NEW SOUTH WALES
BAR ASSOCIATION

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

By email: climatereportingconsultation@treasury.gov.au

Response to Consultation Paper, 'Climate-related financial disclosure' (June 2023)

1. The New South Wales Bar Association (**the Association**) thanks the Treasury for the opportunity to respond to its June 2023 Consultation Paper, 'Climate-related financial disclosure' (**Second Consultation Paper**).

2. In the limited time provided, the Association's comments are confined to the proposed "modified liability" approach on page 27.

Moratorium on private actions

3. The Association understands that the Treasury proposes to prohibit private litigants from making misleading or deceptive conduct claims under the *Corporations Act 2001* (Cth), *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**), or the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) in relation to forward-looking statements (namely, scenario analysis and transition planning) and Scope 3 emissions reporting mandated by the proposed climate-related disclosure requirements. It understands that this is intended to apply for three years from the commencement of the requirements (i.e. from July 2024).

4. The Second Consultation Paper relevantly states (p. 27):

> *"…elements of mandatory disclosure including scope 3 reporting, scenario analysis and transition planning would be afforded time-limited protection from misleading or deceptive conduct, false or misleading representations, and similar claims. This protection would only operate in respect of private litigants and would allow ASIC to take action where appropriate.*
>
> *The protection from misleading or deceptive conduct, false or misleading representations, and similar claims would apply for three years from the commencement of the regime. Beyond this period, it is anticipated that the requirement of reasonable grounds for forward looking statements and scope 3 reporting is not too high a threshold."*

5. The Association wishes to make **three** submissions about this reform proposal. In summary:

    a. A three-year moratorium on private actions in relation to forward-looking statements and Scope 3 emissions reporting should not be introduced;

    b. If there is to be a moratorium, it should be targeted to achieve the policy objective of encouraging engagement and compliance with the law after the date of the amendments. Private litigants should not be denied access to the courts and the administration of justice in cases in which misleading or deceptive statements in contravention of the law were made prior to the amendments, or where it can be seen that the disclosures would have been made regardless of the amendments (ie because the corporation was already voluntarily making disclosures of that kind prior to the amendments);

    c. The Association also suggests that if there is to be a moratorium, it should operate only to limit the remedies that private litigants can seek (for example, limit remedies to declarations and injunctions), rather than entirely prohibit private actions.

6. Our detailed reasons in support of these points follow.

7. **First,** adequate enforcement mechanisms for "greenwashing" – misrepresenting an entity's climate-related impacts, risks and mitigation efforts – are critical for protecting investors from unexpected losses and ensuring that Australia fulfils its international and statutory climate-related commitments. While Australian regulators are integral to enforcement, resource considerations necessarily limit the enforcements actions they can commence. A recent "internet sweep" by the Australian Competition and Consumer Commission (**ACCC**) suggests that "greenwashing" is widespread, with 57% of Australian businesses reviewed making "concerning" claims about their environmental credentials.[1] In those circumstances, actions by private litigants fill an important gap in helping the regulators to ensure that entities are accountable for greenwashing. The Deputy Chair of the ACCC, Delia Rickard, has welcomed such actions.[2]

8. While three years may be a relatively short time period from the perspective of disclosing entities, it is a critical time period for Australia's statutory commitment to reduce its greenhouse gas emissions to 43% below 2005 levels by 2030.[3] If the climate-related disclosure requirements apply to reporting from the 2024-25 financial year,[4] then the proposed moratorium period would extend until mid-2028. By prohibiting private actions that may enhance transparency effective compliance regarding disclosing entities' climate-related impacts and mitigation efforts, the proposed moratorium – even if limited to three years – is likely to undermine Australia's ability to achieve its 2030 emissions reduction target. It would also amount to an unwarranted zone of immunity for corporations from action by private litigants under provisions of the law that otherwise regulate (and have for many years regulated) corporate behaviour in all other areas of the commercial life of the nation, and which operate to protect individuals from harm that may be suffered as a consequence of "greenwashing" activity.

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[1] ACCC, *Greenwashing by businesses in Australia: Findings of the ACCC's internet sweep of environmental claims* (March 2023) p. 1.
[2] Australian Financial Review, 'ACCC says it's ready to pursue greenwashers' (News article, 15 June 2022) <available at: https://www.afr.com/companies/financial-services/accc-says-it-s-ready-to-pursue-greenwashers-20220615-p5atv7>.
[3] *Climate Change Act 2022* (Cth) s 10(1)(a).
[4] Second Consultation Paper, p. 11.

9. Moreover, the three-year moratorium period would operate to disproportionately benefit Group 1 entities, which according to the timeline proposed on page 8-9 of the Consultation Paper will be subject to the moratorium for the first three years of their exposure to the reporting obligations, compared with Group 2 and 3 entities which will be subject to the moratorium for a shorter period. There does not appear to be any sound rationale for providing enhanced immunity to larger entities which Parliament has deemed to have greater capacity to meet their reporting obligations from the outset.

10. These matters weigh heavily against *any* moratorium.

11. **Second**, the Association understands from the consultations that the moratorium would apply: (a) only to disclosures made after the amendments take effect (and not disclosures that had already been made by the time of the reform; and (b) to all disclosing entities regardless of whether they already had an established practice of making voluntary climate disclosures.

12. If the moratorium were to extend to *all* forward-looking statements and Scope 3 emissions disclosures made after enactment, then it would capture not only companies forced by the reform to make those disclosures for the first time but also companies which had already made such statements or disclosures (possibly for many years) prior to the reform.

13. Reported statistics on existing climate-related disclosures in the ASX200 suggest that a substantial number of disclosing entities are already disclosing forward-looking statements and Scope 3 emissions data that would be mandated by the disclosure requirements. It has been reported that, as at 31 March 2022, two-thirds of the ASX200 had set at least one emissions reduction target, and 88 companies disclosed climate scenario analysis.[5] Further, it is said that 93 companies disclosed Scope 3 emissions data.[6] That disclosures are so wide-spread reflects that ASX entities presently perceive benefit, and very likely commercial benefit (in the form of cheaper access to debt, equity and insurance) in making them.

14. Statutory norms regarding misleading or deceptive conduct applicable to those disclosures are designed to protect consumers. They are already being enforced by private litigants. For example, in an ongoing proceeding in the Federal Court of Australia, a private litigant alleges that Santos Ltd misled investors when it claimed to have a "clear" and "credible" plan to achieve net zero emissions by 2040.[7] Santos first made that announcement in February 2021. A consequence of the reform would be that a company like Santos would be exposed to liability from 2021 to 2H 2024, and from 2H 2027 onwards, but would be protected for a 3 year period in the interim. The moratorium would, in that sense, operate arbitrarily for entities who are already making voluntary disclosures. This would be to the detriment of consumers.

15. For that reason, the Association respectfully suggests that if there is to be any moratorium at all, it should be a more targeted moratorium. A disclosing entity which has <u>already</u> made forward-looking statements and/or reported Scope 3 emissions <u>prior</u> to the commencement of the reform should not be protected by the moratorium. There is no good reason why a private litigant should not have access to the courts and the administration of justice in cases where a misleading disclosure is made by a company

[5] Australian Council of Superannuation Investors, *Promises, pathways & performance: Climate change disclosure in the ASX200* (July 2022) pp 5-6.
[6] Australian Council of Superannuation Investors, *Promises, pathways & performance: Climate change disclosure in the ASX200* (July 2022) p 17.
[7] *Australasian Centre for Corporate Responsibility v Santos Ltd* (NSD858/2021).

with a substantial history of voluntary disclosures prior to the reform, particularly where the company makes misleading disclosures both within and outside the moratorium period. In such cases, the proposed moratorium would not seem to be furthering the Treasury's objective of *encouraging* disclosing entities to provide decision-useful information - because such information is already being provided.

16. Instead, the moratorium should protect only those entities who make forward-looking statements and/or reported Scope 3 emissions for the first time under the compulsion of the reform. A more limited moratorium would provide an appropriate degree of protection only to those companies which are being forced by the law to adapt or change their practices, and which may not already have internal resources or established relationships with external consultants to do so.

17. Accordingly, if the Treasury considers that a limited form of liability protection is appropriate, the Association considers that protection should be limited to disclosing entities making forward-looking statements and/or Scope 3 emissions disclosures *for the first time* as a result of the mandatory framework. That is, the liability protection should *not* apply to disclosing entities that have already made such statements or disclosures prior to the commencement of the framework. That those entities have been voluntarily disclosing prior to the reform, despite the misleading and deceptive conduct risk, shows that they perceive sufficient self-interest to make it worthwhile doing so. A more limited moratorium would avoid the unusual and possibly arbitrary consequence detailed above.

18. **Third**, if there is to be any moratorium, the Association suggests that it should not entirely prohibit private actions for the three-year period. A preferable outcome would be to continue to provide access to the administration of justice for new misleading and deceptive disclosures, but to limit the remedies that private litigants can seek. For example, if remedies were limited to declarations and injunctions, that more limited form of access to justice by private litigants would be preferable to a complete zone of immunity for corporations in relation to forward-looking statements and Scope 3 emissions reporting. The Association notes that the Santos litigation (for example) does not involve a claim for damages.

Conclusion

19. The Association thanks you in advance for considering its input. Should you wish to discuss, or if the Association may be of further assistance, please contact [redacted], Policy Lawyer, at [redacted].

Yours sincerely,

[redacted]

President