

19 December 2024

Claire LaBouchardiere,  
Senior Executive Leader  
Compliance & Small Business  
Australian Securities and Investments Commission  
GPO Box 9827  
Melbourne VIC 3001

Sent to: [sustainable.finance@asic.gov.au](mailto:sustainable.finance@asic.gov.au)

Dear Claire,

**RE: Consultation Paper 380 Sustainability reporting**

**Who we are**

A national membership association, Governance Institute of Australia (Governance Institute) advocates for governance and risk management professionals, providing community and support to over 8,000 members.

As an Institute of Higher Education, the Governance Academy provides practical training and expert insights, equipping professionals with the tools to excel in their roles and drive better decision-making in their organisations.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group. Governance Institute is also a thought-leadership partner with the National Centre for Artificial Intelligence, within CSIRO.

## Executive summary

This Submission offers suggested improvements to the proposed Regulatory Guide (Guidance) and outlines further clarity required about ASIC's compliance approach. It is acknowledged that the Guidance is not intended to provide exhaustive guidance on the preparation and content of a sustainability report. Explanations of ASIC's interpretation of the sustainability reporting requirements under the *Corporations Act* should be as clear as possible and not leave room for ambiguity or be subject to interpretation. This extends to how ASIC aims to administer and enforce the sustainability reporting requirements and its general compliance approach. We encourage ASIC to work closely with the AASB and AUASB in developing further guidance and education materials on sustainability reporting and assurance. We also urge caution in relation to reliance on ISSB accompanying guidance and education materials to support the application of IFRS S2 in the Australian context, as it may apply differently to Australia's unique liability framework.

## Preparing a sustainability report

The section of the Guidance considers the merits of ASIC issued guidance on maintaining sustainability records, directors' duties in relation to sustainability reporting and the modified liability settings applicable to sustainable reporting.

### 1. Definition of entities that must prepare a sustainability report

Proposal B1 is an adequate description of when the sustainability reporting requirements commence for each cohort of reporting entity, how the sustainability reporting thresholds apply to different corporate structures and who is required to prepare the sustainability report on their behalf and provides a useful explanation of the concept of control as detailed further under s292A(3) and s292A(6) of the *Corporations Act 2001*.

Our members consider further guidance is required for entities that operate with complex and dynamic ownership structures such as those with offshore subsidiaries and in determining how consolidated revenue is measured with complex ownership structures. We note there is also little to no guidance about corporate takeovers, mergers and acquisitions or the divestment of subsidiaries. We consider further clarity is required to explain how corporate entities undergoing significant transformation or ownership changes will be impacted by the reporting requirements.

**Recommendation 1:** Provide further guidance on how complex ownership structures will be assessed and further guidance about dynamic corporate structures such as may occur during corporate takeovers, mergers and acquisitions and divestments of subsidiaries and offshore entities.

### 2. The obligation to keep sustainability records

The proposed obligation to maintain a non-exhaustive list of sustainability records outlined under RG 000.46 appears to be overly prescriptive and extends beyond the core content requirements outlined under s 296D(1). RG 000.48 proposes that "entities assess whether they may be required to prepare a sustainability report at the end of the financial year even if they do not meet the

sustainability reporting threshold at the commencement of that financial year". This approach is unreasonable where there is insufficient certainty or foresight as to the potential for or finalisation of proposed corporate restructures, acquisitions, mergers or takeovers that may occur late in the financial year. Entities should be assessed as to whether they are required to report early in the financial reporting period or within a reasonable period thereafter.

Our members have raised concerns about the prescriptive nature of detail relating to maintaining sustainability records because of the significant regulatory burden associated with these requirements. As drafted, RG 000.46 to 000.48 will increase the complexity, burden and cost of compliance beyond that which our members considers is reasonably necessary. The obligation to maintain climate-related financial records should be aligned with the existing and well-understood financial reporting record-keeping requirements that currently adequately provide for integrity in financial reporting, rather than imposing a new and different layer of record keeping requirements.

**Recommendation 2:** Align climate-related financial record keeping reporting obligations with standard financial reporting record keeping requirements and revisit RG 000.46 and RG 000.48 to reduce the prescriptive nature of the content and volume of sustainability records required and provide further information on dynamic corporate structures that may be subject to change throughout the reporting period.

### 3. Directors' duties and the preparation of information between reporting periods

Our members consider RG 000.52 appears overly prescriptive as it proposes that directors are to be kept 'regularly informed' over the extent that a climate-related risk or opportunity 'may be material within the reporting period' and that 'assessments should not be confined to the annual reporting season but considered on an ongoing basis'. This is perceived as regulatory overreach. As a matter of principle, it should be left for companies to decide how often the board receives updates on sustainability-related risks as is the case with all other risk classes. The risk of setting expectations for the regular cadence of updates to the board is that where that is not occurring for any given reason, it is seen as directors not discharging their duties.

For listed entities, material financial impacts with the potential to impact the price of securities are generally managed and administered within the requirements of the continuous disclosure framework. For unlisted entities, the cadence of updating the market does not appear practical where there is no obligation to do so. We suggest removing or substantially rewording RG 000.52 as to avoid unnecessary confusion and conflation with other disclosure obligations.

**Recommendation 3:** Remove and/or substantially reword RG 000.52 to clarify that the regular cadence of information provided to the board is at the discretion of the entity and is distinct from the continuous disclosure requirements.

### 4. Further guidance on director declarations is required

The Guidance on directors' declarations could be improved by providing a non-exhaustive list of factors that ASIC may consider it appropriate for directors to take into account.

**Recommendation 4:** Provide a non-exhaustive list of factors that directors may want to consider prior to making declarations and factors on which ASIC may place greater weighting when exercising its judgement of whether directors have appropriately exercised their directors' duties.

## 5. Selective use of the modified liability regime may create unintended consequences

Our members have expressed concern over how the selective use of the modified liability provisions, particularly where they relate to other reports, documents and investor presentations will be enforced. As a practical matter entities are likely to reproduce material from their sustainability reports in other documents and presentations and our members are of the view that these disclosures should also be protected under the modified liability provisions as well as any cross-references made back to the Sustainability Report. By excluding these types of disclosures from the modified liability regime, disclosing entities are exposed to risk on otherwise protected disclosures, which may lead to entities being reluctant to discuss sustainability performance in forums such as investor briefings.

The Explanatory Memorandum states that the transitional periods under the modified liability regime are designed for ASIC to take an educational role, focusing on promoting compliance, and deterring poor behaviours and reporting practices that undermine the objectives of the new reporting regime.<sup>1</sup> It is therefore critical that ASIC consider the broader view of how the selective use of modified liability provisions will impact information provided to investors outside the sustainability report and effectively monitor the unintended consequences this creates.

**Recommendation 5:** Consider the broader effects that the selective use of the modified liability regime will have where it excludes sustainability-related information in other financial reports, documents and investor presentations including where cross-references are made back to the Sustainability Report.

## Content of the sustainability report

### 6. Statements with forward-looking climate information

The Consultation Paper outlines a number of reasons as to why additional guidance on factors that would establish reasonable grounds for forward-looking disclosures is not warranted, including that the requirements are already embedded in AASB S2 as highlighted in paragraphs D1-D33 of Appendix D to AASB S2 and that imposing domestic and Australian-specific guidance, in addition to detailed requirements set out in AASB S2 may create divergences in Australian reporting practice relative to the international IFRS S2 baseline.

Our members consider this justification is inadequate. There is significant scope for litigation against corporate entities in relation to forward looking statements that are not adequately addressed in the AASB S2. Australian-specific guidance is necessary to incorporate Australian law

<sup>1</sup> <https://www.allens.com.au/insights-news/insights/2024/09/mandatory-climate-related-financial-reporting-legislation/#anchor3>

as well as the need to factor the unique liability settings that are distinguish Australia from the UK and US. More specific regulatory guidance on the Australian approach is required.

**Recommendation 6:** Provide additional specific guidance on matters relating to forward-looking statements for the Australian context that are not adequately addressed in the international IFRS S2 baseline.

Suggested improvements could be made to RG 000.72 on the short, medium and long-term time frames to be considered. ASIC guidance under RG 000.76 could be improved by providing additional information about what constitutes a forward-looking statement that complies with Appendix D of AASB S2 and what does not comply. In addition to the reasons outlined earlier in this submission, RG 000.77 should also provide some guidance as to what ASIC may consider 'adequate sustainability records'. It would also be helpful to provide additional guidance under RG 000.78 to address the interplay between materiality and continuous disclosure, including confirmation of the proposed approach to be taken in relation to forward-looking statements. For example, Scope 3 data is constantly evolving, and it would be very helpful to have additional guidance on potential inconsistencies and when re-statements will be required.

**Recommendation 7:** Consider amendments to clarify the meaning of short-medium and long-term time frames and provide guidance on what will be considered 'adequate sustainability records'. Consider clarifying distinctions between matters of materiality and continuous disclosure obligations that may apply to listed entities.

## 7. Cross-referencing in a Sustainability Report

Our members have raised concerns with ASIC encouraging cross-referenced documents to be lodged because information included by cross-reference is taken to form part of the complete set of climate-related financial disclosures. Cross-referenced information must be made available on the same terms and at the same time as the climate-related financial disclosures and users of the sustainability report, both present and future, should have access via ASIC's register to both the sustainability report and any cross-referenced document as outlined in RG 000.79-81.

Our members consider this approach will require disclosing entities to lodge reference documents such as data books which are made available on corporate websites. Our view is that this approach is a departure from current financial reporting requirements and is unduly onerous, particularly when the location of the information is clearly cross-referenced and are supplementary information for a user of the report – they are not required reading to understand the reporting entity's Sustainability Report.

For listed disclosing entities that rely upon the deemed dual lodgement provisions in ASIC Corporations (Electronic Lodgement of Financial Reports) Instrument 2016/181, this filing requirement will require data books (for example) to be lodged with ASIC separately as it is a document that is unlikely to be lodged with the ASX. Our members suggest that an alternative approach is to require disclosing entities to ensure these documents remain accessible on the corporate website.

**Recommendation 8:** Reconsider the need to lodge cross-referenced documents as this presents as a significant departure from standard financial reporting obligations. Consider amending the guidance to require supplementary information that is cross-referenced in a Sustainability Report to be accessible via the disclosing entity's website.

## 8. Labelling

Regulatory guidance provided under RG 000.82 – 000.83 is potentially confusing to disclosing entities with global operations that prepare sustainability reports under a range of different reporting and disclosure frameworks internationally. There may be reasonable instances where entities make or combine voluntary and mandatory sustainability-related disclosures into one report. Entities should be required to flag upfront what reporting frameworks they are complying with to avoid confusion. It would be helpful if ASIC provided specific examples of how labelling should be applied to different statement and document types. ASIC should also consider how the Australian labelling regime will be interpreted by users in other jurisdictions, particularly while the mandatory reporting only includes climate information, but reports will be identified as Sustainability Reports.

**Recommendation 9:** Reconsider the approach on labelling and instead require reporting entities to disclose the reporting framework they are complying with, where more than one reporting framework may apply.

## 9. Proportionality mechanisms and exceptions under AASB S2

Members considered RG 000.92 – 000.94 do not provide sufficient scope or information as to what is acceptable and reasonable. It may be useful for ASIC to consider elaborating on what precisely it is looking for, what it considers adequate and reasonable taking into account the subjectivity referred within the Guidance.

**Recommendation 10:** Provide greater context and content as to the proportionality mechanisms and exceptions under AASB S2.

## Sustainability-related financial disclosures outside the sustainability report

### 10. Sustainability-related financial disclosures outside the Sustainability Report

Our members have expressed concern with the examples of selective reproduction or use of information from a Sustainability Report of 'a climate-related target in the headline of an investor presentation without disclosing or referencing the target's accompanying inputs, assumptions and contingencies that are disclosed in the sustainability report' as outlined under RG 000.105 does not factor scenarios where accompanying information may be complex, affect or delay effective decision-making, or where there appears to be no express request for this type of information from an investor or group of investors. Entities should be able to exercise at their discretion the information necessary to inform effective decision making of investors as is

currently the standard applied to financial disclosures generally. We note that reference to INFO 271: *How to avoid greenwashing when offering or promoting sustainability-related products* is useful in this regard.

**Recommendation 11:** Provide the necessary flexibility for entities to exercise at their discretion the type of information necessary for effective investor decision making outside of the Sustainability report as required noting reference to INFO 271 guidance on greenwashing.

## ASIC's administration of the sustainability reporting requirements

### 11. Approach on sustainability reporting and audit relief

There appears to be limited information as to how ASIC plans to enforce audit relief for Group 3 entities and/or those that provide a statement that the entity does not expect climate-related financial impacts on its business, as outlined under s296B(1), where an entity may prepare a simplified climate statement where they do not have material climate-related financial risks and opportunities for a financial year. Our members consider it is unreasonable to expect these entities will require an audit of such statements. Auditing of these statements for entities unlikely to have material impacts is an additional administrative burden and cost on doing business that is wasteful and unnecessary. It is further suggested that RG 000.120 may be onerous as far as what is reasonably practicable in terms of cross-referencing to sustainability reports with the necessary information within the OFR.

**Recommendation 12:** Consider auditing relief for entities making concise statements as to non-material financial impacts.

## Other matters

### 12. Definition of primary users

AASB S2 requires reporting entities to disclose information about material risks and opportunities for 'primary users' of financial reports. There is potential for this definition to be interpreted too broadly, and it may be difficult to balance the needs of what could be a diverse group of stakeholders that interact with the Sustainability Report. For instance, the level of financial literacy and sophistication will be substantially different between retail and institutional investors and this would impact the level of detail or generality.

**Recommendation 13:** Clarify who primary users of sustainability reports are and consider distinctions between retail and institutional investors if and as required to mark a clear difference in what would be reasonably expected within investor presentations or AGMs.

### 13. Consider complementary guidance for investors

It may be practically useful to develop a complementary guidance note for investors, as is the case with the approach taken by the Financial Markets Authority in NZ. A regulatory guide on sustainable or ethical investing will support investors in making informed decisions and choices about what they should be looking for when making appropriate investment decisions.

**Recommendation 14:** Consider creating sustainable investor guides such as those issued by the FMA in NZ to help support investors in making informed decisions and navigating sustainability guides.

#### 14. Penalty notices, fines or case proceedings

There is limited information provided in the Guidance about whether failure to comply with certain provisions attracts pecuniary or other associated penalties or instances that may be subject to proceedings, for example if misleading or deceptive conduct is suspected. Our members consider greater guidance is needed on what to expect from ASIC on its compliance and enforcement approach, particularly following the end of the modified liability settings and the commencement of the assurance obligations.

**Recommendation 15:** Consider clarifying the regulatory approach as well as the penalty notices, pecuniary or other associated penalties or potential for proceedings.

#### 15. Definition of materiality

There appears to be confusion throughout the Guidance about the definition of materiality in the context of financial and sustainability reporting. It may be useful to make this distinction clearer particularly where there may be confusion created over the interactions with the continuous disclosure regime.

**Recommendation 16:** Consider clarifying the concept of materiality as it relates to climate-related financial disclosure requirements and make clear distinctions from the concept as it may be defined within the continuous disclosure regime.

#### 16. Interaction with National Greenhouse Gas Emissions Reductions (NGERs) reporting scheme

It would be useful for ASIC to deal with the inconsistencies between the NGERs reporting scheme, Corporations Act and the accounting and auditing standards requirements and whether class order other relief will be provided if needed over time.

**Recommendation 17:** Provide further information on the inconsistencies between the NGERs reporting scheme and climate-related financial disclosure requirements embedded in the Corporations Act and work closely with the AASB on provided further guidance on the accounting and auditing standards requirements.

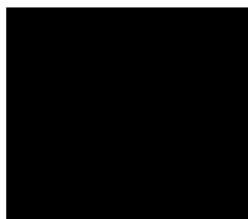
## 17. Regular review and feedback of the proposed guidance note

It would be helpful if ASIC takes an active role engaging with disclosing entities, auditors and other stakeholders on an annual basis over the first 3 years to receive feedback on what is working well and what needs addressing and adjust the guidance accordingly. A review should also be integrated for when additional sustainability reporting under ISSB becomes mandatory in Australia. This engagement will help to ASIC to identify and address challenges early in the process and contribute to a more effective disclosure regime.

**Recommendation 18:** ASIC to take an active role engaging with those interacting with the scheme and adjusting the guidance accordingly. Integrate a review for when additional reporting sustainability-related reporting obligations become mandatory.

For further information regarding this submission, please contact me or [REDACTED] Senior Policy and Advocacy Advisor, [REDACTED].

Yours sincerely,



Megan Motto  
CEO