



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 134

Infrastructure entities: Improving disclosure for retail investors

April 2010

About this paper

This consultation paper sets out benchmarks for improved disclosure by listed and unlisted infrastructure entities.

The paper also seeks feedback on other regulatory proposals to address issues concerning investments in infrastructure entities.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 19 April 2010 and is based on the Corporations Act as at 19 April 2010.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

In this consultation paper, we are proposing benchmarks and detailing our expectations regarding disclosure for infrastructure entities. Infrastructure entities typically have complex characteristics and risks that retail investors need to understand fully in order to make informed investment decisions. Initiatives for improving disclosure may now be appropriate, given the need for new investment in infrastructure in Australia.

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on the likely compliance costs and other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on matters relevant to infrastructure entities. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator report and/or a Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

All legislative references in this consultation paper are to the *Corporations Act 2001* (Corporations Act) unless otherwise stated.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 30 June 2010 to:

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What will happen next?

Stage 1	19 April 2010	ASIC consultation paper released
Stage 2	30 June 2010	Comments due on the consultation paper
Stage 3	30 September 2010	Regulatory guide released

A Background

Key points

Investment in infrastructure assets is important for the maintenance of critical systems and services for our community and has significance for capital flows in Australia.

We have considered the general characteristics of infrastructure entities. Having regard to recent developments in this sector, we believe it is an appropriate time for initiatives to improve disclosure relating to infrastructure entities, to enhance investor confidence and understanding.

Investment in infrastructure assets

- 1 Investment in infrastructure is important for the maintenance of critical systems and services and to support positive economic growth. Due to expected growth in population and the Australian economy, there is a need for new investment in water, rail, ports, roads and telecommunications infrastructure in Australia.
- 2 There has been a steady increase in privately funded investments in infrastructure assets over the last decade. Over the next 10 years, A\$770 billion of critical infrastructure investment is anticipated in Australia. More than half of this is likely to be raised from the private sector, including overseas investors.
- 3 The global financial crisis has highlighted some key issues and risks associated with infrastructure entities, including:
 - (a) the use of complex financial engineering to enhance short-term returns;
 - (b) misunderstanding by investors of key assumptions in models and expert reports (including utilisation estimates and risk premium discounting) and the lack of independence of experts;
 - (c) management fee structures that result in inflated fees, excessive growth in capital requirements, inflated asset prices and a high volume of asset transactions between sponsor entities; and
 - (d) arrangements that make it difficult to remove management, lead to a lack of independence of directors and management and to related party conflicts.

Improving disclosure by infrastructure entities

- 4 Infrastructure entities typically have complex characteristics and risks that retail investors need to understand in order to make informed investment decisions. We believe improving the quality of disclosure by infrastructure entities will enhance investor confidence. Investors will have better and more consistent information to understand the characteristics of infrastructure entities and the risks associated with them, particularly as there is an increasing tendency for infrastructure to be privately funded and for infrastructure entities to be unlisted vehicles.
- 5 We are proposing benchmarks and detailing our expectations regarding disclosure for infrastructure entities. We may also consider using our modification powers to address key risks associated with infrastructure entities. These proposals are also set out for consultation in this paper: see proposal C2.

Disclosure requirements under the Corporations Act

- 6 Infrastructure entities may be required under the Corporations Act to disclose certain information in a Product Disclosure Statement (PDS) under Pt 7.9 or a disclosure document under Ch 6D. For example, in a PDS, 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 should generally be disclosed. Similarly, this information might reasonably be expected in a Ch 6D disclosure document, for example a prospectus, as the information is required to make an informed decision about the rights and liabilities attaching to the securities offered and the body issuing the securities.

Ongoing disclosure and advertising

- 7 Infrastructure entities may have obligations under Chs 6CA and 6D and Pt 7.9 to provide ongoing disclosure to investors, including:
 - (a) issue of a supplementary PDS or prospectus when there are certain material changes to information in a current PDS or prospectus;
 - (b) periodic statements to investors in registered schemes under s1017D; and
 - (c) disclosure of material changes and significant events (s674 and 675 for issuers or s1017B for registered schemes that are not issuers).
- 8 We consider that the ongoing disclosure obligations apply to information disclosed against the proposed disclosure benchmarks. Disclosing entities

and registered schemes should provide disclosure updates annually and whenever there have been material changes to previously disclosed information.

- 9 There are provisions under the Corporations Act and the *Australian Securities and Investments Commission Act 2001* that apply to disclosure made in advertising material. Advertising by infrastructure entities should support investor understanding of the disclosure against the proposed benchmarks and not convey messages inconsistent with them.

B Regulation of infrastructure entities

Key points

We believe there are certain features that are common to infrastructure entities. Some of these features highlight key risks for investors.

We consider disclosure benchmarks are an appropriate way of enhancing investors' ability to understand the key features of infrastructure entities and to assess the risks associated with them.

We propose to set certain benchmarks and detail our expectations regarding disclosure by infrastructure entities and the form that disclosure should take.

Definition of 'infrastructure entity'

Proposal

B1 We propose to define an 'infrastructure entity' as a listed or unlisted registered managed investment scheme or company in which retail investors invest that has, or is likely to have, at least 70% of its non-cash assets in listed or unlisted infrastructure entities or infrastructure assets. These assets may be roads, railways, ports, airports, other transport facilities, telecommunication facilities, waste processing, gas or electricity generation, transmission or distribution, water supply and sewerage, hospitals, education, public housing or recreational facilities. In relation to an infrastructure entity that is a property fund, we propose to apply the guidance we will develop based on this consultation paper, rather than Regulatory Guide 46 *Unlisted property schemes—improving disclosure for retail investors* (RG 46).

Your feedback

B1Q1 Do you agree with our proposed definition of 'infrastructure entity'? If not, why not?

Proposed benchmarks for infrastructure entities

- 10 We have developed seven disclosure benchmarks that apply to infrastructure entities: see Table 1. The purpose of the disclosure benchmarks is to improve the consistency and quality of disclosure by infrastructure entities and to enhance investor confidence. The disclosure benchmarks will provide investors with more consistent information to enhance their understanding of the characteristics of infrastructure entities and the risks associated with them.
- 11 The disclosure benchmarks are outlined in detail in Section C.

Proposal

- B2** We propose that the seven disclosure benchmarks in Table 1 apply to all infrastructure entities. Each of the disclosure benchmarks contains two components:
- (a) benchmark statements that set levels against which disclosure is required; and
 - (b) additional disclosure requirements.

Your feedback

B2Q1 Do you think that disclosure benchmarks are necessary? If not, why not?

B2Q2 Do you think there are other, more relevant disclosure benchmarks that should be used to highlight information for retail investors?

Table 1: Benchmarks for infrastructure entities

Disclosure benchmark	Summary of disclosure benchmark
1. Corporate structure and management	Benchmark 1 addresses the infrastructure entity's corporate structure, related party policy, independence of directors policy, remuneration of management and fees
2. Funding	Benchmark 2 addresses the infrastructure entity's policy on borrowing and hedging
3. Assumptions and sensitivity analysis	Benchmark 3 addresses the key assumptions in the infrastructure entity's business model and sensitivity analysis of those assumptions
4. Valuation policy	Benchmark 4 addresses the infrastructure entity's policy on valuation of assets
5. Distribution policy	Benchmark 5 addresses the infrastructure entity's policy on funding and payment of distributions
6. Withdrawal policy	Benchmark 6 addresses the withdrawal policy of an infrastructure entity that is a unit trust
7. Portfolio diversification	Benchmark 7 addresses the infrastructure entity's policy on portfolio diversification

Explanation

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The proposed disclosure benchmarks capture information that investors require to make an informed assessment as to whether to invest in an infrastructure entity and are consistent with the content requirements set out in Ch 6D (for a prospectus) and Pt 7.9. (for a PDS). Accordingly, these benchmarks apply to both listed and unlisted infrastructure entities that are required to provide disclosure documents under these regimes.

- 13 The purpose of the disclosure benchmarks is to target key risk areas for an infrastructure entity and establish a common standard against which entities are required to disclose. The additional disclosure requirements aim to ensure that investors have all material information to enable them to make informed decisions.
- 14 Meeting the disclosure benchmarks would not be mandatory. Where figures are used in the disclosure benchmarks, it does not mean that we believe those figures are appropriate ratios for infrastructure entities. They are merely used to set levels at which disclosure of issues related to those ratios is regarded as necessary.
- 15 We recognise that different ratio settings and formulae are appropriate for different infrastructure entity assets and different entity structures. However, for consistency of disclosure, we have used common ratios.
- 16 Failing to meet one or more of the disclosure benchmarks does not mean that a particular infrastructure entity is necessarily a poor investment. However, we believe it important that an investor understand that an infrastructure entity does not meet the disclosure benchmark, so they can assess its impact on their investment decision.
- 17 Compliance with disclosure benchmarks will not ensure that the disclosure obligations in relation to the infrastructure entity have been met. The disclosure benchmarks only assist with disclosure of specific issues within the broader disclosure requirements.

Disclosure against the benchmarks: ‘if not, why not’

- 18 Issuers should address the disclosure benchmarks in Section C on an ‘if not, why not’ basis. This means stating that the company or scheme either:
- (a) meets the benchmark; or
 - (b) does not meet the benchmark (*and* explaining how and why the issuer deals with the business factors or issues underlying the benchmark in another way).
- 19 Disclosure against the benchmarks should be:
- (a) addressed in the PDS or prospectus;
 - (b) updated in ongoing disclosures as material changes occur; and
 - (c) supported in, and not undermined by, advertising material.

Proposal

- B3** We propose that the issuer for an infrastructure entity should address the disclosure benchmarks in Section C on an ‘if not, why not’ basis.

Your feedback

- B3Q1 Do you agree that this is an effective means of improving disclosure for retail investors in infrastructure entities? If not, why not?

C Disclosure benchmarks

Key points

Issuers for infrastructure entities should provide improved disclosure for retail investors by addressing the disclosure benchmarks in this section.

Where a particular benchmark is not met, there should be an explanation of the reasons for this and the way the issuer or infrastructure entity addresses the issue instead.

In addition to the disclosure benchmarks, a number of matters need to be disclosed.

Benchmark 1: Corporate structure and management

Proposal

- c1** We propose the issuer should address each disclosure benchmark in Table 2 and make the additional disclosures listed in paragraph 20.

Your feedback

C1Q1 Are the disclosure benchmarks we propose appropriate?

C1Q2 Do you think there are more effective ways of addressing the issues relating to the structure of an infrastructure entity? Please explain your answer.

- c2** If guidance about disclosure is not implemented or is ineffective, we have alternative powers, for example, to direct modification of the compliance plan of an infrastructure entity that is a registered scheme, to impose licence conditions on Australian financial services licensees, and exemption and modification powers that might be available to address the concerns regarding conflicts of interest and activities involving related parties. Consideration might be given to the scope for use of powers for:
- (a) prohibiting arrangements that entrench management;
 - (b) prohibiting acquisition of assets from related parties, on the basis that there are irreconcilable conflicts involved in these transactions;
 - (c) requiring the purchasing infrastructure entity to obtain an independent valuation before a transaction with a related party seller can proceed;
 - (d) requiring independent board or investment committee members to preside over related party acquisitions; and
 - (e) prohibiting the issue of more than one class of shares or requiring that one share is only ever allocated one vote.

Your feedback

C2Q1 What are your views on the use of these powers to address the concerns in proposal C2?

Table 2: Disclosure benchmarks on corporate structure and management

Benchmark	Statement	'If not, why not' explanation
The infrastructure entity's corporate governance policies and practices conform with the principles and recommendations in ASX Guidance Note 9A	State whether or not the benchmark is met	If not, explain which components of the corporate governance policies and practices do not conform with ASX Guidance Note 9A Note: Our intention is that this would apply to unlisted entities as well as listed entities.
There are no arrangements that have the effect of entrenching management beyond a five-year term	State whether or not the benchmark is met	If not, explain what entrenchment arrangements are in place and what fees are payable on termination
The base fee payable for operating the infrastructure entity or managing its assets will be 1% or less of enterprise value	State whether or not the benchmark is met	If not, explain how the base fee is calculated
Incentive-based remuneration paid to management or the board of the issuer is substantially linked to the performance of the infrastructure entity	State whether or not the benchmark is met	If not, explain the remuneration policy
The infrastructure entity will only pay performance fees from operating cash flow	State whether or not the benchmark is met	If not, explain how performance fees will be paid
The infrastructure entity will only enter into material related party transactions if: <ul style="list-style-type: none"> • an independent expert has confirmed that the transaction is fair and reasonable for members; or • investors have been provided with 14 days notice of the proposed transaction, with a statement by the independent directors that, in their view, the transaction is fair and reasonable for members 	State whether or not the benchmark is met	If not, explain on what basis the infrastructure entity will enter into related party transactions
All units or shares are fully paid and have the same rights	State whether or not the benchmark is met	If not, explain what proportion is paid and on what basis the rights attached to the units or shares differ

Disclosure

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In addition to addressing the disclosure benchmark in Table 2, the issuer should:

- (a) include a diagram showing the control relationships for the infrastructure entity and the issuer and any other material related party

- arrangements, including any special voting rights or director appointment rights;
- (b) for an asset under development:
 - (i) include a diagram showing the key relationships in the development, including any concessionaire, developer, builder, asset manager, independent expert, financier, joint venture party, issuer or manager;
 - (ii) identify which key participants bear material development-related risks, including in relation to timing and cost of delivery of the development, procurement and cost of financing for the development, guaranteeing of the performance of other entities, material variance between the output and capacity from the asset post-completion with the assumptions regarding output and capacity in the infrastructure entity's base model; and
 - (iii) disclose any material incongruence in the objectives of the key participants in the development;
 - (c) disclose all fees and related costs associated with the management of the infrastructure entity's assets paid or payable directly or indirectly out of the monies invested in the infrastructure entity, providing a clear justification for the fees (for a registered scheme this should be in accordance with Sch 10 of the Corporations Regulations 2001);
 - (d) disclose any material terms of current or proposed material agreements with related parties, including:
 - (i) who the related party is;
 - (ii) the remuneration arrangements under the agreement;
 - (iii) the term of the agreement;
 - (iv) if a fee is payable by the infrastructure entity on termination of the agreement, the method of termination that will incur a fee and the calculation of the fee;
 - (v) any exclusivity arrangements in the agreement; and
 - (vi) whether a copy of the agreement is available to investors and, if so, how an investor can obtain a copy of the agreement;
 - (e) disclose whether termination of any current or proposed management agreement triggers the commencement of any other management arrangements; and
 - (f) disclose the following details for any proposed material transactions with related parties:
 - (i) how much consideration is payable in relation to the transaction;
 - (ii) what steps the issuer took to evaluate the transaction; and

- (iii) a summary of any independent expert opinion obtained for the transaction and whether, and if so how, an investor can obtain a copy of the opinion.

Explanation

- 21 Disclosure of the governance and control structure of the infrastructure entity provides transparency about the context within which directors and other officeholders of the issuer fulfil their duty to give priority to the interests of investors or, for a company, the company as a whole.
- 22 We believe it is important for investors to understand the extent to which the remuneration of management and board members is linked to 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 issuer's board might influence investment decisions.
- 23 An investor should be aware of the key relationships in a development, the risks associated with development, the party that bears them and any incongruence in the objectives of the participants in a development.
- 24 It is important for investors to understand the fees payable by the infrastructure entity and the justification for those fees. Inappropriate 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.
- 25 An independent assessment for a proposed related party transaction can assist investors to assess whether the transaction is in their best interest.

Benchmark 2: Funding

Proposal

- c3 We propose the issuer should address the disclosure benchmarks in Table 3 and make the additional disclosures listed in paragraphs 26–34.

Your feedback

- c3Q1 Are the disclosure benchmarks we propose appropriate?
- c3Q2 Do you think there are more effective ways of addressing the issues regarding infrastructure entity borrowings?
Please explain your answer.

Table 3: Disclosure benchmarks on funding

Benchmark	Statement	'If not, why not' explanation
The 'look through' gearing ratio for the infrastructure entity, taking into account 'off balance sheet (proportionate share) financing', will be 65% or less	State whether or not the benchmark is met	If not, explain the gearing ratio
The net debt/EBITDA ratio for the infrastructure entity at a consolidated level will be 6.5 times or less	State whether or not the benchmark is met	If not, explain the net debt/EBITDA ratio
The short-term debt/EBITDA ratio for the infrastructure entity will be 1.2 times or less	State whether or not the benchmark is met	If not, explain the short-term debt/EBITDA ratio
Asset values or operating cash flow must fall by more than 10% before the infrastructure entity will breach its financial covenants in a manner entitling the lender to require repayment	State whether or not the benchmark is met	If not, explain the percentage fall that will result in breach
For an infrastructure entity with foreign exchange and/or variable interest rate exposure, at least 80% of those risks are fully hedged	State whether or not the benchmark is met	If not, explain the percentage of risk that is hedged

Disclosure

26 In addition, the issuer should provide for the infrastructure entity a breakdown of debt maturities in 12-month intervals showing the drawn amount, undrawn amount and total. We consider it acceptable to group facilities maturing after 5 years into a single banding.

Table 4: Example of breakdown of debt maturities

Year	Drawn \$000s	Undrawn \$000s	Total \$000s
Less than 12 months	50	10	60
Between 12 and 24 months			
Between 24 and 36 months			
Between 36 and 48 months			
Between 48 and 60 months			
Greater than 5 years			
Total			

- 27 The issuer should detail the risks and consequences related to seeking refinance in periods when credit markets are disrupted.
- 28 If the infrastructure entity has foreign exchange and/or interest rate risk, the issuer should disclose the infrastructure entity's policy for hedging those risks. Disclose the infrastructure entity's current and intended future hedging positions.
- 29 The gearing ratio for the infrastructure entity should be calculated (excluding any investors' contributions classified as liabilities, other than borrowings) using the following formula, separately on both 'on balance sheet' and 'off balance sheet (proportionate share)' bases:

$$\text{Gearing ratio} = \frac{\text{Total liabilities}}{\text{Total assets}}$$

Note: The formula used should be shown with the information above.

- 30 The net debt/EBITDA ratio should be calculated (on a consolidated basis, if applicable) using the following formula, based on the latest financial statements, separately on both 'on balance sheet' and 'off balance sheet (proportionate share)' bases:

$$\text{Net debt/EBITDA ratio} = \frac{\text{Net debt (being total interest bearing liabilities less cash and cash equivalents)}}{\text{EBITDA – unrealised gains + unrealised losses}}$$

- 31 The short-term debt/EBITDA ratio should be calculated using the following formula, based on the latest financial statements:

$$\text{short-term debt/EBITDA ratio} = \frac{\text{short-term debt (being interest bearing liabilities required to be classified as current under the Accounting Standards)}}{\text{EBITDA – unrealised gains + unrealised losses}}$$

- 32 The PDS or prospectus should explain to investors what the ratios mean in practical terms and how investors can use the ratios to determine the infrastructure entity's level of risk and overall gearing and debt/EBITDA cover. The liabilities and assets used to calculate the ratios should be based on the infrastructure entity's latest audited or reviewed financial statements or the latest valuations. Where there have been material changes since the last financial statements, the infrastructure entity will also need to provide updated calculations in the PDS.

- 33 The issuer should provide a table showing details on each facility, including at a minimum:
- (a) name and provider of the facility;
 - (b) gearing;
 - (c) maturity;
 - (d) drawn;
 - (e) undrawn;
 - (f) interest rate;
 - (g) material covenants;
 - (h) hedged/unhedged;
 - (i) the security provided for the facility, for example, whether recourse is limited to an asset (ring-fenced);
 - (j) the potential impact of breach of any material covenant; and
 - (k) whether the facility will have a higher priority than investors.
- 34 The issuer should disclose its operating cash flow forecast for the next five years in tabular form showing inflows and outflows on an annual basis.

Explanation

- 35 Information about the financial terms and material covenants in debt and credit facilities is important. A breach of a material covenant can result in termination of the facility. The viability of an infrastructure entity can also be affected if debt is not ring-fenced. Operating cash flow is an important indicator of an entity's sustainable capacity to meet its commitments.
- 36 The returns of an infrastructure entity may be substantially affected by changes in the interest rate or foreign exchange rates.
- 37 Debt and credit facilities that are due to mature within a relatively short timeframe can be a significant risk factor, especially in periods where credit is more difficult and expensive to obtain.
- 38 We consider that gearing and debt/EBITDA ratios are important information for investors when they are comparing relative risks and returns of infrastructure entities.
- 39 If an infrastructure entity engages in hedging of foreign exchange and interest rates, investors are exposed to the counterparties. Information about the infrastructure entity's approach to engaging counterparties and the entity's engagement with counterparties is therefore relevant for investors, as it allows them to analyse their counterparty risk.

Benchmark 3: Assumptions and sensitivity analysis

Proposal

- c4 We propose the issuer should address the disclosure benchmarks in Table 5 and make the additional disclosures listed in paragraphs 40–41.

Your feedback

- C4Q1 Are the disclosure benchmarks we propose appropriate?
- C4Q2 Do you think there are more effective ways of addressing the issues relating to sensitivity analysis? Please explain your answer.

Table 5: Disclosure benchmarks on assumptions and sensitivity analysis

Benchmark	Statement	'If not, why not' explanation
An independent expert has provided an unqualified confirmation that the key assumptions in the infrastructure entity's base-case model used for forecasting, including in relation to net profits, rates of return or distributions, are reasonable	State whether or not the benchmark is met	If not, explain on what basis the assumptions were considered reasonable
The assumptions in the entity's base-case models for debt and equity raising are consistent	State whether or not the benchmark is met	If not, explain how the assumptions differ
For any completed asset developed by the infrastructure entity or completed immediately prior to its ownership of the asset, assessed on each anniversary of completion of the asset for the first 2 years after completion, the actual results equal or exceed the key assumptions for that year in the model at the commencement of the development	State whether or not the benchmark is met	If not, explain why the actual results are below the assumptions Note: This benchmark should also be addressed in any PDS or prospectus current between the 1st and 3rd anniversary of completion of development of the asset.

Disclosure

- 40 In addition to addressing the disclosure benchmark in Table 5, the issuer should:
- provide details of the operating capacity of the infrastructure entity's assets;
 - provide a table disclosing three to five of the assumptions in the entity's model likely to have the most material impact on forecasted information (e.g. estimates of net profit, rate of return or distributions), showing the impact on an investor if any, and separately if all, of the actual figures were materially less than forecast, for example, 10% and 20% less than the assumptions; and

- (c) disclose:
- (i) the infrastructure entity's policy regarding independent auditing of the base-case model;
 - (ii) whether audits and supporting documentation are available for inspection by investors; and
 - (iii) any circumstances that may result in a conflict of interest arising in respect of the conduct of the audit.

41 Where an independent expert's report is provided for the development of a model, the issuer should state that having regard to the report the disclosure complies with Regulatory Guide 170 *Prospective financial information* (RG 170) and ensure that the expert's report contains sufficient information to enable investors to assess the reasonableness of the forecasts.

Explanation

42 It is important for investors to understand the key assumptions that are used to estimate the returns of an infrastructure entity and the actual performance of the entity in comparison with those assumptions. Disclosure about the effect on returns if an asset underperforms will assist investors to assess the risk associated with the infrastructure entity. It will also provide investors with confidence to know that the infrastructure entity's model has been independently verified by an appropriately qualified person.

Benchmark 4: Valuation policy

Proposal

c5 We propose the issuer should address the disclosure benchmarks in Table 6 and make the additional disclosures listed in paragraph 43.

Your feedback

C5Q1 Are the disclosure benchmarks we propose appropriate?

C5Q2 Do you think there are more effective ways of addressing the issues relating to valuations? Please explain your answer.

Table 6: Disclosure benchmarks on valuation policy

Benchmark	Statement	'If not, why not' explanation
Valuations are conducted pursuant to a policy approved by the board of the issuer	State whether or not the benchmark is met	If not, explain how valuations are conducted
The infrastructure entity's valuation policy requires an updated valuation no more than 3 months after the issuer has	State whether or not the benchmark is met	If not, explain how often the infrastructure entity's assets are valued

Benchmark	Statement	'If not, why not' explanation
	<p>reason to believe that the market value of an asset is likely to have changed by 5% or more, unless:</p> <ul style="list-style-type: none"> the likely change is no more than 10%; and the directors of the issuer have determined that this is not in the best interests of members and have published a statement of that determination on the issuer's website 	

Disclosure

- 43 In addition to addressing the disclosure benchmark in Table 6, the issuer should disclose:
- the infrastructure entity's valuation policy;
 - whether valuations and supporting documentation are available for inspection by investors;
 - any circumstances that may result in a conflict of interest arising in respect of preparation of the valuation; and
 - in relation to the current valuation for each significant asset, its purpose, the market value assessed, the key assumptions used to determine market value, including, in relation to income and capital growth, discount rates, terminal yield and capital expenditure (if applicable).

Explanation

- 44 It is important for investors to have access to, and understand, valuations and their key assumptions. Investors should also understand the infrastructure entity's policy on valuations so that they can form a view as to their reliability.

Benchmark 5: Distribution policy

Proposal

- c6 We propose the issuer should address the disclosure benchmark in Table 7 and make the additional disclosures listed in paragraph 45.

Your feedback

- C6Q1 Is the disclosure benchmark that we propose appropriate?
- C6Q2 Do you think there are more effective ways of addressing the issues relating to the distributions of an infrastructure entity? Please explain your answer.

Table 7: Disclosure benchmark on distribution policy

Benchmark	Statement	'If not, why not' explanation
An infrastructure entity which is a trust will only pay distributions from operating cash flow	State whether or not the benchmark is met	If not, explain how the infrastructure entity which is a trust will pay distributions

Disclosure

- 45 In addition to addressing the benchmark in Table 7, the issuer should disclose:
- the infrastructure entity's distribution policy and any rights that the issuer has to change the policy;
 - on payment of distributions, the portion attributable to income, capital and debt;
 - the risks associated with distributions being paid from sources other than operating cash flow; and
 - the sustainability of forecast distributions.

Explanation

- 46 Investors should understand how distributions are funded and the extent to which distributions are contingent on the accuracy of the assumptions in the infrastructure entity's model, in order to assess whether the distributions policy is sustainable.

Benchmark 6: Withdrawal policy

Proposal

- c7 We propose the issuer should address the disclosure benchmark in Table 8 and make the additional disclosures listed in paragraph 47.

Your feedback

- C7Q1 Is the disclosure benchmark we propose appropriate?
- C7Q2 Do you think there are more effective ways of addressing these issues? Please explain your answer.

Table 8: Disclosure benchmark on withdrawal policy

Benchmark	Statement	'If not, why not' explanation
For an unlisted registered scheme that is a unit trust, the unit price for the issue of new units or withdrawals will be reviewed, and updated if appropriate, after finalisation of a new valuation and	State whether or not the benchmark is met	If not, explain how often the unit price is updated

Benchmark	Statement	'If not, why not' explanation
before the issue of new units or withdrawal of any units		

Disclosure

- 47 In addition to addressing the benchmark in Table 8, the issuer for an unlisted infrastructure entity that is a unit trust should disclose:
- the withdrawal policy, the maximum period allowed under the constitution of the entity where there is a right of withdrawal and any rights that the issuer has to change the policy;
 - any significant risk factors or limitations that may impact on the ability of investors to withdraw from the entity;
 - how investors can exercise their withdrawal rights, including any conditions on exercise;
 - if withdrawal from the entity is to be funded from an external liquid facility, the material terms of this facility, including any rights the provider has to suspend or cancel the facility;
 - how investors will be notified of any material changes to withdrawal rights, for example, if withdrawal rights are to be suspended; and
 - whether the amount of capital in the infrastructure entity has been reduced by more than 5% in any three-month period.

Explanation

- 48 It is important for an investor to understand their withdrawal entitlement, the risk factors that may impact on their entitlement and how withdrawals will be funded.

Benchmark 7: Portfolio diversification

Proposal

- c8 We propose the issuer should address the disclosure benchmark in Table 9 and make the additional disclosures listed in paragraph 49.

Your feedback

- C8Q1 Is the disclosure benchmark that we propose appropriate?
- C8Q2 Do you think there are more effective ways of addressing these issues? Please explain your answer.

Table 9: Disclosure benchmark on portfolio diversification

Benchmark	Statement	'If not, why not' explanation
For an infrastructure entity with more than one asset, the assets of the infrastructure entity conform with the portfolio diversification policy for the entity	State whether or not the benchmark is met	If not, explain why the assets of the infrastructure entity do not conform with the policy

Disclosure

- 49 In addition to addressing the benchmark in Table 9, the issuer should disclose:
- (a) the infrastructure entity's portfolio diversification policy, including in relation to investment size, asset and investment type, location, political, operational and financing risk;
 - (b) the infrastructure entity's actual portfolio diversification having regard to the infrastructure entity's portfolio diversification policy; and
 - (c) if there is a variance between the policy and the actual position of more than 5%, or that is otherwise material, explain why.

Explanation

- 50 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. We acknowledge that there are infrastructure entities with only one asset type. We believe it is necessary for investors to understand the concentration risk associated with that investment policy.

D The form of benchmark disclosure

Key points

Product disclosure statements and prospectuses for an infrastructure entity should contain a table, within the first 15 pages, summarising the entity's disclosure against the benchmarks, including explanations where the infrastructure entity does not meet the disclosure benchmarks.

Proposal

- D1** We propose that disclosure documents contain a summary in table form, within the first 15 pages, setting out the infrastructure entity's disclosure against the benchmarks, including an explanation on an 'if not, why not' basis where the infrastructure entity does not meet the disclosure benchmark.
- D2** We propose that if need be disclosure against the benchmarks should be made more fully in the remainder of the document.

Your feedback

- D2Q1** Do you foresee any difficulties associated with providing a summary of disclosure benchmark issues near the beginning of the disclosure document?
- D2Q2** Are there any other issues associated with requiring disclosure against the benchmarks for infrastructure entities?

Explanation

- 51 The purpose of the proposed form of disclosure is to achieve consistent disclosure about particular features of an infrastructure entity, in a format that allows investors to compare different entities easily.
- 52 Disclosure should be in the form of a table, with a separate section for each of the disclosure benchmarks: see the example in Table 10.
- 53 For each disclosure benchmark, the table should state the disclosure benchmark, whether or not the benchmark is met and provide an explanation if the benchmark is not met. This should be immediately followed by the additional disclosure information for that benchmark, set out in the same order as the relevant paragraphs of this consultation paper.
- 54 Any further disclosure that is required against the benchmark should be:
- (a) clearly and prominently disclosed in the PDS as close to the table referred to in proposal D1 as is practicable; and
 - (b) updated in ongoing disclosures.

Example of benchmark disclosure

Table 10: Example for Benchmark 6: Withdrawal policy

Benchmark 6	Statement	Explanation
For an unlisted registered scheme that is a unit trust, the unit price for the issue of new units or withdrawals will be reviewed, and updated if appropriate, after finalisation of a new valuation and before the issue of new units or withdrawal of any units	The benchmark is met / The benchmark is not met	<i>If the benchmark is not met, explain how often the unit price is updated</i>

Benchmark 6 disclosure

The issuer for an unlisted infrastructure entity should disclose:

- *the withdrawal policy, the maximum period allowed under the constitution of the entity and any rights that the issuer or company has to change the policy;*
- *any significant risk factors or limitations that may impact on the ability of investors to withdraw from the entity;*
- *how investors can exercise their withdrawal rights, including any conditions on exercise;*
- *if withdrawal from the entity is to be funded from an external liquid facility, the material terms of this facility, including any rights the provider has to suspend or cancel the facility;*
- *how investors will be notified of any material changes to withdrawal rights, for example, if withdrawal rights are to be suspended; and*
- *whether the amount of capital in the infrastructure entity has been reduced by more than 5% in any three-month period.*

E Regulatory and financial impact

- 55 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) the desirability of ensuring that retail investors have appropriate information to make fully informed investment decisions; and
 - (b) ensuring that the efficiency of the market in executing transactions is not inhibited through unnecessary and overly burdensome disclosure requirements.
- 56 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis, that is, completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 57 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 58 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches including:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits.

See ‘The consultation process’, p. 4.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
Ch 6D (for example)	A chapter of the Corporations Act (in this example numbered 6D)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
EBITDA	Earnings before interest, tax, depreciation and amortisation
enterprise value	Market capitalisation plus interest bearing liabilities less cash and cash equivalents
infrastructure entity	A listed or unlisted registered managed investment scheme or company in which retail investors invest that has, or is likely to have, at least 70% of its non-cash assets in listed or unlisted infrastructure entities or infrastructure assets. These assets may be roads, railways, ports, airports, other transport facilities, telecommunication facilities, waste processing, gas or electricity generation, transmission or distribution, water supply and sewerage, hospitals, education, public housing or recreational facilities
operating cash flow	Cash flow after working capital requirements (including maintenance capital expenditure), interest and debt payments but before distributions
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9)
s766E (for example)	A section of the Corporations Act (in this example numbered 766E)

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to define an ‘infrastructure entity’ as a listed or unlisted registered managed investment scheme or company in which retail investors invest that has, or is likely to have, at least 70% of its non-cash assets in listed or unlisted infrastructure entities or infrastructure assets. These assets may be roads, railways, ports, airports, other transport facilities, telecommunication facilities, waste processing, gas or electricity generation, transmission or distribution, water supply and sewerage, hospitals, education, public housing or recreational facilities. In relation to an infrastructure entity that is a property fund, we propose to apply the guidance we will develop based on this consultation paper, rather than Regulatory Guide 46 <i>Unlisted property schemes—improving disclosure for retail investors</i> (RG 46).</p>	<p>B1Q1 Do you agree with our proposed definition of ‘infrastructure entity’? If not, why not?</p>
<p>B2 We propose that the seven disclosure benchmarks in Table 1 apply to all infrastructure entities. Each of the disclosure benchmarks contains two components:</p> <p>(a) benchmark statements that set levels against which disclosure is required; and</p> <p>(b) additional disclosure requirements.</p>	<p>B2Q1 Do you think that disclosure benchmarks are necessary? If not, why not?</p> <p>B2Q2 Do you think there are other, more relevant disclosure benchmarks that should be used to highlight information for retail investors?</p>
<p>B3 We propose that the issuer for an infrastructure entity should address the disclosure benchmarks in Section C on an ‘if not, why not’ basis.</p>	<p>B3Q1 Do you agree that this is an effective means of improving disclosure for retail investors in infrastructure entities? If not, why not?</p>
<p>C1 We propose the issuer should address each disclosure benchmark in Table 2 and make the additional disclosures listed in paragraph 20.</p>	<p>C1Q1 Are the disclosure benchmarks we propose appropriate?</p> <p>C1Q2 Do you think there are more effective ways of addressing the issues relating to the structure of an infrastructure entity? Please explain your answer.</p>

Proposal	Your feedback
<p>C2 If guidance about disclosure is not implemented or is ineffective, we have alternative powers, for example, to direct modification of the compliance plan of an infrastructure entity that is a registered scheme, to impose licence conditions on Australian financial services licensees, and exemption and modification powers that might be available to address the concerns regarding conflicts of interest and activities involving related parties. Consideration might be given to the scope for use of powers for:</p> <p>(a) prohibiting arrangements that entrench management;</p> <p>(b) prohibiting acquisition of assets from related parties, on the basis that there are irreconcilable conflicts involved in these transactions;</p> <p>(c) requiring the purchasing infrastructure entity to obtain an independent valuation before a transaction with a related party seller can proceed;</p> <p>(d) requiring independent board or investment committee members to preside over related party acquisitions; and</p> <p>(e) prohibiting the issue of more than one class of shares or requiring that one share is only ever allocated one vote.</p>	<p>C2Q1 What are your views on the use of these powers to address the concerns in proposal C2?</p>
<p>C3 We propose the issuer should address the disclosure benchmarks in Table 3 and make the additional disclosures listed in paragraphs 26–34.</p>	<p>C3Q1 Are the disclosure benchmarks we propose appropriate?</p> <p>C3Q2 Do you think there are more effective ways of addressing the issues regarding infrastructure entity borrowings? Please explain your answer.</p>
<p>C4 We propose the issuer should address the disclosure benchmarks in Table 5 and make the additional disclosures listed in paragraphs 40–41.</p>	<p>C4Q1 Are the disclosure benchmarks we propose appropriate?</p> <p>C4Q2 Do you think there are more effective ways of addressing the issues relating to sensitivity analysis? Please explain your answer.</p>
<p>C5 We propose the issuer should address the disclosure benchmarks in Table 6 and make the additional disclosures listed in paragraph 43.</p>	<p>C5Q1 Are the disclosure benchmarks we propose appropriate?</p> <p>C5Q2 Do you think there are more effective ways of addressing the issues relating to valuations? Please explain your answer.</p>

Proposal	Your feedback
<p>C6 We propose the issuer should address the disclosure benchmark in Table 7 and make the additional disclosures listed in paragraph 45.</p>	<p>C6Q1 Is the disclosure benchmark that we propose appropriate?</p> <p>C6Q2 Do you think there are more effective ways of addressing the issues relating to the distributions of an infrastructure entity? Please explain your answer.</p>
<p>C7 We propose the issuer should address the disclosure benchmark in Table 8 and make the additional disclosures listed in paragraph 47.</p>	<p>C7Q1 Is the disclosure benchmark we propose appropriate?</p> <p>C7Q2 Do you think there are more effective ways of addressing these issues? Please explain your answer.</p>
<p>C8 We propose the issuer should address the disclosure benchmark in Table 9 and make the additional disclosures listed in paragraph 49.</p>	<p>C8Q1 Is the disclosure benchmark that we propose appropriate?</p> <p>C8Q2 Do you think there are more effective ways of addressing these issues? Please explain your answer.</p>
<p>D1 We propose that disclosure documents contain a summary in table form, within the first 15 pages, setting out the infrastructure entity's disclosure against the benchmarks, including an explanation on an 'if not, why not' basis where the infrastructure entity does not meet the disclosure benchmark.</p>	<p>D2Q1 Do you foresee any difficulties associated with providing a summary of disclosure benchmark issues near the beginning of the disclosure document?</p> <p>D2Q2 Are there any other issues associated with requiring disclosure against the benchmarks for infrastructure entities?</p>
<p>D2 We propose that if need be disclosure against the benchmarks should be made more fully in the remainder of the document.</p>	