ASIC

Australian Securities & Investments Commission

REGULATION IMPACT STATEMENT

Infrastructure entities: Improving disclosure for retail investors

January 2012

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposed policy on infrastructure entities to improve disclosure for retail investors while maintaining the flexibility of the public fundraising process.

What this Regulation Impact Statement is about

1 This Regulation Impact Statement (RIS) addresses ASIC's proposals for improving disclosure for retail investors about infrastructure entities.

2 In developing our final position, we need to consider the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:

- improving the quality of disclosure on investments that have complex characteristics and risks;
- not unduly interfering with the operation and marketing of infrastructure investments; and
- promoting efficiency in capital markets

3 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy, and our achievement of this balance. It deals with:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

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A Introduction

Background

4 Australia's infrastructure has been built up over more than 200 years. The infrastructure industry reforms, which commenced in Australia in the late 1980s, boosted Australia's productivity growth significantly and have been a key underpinning of Australia's strong economic performance over the past 15 years.

5 However, in spite of Australia's sustained economic growth and development over the past decade and a half, the capacity and condition of Australia's existing infrastructure asset base has not kept pace with demand. As Australia looks to the future, we are facing significant challenges in our ability to finance and deliver the infrastructure that will underpin continued economic growth and social development. The challenges of rapid growth in population, forecast to exceed 37 million by 2050, the ageing of the population and the return of economic growth mean that capacity constraints in public transport, roads, freight and utilities will increasingly frustrate national economic and social objectives.

6 The Australian Government has made significant commitments to boost infrastructure investments through public funding. In the 2009 stimulus package, the Government announced more than $82 billion in funding to support infrastructure development, including the $12.6 billion Building Australia Fund, funds for education ($6 billion), health and hospitals ($10 billion), and a $26.4 billion investment in road and rail.[1]

7 Despite these record investments, the sufficient development of new and renewed infrastructure continues to pose a significant challenge to the Australian Government. In July 2007, Infrastructure Partnerships Australia released the report, *Australia's infrastructure priorities: Securing our prosperity*, which identified more than 160 critical projects and key policy reforms to build Australia for the future. The projects identified were estimated by external parties to cost more than $700 billion.[2]

8 The Australian Government has long recognised the need for private investment in Australian infrastructure assets due to the size of the challenge. While Australia has seen a steady increase in privately funded major infrastructure projects over the years, it is far from enough. According to research, the

[1] *Financing infrastructure in the global financial crisis,* Infrastructure Partnerships Australia, March 2009.
[2] *Financing infrastructure in the global financial crisis*, Infrastructure Partnerships Australia, March 2009.

national infrastructure investment task to 2018 is estimated to need private sector capital of more than $360 billion.[3]

What is an infrastructure entity?

9 Infrastructure assets are the physical plant, property or equipment of roads, railways, ports, airports, telecommunications facilities, electricity generation, gas or electricity transmission or distribution, water supply or sewerage, and hospitals.[4] Investment in these assets is essential for driving sustainable economic development and growth, lifting levels of productivity and boosting employment for Australia, given its size, climate and urbanisation.

10 Privately funded infrastructure entities tend to operate as a listed or unlisted registered managed investment scheme, company or stapled structure investment, with a primary investment strategy or mandate to invest in any of:

(a) infrastructure assets;

(b) the right to operate infrastructure assets; or

(c) other entities which, either directly or indirectly, primarily invest in the items in paragraphs (a) or (b).

The infrastructure market

11 In Australia, both retail investors and wholesale investors have invested significantly in the private infrastructure sector in recent years, and investments are projected to grow even further based on current estimates of national infrastructure needs.

12 The majority of retail investors gain their exposure to the infrastructure industry through their investments in listed infrastructure entities. There are approximately 23 privately funded infrastructure entities listed on the ASX that are available to retail investors. As at June 2011, they represented a total market capitalisation of approximately $39.5 billion, or 2.8% of total ASX market capitalisation. Investments in unlisted infrastructure entities by retail investors are small by comparison, estimated at $200 million in total capital.

13 The majority of wholesale investors gain their exposure to the infrastructure industry through their investments in both listed and unlisted infrastructure entities. They are sophisticated investors and are mostly corporations and major superannuation schemes.

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[3] *Financing infrastructure in the global financial crisis,* Infrastructure Partnerships Australia, March 2009.

[4] For an infrastructure entity that is also a property fund, we note that Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46) excludes infrastructure entities. Our intention is that Regulatory Guide 231 *Infrastructure entities: Improving disclosure for retail investors* (RG 231) will apply to infrastructure entities that may also be considered property funds (to clearly differentiate it from RG 46).

The key risks of infrastructure entities

14 The risks of investing in infrastructure entities were highlighted during the global financial crisis in 2008–09. The total market capitalisation of infrastructure entities listed on the ASX available to retail investors halved in value from a high in April 2008 of approximately $42 billion to approximately $21 billion in February 2009.[5]

15 Many infrastructure entities in which capital loss was experienced by investors exhibited complex business and operational characteristics or risks, including those listed in Table 1.

Table 1: The key risk features of infrastructure entities

Risk feature	What this means
Corporate structure and management	There was often a lack of transparency regarding the existing corporate structure and the management arrangements that were in place. For example, the fee structures paid to issuers, which are often linked to assets under management in infrastructure entities, resulted in: • high management fees; • excessive growth in capital requirements, as infrastructure entities continually sought new assets to grow; and • inflated asset prices because of excessive demand for assets. Termination fees to remove management were also common. For example, in the instance of Macquarie Infrastructure Group, approximately $50 million was paid to the departing manager upon internalisation of management.
Remuneration of management	The board and management of the issuers often had their remuneration linked to the performance of their group company, rather than the infrastructure entity that they were responsible for managing. This kind of remuneration structure can promote aggressive debt financing and upward asset valuation behaviour to generate more fees for the group company. In addition, board and management remuneration was often focused on short-term performance, rather than long-term performance.
Structure of units and shares	Many infrastructure entities offered different classes of units and shares with different terms and payment profiles, with some to related parties. Many investors were confused about the rights and obligations attached to their investments, and whether there were any competing rights that varied from their own.
Related party transactions	Related party transactions were common in infrastructure entities and, in many instances, related parties had a significant influence on the performance of the entity because of a common management team and board of directors. High asset turnover, inflated valuations to generate fees and third-party services were common, and were to the detriment of investors.

[5] ASX at www.asx.com.au.

Risk feature	What this means
Cash flow, financial forecast and performance	Most infrastructure entities utilised complex financial models with a high level of dependency on model forecasts. Assumptions in these models were often overly optimistic, resulting in excessive valuations of assets and inflated security prices. Such models are usually internally prepared and there is no external checking or sensitivity analysis of the models, which may result in infrastructure entities paying too much for assets. There is often a lack of performance comparison over time against the original forecast, which makes it difficult for investors to understand how their investment is performing against their expectations.
Funding source of distributions	Many distributions made by infrastructure entities were not sustainable because they were often funded by debt with high borrowing costs.
Asset valuations and unit prices	Many infrastructure entities were obtaining leverage ostensibly to acquire assets. High levels of leverage to acquire assets contributed to inflation of asset prices. Unit prices were also often not updated regularly on the basis of the long-term nature of infrastructure assets.
Concentration risk and portfolio diversification	Some infrastructure entities have a single asset or a high concentration in one asset type or one location. This can lead to significant loss of capital in adverse market conditions, affecting the asset class in which there is a concentration.

Current regulation of infrastructure entities

16 The offer of interests in infrastructure entities is regulated under the *Corporations Act 2001* (Corporations Act).[6] (All sections (s), chapters (Chs) and parts (Pts) referred to in this RIS are from the Corporations Act, unless otherwise stated.) For example, Pt 7.9 of the Corporations Act requires a Product Disclosure Statement (PDS) to contain, among other things, information about the characteristics and risks of infrastructure entities that might reasonably be expected to have a material influence on a retail client's decision to invest. Similarly, this information might reasonably be expected to be disclosed in a Ch 6D disclosure document, such as a prospectus.

17 For example, an interest in an infrastructure entity in the form of a registered managed investment scheme is a financial product, and so the obligations for the offer of financial products in Pt 7.9[7] apply to the offer of interests in such an infrastructure entity, including the requirement to prepare a PDS. In addition, Ch 5C imposes various requirements on infrastructure entities, including (where applicable) the requirements to be registered as a managed investment scheme, to be operated by a responsible entity that holds an Australian financial services (AFS) licence, and to have a scheme constitution and compliance plan.

18 The Corporations Act requires disclosure in the form of a PDS for an offer of interests in an infrastructure managed investment scheme to retail investors. The PDS must:

[6] Listed entities are also subject to the ASX Listing Rules.
[7] Different laws and regulations may apply to infrastructure entities in a form other than a managed investment scheme.

(a) be worded and presented in a clear, concise and effective manner (s1013C(3));

(b) make specific disclosures (s1013D), including among other things about the significant risks associated with holding the product; and

(c) include all other information that might reasonably be expected to have a material influence on the decision of a reasonable person (when investing as a retail client) about whether or not to invest in the product (s1013E).

19 The general PDS content requirement in s1013E is designed to:

(a) promote efficiency in the capital markets;

(b) promote disclosure of relevant information;

(c) reduce the likelihood of omitting important information;

(d) focus responsible entities on the information needs of investors; and

(e) be sufficiently flexible to accommodate changes in investors' information needs.

20 A responsible entity of an infrastructure managed investment scheme also has obligations to provide ongoing disclosures to investors under the Corporations Act, including:

(a) disclosure of material changes and significant events (s675 and 1017B);

(b) notification of any material change to a matter that would be required to be specified in a PDS (s1017B); and

(c) periodic statements to members who acquired their interests as retail clients (s1017D).

21 The Corporations Act provides restrictions on advertising and publicity for offers of interests in an infrastructure entity before and after interests are available for acquisition by retail clients: s1018A.

22 There are also general consumer protection provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), including prohibitions against misleading and deceptive conduct, as well as prohibitions against false or misleading representations.

ASIC's role in administering the law

23 We administer the law regulating infrastructure entities, within the powers granted by the Corporations Act. This includes conducting surveillance and undertaking enforcement action in cases of any breach of the Corporations Act (as well as the ASIC Act).

24 While disclosure documents of infrastructure entities are generally not required to be lodged with ASIC, and ASIC does not approve disclosure documents, we

have powers to stop offers being made in a disclosure document if we are satisfied that:

(a) information in the disclosure document is not worded and presented in a clear, concise and effective manner; or

(b) an offer of securities under a disclosure document contains a misleading or deceptive statement, or omits information from the disclosure statement that is required under the Corporations Act (s1020E).

25 In administering the law, we are able to exercise our regulatory powers without notice; however, it can be more effective and efficient to provide the market with specific and clear guidance on our view of the existing requirements of the Corporations Act—as they apply to particular financial products. This approach informs the industry as a whole about our views on the requirements of the Corporations Act, rather than communication of these views on an individual basis, which can be disruptive to individual fundraising and inefficient for ASIC. For example, in RG 228 *Prospectuses: Effective disclosure for retail investors* (RG 228), we provided guidance that a prospectus will generally be 'clear, concise and effective' if it:

(a) highlights key information (e.g. through an 'investment overview' that gives cross-references to the more detailed information);

(b) uses plain language;

(c) is as short as possible;

(d) explains complex information, including any technical terms; and

(e) is logically ordered and easy to navigate.

Assessing the problem

26 The issue to assess is whether the current regime for disclosure to retail investors about infrastructure entities is adequate and effective.

ASIC's review of existing PDSs and disclosure documents

27 The existing regulatory framework in the Corporations Act is intended to provide adequate disclosure for the offer of interests in infrastructure entities. This disclosure may change as the market changes and significant risks become apparent.

28 Infrastructure entities are often specific in their nature and complicated in structure. A PDS or prospectus is the key source of information that investors receive with a degree of independence (as issuers must include certain information by law). While there may be independent research reports from research houses, these are often commissioned by the infrastructure entities and often rely on information provided by the infrastructure entities.

29 A review of existing PDSs and prospectuses under the regulatory framework in 2010 revealed that disclosure is often complicated and not readily comparable across infrastructure entities. For example, some of the identified issues were:

(a) the PDS or prospectus used for initial fundraising was often over 100 pages in length;

(b) the disclosures about risks were often presented as a 'laundry list' of all possible risks, which made it difficult for retail investors to understand and give serious consideration to the key risks in light of their individual risk profile;

(c) there were significant variances among entities in the structure of the PDS or prospectus, and important information (such as financials) was often presented differently, making direct comparisons difficult; and

(d) infrastructure entities often have complicated management and remuneration structures, with embedded incentives, and while details of these arrangements were often disclosed in the PDS or prospectus, their possible implications were often left unexplained.

30 These disclosure documents do not warrant any active regulatory enforcement actions under the current regulatory framework. We do not have any evidence to suggest that entities are not attempting to comply with their obligations. In fact, the length of many documents we reviewed suggests that infrastructure entities are attempting to include as much relevant information about the entity as possible. The disclosure content requirements are principles-based and very broad, which is not assisting infrastructure entities to ensure the information that they provide in a PDS or prospectus is appropriately targeted to the needs of retail investors.

31 As a result, PDSs and prospectuses have become long and complicated, and do not facilitate retail investors' understanding of, or ability to compare, investments in infrastructure entities. This has heightened the difficulties retail investors face in making informed investment decisions.

32 Case-by-case assessment of infrastructure disclosure documents is resource intensive. It is also time consuming for individual infrastructure entities to amend deficiencies in their disclosure documents and disruptive for their fundraising activities.

Observed retail investor understanding of infrastructure entities

33 Many retail investors invest in infrastructure entities through either financial advisers or direct investments. While it is difficult to assess how many retail investors currently invest in these entities, it is estimated to be several hundred thousand. Many of these investors incurred a significant capital loss in infrastructure entities during the global financial crisis.

34 The response of retail investors to this significant capital loss—as observed through a large number of distressed investors appearing in the media, and through calls and letters received by ASIC and associated consumer groups—indicated that the PDSs:

(a) did not effectively communicate an understanding of the characteristics and risks of infrastructure entities to investors;

(b) lacked clarity; and

(c) did not facilitate effective and efficient comparison of infrastructure investments, which would allow retail investors to make informed investment decisions.

35 Investors considered the risks relating to the often complicated corporate structure, management arrangements and high level of gearing were not effectively communicated in a balanced and accessible way. In fact some PDSs, while including appropriate information, left investors with a view (through the highlighting of beneficial aspects of the investment) that these infrastructure entities provided capital protection and generated stable income for long periods of time.

36 In summary, the global financial crisis presented an opportunity to test the effectiveness of the existing disclosure requirements in communicating to retail investors the risks they had taken on. The observation is that the quantity of information provided in the various formats and the structures of the PDSs, while fulfilling the disclosure requirements, was in many cases ineffective at communicating the key characteristics and risks of the investment to retail consumers.

ASIC's conclusion on the nature of the problem

37 We are of the view that regulatory intervention is necessary because:

(a) The different characteristics of, and risks associated with, infrastructure entities mean that they are distinguishable from other financial products offered to retail investors, and the disclosure of those characteristics and risks has not been effective to ensure retail investors can make informed investment decisions about infrastructure entities or determine whether investment in an infrastructure entity is appropriate for their investment needs, objectives and risk profile.

(b) Most retail investors rely on the information in the PDS or prospectus. However, we have concerns that PDSs and prospectuses for infrastructure entities do not have sufficiently consistent and clear information about the key characteristics and risks associated with infrastructure entities to enable retail investors to make informed decisions. The problem is partially one of legislative inadequacies—that is, the PDS or prospectus content requirements are principles-based and apply to all financial products. The requirements do not specifically address the risks and characteristics of infrastructure entities. The law is not sufficiently clear on how to produce a good PDS or prospectus for an infrastructure entity.

(c) We also note that the current market is not in a position to completely address the problem on its own through self-regulation. The actions taken so far by the industry have not been undertaken on a consistent, industry-wide basis, nor in a timely manner. While it is possible for infrastructure entities to disclose how they are dealing with the key risks identified during the global financial crisis, in the absence of establishing common risks, retail investors would find it difficult to compare performance across different infrastructure entities.

(d) The need to provide adequate and effective disclosure to investors and improve investor understanding in the infrastructure sector is particularly important because of the increasing tendency for infrastructure to be funded by capital raised from the public.

38 Because we think that the problem is partly one of legislative inadequacies, and not necessarily the lack of compliance among issuers, we do not think that targeting individual issuers is an efficient solution to the problem; rather, a holistic solution to improve disclosure is required.

ASIC's objectives

39 We consider that it is important for retail investors to understand the characteristics of, and the risks associated with, investing in infrastructure entities, and that this information should be made readily available to retail investors in a complete, concise, consistent and comparable manner. If investors are better informed about the characteristics and risks associated with investments in infrastructure entities, they will be better equipped to make an investment decision that suits their needs and risk profile. They will also be more likely to invest in an infrastructure entity if they are confident that they understand the product.

40 If retail investors have easy access to relevant information and are able to compare different infrastructure entities in a more uniform and concise way, this will assist them in making the right investment decisions. This is paramount in light of the anticipated volume of capital to be raised from the public over the next decade in this sector because of investment demand.

41 The report, *National infrastructure priorities*, undertaken by Infrastructure Australia, identified nine challenges to the development of, and investment in, infrastructure.[8] One of those was delivering better governance to ensure that

[8] Australian Government, *National infrastructure priorities: Infrastructure for an economically, socially, and environmentally sustainable future,* Infrastructure Australia, May 2009, p. 4.

inefficiencies and inconsistencies did not adversely affect infrastructure operations and investment in Australia. We have a significant role to play in this by ensuring the integrity and efficiency of the regulatory system as it relates to investment by the public in infrastructure entities. Developing and implementing a framework that assists in the efficient harnessing of additional private sector capital, and at the same time promotes confident and informed retail investors, is very important.

42 We are seeking to strike an appropriate balance between:

(a) improving the quality of disclosure on investments that have complex characteristics and risks;

(b) not unduly interfering with the operation and marketing of infrastructure investments; and

(c) promoting efficiency in capital markets.

43 The need to strike an appropriate balance between promoting confident and informed investors and allowing markets to operate freely is part of ASIC's mandate under the ASIC Act.

B Options

44 We consider that the possible options to meet the objectives include:

Option 1: ASIC provides clarification on disclosure in a PDS or prospectus, including benchmarks and disclosure principles that apply (as appropriate), clarification on advertising and educational material to investors (preferred option).

Option 2: Current disclosure requirements continue to apply, but with increased enforcement by ASIC, including requiring infrastructure entities to lodge a PDS or prospectus and advertisements with ASIC.

Option 3: Current disclosure requirements continue to apply (status quo).

Option 1: ASIC provides clarification on disclosure in a PDS or prospectus, including benchmarks and disclosure principles that apply (as appropriate), clarification on advertising and educational material to investors (preferred option)

45 Under Option 1, we would provide clarification to infrastructure entities on how to comply with the Corporations Act, with the goal of improving investor understanding and assessment of the characteristics and risks associated with infrastructure entities.

46 The means of achieving this would be through the benchmark and disclosure principle model of disclosure, which includes:

(a) setting out the information that we believe should be disclosed at law to help retail investors identify the key risks and risk–reward prospects associated with infrastructure entities;

(b) requiring issuers of infrastructure entities to address certain standard benchmarks on an 'if not, why not' basis (see paragraph 47) and apply the disclosure principles in any PDS or prospectus current at, or issued after, 1 July 2012 so that retail investors can assess whether infrastructure entities have strategies in place to mitigate key areas of risk, where possible;

(c) clarifying that on or after 1 July 2012 issuers of infrastructure entities should address the benchmarks and apply the disclosure principles in information to investors to meet their continuous disclosure obligations under the Corporations Act;

(d) providing additional clarification to issuers of infrastructure entities on good practices in disclosure and advertising; and

(e) providing additional educational material to investors and potential investors in infrastructure entities through the release of an investor guide to assist investors to better understand these entities.

The benchmark model of disclosure

47 The benchmark model of disclosure:

(a) identifies, for a particular financial product, the key characteristics and risks potential investors should understand before making a decision to invest;

(b) includes a benchmark to assist an issuer to address the risks when establishing its business model and compliance procedures; and

(c) provides the infrastructure entity with an opportunity to identify whether it meets the benchmark, and if does not meet the benchmark, to explain why not.

48 'Why not' also means explaining how an infrastructure entity deals with the issues underlying the benchmark.

49 Disclosure on an 'if not, why not' basis would be required:

(a) up-front in the PDS or prospectus; and

(b) as material changes occur—in a supplementary PDS or prospectus, continuous disclosure notice, notice under s1017B or periodic reports.

The disclosure principle model of disclosure

50 In addition, the issuer would need to apply disclosure principles when disclosing to investors. The disclosure principle model of disclosure:

(a) identifies, for a particular financial product, the key characteristics and risks potential investors should understand before making a decision to invest;

(b) enables an issuer to apply the disclosure principles to those key characteristics and risks, where appropriate; and

(c) sets out our expectations regarding disclosure in a PDS or prospectus and other disclosures material in order for the infrastructure entity to comply with the Corporations Act.

51 The disclosure principles clarify the standards to which retail investors are to be provided key information to assess financial products for which there are typically few readily comparable products.

Benchmarks and disclosure principles for infrastructure entities

52 We propose to clarify that the nine benchmarks (listed in Table 2) and 11 disclosure principles (listed in Table 3) reflect the key characteristics and risks for retail investors in infrastructure entities. Our view is that infrastructure entities are required by law to address whether or not the benchmarks are met and apply the disclosure principles when disclosing information to investors. An infrastructure entity is under no obligation to adopt the benchmarks in operating its business.

53 The purpose of the benchmarks and disclosure principles is to target certain key characteristics and risks that have an impact on infrastructure entities, and to establish a common standard against which such entities should disclose. Disclosing against the benchmarks and applying the disclosure principles would help to achieve consistent, comparable, clear and meaningful disclosure to investors, enabling them to assess an infrastructure entity, understand its characteristics and the risks associated with it, and more easily compare it with other infrastructure entities.

54 We recognise that in unusual circumstances it may be difficult for infrastructure entities to disclose some of the information requested because it is not available to them or they do not have the right to disclose that information. For instance, an infrastructure entity that holds investments in wholesale or overseas infrastructure entities may not have access to all the information expected to be disclosed about those underlying investments. We would expect those infrastructure entities to use reasonable endeavours to obtain and provide such information. However, if the infrastructure entity is unable to obtain that information, or does not have the right to disclose that information, the infrastructure entity should simply disclose why it was not able to provide the information.

55 We first introduced benchmark disclosure requirements for unlisted, unrated debentures in October 2007: see Regulatory Guide 69 *Debentures and unsecured notes: Improving disclosure for retail investors* (RG 69). Since then, we have applied similar requirements to mortgage schemes: see Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45) and for over-the-counter contracts for difference (CFDs): see Regulatory Guide 227 *Over-the-counter contracts for difference: Improving disclosure for retail investors* (RG 227).

56 We first introduced disclosure principles for unlisted property schemes in September 2008: see Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46).

Table 2: The nine benchmarks for infrastructure entities

Benchmark	Description	Rationale
1 Corporate structure and management	Benchmark 1 addresses whether the infrastructure entity's corporate governance policies and practices conform with ASX Listing Rules Guidance Note 9A *Corporate governance—ASX Corporate Governance Council—Revised corporate governance principles and recommendations* (GN 9A).	Disclosure of the corporate governance and control structure of the infrastructure entity provides transparency about the context within which directors and other officeholders fulfil their duty to give priority to the interests of investors.
2 Remuneration of management	Benchmark 2 addresses whether incentive-based remuneration paid to management is derived from the infrastructure entity's performance.	We believe it is important for investors to understand the extent to which the remuneration of management and board members is derived from the performance of the infrastructure entity. This information will allow investors to form a view about how the incentives and rewards provided to management and the board might influence investment decisions.
3 Classes of units and shares	Benchmark 3 addresses whether all the units or shares in the infrastructure entity are fully paid and have the same rights.	It is important for investors to understand whether units or shares acquired have been fully or partly paid. If the units or shares are partly paid, investors should understand what obligations for further payment attach to those units or shares. Investors also need to understand whether other investors have rights that vary from their own (e.g. priority rights).
4 Substantial related party transactions	Benchmark 4 addresses whether the infrastructure entity has complied with ASX Listing Rule 10.1 *Acquisition and disposal of assets* (ASX Listing Rule 10.1) for substantial related party transactions.	An independent assessment for a proposed related party transaction can help investors to assess whether the transaction is in their best interest.
5 Cash flow forecast	Benchmark 5 addresses whether the infrastructure entity has prepared and had approved by its directors certain cash flow forecasts.	Cash flow forecasts are an important indicator of an infrastructure entity's sustainable capacity to meet its commitments. We consider it appropriate that cash flow forecasts are checked and approved by directors and examined by an independent, suitably qualified person or firm. This will encourage more rigorous analysis of the assumptions within cash flow forecasts.

Benchmark		Description	Rationale
6	**Base-case financial model**	Benchmark 6 addresses whether an agreed-upon procedures check has been performed on the infrastructure entity's base-case financial model.	We consider that investor confidence will be enhanced if investors understand how the assumptions in the infrastructure entity's base-case financial model were confirmed and that an assurance practitioner has performed an agreed-upon procedures check of the model.
7	**Performance and forecast**	Benchmark 7 applies to operating assets and addresses whether performance for the first two years of operation equals or exceeds the original disclosed forecasts.	It is important for investors to understand how an investment is performing against their expectations and for the infrastructure entity to explain why the expectations may not have been met.
8	**Distributions**	Benchmark 8 applies only to infrastructure entities that are unit trusts and addresses whether distributions will be paid from scheme borrowings.	If an infrastructure entity that is a unit trust borrows against the assets of the scheme, investors' interests in these assets will generally rank behind those of the lender. Investors in such infrastructure entities with high borrowings face the risk that distributions may not be sustainable. Investors often rely heavily on distributions from investments. To assess whether current distributions are sustainable, investors should understand whether these distributions are funded from income or debt. Investors also face the risk that they may lose part or all of their investment if the entity defaults on loans used to fund distributions.
9	**Updating the unit price**	Benchmark 9 applies only to unlisted infrastructure entities that are unit trusts and addresses whether the infrastructure entity has, after valuations, reviewed and updated the unit price before issuing new units or redeeming units.	The market value of an asset can be a significant influence on the unit price for a scheme. It is important that unit prices reflect the current value of infrastructure assets when units are issued or redeemed.

Table 3: The 11 disclosure principles for infrastructure entities

Disclosure principle	Description	Rationale
1 Key relationships	Disclosure Principle 1 addresses the infrastructure entity's key relationships (e.g. controlling arrangements), including for significant infrastructure assets under development.	Key relationships can have an important influence on decisions relating to infrastructure entities. Investment in infrastructure entities that undertake development can be more risky than passive investments.
2 Management and performance fees	Disclosure Principle 2 addresses how management fees and performance fees will be paid, and the justification for those fees.	It is important for investors to understand the fees payable by an infrastructure entity, the justification for those fees and the funding of those fees. Some management fee structures can result in inflated fees, excessive growth in capital requirements, inflated asset prices and a high volume of asset transactions with sponsor entities or other related entities.
3 Related party transactions	Disclosure Principle 3 addresses what details we expect to be disclosed for related party arrangements relevant to an investor's investment decision, including any financial benefits in the arrangements, whether the arrangements are on arm's length terms or whether member approval has been sought.	Investors should have sufficient information to assess related party transactions and agreements, and the rationale for entering into such transactions and agreements.
4 Financial ratios	Disclosure Principle 4 addresses the infrastructure entity's publicly disclosed target and actual financial ratios, and how investors can use these ratios in practical terms (e.g. to assess the level of debt-related risk).	We consider that financial ratios are important information for investors when they are comparing relative risks and returns of infrastructure entities.
5 Capital expenditure and debt maturities	Disclosure Principle 5 addresses the infrastructure entity's planned capital expenditure requirements (including funding of these requirements) and certain information on its material debt maturities.	It is important for investors to understand the capital expenditure requirements for infrastructure entities and how these requirements will be funded. Information about debt and credit facilities is also important. For example, the viability of an infrastructure entity can be affected if security against debt is not limited to the asset level. Debt and credit facilities that are due to mature within a relatively short timeframe can be a significant risk factor, especially in periods when credit is more difficult and expensive to obtain.

Disclosure principle	Description	Rationale
6 Foreign exchange and interest rate hedging	Disclosure Principle 6 addresses the infrastructure entity’s foreign exchange and interest rate hedging policies, and whether the actual foreign exchange and/or variable interest rate exposure conforms with these policies.	The returns of an infrastructure entity may be substantially affected by changes in the interest rate and/or foreign exchange rates. It is important for investors to understand the infrastructure entity’s foreign exchange and hedging policies, and any material variance between its actual position and those policies.
7 Base-case financial model	Disclosure Principle 7 addresses various aspects of the infrastructure entity’s base-case financial model (e.g. the assumptions, procedures) and an analysis of the effect on the infrastructure entity if key assumptions were materially less favourable than anticipated.	It is important for investors to understand the key assumptions that are used to estimate the returns of an infrastructure entity’s assets and the actual performance of the entity in comparison with those assumptions. Disclosure about the effect on returns if an asset underperforms will help investors to assess the risks associated with the infrastructure entity. It will also provide investors with confidence to understand how the reasonableness of the assumptions in the base-case financial model was confirmed, and that the assurance practitioner has performed the agreed-upon procedures for the model.
8 Valuations	Disclosure Principle 8 addresses whether valuations, or a summary of valuations for significant infrastructure assets, are available to investors, as well as any potential conflicts of interest that may arise in the preparation of valuations.	It is important for investors to have access to, and understand, basic information about valuations and their key assumptions. Investors should also understand the infrastructure entity’s policy on valuations so that they can form a view about their reliability.
9 Distribution policy	Disclosure Principle 9 applies to infrastructure entities that are unit trusts and addresses the entity’s distribution policy, the source of distribution payments and the risks associated with distributions being paid from sources other than operating cash flow.	It is important for investors to understand the infrastructure entity’s distribution policy and the source of funding of distributions. Investors should also be provided with information on the extent to which distributions are sustainable if they are paid from sources other than operating cash flow.
10 Withdrawal policy	Disclosure Principle 10 applies to unlisted infrastructure entities that are unit trusts and addresses the entity’s withdrawal policy, how investors will be notified of changes to this policy and risks that may affect the ability of investors to withdraw their money.	Investors need to understand their withdrawal rights, the risk factors that may affect their capacity to withdraw and how withdrawals will be funded.
11 Portfolio diversification	Disclosure Principle 11 addresses the infrastructure entity’s portfolio diversification policy, its actual portfolio diversification position and an explanation for any material variances between its policy and position.	Portfolio diversification is an important risk management tool. It is also often an important consideration for investors. It is therefore important that investors understand whether an infrastructure entity’s assets accord with its portfolio diversification policy.

57 We released two consultation papers, in April 2010 and March 2011, setting out our proposals for change in the infrastructure sector: see Consultation Paper 134 *Infrastructure entities: Improving disclosure for retail investors* (CP 134) and Consultation Paper 154 *Infrastructure entities: Improving disclosure for retail investors—Further consultation* (CP 154). A summary of the submissions made in response to CP 134 and CP 154, and our consideration of those responses, can be found in Report 272 *Response to submissions on CP 133 and CP 154 Infrastructure entities: Improving disclosure for retail investors* (REP 272).

58 As a result of the consultation process, we amended some of the benchmarks and replaced the additional disclosure guidance with 'disclosure principles'.

59 We have monitored disclosure issued under RG 69, RG 45 and RG 46, and we are of the view that benchmarks and disclosure principles are an effective means of improving the consistency and quality of disclosure, and have assisted investors to better understand the investments they are either considering or have invested in.

Clarification on advertising

60 To provide further context to our proposals, and to assist issuers with their disclosure practices, we would also provide clarification on good disclosure and advertising practices for infrastructure entities.

61 We propose to clarify for issuers of infrastructure entities in relation to advertising that:

(a) there should be disclosure that investors risk losing some or all of their principal investment;

(b) returns on the investment should only be quoted if they are accompanied by prominent disclosure that there is a risk the investment may achieve lower than expected returns;

(c) statements in advertisements should be consistent with all corresponding disclosures on that subject in the PDS or prospectus; and

(d) if an investment rating is used, it should be properly explained.

Education of investors

62 As a complement to the clarification provided under Option 1, we would address investor education needs by:

(a) publishing an investor guide to assist investors' understanding of the risk areas and how to evaluate the issuer's responses on how it addresses those risk areas; and

(b) encouraging issuers to provide investors with a copy of the investor guide with the PDS or prospectus.

63 Educating investors would help them understand and use the benchmarks, together with the 'if not, why not' responses and the disclosure principle information, in their investment decision making.

Option 2: Current disclosure requirements continue to apply, but with increased enforcement by ASIC, including requiring infrastructure entities to lodge a PDS or prospectus and advertisements with ASIC

64 Under Option 2, the existing disclosure requirements under the Corporations Act, the ASIC Act and/or the ASX Listing Rules would continue to apply. In addition, we would increase our current level of surveillance activities on all infrastructure entities, specifically requiring infrastructure entities to prepare and lodge with ASIC all PDSs or prospectuses and advertisements for the offer of interests in the entity. The PDS or prospectus must:

(a) include any information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product (s1013E);

(b) make specific disclosures (s1013D); and

(c) be worded and presented in a clear, concise and effective manner (s1013C(3)).

65 The Corporations Act currently provides ASIC with the power to deal with PDSs or prospectuses and advertisements that are defective on a case-by-case basis. We have the power to make a stop order if we are satisfied that:

(a) information in a PDS or prospectus is not worded and presented in a clear, concise and effective manner; or

(b) an offer of securities under a PDS or prospectus contains a misleading or deceptive statement, or omits information from the disclosure statement that is required under the Corporations Act.

Option 3: Current disclosure requirements continue to apply (status quo)

66 Under Option 3, the existing disclosure requirements under the Corporations Act, the ASIC Act and/or the ASX Listing Rules would continue to apply without any specific requirements for infrastructure entities. We would continue to administer the law under our current policy settings. Our existing powers to take action on a case-by-case basis against defective disclosure documents and advertisements would also continue.

67 Our current approach is to review PDSs and prospectuses for infrastructure entities, along with PDSs and prospectuses for all other types of managed

investment schemes, on a periodic and selective basis, as part of our active surveillance program.

68 We estimate at least 20 prospectuses are currently on issue and are being marketed to retail investors in relation to infrastructure entities. This number is an estimate only because there is currently no requirement for a PDS or prospectus (or the issuer of a PDS or prospectus) to notify ASIC of the type of infrastructure entities offered through the PDS or prospectus. Appropriate action is taken if the PDS or prospectus is considered to be inadequate and unsatisfactory. Exact numbers on the proportion of infrastructure entities' PDSs or prospectuses that have been reviewed by ASIC in the past are not available.

C Impact analysis

Affected parties

69 Parties affected by the proposed policy would include:

(a) issuers of infrastructure entities (we estimate that there are currently 23 issuers operating approximately 25 infrastructure entities);

(b) experts employed by infrastructure entities to provide asset consultancy and opinions on the likely performance of infrastructure entities;

(c) advisers of issuers of infrastructure entities;

(d) investors who receive an offer of interests in an infrastructure entity; and

(e) ASIC.

Costs and benefits of each option

Option 1: ASIC provides clarification on disclosure in a PDS or prospectus, including benchmarks and disclosure principles that apply (as appropriate), clarification on advertising and educational material to investors (preferred option)

Benefits

70 The entire package proposed in Option 1 is designed to benefit issuers of infrastructure entities, as well as retail investors who invest in these entities. The clarification of the requirements of the Corporations Act is intended to promote improved disclosure in a PDS or prospectus for the purpose of enabling investors to better understand the characteristics of, and assess the risks involved in investing in, infrastructure entities. This is especially important, given the significant need for capital investment in infrastructure from the private sector, including retail investors.

71 The improved disclosure option aims to address all identified issues and strike a more appropriate balance between investors' information needs and the level of disclosure—to assist investors in making better informed investment decisions. The improved disclosure would help to rebuild confidence in the infrastructure sector as infrastructure entities address the benchmarks and apply the disclosure principles to information disclosed to investors. The disclosure principles address key areas of potential risk for investors and would, where appropriate, assist investors to obtain adequate information.

72 The financial crisis has underlined the extent to which infrastructure entities are vulnerable to a wide range of common risks. While the nature and intensity of these risks vary between entities, these risks are of direct concern to investors in those entities. This option would require entities to provide consistent and clear disclosure to enable investors to assess an infrastructure entity and more easily compare it with other infrastructure entities.

73 Comparable disclosure of key characteristics and risks information should assist individual investors to better assess whether to invest in a particular entity. This would help investors to decide whether a specific infrastructure entity is appropriate for them—in particular, whether the characteristics and risks align with the investor's risk profile. More comparable disclosure may also benefit certain infrastructure entities because investors would be more readily able to distinguish them from other infrastructure entities.

74 Benchmarks and disclosure principles can lead to a better understanding of the characteristics and risks associated with investments by also focusing an investor's attention on the disclosed information in a single location in an otherwise lengthy disclosure document, which a retail investor might not otherwise read.

75 Apart from the improved disclosure for investors, this option would also strengthen the transparency and robustness of the governance of infrastructure entities, and encourage the formation of more prudent business models in the future. For example, expecting clear disclosure of the entity's corporate governance arrangements encourages the continuation of good corporate governance and risk management practices, and increases the competitiveness of Australian infrastructure entities globally.

Benefits of the 'if not, why not' benchmark approach

76 At the same time, the 'if not, why not' benchmark approach provides flexibility. The 'if not, why not' approach means that if there are good reasons why an infrastructure entity does not meet a particular benchmark, the infrastructure entity can explain why it does not meet the benchmark. It can explain that this is because it has, for example, an alternative method of ensuring stability and viability.

Benefits of providing educational material to investors

77 The proposal to complement benchmark and disclosure information with investor education materials would help investors to understand the benchmarks and the explanations given by infrastructure entities. This would help investors to better understand the products offered to them, and thus make better choices that suit their own risk tolerance.

Costs

78 We expect that the clarification of the requirements of the law will result in some additional compliance and administrative (one-off and ongoing) costs. These are costs involved in complying with the law. Our guidance simply outlines our view of how the law operates.

79 There will be an increase in compliance and administrative costs incurred by infrastructure entities as a result of the collation, analysis and dissemination of information and the materials to provide the benchmark and disclosure principle information, both at the time of capital raising and as an ongoing obligation.

80 There would be costs involved if an issuer chose to modify its business model in order to meet a benchmark. However, complying with the benchmarks is not mandatory—this is because the option provides for an 'if not, why not' explanation. ASIC considers that, although meeting the benchmarks is not mandatory, some entities will change their practices to meet the benchmarks and therefore some costs will be incurred as a result of this guidance.

81 In both CP 134 and CP 154, we requested that the industry provide us with an estimate of the anticipated incremental compliance and administrative costs. While respondents raised the issue of a potential increase in compliance costs, they did not provide detailed information on the likely compliance and administrative costs associated with implementing the proposal. In our opinion, the incremental cost is difficult to quantify and may vary depending on the nature and size of the entities, the extent to which the proposed disclosure information is known, and other factors, but is unlikely to be material.

82 We consider the information identified in our proposal is already required as a result of the current disclosure regime and any information that the infrastructure entities have not disclosed would generally be available to infrastructure entities. We estimate approximately 25 entities would fall under the definition of 'infrastructure entities'. In Regulatory Guide 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (RG 232), which will soon be issued, industry bodies estimated the initial and ongoing compliance costs to address the benchmarks and disclosure principles to be:

(a) $170,000 for initial compliance costs; and

(b) $90,000 for annual ongoing compliance costs.

83 ASIC considers that the substantially similar nature of the benchmarks and disclosure principles, and the similar nature of the entities, means that this cost estimate is a reasonably high-level cost estimate of this option.

84 Entering into the wholesale market may become more attractive to infrastructure entities down the track as a result of the benchmark and disclosure principles. This would depend on the goals of the entity. The

wholesale market has fewer rules and regulations for an offer of interests, or the provision of financial services, because wholesale clients are generally more sophisticated than retail clients. This may be a cost to the industry because it is anticipated there will be a significant need for capital, from both the wholesale and retail markets, within the next decade for investment in infrastructure entities and infrastructure assets. A move away from the retail market would increase the competitive tension and cost of funding for all infrastructure entities in the wholesale market.

85 There is a risk that increasing the disclosure requirements for infrastructure entities might push issuers to less regulated areas of fundraising, such as issuer promissory notes. However, while this might be a risk for investors if they do not understand the investment being offered, investors would still have the benefit of the general provisions of the Corporations Act and the ASIC Act, such as the prohibition on misleading and deceptive conduct. We would monitor this on a case-by-case basis initially. In addition, retail investors who choose to invest in products other than managed investment schemes generally have a better understanding of their investment, particularly of the risk of not getting their principal back. However, if there was a significant move to a less regulated sector, we would consider whether it was desirable to identify general standards that applied to that sector.

86 We do not consider the proposal would in itself have any significant cost impact on compliance plans, compliance committees and compliance plan auditors. This is because a compliance plan should already address issues relating to ensuring compliance with disclosure obligations under the Corporations Act. Compliance committees and compliance plan auditors would already be aware of, and need to take into account, the information required under the benchmarks and disclosure principles when examining compliance plans and effectively discharging their obligations under the current legal requirements.

87 To implement this option, including engagement of industry during the implementation of the proposals, we consider ASIC would incur additional costs in staff, estimated at a quarter of a full-time equivalent (FTE)—which we estimate to cost approximately $25,000 per year—but that this may decrease over time as industry becomes more familiar with the benchmark and disclosure principle information. We would expect that there would be less need to review PDSs or prospectuses on an ongoing basis if the proposals are implemented.

88 Following the implementation of the ‘if not, why not’ principle, ASIC will conduct a review of relevant fundraising documents and updated investor disclosure documents. It is anticipated that this would require half an FTE, estimated at approximately $50,000 per year.

Summary of analysis

89 We consider the benefits of producing better disclosure and more informed and confident investors outweigh the additional compliance costs of implementing Option 1.

Option 2: Current disclosure requirements continue to apply, but with increased enforcement by ASIC, including requiring infrastructure entities to lodge a PDS or prospectus and advertisements with ASIC

Benefits

90 In the short term, increasing our surveillance activities and requiring the lodgement of PDSs or prospectuses and advertisements with ASIC avoids any new direct costs to industry.

91 Investor protection would continue at its current level while ASIC became more proactive on a targeted case-by-case basis against infrastructure entities whose disclosure documents were defective or inadequate. Through this process, we would be in a position to take action to improve disclosure of the key characteristics and risks of infrastructure entities.

92 Availability to retail investors of investment in infrastructure entities would remain at current levels.

Costs

93 Retail investors' response to significant capital loss associated with infrastructure entities indicated that there was a lack of understanding by many retail investors about the characteristics of infrastructure entities and risks associated with investing in them.

94 As mentioned previously, through a large number of distressed retail investors appearing in the media, and through calls and letters received by ASIC and associated consumer groups, it became evident that there was a lack of understanding of the investments these investors made in infrastructure entities. Many retail investors thought that these infrastructure entities provided capital protection and generated stable income for long periods of time, without being aware of the often complicated corporate structure, management arrangements and high levels of gearing attached to these assets. ASIC's review of PDSs found that, although they complied with the existing disclosure requirements, the PDSs did not effectively communicate the risks and characteristics of the infrastructure entities.

95 A lack of comparability in lengthy complicated disclosure documents heightens the difficulties retail investors face in making informed investment decisions. An increase in our surveillance activities and our review of PDSs and

prospectuses would be unlikely to provide investors with key risk information that would be easily comprehensible and readily comparable between infrastructure entities. These are not issues that can be solved simply by increased surveillance activities from ASIC.

96 There may be additional costs incurred by individual entities in responding to concerns identified by ASIC that may require additional disclosure or amendments to existing disclosure. These costs would be borne by those entities where concerns were identified in the PDS or prospectus, and may include costs associated with obtaining legal advice, drafting and issuing revised disclosure, and the effect of having to offer investors the opportunity to have their investment refunded when the document is defective under the Corporations Act.

97 In addition, there may be other implications—for example, investors might assume that because we review each PDS or prospectus that this means ASIC in some way has approved the entities or their disclosure, and inappropriately transferring consideration of disclosure issues to ASIC.

98 We would incur additional costs in staff, estimated at one FTE (estimated to cost approximately $100,000 per year), to carry out the review of PDSs and prospectuses and the desired level of surveillance activities. This additional cost would be passed back to industry through lodgement and application fees.

99 A further cost for ASIC associated with this option is that it would require a continued focus on infrastructure entities in circumstances where resources could be better allocated to cover emerging or urgent risks. The failure to introduce consistency through clarification of the requirements of the law may result in reduced effectiveness of disclosure in circumstances where we no longer have the resources to continue to apply this approach to the sector.

100 We do not think that this would be an appropriate solution to the problem we have identified. As noted previously, there is no evidence to suggest that infrastructure entities are not attempting to comply with their disclosure obligations, but we do think further clarification would assist entities to comply. Therefore, an option relying on our compliance and enforcement regulatory tools would not be as effective as a more holistic, guidance-based solution because:

(a) the problem extends across the industry and targeting particular infrastructure entities would not be efficient;

(b) issuers would have less certainty about disclosure;

(c) there would continue to be inconsistency in disclosure across infrastructure entities;

(d) investors would be less likely to be given key risk information that was readily comparable between infrastructure entities; and

(e) investors would have less confidence in infrastructure entities.

Summary of analysis

101 We consider the benefits of this option are outweighed by the costs.

Option 3: Current disclosure requirements continue to apply (status quo)

Benefits

102 In the short term, maintaining current disclosure obligations avoids new direct costs to industry because there are no changes to how issuers of infrastructure entities are regulated.

103 Investor protection would continue at its current level because we would be able to take action on a case-by-case basis against issuers whose disclosure documents were defective.

104 Lack of clarity on the requirements of the current law provides greater flexibility concerning disclosure for infrastructure entities, and the retail market would have disclosure obligations consistent with the wholesale market.

105 Fewer regulations and rules in the retail market would increase its competitiveness, and attractiveness to investors, when compared to the wholesale market.

Costs

106 Maintaining the status quo is likely to involve some costs to industry. Doing nothing (i.e. no changes to the regulatory settings) is likely to mean that some potential investors would avoid infrastructure entities and pursue other investment opportunities, especially in light of retail investors' response to the significant capital loss associated with investment in infrastructure entities in recent times. Doing nothing and providing no clarification also means that there would be no reduction in existing risks, which may dampen general confidence in the infrastructure sector.

107 Further, providing no clarification is likely to particularly affect those infrastructure entities that are operating well in the market. Without any clarification of the existing law, these entities are likely to find it difficult to differentiate themselves and signal their greater quality to investors. Further, we may raise regulatory concerns and issue stop orders in respect of the matters covered by our proposed guidance.

108 Over time, the lack of a regulatory response may compound the eventual costs for the industry and investors—that is, not intervening now may mean that the cost of any eventual intervention is much higher. While not changing the

regulatory settings would not necessarily contribute to any failures, leaving the settings as they are forgoes the opportunity of reducing the risks contributing to failures by improving the compliance settings and robustness of the business model.

109 Although it would be possible to take action against defective disclosure documents and advertisements on a case-by-case basis, this approach would suffer from the following weaknesses when compared to an approach that seeks to provide more general guidance:

(a) the process for identifying these industry standards would be less transparent and only emerge as issues arose on a case-by-case basis; and

(b) it would be less likely that investors would be provided with key risk information that was readily comparable between infrastructure entities.

Summary of analysis

110 We consider the benefits of this option are outweighed by the costs.

D Consultation

Initial consultation

111 In April 2010, we issued CP 134, which set out our proposals for improving the quality of disclosure for infrastructure entities that raise funding through retail investors. We invited submissions on our proposed benchmark-based disclosure and additional disclosure guidance and asked the general public, including retail investors, for feedback on the proposals. The consultation paper also provided background and rationale for the proposed benchmarks.

112 We received 24 written submissions from a wide variety of sources, including issuers of infrastructure entities, accounting firms, relevant industry bodies and law firms.

113 Most respondents recognised the need for further improvements to disclosure that would enhance the quality of information provided to retail investors and complement the current disclosure regime for infrastructure entities. Some submissions considered the proposed benchmarks to be unnecessary. However, if a benchmark approach were to be adopted, an 'if not, why not' approach was preferred.

114 The main comments received from respondents on the proposed benchmarks and additional disclosure guidance in CP 134 related to:

(a) whether the definition of 'infrastructure entity' was too broad and captured entities not commonly considered to be infrastructure entities. A number of respondents submitted that registered managed investment schemes that focus on investment in listed infrastructure entities as part of an investment portfolio should be excluded from the definition of 'infrastructure entity';

(b) whether the benchmarks and additional disclosure guidance should apply to infrastructure entities when they do not apply to other listed entities;

(c) whether the benchmark model for disclosure on an 'if not, why not' basis, which assumes a one-size-fits-all approach, was appropriate, given the varying characteristics of infrastructure assets;

(d) the static nature of the financial matrix benchmarks, many of which were based on industry averages at a fixed point in time;

(e) the view in some submissions that changes in the infrastructure sector had resulted in self-correction, which meant that the proposed benchmarks and additional disclosure guidance were unnecessary;

(f) the concern that disclosure of commercial in-confidence information for selected benchmarks might place infrastructure entities at a commercial disadvantage;

(g) the added length, complexity and associated costs of the proposed disclosure documentation;

(h) difficulties in obtaining information to disclose against the proposed benchmarks and to address the additional disclosure guidance;

(i) the possible risk of a reduction in opportunities for retail investors to invest in infrastructure entities because of the introduction of the proposed benchmarks and additional disclosure guidance; and

(j) the possible risk that the proposed benchmarks and additional disclosure guidance would decrease the effectiveness of disclosure by infrastructure entities because retail investors might focus only on information relating to the benchmarks and additional disclosure guidance, and not read the full disclosure documentation.

115 After assessing the responses, we conducted a further phase of informal consultation. We met with seven respondents. Before each meeting, we provided a summary of the key comments made in the responses and our proposed changes to address these comments. The feedback on our proposed changes appeared generally to be positive, although two respondents restated their overarching comments, the substance of which is summarised above.

Further consultation: CP 154

116 As a result of some of the comments received in response to CP 134, we considered it would be prudent to have a second consultation with the public on the proposed regulatory guide before publication. In March 2011, we issued CP 154, which set out our amended proposals for improving disclosure by infrastructure entities.

117 Despite some of the comments received in response to CP 134, we retained our general approach to the introduction of benchmarks and disclosure guidance for infrastructure entities for the reasons we identified in CP 154 (reproduced below as Table 4).

118 In response to feedback about the breadth of the proposed definition of ‘infrastructure entity’ in CP 134, we proposed in CP 154 to adopt one of two options for this definition and sought views on which of these was the preferred option: see CP 154 for more details.

119 We amended the benchmarks and additional disclosure guidance proposed in CP 134 to address many of the other comments received in submissions and consultation meetings. We also separated the benchmarks and additional disclosure guidance into two sections: one containing the benchmarks and the other containing new disclosure principles, which were based on the earlier additional disclosure guidance. We also included our proposals on how and when the proposed benchmarks and disclosure principles should be applied in disclosures to retail investors.

Table 4: Why we are proposing to retain our benchmark approach and disclosure guidance

Issue or concern	ASIC's response
Is the benchmark approach necessary?	We think that the proposed benchmark approach facilitates disclosure of important issues and can help investors to compare certain key information for different infrastructure entities.
Why focus on infrastructure entities?	We believe the proposed benchmarks and disclosure principles for the infrastructure sector are appropriate to help investors focus on some of the complex characteristics and risks associated with such investments. Further, the anticipated volume of capital to be raised from the public over the next decade in this sector makes it important that disclosure is effective.
What about the added length, complexity and costs of this disclosure?	Disclosure against the benchmarks and applying the proposed disclosure principles may add length, complexity and costs to disclosure documents. However, we consider that retail investors should be able to understand the business model of an infrastructure entity they are considering investing in. Improved disclosure need not add significant length to disclosure documents where disclosure is clear, concise and effective.
What about self-correction by the market already?	We acknowledge that there has been some self-correction by the infrastructure sector (e.g. internalisations). However, it has not removed many issues that are still present. Any self-correction may also be temporary.
Will the benchmarks and disclosure principles reduce opportunities for retail investors?	Infrastructure entities may decide to offer investment opportunities to wholesale investors, but not retail investors, because of the cost associated with improved disclosure. However, where an infrastructure entity does not provide disclosure against the benchmarks and apply the disclosure principles, such an investment might be inappropriate for retail investors and more appropriate for wholesale investors.
Will the benchmarks and disclosure principles decrease the effectiveness of disclosure?	We do not believe so. The proposed benchmarks and disclosure principles focus investors' attention on some key issues in a prominent location in a way that provides easy comparison between infrastructure entities. Other important issues relevant to particular infrastructure entities should still be disclosed in a prominent place in a PDS or prospectus in a clear, concise and effective manner.

120 We received 13 responses to CP 154 (significantly less than the number of submissions received on CP 134) from a variety of sources, including from infrastructure entities themselves, relevant industry bodies, accounting firms, law firms and one retail investor.

121 Some respondents reiterated their earlier concerns (as listed in Table 4) about the amended benchmarks and disclosure principles. While we appreciate these comments, we continue to believe our response to these concerns is valid and have retained our general approach in the regulatory guide. Some additional comments received related to the issues outlined in Table 5. Most submissions on CP 154 were submitted on a confidential basis.

Table 5: Additional comments received in further consultation (CP 154)

Relevant benchmark and disclosure principle	Comments	ASIC's response and regulatory guide amendments
Definition of an infrastructure entity	The majority of respondents preferred to adopt Option 1 as the definition for infrastructure entity.	Option 1 has been adopted in RG 231. An infrastructure entity is a listed or unlisted registered managed investment scheme, company or stapled structure investment that has been offered to retail investors on the basis that its primary strategy or investment mandate is to invest in any of: (i) infrastructure assets; (ii) the right to operate infrastructure assets; or (iii) other entities which, either directly or indirectly, primarily invest in infrastructure assets in (i) or (ii).
Related party transactions (Benchmark 4 and Disclosure Principle 3)	Many respondents felt the existing Corporations Act and Regulatory Guide 76 *Related party transactions* (RG 76) were sufficient in dealing with any related party disclosure issues. Some also noted the disclosure of an independent expert opinion might be problematic because it would require consent from the expert, which may not be forthcoming.	We continue to believe that improved disclosure will assist in ensuring that retail investors have sufficient information to assess related party transactions and agreements, and the rationale for entering into such transactions and agreements. All our proposals on related party transactions are designed to ensure that members are given sufficient quality information to allow them to make an informed decision about whether to invest or remain invested in an entity with existing related party arrangements. We note that many infrastructure entities are listed on the ASX and are therefore subject to the listing rules. The disclosure of an independent expert opinion for transactions with related parties involving a significant infrastructure asset is no more strenuous than the current requirements under the ASX. For unlisted infrastructure entities, we uphold that the same standards should be applied on an industry-wide basis.
Cash flow forecast (Benchmark 5)	Accounting firms noted that auditors would not be able to provide the relevant assurances on all the assumptions that the benchmark was seeking, due to their specialised nature, and that they may be inconsistent with the Australian accounting standards (issued by the Auditing and Assurance Standards Board (AUASB)). In addition, they would not allow their opinions to be disclosed in the PDS.	We clarify that any assurance given by a suitably qualified person or firm for a 12-month cash flow forecast prepared by the entity should be provided in accordance with auditing standards. Auditing Standard AUS 804 *The audit of prospective financial information* will be the most relevant. We clarify that no disclosure of detailed opinions given by a suitably qualified person or firm was sought in this instance.

Relevant benchmark and disclosure principle	Comments	ASIC's response and regulatory guide amendments
Cash flow forecast (Benchmark 5) (cont'd)	Many felt the regulatory guide should not necessitate the disclosure of cash flow forecasts because any disclosure has to be made in accordance with Regulatory Guide 170 *Prospective financial information* (RG 170). In addition, many entities may only prepare one to five years of cash flow forecasts, except in the case of acquisitions.	We clarify that the benchmark does not necessitate disclosure of cash flow forecasts, and any such disclosure should be made in accordance with RG 170. We have amended RG 231 to incorporate comments received about the length of the cash flow forecast typically prepared. In addition, we have amended RG 231 to reflect that, in the case of an acquisition, an internal unaudited cash flow forecast for the remaining life of each significant infrastructure asset is appropriate: see RG 231 for further details.
Base-case financial model and valuation (Benchmarks 6 and 7, Disclosure Principle 8)	Some respondents felt such benchmarking and disclosure was commercially prejudicial. The valuation may vary greatly over time and it would be unfair to require entities to assume PDS liability in these instances.	We clarify that the benchmarks and disclosure principles do not necessitate disclosure of the base-case financial model and valuation. Any such disclosure should be made in accordance with RG 170.
	Some also sought clarification on the terms 'significant infrastructure asset', 'agreed-upon procedures' and 'base-case financial model'.	We note the 'Key terms' section in RG 231, which contains the definition of these terms.
Distributions (Benchmark 8 and Disclosure Principle 9)	Some questioned why unit trusts were targeted and felt that the board was in a better position to determine distributions.	We note the approach taken in RG 231 is consistent with all other ASIC regulatory guides. Section 245T of the Corporations Act (circumstances in which a dividend may be paid) governs the appropriate distribution of dividends for companies.
Form and method of disclosure	Some have expressed concern about the correct interpretation of the requirements, especially given the lack of examples and precedents when applying the guidance for the first time.	We have provided detailed guidance on the form and method of disclosure, in addition to examples of disclosure against the benchmarks in the appendix to RG 231.

122 We received a submission from one retail investor directly in this round of consultation. They were very supportive of the proposed regulatory guide and pointed out that retail investors often do not have access to the right information to carry out an in-depth assessment when it comes to investing in infrastructure entities themselves.

E Conclusion and recommended option

123 We consider that Option 1 clarifying the requirements under the Corporations Act through benchmarks and disclosure principles is the preferred option.

124 Option 1 provides a package that is designed to benefit issuers of infrastructure entities and increase the ability of retail investors to invest in infrastructure entities in a more informed way. The ‘if not, why not’ benchmarks and the disclosure principles are intended to provide better information for investors to adequately assess the key characteristics and risks of infrastructure entities. Investor education completes the package by helping investors to understand the additional disclosure expected.

125 We consider that implementing Option 1 has the potential to attract more capital into the infrastructure industry as a result of enhanced investor confidence flowing from improved, and more consistent, disclosure and a more informed investor base.

126 By requiring greater transparency, Option 1 will also improve the overall corporate governance of infrastructure entities and encourage the creation of more sustainable business models.

127 There may be some added compliance and administrative costs incurred by issuers of infrastructure entities. However, we consider that the initial and ongoing costs are outweighed by the benefits of our proposal (e.g. producing more informed and confident investors).

128 We have considered that it is possible to deal with defective disclosure documents on a case-by-case basis under the existing regulatory environment—however, the more general approach in Option 1 has the following advantages:

(a) issuers will have greater certainty about disclosure and advertising obligations under the Corporations Act;

(b) the approach will apply consistently across the infrastructure sector; and

(c) key risk information provided to investors will be more comparable between different infrastructure entities and will be brought together in the one place in disclosure documents.

F Implementation and review

129 We would implement our proposals by providing a regulatory guide (RG 231), which would be published in January 2012.

130 Infrastructure entities should adopt the benchmarks and disclosure principles regime for their fundraising documents, as well as for ongoing disclosure documents in:

(a) any PDS, prospectus or other relevant disclosure document dated on or after the first day of the next financial year for the infrastructure entity occurring on or after 1 July 2012; and

(b) any ongoing or updated disclosures (including supplementary disclosure documents) provided after the above first day.

131 For an existing PDS or prospectus dated on or before 30 June 2012, the infrastructure entity must, by the first day of the entity's next financial year that begins on or after 1 July 2012, update the PDS or prospectus by providing a new or supplementary PDS or prospectus that includes disclosure against the benchmarks and provides the information outlined in the disclosure principles.

132 We may review a selection of fundraising documents and updated investor disclosure against the 'if not, why not' approach as they become publicly available until the end of 30 June 2013, in addition to ongoing monitoring of market conditions and investor sentiments within the infrastructure industry. Any review will check that the benchmark and disclosure principle information has been adequately disclosed to investors, and indicate whether or not the improved disclosure was well received by investors.

133 Over this period, we will:

(a) work with issuers to ensure that the benchmarks and disclosure principles are understood;

(b) discuss any concerns we have about an issuer's disclosure with them and, where necessary, request additional disclosure (e.g. about the practical impact of not meeting a particular benchmark and the associated risks for investors); and

(c) conduct surveillance activities, as needed, to reinforce the benchmarks and disclosure principles.

134 We can use stop order powers if we consider that a PDS or prospectus does not comply with the content requirements. We will continue to monitor fundraising documents on an ongoing basis as a part of our business-as-usual activities.

ASIC guidance

135 Our proposed policy will be implemented by publishing the following documents:

(a) a regulatory guide (see RG 231);

(b) an investor guide; and

(c) a report on submissions received in response to CP 134 and CP 154 (see REP 272).