Environmental Defenders Office

August 2024

Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024

In March 2024, the Government introduced the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (**the Bill**). Schedule 4 to the Bill seeks to establish a framework for a **mandatory climate disclosure reporting regime** in Australia.

The EDO supports a robust climate-related reporting regime to ensure that disclosures are accurate, transparent and consistent across all companies that are required to report. This will provide investors with information they require to assess how climate-related risks and opportunities impact companies and has the potential to curb greenwashing at a time when it is prolific.

However, EDO is deeply concerned that the Bill **significantly strengthens entities' protection from liability for greenwashing** at a time when urgent climate action is critical.

Recommendation: Third parties retain the right to take legal action against entities for making misleading statements about their climate transition plans.

Including transition plans in the proposed modified liability regime may carry the unintended consequence of facilitating greenwashing.

Transition plans include statements about an entity's interim and long-term emissions reductions targets and a strategy on how it will meet targets for reducing emissions, such as a net zero plan. Under the Bill, entities will have immunity for statements made in their transition plans for the first three financial years commencing on or after 1 January 2025 in respect of civil claims brought by third parties, including investors.

Crucially, those claims include that an entity has engaged in misleading or deceptive conduct in contravention of the *Corporations Act 2001* (Cth) (**Corporations Act**), *Australian Consumer Law* (**ACL**) and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).[1] This is a significant departure from the Exposure Draft. It is also a departure from the general application of misleading or deceptive conduct provisions in the Corporations Act, ACL and ASIC Act to **all** representations made in trade or commerce or in relation to a financial product.

Including transition plans in the modified liability regime is unnecessary because:

- ***Transition plan reporting is already taking place:***
  The largest and highest-emitting entities (being Group 1 entities under the Bill) are already making voluntary disclosures about transition plans. As at 31 March 2023, 78% of the ASX200's collective market capitalisation had made a net zero commitment.[2] These entities are already susceptible to claims by third parties if their net zero commitments are not based on reasonable grounds.

[1] *Corporations Act 2001* (Cth) s 1041H; ACL s 18; ASIC Act s 12DA.
[2] ACSI, 'Promises, Pathways & Performance': Climate Change Disclosure in the ASX200' (August 2023) 8.

- ***It removes important accountability mechanisms that prevent greenwashing:*** ACCR's claim against Santos and Greenpeace's claim against Woodside are examples of claims brought by third parties in Australia, both alleging that the companies respectively made misleading statements in respect of their net zero claims.[3] The effect of the modified liability regime proposed in the Bill would be to prevent third parties from bringing such claims in relation to misleading statements in transition plans. Indeed, had the proposed legislation been in force at the time, the applicants would have been prevented from commencing these proceedings against Santos and Woodside.
- ***Investors require accurate information about the global transition and its impacts:*** The global transition will impact on entities' future financial prospects, and investors need to make informed decisions, including accurate assessments of the viability of their investment and the extent of their financial exposure. Ensuring that entities make accurate disclosures in relation to their emissions reductions plans is crucial due to the significant uptick in entities making net zero commitments at a time when greenwashing is prolific.[4]
- ***'Reasonable grounds' already offers protection for forwarding looking disclosures:*** The "reasonable grounds" requirements in the Corporations Act, the ACL and the ASIC Act are appropriate and sufficiently flexible to accommodate any uncertainties or assumptions that may be inherent in transition plans.[5] Where an entity has disclosed any assumptions, methodologies or uncertainties, the assessment of whether the disclosure was made on "reasonable grounds" will take those into account. Moreover, a forward-looking statement is not misleading merely because it later turns out to be wrong.[6] As long as entities are adequately disclosing the assumptions, methodologies and uncertainties that underpin their disclosures, and had a reasonable basis for making those assumptions, the risk of being found liable for forward-looking statements should be minimal.

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[3] ACCR (26 August 2021) available at: Australasian Centre for Corporate Responsibility files landmark case against Santos in Federal Court - ACCR; Greenpeace Australia Pacific (14 December 2023) available at: Greenpeace Australia Pacific Takes Woodside To Court Alleging Misleading Climate Claims - Greenpeace Australia Pacific

[4] See for example, analysis of problems with all the major net zero plans of top ASX listed companies; and in mining.

[5] *Corporations Act 2001* (Cth) s 796C; ACL s 4(1); ASIC Act s 12BB(1).

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