



Environmental
Defenders Office

Submission to the Treasury on climate-related financial disclosure

20 July 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

Executive Summary

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Climate-related financial disclosure consultation paper dated June 2023. We welcome Treasury's proposed mandatory climate-related financial disclosure regime. Our response is confined to two aspects of the proposed regime: scenario analysis and the modified liability approach.

Scenario analysis

Entities would be required to disclose climate resilience assessments against at least two possible future states, one of which must be consistent with the global temperature goal set out in the *Climate Act 2022*.

Recommendation: Reporting entities are required to disclose climate scenario analysis consistent with both the latest IPCC and IEA modelled pathways that limit warming to 1.5°C consistent with the climate science.

Modified liability approach

It is proposed that the application of misleading or deceptive conduct provisions to scope 3 emissions and forward-looking statements are limited to regulator-only actions for a fixed period of three years.

Removing third party rights would have the unintended consequence of delaying urgent climate action by permitting entities to engage in greenwashing without sufficient accountability mechanisms. The "reasonable grounds" standard contained in misleading or deceptive conduct provisions is sufficiently flexible to accommodate the uncertainties inherent in forward-looking statements.

Recommendation: Third parties retain the right to bring actions for misleading or deceptive conduct in relation to forward looking statements. In relation to Scope 3 emissions disclosures, relief should remain available for declarations and injunctions.

SCENARIO ANALYSIS

Proposal: From commencement, reporting entities would be required to disclose climate resilience assessments against at least two possible future states, one of which must be consistent with the global temperature goal set out in the *Climate Act 2022*.

The EDO refers to our response to question 11 in our 'Submission to Treasury on climate-related financial disclosure' (dated 17 February 2023) and we reiterate our recommendation that reporting entities should be required to disclose climate scenario analysis consistent with both the latest IPCC and IEA modelled pathways that limit warming to 1.5°C.

The EDO is concerned that giving entities discretion to choose climate scenarios that are consistent with the objective of holding the global average temperature increase to 1.5°C or “well below” 2°C allows entities to choose scenarios - “scenario shopping” – that do not align with the climate science. We note that there are hundreds of climate scenarios, many of which are consistent with that objective. However, the extent to which these scenarios are technically feasible, consistent with market structures, available technologies and stated policies varies significantly. As such, climate scenarios that achieve the same long-term temperature goal of “well below” 2°C may vary considerably in terms of energy and land use requirements, technology deployment and temperature overshoot. This, in turn, increases the risk of failing to limit global warming to well below 2°C, the consequence of which is that the worst impacts of climate change would be realised.¹

The EDO considers that requiring entities to disclose scenario analysis consistent with both the IPCC and IEA modelled pathways that limit warming to 1.5°C ensures that entities do not “cherry pick” scenarios that appear to minimise risk in their operations and business strategies, particularly the high-emitting industries. We consider that requiring entities to disclose against both IPCC and IEA modelled pathways that limit warming to 1.5°C would not entail any risk that “significant climate-related risk and opportunity is overlooked” because entities would be free to disclose alternative climate scenario analysis in addition to the above.

MODIFIED LIABILITY APPROACH

Proposal: The application of misleading and deceptive conduct provisions to Scope 3 emissions and forward-looking statements would be limited to regulator-only actions for a fixed period of three years.

We welcome Treasury’s confirmation that the proposed regime is forward-looking and is intended only to affect causes of action based on disclosures made from commencement date. We would **strongly oppose** depriving third parties of existing causes of action.

Third party rights

The EDO considers that best practice is to ensure that third party rights to enforce misleading or deceptive conduct provisions are maintained and we **strongly oppose** the proposed third-year limitation on third party actions. We consider that the liability protections would deny third parties enforcement rights at a time when greenwashing is prolific and climate action is critical. While regulators have an important role to play in enforcing greenwashing – and should be commended for their recent enforcement actions – they are limited in the number of enforcement actions they can bring. We note the Deputy Chair of the ACCC, Delia Rickard’s, comment that the ACCC welcomes private actions against companies for greenwashing.² As such, we consider that

¹ IPCC, Impacts of 1.5°C of Global Warming on Natural and Human Systems (2018), p274-283, available at: [SR15 Chapter 3 LR.pdf \(ipcc.ch\)](#)

² AFR, ‘ACCC says it’s ready to pursue greenwashers’ (15 June 2022) available at: [ESG Summit: ACCC says it’s ready to pursue greenwashers \(afr.com\)](#)

the liability protection would have the unintended consequence of delaying climate action by allowing entities to greenwash without the requisite mechanisms in place to hold them to account.

The EDO understands the need to ensure that liability is proportionate to the uncertainty inherent in making disclosures in relation to Scope 3 emissions and forward-looking statements and that entities are not deterred from making decision-useful disclosures. As stated in our response to question 15 in our ‘Submission to Treasury on climate-related financial disclosure’, our position is that the “reasonableness” standard addresses the proportionality requirement and that it is sufficiently flexible to accommodate these uncertainties.³ A disclosure relating to emissions reductions targets and plans, for example, would not be misleading on the basis that it later turned out to be wrong;⁴ so long as entities are transparent in their disclosures and adequately report any assumptions, methodologies or uncertainties relied on at the time the disclosure was made, and ensure that there was a reasonable basis for doing so, their exposure to liability should be minimal.

In addition, the EDO considers that Treasury’s proposed proportionality mechanisms imposes sufficiently less onerous disclosure requirements on entities during the transition period so as not to deter them from making decision-useful disclosures. In relation to Scope 3 emissions, the EDO understands that gathering data is difficult. However, preliminary research conducted by the EDO into Scope 3 emissions disclosures by the largest entities by market capital across fossil fuel intensive industries revealed that 24 entities already disclose Scope 3 emissions. A list of those entities is contained at **Annexure A**. We further note that, in 2022, 93 entities provided Scope 3 emissions data (which includes Scope 3 emissions reductions targets and milestones).⁵ We consider that the proposed one-year relief from reporting Scope 3 emissions, the proposed delayed accrual period and that entities have effectively been put on notice that they will be required to disclose Scope 3 emissions at a minimum of two years from now provides adequate lead time for entities to gather data which can found a reasonable basis for disclosure. If Treasury intends to pursue the liability protections, the EDO **recommends** in respect of third-party actions for misleading or deceptive conduct in relation to Scope 3 emissions disclosure that relief remains available for declarations and injunctions. This would address proportionality by striking an appropriate balance between protecting entities from liability for damages and retaining third party enforcement rights to protect consumers and investors.

In relation to transition planning and climate-related targets, we note that the largest, and highest-emitting companies are already making these disclosures in some form. Indeed, as at 31 March 2022, 70% of the ASX200’s collective market capitalisation had made a net zero commitment, and the number of ASX200 companies making net zero commitments almost

³ Corporations Act 2001 (Cth) s 796C; ACL s 4(1); ASIC Act s 12BB(1).

⁴ *Bonham atf Aucham Super Fund v Iluka Resources Ltd* (2022) 404 ALR 15 at [698].

⁵ ACSI, ‘Promises, pathways & performance’: Climate change disclosure in the ASX200’ (July 2022), p17 available at: [WEBSITE-VERSION-ACSI-Climate-Change-Disclosure-in-ASX200-designed-1.pdf](#)

doubled from 49 to 95.⁶ These entities are already susceptible to actions by third parties if their net zero commitments are not based on reasonable grounds. As such, the EDO considers that removing third party rights in respect of such disclosures is a regressive step that would enable the highest emitting entities to disclose climate related targets and plans with significantly reduced mechanisms to be held to account.

There are significant current proceedings that provide examples of the type of actions brought in the public interest by third parties alleging greenwashing that would be barred by the liability protections in relation to new climate-related disclosures. In August 2021, the Australasian Centre for Corporate Responsibility commenced proceedings against Santos Ltd alleging that Santos engaged in misleading or deceptive conduct, including that its net zero roadmap was not based on reasonable grounds.⁷ In March 2022, similar proceedings were commenced in France against TotalEnergies by environmental groups, including Greenpeace, alleging that TotalEnergies engaged in greenwashing by misleading the public about its commitment to be “carbon neutral” by 2050 despite planning further investments in fossil fuel projects.⁸ In July 2022, a Dutch environmental group “Fossil Free Netherlands” commenced proceedings against KLM alleging that its climate and carbon offsetting advertising is misleading because it is inconsistent with its business growth strategy.⁹ These proceedings are critical to ensure that companies are transparent and are held to account for greenwashing.

Climate action and greenwashing

Greenwashing is an important and pervasive issue. In March 2023, the ACCC reported that of the 247 businesses it reviewed during an ‘internet sweep’, 57% were identified as having potentially engaged in greenwashing. It is an issue because investors require accurate information about the ways in which the global transition to reducing greenhouse gas emissions to net zero by 2050 may impact entities’ future financial prospects in order to make informed investment decisions. Greenwashing distorts that information so that investors cannot make accurate assessments of the viability of their investment and the extent of their financial exposure. Similarly, consumers without adequate disclosure information cannot make informed choices about which products and services to purchase. Misleading information can leave investors vulnerable to major losses, which erodes investor confidence in the market for sustainability-related products. It also potentially skews the market in favour of companies that are not adequately managing climate-related risk and away from companies that are acting responsibly, which poses a threat to the fair and efficient operation of the markets. This is critical because there has been an increase in the number of listed companies making price sensitive announcements to the ASX that reference “net

⁶ACSI, ‘Promises, pathways & performance’: Climate change disclosure in the ASX200’ (July 2022), p9 available at: [WEBSITE-VERSION-ACSI-Climate-Change-Disclosure-in-ASX200-designed-1.pdf](#)

⁷Environmental Defenders Office (26 August 2021 available at: [World-first Federal Court case over Santos’ ‘clean energy’ & net zero claims - Environmental Defenders Office \(edo.org.au\)](#)

⁸ Financial Times (3 March 2022) available at: [TotalEnergies target of lawsuit to test ‘greenwashing’ in advertising | Financial Times \(ft.com\)](#)

⁹ClientEarth (7 June 2023) [Landmark greenwashing lawsuit against KLM airline granted court permission | ClientEarth](#)

zero” or “carbon neutral” by 840% in three years.¹⁰ The importance of tackling greenwashing was recognised by the current Senate inquiry into greenwashing.

The EDO notes that the first principle underpinning the reforms to climate-related disclosure is to support Australia’s climate goals. By concealing opportunities for climate-informed investment, misleading information may impede an effective and timely response to climate change. To avoid the worst impacts of climate change, global temperature levels must remain within 1.5°C above pre-industrial levels, which requires that global emissions are reduced to net zero by at least 2050.¹¹ According to the Intergovernmental Panel on Climate Change in its 2023 Climate Change Synthesis Report, this requires deep, rapid and immediate emissions reductions across all sectors in the next seven years.¹² Delayed action will lead to increasing global warming with every additional increment of warming escalating adverse impacts, many of which will be irreversible.¹³ While three years appears to be a relatively short time period from the perspective of reporting entities, it is critical from the perspective of climate action.

¹⁰ Jennifer Balding, ASIC, UNGCNA Webinar “Avoiding Greenwashing, Bluewashing and Other Forms of Corporate Greenwashing” available at: [UNGCNA Webinar | Avoiding Greenwashing, Bluewashing and Other Forms of Corporate Whitewashing - YouTube](#)

¹¹ IPCC, Climate Change 2023 Synthesis Report: Summary for Policymakers (**IPCC Report**), p19 available at: [IPCC_AR6_SYR_SPM.pdf](#)

¹² IPCC Report, p20-21.

¹³ IPCC Report, p24.

Annexure A: Entities that already disclose Scope 3 emissions

| Entity | Page | Link | Page | Link |
|---|--------|--|------|--|
| AusPost | 62 | AusPost Annual Report | | |
| Viva Energy | 23-24 | Viva Energy SR 2022 FINAL.pdf | | |
| Cobham Aviation Services | 83 | Cobham 2018 Annual Report | | |
| ComfortDelGro | 36 | ComfortDelGro Sustainability Report | | |
| Toll Holdings | 33, 50 | Toll Sustainability Report | | |
| Anglo American Australia Pty Ltd | 27-31 | Anglo American Climate Change Report | 48 | Anglo American Annual Report |
| BHP | 28 | BHP Climate Change Report 2020 | 50 | BHP Annual Report 2022 |
| Chevron Australia Holdings Pty Ltd | 61-63 | Chevron 2022 Corporate Sustainability Report | | |
| ConocoPhillips Australia Gas Holdings Pty Ltd | 171 | ConocoPhillips Sustainability Report 2021 | | |
| ExxonMobil Australia Pty Ltd | 6 | Advancing Climate Solutions Progress Report GHG Data Supplement April 2023 | | |
| Fortescue Metals Limited | 28-29 | Fortescue FY22 Climate Change Report | | |
| Glencore | 36 | Glencore Climate Report 2022 | 1 | Glencore Annual Report 2022 |
| INPEX Australia Pty Ltd | 190 | INPEX Sustainability Report 2022 | | |
| Newcrest Mining Limited | 87 | Newcrest 2022 Sustainability Report | | |
| Rio Tinto | 12 | Climate Change Report 2021 | 22 | Climate Change Report 2022 |

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|----------------------------|-------|--|----|---|
| South32 Mining Limited | 90 | Climate Change Action Plan 2022 | | |
| AGL Energy | 28 | AGL FY21 TCFD Report | | |
| Alinta | 58 | Alinta Sustainability Report 2021/2022 | | |
| EnergyAustralia | 38-39 | CLP Holdings 2022 Climate-related Disclosures Report | | |
| Origin Energy | 30 | FY2022 Origin Sustainability Report | | |
| Alcoa of Australia Limited | 84 | Alcoa 2022 Sustainability Report | | |
| Ampol Limited | 25 | 2022 Sustainability Performance Report.pdf | 39 | Ampol Annual Report 2022 |
| BlueScope Steel | 13 | BlueScope Climate Action Report 2021 | 45 | BlueScope Sustainability Report 2021/22 |
| Boral Limited | 46-47 | Boral Sustainability Report 2022 | | |