

Director
Climate Disclosure Unit
Climate & Energy Division
Treasury
Langton Cres
Parkes ACT 2600
By email only: ClimateReportingConsultation@treasury.gov.au

8 February 2024

RE: Climate-related financial disclosure: exposure draft legislation

The National Environmental Law Association Ltd ACN 008 657 761 (NELA) welcomes the opportunity to make a submission to the Treasury in relation to the climate-related financial disclosure exposure draft legislation (**Exposure Draft legislation**).

I. About NELA and its interest in the Exposure Draft

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes directors with expertise in international and domestic legal frameworks for biodiversity conservation, climate change and natural disasters, environmental regulation and regulatory theory and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. NELA is also a member of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors from finance, insurance, science, engineering, law, health, construction, and the built environment.

The Exposure Draft legislation has the capacity to establish a transparent, internationally aligned and robust Australian framework for corporate reporting of climate-related risks and opportunities. For this reason, the Exposure Draft legislation is important to NELA's members. NELA is grateful for the opportunity to make a submission.

II. Background to this Submission

1. NELA supports the Commonwealth Government’s commitment to improve the quality of corporate climate-related financial disclosures and to mandate preparation of sustainability reports that identify an entity’s exposure to climate-related financial risks and opportunities and climate-related plans and strategies.¹
2. NELA notes that the findings of Working Group III of the Intergovernmental Panel on Climate Change (IPCC) in its 2022 report support the need for national governments to implement policy on climate-related financial disclosure. The IPCC highlighted the need to enhance transparency and improve the quality of information within capital markets to effectively price climate risks and to promote climate financing.
3. The IPCC has also stated, with high confidence, that:
 - 3.1. framing climate risk as a financial risk (not just as an ethical, administrative, or environmental issue) is key to ensuring that climate becomes an actionable criterion for investment decision among mainstream investors;²
 - 3.2. policy ‘de-risking’ measures such as robust policy design and better transparency, as well as financial de-risking measures such as green bonds and guarantees, at both domestic and international levels, enhance the attractiveness of clean energy investments;³ and
 - 3.3. regulatory developments that focus on increasing financial disclosure can help to align and clarify appropriate definitions of environmentally sensitive or environmentally-sound financial decision making, but these definitions cannot, themselves, substitute for broader, finance-related climate policies.⁴

¹ Department of Treasury, ‘Mandatory climate-related financial disclosures – Policy position statement’ (January 2024), 1.

² Kreibichl, S., T. Yong Jung, S. Battiston, P. E. Carvajal, C. Clapp, D. Dasgupta, N. Dube, R. Jachnik, K. Morita, N. Samargandi, M. Williams, 2022: Investment and finance. In IPCC, 2022: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.017 (IPCC, AR6, WGIII), 1584.

³ IPCC, AR6, WGIII, 1586.

⁴ IPCC, AR6, WGIII, 1599.

4. The Commonwealth Government now seeks submissions on whether the Exposure Draft legislation and explanatory materials appropriately reflect and give effect to the policy intent outlined in the Mandatory climate-related financial disclosures Policy position statement (**Policy Statement**).

III. Relevant standards

5. NELA understands that the Commonwealth Government's policy intent, in developing the Exposure Draft legislation, is to adopt '*a rigorous, internationally aligned and credible climate disclosure regime*'.⁵ That policy intent is supported by the recent endorsement of the International Sustainability Standards Board (**ISSB**) standards by the G20, the Financial Stability Board and the International Organization of Securities Commissions.
6. NELA notes, however, that the practical implementation of the policy intent underlying corporate climate-related financial disclosure is dependent on the development of tailored Australian accounting standards by the Australian Accounting Standards Board (**AASB**) and Auditing and Assurance Standards Board (**AUASB**) that meet the global accounting standard baseline set by the ISSB.
7. While the power of the AASB and AUASB to make accounting standards is reflected in provisions of the Exposure Draft legislation,⁶ NELA submits that the Commonwealth Government's policy intent is not adequately reflected in the Exposure Draft legislation because it fails to impose a requirement that Australian standards developed AASB and AUASB must:
 - 7.1. incorporate the ISSB standards; and
 - 7.2. support interoperability with European Union reporting requirements and reporting considerations articulated by the relevant regulator in the United States, for Australian entities with operations in Europe or the United States.
8. NELA understands that Australian assurance standards are likely to follow the development of international standards on sustainability assurance by the ISSB (ISSA 5000), though the relevant standards are not expected to be finalised until late 2024.⁷ Although auditing of sustainability reports

⁵ Department of Treasury, 'Mandatory climate-related financial disclosures – Policy position statement' (January 2024), 1.

⁶ Exposure Draft legislation, ss 336A(1), 336(1) (in respect of 301A audits) and 1705D(1) (in respect of 301B audits).

⁷ IAASB, 'Understanding International Standard on Sustainability Assurance 5000' [iaasb.org](https://bit.ly/49n1wDk) (Focus Areas, November 2023), <<https://bit.ly/49n1wDk>>.

will not be required until 1 July 2030, delaying the development of Australian standards risks frustrating the purposes of the Exposure Draft legislation.

9. To strengthen and advance compliance under the limited assurance regime,⁸ NELA recommends that the development of Australian auditing standards during 2024 be aligned with the development ISSA.

IV. Nexus to GHG emissions

10. NELA acknowledges that the Commonwealth Government’s policy intent is to respond to ‘*systemic risks to the financial system as a result of climate change*’, including by integrating climate risks into capital allocation decisions, and to ‘*unlock investment in emissions mitigation and climate risk adaptation*’.⁹
11. However, sustainability reporting should involve a sufficient nexus to the greenhouse gas (GHG) emissions of a participating entity. Embedding this nexus in reporting obligations will help to ensure that sustainability reports relate directly to the specific climate impact of a relevant entity’s operations; the entity’s capacity to contribute to mitigating those climate impacts; and evidence of the entity’s activities to, in fact, address the specific climate impacts of its operations.
12. NELA submits that the Threshold Criteria (see further below) should be revised to include references to both:
 - 12.1. the GHG emissions intensity of the portfolio of each entity according to the sectors to which it is most exposed, and according to its share of the emissions of those sectors; and
 - 12.2. the share of the GHG emissions “held” by each entity across all economic sectors and in comparison with the totality of entities involved in the scheme, where the emissions “held” are defined as the entity’s total market share across economic sectors, weighted by the relative share of emissions of each sector.¹⁰

⁸ Exposure Draft legislation, s 301B.

⁹ Department of Treasury, ‘Mandatory climate-related financial disclosures – Policy position statement’ (January 2024), 1, 5.

¹⁰ Monasterolo, Irene Stefano Battiston, Anthony C. Janetos & Zoey Zheng, ‘Vulnerable yet relevant: the two dimensions of climate-related financial disclosure’ (2017) 145 *Climatic Change* 495–507, 500. <https://doi.org/10.1007/s10584-017-2095-9>.

V. “Books”

13. The Exposure Draft legislation proposes to expand the definition of “books” in Australian law to include ‘*sustainability reports or sustainability records*’.¹¹
14. This expanded definition, however, is unhelpfully circular. It references, in turn, the definition of “*sustainability records*” and “*climate statements*”, which both ultimately refer to the “*annual sustainability report*” required under s 296A(1).¹²
15. As it is currently drafted, the Exposure Draft legislation connects the definition of “books” to the definition of “*climate statements*,” meaning annual climate standards under ss 296A and 296B.
16. NELA submits that the critical content required to be maintained in a company’s records concerns the methods, assumptions, and evidence required to comply with the sustainability standards, prescribed in s 296C, and to disclose the matters stipulated in s 296D.
17. If the existing drafting is retained, the value of “sustainability records” may be significantly reduced and lead to an inconsistency in reporting standards.

VI. Commonwealth corporations

18. At present, Chapter 2M provides that financial reports and directors’ reports must be prepared by all disclosing entities incorporated or formed in Australia, public companies, large proprietary companies, and registered schemes.¹³
19. In the context of Chapter 2M, more broadly, NELA notes that the expression ‘entity’ in s 292A is not defined, but is instead applied in s 292A to entities that satisfy the threshold tests under s 292A(3), (6) or (7).

¹¹ Exposure Draft legislation, ss 1-2.

¹² Exposure Draft legislation, s 23.

¹³ *Corporations Act 2001* (Cth), 292(1) and see 285(2).

20. The Exposure Draft legislation, therefore, makes it apparent that the requirement to prepare a sustainability report is only intended to apply to a subset of Chapter 2M entities, as determined by thresholds (“Threshold Criteria”) relating to:
- whether an entity is a registered corporation under the *National Greenhouse and Energy Reporting Act 2007* (Cth);
 - numerical and value thresholds for consolidated revenue, consolidated gross assets, and employees; and
 - the value of assets under management.
21. The Threshold Criteria that define an ‘entity’ for the purposes of s 292A, effectively disconnect sustainability reporting requirements from those of other entities to which obligations under Chapter 2M apply, including the types of entity listed in s 292.
22. In respect of Commonwealth companies, the current drafting of the Exposure Draft legislation is unsatisfactory because it leaves open the question of whether it is intended to apply to Commonwealth companies, insofar as:
- 22.1. it fails to clarify that an ‘entity’ may include a Commonwealth company; and
- 22.2. no consequential amendments are indicated to the *Public Governance, Performance and Accountability Act 2013* (Cth), e.g., to ensure that the directors of a Commonwealth company required to prepare a sustainability report under s 292A must give the responsible Minister a copy of the company's sustainability report.¹⁴

The drafting needs to clarify that an entity may include a Commonwealth company, and the relevant consequential amendments made.

VII. Use of information gathered

23. NELA understands that:
- 23.1. a company must send a copy of a sustainability report for any particular financial year to each member who so elects;¹⁵
- 23.2. an entity must also lodge a sustainability report, and an auditor’s report on it, with ASIC;¹⁶ and

¹⁴ See *Public Governance, Performance and Accountability Act 2013* (Cth), s97(1).

¹⁵ Exposure Draft legislation, ss 31, 99.

¹⁶ *Corporations Act 2001* (Cth), s 319(1).

- 23.3. the entity is required to prepare a sustainability report but not to provide it to members, it must make the sustainability report publicly available on the entity's website..¹⁷
24. Presumably, once lodged with ASIC, a sustainability report and associated auditor's report will become available for inspection by any person..¹⁸
25. However, NELA submits that the Commonwealth Government should further consider the potential for systemic use or misuse of information gathered and provided in sustainability reports and consider how information gathered by ASIC can be used to facilitate the government's overarching policy intent to allow regulators to act and manage systemic risks.
26. While the Government's policy intent accurately identifies the potential use of sustainability reporting by investors, better guidance is needed on the potential for applied uses of sustainability reporting by government and regulators, including in support of Australia's existing and adjusted greenhouse gas emissions reduction targets under the *Climate Change Act 2022* (Cth).

VIII. Conclusion

NELA appreciates the opportunity to make submissions to the Treasury in relation to the climate-related financial disclosure exposure draft legislation, which has the potential to establish a transparent, internationally aligned and robust Australian framework for corporate reporting of climate-related risks and opportunities.

NELA looks forward to further opportunities to participate in the consultation process. Any questions should be directed to president@nela.org.au.

This submission was drafted by the NELA Climate Change Working Group on behalf of the NELA Board

¹⁷ Exposure Draft legislation, ss 33.

¹⁸ *Corporations Act 2001* (Cth), ss 1274(2) or 1274A(2).