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By email: climatereportingconsultation@treasury.gov.au

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SUBMISSION TO THE TREASURY: CLIMATE-RELATED FINANCIAL DISCLOSURE CONSULTATION PAPER

To the Corporations Branch,

Market Forces advocates for policy and practical action to redirect finance from projects and activities that harm the environment and into those that protect and enhance it. We appreciate the opportunity to make a submission to the Treasury regarding its consultation paper on climate-related financial risk. We have included below a number of recommendations most applicable to consultation questions 3, 5, 9, 11, 14 and 15.

As a preliminary matter, we would like to direct your attention to the following resources and events regarding the existing legal and regulatory backdrop against which the Treasury's consultation paper sits. We note:

- Noel Hutley Senior Counsel (SC) and Sebastian Hartford Davis' October 2016 Memorandum of Opinion 'Climate Change and Directors' Duties,'¹ outlining the requirement for all company directors to consider climate change risks.
- The Australian Securities and Investments Commission's (ASIC) September 2018 report 'Climate risk disclosure by Australia's listed companies'² confirming Hutley and Hartford Davis' position and stating: "Listed companies should provide meaningful and useful risk disclosure to enable investors to make fully informed decisions."
- ASIC's updated guidance 'Effective disclosure in an operating and financial review,'³ published in August 2019, setting out companies' legal obligations with respect to climate risk reporting.

¹ Noel Hutley SC and Sebastian Hartford Davis (2016) '[Memorandum of Opinion: Climate Change and Directors' Duties](#)' *The Centre for Policy Development* (accessed 18 January, 2023)

² ASIC (2018) '[Climate risk disclosure by Australia's listed companies](#)' *The Australian Securities and Investments Commission* (accessed 18 January 2023)

³ ASIC (2019) '[Effective disclosure in an operating and financial review](#)' *The Australian Securities and Investments Commission* (accessed 18 January 2023)

- Noel Hutley SC and Sebastian Hartford Davis' April 2021 further supplementary memorandum of opinion, 'Climate Change and Directors' Duties,'⁴ concluding "...a company (and its directors) could be found to have engaged in misleading or deceptive conduct or other breaches of the law by not having had reasonable grounds to support the express and implied representations contained within climate change commitments."
- The United Nations' (UN) High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities' November 2022 report, 'Integrity Matters,'⁵ on net zero emissions commitments of non-state entities, particularly the recommendations relating to fossil fuel exposure, carbon credits, scope 3 emissions and regulated requirements for net zero, as stated in the Chair's note on page 7.
- The current Federal Court action⁶ alleging oil and gas producer Santos engaged in misleading and deceptive conduct relating to net zero claims.
- A legal opinion⁷ commissioned by Market Forces and written by Noel Hutley SC and James Mack in June 2017, which found:
 - Climate change risks can and should be considered by trustee directors to the extent that those risks intersect with the financial interests of a beneficiary of a registrable superannuation entity;
 - The differing functions of a company and a trust are such that considerations of climate change risk may result in different emphasis and outcomes, and;
 - Trustee directors should source, consider and weigh relevant information relating to climate change risk and record their decision making processes, including any considerations of climate change risks.

⁴ Noel Hutley SC and Sebastian Hartford Davis (2021) '[Further Supplementary Memorandum of Opinion: Climate Change and Directors' Duties](#)' *The Centre for Policy Development* (accessed 18 January, 2023)

⁵ UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities (2022) '[Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions](#)' *The United Nations* (accessed 18 January, 2023)

⁶ Daniel Fitzgerald (2022) '[Gas giant Santos accused of "greenwashing" clean energy claims, in Federal Court case](#)' *ABC News* (accessed 18 January, 2023)

⁷ Noel Hutley SC and James Mack (2017) '[Memorandum of Opinion: Superannuation Fund Trustee Duties and Climate Change Risk](#)' *Market Forces* (accessed 18 January, 2023)

- A legal opinion⁸ commissioned by Market Forces and written by Noel Hutley SC and James Mack in February 2021, which found:
 - Super funds must take a thorough approach to understanding the financial risks posed by climate change, including obtaining regular expert advice;
 - Where these risks are too great for a particular investment, funds must consider divestment – that is, shifting funds to less risky investments;
 - Multiple studies have confirmed that failing to limit global warming in line with the Paris climate goals would have serious negative financial impacts across the economy broadly, and therefore super funds' entire portfolios; and
 - Target [investment] exposures, such as portfolio wide net zero emissions reduction targets, will need to be determined having regard to any financial risk posed by climate change.
- The Australian Prudential Regulation Authority's (APRA) November 2021 prudential practice guide 'CPG 229 Climate Change Financial Risks,'⁹ intended to assist APRA-regulated entities in managing the financial risks of climate change by providing clarity on regulatory expectations.

Taking the above into consideration, our recommendations demonstrate that disclosure of material climate risks is already required under existing legal and regulatory frameworks, yet further guidance and standardisation concerning these disclosures is required. Critically, given the clear legal risks of greenwashing, misleading and deceptive conduct, and inadequate climate risk management evident in current climate disclosures, guidance and regulation is required to ensure disclosed climate targets and detailed plans to achieve them comprehensively and demonstrably align with entities' broad climate statements and commitments.

We look forward to discussing our recommendations should the opportunity arise.

Sincerely,



Asset Management Campaigner, Acting Executive Director

Market Forces

⁸ Noel Hutley SC and James Mack (2021) '[Memorandum of Opinion: Superannuation Trustee Duties and Climate Change](#)' Market Forces (accessed 18 January, 2023)

⁹ APRA (2021) '[Prudential Practice Guide: CPG 229 Climate Change Financial Risks](#)' The Australian Prudential Regulation Authority (accessed 18 January, 2023)



RECOMMENDATIONS

- (1) As a starting point, mandatory climate disclosures should apply to ASX 300 companies, superannuation funds, and any large unlisted companies operating in 'high risk' sectors,¹⁰ as soon as possible.
 - Market Forces has previously analysed¹¹ the disclosures of ASX 100 companies in the 'high risk' sectors identified by the TCFD, finding an alarming gap in key demonstrations of understanding and management of climate transition risk, such as scenario analysis, emissions reduction targets and emissions reduction plans.
 - The ASX 300 generally covers the majority of listed companies most exposed to climate risk.¹²
 - Superannuation funds should be a key focus for climate-related disclosure on account of their duties to their members.¹³
- (2) Climate plans must be modelled against credible climate scenarios¹⁴ to ensure the integrity of stated climate targets, commitments, and / or claims.
 - If disclosures rely on additional assumptions or bespoke scenarios, the details of these must also be disclosed.
- (3) Where material, climate targets and plans must be science-based and include details on scope 3 emissions, financed emissions and / or exposure to fossil fuels in order to substantiate claims such as 'Paris-alignment' and 'net zero by 2050.'
 - As per the UN High-Level Expert Group's report:¹⁵ "Non-state actors must prioritise urgent and deep reduction of emissions across their value chain. High integrity carbon credits in voluntary markets... cannot be counted

¹⁰ As identified by the [Task Force on Climate-Related Financial Disclosures \(TCFD\)](#): finance, energy, transportation, material and building, agriculture, food and forest products

¹¹ Market Forces (2019) '[Investing in the Dark: Australian companies are still failing to properly disclose climate risk](#)' *Market Forces* (accessed 18 January, 2023)

¹² See Market Forces (2021) '[Out of Line, Out of Time](#)' *Market Forces* (accessed 18 January, 2023)

¹³ See Noel Hutley SC and James Mack (2017) '[Superannuation Fund Trustee Duties and Climate Change Risk](#)' and Noel Hutley SC and James Mack (2021) '[Superannuation Trustee Duties and Climate Change](#)'

¹⁴ Such as the International Energy Agency's (IEA) Net Zero Emissions by 2050 (NZE) scenario, or the Intergovernmental Panel on Climate Change's (IPCC) various 1.5°C pathways. See IEA (2021) '[Net Zero by 2050: A Roadmap for the Global Energy Sector](#)' *International Energy Agency* (accessed 18 January, 2023) and IPCC Working Group I (2021) '[Climate Change 2021: The Physical Science Basis](#)' *Intergovernmental Panel on Climate Change* (accessed 18 January, 2023)

¹⁵ UN High-Level Expert Group (2022) '[Integrity Matters](#)'

toward a non-state actor's interim emissions reductions required by its net zero pathway.”

- (4) On the transparency of information pertaining to the management of climate-related risks, financial institutions which rely on investor stewardship to meet stated climate targets must adhere to the principles and recommendations for climate-related engagement with portfolio companies, such as those set out in the Institutional Investors Group on Climate Change's (IIGCC) 'Net Zero Stewardship Toolkit',¹⁶ the UN Principles for Responsible Investment's (PRI) 'A Practical Guide to Active Ownership in Listed Equity'¹⁷ and the Science Based Targets initiative's (SBTi) 'Financial Sector Science-Based Targets Guidance'.¹⁸
- These principles and recommendations include (but are not limited to): identifying and prioritising high climate risk-exposed companies for targeted engagement, setting time-bound engagement objectives for these companies, reporting on progress towards these objectives, outlining the consequences for companies failing to meet these objectives through an escalation framework, and divesting from companies which fail to adequately respond to escalating engagement.
- (5) The 'reasonable grounds' requirement in the *Corporations Act* is both suitable and practical for the purposes of a regulatory framework, as highlighted by Noel Hutley SC and Sebastian Hartford Davis' April 2021 further supplementary memorandum of opinion 'Climate Change and Directors' Duties'.¹⁹
- We note there is ample evidence and climate modelling²⁰ to conclude 'net zero emissions' or 'Paris-alignment' claims are incompatible with fossil fuel expansion, while the Hon. Catherine McKenna of the UN High-Level Expert Group has stated:²¹ “Non-state actors cannot claim to be net zero while continuing to build or invest in new fossil fuel supply.”

¹⁶ IIGCC (2022) '[Net Zero Stewardship Toolkit](#)' *The Institutional Investors Group on Climate Change* (accessed 18 January, 2023)

¹⁷ UNPRI (2018) '[A Practical Guide to Active Ownership in Listed Equity](#)' *United Nations Principles for Responsible Investment* (accessed 18 January, 2023)

¹⁸ SBTi (2022) '[Financial Sector Science-Based Targets Guidance](#)' *The Science Based Targets initiative* (accessed 18 January, 2023)

¹⁹ Noel Hutley SC and Sebastian Hartford Davis (2021) '[Climate Change and Directors' Duties](#)'

²⁰ See IEA (2021) '[Net Zero by 2050](#)', IPCC Working Group I (2021) '[Climate Change 2021](#)' SEI, IISD, ODI, E3G and UNEP (2021) '[The Production Gap Report 2021](#)' *Production Gap Report 2021* (accessed 18 January, 2023)

²¹ UN High Level Expert Group (2022) '[Integrity Matters](#)' pg. 7