

19 December 2024

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Dear Ms LaBouchardiere,

ASIC Consultation Paper 380: Sustainability reporting

Thank you for the opportunity to provide a submission on ASIC's draft Regulatory Guide 000 *Sustainability reporting (Draft Guide)* and Consultation Paper 380 *Sustainability reporting (Consultation Paper)*.

The Australian Institute of Company Directors (**AICD**)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 53,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

We commend ASIC for developing regulatory guidance to help entities comply with sustainability reporting requirements. As Australia begins its mandatory sustainability reporting journey, it is critical that ASIC provide clear guidance to assist reporting entities prepare high-quality, comparable and useful climate disclosures.

The AICD's submission focuses on aspects of the Draft Guide that are particularly relevant to AICD members. Our positions have been informed by consultation with members, including the AICD's Law Committee and Reporting Committee, as well as industry stakeholders.

1. Executive Summary

Overall, the AICD considers that the Draft Guide will assist regulated entities to prepare a statutory sustainability report under Chapter 2M of the *Corporations Act 2001 (Cth)* (**Sustainability Report**). However, we believe there are certain areas that would benefit from further clarification and additional guidance.

In summary, our key points and recommendations are as follows:

- **Directors' duties and directors' declarations:**
 - The Draft Guide should include guidance on steps directors should take to assess the materiality of climate-related financial risks and opportunities, including examples of materiality factors that may be considered.
 - The Draft Guide should reference section 344 of the Corporations Act requiring directors to take all reasonable steps to comply with, or to secure compliance, with provisions in Part 2M.2 and 2M.3, and clearly explain its interaction with the new requirement to provide a

directors' declaration in the Sustainability Report (particularly in the initial three year period where only a declaration that the *entity* has taken reasonable steps to comply is required).

- The Draft Guide should clarify that a directors' declaration is required even if the climate statement states there are no financial risks or opportunities related to climate, as required under section 296B of the Corporations Act.
- **Modified liability settings:**
 - The Draft Guide cautions against "selective use or reproduction of information contained in a Sustainability Report", which appears to run counter to ASIC stating that a listed entity should disclose sustainability-related financial information in the Operating and Financial Review (**OFR**) report.
 - The Draft Guide should clarify that reporting entities may selectively use or reproduce information contained in a Sustainability Report within publications required by law (e.g. Financial Report, OFR report, a Corporate Governance Statement, or Notice of Meeting) and that the summary or reproduction of such information will be treated as a protected statement under the modified liability settings.
 - The Draft Guide should clarify that relevant answers required by law to be provided at an AGM are protected under the modified liability settings – for example, responses to questions from investors that relate to information provided in the Sustainability Report that is subject to statutory protection (e.g. all forward looking climate statements in year one of reporting).
 - The Draft Guide should clarify that climate statements provided voluntarily by early adopters in a Sustainability Report in line with the sustainability standards are protected under the modified liability settings consistent with the policy intent of the climate reporting regime, as outlined in the Explanatory Memorandum.
- **Reasonable grounds and forward-looking statements:** The Draft Guide should provide specific guidance on 'reasonable grounds' in the context of climate-related forward-looking disclosures. ASIC should also consider explaining how Australian law, including Australia's unique liability settings, interacts with the concepts contained within International Sustainability Standards Board (**ISSB**) Disclosure Standard S2, which have then been adopted domestically via AASB S2.
- **ASIC supervision and enforcement:** ASIC should clarify what a "proportionate and pragmatic approach to supervision and enforcement" will involve, as well as how ASIC intends to escalate matters beyond the use of its 'direction powers'.

We elaborate further on these key points below.

2. Directors' duties and directors' declarations

The AICD has concerns with the following elements of the Draft Guide:

- **Guidance on assessing materiality:** The Draft Guide states that in discharging their obligations, "*directors should consider the extent that material climate-related physical and transition risks, like all other material risks, pose a foreseeable risk of harm to the interests of the entity.*" However, no specific guidance is provided on steps directors should take to assess whether climate-related risks and opportunities are material, or whether they pose a foreseeable risk of harm to the interests of the entity. We consider the Draft Guide

should set out suggested or example factors to be considered by directors in determining the materiality of risks in the climate context, noting the complexities and different judgment calls that may arise in this area. This guidance is particularly critical for Group 3 entities many of whom are expected, according to Treasury analysis, not to face material climate risks or opportunities.¹

- Broader guidance on materiality and application to AASB S2 requirements:** We strongly encourage ASIC, in conjunction with the AASB, to clarify whether they consider each of the individual disclosure requirements of the Corporations Act and AASB S2 must be subject to a materiality assessment – with disclosure only required when materiality is established (this is the AICD's understanding for disclosures in the sustainability standard). There appears to be some confusion in the market on this topic, with some stakeholders considering that entities required to produce a Sustainability Report must report against each of the relevant reporting criteria regardless of any materiality assessment.
- Section 344 obligation:** The Draft Guide does not refer to section 344 of the Corporations Act in discussing the requirement for a directors' declaration. Section 344 is a non-delegable obligation requiring directors to take all reasonable steps to comply with, or to secure compliance, with provisions in Part 2M.2 and 2M.3. Section 344 is a civil penalty provision and a failure to comply can lead to a director's breach of their duty of care and diligence under section 180(1). The section 344 obligation exposes directors to a considerable degree of liability if not adhered to. Section 344 and its interaction with the requirement to provide a directors' declaration regarding the Sustainability Report should be explained clearly in the Draft Guide, including differentiating between the Qualified Director Declaration that applies for the first three years of the regime (which requires directors to declare that "in their opinion, the entity has taken reasonable steps" to ensure compliance) and declarations post that initial period (commencing on 1 January 2028). In our view, consistent with longstanding legal principles, the specific provision should take precedence over the general provision.
- Use of the term "ensure":** We note that in several areas (for example, para 52) the Draft Guide refers to directors 'ensuring' that certain actions are taken. Non-executive directors are not involved in the day-to-day management of the organisation, but rather can ask questions and seek further information from the executive. As Commissioner Hayne observed in the Financial Services Royal Commission, *"boards cannot, and must not, involve themselves in the day-to-day management of the corporation. Nothing in this Report should be taken to suggest that they should. The task of the board is overall superintendence of the company, not its day-to-day management"*.² Industry has engaged previously with APRA on the proposed usage of the term "ensure", leading the prudential regulator to clarify the intended meaning in its prudential standards and recognise its usage as inappropriate in the context of 'accountable person obligations' under the Financial Accountability Regime.³ As an alternative to the use of "ensure", we

¹ Treasury (January 2024), Policy Impact Analysis – "We assume 5 per cent of companies in this group have material climate risks that they would be compelled to disclose against in accordance with the Australian standards.", p. 26, available [here](#).

² Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, page 400.

³ Banking, Insurance, Life Insurance and Health Insurance (prudential standard) determination No. 1 of 2024, Prudential Standard CPS 001 Defined terms, p. 13.

suggest amended wording in the Draft Guide such that directors of reporting entities should “require” or “request” that the entity takes the relevant step(s).

- **Maintain adequate sustainability records:** The Draft Guide incorrectly frames the obligation to maintain adequate sustainability records at the director level at paragraph 58. This obligation should be clarified as at the reporting entity level.
- **Frequency of board consideration of climate risk and opportunity:** The guidance states that directors should ensure that they are regularly informed about the extent that a climate related risk or opportunity may be material to the reporting entity, and the extent that any such material risk or opportunity may reasonably affect the reporting entity’s prospects. It is important that these assessments are not confined to the annual reporting season, but are considered on an ongoing basis”. We would discourage such a degree of commentary as it may suggest that the climate topic needs to be considered more than is warranted – an assessment that must ultimately be a judgment for the board to make, bearing in mind their directors’ duties, the policy intent of *annual* sustainability reporting as well as continuous disclosure obligation for listed entities.
- **Additional guidance for directors:** There is limited guidance for directors in the Draft Guide and in particular, the section discussing directors’ duty of care and diligence and directors’ declarations. For example, the guidance could recommend that directors seek relevant management attestations prior to signing off on the Sustainability Report, following similar processes to that followed for financial reporting. More broadly, we consider there is an opportunity to refer to recent AICD guidance to support directors in these areas, including:
 - [AICD Directors’ Guide to Mandatory Climate Reporting \(version 2\)](#) which provides guidance for directors on the core elements of the reporting regime, including key director responsibilities and practical steps boards can take to help their organisations navigate these obligations. The AICD Guide, produced with Deloitte and Minter Ellison, has had strong market uptake and includes a Foreword from ASIC Chair, Joe Longo, recognising the critical role directors will play in managing ‘the biggest change to corporate reporting in a generation’; and
 - [AICD Practice Statement on Directors’ Oversight of Company Compliance Obligations](#) which provides guidance and suggested steps for effective director monitoring and oversight of regulatory compliance, informed by a legal opinion on directors’ section 180 duty of care and diligence by Michael Hodge KC and Sonia Tame. The AICD Practice Statement also discusses the extent to which directors can rely on management or external experts or delegate responsibilities.
- **Statement of no financial risks or opportunities relating to climate:** The Draft Guide does not state that a directors’ declaration must still be made if the climate statement disclosure is a statement about there being no financial risks or opportunities relating to climate in accordance with section 296B of the Corporations Act. This should be clarified in the Draft Guide, including in section 3 detailing the content required in the statements of no financial risks or opportunities relating to climate.

3. Modified liability settings

The Draft Guide states that the modified liability settings will apply to a statement outside a Sustainability Report which is required to be made by a Commonwealth law, provided it is the same

as the protected statement, or differs from a protected statement only in so far as it contains updates or corrections to the protected statement.

The Draft Guide notes, however, that the modified liability settings do not extend to statements voluntarily made outside a Sustainability Report. For example, where a protected statement is reproduced, quoted, or summarised in an investor presentation or in promotional material.

The AICD has the following concerns with the Draft Guide's guidance, recognising that the policy objective of mandatory reporting is not to encourage entities to talk about their climate approach exclusively through the Sustainability Report:

- **Statements made in other corporate reports:** The Draft Guide should confirm how the modified liability settings apply to statements reproduced or summarised in other corporate reports required by law, such as the Financial Report, OFR report in the Directors' Report, a Corporate Governance Statement, or Notice of Meeting. Currently, there is no commentary in the Draft Guide to suggest how this can be done appropriately, and in fact a discouragement of "selective" use or reproduction (see further below).
- **Investor questions at the AGM:** The Draft Guide should clarify that answers, required by law to be provided, in response to questions from investors at the AGM that relate to information provided in the Sustainability Report (for example, all forward-looking climate-related information for the first year of reporting, and scope 3 disclosure, scenario analysis and transition planning for the first three years of reporting) are covered by the modified liability settings. Indeed, the Explanatory Memorandum to the climate reporting legislation notes that the intent of the regime is to ensure that Sustainability Reports are considered as part of the AGM.⁴
- **Selective use or reproduction:** The Draft Guide cautions against "selective use or reproduction of information contained in a Sustainability Report" warning that it can be misleading. In our view, this is unhelpful and would limit information flows, particularly given the Sustainability Report is likely to be long and complex. A more balanced ASIC view should be presented that recognises it would be unrealistic to expect that climate-related information will only be provided to the market once a year in the Sustainability Report.

ASIC cautioning against reproduction also conflicts with the Draft Guide stating that a listed entity must disclose sustainability-related financial information in the OFR if members reasonably require this information to make an informed assessment of the entity's operations, financial position, business strategies and prospects for future years. In our view, if, for example, the OFR briefly summarises the thrust of a transition plan, and then refers users to the full Sustainability Report for more detail, we consider that should be protected under the modified liability settings. The AICD strongly encourages ASIC to confirm in the Draft Guide that reporting entities may use or reproduce some information contained in a Sustainability Report within corporate reports required by law (e.g. Financial Report, OFR report, a Corporate Governance Statement, or Notice of Meeting) and that such information will be treated as a protected statement under the modified liability settings.

- **Reduced level of disclosure:** In the absence of clarity on whether a summary or partial reproduction of information contained in the Sustainability Report will be treated as a protected statement, we anticipate reporting entities will likely cross-reference these corporate

⁴ *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024 (Cth)*, Explanatory Memorandum, paragraph [4.30], available [here](#).

reports to information included in the Sustainability Report to minimise private litigation risk. Such an approach would likely reduce the amount of information in the annual reporting suite on climate-related information. It would also run counter to the intended policy objective of the climate reporting regime – namely, to provide fulsome and decision useful information for investors on the steps entities are taking to reduce their exposure to climate-related risks and embrace relevant opportunities.

- Early adopters and voluntary Sustainability Reports:** Reporting entities in Group 2 or 3 may wish to begin reporting voluntarily in line with AASB S2 and issue a Sustainability Report in advance of their statutory obligation commencing. The Draft Guide does not however confirm that AASB S2-aligned climate statements made on a voluntary basis are protected under the modified liability settings. The Explanatory Memorandum to the climate reporting legislation notes: *“to avoid doubt, the modified liability protections described in section 1707D extend to all sustainability reports, whether or not required to be prepared, if the statement was made in compliance with the sustainability standards, the Act, or the auditing standards. Entities seeking to rely on this protection should ensure they make this explicit in their sustainability report”*.⁵ Entities should be encouraged to become early adopters and provide consistent and decision-useful information to investors from the point at which it becomes feasible for the entity. It is critical that ASIC provide guidance for entities wishing to do so and clarify in the Draft Guide the application of the modified liability settings to statements made in this context. We also suggest that ASIC set out the steps they would expect voluntary reporters to take in order to attract Modified Liability.

4. Operating and Financial Review reporting requirements

The AICD is concerned that the Draft Guide appears to provide inconsistent advice regarding the Operating and Financial Review. Specifically, paras 111-112 of the Draft Guide suggests that it will be a matter for the entity's board to determine whether to include climate related disclosures in the OFR. However, paras 117-119 appears to set an expectation that climate will feature in the OFR.

We understand that many organisations may not consider climate matters in the OFR, nor should they be required to. In our view, such a decision should be left to the judgment of the entity's board. As discussed above, we recommend that ASIC clarify that *if* listed reporting entities disclose climate-related financial information in the OFR, entities may use or reproduce information from the Sustainability Report and the modified liability settings will apply to any summaries or reproduced content from the Sustainability Report.

In addition, the Draft Guide notes that listed reporting entities should consider, and be informed by, AASB S1 in disclosing any other sustainability-related financial information required in the OFR. However, unlike AASB S2, reporting in line with AASB S1 has not been mandated by the Government. We consider this reference in the Draft Guide may imply an obligation that is not in place for listed entities. It should be clarified that reporting against AASB S1 would be on a voluntary basis only and that it is a matter for the entity to determine if/how such reporting should occur. A failure to make such a clarification may discourage entities from reporting on stakeholder/community impact, beyond climate, other than through the rather complex AASB S1 framework.

5. Reasonable grounds and forward-looking statements

Representations as to future matters must be made on 'reasonable grounds' to avoid being misleading or deceptive. There is no Australian judicial precedent on what constitutes 'reasonable

⁵ As above, paragraph [4.193], available [here](#).

grounds' in the context of forward-looking climate disclosures, particularly over 5, 10 and 25 year time horizons.

Through the policy consultation process, the AICD has consistently called for ASIC guidance on 'reasonable grounds' in the context of climate-related forward-looking disclosures. The AICD is therefore concerned with ASIC's decision to not include specific guidance on 'reasonable grounds' on the basis that Appendix D to AASB S2 (D1 – D33) provides some guidance on forward-looking climate disclosure.

The relevant guidance in AASB S2 Appendix D (D1 – D33) is not specific to forward-looking statements, but rather goes to broader concepts, such as the fundamental qualitative characteristics of useful climate-related financial information. Derived from the ISSB S2, the guidance was not drafted with Australia's unique liability settings in mind. For example, paragraph 79 of Appendix D of AASB S2 states that "*even a high level of measurement uncertainty would not necessarily prevent such an estimate from providing useful information.*" This is not necessarily compatible with how Australian courts have approached the making of highly uncertain forward-looking statements (noting that, unlike other jurisdictions such as the US, Australian courts are sceptical of disclaimers and cautionary language as a way of minimising liability).⁶

ASIC's existing Regulatory Guide 170 (Prospective Financial Information) is overly general and not suited to the unique characteristics of climate-related forward-looking disclosures. Accordingly, we consider ASIC should provide specific guidance on 'reasonable grounds' which explains how ASIC sees Australian law interacting with the concepts contained within ISSB S2, which have then been adopted domestically via AASB S2.

In addition, the Draft Guide (at paragraph 73) provides examples of information in climate statements that may constitute forward-looking information. We consider this list should be expanded to include examples such as: scenario analysis, transition plans, as well as anticipated effects on the entity's business model, value chain, cash flows, resource allocation, investment and disposal plans.

6. Proportionality relief mechanisms

AASB S2 contains a number of proportionality relief mechanisms designed to assist entities disclosing information that is subject to high levels of measurement or outcome uncertainty. For instance, for certain disclosures, entities are only required to provide "reasonable and supportable information available to the entity at the reporting date without undue cost or effort."

While Appendix D of AASB provides some guidance (adapted from the ISSB), this test is not widely understood and does not exist as a broader concept under Australian law. Further, the interaction between this test and the 'reasonable grounds' test (discussed above) under Australian law remains unclear.

The Draft Guide does not address this issue. Instead, it simply states that entities should take particular care to ensure adequate sustainability records are kept substantiating reliance on the relief mechanisms.

We recommend that ASIC issue specific guidance on its interpretation of the relevant proportionality relief mechanisms within AASB S2.

⁶ See Herbert Smith Freehill legal advice, 'Directors' exposure to liability associated with disclosure under the ISSB Standards, (2023), available [here](#).

7. Reporting phase-in and thresholds

Entities are phased-in by organisational size defined by consolidated revenue, gross assets, employee size and Assets Under Management thresholds and the Draft Guide clarifies that entities must assess themselves against the thresholds at the end of the financial year balance date in accordance with the accounting standards.

The AICD is concerned that, given the dependencies between the Financial Report and Sustainability Report and the requirement that both reports are lodged simultaneously, there may be some difficulties for organisations (especially those near the relevant thresholds) assessing whether they are captured by the regime or not - creating uncertainty and an additional compliance burden. This will be particularly challenging for entities that have undertaken an acquisition or corporate restructure, as it may not be clear until the first reporting period ends whether they have met sustainability reporting thresholds.

While we appreciate this will only impact entities on the threshold boundaries, the AICD suggests that the Draft Guide provide additional guidance to help entities in this situation, particularly those near the threshold in their first year of reporting. It may be that ASIC's position that it will only grant extension of time to lodge a Sustainability Report in "rare circumstances" will need to be revisited to address these issues.

8. Unlisted entities to continually update disclosures

The Draft Guide confirms that listed reporting entities must comply with their continuous disclosure obligations, including for forward-looking information in the climate statement, when relevant facts or circumstances change that will have a material effect on the price or value of securities. The Draft Guide also suggests that reporting entities that are *not* disclosing entities should also provide an update to the market when these relevant facts or circumstances change. The AICD is concerned with this suggestion as it appears to deviate from the policy intent of a climate reporting regime which is to create an *annual* reporting requirement, rather than an obligation akin to continuous disclosure on unlisted entities.

We recommend that the reference to unlisted entities updating the market be removed from the Draft Guide.

However, if ASIC is referring to the obligation under section 675 of the Corporations Act for unlisted disclosing entities to disclose information the entity becomes aware of that would have a material effect on the price or value of securities to ASIC, then this should be clarified in the Draft Guide. In this context, the obligation should be for reporting entities that are not disclosing entities to provide updated information to ASIC only, not an update to the market which unlisted entities are not required to provide in any event, including under section 675. Of course, such entities may choose to make public disclosures, although that should be a matter for them to determine.

9. ASIC supervision and enforcement

The Draft Guide states that ASIC "recognises that there will be a period of transition as reporting entities continue to build their capability" and that it will take a "proportionate and pragmatic approach to supervision and enforcement." However, the Draft Guide does not outline what a "proportionate and pragmatic" approach involves and how ASIC intends to escalate matters.

As ASIC Chair, Joe Longo, has described "the shift to mandatory climate-related disclosure presents the biggest change to corporate reporting in a generation". Reporting entities and their boards recognise the significant focus and investment required to navigate these changes. There is also

considerable apprehension in the market about providing forward-looking disclosures in the climate context, particularly where underlying analysis suffers from a high degree of measurement and outcome uncertainty. It is reasonable in these circumstances for reporting entities to expect ASIC to provide more fulsome guidance on its intended enforcement approach for this novel area of disclosure.

We recommend that ASIC provide clarity for preparers on what a "proportionate and pragmatic approach to supervision and enforcement" will involve, as well as the range of enforcement tools ASIC intends to use beyond its 'directions powers', and in what circumstances.

10. Labelling

The AICD is concerned that guidance recommending how entities should label Sustainability Reports and climate statements as voluntary or mandatory may have unintended consequences. This requirement may be particularly challenging for global organisations that may need to disclose in other jurisdictions using more than one sustainability reporting framework, or for entities that are not subject to reporting requirements and may be unaware of the need to label their reports or statements as voluntary.

To date, sustainability-related information has been included in various corporate reporting under a range of names, including "sustainability reports", "ESG reports" or in subsections of the annual report with similar labels. While we understand the benefits of clear labelling for users, we also query whether this requirement will limit progressive sustainability disclosures. For example, the integration of climate and nature-related financial disclosures within the one Sustainability Report.

We recommend that a less rigid approach is adopted in the Draft Guide and that entities are not required to adhere to strict labels. To ensure users of sustainability-related financial information are not misled, we suggest that ASIC instead recommend that entities highlight in the introduction what reporting frameworks the relevant report or statement is intended to comply with or align to.

11. Extending relief in other ASIC instruments

The AICD is of the view that *ASIC Corporations (Rounding in Financial/Directors' Reports) Instrument 2016/191* should be amended so that it applies to sustainability reporting requirements. This would be consistent with the approach followed for financial reporting, noting that AASB 101, paragraphs 51 and 53, also explicitly contemplate rounding, allowing entities to make financial statements more understandable, provided the level of rounding does not omit material information and is clearly disclosed.

12. Next steps

We hope our submission will be of assistance to you. If you would like to discuss these matters further, please contact Laura Bacon, Senior Policy Adviser at lbacon@aicd.com.au, or Christie Rourke, Senior Policy Adviser at crouke@aicd.com.au

Yours sincerely,



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