition, will be material for the vast majority of large companies in the near term, if they are not already”¹⁸ and “it is increasingly understood that climate-related risks (either transition or physical risks) would be material for most businesses.”¹⁹

We note that the ASX has called for more information to justify the Treasury statement that climate related risks would be material for most businesses.²⁰ We would concur with the exchange that an assessment of materiality is best left to the entity to consider based on its specific circumstances and facts.

Second, it is difficult to reconcile how materiality under the Sustainability Standards, which provides that every disclosure is subject to an assessment (that is, an entity must ask, “will this specific disclosure produce information that is material to my existing and potential investors, lenders and other creditors?”), will sit alongside a legislative regime which mandates specific disclosures.

Proceeding on the basis that the need for a materiality assessment for each and every disclosure remains intact, per the Sustainability Standards, it is unclear how the new Group 3 materiality threshold is adding anything new.

We recommend that the Draft Legislation carefully consider how materiality will operate in practice. It is imperative that all relevant reporting entities are clear on their obligations, with any drafting and application ambiguity increasing the compliance burden and likely to prompt legal risks.

Third, we are concerned about the liability exposure to Group 3 entities arising out of any assessment and statement that climate risk or opportunity is not material. The content and form of such a declaration is not clear – neither is it clear whether directors are required to sign-off on such a statement and the form and content of such a declaration (if required). The KWM Advice notes that a Directors’ Declaration would be required,²¹ and that directors of Group 3

¹⁷ Treasury’s June 2023 Consultation Paper at page 7.

¹⁸ Ibid.

¹⁹ Ibid at page 12.

²⁰ See page 4 of the [ASX submission](#) to the June Consultation.

²¹ See section 4.2 on page 12 of the KWM Advice.

entities could be subject to liability if that statement is incorrect or misleading.²²

Moreover, statements that climate risk or opportunity is not material, made under section 296B(1) by Group 3 entities will not fall within the Limited Immunity, such that any such statements could be subject to private litigation. We do not consider it appropriate to subject Group 3 entities, comprised of NFP and other smaller and less resourced entities, to face such liability risk, particularly given their likely limited impact on national emissions.

Fourth, given Treasury's Policy Impact Analysis estimates that only 5% of Group 3 will have material climate risk or opportunity²³, it is unclear why there is a need to require Group 3 entities to report at all. Whilst presumed the new materiality threshold is intended to exempt a proportion of Group 3 entities from reporting, these 'exempted' entities still need to undertake the process of considering whether climate-related risk or opportunity is material. This will require undertaking sufficient due diligence to ensure that any statement to this effect is made on reasonable grounds (noting that the Limited Immunity does not apply). We are concerned that this is a significant burden which, for the majority of Group 3 entities, is unjustified.

In our view, the relevant asset and revenue thresholds should be lifted substantially, or if deemed unacceptable from a policy perspective, a simplified reporting regime be tailored for this cohort (we understand the European Union and Malaysia are taking this approach).

Recommendation:

1. Increase the revenue threshold for Group 3 entities from \$50 million to \$100 million and gross assets threshold from \$25m to \$50m and/or Group 3 entities to report under a simplified climate reporting standard (similar to the simplified financial accounting standards that apply to Tier 2 entities.)²⁴
2. Whichever reporting threshold is ultimately decided upon, the question of the breadth and detail of reporting for Group 3 entities should be covered as part of the statutory review.
3. To reduce market confusion, that the Draft Legislation and/or Explanatory Memorandum clarify that all disclosures undertaken by Group 1, 2 and 3 entities are subject to a materiality assessment (i.e. that each disclosure is subject to a materiality assessment).

4. Not-for-Profit entities

We are concerned that the regime captures NFP entities not registered with the ACNC despite the fact that the ISSB standards were drafted for application to for-profit entities and the needs of their investors.

No policy rationale has been offered in the Policy Statement or other consultation documents for why NFPs are not afforded the same exemption as that offered to charities. The fact that NFPs are reporting entities for the purposes of Chapter 2M of the Corporations Act should not, in our view, be justification for their inclusion in the regime.

We are also not aware of any significant consultation with the NFP sector regarding the regime's potential application. In our view, any coverage of NFPs must be preceded by detailed consultation with the sector and a comprehensive cost-benefit analysis.

²² See section 4.2 on page 12 of the KWM Advice. Also see the various causes of action arising out of a misleading or deceptive Directors' Declarations at section 3.1 of pages 9 and 10 of the KWM Advice.

²³ See page 26 of the [Policy Impact Analysis](#).

²⁴ See [AASB 1060 General Purpose Financial Statements - Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 entities](#).

In our experience NFPs have, to date, had limited engagement with climate reporting, and compliance with the proposed regime will require significant upskilling and external support.

Recommendation: NFPs should be omitted from the mandatory climate reporting regime, with their inclusion to be considered as part of the statutory review.

5. Assurance timelines

The AICD is concerned that there is no clear timetable for mandatory reasonable assurance over disclosures required by the proposed Sustainability Standards. Rather, the timetable is being left for future decision by the Auditing and Assurance Standards Board (**AUASB**), within a target date of July 2030. This creates significant uncertainty for business and means that the market will likely be operating in an environment of subdued confidence in the accuracy of reporting (due to the lack of reasonable assurance over most disclosures) for many years.

Currently only limited assurance of select aspects of the reporting regime (Scope 1 and 2 emissions for Group 1 entities from FY25) is required from the outset, with reasonable assurance over all disclosures not anticipated before FY31. A clearer and accelerated pathway is required to allow entities and their auditors to plan effectively.

We also reiterate our comments from section 2 (Directors' Declaration) above that it appears somewhat incongruous that assurance providers are not required to make declarations as to compliance with all sustainability standards until 1 July 2030, whilst directors are required to do so (with only the benefit of limited assurance confined to scope 1 and 2 emissions disclosures) from 1 July 2024.

Finally, as noted in the KWM advice,²⁵ obtaining external assurance is likely to have bearing for a director or entity seeking to establish that they had "reasonable grounds" for making the kind of forward-looking statements required by the Sustainability Standards.

Recommendation: To support market confidence in the accuracy of reporting, and mitigate liability risks for entities and directors, that reasonable assurance over all mandated disclosures be required well in advance of July 2030, and that the final assurance timeline be outlined as quickly as practicable.

6. Commencement date

Whilst the AICD has always recognised the pressing need to introduce mandatory reporting, given legislation has yet to be introduced into Parliament and there some key issues to be resolved in the Exposure Draft, a commencement date of 1 July 2024 is likely to be unfeasible.

Adjusting the commencement date may be needed to allow for the finalisation of the Sustainability Standards and Sustainability Audit Standards, and to effectively resolve the complex and nuanced drafting issues which stakeholders, including the AICD, have raised. Given the International Auditing and Assurance Standards Board (**IAASB**) is not due to finalise its foundational International Sustainability Assurance Standard (**ISSA 5000**) until September 2024, it is difficult to understand how the AUASB is expected to comply with the requirement in section 1705D(2) to issue its first Australian sustainability auditing standard by 1 July 2024.

²⁵ Section 2.4(d) on page 8 of the KWM Advice.

If the parliamentary and parallel standards making processes prove to be protracted, there is a strong case to commence the regime from a later date. Although such an outcome would not be ideal, reporting entities need all key elements of this new regime to be finalised a reasonable time in advance of new legal obligations commencing.

We note that the majority of Australian entities have a 1 July year-start. In feedback to the AICD directors have noted that a commencement date aligned to this cycle would be preferable.

As we previously stated in our submission to Treasury's Second Climate Reporting Consultation, the proposals require material changes to existing law, including the already complex Corporations Act (the complexity of which has been the subject of significant criticism in the Australian Law Reform Commission (**ALRC**)'s recent [Final Report on the Inquiry into simplification of the legislative framework for corporations and financial services regulation](#) (ALRC January 2024 Report)). These changes need to be carefully managed to avoid unintended negative consequences. We are mindful of the comments of the ALRC January 2024 Report which provide that:

"short timeframes for new legislative initiatives and insufficient legislative maintenance may contribute to the complexity of the existing legislative framework"²⁶ and that "the complexity of the existing framework often means that consultation periods prove insufficient. Stakeholders must take more time and expend more resources to understand how proposed reforms would operate within the existing legislative framework. This can make it difficult to understand the various interconnections between exposure draft legislation and the existing legislation contained in the Act or one of the hundreds of regulations and ASIC legislative instruments."²⁷

The AICD agrees with the ALRC's observation and urges the Draft Legislation be introduced into Parliament only once there is clarity on the policy intent in a number of key areas, and that the relevant legislative drafting aligns accordingly.

Recommendation: Consideration to be given to a commencement date that aligns with the finalisation of the relevant standards and reporting cycles.

7. Timing of disclosures

We are pleased to see that the Draft Legislation confirms that disclosures are only required on an annual basis.

However, we have received feedback that directors (including Chairs of Audit Committees) are concerned about the compliance burden of undertaking climate disclosures at the same time as financial reporting disclosures.

The compliance burden will be particularly significant in the first few reporting years, with entities needing to invest time and resources in order to uplift their reporting practices to undertake ISSB-aligned reporting.

Research on climate disclosures shows that current practice needs to significantly develop and mature to reach the detail and granularity required under ISSB-based standards. AASB and AUASB research found that there were still more than 50% of listed companies which did not

²⁶ ALRC January 2024 Report at paragraph 2.45 at page 64.

²⁷ Ibid at paragraph 2.49 at page 65.

make any climate-related disclosures in their 2022 Annual Reports,²⁸ with only 3.4% of listed entities reporting under all four Taskforce for Climate-related Financial Disclosures (TCFD) pillars.²⁹

More complex disclosures required under the Sustainability Standards, such as internal carbon prices and remuneration, remain challenging and relatively limited, with only 20.5% of the ASX200 making internal carbon price disclosures,³⁰ while less than half of the ASX100 are making remuneration disclosures.³¹

There is concern that the additional resources needed to achieve the significant uplift in climate reporting will delay the financial reports. This is a greater risk in the first year of reporting, when the market is adjusting to the new climate disclosure regime and has not yet developed the required skills and capabilities.

To address this issue, the ISSB's General Sustainability Standard, IFRS S1, allows entities, in their first reporting year, to issue their climate disclosures within a maximum of nine months following the issue of their financial statements.³² While such an extension of time may be deemed excessive in the Australian context, we urge policy-makers to build in some flexibility in timing to encourage reports to be produced of a high quality, and not rushed to meet an ambitious implementation timetable.

We also note that, as currently drafted, a reporting entity may not know whether it meets the thresholds for mandatory reporting until after the end of the relevant financial year. To address this issue, we recommend that the mandatory reporting obligation should only apply if the entity meets the reporting thresholds in both the financial year prior to the relevant financial year, and in the relevant financial year (see also section 2.4(g) on page 9 of the KWM Advice).

Recommendation:

1. Allow entities, in their first reporting year, to submit their Sustainability Report a maximum of two months following the issue of the Financial and Directors' Reports, provided that the Sustainability Report is issued at least three weeks before the AGM.
2. Provide that ASIC may use its powers under sections 340 and 341 of the Corporations Act to approve an extension of time to prepare, lodge and/or distribute a Sustainability Report (as is the case for Financial Reports). It may be helpful for [ASIC Regulatory Guide 43](#) to be updated to reflect this.
3. The mandatory reporting obligation should only apply if the entity meets the reporting thresholds in both the financial year prior to the relevant financial year, and in the relevant financial year.

8. Offences

The Draft Legislation creates a significant number of new offences,³³ including two fault-based offences, being (1) the failure to keep sustainability records for the relevant time period (7 years); and (2) an auditor's failure to conduct a Sustainability Report audit in accordance with the auditing standards (**Offences**). Both Offences carry a two-year imprisonment sentence.

²⁸ AASB and AUASB (December 2023), [Trends in climate-related disclosures and assurance in the Annual Reports of ASX-listed entities](#) at page 11.

²⁹ Ibid at page 9.

³⁰ ACSI (August 2023), [Promises, Pathways & Performance: Climate change disclosure in the ASX200](#) at page 14.

³¹ AASB and AUASB (December 2023), [Trends in climate-related disclosures and assurance in the Annual Reports of ASX-listed entities](#) at page 18.

³² Paragraph E4 of Appendix E of IFRS1.

³³ See Annexure 2 of the KWM Advice.

The exact fault element for the Offences is not specified (unlike the 15 new strict liability offences³⁴ which specifically refer to section 6.1 of the Criminal Code). Where a fault threshold is not specified by the legislation, default fault thresholds from section 5.6 of the Criminal Code apply. Our interpretation is that both Offences have a physical element of 'conduct'. As such, both the default and appropriate fault element for these offences is intention.

The importing of criminal law elements into civil legislation has been criticised by the ALRC,³⁵ with the ALRC recommending that "*offences should be capable of being interpreted and understood on their face without extensive and frequent regard to the Criminal Code.*"³⁶ As such, we consider that the Draft Legislation should explicitly set out the required fault elements.

Recommendation: The Draft Legislation should set out that the fault element for the Offences is intention.

9. Ministerial powers

The Ministerial powers contained in sections 292A(4) and (8), sections 296A(3), (4)(b)(iii) and (5), and section 296C(2) give the Minister broad unfettered discretion on key and contentious areas of policy. Notably, the discretion gives the Minister powers to amend the thresholds for reporting (such that entities previously not captured by mandatory reporting may subsequently be captured), and to require entities to report on topics "relating to a matter concerning environmental sustainability."

The latter power is significantly beyond the scope of the proposed policy and has not been subject to any consultation to date. It is not clear why the Minister needs such broad and unfettered powers on key matters of scope of coverage and the content of reporting, particularly given the complexity of the reforms.

Such broad discretion is also contrary to the standard wording suggested in paragraph 24 of the [Office of Parliamentary Counsel \(OPC\)'s Drafting Direction No 3.8](#)³⁷ and the ALRC's Draft Guidance on Delegated Legislation. Notably, the ALRC stated that:

*"unconstrained or open-ended delegations that effectively enable delegates to determine matters of significant policy risk undermining the law's predictability and the federal separation of powers"*³⁸ and that *"as a general rule, therefore, matters of significant policy and principle should be contained in an Act. Generally, delegated legislation should deal with minor or technical matters that relate to implementing the objectives and intent of the Act, and the Act's operation."*³⁹

For the reasons stated above, the matters delegated to the Minister could extend beyond "minor or technical matters" into matters of significant policy and principle that are not appropriate for delegated legislation.

³⁴ See section 1.1 of page 1 of the KWM Advice.

³⁵ The ALRC January 2024 Report states that "*The vast majority of Corporations Act offences do not specify a fault element, and are therefore subject to s 5.6 of the Criminal Code. Evidently, these offences were not drafted with the Criminal Code in mind, such that it is not always clear whether a physical element consists of conduct, a circumstance, or a result. Stakeholders have told the ALRC that identifying the relevant fault element for an offence in the Corporations Act can be challenging*" (page 215).

³⁶ At page 215.

³⁷ Paragraph 3.8 provides that the standard form of Ministerial or other delegation suitable for Delegation Legislation is to confer powers to prescribe matters required or permitted by the legislation or matters that are necessary or convenient to be prescribed for carrying out or giving effect to the legislation.

³⁸ See page 293 of the ALRC January 2024 Report (Appendix D – Draft Guidance on Delegated legislation).

³⁹ Page 294, *Ibid.*

If there is an intention to make material amendments to mandated sustainability reporting, such changes should be contained in *primary* legislation and subject to the usual Parliamentary process.

Recommendation: Remove the broad unfettered ministerial powers and replace with the standard wording set out in paragraph 24 of [the OPC's Drafting Direction No 3.8](#), having regard to the ALRC's Draft Guidance on Delegated Legislation (Appendix D of the [ALRC January 2024 Report](#)).

10. Technical drafting issues

There are a number of other technical drafting issues which we set out in **Annexure C**

Annexure A: Summary of key recommendations

1. Limited Immunity

- a. Section 1705B(2) of the Draft Legislation should be amended, drawing on the current section 728(2) which deals with forward looking statements, to explicitly cover *“statements made about a future matter in order to comply with the substance or intent of the sustainability standards, including such statements made as part of a transition plan.”*
- b. Disclosures covered by the Limited Immunity which are made in the Sustainability Report and are subsequently substantially reproduced (in whole or in part) elsewhere should also be subject to the Limited Immunity.
- c. Limited Immunity should cover any legally required updates to material contained in the Sustainability Report - for example under continuous disclosure laws - by way of a Supplementary Sustainability Report. It should be made clear that reporting entities do not have to reconsider the accuracy of any other material in the (original) Sustainability Report.
- d. The Limited Immunity should extend to relevant climate-related matters also disclosed in the Directors' Report or Financial Report.
- e. The criminal proceedings carveout should exclude the criminal prosecution of strict liability offences.
- f. The Limited Immunity should apply to both statements and omissions in disclosures.
- g. A three-year immunity period should apply to each Group.

2. Directors' Declaration

- a. Delete section 296A(6)(a).
- b. Two options for modification of the Directors' Declaration:
 - i. **Option 1:** The Directors' Declaration should be confined only to disclosures over which reasonable assurance has been obtained.
 - ii. **Option 2:** The Directors Declaration should be amended so that directors are required to declare that ***“in their opinion there are reasonable grounds to believe that”*** the climate disclosures comply with the Sustainability Standards and the Corporations Act (this wording is consistent with the directors' solvency declaration in section 295(4)(c) of the Corporations Act.) If this option is adopted, guidance from ASIC as to what constitutes “reasonable grounds” in the climate disclosure context would be necessary. Alternatively, directors could provide this qualified sign-off for sustainability reporting on a transitional interim, rather than permanent basis – for example, to align with the three-year Limited Immunity period.
- c. The Explanatory Memorandum should also clearly recognise that Directors' Declarations need to be read in a context where disclosures are nascent and novel, there is significant uncertainty regarding many climate disclosures (particularly forward-looking disclosures), and for the first six years, there is no reasonable assurance mandated for most disclosures.

3. Group 3 and Not-for-Profits (NFPs)

- a. Increase the revenue threshold for Group 3 entities from \$50 million to \$100 million and gross assets threshold from \$25m to \$50m and/or Group 3 entities to report under a simplified climate reporting standard (similar to the simplified financial accounting standards that apply to Tier 2 entities.)
- b. NFPs should be omitted from the mandatory climate reporting regime, with their inclusion to be considered as part of the statutory review.
- c. Whichever reporting threshold is ultimately decided upon, the question of the breadth and detail of reporting for Group 3 entities should be covered as part of the statutory review.
- d. The Draft Legislation and/or Explanatory Memorandum should clarify that all disclosures undertaken by Group 1, 2 and 3 entities are subject to a materiality assessment (i.e. that each disclosure is subject to a materiality assessment).

4. Assurance

- a. Reasonable assurance over all mandated disclosures should be required well in advance of July 2030, and that the final assurance timeline be outlined as quickly as practicable.

5. Commencement date

- a. Consideration to be given to a commencement date that aligns with the finalisation of the relevant standards and reporting cycles.

6. Timing of disclosures

- a. Allow entities, in their first reporting year, to submit their Sustainability Report a maximum of two months following the issue of the Financial and Directors' Reports, provided that the Sustainability Report is issued at least three weeks before the AGM.
- b. Provide that ASIC may use its powers under sections 340 and 341 of the Corporations Act to approve an extension of time to prepare, lodge and/or distribute a Sustainability Report (as is the case for Financial Reports). It may be helpful for ASIC Regulatory Guide 43 to be updated to reflect this.
- c. The mandatory reporting obligation should only apply if the entity meets the reporting thresholds in both the financial year prior to the relevant financial year, and in the relevant financial year.

7. Offences

- a. The Draft Legislation should set out that the fault element for the two new fault-based Offences is intention.

8. Ministerial powers

- a. Remove the broad unfettered ministerial powers and replace with the standard wording set out in paragraph 24 of the [OPC's Drafting Direction No 3.8](#), having regard to the ALRC's Draft Guidance on Delegated Legislation (Appendix D of the [ALRC January 2024 Report](#)).

TO Christian Gergis, Laura Bacon, Anna Gudkov
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CONFIDENTIAL

8 FEBRUARY 2024

ADVICE: DRAFT SUSTAINABILITY REPORTING LEGISLATION

This memorandum sets out our advice in response to the questions that AICD has asked in relation to the exposure draft of the Treasury Laws Amendment Bill 2024: Climate-related financial disclosure (the **Draft Legislation**).

The questions for advice are in four areas:

- Modified liability / limited immunity;
- The directors' declaration;
- Materiality; and
- Other.

We have set out each question and our detailed advice below, following the Summary.

References to Parts and sections of legislation are references to the Corporations Act unless otherwise stated.

1 Summary of Advice

1.1 Modified liability / Limited immunity

The limited immunity provisions are extremely narrow in scope - narrower than any proposal in prior consultation, covering only statements relating to Scope 3 emissions and scenario analysis. The scope should be expanded to include immunity for transition plans and other forward-looking statements.

Other issues include:

- The immunity period is currently applicable only to sustainability reports for financial years commencing between 1 July 2024 and 30 June 2027, which provides limited immunity for three reports for very large enterprises in Group 1 but no immunity for Group 3 medium-sized entities. Immunity should apply to the first three reports of each reporting entity;
- No immunity from criminal proceedings, which includes strict liability offences. There are 15 new or modified strict liability offences in the Draft Legislation. Immunity should apply to strict liability offences.
- No immunity from omissions: the immunity should apply to both statements and omissions concerning matters within the scope.
- No immunity from civil proceedings by ASIC for fault-based breaches. This will include actions against directors for civil penalties and disqualification under s180(1) and s674A(3). This outcome effectively undermines almost all the benefits of the proposed immunity that



may otherwise have been available to directors. Civil actions by ASIC during the immunity period should be limited to those in which the only remedies sought are declarations or injunctions.

1.2 The directors' declaration

The proposed declaration in s296A(6)(a) concerning compliance with international standards has nothing to do with compliance with mandatory sustainability reporting under the Draft Legislation. We recommend that it be deleted.

The proposed declaration in s296A(6)(b) as to whether, in the directors' opinion, the [contents of the sustainability report] are in compliance with the Act is problematic due to the uncertain nature of many of the reporting requirements, and the absence of full assurance for all reports for financial years commencing prior to 1 July 2030. The declaration should be qualified, at least until sustainability reports are fully audited, so that it is a declaration that in the directors' opinion "there are reasonable grounds to believe that" the [contents of the sustainability report] are in compliance with the Act.

Alternatively, directors' declarations should only be required for reports that are fully audited.

1.3 Materiality

Group 1 and 2 reporting entities will be required to make disclosures irrespective of materiality assessments, unless particular disclosures required by sustainability standards include a materiality qualifier.

Group 3 reporting entities that conclude that they have no material climate risks or opportunities for a financial year under s296B(1) must still make a statement accordingly in a sustainability report which includes a directors' declaration. That statement and the declaration will not have any immunity, even if the proposed limited immunity applied to Group 3 entities.

1.4 Other matters

Timing for lodgement of sustainability reports: clarification is required to permit reporting entities to provide sustainability reports separately from other financial reporting requirements, provided that the sustainability report is provided at least 3 weeks prior to the entity's annual general meeting.

Scope 3 reporting: Under the guidance in Appendix B for draft standard ASRS2, paragraph B39.1, reporting entities may report scope 3 emissions for the financial year preceding the financial year for which the rest of the report is prepared, in certain circumstances.

2 Modified Liability / Limited immunity

2.1 Question:

What are the liability implications for directors arising from the immunity provisions in the Draft Legislation? (In particular, the exclusion of transition planning and other forward-looking disclosures from the regulator-only transitional period). As part of your analysis, if you could please:

- consider where climate litigation has arisen from in the past (our understanding is the vast majority have come from transition plan representations, such as net zero statements - see Santos litigation as an example)
- compare liability risks arising from scenario analysis representations v. transition plan representations, and opine as to which one has a greater liability risk (also worth noting the linkage between the two)



- In relation to the criminal proceeding carve-out to the immunity - your concerns as to strict liability offences and consideration as to whether private litigants would have standing to bring private criminal proceedings in Australia (noting your observation this has occurred internationally).

Answer:

The immunity provisions as currently drafted are extremely limited and in any event will not protect directors against criminal prosecutions or fault-based civil actions by ASIC. The provisions are narrower than the immunity proposals in Treasury's prior consultation, and are inconsistent with references in the policy impact analysis.

Coverage of the immunity - content

The limited immunity only applies to private civil actions in relation to statements about scope 3 emissions and scenario analysis in sustainability reports for financial years commencing in the period from and including 1 July 2024 to 30 June 2027. The immunity does not apply to transition plans or other forward-looking statements.

There is no immunity in relation to sustainability reports, including disclosures about scope 3 emissions and scenario analysis, from:

- actions concerning statements about scope 3 emissions and scenario analysis that are published anywhere other than in a sustainability report¹ (which means that a statement that is "immune" when published in a sustainability report will be actionable if the same statement is published elsewhere, for example in an annual report, a fundraising document, a document required by another regulator or marketing material);
- actions for omissions in disclosures about scope 3 emissions or scenario analysis;
- criminal prosecutions, including prosecutions for strict liability offences relating to sustainability reports;
- civil actions by ASIC for fault-based contraventions (which in our view includes actions under s180(1) involving negligence, actions under s674A(3) and actions under any fault-based misleading conduct provision of the Corporations Act such as section 1041E or section 1308(1)).
- civil actions by ASIC in which the remedies sought by ASIC are limited to declarations and injunctions (which could include no-fault actions for misleading statements or omissions under s1041H including statements or omissions in relation to scope 3 emissions or scenario analysis).

As noted above, there is no immunity for statements or omissions in transition plans or other forward-looking statements.

The narrow scope of the proposed immunity in this regard is inconsistent with the broader scope proposed in prior consultation, and also with the broader scope of the policy intent of the limited immunity as described in the policy impact statement. The immunity in the Draft Legislation should be amended so that it is consistent with the published policy basis of the legislation. Once the legislation is passed, any inconsistency between the legislation and the policy documents will not be able to alter the meaning of clear words in the legislation.

¹ See the note to Section 1705B(1)



Period of the immunity

In practice, the immunity will apply to the first three annual sustainability reports for very large entities and NGERs reporters in the first cohort, irrespective of the date on which the financial year commences. Those entities are required to first report for financial years commencing on or after 1 July 2024. The immunity will also apply to the first report for large entities, large asset managers and NGERs reporters in the second cohort, required to first report for financial years commencing on or after 1 July 2026, again irrespective of the date on which the financial year commences. The immunity will not apply to any reports of medium-sized entities in the third cohort, required to first report for financial years commencing on or after 1 July 2027.

Immunity limits: Liability of directors

The only protection provided to directors by the draft immunity provisions is immunity from civil suit by private plaintiffs in relation to inaccurate or misleading statements in Scope 3 disclosures and scenario analysis.

Directors will be exposed to liability in relation to sustainability reports for the following:

- A false or misleading directors' declaration given under section 296A(6), for which liability may arise under several provisions of the Corporations Act - see the answer to Question 2.1 below.
- A failure to take all reasonable steps to comply with, or to secure compliance with, the new provisions in Part 2M.2 and 2M.3 (including all new or amended provisions from section 286A to section 323C) under section 344(1). The obligation under s344(1) cannot be delegated. A breach of s344(1) is a civil penalty provision and a dishonest breach is an offence.
- A breach of the duty of care and diligence under s180(1) of the Corporations Act (and of the common law duty of care) for failing to take reasonable steps when put on notice to ensure that, amongst other things:
 - The entity complies with its sustainability reporting requirements;
 - All information in the entity's sustainability reports is accurate and not misleading, and that estimates are clearly identified;
 - All forward-looking statements in the entity's sustainability reports (including transition plans, scenario analysis and other forward-looking statements) have been made on reasonable grounds². If a forward-looking statement does not have reasonable grounds, an explanation of the level of uncertainty, qualifications or disclaimers is not sufficient to prevent it from being misleading³;
 - Any breach by the entity of the sustainability reporting requirements is rectified promptly; and
 - The entity complies with its continuous disclosure requirements relating to disclosures in sustainability reports.

(Note that in our view, ASIC can take action against directors for a breach of s180(1) relating to statements concerning scope 3 emissions and scenario planning even if the limited immunity applies to those statements.)

² See, as applicable, s728 and s769C of the Corporations Act; s12BB of the ASIC Act; s4 of the Australian Consumer Law.

³ *ASC v McLeod* [2000] WASCA 101 at [32]-[39] (overturned by the High Court on unrelated grounds) and *Digi-Tech (Australia) Ltd v Brand and Others* [2004] NSWCA 58 at [97] and [117]-[121].



- A breach of the entity's continuous disclosure obligations under s674A(2) if the director is involved in the contravention (which requires knowledge of the circumstances) unless the director has taken reasonable steps to ensure that the entity complied with its obligations and reasonably believed that the entity was complying (s674A(3) and (4)).
- As an accessory to a breach by the entity in relation to a sustainability report⁴. Accessorial liability requires "knowing involvement" in the breach by the director.

Likely causes of action: Greenwashing

The most likely cause of action in relation to sustainability reports (including an action by ASIC during the limited immunity period) is an action for misleading statements or omissions in the nature of greenwashing, particularly inaccurate, exaggerated or unsupported claims about greenhouse gas emissions. These could be statements about emissions in the reporting period, reliance on carbon off-sets, forward-looking statements about emissions in future periods, including emissions under a plan to transition to net zero that cannot reasonably be achieved, or statements or omissions in a scenario analysis including forward-looking statements about emissions and financial impacts which lack a reasonable basis.⁵

The majority of greenwashing actions in Australia to date have involved claims concerning "green" products, including investment products, energy offerings and consumer products. More relevantly, claims have also been made in relation to statements about current period net emissions and expected emissions outcomes in transition plans. We expect that the incidence of claims concerning those matters will increase following the commencement of the Draft Legislation.

We are not aware of any greenwashing claims in Australia concerning statements in scenario analysis but note that the terms of the settlement in *McVeigh v Rest*, an action alleging failure to provide adequate information on climate change risks, included a commitment by the Rest superannuation fund to undertake scenario analysis.

No immunity from criminal prosecutions

As noted above, there is no immunity under the Draft Legislation for criminal prosecutions, including prosecutions for strict liability offences relating to sustainability reports. It is difficult to understand why a no-fault strict liability offence is not immune, whereas no-fault civil actions can only be taken by ASIC and then only if remedies are limited to declarations and injunctions.

Whether private criminal prosecutions can be instituted for offences under the Corporations Act is unclear. In our view, the better position is that section 1315 operates as a specific provision that excludes private criminal prosecutions for offences under the Corporations Act, but the provisions of section 1338C would arguably permit private criminal prosecutions to be instituted under State laws concerning criminal procedure⁶.

2.2 Question:

What are the most likely causes of action relating to the alleged contravention of a provision of a law of the Commonwealth that has a fault element? (e.g. s 1041E, directors duties, etc) (These could be set out in a table or annexure)

⁴ See s79 of the Corporations Act

⁵ See ASIC INFO Sheet 271

⁶ For example, under s49 of the NSW Criminal Procedure Act with the consent of the Registrar of the Local Court.



Answer:

Annexure 1 contains a list of the most likely causes of action against reporting entities and their directors.

2.3 Question:

What new offences apply under the Draft Legislation? Which of these are strict liability? (These could be set out in a table or annexure)

Answer:

Annexure 2 contains a list of offences created or amended by the Draft Legislation.

2.4 Question:

What amendments would you suggest to address liability concerns for directors?

Answer:

We would suggest the following amendments to address liability concerns for directors:

- (a) *Limited immunity scope and exclusions:* Section 1705B sets out the terms of a limited immunity from suit, that is inconsistent in substantive respects with the proposals in the previous consultation documents and Treasury's policy impact analysis published with the Draft Legislation (see page 29).

We understood that the purpose of the immunity is to limit the circumstances in which reporting entities could be sued in relation to certain statements required by the Draft Legislation and the sustainability standards that are inherently uncertain: scope 3 emissions and forward-looking statements.

We suggest that section 1705B(1)(a) be amended by inserting the word "first" before the words "made in a sustainability report", so that statements that are immune from suit when made in a sustainability report (which should include scope 3 emissions and all forward-looking disclosures including transition plans) will not be actionable when subsequently reproduced in other documents. It is non-sensical to expect that statements about, for example, scope 3 emissions will not be reproduced in other documents. If this change is made the note to section 1705B(1) should be amended accordingly.

Listed companies may be required to update or otherwise amend statements in sustainability reports under their continuous disclosure obligations. As presently drafted, the immunity would not apply to that supplementary disclosure. We suggest that reporting entities be permitted to prepare a supplementary sustainability report for this purpose, and that the immunity provisions should apply to the relevant content of a supplementary sustainability report.

We suggest that s1705B(1)(b) be amended so that the limited immunity regime applies to:

- actions for disclosures (including statements and omissions) relating to Scope 3 emissions, scenario analysis and transition planning (in accordance with the proposal set out in Treasury's second-round consultation) and all other forward-looking statements first published in a sustainability reports or supplementary sustainability



report during the immunity period, being the apparent basis of the policy impact statement.; and

- actions relating to any statement that an entity is directed by ASIC to publish under s1705C.

Section 1705B(2) provides that the limited immunity regime does not apply to criminal offences. As noted above, this includes offences of strict liability, of which there are several in the Draft Legislation. We suggest that the reference to “criminal offence” in this section should not include strict liability offences.

S1705B(3)(c) permits ASIC to take civil action against reporting entities if the action concerns a provision of a Commonwealth law with a fault-based element, or if the only remedy sought is an injunction or declaration. In this context, fault can include negligence, and would arguably allow ASIC to commence civil actions relating to Scope 3 emissions and scenario analysis (as presently drafted) seeking civil penalties against reporting entities and their directors for a breach, for example, of continuous disclosure obligations and the directors’ duty of care and diligence. That would be totally inconsistent with the intent of the limited immunity proposal. We suggest that the scope of civil actions that ASIC will be permitted to commence during the immunity period should be limited to those in which the only remedy is an injunction or declaration (that is, delete all of s1705B(3)(c) except paragraph (c)(ii)).

- (b) *Limited immunity period*: The proposed immunity period will capture the first three sustainability reports of very large entities and some NGERs reporters, and the first report of large entities, large asset owners and the remaining NGERs reporters. However, there will be no immunity for medium-sized reporting entities who arguably would benefit most from some level of immunity. We suggest that an equitable application of the immunity period would apply the limited immunity to the first three sustainability reports of each reporting entity. For medium-sized entities, this would mean that the immunity would apply until their reports are required to be audited (as the timing of audit requirements is currently proposed).
- (c) *Directors’ declaration (international)*: The directors’ declaration described in section 296A(6)(a) refers to “an unreserved statement of compliance with international sustainability reporting standards” (a term which is not defined). Such a statement would have nothing to do with compliance with the requirements of the Act, and as the section is presently drafted, we think it would be impossible to give such a statement in any event. For these reasons, we suggest that this requirement be deleted.
- (d) *Directors’ declaration (compliance with the Act)*: Sub-section 296A(6)(b) requires directors to declare whether in their opinion the contents of the sustainability report “are in accordance with this Act”.

In view of the inherent uncertainty of the matters required to be included in a sustainability report, and the deferral of any audit requirement, we suggest that the form of the declaration required by section 296A(6)(b) be amended to read:

“whether, in the directors’ opinion, there are reasonable grounds to believe that the climate statements, the statements mentioned in paragraph (1)(c), and the notes to the climate statements are in accordance with this Act, including (etc) ...”

We are also concerned that directors will be required to make this declaration with respect to the content of reports that have not been assured or audited. At a minimum,



the revised form of declaration set out above should apply to reports that have not been fully audited.

The assurance industry has persuaded Treasury that it will not have the resources or expertise to fully audit sustainability reports until the report for the first financial year commencing on or after 1 July 2030 (see s301A). But the Draft Legislation requires directors, the vast majority of whom are not climate experts and are part-time non-executives, to make this declaration for all reports for financial years commencing on or after 1 July 2024 for very large entities and certain NGERs reporters, and by the financial year commencing on or after 1 July 2027 for all other entities, without the benefit of assurance (except for Scope 1 and Scope 2 emissions).

We do not believe that this requirement is fair and places an unreasonable burden on directors. While directors must make an independent assessment of the matters the subject of the declaration, they do derive assistance from external assurance or audit especially in relation to matters requiring reasonable grounds. We suggest that the requirement to make a declaration under s296A(6)(b) should be aligned both for timing and relevant content with the requirement for statements to be reviewed or audited. That would mean that unless the assurance requirements change, the directors' declaration would relate initially only to Scope 1 and Scope 2 emissions.

However, we also suggest that the 6-year deferral for full audit requirements for all reporting entities should be revised. We suggest that it would be reasonable for a full audit to be required for the second and subsequent reports of each relevant reporting entity, and for the directors' declaration also to be required for the second and subsequent reports of the entity. This "compromise" would mean that the assurance burden is phased in as each cohort of reporting entities commences reporting, with a full audit of the third and largest cohort of reporting entities not required until the report for the first financial year commencing on or after 1 July 2028, only 2 years earlier than currently proposed. The first actual audit task for that cohort would not be required to be completed until the second half of 2029, in five and a half years' time. Surely that is long enough for the assurance industry to acquire the necessary resources and expertise.

In summary, in relation to the requirement for a directors' declaration, we suggest that:

- S296A(6)(a) should be deleted;
 - The declaration required by s296A(6)(b) should be amended to be an opinion that "there are reasonable grounds to believe" and should apply only to the extent that the relevant sustainability report has been reviewed or audited; and
 - In that regard a full audit should be required for the second and subsequent sustainability reports of each reporting entity.
- (e) Define the critical term "climate statements" by reference to climate-related matters required to be reported by the sustainability standards. Section 296A(1) prescribes the content of sustainability reports, including "climate statements" and notes to "climate statements". The term "climate statements" is described in s296A(2) as the "climate statements" required by the sustainability standards. But the term is not defined or even used in the draft sustainability standards (and is not otherwise defined in the Draft Legislation).
- (f) Limit the circumstances in which the mandatory content of sustainability reports can be expanded. At present, the Minister can prescribe additional content related to environmental matters (not limited to climate change) and additional content can be



required by regulation (see sections 296A(3), 296A(5)(c), 296C(2) and 336A(1)). Also, section 296A(4)(b)(iii) requires the report to include notes “in relation to other matters concerning environmental sustainability”, which is undefined and open-ended. Further, there is no restriction in the Draft Legislation on the content of sustainability standards that can be made by the AASB under section 336A(1) provided that the standards “must not be inconsistent with” the Act, and regulations and legislative instruments made under the Act. See also the definition of “sustainability standard” in section 9.

We recommend that at the very least:

- any expansion of the content of mandatory reports under these provisions be subject to a period of public consultation, in the same manner as the current proposals; and
 - section 296A(4)(b)(iii) be deleted.
- (g) As the Draft Legislation is drafted, a reporting entity may not know whether it meets the thresholds for mandatory reporting until after the end of the relevant financial year. An entity that is required to report for the first time will not necessarily have kept records to enable it to report. (The same issue applies to financial reporting but in that case, the entity will have been obliged to keep accounting records in any event, from which the financial reports can be prepared.)

We suggest that the mandatory reporting obligation should only apply if the entity meets the reporting thresholds in both the financial year prior to the relevant financial year, and in the relevant financial year.

- (h) The term “entity” should be clearly defined in the same manner as the entities to which financial reporting obligations apply, excluding charities, individuals and certain registered foreign companies.

A summary of all amendments suggested in this advice is contained in Annexure 3.

3 Directors’ Declaration

3.1 Question:

What are the legal implications (including liability implications) for directors arising from the proposed director declaration requirements? (Apart from the directors’ declaration itself, we query whether this should also cover the relationship with the Auditors’ Report and Declaration and the implications of requiring a director’s sign-off on disclosures that are not subject to mandatory reasonable assurance)

Answer:

A failure to take all reasonable steps to comply with, or to secure compliance with, the new provisions in Part 2M.2 and 2M.3 (including all new or amended provisions from section 286A to section 323C) under section 344(1). The obligation under s344(1) cannot be delegated.

A false or misleading declaration made in accordance with section 296A(6) will be actionable by ASIC and by private plaintiffs in a claim under s1041H of the Corporations Act for remedies that could include declarations, injunctions and damages. A breach of s1041H is not an offence and no civil penalty can be imposed.

If the declaration is made by directors knowing that it is false or misleading, an offence may be committed under, for example, s1041E, which is also a civil penalty provision.

If the declaration is made by directors knowing that it is materially false or misleading, an offence may be committed under s1308(1).



If the declaration is materially false or misleading and the directors did not take all reasonable steps to ensure that the declaration was not materially false or misleading, an offence may be committed under s1308(3), whether or not the directors knew that the statement was materially false or misleading.

Finally, if the declaration is false or misleading and the directors failed to take reasonable steps to ensure that the declaration was not materially false or misleading, the directors may breach their duty of care and diligence under section 180(1) and may be liable for civil penalties and disqualification.

More generally, if the declaration is false or misleading, indicating non-compliance with the requirements for the sustainability report, and the directors have failed to take all reasonable steps to comply with, or to secure compliance with, the new provisions in Part 2M.2 and 2M.3 (including all new or amended provisions from section 286A to section 323C) the directors will breach their obligation under section 344(1), which cannot be delegated.

As for the alignment of the requirement to give a declaration with the review and audit requirements, see our suggestions at 2.4(d) above.

3.2 Question:

What steps would directors need to take to satisfy themselves that the climate statements and notes are in compliance with s 296C and s 296D and reduce liability under s 296A(6)(b)?

Answer:

In addition to making the changes to the Draft Legislation suggested at 2.4 above, the directors must take “all reasonable steps” to comply with, or to secure compliance with, the provisions of the Draft Legislation (section 344(1)).

Directors could take the following practical steps (noting that the uncertain nature of climate-related disclosures may mean that directors will be subject to heightened liability exposure relative to financial disclosures):

- (a) Delegate the preparation of risk and compliance policies and controls for the preparation of sustainability reports to appropriate members of the management team, review and approve those documents, and monitor compliance with those documents.
- (b) Implement clear lines of management accountability for the preparation of sustainability reports
- (c) Arrange training for the board and relevant employees in relation to the requirements for compliant sustainability reports.
- (d) Employ or engage expert climate scientists to assist in the collection and collation of relevant data and the preparation of the climate statements and notes.
- (e) Request management to verify the contents of the draft sustainability report and obtain legal advice concerning compliance with the legislation and any false or misleading statements in the draft sustainability report.
- (f) Request the entity’s auditor to review the statements concerning financial impacts in the climate statements and notes, including whether forward-looking statements concerning financial impacts have reasonable grounds. Make this request whether or



not there is an obligation to have the climate statements in the sustainability reports reviewed or audited.

- (g) As permitted by paragraph 38 of draft ASRS 1, exclude any statement containing quantitative information about the current or anticipated financial effects of a climate-related risk or opportunity if those effects are not separately identifiable or the level of measurement uncertainty involved in estimating those effects is so high that the resulting quantitative information would not be useful.
- (h) Engage an independent expert climate scientist to review the science-based statements in the sustainability report, including measurement of emissions, contents of transition plans and contents of scenario analysis.
- (i) Carefully review the contents of the sustainability report, especially the grounds for forward-looking statements, ask questions of the relevant employees and external advisors, and challenge any statement about which a director has reasonable concerns.
- (j) Keep records of these steps.

3.3 Question:

What amendments would you suggest to address liability concerns for directors? (This might include interrelated changes to the assurance requirements)

Answer:

See responses to Question 2.4, including our suggestion at 2.4(d) to align the requirement to give a directors' declaration with the review and audit requirements.

4 Materiality

4.1 Question:

Does the current drafting require Group 1 and 2 entities to disclose against the Sustainability Standards irrespective of their materiality assessment?

Answer:

There is no materiality requirement for Group 1 and Group 2 entities in the legislation itself. However, the draft sustainability standard only requires disclosure of material information. See paragraphs 17 to 19 of Draft ASRS1 and paragraphs B13 to B37 in Appendix B, Draft ASRS1.

Note also paragraph Aus6.2 of draft ASRS1, which applies to all reporting entities and is therefore inconsistent with s296B(1) of the Draft Legislation. This inconsistency must be resolved:

“For the purposes of this [draft] Standard, if an entity determines that there are no material climate-related risks and opportunities that could reasonably be expected to affect the entity’s prospects, the entity shall disclose that fact, and explain how it came to that conclusion, in its general purpose financial reports.”



4.2 Question:

What are the legal implications (including liability implications) for directors of Group 3 entities arising from the requirement to assess whether they face material climate risks or opportunities, and disclose or not disclose on that basis?

Answer:

If a Group 3 entity determines that the entity does not face material climate risks and does not have material climate opportunities, the “climate statements” for the relevant year will be a statement by the entity accordingly.

In our view, a directors’ declaration under section 296A(6)(b) will still be required in relation to a sustainability report that contains such a statement.

Accordingly, directors of Group 3 entities that state that the entity has no material climate risks or opportunities will be subject to the same liability exposure as directors who prepare a “full” sustainability report, if the statement is incorrect or misleading. Further, the limited immunity will not apply to the statement, even if the limited immunity period is extended to cover Group 3 entity reports.

5 Other matters

5.1 Timing and deferral of date for lodgement

You have asked whether ASIC can be given powers to defer the date for lodgement of sustainability reports. In our view, ASIC will have that power under the existing section 340 of the Corporations Act. It may be helpful for ASIC RG 43 to be updated in this regard.

As presently drafted, sustainability reports for most reporting entities are required to be provided to members and lodged with ASIC at least 3 weeks before the AGM, or within four months of the end of the financial year, whichever occurs first. You have asked us to consider whether the Draft Legislation should be amended to permit additional time for the provision and lodgement of sustainability reports. We agree that the Draft Legislation should be clarified so that it is clear that sustainability reports can be provided after the provision of other financial reports, provided that the sustainability report is provided at least 3 weeks before the entity’s AGM. In our view, while the burden of preparing sustainability reports will be substantial, especially for medium-sized entities, if sustainability reports are not provided in time for consideration prior to the AGM, the utility of the reports will be compromised.

We also note that ASIC does have the power to permit extensions of time for reporting and the holding of the AGM in appropriate circumstances.

5.2 Scope 3 reporting

Under the guidance in Appendix B for draft standard ASRS2, paragraph B39.1, reporting entities may report scope 3 emissions for the financial year preceding the financial year for which the rest of the report is prepared, in certain circumstances.

Paragraph B39.1 is subject to consultation but currently states:

“An entity shall measure its Scope 3 greenhouse gas emissions using data for the same reporting period as its related financial statements, unless reasonable and supportable data related to that reporting period (i.e. the current reporting period) is not available to the entity at the reporting date without undue cost or effort. Notwithstanding paragraph



B19, if reasonable and supportable data related to the current reporting period is unavailable, an entity is permitted to disclose in the current reporting period its Scope 3 greenhouse gas emissions using data for the immediately preceding reporting period. An entity measuring and disclosing Scope 3 greenhouse gas emissions using data for the immediately preceding reporting period shall disclose that fact.”

We would support the retention of that flexibility for scope 3 emissions reporting.

There is also an issue with the definition of scope 3 emissions. The term “scope 3 emissions” is defined in section 9 to have “the same meaning as in the Corporate Value Chain (Scope 3) Accounting and Reporting Standard, published by the World Business Council for Sustainable Development and the World Resources Institute, as existing on the commencement of this definition”.

There are two problems with this critical definition. First, there is no clear definition of scope 3 emissions in that standard. Second, the meaning of “scope 3 emissions” is constantly under review, and if this definition applies it will inevitably become inconsistent with the prevailing international meaning.

We submit that “scope 3 emissions” should be defined by reference to the definition in the sustainability standards from time to time.

Tim Bednall
King & Wood Mallesons
8 February 2024



Annexure 1: Most likely causes of action against reporting entities and directors.

Section of Corporations Act	Description	Entity and/or Director liability
79	Accessorial liability for breach by entity	Director
180(1)	Duty of care and diligence	Director
286A	Keep and retain sustainability records	Entity
289A	Place for keeping records	Entity
S292A	Failure to prepare a report	Entity
S296A	Incomplete report	Entity
296A(6)	False or misleading directors' declaration	Directors
344(1)	Take all reasonable steps to comply or secure compliance	Director
674A(2)	Breach of continuous disclosure obligations	Entity
674A(3)	Involvement in continuous disclosure breach without taking reasonable steps	Director
1041E	Materially false or misleading statement inducing a person to deal or affecting the price of securities	Entity or director
1041H	Misleading and deceptive conduct	Entity and director
1308(1)	Knowingly making a materially false or misleading statement	Entity and director
1308(3)	Making a materially false or misleading statement without taking reasonable steps to ensure that the statement was not materially false or misleading	Entity and director



1705C	Failure to comply with an ASIC direction to amend a sustainability report	Entity
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Annexure 2: Offences under the Draft Legislation



Section	Description of offence	Type of offence	Penalty
286A(3)	Failure to keep and retain sustainability records for 7 years	Fault-based*	2 years imprisonment
286A(4)	Failure to keep and retain sustainability records for 7 years	Strict liability	60 penalty units
289A(2)	Failure to keep sufficient written information in Aus to enable sustainability statements to be prepared and failure to give ASIC written notice in the prescribed form of the place where sustainability records are kept	Strict liability	60 penalty units
289A(5)	Failure to comply with ASIC direction regarding the production of sustainability records kept outside Australia	Strict Liability	60 penalty units
314(1)	Failure to report to members	Strict liability	30 penalty units
314AA(1)	Reporting by superannuation entities	Strict liability	30 penalty units
316(2) and (3)	Requests for report by members	Strict liability	30 penalty units
316A(3) and (4)	Requests for report by members of a company limited by guarantee	Strict liability	30 penalty units
316B(1)	Failure to make the Sustainability Report publicly available on the entity's website on the day after it is lodged with ASIC	Strict Liability	30 penalty units
318	Reporting to trustee for debenture holders	Strict liability	60 penalty units
322	Relodgement and provision of amended reports -	Strict liability	30 penalty units



Section	Description of offence	Type of offence	Penalty
323	Directors to assist in preparation of consolidated reports	Strict liability	60 penalty units
323B	Officers of controlled entities to assist in preparation of consolidated reports	Strict liability	60 penalty units
307AC(3)	Failure of auditor (individual auditor or audit company or lead auditor) to conduct audit of Sustainability Report in accordance with auditing standards	Fault-based*	2 years imprisonment
307AC(4)	Failure of auditor (individual auditor or audit company or lead auditor) to conduct audit of Sustainability Report in accordance with auditing standards	Strict Liability	50 penalty units
309A(1) and (3)	Failure to issue an auditor report which opines on whether the Sustainability Report complies with the Corporations Act and Sustainability Standards	Strict Liability	50 penalty units
1705C(2)	Failure to comply with ASIC direction on Sustainability Reporting	Strict Liability	60 penalty units

This table does not include existing audit-related offences which will now include a reference to a sustainability report.



Annexure 3: Summary of suggested amendments to the Draft Legislation

Section	Amendment
292A and 1705A	The mandatory reporting obligation should only apply if the entity meets the reporting thresholds in both the financial year prior to the relevant financial year, and in the relevant financial year.
296A(1)	Define “climate statements”
296A(3), 296A(5)(c), 296C(2) and 336A(1)	Require public consultation for any expansion of the scope or subject matter of sustainability reports
296A(4)(b)(iii)	Delete - too broad. Requires the report to include notes “in relation to other matters concerning environmental sustainability”
296A(6)(a)	Delete - directors’ declaration in relation to compliance with international standards
296A(6)(b)	<p>The declaration required by s296A(6)(b) should be amended to be an opinion that “there are reasonable grounds to believe” at least until reports are fully audited. Alternatively, a directors’ declaration should be required only to the extent that the relevant sustainability report has been reviewed or audited.</p> <p>In that regard a full audit should be required for the second and subsequent sustainability reports of each reporting entity.</p>
1705B	<p>Insert the word “first” before the words “made in a sustainability report”, so that statements that are immune from suit when made in a sustainability report will not be actionable when subsequently reproduced in other documents.</p> <p>The note to section 1705B(1) should be amended accordingly.</p> <p>The limited immunity regime should apply to:</p> <ul style="list-style-type: none"> disclosures (including statements and omissions) relating to Scope 3 emissions, scenario analysis, transition planning and all other forward-looking statements first published in sustainability reports or supplementary sustainability reports during the immunity period; and any statement that an entity is directed by ASIC to publish under s1705C. <p>The reference to “criminal offence” in this section should not include strict liability offences.</p> <p>The scope of civil actions that ASIC will be permitted to commence during the immunity period should be limited to those in which the only remedy is</p>



	<p>an injunction or declaration (that is, delete all of s1705B(3)(c) except paragraph (c)(ii)).</p> <p>The limited immunity should apply to the first three sustainability reports of each reporting entity.</p>
Definition of “entity”	The term “entity” should be clearly defined in the same manner as the entities to which financial reporting obligations apply, excluding charities, individuals and certain registered foreign companies.
Definition of “scope 3 emissions”	The term “scope 3 emissions” should be defined by reference to the definition in the sustainability standards from time to time
Timing of reporting	Clarify that sustainability reports may be provided after other financial reports, so long as they are provided at least 3 weeks before the entity’s AGM.

Annexure D: Technical Drafting Issues

Section of Draft Legislation	Description of Issue	Proposed amendment
Various locations	'Entity' not defined: Currently the term 'entity' is used across the Draft Legislation to mean those entities captured by the climate reporting regime. However, this term is not defined. Failing to define 'entity' would lead to the application of the current section 64A Corporations Act definition, which is significantly broader than entities covered by the climate reporting legislation - for instance, it includes 'natural persons.'	'Entities' be defined to capture only those entities covered by the climate reporting regime – being Part 2M.3 Corporations Act reporting entities: a company, registered scheme, registrable superannuation entity or disclosing entity incorporated or formed in Australia.
S 9 Definition of 'Sustainability records' s 286A(1)(c) s 296C(1) and (2)	Referring to "statements mentioned in paragraph 292A(1)(c)" where s 292A(1)(c) does not exist. The reference should be to section 296A(1)(c) (additional 'environmental sustainability' statements set by the Minister). However, for the reasons set out in section 9 of our Submission, we oppose the broad and unfettered Ministerial Powers in sections 292A(4) and (8), sections 296A(3), (4)(b)(iii) and (5), and section 296C(2).	Change all references to section 292A(1)(c) to refer to section 296A(1)(c). As set out in section 9 of our Submission - delete or amend sections 292A(4) and (8), sections 296A(3), (4)(b)(iii) and (5), and section 296C(2), and replace with the standard wording set out in paragraph 24 of the OPC's Drafting Direction No 3.8, having regard to the ALRC's Draft Guidance on Delegated Legislation.
S 296D(1)(b) Climate Statement Disclosures	The section requires that entities disclose any metrics and targets required by the Sustainability Standards, including scope 1,2 and 3 emissions. We note that the Draft Australian Sustainability Reporting Standard ASRS 2 paragraphs AUsC4.1 and C4.2 permit entities not to disclose scope 3 emissions in their first reporting years and not to disclose market-based scope 2 greenhouse gas emissions in their first three annual reporting periods. The draft legislation needs to ensure that this relief is retained. This issue is indicative of a broader issue of legislating content requirements in section 296D rather than leaving content to the Sustainability Standards. Such an approach may lead to inconsistencies and the need to amend section 296D in the event of later amendments to the Sustainability Standard.	Delete section 296D. Alternatively, provide clarity in the Explanatory Memorandum with wording to the effect of: <i>"The requirements under section 296D are subject to any specific modifications set out in the Sustainability Standards including any relief mechanisms."</i>

Section of Draft Legislation	Description of Issue	Proposed amendment
S 9 Definition of Climate Statements	<p>Climate Statements is defined in section 9 as the “<i>annual climate statements under sections 296A and s 296B.</i>”</p> <p>Section 296A states that the ‘climate statements’ are those required under the Sustainability Standards and any additional disclosure requirements set by the Minister in delegated legislation. The draft Sustainability Standards (ED SR1) do not define the term ‘climate statements.’</p> <p>Section 296B states that ‘climate statements’ also includes a statement by a Group 3 entity that the entity does not face any material climate risks or opportunities. We note that such a statement is already built into the Sustainability Standard at paragraph Aus 6.2 of Draft ASRS 1 (albeit it is available to all entities, not just Group 3 entities).</p> <p>Section 296D states that the climate statements and notes must disclose the requirements set out in section 296D. However, there is no reference to section 296D in the definition of ‘climate statements’ in section 9.</p> <p>The wording of this definition is circular and seems to omit a reference to section 296D (albeit we have reservations about the inclusion of section 296D altogether – see above), and is otherwise inconsistent with the Sustainability Standards given the draft Sustainability Standards do not define ‘climate statements.’</p>	<p>Either amend the definition of “climate standards” in s 9 to include a reference to section 296D</p> <p>or delete section 296D (preferred option).</p> <p>Amend section 296A(2) to read:</p> <p><i>“Subject to section 296B, the climate statements for the year are the matters required to be disclosed in relation to the entity by the sustainability standards.”</i></p>
S 9 Definition of scope 3 emissions	The definition of scope 3 emissions (by reference to the Greenhouse Gas Protocol) is inconsistent with the definition of scope 3 emissions in ED SR1. Given scope 3 methodologies are constantly evolving, we recommend against defining this term in legislation to avoid the need for repeated amendment.	Define scope 3 by reference to the Sustainability Standards, with wording to the effect of “ <i>Scope 3 emissions has the meaning ascribed to them under the Sustainability Standards from time to time.</i> ”
S 9 Definition of scope 1 and 2	We query whether the definition of scope 1 and 2 emissions would be better left to the Sustainability Standards to avoid any inconsistencies.	Define scope 1 and 2 emissions by reference to the Sustainability Standards.
S 296A(1)(b) The directors' declaration about the statements and the notes	This is an incorrect reference – should be section 296A(1)(d)	Amend to say section 296A(1)(d)