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By Email

Dear Sir/Madam

HSF Submission on 'Climate-related financial disclosure'

This submission is made by Herbert Smith Freehills in response to the consultation paper released by the Government seeking views on climate-related financial disclosure (**Consultation Paper**).

Our responses to the questions raised in the Consultation Paper are set out in **Attachment 1**.

Yours sincerely

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HERBERT SMITH FREEHILLS

Attachment 1

Submissions in response to the Consultation Paper

This submission is intended to mirror the questions set out on pages 21-22 of the Consultation Paper. While this submission does not expressly deal with each question, the below table summarises our position on relevant topics.

Question	Submission
1 What are the costs and benefits of Australia aligning with international practice on climate-related financial risk disclosure (including mandatory reporting for certain entities)? In particular: – What are the costs and benefits of meeting existing climate reporting expectations? – What are the costs and benefits of Australia not aligning with international practice and in particular global baseline standards for climate reporting?	*Costs and benefits of meeting existing climate reporting* We agree that Australia's future climate-related disclosure framework should be aligned with the Task Force on Climate-related Financial Disclosures (**TCFD**) framework. This would ensure existing (voluntary) disclosures made by some Australian listed companies[1] can be leveraged as much as possible, reducing, to some extent, compliance costs in the Australian market. The introduction of TCFD-based reporting requirements would also enhance Australia's integration into international markets, with the TCFD framework forming the basis of many investor expectations on climate disclosure and, increasingly, the basis of climate reporting legal regimes across the world. In particular, in our view, the implementation of a TCFD-aligned disclosure framework in Australia has potential to boost the international competitiveness of local companies by better empowering Australian companies to attract: • capital investment from a larger, global pool of investors who are able to perform due diligence and undertake analysis; and • debt financing from banks, lenders and other financial institutions which are able to gain comfort as to the particular risk profile of the company, by reference to internationally recognised climate-related disclosure. However, while the introduction of a TCFD-aligned climate disclosure regime may not represent a significant transition for some Australian companies *already* making voluntary climate disclosure, it will require a

[1] We understand that 103 companies on the ASX 200 either report fully or partially against the TCFD framework. See Australian Council for Superannuation Investors, 'Climate change disclosure in the ASX200' (July 2022), 6 <https://acsi.org.au/wp-content/uploads/2022/08/WEBSITE-VERSION-ACSI-Climate-Change-Disclosure-in-ASX200-designed-1.pdf>.

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	substantial effort from those companies whose approach to reporting on climate matters is less developed. For those companies, reporting against the TCFD framework is likely to involve a significant investment of resources and the embedding of new technical and analytical capabilities, which would carry a considerable cost burden. However, considering the benefits of aligning the Australian framework with international practices, we think these costs can be managed appropriately by introducing the new climate reporting requirements on a phased basis, such that these entities can benefit from the institutionalisation of reporting in the market prior to commencing their own reporting. See further our response to Question 2. *Costs and benefits of not aligning with international practice* Introducing a locally focussed climate reporting regime would hinder Australia's integration into international markets and limit banks, investors, and other financial institutions' ability to benchmark the performance and prospects of Australian companies through comparable climate disclosure.
2 Should Australia adopt a phased approach to climate disclosure, with the first report for initially covered entities being financial year 2024-25? – What considerations should apply to determining the cohorts covered in subsequent phases of mandatory disclosure, and the timing of future phases?	In our view, Australia should adopt a phased approach to climate disclosure. While larger entities have greater resources available to adequately respond to new reporting requirements and, in some cases, have already commenced reporting against the TCFD framework in some form, smaller firms will require more time to build the internal resources, competences, processes and procedures necessary to commence such reporting. As mentioned in response to Question 1 above, a phased approach would also enable those smaller firms to benefit from the institutionalisation of reporting in the market prior to commencing their own reporting, providing an important benchmark and frame of reference. In our view, a phased approach to reporting, as has been implemented in the United Kingdom (**UK**) and the European Union (**EU**), for example, would improve the quality of disclosure, ensuring investors and lenders have access to more complete and decision-useful climate-related information. *Timing for phased reporting* In terms of the timing for the first reports (for the first tranche of entities required to make climate disclosures), in our view, providing companies with a minimum 12-month lead time to make their first disclosures from the finalisation of the legal requirements will be important given the requirements will be, for some, new and quite onerous. Reporting for later cohorts could follow in subsequent periods. This is in line with the approach taken in other jurisdictions, for example the TCFD-aligned reporting required under the UK's Listing Rules and the EU's Corporate Sustainability Reporting Directive (**CSRD**). Given the potentially significant uplift needed to comply with the climate reporting requirements for some companies in terms of collecting data and building capabilities to provide certain disclosures, Treasury might

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	consider implementing a 'comply or explain' or 'if not, why not' approach, or a time-limited exemption, in respect of some aspects of climate disclosure. Under these approaches, companies could explain where they have not been able to make certain disclosures due to transitional challenges in obtaining the necessary data or embedding the relevant technical or analytical capabilities within their business. We would expect this to be particularly relevant in regards to scenario analysis and the collection of Scope 3 emissions and other value chain data. See further our comments in response to Question 12. Again, this is consistent with the approach taken in other jurisdictions. Under the UK's Listing Rules, the reporting entity must disclose its reasons for not making certain climate-related disclosure, any steps it is taking or plans to take to be able to make those disclosures in the future, and the timeframe within which it expects to be able to make those disclosures. Similarly, under the EU's CSRD, there is a partial exemption in the first three years of its application, where certain information about an undertaking's value chain is unavailable and those undertakings can explain efforts made to obtain the information and why it was unavailable or could not be reported. *Considerations to determining the cohorts covered in subsequent phases* We suggest that Treasury have regard to a blend of thresholds informed by balance sheet, number of employees, turnover, and sector when determining the cohorts for future phases of implementation of the climate reporting framework. The thresholds may then be gradually lowered through each successive phase as the disclosure regime is institutionalised, and baseline expectations for disclosure become more settled. Again, this is consistent with the approach taken in other jurisdictions. In the UK, the initial phases of the climate-related financial disclosure regime applied to premium and then standard listed companies under its Listing Rules, before then applying to a broader range of companies and partnerships via other legislative frameworks, including unlisted UK companies with more than 500 employees and turnover of more than £500 million. A similar approach was adopted by the EU's CSRD, which will be implemented on a phased basis. At a high level, the CSRD will impact: • large EU companies, being those companies that meet at least two of the following criteria: (i) more than 250 employees; (ii) turnover of more than €40 million; or (iii) total assets of €20 million. Parent undertakings of large groups which satisfy (on a consolidated basis) these criteria are also in scope; • companies which are listed on an EU regulated market (except for certain listed micro-enterprises based on size criteria relating to employees, turnover and/or assets); and • non-EU undertakings with substantial activity in the EU. Where annual EU-generated revenues exceed €150 million and the non-EU undertaking has either a large or listed EU subsidiary or a significant EU

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	branch (based on revenue thresholds), the EU subsidiary or branch reports for the non-EU undertaking at consolidated group level. Reporting under the CSRD will be required: • in 2025 for undertakings already subject to the requirements of the EU's Non-Financial Reporting Directive (**NFRD**) (listed entities, credit institutions and insurance companies with more than 500 employees and which either have a balance sheet total exceeding €20 million or turnover that exceeds €40 million); • in 2026 for large undertakings and parent undertakings of large groups that are not already subject to the NFRD; • in 2027 for listed SMEs (except micro undertakings), with an opt-out for two years; and • in 2029 for group-level reporting of non-EU undertakings with in-scope EU subsidiaries or branches. In our view, an approach which reflects the principles of the UK's climate reporting requirements and the EU's CSRD and NFRD – that is, that larger entities with the most resources and which are best placed should comply first – should be applied in the Australian context. The same criteria as used in those instruments should likewise be considered in Australia, being industry, turnover, employees and assets. Where precisely the size thresholds should be set – that is, at what stage a company is categorised as 'large' – under Australia's climate reporting regime would need to be considered carefully. Given the size of the economies of the UK and the EU, the size thresholds in the relevant UK and EU instruments may not be suitable in Australia.
3 To which entities should mandatory climate disclosures apply initially? – What size thresholds would be appropriate to determine a large, listed entity and a large financial institution, respectively? – Are there any other types of entities (that is, apart from large, listed entities	We refer to our comments set out in response to Question 2 above.

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and financial institutions) that should be included in the initial phase?	
4 Should Australia seek to align our climate reporting requirements with the global baseline envisaged by the International Sustainability Boards? – Are there particular considerations that should apply in the Australian context regarding the ISSB implementation of disclosures relating to: governance, strategy, risk management and/or metrics and targets? – Are the climate disclosure standards being issued by the ISSB the most appropriate for entities in Australia, or should alternative standards be considered?	The alignment of Australia's climate reporting regime with the global baseline envisaged by the International Sustainability Standards Board (**ISSB**) will be important for the same reason alignment of Australia's climate reporting regime with the TCFD framework is important. That is, such alignment streamlines the fragmented voluntary reporting environment and enables Australian companies to report by reference to a globally standardised and accepted framework. It would be counter-productive if Australia were to adopt overly bespoke or alternative disclosure requirements which did not align with an internationally recognised standard. Such an approach would undermine the comparability (and therefore usability) of sustainability reporting, potentially placing Australian companies at a disadvantage in the global marketplace for debt, investment and capital. We note, however, that the potential alignment of reporting requirements with the future ISSB standards on disclosure of climate and other sustainability topics is likely to have a significant cost implication for Australian companies, which will be required to report against matters they are not currently reporting, even if making voluntary disclosures under the TCFD framework. The Australian Institute of Company Directors (**AICD**) has also indicated that there is a shortage of ESG specialists with the knowledge, skillset and experience required to carry out the work required by international standards.[2] This underscores the need to ensure that both companies and service providers are afforded sufficient time to enhance capabilities and prepare for the introduction of the regime. *Particular considerations in the Australian context* The incorporation of the ISSB standard on climate-related disclosure (as currently drafted)[3] within Australian's climate reporting regime would represent a leap in the amount and level of detail of information currently disclosed in Australia, even for companies which currently voluntarily disclose against the TCFD framework. For example, the ISSB standard on climate disclosure is expected to require disclosure of additional and more granular information, such as information on a range of metrics, including Scope 3 emissions, the percentage of assets vulnerable to climate risk, and internal carbon prices, as well as more

[2] Australian Institute of Company Directors, 'Responses to Questions for Respondents: Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information' (15 July 2022), 11 <https://www.aicd.com.au/content/dam/aicd/pdf/news-media/policy/2022/AICD-Submission-ISSB-ISSB-Standards-S1-and-S2-July%202022.pdf>.

[3] IFRS Foundation, '[Draft] IFRS S2 Climate-related Disclosures' (March 2022), <https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf>. The final disclosure standard has not yet been published.

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	extensive forward-looking matters. The incorporation of the ISSB standard on sustainability-related disclosure (as currently drafted),[4] as well as additional future ISSB standards on other sustainability topics, would present a further step change, as they apply to broader (not just climate) matters which are not included in voluntary disclosures under the TCFD framework. We consider it would be prudent to develop the Australian climate reporting system having regard to development of these ISSB standards as well as the Taskforce on Nature-related Financial Disclosure (**TNFD**) so as to not preclude future integration of those systems and issues if determined appropriate, although it would be premature to hard-wire any of that content into the Australian reporting system. In particular, any requirements to assure climate and sustainability disclosure (including Scope 3 emissions) and the requirement to disclose on extensive forward-looking matters present particular challenges in the Australian context. <u>Assurance requirements</u> We note that assurance is currently not required on sustainability or ESG reports and, in our experience, to the extent such assurance is provided, it is often limited to quantitative technical data, and Scope 1 and 2 emissions. While there are examples of limited assurance being provided beyond these matters, in our experience, auditors in Australia are not yet undertaking assurance on the full scope of climate and sustainability disclosure. In our view, a key barrier to obtaining assurance over this information is that specific assurance standards for such information have not yet been developed. These assurance standards should be developed before any requirements to assure climate and broader sustainability-related information are implemented. See further our comments in response to Question 8. <u>Forward-looking disclosure</u> Certain aspects of the ISSB standards require estimation or prediction of the impacts of climate and sustainability risks and opportunities even though such disclosure would be necessarily speculative and, in some cases, may be unknowable. The current 'reasonable grounds' requirements in respect of disclosure of forward-looking information present practical challenges in this context. Further, while the 'reasonable grounds' test is intended to adapt to the relevant circumstances, in practice it is susceptible to challenge: including given differing views on reasonableness and the fact that claims are framed with the benefit of hindsight.

[4] IFRS Foundation, '[Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information' (March 2022), <https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf>. The final disclosure standard has not yet been published.

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	As such, disclosing entities and their directors may be subject to heightened risk of litigation under the *Corporations Act 2001* (Cth) (**Corporations Act**), *Australian Securities and Investments Commission Act 2001* (Cth) (**ASCI Act**) and Australian Consumer Law (**ACL**) for making misleading representations in relation to disclosures required under the ISSB standards. As such, consideration should be given to adapting the liability regime in Australia, so that it is proportionate and strikes an appropriate balance between incentivising complete and comprehensive disclosure and penalising misconduct. See further our comments in response to Question 15. <u>Other matters</u> In addition to the above, consideration should be given to ensuring consistency in: • materiality thresholds for reporting as those currently in place in Australia (see our comments in response to Question 7 and Question 16); and • emissions reporting methodologies as those currently applied under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER**) framework (see our comments in response to Question 9).
5 What are the key considerations that should inform the design of a new regulatory framework, in particular when setting overarching climate disclosure obligations (strategy, governance, risk management and targets)?	We think it will be important that Australia adopts a regulatory framework which provides certainty and allows for consistency in climate reporting, whilst at the same time maximises flexibility to ensure that companies can produce information that best responds to the needs of their stakeholders and that Australia can effectively and efficiently adapt to developments in sustainability reporting. In this regard, we think an appropriate response would be for the climate reporting regulatory framework to broadly follow the structure currently in place in respect of accounting standards. That is, legislative requirements to follow climate reporting standards, which themselves set out requirements to report against the four disclosure pillars of the TCFD framework: governance, strategy, risk management and metrics and targets. The granular detail of the reporting framework – such as the 11 recommended disclosures under the four disclosure pillars – should then be set out in associated guidance. In our view, taking this approach would enhance market acceptance and understanding, and provide sufficient flexibility to ensure that the regulatory framework can swiftly adapt and respond to international developments. See further our comments in response to Question 17.

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6 Where should new climate reporting requirements be situated in relation to other periodic reporting requirements? For instance, should they continue to be included in an operating and financial review, or in an alternative separate report included as part of the annual report?	In our view, companies should have flexibility to determine their own approach to reporting – but to enhance transparency a 'roadmap' could be included in the operating and financial review (**OFR**) to identify where the relevant disclosures can be located. In our experience, many companies which undertake voluntary TCFD reporting have done so in separate reports which can accommodate more detailed disclosures than could be fit within the OFR. To continue to facilitate this approach and avoid unnecessary duplication, consideration should be given to adapting the obligations associated with the OFR to allow climate-related financial risk disclosures to be set out in a separate report, with cross-referral from the OFR to that separate report being sufficient for the purposes of legal compliance with the relevant OFR requirements.
7 What considerations should apply to materiality judgements when undertaking climate reporting, and what should be the reference point for materiality (for instance, should it align with ISSB guidance on materiality and is enterprise value a useful consideration)?	We encourage Treasury to harmonise the definition of materiality under the climate disclosure framework with its meaning under Australia's accounting standards. This threshold is well-understood and well-accepted by stakeholders. In our view, establishing a materiality regime which conforms to the existing framework will ensure that decision-useful climate disclosure will be made, and that the provision of excessive material will be avoided. In this way, such alignment would allow for a degree of cogency in reporting under the financial and climate reporting frameworks; that is, that disclosed information has been assessed and considered material by reference to the same suite of considerations (i.e. whether the omission, misstatement or obscuring of information could reasonably be expected to influence primary users of general purpose financial reporting). See further our response to Question 16. If the new climate reporting requirements require the disclosure of information that goes beyond what would be considered 'material' under Australia's current framework (for example, if disclosure of Scope 1, Scope 2 and Scope 3 emissions was required regardless of materiality), companies should be afforded flexibility in how they comply with such requirements, and the level of detail provided. We note the ISSB suspended its proposed use of enterprise value in its draft disclosure standards based on stakeholder feedback. In our view, it would be unhelpful to reference enterprise value in the materiality thresholds for climate reporting, on the basis that this could create inconsistencies and incongruencies with current reporting and well-accepted materiality concepts, as set out above.
8 What level of assurance should be required for climate disclosures, who	We recognise that the independent assurance of climate-related financial risk disclosure would enhance its reliability and give users and companies (and their directors) alike a degree of comfort as an independent

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should provide assurance (for instance, auditor of the financial report or other expert), and should assurance providers be subject to independence and quality management standards?	check on the quality of disclosure. However, as set out above in response to Question 4, in our experience, assurance is only generally provided in relation to quantitative technical data and Scope 1 and 2 emissions, with a key barrier to broader assurance being that that specific assurance standards for climate and sustainability information have not yet been developed. Although we understand that the Australian Government has proposed to expand the function of the Auditing and Assurance Standards Board (**AUASB**) to allow it to develop auditing and assurance standards for sustainability purposes, these are not yet in place or understood by users. In our view, these standards would need to be developed, and the market would need to mature, before any requirements to assure climate- and broader sustainability-related information could be implemented. In this sense, we think that the adoption of a phased approach to assurance of climate-related financial risk disclosure would be appropriate, commencing with no requirement for assurance, before proceeding to limited and eventually reasonable assurance over time, as appropriate, as standards are developed and the market matures. This would enable audit firms and practitioners the time to embed the assurance capabilities required and for the AUASB to develop and 'road test' draft assurance standards before implementation. In accordance with best practice, and as is currently the case, we think it is appropriate that such assurance should be provided by auditors who are subject to independence, integrity and quality management standards, and who have the necessary education, experience and competency to assure climate and sustainability disclosure.
9 What considerations should apply to requirements to report emissions (Scope 1, 2 and 3) including use of any relevant Australian emissions reporting frameworks?	We consider that the climate disclosure framework should permit reporting entities the flexibility to adopt the emissions reporting methodology which they consider the most appropriate and relevant for their business and circumstances. However, to enhance comparability and transparency, there should be a requirement to disclose the methodology used in calculating and disclosing emissions and why that methodology has been chosen. In this way, companies that are already required to report on their Scope 1 and Scope 2 emissions under the existing reporting framework in the NGER regime can continue to apply the NGER-mandated methodology to their Scope 1 and Scope 2 emissions disclosures under Australia's future climate reporting regime. This would minimise the cost and regulatory burden associated with the imposition of a single emissions reporting methodology, while enabling companies to engage with a regime with which they are familiar, potentially optimising the quality of disclosure.

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	To enhance comparability, guidance associated with the future climate reporting regime could identify commonly used emissions methodologies reporting entities might consider, such as the Greenhouse Gas Protocol Corporate Standard and the NGER methodologies. We note that this is the approach adopted by the UK is its Streamlined Energy and Carbon Reporting (**SECR**) regime, where the legislation requires the disclosure of the methodology used to calculate emissions, and associated statutory guidance suggests that widely recognised independent methodologies should be used and provides a list of examples.
10 Should a common baseline of metrics be defined so that there is a degree of consistency between disclosures, including industry-specific metrics?	In our view, it is not necessary to define a common baseline of metrics as these will be determined by the market and stakeholder expectations. We do not consider it appropriate to require the application and disclosure common metrics given that the framework will necessarily straddle wide ranging industries and economic sectors whose stakeholders expect metrics which respond to the particularities of those industries and sectors. We instead suggest that reporting entities be afforded the flexibility to identify and apply meaningful metrics which are relevant to their business and which are decision-useful to investors and lenders. This reflects the TCFD framework's approach to metrics, which permits reporting entities to use the metrics which are appropriate for their industry and/or sector. Whilst we appreciate that the ISSB standard on climate-related disclosure (as currently drafted) takes a different approach, we note that such approach is in part based on the industry-based metrics set out in standards developed by the Sustainability Accounting Standards Board (**SASB**). SASB standards are not commonly applied or understood in Australia, and so any introduction or transposition of such standards and associated metrics should be the subject of separate consultation.
11 What considerations should apply to ensure covered entities provide transparent information about how they are managing climate related risks, including what transition plans they have in place and any use of greenhouse gas emissions offsets to meet their published targets?	In our view, there is a risk that mandating the detailed disclosure of certain forward-looking information on transition plans, climate targets, and intended use of offsets would lead to many covered entities producing generic or broad disclosure, which is not particularly decision-useful for investors and other users. This is because, in the context of Australia's current legal framework, many covered entities may not feel they have sufficient certainty to justify reasonable grounds for making detailed forward-looking disclosure on these topics. Without this certainty, covered entities may err on the side of excluding detail from disclosure, or frame disclosure in vague and broad terms, so as to mitigate risks associated with misleading disclosure or 'greenwashing'. We note with some concern the research undertaken by consultancy South Pole, which surveyed 1200 companies and found that up to a quarter of respondents with science-based targets were

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	not planning on publishing them (known as 'green-hushing').[5] This outcome would seem to oppose one of the key driving considerations behind the introduction of climate reporting: to provide decision-useful and comprehensive disclosure. Please see further our response to Question 15. In this context, and without changes to support appropriate disclosure as discussed in response to Question 15, we consider that it would be appropriate to set a reporting standard requiring that businesses report against their climate related risks in line with the TCFD framework's 'Strategy' pillar, but not mandating the disclosure of specific forward-looking information on transition plans, climate targets and use of offsets.
12 Should particular disclosure requirements and/or assurance of those requirements commence in different phases, and why?	*Disclosure requirements* We think that disclosure requirements relating to scenario analysis and a reporting entity's value chain should be introduced on a phased basis. In particular: • (***Scenario analysis***) undertaking quantitative scenario analysis would likely require the reporting entity to enhance internal modelling and analytical capabilities and/or to seek third-party expertise. This is likely to require a significant time investment and/or result in considerable cost. Reporting entities should accordingly be provided with the time to consider how best to undertake scenario analysis and embed or seek the relevant capabilities as needed; and • (***Value chain data***) disclosures relating to data from third parties, including Scope 3 emissions and the current and anticipated effects of risks and opportunities on the value chain (for ISSB-aligned reporting), represent a significant extension upon the matters that might be currently voluntarily disclosed under the TCFD framework (and an even more significant extension to current mandatory reporting requirements). Where such data is unavailable or lacks reliability, it would be appropriate for Australia's regime to require disclosure of such information to at a later time. This would allow the market to mature in terms of collecting and analysing third-party data and to develop appropriate methodologies to estimate and transpose data where needed. A phased approach for these disclosures could take various forms. For example, Australia's climate reporting regime could provide for a time-limited exemption or be subject to a 'comply or explain' or 'if not, why not' approach, as discussed in response to Question 2.

[5] South Pole, 2022 Net Zero Report, accessible at 'Going Green, then Going Dark' (18 October 2022), <https://www.southpole.com/news/going-green-then-going-dark>.

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	Assurance requirements Any requirements around assurance should be introduced under a phased approach to allow sufficient time for the development of specific assurance standards and for the maturation of the market. Please see above our response to Question 8.
13 Are there any specific capability or data challenges in the Australian context that should be considered when implementing new requirements? – How and by whom might any data gaps be addressed? – Are there any specific initiatives in comparable jurisdictions that may assist users and preparers of this information in addressing these challenges?	There are capability and data challenges in relation to disclosure of value chain information (including Scope 3 emissions) and scenario analysis, as set out above in response to Question 12. Disclosure on these matters would require significant reliance on technical capabilities, which in turn requires access to a pool of human resources with specific modelling and analytical capability. We understand that the market is currently experiencing a shortage in qualified candidates to be able to fulfil these functions, which would likely be exacerbated in light of any requirements to disclose against these topics. In our view, these challenges warrant the phased implementation of any requirements to make associated disclosures. See our response to Question 12 for further detail. To the extent that a covered entity experiences challenges in collecting data and embedding or sourcing the required capabilities, it would be helpful to have one authoritative Australian body – structured as either a consultative body or multi-stakeholder group – that releases guidance materials to assist covered entities to respond to these challenges. We note the absence of authoritative guidance has historically created significant complexity for companies looking to disclose against these matters, given the variety of frameworks, standards and resources recommended by different industry groups, NGOs or other stakeholders. See our response to Question 14 for further detail.
14 Regarding any supporting information necessary to meet required disclosures (for instance, climate scenarios), is there a case for a particular entity or entities to provide that information and the governance of such information?	In our view, it is desirable for there to be a single authoritative consultative body that engages with stakeholders, or a multi-stakeholder group, that develops guidance and recommendations on the supporting information needed to meet disclosure requirements under the new Australian climate reporting regime. This model has historically been successful in the Australian context: • consultation with stakeholders and having a central forum for the development of guidance was key to the articulation of the principles and recommendations for corporate governance developed by the ASX Corporate Governance Council; and

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	• the Australian Accounting Standards Board engages with various stakeholders, such as the IASB and Australian organisations and specialist individuals, in setting accounting standards tailored to the Australian market. Given the success of these approaches, a similar approach should be considered in respect of the supporting information needed to meet climate-related disclosure requirements under the new regime. Such a central body or group could also provide guidance on responding to challenges associated with data availability and capability constraints, as discussed in our comments in response to Question 13. In our view, whatever structure the body or group takes, it will be imperative that it: • allows for consultation with stakeholders to ensure guidance and supporting information is readily applicable or adaptable for covered entities and the Australian context; and • ensures that guidance and other information is consistent with international practice on climate-related disclosure, to enhance Australia's integration into international markets and avoid fragmentation, to ensure investors are provided with decision-useful information that can be compared across jurisdictions, and to minimise further burden and costs on reporting entities.
15 How suitable are the 'reasonable grounds' requirements and disclosures of uncertainties or assumptions in the context of climate reporting? Are there other tests or measures that could be considered to ensure liability is proportionate to inherent uncertainty within some required climate disclosures?	Under the Corporations Act, person must not engage in conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive. This prohibition applies to the making of public statements by a company. A representation with respect to any future matter will automatically be taken to be misleading if the representation is not made on 'reasonable grounds'. Similar provisions exist in the ASIC Act and the ACL. Directors can become personally liable for compensation for statements that are found to be misleading or deceptive. Directors may also be at risk of 'stepping-stone liability' for failing to discharge their duty of care and diligence where they do not prevent the company's breach of a legal requirement (such as the making of misleading statement in public reporting). Australia's current periodic reporting requirements largely require the disclosure of backward-looking information, with some limited exceptions like the OFR. However, the TCFD framework and, in time, the ISSB standards (if adopted in the same form as the current drafts) would represent a significant step-change in terms of the level and detail of forward-looking information required to be disclosed. The current 'reasonable grounds' requirements in respect of disclosure of forward-looking information present significant practical challenges in respect of climate-related (and broader sustainability) matters. Extensive prediction or estimation of the impacts of risks and opportunities for the reporting entity, which rely on external parameters or input subject to significant uncertainty, will be required, despite those impacts

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	being speculative and in some cases, unknowable. The pace with which market dynamics are changing and the breadth of challenges with respect to energy transition, technological development, policy uncertainty and geopolitical pressures further complicate assessments underpinning such forward-looking statements. Even where a reporting entity and its directors consider that forward-looking disclosures are supported by reasonable grounds, this may be challenged in court by private litigants. While the 'reasonable grounds' test is intended to adapt to the relevant circumstances, in practice it is susceptible to challenge: including given differing views on reasonableness (e.g. reliance on particular technologies, strategies or offsetting) and given the fact that claims are framed with the benefit of hindsight. While we understand a view from some market participants and commentators that the 'reasonable grounds' test will be clarified over time through the development of practice and related case law, recognising the time and cost that such litigation entails (including for directors personally), we take the view that it would be more appropriate to adapt the applicable regulatory framework to take account of these issues. To achieve its aims, Australia's climate disclosure framework needs to incentivise the disclosure of comprehensive and decision-useful information. At the same time, as has always been the case in respect of financial reporting, proportionate liability provisions should exist to penalise misconduct in reporting. Shifting from the current (mostly backward-looking) periodic reporting requirements to include requirements to disclose extensive forward-looking climate-related information under the TCFD framework warrants a reconsideration of the current liability framework. The potential incorporation of the more granular ISSB standards in future – covering a wide range of sustainability topics (not only climate) – further necessitates this review of liability provisions. Without a more proportionate liability regime, directors may face significant challenges in reaching a requisite level of comfort to be able to fully disclose the substantial forward-looking information required. As noted above, analysis undertaken by consultancy South Pole suggests that a significant proportion of companies are under-disclosing or not disclosing their science-based targets (of the 1200 companies surveyed, up to a quarter of respondents with science-based targets were not planning on publishing them).[6] Importantly, even in heavy emitting industries (which arguably face the most acute pressure for disclosure to stakeholders), equivalent trends were observed by South Pole regarding non-disclosure of forward targets. For the above reasons, a 'safe harbour' from liability should be considered to respond to the inherent uncertainty associated with forward-looking climate (and broader sustainability) disclosure. Other key jurisdictions provide safe harbours for forward-looking disclosure made in good faith and we are not aware

[6] South Pole, 2022 Net Zero Report, accessible at 'Going Green, then Going Dark' (18 October 2022), <https://www.southpole.com/news/going-green-then-going-dark>.

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	of it having presented significant barriers to the integrity of their markets or the quality of their reporting regimes. In those jurisdictions, it is comparatively easier for companies and directors to disclose complete and candid forward-looking information on the anticipated financial impacts of climate and sustainability matters. Conversely, as the liability risks in Australia are higher, Australian companies and their directors may be dissuaded from making comprehensive disclosure on forward-looking matters subject to inherent uncertainty. In this regard, a 'safe harbour' mechanism which protects companies and directors from *private claims* in respect of forward-looking disclosure made in good faith may strike an appropriate balance between incentivising comprehensive disclosure and penalising misconduct. Under this model, Australian regulators would be able to take public enforcement action when they believe information is misleading, but private litigants would have to meet a more stringent test to be able to bring private litigation.
16 Are there particular considerations for how other reporting obligations (including continuous disclosure and fundraising documents) would interact with new climate reporting requirements, and how should these interactions be addressed?	Consideration should be given to the interaction of new climate reporting requirements with the existing current Australian reporting regime. *Periodic reporting requirements* See our response to Question 15 in relation to the interaction of the new climate reporting requirements with Australian's current periodic reporting regime, particularly in respect of misleading disclosure provisions. Further to those observations, the materiality threshold of the climate reporting requirements should be aligned with the existing materiality thresholds for periodic reporting as much as possible. These thresholds are well-understood and well-accepted by stakeholders. Otherwise, a different materiality threshold for climate reporting could result in the disclosure of information that is not considered decision-useful by users of financial statements and cause the excessive disclosure of information which could obscure the material that is most relevant. If the new climate reporting requirements require the disclosure of information that goes beyond what would be considered 'material' under Australia's current framework (for example, if disclosure of Scope 1, Scope 2 and Scope 3 emissions was required regardless of materiality) companies should be afforded flexibility in how they comply with such requirements, and the level of detail provided. This should be coupled with the adjustment of existing liability provisions, as outlined in response to Question 15. See further our comments in response to Question 7.

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	Continuous disclosure requirements Similarly, the interaction between the new climate reporting requirements and existing continuous disclosure requirements should be streamlined as much as possible. The Australian test for continuous disclosure requires the disclosure of information "that would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of…securities".[7] This is "information that a reasonable person would expect to have a material effect on the price or value of the entity's securities".[8] ASIC has in recent years continued to emphasise that material climate related disclosures may be relevant to compliance with continuous disclosure obligations.[9] Careful consideration should be given to the interaction of continuous disclosure requirements and the disclosure of targets under the new climate reporting regime. Such targets are, by their nature, forward-looking and subject to uncertainty, particularly given that climate change is an area subject to rapid change. For Australian listed companies, this could cause periodic disclosure documents into sources of ongoing continuous disclosure obligations. This is because listed entities are required under the ASX Listing Rules to correct or prevent a false market, which could arise where an existing announcement subsequently becomes incorrect in a material respect. Should a reporting entity become aware that an announced climate target can no longer be met (for example, due to a change in external factors), or the assumptions underlying those targets have changed, careful consideration would need to be given to the materiality of such information and whether there may be a false market in the entity's securities. Given the rapidly evolving climate landscape, this could significantly increase the regulatory and compliance burden on reporting entities. *Carve-out for commercially sensitive information* In line with the OFR provisions under section 299A of the Corporations Act, which allow the omission of relevant information from the directors' report if that information is likely to result in unreasonable prejudice to the reporting entity, consideration should be given to providing a similar carve-out for climate related

[7] Corporations Act s 677(1).

[8] ASX Listing Rule 3.1.

[9] ASIC, 'Corporate governance update: climate change risk and disclosure' (14 October 2021), <https://asic.gov.au/about-asic/news-centre/speeches/corporate-governance-update-climate-change-risk-and-disclosure/>; ASIC, 'ASIC's current focus: What are the regulator's expectations on sustainability-related disclosures?' (7 December 2022), <https://asic.gov.au/about-asic/news-centre/articles/asic-s-current-focus-what-are-the-regulator-s-expectations-on-sustainability-related-disclosures/>.

Question	Submission
	information. This issue should be carefully considered to ensure that the appropriate balance is struck between fulsome disclosure and the protection of companies' legitimate commercial interests.
17 While the focus of this reform is on climate reporting, how much should flexibility to incorporate the growth of other sustainability reporting be considered in the practical design of these reforms?	Flexibility should be a key consideration in the design of these reforms. We appreciate that the TNFD disclosure framework will soon be released, and that the ISSB is developing standards for climate and other sustainability disclosure that will be released in the coming years. As sustainability (including climate) reporting is in a state of flux and still relatively nascent, it is important that the design of the reforms maintains flexibility to be able to incorporate changes as they occur, as appropriate. This will enhance Australia's integration into international markets, and help ensure that climate- and broader sustainability-related disclosures are comparable across jurisdictions and respond to evolving market expectations.
18 Should digital reporting be mandated for sustainability risk reporting? What are the barriers and costs for implementing digital reporting?	Whether to produce digital reporting should be determined by companies, as they are ultimately best placed to understand stakeholders' needs and preferences, as well as their own capabilities in delivering this type of reporting. We do not have specific comments on the barriers and costs, but the fact that no companies have adopted digital reporting since the facility was available in 2010 suggests it is not meaningfully useful in practice.
19 Which of the potential structures presented (or any other) would best improve the effectiveness and efficiency of the financial reporting system, including to support introduction of climate related risk reporting? Why?	In our view, it would be important to leverage existing expertise and international relationships with other standard setting bodies and relevant stakeholders, but we otherwise have no further comments on this question.