

t: [REDACTED]
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DX: [REDACTED]

FAO [REDACTED]
Scottish Government Legal Directorate

Our Ref: [REDACTED]
[REDACTED]

By email only: [REDACTED]

Your Ref:

26 October 2023

Dear [REDACTED]

**Climate Change (Scotland) Act 2009 – Section 94A
Assessment of climate impact of Infrastructure Investment Plan
Judicial Review**

Thank you for your letter of 12 October 2023. Having now had an opportunity to discuss the content of your letter with my clients and counsel, a response is set out below.

Section 94A Duty

You have confirmed that the Scottish Ministers accept that the documentation to date falls short of the requirements of section 94A of the 2009 Act. You do not set out which of the requirements and in what manner caused them to accept their failure to comply with their statutory duty, but that acceptance is nonetheless welcome.

You ask how my clients reached their view on the interpretation of the section 94A duty that is contained in the letter of 5 September 2023. For completeness, that interpretation was that, in order to comply with the statutory duty, the assessment must contain at least:

- a. An identification of the current emissions reduction targets;
- b. An assessment of the emissions expected to be produced as a result of the implementation of the infrastructure investment plan; and
- c. An indication of whether the implementation of the infrastructure investment plan makes it more or less likely that the current emissions reduction targets will be met.

Your letter suggests that the Scottish Ministers do not agree that the second element is a requirement under the legislation. I infer, therefore, that it is accepted that the first and third elements are requirements.

Without the second element shown above, the published matters would be restricted to identifying the current emissions target and indicating whether the target is more or less

likely to be met as a result of the IIP. That is neither an assessment nor a publication of the extent of the contribution of the emissions to the target, and leaves the public with no way of verifying how the assessment has been carried out and, crucially, whether it has been carried out properly. That would be to undermine and thwart the clear intention of the legislation.

The requirement under section 94A(2) is the publication of “*an assessment of the extent to which investment in accordance with the plan is expected to contribute to the meeting of the emissions reduction targets*”. The duty is not only to indicate if the target is more or less likely to be met but to demonstrate *how* that indication has been achieved by publishing the assessment and by giving an indication of the *extent* to which it is more or less likely as a result. That is not possible without showing (i) what the target is, (ii) what the emissions are, and (iii) what effect the emissions will have on the target. It is not enough to publish only the outcome or conclusion. That is not an assessment, but a conclusion.

In your letter you claim that “The section 94A duty was not intended by Parliament to be overly prescriptive in light of the recognised uncertainties around methodologies for assessing emissions impacts”. Whilst you provide no supporting evidence for that and cannot presume to speak on behalf of Parliament, my clients do not seek to suggest that the legislation requires the assessment to be published in a single, prescribed manner on every occasion. But the publication must include certain information in order to meet the requirements of the duty. It must show how the conclusion is reached as to whether and to what extent the IIP makes it more or less likely that the emissions targets will be met.

In your letter you say that you intend to use an “an enhanced taxonomy approach” but have not explained what you mean by this. Without further information my clients cannot comment on whether this approach creates per se any issues with the duty, and therefore request that you clarify what it entails. For the avoidance of doubt, the publication of, for example, nothing more than a traffic light system showing whether the likelihood of achieving a target has gone up or down is wholly insufficient to comply with the statutory duty for the reasons already set out above.

Remedy and Timescales

My clients are very pleased to hear that the Scottish Ministers are committed to complying with the duties imposed on them by Parliament and wish to cooperate with them as much as possible to assist them to do so. I note that you expect to be in a position to share with ESS the proposed assessment prior to publication and that you expect this to be before the end of the current year.

Given the correspondence between my clients and the Scottish Ministers in relation to this matter, it seems to me that there would be a benefit to my clients also playing a role in that procedure in the hope of avoiding court proceedings. With that in mind and given their interests in these matters, I should be grateful if you could take instructions on the sharing of the proposed assessment with my clients as well as with ESS prior to publication. There seems to me to be no prejudice in my clients being involved in that process.

My clients are hopeful that this cooperation can avoid altogether the need to become involved in court proceedings. However, if there remains any material disagreement on the

matters set out above, my clients would have to reconsider their position – there would be no point waiting for a report that was doomed to fail the statutory requirements.

In the circumstances, I would seek a response to this letter within 14 days and I am grateful for your attention to this matter to date.

Yours sincerely

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Partner
Balfour+Manson LLP