ALLANGRAY

19 July 2023

Climate Disclosure Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: climatereportingconsultation@treasury.gov.au

Dear Dr Chalmers,

Consultation on climate-related financial disclosure

We refer to Treasury's June 2023 Consultation Paper on climate-related financial disclosure.

Our overarching position in relation to mandatory climate-related financial disclosure is set out in our submission dated 19 January 2023 to Treasury's first consultation on this issue. We reiterate our comments in that submission and welcome the opportunity to now make further submissions. Our views as to the workability of most of the proposals in Treasury's June 2023 Consultation Paper are set out in our earlier submission. Accordingly, in this submission, we only comment on the proposal relating to civil penalty provisions. To the extent that any of our comments below are inconsistent with the position set out in earlier submission, our overarching position should be given priority.

Civil penalty provisions

Subject to our reservations about the substance of climate-related disclosure requirements and as set out below, we are generally supportive of mandatory corporate disclosure requirements being civil penalty provisions. We consider that this is important for ensuring that investors can be satisfied as to the integrity of the information with which they are provided by companies.

Scope 3 emissions and scenario analysis

There remains significant debate and uncertainty as to what are reasonable estimates and assumptions in the context of scope 3 emissions calculation and scenario analysis.[1] If potential liability attaches to such disclosures, we consider it likely that companies will overestimate their emissions and risks or incur material expenses to overengineer and significantly caveat their disclosures, in order to avoid that liability. Both approaches would themselves be distortive and provide little, if any, benefit to investors. The protections afforded by sections 1317S and 1318 of the *Corporations Act* 2001 (Cth) do not appear sufficient to overcome this issue.

First, the sections do not come into effect until there has been a finding of a contravention of a civil liability provision and, even then, do not provide protection against such a finding, only potential relief from liability.[2] Serious reputational, and therefore professional, consequences attach to any breach of directors' duties, even if the breach is inadvertent, and these consequences will not be avoided just because a director is excused from liability. Secondly, owing to the limited success with which directors have sought the protection of sections 1317S and 1318,[3] directors are likely to have very little

[1] Examples of matters in respect of which assumptions and subjective decision making is required in scenario analysis are set out in our earlier submission.
[2] *Deputy Commissioner of Taxation v Dick* [2007] NSWCA 190; (2007) 242 CLR 152 at [78] cited with approval in *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003 at [86] (per Middleton J).
[3] See, for example, Xynas, L., & Xynas, A. "Insolvency and the Australian safe harbour reforms of 2027 – Do they adequately support all Australian directors in fulfilling their role as a fiduciary of their company in 2021? (2021) 37 *Australian Journal of Corporate Law* 46, 55-56; Harris, J. "Relief from Liability for Company Directors: Recent Developments and their Implications" (2008) 12(1) *University of Western Sydney Law Review* 152 (FN94).

comfort that those sections provide any sort of practical protection. Thirdly, to the extent that sections 1317S and 1318 are considered to provide some protection to directors, relying on that protection is nevertheless risky, particularly when there remains genuine debate as to what are reasonable estimates and assumptions in relation to scope 3 emissions calculations and scenario analysis.[4] The granting of relief under either section, both of which must be applied in the context of civil penalties acting as a deterrent and into the operation of which a standard of reasonableness can be imported,[5] requires both a value judgment and the exercise of judicial discretion,[6] which Courts have been reluctant to exercise.[7] The fact that Courts will, when considering an application for relief under section 1317S or 1318, have regard to the commercial environment in which directors operate is unlikely to outweigh the risks associated with relying on those provisions, particularly when the matter of disclosure is not expected to involve corporate risk-taking.[8]

Looked at collectively, these reasons suggest that the theoretical protections afforded by sections 1317S and 1318 will not provide directors with good reason to adopt anything other than an overly cautious approach to the disclosure of uncertain scope 3 emissions calculations and scenario analyses. As we set out in our earlier submission, such an approach to climate-related disclosure will be unnecessarily costly for companies (and therefore investors) whilst also being of questionable tangible benefit to investors. For these reasons, we are of the view that the workability of the proposals to mandate scope 3 emissions disclosure and scenario analysis is not enhanced by the further proposal to make all climate-related disclosure provisions civil penalty provisions.

Misleading or deceptive conduct actions

The practical effect of the proposed three-year restriction on the bringing of misleading or deceptive conduct actions to regulator-only actions appears limited. It is unclear from the drafting of the proposal whether that restriction applies for a period of three years or in respect of all relevant disclosures made in the first three years of a company's reporting obligations. However, the distinction is largely irrelevant. If the restriction is for a period of three years but does not limit the later bringing of actions in respect of disclosures made in that period, there will in fact be no benefit to directors at all. If the restriction applies for an unlimited time in respect of disclosures made within the first three-year period of a company having reporting obligations, there may be some protection from shareholder actions,[9] though directors remain exposed to regulators. For similar reasons to those discussed above, we expect that this position will result in an overly cautious approach to scope 3 emissions disclosure and scenario analysis. Given the increased interest of regulators in companies' climate-related statements, this risk may in fact be heightened.

Again, we do not consider that the proposal regarding the application of misleading or deceptive conduct provisions to scope 3 emissions and forward-looking statements assists with the workability of the corresponding proposals for disclosure requirements.

Concluding remarks

When read together, the proposals regarding scope 3 emissions disclosure, scenario analysis, and civil penalty provisions do not appear to present a balanced and effective tool to compel companies to disclose material climate-related information for the benefit of investors. We have concerns that the proposals will result in the costly disclosure of inaccurate and / or immaterial information. This will be of little, if any, benefit to investors.

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[4] Legg, M., & Jordan, D. "The Australian Business Judgment Rule after *ASIC v Rich:* Balancing Director Authority and Accountability" (2014) 24 *Adelaide Law Review* 403, 408 (particularly FN25).

[5] *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 714 at [359]; *Australian Securities and Investments Commission (ASIC) v Adler* [2002] NSWCA 483 at [125]; *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 at [810].

[6] *Paes Property Investments Pty Ltd v Attila Boros & Ors* [2020] NSWSC 1270 at [263], citing *Australian Securities and Investments Commission v Edwards (No 3)* [2006] NSWSC 376; (2006) 57 ACSR 209 at [10]; *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 85 ACSR 654 at [83]-[84]; *Great Southern Finance Pty Ltd (in liq) v Rhodes* [2014] WASC 431; (2014) 103 ACSR 137 at [60]; *RE Swan Services Pty Ltd (in liq)* [2016] NSWSC 1724 at [236]—[237].

[7] See, for example, *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 85 ACSR 654 at [133].

[8] *Daniels v Anderson* (1995) NSWLR 438, 525; *Australian Securities and Investments Commission v Vines* [2005] NSWSC 1349 at [69].

[9] Though the usefulness of such protection is debatable given the history of shareholder actions for misleading or deceptive conduct in Australia.

In light of the difficulties with accurately estimating scope 3 emissions and conducting long-term scenario analysis, we urge Treasury to reconsider making the relevant requirements civil penalty provisions in circumstances where there is no safe harbour in respect of such disclosures.

Yours sincerely,

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