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Submitted via email to ClimateReportingConsultation@treasury.gov.au

Submission on Treasury Laws Amendment Bill 2024: Climate-related financial disclosure

Equity Generation Lawyers, a legal practice specialising in Australian climate change law, is pleased to make a submission regarding the *Treasury Laws Amendment Bill 2024: Climate-related financial disclosure* (**Bill**).

Executive Summary

Recommendation 1: The *Treasury Laws Amendment Bill 2024: Climate-related financial disclosure* should be amended by removing proposed section 1705B in its entirety.

Recommendation 2: Alternatively, at a minimum, the immunity in proposed section 1705B should not extend to litigation where the only relief sought is declaratory and/or injunctive relief.

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Recommendations

1. Our recommendations focus on the proposed insertion of section 1705B in the *Corporations Act 2001* (Cth) (at section 129 of the Bill) (**proposed section 1705B**).

2. Proposed section 1705B provides, in summary, that no action, suit or proceeding can be brought against a person or entity in relation to statements made in a sustainability report about scope 3 emissions or scenario analysis. There is then a carve out for criminal proceedings and certain proceedings brought by ASIC.

> **Recommendation 1:** The *Treasury Laws Amendment Bill 2024: Climate-related financial disclosure* should be amended by removing proposed section 1705B in its entirety.

3. Proposed section 1705B is unnecessary and problematic. It should be removed.

4. ***First***, disclosures that are made in good faith, that are made with best efforts, and that are detailed and appropriately qualified are unlikely to give rise to liability.

5. Section 1705B is said to be a result of balancing the needs of investors with "*the needs of reporting entities adjusting to the new requirements by providing reassurance that entities will not face full financial penalties if disclosures are made with best efforts but prove inaccurate*".[1]

6. The Explanatory Memorandum to the Bill anticipates the most common basis of liability protected by this immunity to be misleading or deceptive conduct. It also mentions breach of directors' duties, negligent misstatement, breach of statutory duty and breach of fiduciary duties.

7. It would be unusual for a company to be found to have breached these legal norms if the company makes detailed, good-faith disclosures, with best efforts (including dedicating appropriate resources to the task), taking care to articulate the reasonable bases for the company's statements, explain any uncertainty and include appropriate qualifications.

8. None of the materials published by Treasury in relation to the Bill, nor any of the public submissions in relation to the Bill, articulate any robust analysis as to why companies that approach their reporting in this way will face significant litigation risk in relation to their reporting. Absent analysis of that kind, Treasury should not impose the immunity in proposed s 1705B.

9. ***Second***, companies already regularly grapple with reporting on matters that are inherently uncertain. One can readily find examples in any large public company's annual reporting.

[1] Explanatory Memorandum to the Bill at [1.120].

10. ASIC Regulatory Guide 247 *Effective disclosure in operating and financial review* requires narrative disclosure of issues dealing with uncertainty such as solvency and risk [RG247.45, RG247.62].

11. Moreover, in relation to sustainability issues, *IFRS S1* and *IFRS S2* thoroughly and adequately deal with issues around uncertainty.[2]

12. There is an established framework for companies to report matters about which there is inherent uncertainty. Proposed section 1705B is anomalous and unnecessary.

13. ***Third***, other jurisdictions such as the European Union[3] and New Zealand[4] have introduced similar measures without litigation immunity – it was not necessary there, it is not necessary here.

14. ***Fourth***, the phased introduction of the reporting requirements in the Bill already provides adequate protection to companies that are "*adjusting to the new requirements*".[5]

15. The first phase of companies are sophisticated corporate actors. They are likely already considering climate risk and gathering the sort of information the subject of the proposed reporting requirements. Smaller companies have a longer lead time to prepare for their new reporting obligations.

16. Proposed section 1705B gives the largest companies in Australia an unnecessary buffer. These companies are well resourced and are very likely already considering these issues.

17. ***Fifth***, proposed section 1705B is broadly drafted and may have a raft of unintended consequences.

18. For example, it might have unintended impacts on shareholder rights and shareholder engagement, including by limiting recourse by shareholders to the Courts where the subject of the shareholder activity could be characterised, in whole or in part, as "in relation to" statements made in a Sustainability Report regarding scope 3 emissions or scenario analysis. This is just one illustrative example of how proposed section 1705B could undermine the ability of shareholders to engage with companies, or have broader unintended consequences.

19. APRA *CPG 229 Climate Change Financial Risks* encourages APRA regulated institutions to act in accordance with "the established framework for considering and

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[2] See IFRS S1 from p75. IFRS S2 at 9(e); 19(b); 22(a)(ii); 22(b)(i(5);

[3] Directive (EU) 2022/2464 of the European Parliament and the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022.

[4] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill (New Zealand).

[5] EM at at [1.120].

managing climate risks developed by the Financial Stability Board's Task Force on Climate-Related Financial Disclosures (TCFD)" the proposed s 1705B may limit the ability of an asset owner (or other investor) to independently verify climate disclosures of investee companies in the Courts. The effect is, without adequate regulator enforcement, to unfairly transfer the spectre of liability from companies disclosing under the sustainability standards to superannuation funds and other regulated entities who invest in them.

20. Proposed s 296D(1) in the Bill removes the requirements in ASIC Regulatory Guide 247 for climate risk disclosure from the Operating and Financial Review (**OFR**) to the sustainability report.[6] It follows that the proposed amendment may provide immunity to companies for misconduct related to other types of company disclosures such as on material risks that are based on Scope 3 assessments and scenario analysis. These are otherwise covered and have been adequately governed by s 299A.

21. The apparent purpose of standardised Scope 3 assessment and Scenario Analysis in the sustainability standards is to provide a baseline for their assessment and methodology, and subsequently contribute to an informed market. For companies, standardisation provides protection. The audit assurance also provides third-party protection to companies. It follows that sustainability standards act to remove uncertainty and provide assurance to investors and protection to companies. Private litigants should be able to test the integrity of statements made in relation to Scope 3 and scenario analysis.

22. The application of the new s 1705B is potentially very broad with ill-considered consequences. The proposed section should be abandoned.

23. ***Sixth***, it is inappropriate to rely entirely on ASIC to perform a supervisory function in relation to the matters in proposed section 1705B. ASIC has, for decades, taken an approach to enforcement that reflects a balance between regulatory intervention and private litigation.[7] That is because the system functions effectively when both private and public entities are able to hold companies to account.

24. ASIC's enforcement regime is influenced by its yearly corporate plan and enforcement priorities which are subject to change and, we expect, resourcing levels.[8] There can be no guarantee that the regulator's ongoing priorities or resourcing will be sufficient to ensure investors are properly protected.

25. ***Seventh***, proposed section 1705B is inconsistent with the objectives of the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth)

[6] RG247 already adequately deals with uncertainty and climate risk [RG247.62, RG247.66]
[7] See, for example, ASIC Information Sheet 151 (ASIC's Approach to Enforcement), available here: https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/
[8] https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/

and the *Competition and Consumer Act 2010* (Cth) to protect investors and consumers. It is highly irregular for these beneficial and protective pieces of legislation to be the subject of a carve out for new legislative requirements that mandate specific disclosures. For example, we are not aware of any second-order liability carve-outs in the wake of the introduction of the *Modern Slavery Act 2018* (Cth), despite that legislation imposing reporting obligations in respect of a topic about which there is often inherent uncertainty, particularly for businesses with long and complex supply chains.

26. ***Eighth***, the stated justification for proposed section 1705B does not give sufficient consideration to whether the supposed benefits of the litigation immunity – including providing companies with “reassurance” – outweigh the costs of limiting access to justice. It is a serious thing to deprive citizens and organisations of recourse to the Courts. In light of the points made in this submission, it should be clear that proposed section 1705B disproportionately and unjustifiably limits access to justice.

Recommendation 2: Alternatively, at a minimum, the immunity in proposed section 1705B should not extend to litigation where the only relief sought is declaratory and/or injunctive relief.

27. It appears that part of the motivation for the proposed immunity is to protect companies from class actions or other litigation for substantial damages. For reasons articulated above, it is difficult to imagine compulsory reporting on scope 3 and scenario analyses giving rise to a wave of class action litigation.

28. But, in any event, the proposed immunity goes much further than "*providing reassurance that entities will not face full financial penalties if disclosures are made with best efforts but prove inaccurate*".[9]

29. The proposed immunity would prevent *all* suits by civil society, including public interest proceedings where the only relief sought is declaratory and/or injunctive relief.

30. Public interest proceedings play an important function in keeping companies accountable. The stated justification for the immunity does not explain why claims of this nature ought to be banned.

31. Our primary position is that proposed section 1705B should be removed in its entirety (Recommendation 1). Alternatively, the litigation immunity in proposed section 1705B should not extend to private litigation where the only relief sought is declaratory and/or injunctive relief.

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[9] EM at at [1.120].