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Australian Accounting Standards Board

Via web portal

Dear Australian Accounting Standards Board (AASB)

AASB Exposure Draft 321: Request for comment on Draft IFRS S1 General Requirements for Disclosure of Sustainability Related Financial Information; Draft IFRS S2 Climate-related disclosures

Thank you for the opportunity to respond to the AASB Exposure Draft 321 concerning the two draft standards released by the International Sustainability Standards Board (**ISSB**) related to general sustainability related financial information (**Sustainability Standard**) and climate related disclosures (**Climate Standard**).

The AICD's mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 49,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits, large and small businesses and the government sector.

The AICD strongly supports the principle of harmonised international sustainability standards under the ISSB umbrella and urges a consistent approach across jurisdictions. We have consistently heard from members that there is a need to consolidate competing existing non-financial reporting frameworks, and to address growing investor demand for high quality, comparable disclosure. Such reporting will also allow companies to better benchmark their own sustainability practices and see where there may be room for improvement. A fragmented regulatory approach across jurisdictions would undermine these outcomes.

In our view, the two draft Standards are a strong starting point from which a global baseline can be developed. In the Australian context, we recognise that comprehensive adoption of these new standards, at least in their current form, would represent a significant enhancement on current reporting practices with corresponding challenges.

We support the AASB's consultation on how sustainability standards might best be developed in the Australian market, including the AASB's preliminary approach of doing so in a suite separate to existing Australian accounting standards. We agree with the AASB's view that the decision on whether to mandate certain sustainability reporting is within the proper purview of the Australian parliament, and support the initial focus being on for-profit entities, especially those listed or with a large carbon footprint.

The AICD looks forward to playing a constructive role in the adoption of these standards in the Australian market. In our view, an appropriately phased in approach that recognises the varying levels of maturities within sectors, and the Australian market more broadly, will be critical to the Standards' successful adoption. In doing so, we must recognise that, although there are examples of advanced approaches in Australia, current sustainability and climate related reporting practices are less mature overall than in other global markets.

Enclosed with this cover letter are our detailed responses to AASB specific questions (**Attachment A**), the Sustainability Standard (**Attachment B**), Climate Standard (**Attachment C**), along with legal advice obtained from Herbert Smith Freehills regarding Australian implementation issues (**Attachment D**).

Executive Summary

The AICD welcomes the current consultation and provides the following key comments:

1. We strongly support the goal of high quality, consistent and comparable sustainability reporting. All stakeholders recognise that a consolidation of existing frameworks is crucial to the success of the ISSB project and meeting the evolving needs and expectations of investors.

2. We support climate change being identified as the first area to be the subject of a specific ISSB standard. We acknowledge the varying regulatory and disclosure initiatives taking place globally, and the value in a harmonised approach across jurisdictions. The TCFD framework is a solid foundation for any such standard.

3. We strongly recommend that further work be done to clarify and refine the Standards so that they are capable of reasonable, independent assurance. In our view, in their current form, this will be very difficult to achieve. Without such assurance the value of the Standards will be considerably diminished. As a matter of priority, work on how assurance will take place should be pursued in parallel with consultation on the substantive elements of the Standards. Further, while we agree that a degree of specificity is important, a more principles-based approach to the proposed requirements would allow flexibility to evolve with market practice and expectations.

4. We urge a carefully designed phased-in approach that recognises the considerable uplift in practice and capability that will be required in Australia. There are unique aspects of the Australian legal environment that if not addressed will hinder comprehensive adoption. Liability settings for the kinds of forward-looking statements contemplated by the Standards will need to be calibrated appropriately, or else risk unhelpful, generalised disclosures that will not meet investors' expectations (see HSF legal advice at Attachment D). We encourage a clear focus on these issues from policymakers and standard setters to support comprehensive, good faith adoption by entities.

5. We highlight current data and workforce skills gaps that, in the short term, will make comprehensive and consistent adoption of the Standards very difficult to achieve. The lack of clear, well accepted methodologies for measuring key metrics such as scope 3 greenhouse gas emissions is one such area. The ISSB, as well as domestic policy-makers and standard-setters, will need to bear this in mind when developing implementation plans and devising appropriate transitional arrangements.

Next steps

We hope our submission will be of assistance to the AASB in this important and timely work. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au.

Yours sincerely,

Angus Armour FAICD
Managing Director & CEO

Australian Institute of Company Directors

AASB Exposure Draft ED 321

Request for Comment on ISSB [Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and [Draft] IFRS S2 Climate-related Disclosures

Part A: Matters for comment relating to specific proposals in Exposure Draft on [Draft] IFRS S1

A1. Exposure Draft on [Draft] IFRS S1 is proposing that entities be required to disclose information that is material and gives insight into an entity's sustainability-related risks and opportunities that affect enterprise value.

Is focusing on an entity's enterprise value the most appropriate approach when considering sustainability-related financial reporting? If not, what approach do you suggest and why?

When we wrote to the IFRS Foundation supporting the establishment of the International Sustainability Standards Board, a key reason for doing so was the hope that a consolidation of existing reporting frameworks would occur. Removing the 'alphabet-soup' of Standards remains a key reason for Australian director support of the project, along with greater consistency in disclosure and a clearer ability to benchmark their organisation's sustainability performance.

We note that the Exposure Draft is investor-focused with a financial materiality test based on enterprise value. This aligns the Exposure Draft with the SASB standards on which it is based. This means that the ISSB Standards differ from, for example, the GRI Standards and the CDP which cater to a broader range of stakeholders (including investors) seeking to understand an organisation's significant impacts on the economy, environment, or people.

We acknowledge that by retaining its investor, financial-materiality and enterprise-value focus, the Exposure Draft and any resultant standards are less likely to meet the needs of those broader range of stakeholders. This reduces the likelihood of consolidation of the ISSB into other Standards such as the GRI. This investor and enterprise value focus may mean that preparers are expected to continue to issue sustainability reports under frameworks, such as the GRI, to meet the needs of a broader group of stakeholders.

Notwithstanding this concern, on balance, we support the investor focus of the Exposure Draft. We do not support a double materiality test, a concept not generally applied in Australia. We believe that were the focus to be expanded to other stakeholders, the scope of any resultant standards would be prohibitive and its complexity and the shift in practice expected would likely mitigate against global adoption. The slightly narrower focus on enterprise value, investors and financial materiality will be easier for jurisdictions such as Australia to adopt, albeit still a very challenging prospect.

Part B: Matters for comment relating to specific proposals in Exposure Draft on [Draft] IFRS S2

B1. To comply with the proposals in Exposure Draft on [Draft] IFRS S2 an entity would be required to disclose its Scope 3 greenhouse gas (GHG) emissions in addition to its Scope 1 and 2 GHG emissions. Do

you agree that Australian entities should be required to disclose their Scope 3 GHG emissions in addition to their Scope 1 and Scope 2 GHG emissions? If not, what changes do you suggest and why?

Yes, we believe it is necessary to disclose Scope 3 emissions, subject to materiality. In our discussions with directors, they acknowledge that stakeholders are increasingly demanding this information from entities. However, we note that in jurisdictions such as Australia there is currently limited reporting of Scope 3 and potentially limited gathering of Scope 2 information by many entities. In our view, there will need to be an appropriate transition period to enable the creation of proper systems and accepted methodologies so that entities are able to capture accurate and reliable information to allow for Scope 3 disclosure.

Given the inherent uncertainty in the collection of data, we also believe that there should be a safe harbour for liability for Scope 3 disclosure. This would align the ISSB with the climate disclosure proposal put forward by the SEC. In this regard, we note the legal advice from Herbert Smith Freehills (see Attachment D) which details the legal liability risks associated with the kinds of forward-looking statements expected by the ISSB Standards.

In our view, it is only fair that if companies are being asked to provide Scope 3 disclosures, notwithstanding the widely acknowledged uncertainty surrounding them, there should be corresponding protections for good faith disclosures.

B2. To comply with the proposals related to GHG emissions disclosures in Exposure Draft on [Draft] IFRS S2 an entity would be required to apply the Greenhouse Gas Corporate (GHGC) Standard. Do you agree that Australian entities should be required to apply the GHGC Standard given existing GHG emissions legislation and guidance in place for Australian entities (for example, the NGER Act, NGER (Measurement) Determination 2008 and related guidance)?

No comment.

B3. Are the proposed industry-based disclosure requirements in Appendix B to Exposure Draft on [Draft] IFRS S2 relevant for Australian industries and sectors? If not, what changes do you suggest and why?

It is difficult for the AICD to comment on the disclosure topics defined in the industry disclosure requirements (Appendix B). Australia is not a jurisdiction where SASB Standards are commonly applied and there is limited understanding of them. A recent survey of 250 entities listed on the ASX that reported against a framework or standard, found that a majority used TCFD (63 percent) or GRI Standards (55 percent). Reporting against the <IR> Framework (5 percent) and SASB Standards (26 percent) was less prevalent.[1]

Appendix B is voluminous with extensive and detailed disclosure requirements and there has not been the opportunity for Australian preparers to properly understand the implications of these disclosure requirements. The large number of metrics set out in the Appendix does raise concerns about how cost effective the process will be, especially as there are more metrics to come in future Standards.

It will be important for the ISSB to set out how reviews of the matters contained within Appendix B will occur in the future. Australia will need to play a role in this process, rather than leaving it as a US-centred SASB process. There would be merit in having a parallel, more detailed consultation on the SASB standards. In our view, if the Standards are to be adopted in Australia there will need to be an extensive consideration and discussion about their application. This will need to occur on an industry basis.

[1] KPMG and ASX. Adoption of Recommendation 7.4: Reporting on Environmental and Social Exposures. Analysis of disclosures made by listed entities between 1 January 2021 and 31 December 2021 at p.44. Available at: < https://assets.kpmg/content/dam/kpmg/au/pdf/2022/asx-corporate-governance-environmental-social-exposures.pdf>

B4. Are there any Australian-specific climate-related matters that the AASB should consider incorporating into the requirements proposed in Exposure Draft on [Draft] IFRS S2? For example, given the Exposure Draft on [Draft] IFRS S2 is the starting point for the AASB's work on climate-related financial disclosure, should there be additional reporting requirements for Australian entities? If so, what additional reporting requirements should be required and why?

No comment.

Part C: Matters for comment relating to both Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2

C1. Which Australian entities should be expected to apply the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 and why? Specifically: (a) should the proposals be intended for all for-profit entities in Australia or only to a subset of for-profit entities? And (b) should relief from specific aspects of the proposals be permitted for some entities for which the proposals are deemed burdensome (for example, Scope 3 GHG emissions and scientific and scenario analyses)? If so, which entities and why?

There are some significant concerns around the Exposure Drafts set out in our attached responses and we would need to see the final form of the drafts to be in a position to provide an answer to this question.

As a starting point, these Standards would need to be limited to larger listed entities and organisations with large carbon footprints that have the resources necessary to gather the data required and which regularly provide public disclosure and/or whose activities will have the greatest impact. Disclosure by these entities would also help establish a baseline of quality reporting which could help inform wider adoption over time.

C2. Are there any regulatory issues or other issues arising in the Australian environment that may affect the implementation of the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2?

Yes, various regulatory and legislative arrangements in Australia give rise to director and corporate liability issues that will require detailed consideration prior to any adoption in Australia.

The AICD has obtained detailed legal advice from Herbert Smith Freehills (HSF) on liability risks associated with the proposed ISSB Standards (see Attachment D).

It is important to note that some investors have already recognised that legal liability risks could lead to poor disclosure outcomes. For example, the world's largest institutional investor, BlackRock, in its recent submission to the SEC on climate disclosures, stated the following:

> ***Protections from liability****: the liability attached to climate-related disclosure should be commensurate with the evolving nature of that disclosure to encourage rather than discourage higher quality disclosure.* ***We urge regulators to adopt a liability framework that provides meaningful protection from legal liability for disclosures provided in good faith while standards continue to evolve****, and that gives companies the flexibility they need to develop their disclosures without imposing a chilling effect [emphasis added].*[2]

It is important to highlight that Blackrock's comments were made in an US environment with significantly less disclosure risk than the Australian market (see below).

[2] BlackRock submission to the SEC: Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22), 17 June 2022, available here.

The following comments are made drawing on the HSF advice at Attachment D.

Australian corporate and director liability issues

Under s 769C of the *Corporations Act*, where a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act), the representation will automatically be taken to be misleading if the person does not have reasonable grounds for making the representation. The subjective belief of the person at the time that the representation was made is immaterial, even if it was honestly held. Similar provisions are included in s 12BB of the *ASIC Act 2001* (Cth) and s 4 of the *Australian Consumer Law* (**ACL**) and, in the case of the ACL in particular, the person making the representation is also deemed **not** to have reasonable grounds unless they adduce evidence to the contrary.

Accordingly, forward-looking statements place an evidential burden on the person who makes the representation, to adduce evidence that there were reasonable grounds for making it.[3] Any representation in a periodic report that is not supported by reasonable grounds will automatically be deemed to be misleading, with associated penalties.

As the HSF advice highlights, many aspects of the proposed ISSB Standards require estimation or prediction of the impacts of risks and opportunities for the reporting entity, notwithstanding that those impacts are inherently unknowable and the relevant disclosure would be speculative – and for that reason, likely to be questioned as not being based on reasonable grounds (and therefore misleading.

For example, it is likely to be challenging (and potentially impossible) for a reporting entity to establish reasonable grounds with respect to the required disclosure of the 'anticipated effects of sustainability-related risks over the short, medium and long term'. To illustrate, in the area of climate change, those short, medium and long term impacts are highly contingent on developments such as technology and global and domestic policy settings.[4]

Additionally, while it has become more common for companies to undertake (and publish the findings of) scenario analysis for climate impacts under different climate change scenarios, it is notable that those disclosures are typically bound by issue (i.e. climate) and do not require the reporting entity to present its granular view on anticipated outcomes (i.e. they are presented as possible scenarios rather than probabilities). The scale of analysis implied by the proposed ISSB Standards is considerably more ambitious given the broad application to sustainability-related risks and opportunities, and the requirement for the estimation / prediction and disclosure of their anticipated effects on entities.

The Exposure drafts often explicitly require disclosure when there are unlikely to be reasonable grounds for making such a statement. For example, paragraph 79 of draft IFRS S1 requires disclosure even when metrics can only be estimated, stating that "even a high level of measurement uncertainty would not necessarily prevent such an estimate from providing useful information. An entity shall identify metrics it has disclosed that have significant estimation uncertainty, disclosing the sources and nature of the estimation uncertainties and the factors affecting the uncertainties." In practice, this would require a company to acknowledge that the forward-looking statement does not have a reasonable basis, thereby triggering liability.[5]

HSF has advised that Australia's current periodic reporting requirements are principally backward-looking in nature, which affords reporting entities a considerable degree of certainty over their disclosure and

[3] Australian Competition and Consumer Commission v Woolworths Limited [2019] FCA 1039, 37 [113].
[4] See for example the disclosure requirements at paragraph 14 of IFRS S2.
[5] The same issue arises under paragraph 82, which requires that "When considering possible outcomes, an entity shall consider all relevant facts and circumstances, and consider including information about low probability and high-impact outcomes".

carries comparatively lower levels of disclosure risk. Indeed, Australian securities laws and ASIC policy guidance (ASIC Regulatory Guide 170) discourage statements involving speculation and supposition, as opposed to information that can be positively demonstrated to have a reasonable basis and that is based on reasonable assumptions, rather than hypothetical projections.

Even where a reporting entity and its directors consider that their forward-looking representations are supported by 'reasonable grounds', this may be challenged in court in an allegation of 'greenwashing'.

Higher Australian liability risks than other jurisdictions

Compared to their counterparts in certain peer jurisdictions, reporting entities and officers in Australia are particularly exposed to this risk, because in Australia, there is no 'safe harbour' exemption which allows for the exclusion of liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement.[6]

There is also heightened regulator risk for directors because, in Australia, the securities regulator ASIC can and has pursued directors for alleged breaches of their directors' duties including fiduciary obligations such as the duty of care and diligence. This contrasts to similar jurisdictions such as the UK and US, where enforcement of such duties is largely left to private litigants.

Finally, Australia has a uniquely facilitative class actions regime. This means that the boards of Australian companies listed on the ASX are faced with higher reputational and personal liability risks from disclosure-based shareholder class actions than boards in many of the world's other major capital markets, including the UK and US. Another point of uncertainty at present is whether (and if so, how) the scope of directors' duties in relation to financial reporting might adjust to encompass sustainability- and climate-reporting. With existing case law on the non-delegable duties of directors having thus far been decided on the basis of financial reporting, it remains to be seen whether Australian courts would take a similar approach towards sustainability and climate-related reporting, and extend directors' non-delegable duty in respect of these additional areas.

Notably, the proposed ISSB Standards will require considerable reliance on technical and specialist advice (e.g. methodologies for calculating greenhouse gas emissions, advice on the viability of technologies). In this context, there is likely to also be an unprecedented need for directors to rely on s.189 of the Corporations Act (Reliance on information or advice provided by others) with respect to the basis for Board approvals of reporting.

Further, the ISSB standards will mean a greater volume of market disclosures. An increase in information disclosed by entities will mean a commensurate increase in the amount of information that listed entities will have to monitor under their continuous disclosure obligations. HSF has advised that this will be particularly pronounced with respect to forward looking targets required by the Standards, which will require careful monitoring, and if necessary, updating, to prevent a false market from occurring.

Need for tailored regulatory settings to support implementation

In summary, the above factors mean that Australian directors and entities are likely to be exposed to higher liability risk than other jurisdictions, if the Standards are adopted in their current form, under existing domestic laws and arrangements. We believe that these matters should be resolved at a domestic level. For example, the forward-looking statements required by the standards could be subject to a specific safe harbour from liability to encourage good faith disclosure. Alternatively, language could be built into

[6] For example there is no equivalent to the protection in the US available in 15 USC § 77z-2(i)(1).

the domestic version of the standard, or any explanatory or guidance material, making clear the kinds of disclosures that are required (or not required), thereby providing entities with a degree of comfort.

Interaction with director reporting requirements

Were the Standards to be introduced in Australia, there would need to be clarification on their interactions with directors' current reporting requirements under the Corporations Act, including the directors report, the Operating and Financial Review and the remuneration report. As the Exposure Drafts note, much of what they cover has traditionally been seen as matters for management commentary, rather than financial reporting. Matters contained within the Standards clearly cross over into those statutory obligations and there would need to be a resolution to avoid conflicting obligations. There would also need to be consideration of matters such as prudential reporting requirements for APRA-regulated entities.

Different materiality thresholds would also apply to matters within the Standards and management commentary. In Australia, the test is that the "Operating and Financial Review must contain information that members of a listed entity would reasonably require to make an informed assessment of the operations, financial position, the business strategies, and prospects for future financial years, of the entity reported on."[7] This appears a higher materiality threshold than the materiality test contained within the Exposure Drafts as it is limited to current members, refers to an 'informed assessment' rather than 'influence' and only requires disclosure over the named topics.

C3. Do the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 align with existing or anticipated requirements, guidance or practice in Australia? If not: (a) please explain the key differences that may arise from applying the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 and the impact of any such differences; and (b) do you suggest any changes to the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2?

See answer to Question C2.

C4. Would the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 result in useful information for primary users of general purpose financial reports?

Yes, based on our discussions the Standards would result in useful information, subject to certain refinements outlined elsewhere. Directors are eager to meet the needs of stakeholders for that information, while at the same time, wishing to ensure that disclosures are robust and capable of external assurance.

C5. Do the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 create any auditing or assurance challenges?

Yes. We believe that IFRS S1, in its current form, would be very difficult to assure and it would be difficult to determine whether an entity has complied with it. A particular concern lies with paragraphs 51 and 54 which mandate an open-ended and unsettled process for the identification of sustainability-related risks and opportunities. Assurance challenges for S2 are less pronounced, albeit very difficult in key areas such as scope 3 greenhouse gas emissions.

Please see our response to the ISSB on Question 7(b)of S1 for more details.

[7] S.299A(1) Corporations Act.

C6. When should the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 be made effective in Australia and why?

We believe that S1 and S2 could be made effective in Australia close to the date they are made effective by the ISSB. This would need to be on the basis that they are voluntary standards that Australian entities might choose to adopt and that the AASB might encourage them to adopt. This would give them a similar status to the IFRS Practice Statement on Management Commentary.

Subsequently, if the Standards were to be introduced domestically on some form of mandatory basis, due process would require the AASB to conduct a further Exposure Draft process, in line with its usual approach. It would be crucial that appropriate transitional arrangements are devised to allow the standards to be implemented effectively.

C7. Should the effective date of the proposals in Exposure Draft on [Draft] IFRS S1 be consistent with, or set for a date after, the effective date of the proposals in Exposure Draft on [Draft] IFRS S2? If so, why?

See answer to Question C6.

C8. Would any wording or terminology introduced in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 be difficult to understand? If yes, what changes do you suggest and why?

We have concerns about the lack of a definition of 'sustainability' in S1 and propose that the ISSB provide a definition.

We are also unclear about the meaning of the word 'significant' before 'sustainability-related risks and opportunities' in S1 and 'climate-related risks and opportunities' in S2 and its interaction with the materiality test.

In both cases we have set out potential solutions to those concerns, for further details see our response to Question 2(b) of ISSB S1.

C9. Unless already provided in response to specific matters for comment A1 to C8 above, the costs and benefits of the proposals relative to the current requirements, whether quantitative (financial or non-financial) or qualitative. In relation to quantitative financial costs, the AASB is particularly seeking to know the nature(s) and estimated amount(s) of any expected incremental costs, or cost savings, of the Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2?

We are unable to provide any specific information on the costs that will be involved for entities seeking to implement these Standards, however based on general discussions to date, we believe they will be significant. We suggest that more work may need to be done in this area once the Standards are made and if the jurisdiction considers any mandatory application. There are also workforce shortage issues that will need to be addressed. Currently there would appear to be an insufficient supply of talent to assist entities to report appropriately under the proposed standards as well as receive appropriate assurance.

Part D: Matters for comment relating to the AASB's proposed approach

D1. Do you agree with the AASB's proposed approach to developing sustainability-related financial reporting requirements as a separate suite of standards? As an alternative model, the AASB would value comments as to whether sustainability-related financial reporting requirements should be developed as part of existing Australian Accounting Standards. The alternative model would result in sustainability-related financial disclosures forming part of an entity's general purpose financial statements.

Yes, we agree with the AASB's approach of developing a suite of standards separate to the Australian Accounting Standards. As previously stated, we do not agree with the alternative model as it may not fit within the AASB's legislative mandate and decisions about the scope, transition periods and other matters are policy decisions for Government. For the reasons already stated, because the Standards potentially conflict with various legislative obligations such as around the OFR, any mandatory introduction would need to be considered as part of a holistic package of legislative reform.

D2 Are the proposals in Exposure Drafts on [Draft] IFRS S1 and [Draft] IFRS S2 in the best interests of the Australian economy?

As previously stated, the AICD supports the introduction of the ISSB sustainability standards. However, as we have set out in this submission and in our submission to the ISSB, there remains concerns around them as currently drafted. Moreover, there needs to be detailed consultation at a jurisdictional level about how the Standards might be phased in appropriately and whether liability settings may need to be adjusted to encourage comprehensive adoption.

Australian Institute *of* **Company Directors**

Response to Questions for Respondents

Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information

Question 1—Overall approach

(a) Does the Exposure Draft state clearly that an entity would be required to identify and disclose material information about all of the sustainability-related risks and opportunities to which the entity is exposed, even if such risks and opportunities are not addressed by a specific IFRS Sustainability Disclosure Standard? Why or why not? If not, how could such a requirement be made clearer?

The AICD recommends the Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (**Exposure Draft**) could be revised to create a separate Conceptual Framework and General Standard. We are concerned that the Exposure Draft currently lacks clarity because it is attempting to fulfil both these functions.

Sustainability reporting would benefit from a Conceptual Framework for Sustainability Reporting as has been developed for financial reporting by the IASB. In the same manner as the Conceptual Framework for Financial Reporting, it would set out the fundamental concepts for sustainability reporting that will guide the ISSB in developing Standards and will help to ensure that subsequent Standards are conceptually consistent. Much of the content of the Exposure Draft would then form part of the Conceptual Framework.

We note that the ISSB is intending to issue future Standards in sustainability areas with S2 being the first example. In our view, the ISSB therefore needs an overarching Standard that sets out general requirements for disclosure, particularly in the transition period when new Standards are being released. However, a Standard must have a clear scope. In our view, the Exposure Draft does not meet that requirement. This is most clearly seen in the processes set out in paragraphs 51 and 54 of the Exposure Draft, and the lack of an articulated definition of sustainability or sustainability related financial information (see response to Question 2 below).

A clearly defined general Standard that sets out the process which an entity needs to undertake when considering materiality and sustainability-related disclosures should be contained within a separate Standard. This will have most of its work to do as a transitional Standard while the ISSB issues future Standards, however it will still have application even when this initial process is completed.

(b) Do you agree that the proposed requirements set out in the Exposure Draft meet its proposed objective (paragraph 1)? Why or why not?

For the reasons set out above we believe the Exposure Draft lacks the precision necessary to meet its proposed objective.

(c) Is it clear how the proposed requirements in the Exposure Draft would be applied together with other IFRS Sustainability Disclosure Standards, including the [draft] IFRS S2 Climate-related Disclosures? Why or why not? If not, what aspects of the proposals are unclear?

For the reasons set out above, because the proposed requirements lack precision and a clearly defined approach there is a lack of clarity. This could be resolved by separating the components of the Exposure Draft into a Conceptual Framework and a narrower General Standard.

(d) Do you agree that the requirements proposed in the Exposure Draft would provide a suitable basis for auditors and regulators to determine whether an entity has complied with the proposals? If not, what approach do you suggest and why?

Based on the drafting of the Exposure Draft, it appears it will be very difficult to determine whether an entity has complied with the Standard and to obtain relevant reasonable assurance. A particular concern lies with paragraphs 51 and 54 which mandate an open-ended and unsettled process for the identification of sustainability-related risks and opportunities. See our response to Question 7(b) for more detail.

We are concerned that the utility of reporting under the Standards would be substantially diminished if it is very difficult to obtain reasonable assurance. We urge the international standard setters to undertake a parallel process around assurance as quickly as possible as this will inform stakeholder views on what is legitimately within the scope of the disclosure obligations contained within ISSB standards. We note that, over time, assurance may be assisted by developments in technology and that novel solutions may needed to meet these evolving needs.

Question 2—Objective (paragraphs 1–7)

(a) Is the proposed objective of disclosing sustainability-related financial information clear? Why or why not?

Yes, we believe the proposed objective of disclosing sustainability-related financial information is clear.

(b) Is the definition of 'sustainability-related financial information' clear (see Appendix A)? Why or why not? If not, do you have any suggestions for improving the definition to make it clearer?

No, the definition of 'sustainability-related financial information' is unclear because the Standards do not provide a definition of 'sustainability'. We note that the ISSB goes close to adopting the UN's definition of sustainability in paragraph BC30 of the Basis for Conclusions on [Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information.

We believe that for the Standards to provide sufficient clarity, they require the ISSB to propose a definition of 'sustainability' in the recommended Conceptual Framework document. The ISSB should consult on a definition which takes the UN definition of 'sustainability', set out in paragraph BC 30, as its starting point. An appropriately contained definition will be necessary to make the Standards workable in practice.

We also believe the use of the term 'significant' before 'sustainability-related risks and opportunities' which appears throughout the Exposure Draft is unclear. The term 'significant' is not defined. The interaction between the judgment by an entity as to whether a sustainability-related risk or opportunity is 'significant' or 'material' is also unclear. There is ambiguity over whether the entity is being requested to make two separate judgments or the same judgment in relation to the sustainability-related risk or opportunity.

We suggest that this could be resolved in two potential ways. Firstly, by replacing 'significant' with 'material'. Alternatively, by inserting a definition of significant sustainability-related risk and opportunity which states: "a sustainability-related risk or opportunity will be significant when it is material sustainability-related financial information."

Question 3—Scope (paragraphs 8–10)

Do you agree that the proposals in the Exposure Draft could be used by entities that prepare their general purpose financial statements in accordance with any jurisdiction's GAAP (rather than only those prepared in accordance with IFRS Accounting Standards)? If not, why not?

No comment. Australia applies the IFRS Accounting Standards.

Question 4—Core content (paragraphs 11–35)

(a) Are the disclosure objectives for governance, strategy, risk management and metrics and targets clear and appropriately defined? Why or why not?

We support the TCFD-based structure of the Exposure Draft and the four headings of disclosure of Governance, Strategy, Risk Management and Metrics and Targets. We believe that, broadly speaking and where disclosure normally takes place - such as for entities listed on market exchanges - it is appropriate for entities to make disclosures in these areas. We also agree that boards should explain to investors how their governance structures reflect their oversight of sustainability-related risks and opportunities.

We express the same concerns already stated with the use of the word 'significant' in relation to the disclosure objectives around Governance and Strategy and our concerns around the lack of a definition of 'sustainability'. In other respects, the disclosure objectives are clear and appropriately defined.

(b) Are the disclosure requirements for governance, strategy, risk management and metrics and targets appropriate to their stated disclosure objective? Why or why not?

We consider the disclosure requirements are broadly suitable to their stated disclosure objective. However, in our view, there should be a provision in the Standards allowing an entity not to make a disclosure where that disclosure might result in an unreasonable prejudice.

In Australia, management commentary is regulated by national legislation. The statutory scheme, which sets out the requirements for management commentary, allows an entity to omit material if it is likely to result in 'unreasonable prejudice' to an entity or part of a consolidated entity.[1]

The Australian securities regulator, the Australian Securities and Investment Commission (**ASIC**), which regulates management commentary, in its regulatory guidance states:

> *We think a useful approach to considering whether the publication of information would result in unreasonable prejudice is to identify the adverse consequences that are likely to occur (i.e. the prejudice), and then consider whether these consequences are unreasonable. We suggest that the consequences would be unreasonable if, for example, disclosing the information is likely to*

[1] Corporations Act 2001 (Cth) s.299A(3).

> *give third parties (such as competitors, suppliers and buyers) a commercial advantage, resulting in a material disadvantage to the entity.*[2]

ASIC's regulatory guidance notes that such material may include confidential and commercially sensitive information, where disclosure would unreasonably damage the entity's business. Examples could include a planned hostile takeover of a competitor or negotiations with potential new suppliers to address sustainability risks. Disclosures of this nature would result in a commercial advantage to other stakeholders, and a material disadvantage to the entity. As drafted, we are concerned that the Exposure Draft requires entities to disclose that strategy as part of their risk management.

We recommend the Exposure Draft be amended to allow an entity to omit the disclosure of information if it is likely to result in 'unreasonable prejudice'. As in the Australian market, an entity should be required to state that it has omitted information by relying on this exemption. Entities should be required to disclose the information once the disclosure will no longer result in unreasonable prejudice.

Question 5—Reporting entity (paragraphs 37–41)

(a) Do you agree that the sustainability-related financial information should be required to be provided for the same reporting entity as the related financial statements? If not, why?

Yes.

(b) Is the requirement to disclose information about sustainability-related risks and opportunities related to activities, interactions and relationships, and to the use of resources along its value chain, clear and capable of consistent application? Why or why not? If not, what further requirements or guidance would be necessary and why?

We believe that the requirement to disclose information about sustainability-related risks and opportunities related to activities, interactions and relationships, and to the use of resources along its value chain, is clear and capable of consistent application. We note the intention of the ISSB to release further Standards that will contain similar provisions to the industry-based disclosure requirements set out in Appendix B of the Exposure Draft of IFRS S2 Climate-related Disclosures. We expect that this will progressively narrow the discretion to be applied by preparers considering their disclosure obligations under this S1 general requirement. However, while we agree that a degree of specificity is important, a more principles-based approach would allow flexibility to evolve with market practice and expectations.

We note that, in the Australian context, these are not disclosures that entities would typically make and, accordingly, this is likely to result in more extensive disclosure with associated legal risks to manage. Preparers and entities will require time to adjust to this arrangement, were it to be introduced. Accordingly, appropriate transitional arrangements will likely be necessary in the Australian market to support comprehensive adoption and disclosure.

We believe it would be useful if the ISSB were to develop illustrative guidance to assist entities comply with these obligations, especially if clear practice emerges following their introduction.

[2] ASIC, Regulatory Guide 247, Effective disclosure in an operating and financial review, paragraph RG247.69.

(c) Do you agree with the proposed requirement for identifying the related financial statements? Why or why not?

Yes.

Question 6—Connected information (paragraphs 42–44)

(a) Is the requirement clear on the need for connectivity between various sustainability-related risks and opportunities? Why or why not?

(b) Do you agree with the proposed requirements to identify and explain the connections between sustainability-related risks and opportunities and information in general purpose financial reporting, including the financial statements? Why or why not? If not, what do you propose and why?

Yes, we agree with the proposed requirement to disclose connected information to enable users to have a clear understanding of the various information being disclosed.

We believe this would benefit from further illustrative guidance from the ISSB, particular as practice evolves and develops. Preparers may find it difficult to strike a balance of providing sufficient connecting information to users in reports, without overburdening the preparers and the users with excessive disclosure.

Question 7—Fair presentation (paragraphs 45–55)

(a) Is the proposal to present fairly the sustainability-related risks and opportunities to which the entity is exposed, including the aggregation of information, clear? Why or why not?

Yes.

(b) Do you agree with the sources of guidance to identify sustainability-related risks and opportunities and related disclosures? If not, what sources should the entity be required to consider and why? Please explain how any alternative sources are consistent with the proposed objective of disclosing sustainability-related financial information in the Exposure Draft.

No, we do not agree with the provisions set out in paragraphs 51 and 54 of the Exposure Draft.

Our concern is the requirement that the entity 'shall consider' the sources of guidance set out in paragraphs 51 (a) through (d) and repeated in paragraph 54. The use of the word 'shall' makes this a mandatory process where the entity must consider all these forms of guidance. While paragraphs (a) and (b) refer to named Standards, paragraphs (c) and (d) are imprecise and contain open-ended requirements.

Were the paragraph to apply as currently drafted, an entity would be required to conduct an indefinite search of other Standards and practices in order to comply with the provision. In practice, it seems hard to understand how an entity would be able to comply with such a requirement. Similarly, such an approach may run counter to the widely endorsed goal of the ISSB project, being to create greater consistency and comparability of sustainability reporting.

As set out previously, to be capable of application, in our view a Standard must be precise and clearly demarcated. In our view, the mandatory consideration process set out in paragraphs 51 and 54 does not meet that requirement.

In Australia, directors must make a declaration that forms part of the financial statements, that the financial statements comply with the accounting standards and provide a true and fair view.[3] A director making a false declaration exposes themselves and the entity to civil and criminal liability.

As drafted, we believe that Australian directors would either be unable, or at the least very reluctant, to comply with a similar obligation in relation to the Exposure Draft. It would be very difficult for a director to assure themselves that the entity had complied with the imprecise and open-ended obligation as set out in paragraphs 51 and 54 and therefore that the report complied with the sustainability standards and provides a true and fair view.

Likewise, in our discussion with external auditors and their professional representatives, we understand, for the same reasons, that they believe this process will be very difficult to assure.

<u>The difficulty for directors to make a declaration that would form part of a sustainability report and to obtain external assurance over a report would, in our view, prevent adoption of the Standards as drafted in Australia and/or expose entities and directors to unreasonable legal liability risk</u>.

We understand the reason for the inclusion of paragraphs 51 and 54. We note that the ISSB is seeking coordination with other standard-setting bodies, particularly the GRI, a process we strongly support. Indeed we would urge as much consolidation of frameworks as possible to avoid the current fragmentation of sustainability reporting.

We also note from discussions post the release of the consultation drafts, that the release of further Standards on other subject-matters will mean the progressive narrowing of the application of this paragraph.

We suggest an alternate approach to paragraphs 51 and 54 where it is a non-mandatory process that assists entities identify sustainability-related risks and opportunities. This could be most easily achieved by deleting the word 'shall' and inserting the word 'may'. The use of the word 'may' would indicate that the function may be exercised or not exercised at the person's discretion.[4]

Question 8—Materiality (paragraphs 56–62)

(a) Is the definition and application of materiality clear in the context of sustainability-related financial information? Why or why not?

Yes, Australian preparers are familiar with the IFRS definition of materiality. Please note this is subject to our earlier concern expressed about the need to define 'sustainability'.

(b) Do you consider that the proposed definition and application of materiality will capture the breadth of sustainability-related risks and opportunities relevant to the enterprise value of a specific entity, including over time? Why or why not?

Yes. The AICD does not support the inclusion of a 'double materiality' test. See our response to Question 14.

[3] Corporations Act 2001 (Cth) s. 295(4)(d).
[4] See Legislation Act 2001 (Cth), s.146.

(c) Is the Exposure Draft and related Illustrative Guidance useful for identifying material sustainability-related financial information? Why or why not? If not, what additional guidance is needed and why?

The Exposure Draft proposes a significant increase in the amount of sustainability-related financial information that entities would be expected to disclose along a range of measures that would not fit the commonly accepted definition of 'sustainability' e.g. geo-political risk.

As per our comment to Question 2 (b) above, a definition of sustainability needs to be made clear and must be appropriately contained to make implementation of the Standard workable in practice.

Given the extent of the disclosure that the ISSB is suggesting is necessary, there should be extensive illustrative guidance with examples outlining how various types of risk might be disclosed.

(d) Do you agree with the proposal to relieve an entity from disclosing information otherwise required by the Exposure Draft if local laws or regulations prohibit the entity from disclosing that information? Why or why not? If not, why?

Yes, doing otherwise would prevent adoption in some jurisdictions.

Question 9—Frequency of reporting (paragraphs 66–71)

Do you agree with the proposal that the sustainability-related financial disclosures would be required to be provided at the same time as the financial statements to which they relate? Why or why not?

Yes. Considerations may need to arise around periodic reports for less than a financial year. For example, in Australia, companies listed on the main market exchange (the Australian Stock Exchange (ASX)) are also required to prepare and file a half-year financial report and directors report.[5]

It would seem appropriate that sustainability-related financial disclosures would occur no more than annually and be released in conjunction with the annual financial report. The burden of more frequent data collection and reporting would not be cost effective nor necessarily yield more useful information, given six months is a relatively short period. There should be no corresponding requirement to release sustainability-related financial disclosures alongside any periodic report outside the annual reporting year.

In addition, we note that individual jurisdictions such as Australia will have separate continuous disclosure obligations (regarding the timely public release of market sensitive information) that entities will need to manage. Detailed comments on how these issues would apply in Australia are contained in our national jurisdictional submission.

Question 10—Location of information (paragraphs 72–78)

(a) Do you agree with the proposals about the location of sustainability-related financial disclosures? Why or why not?

Yes. We support the concept of some flexibility in the manner in which an entity locates its sustainability-related financial disclosures, noting that different jurisdictions will employ different practices.

[5] Corporations Act 2001 (cth), s.302.

(b) Are you aware of any jurisdiction-specific requirements that would make it difficult for an entity to provide the information required by the Exposure Draft despite the proposals on location?

Yes. The Exposure Draft seeks to regulate disclosures that traditionally have formed part of management commentary. In Australia, management commentary is regulated by the Corporations Act and contains different requirements to that set out within the Exposure Draft, with additional requirements for companies listed on the Australian Stock Exchange (ASX). For example, there is a different materiality test applicable to that disclosure.

Were Australia to adopt the ISSB Standards there would need to be consideration of the conflict between the legislative requirements and any requirements set out in the Standards.

(c) Do you agree with the proposal that information required by IFRS Sustainability Disclosure Standards can be included by cross-reference provided that the information is available to users of general purpose financial reporting on the same terms and at the same time as the information to which it is cross referenced? Why or why not?

Yes, this is a sensible and cost-effective way to provide for disclosure.

(d) Is it clear that entities are not required to make separate disclosures on each aspect of governance, strategy and risk management for individual sustainability-related risks and opportunities, but are encouraged to make integrated disclosures, especially where the relevant sustainability issues are managed through the same approach and/or in an integrated way? Why or why not?

No comment.

Question 11—Comparative information, sources of estimation and outcome uncertainty, and errors (paragraphs 63–65, 79–83 and 84–90)

(a) Have these general features been adapted appropriately into the proposals? If not, what should be changed?

The proposals around estimation and outcome uncertainty raise some issues around forward-looking statements within the Australian jurisdiction which need to be made on a reasonable basis to avoid legal liability. See our response to question 16 for more details.

(b) Do you agree that if an entity has a better measure of a metric reported in the prior year that it should disclose the revised metric in its comparatives?

No comment.

(c) Do you agree with the proposal that financial data and assumptions within sustainability-related financial disclosures be consistent with corresponding financial data and assumptions used in the entity's financial statements to the extent possible? Are you aware of any circumstances for which this requirement will not be able to be applied?

Yes, we agree with the proposal.

Question 12—Statement of compliance (paragraphs 91-92)

Do you agree with this proposal? Why or why not? If not, what would you suggest and why?

Without regulatory adjustments, we have some concern about the application of the standards in Australia given the need for forward looking statements. Please see our answer to Question 16 for more details.

Question 13—Effective date (Appendix B)

(a) When the ISSB sets the effective date, how long does this need to be after a final Standard is issued? Please explain the reason for your answer, including specific information about the preparation that will be required by entities applying the proposals, those using the sustainability-related financial disclosures and others.

In the AICD's view there will need to be transitional arrangements that will allow entities to roll out Standards over time and adjust systems and models. However, these are best resolved at a jurisdictional level, taking into account varying maturity levels.

(b) Do you agree with the ISSB providing the proposed relief from disclosing comparatives in the first year of application? If not, why not?

No comment.

Question 14—Global baseline

IFRS Sustainability Disclosure Standards are intended to meet the needs of the users of general purpose financial reporting to enable them to make assessments of enterprise value, providing a comprehensive global baseline for the assessment of enterprise value.

Other stakeholders are also interested in the effects of sustainability-related risks and opportunities. Those needs may be met by requirements set by others, including regulators and jurisdictions. The ISSB intends that such requirements by others could build on the comprehensive global baseline established by the IFRS Sustainability Disclosure Standards.

Are there any particular aspects of the proposals in the Exposure Draft that you believe would limit the ability of IFRS Sustainability Disclosure Standards to be used in this manner? If so, what aspects and why? What would you suggest instead and why?

<u>Lack of Consolidation</u>

When we wrote to the IFRS Foundation supporting the establishment of the International Sustainability Standards Board, the AICD did so on the basis that we were looking for consolidation of existing reporting standards. The prospect of consolidating sustainability standards so as to remove the 'alphabet-soup' of Standards remains a key reason cited by Australian directors in support of the ISSB project.

We do not believe the Exposure Draft fully achieves that consolidation. Paragraphs 51 and 54 have the opposite effect as they mandate disclosure under all existing standards requiring entities to actually proactively search for other standards, even when they might not be seen as particularly relevant to their stakeholders. The main effect within Australia would be the rollout of SASB standards, a framework not widely applied in this jurisdiction. A recent survey of 250 entities listed on the ASX that reported against a framework or standard, found that a majority used TCFD (63 percent) or GRI Standards (55 percent). Reporting against the <IR> Framework (5 percent) and SASB Standards (26 percent) was less prevalent.[6]

This further supports the proposed amendments to paragraphs 51 and 54 of the Exposure Draft that we have suggested in response to question 7(b).

Indeed, we recommend the SASB standards not be incorporated by reference into the ISSB standards, without a more specific and detailed consultation being conducted.

More broadly, we believe it would be counter-productive for individual jurisdictions to adopt their own bespoke regulatory approaches (noting recent EU developments for example). In an inter-connected global economy, it is unreasonable for entities to be expected to comply with differing regulatory regimes, which would not only create compliance challenges but also reduce the consistency and comparability of sustainability reporting.

Investor focus

We note that the Exposure Draft is investor-focused with a financial materiality test based on enterprise value. This aligns the Exposure Draft with the SASB standards on which it is based. This means that the ISSB Standards differ from, for example, the GRI Standards and the CDP which cater to a broader range of stakeholders (including investors) seeking to understand an organisation's significant impacts on the economy, environment, or people.

By retaining its investor, financial-materiality and enterprise-value focus the Exposure Draft and any resultant standards are less likely to meet the needs of those broader range of stakeholders. This reduces the likelihood of consolidation of the ISSB Standards with other standards such as the GRI (although we welcome those two bodies' stated commitment to coordinate work programs and standard-setting activities). This investor and enterprise value focus may mean that preparers may be required or expected to continue to issue sustainability reports under frameworks such as the GRI to meet the needs of a broader group of stakeholders.

Notwithstanding this concern, we support the focus of the Exposure Draft. As noted, we do not support a double materiality test, a concept not generally applied in Australia. We believe that were the focus to be expanded to other stakeholders the scope of any resultant standards would be prohibitive and its complexity and the cost of implementation would likely mitigate against global adoption. The slightly narrower focus on enterprise value, investors and financial materiality will be easier for jurisdictions such as Australia to adopt, albeit still a very challenging prospect.

Question 15—Digital reporting

Do you have any comments or suggestions relating to the drafting of the Exposure Draft that would facilitate the development of a Taxonomy and digital reporting (for example, any particular disclosure requirements that could be difficult to tag digitally)?

No comment.

[6] KPMG and ASX. Adoption of Recommendation 7.4: Reporting on Environmental and Social Exposures. Analysis of disclosures made by listed entities between 1 January 2021 and 31 December 2021 at p.44. Available at: < https://assets.kpmg/content/dam/kpmg/au/pdf/2022/asx-corporate-governance-environmental-social-exposures.pdf>

Question 16—Costs, benefits and likely effects

(a) Do you have any comments on the likely benefits of implementing the proposals and the likely costs of implementing them that the ISSB should consider in analysing the likely effects of these proposals?

On balance, the AICD considers the benefits will outweigh the costs.

Subject to refinements, and if implemented appropriately, the ISSB standards can help achieve a global baseline for sustainability related reporting which would allow for greater quality, consistency, and comparability. This improved disclosure will not only allow investors to make better informed investment decisions, and support more efficient global capital flows, but also support broader stakeholders to assess the sustainability performance of companies.

However, it must be acknowledged, that the proposed introduction of the ISSB standards will have a significant cost implication for many entities, including in the Australian market, which would be expected to report extensively on a range of matters that they do not currently. This will likely require a significant lift in resourcing from within entities along with the broader adviser community to allow robust, accurate, assurable disclosures to be made. In this regard, we note the particular challenges around forward-looking statement risk that will need be addressed (see Herbert Smith Freehills legal analysis below).

As noted previously, an appropriate transition phase must be built into implementation to recognise the significant undertaking involved, including uplift in skills and capability across global and domestic economies. For example, it appears that there is currently a shortage of ESG focused professionals capable of carrying out the work required by the Standards, both in terms of preparation of reports as well as assurance of them.

Costs will be more pronounced if the scope of the Standards is not appropriately demarcated, and/or implementation is rushed without working through the complex issues posed. This notwithstanding, there is a clear need for all parts of the global economy to work quickly and collaboratively to seek to achieve the targets of the Paris Agreement.

Some specific implementation issues in the Australian market are addressed in our response to the following question.

(b) Do you have any comments on the costs of ongoing application of the proposals that the ISSB should consider?

We wish to bring the ISSB's attention to certain regulatory and legislative arrangements that may affect the adoption of the ISSB Standards within Australia. While we do not suggest that these are matters that the ISSB necessarily need reflect within the Standards, we believe the ISSB should be cognisant of the arrangements and pressures that will affect local implementation, and which point towards a phased-in approach. We will engage on these matters in more detail within our jurisdiction.

The following is based on commissioned advice from global law firm, Herbert Smith Freehills, regarding domestic implementation of the proposed Standards.

Forward looking statement risk

Under s.769C of the Australian *Corporations Act*, where a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act), the representation will automatically be taken to be misleading if the person does not have reasonable grounds for making the representation. The subjective belief of the person at the time that the representation was made is immaterial, even if it was honestly held. Similar provisions are included in s.12BB of the *ASIC Act 2001* and s.4 of the *Australian Consumer Law* (**ACL**) and, in the case of the ACL in particular, the person making the representation is also deemed **not** to have reasonable grounds unless they adduce evidence to the contrary.

Accordingly, forward-looking statements place an evidential burden on the person who makes the representation, to adduce evidence that there were reasonable grounds for making it. Any representation in a periodic report that is not supported by reasonable grounds will automatically be deemed to be misleading, with associated penalties.

Many aspects of the proposed ISSB Standards require estimation or prediction of the impacts of risks and opportunities for the reporting entity, notwithstanding that those impacts are inherently unknowable, and the relevant disclosure would be speculative – and for that reason, likely to be questioned as not being based on reasonable grounds (and therefore misleading). For example, it is likely to be challenging (and potentially impossible) for a reporting entity to establish reasonable grounds with respect to its the required disclosure of the 'anticipated effects [of sustainability-related risks] over the short, medium and long term' as is required by paragraph 15(d) of the Exposure Draft.

Further, the Exposure Draft explicitly requires disclosure when there are not reasonable grounds for making it. For example, paragraph 79 of the Exposure Draft requires disclosure even when metrics can only be estimated and are subject to uncertainty. In practice, this would require a company to acknowledge that the forward-looking statement does not have a reasonable basis.

Herbert Smith Freehills has advised Australia's current periodic reporting requirements are principally backward-looking in nature, which affords reporting entities a considerable degree of certainty over their disclosure and carries comparatively lower levels of disclosure risk. Indeed, Australian securities laws and ASIC policy guidance (such as ASIC Regulatory Guide 170) discourage statements involving speculation and supposition, as opposed to information that can be positively demonstrated to have a reasonable basis and that is based on reasonable assumptions, rather than hypothetical projections.

Higher liability risks in Australia than other jurisdictions

Compared to their counterparts in certain other jurisdictions, reporting entities and officers in Australia are particularly exposed to this risk, because in Australia, there is no 'safe harbour' exemption which allows for the exclusion of liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement.[7]

There is heightened regulator risk for directors because, in Australia, the securities regulator ASIC often pursues directors for alleged breaches of their directors' duties including fiduciary obligations such as the duty of care and diligence. This contrasts to similar jurisdictions such as the UK and US, where enforcement of such duties is largely left to private litigants.

Finally, Australia has a uniquely facilitative class actions regime. This means that boards of Australian companies listed on the ASX are faced with higher reputational and liability risks from disclosure-based shareholder class actions than boards in many of the world's other major capital markets, including the UK and US.

[7] For example there is no equivalent to the protection in the US available in 15 USC § 77z-2(i)(1).

In summary, Australian directors and entities are likely to be exposed to higher liability risk than other jurisdictions were the Standards to be adopted in their current form and under existing domestic laws and arrangements.

Need for tailored regulatory settings to support implementation

As already noted, we believe that these matters are capable of resolution at a domestic level via transitional arrangements and targeted legislative amendments.

For example, the forward-looking statements required by the standards could be subject to a specific safe harbour from liability to encourage good faith disclosure.

Another option would be to ensure that any Australian standard implementing the ISSB standard, makes clear the uncertainties inherent in such disclosures while providing some guidance on the types of disclosures that would be expected and the caveats around them.

Australian Institute of Company Directors

Response to Questions for Respondents

Exposure Draft IFRS S2 Climate-related Disclosures

General Comments

As set out in our response to IFRS S1, we have concerns about the requirement for the disclosure of 'significant' climate-related risks and opportunities due to the lack of clarity around the meaning of 'significant' and its interaction with the materiality test within the Exposure Draft(s).

As we also set out in that response, we believe that where entities are making disclosures around strategy, risks or opportunities that entity should be able to omit disclosure where disclosure is likely to result in 'unreasonable prejudice'.

These same concerns arise regarding terminology used throughout Exposure Draft IFRS S2 Climate-related Disclosures (**Exposure Draft**) – for example, use of the phrase significant climate-related risks and opportunities occurs frequently. Rather than specifying those concerns for each question we make the same general comment in relation to all occurrences within the Exposure Draft noting we proposed solutions in our response to the S1 Exposure Draft.

Question 1—Objective of the Exposure Draft

(a) Do you agree with the objective that has been established for the Exposure Draft? Why or why not?

Yes, we agree with the TCFD alignment and the alignment with the S1 Exposure Draft.

(b) Does the objective focus on the information that would enable users of general purpose financial reporting to assess the effects of climate-related risks and opportunities on enterprise value?

Yes, we believe it appropriately focuses on that information.

(c) Do the disclosure requirements set out in the Exposure Draft meet the objectives described in paragraph 1? Why or why not? If not, what do you propose instead and why?

Yes, we consider it meets those objectives.

Question 2—Governance

Do you agree with the proposed disclosure requirements for governance processes, controls and procedures used to monitor and manage climate-related risks and opportunities? Why or why not?

Yes, we support the alignment with TCFD.

Question 3—Identification of climate-related risks and opportunities

(a) Are the proposed requirements to identify and to disclose a description of significant climate-related risks and opportunities sufficiently clear? Why or why not?

Yes, we support a broad principles-based approach to disclosure as set out in the Exposure Draft.

(b) Do you agree with the proposed requirement to consider the applicability of disclosure topics (defined in the industry requirements) in the identification and description of climate-related risks and opportunities? Why or why not? Do you believe that this will lead to improved relevance and comparability of disclosures? Why or why not? Are there any additional requirements that may improve the relevance and comparability of such disclosures? If so, what would you suggest and why?

It is difficult for the AICD to comment on the disclosure topics defined in the industry disclosure requirements (Appendix B). Australia is not a jurisdiction where SASB Standards are commonly applied and there is limited understanding of them. A recent review of 250 entities listed on the ASX that reported against a framework or standard, found that a majority used TCFD (63 percent) or GRI Standards (55 percent). Reporting against the <IR> Framework (5 percent) and SASB Standards (26 percent) was less prevalent.[1]

Appendix B is voluminous with extensive and detailed disclosure requirements and there has not been the opportunity for Australian preparers to properly understand the implications of these disclosure requirements. The large number of metrics set out in the Appendix does raise concerns about how cost effective the process will be, especially as there are more metrics to come in future Standards.

It will be important for the ISSB to set out how reviews of the matters contained within Appendix B will occur in the future, as they form "an integral part" of the Standard.

Given the complexity of the SASB standards, we suggest that a dedicated consultation take place on this proposed aspect of the ISSB framework.

Question 4—Concentrations of climate-related risks and opportunities in an entity's value chain

(a) Do you agree with the proposed disclosure requirements about the effects of significant climate-related risks and opportunities on an entity's business model and value chain? Why or why not?

Yes, they align with the TCFD framework.

(b) Do you agree that the disclosure required about an entity's concentration of climate-related risks and opportunities should be qualitative rather than quantitative? Why or why not? If not, what do you recommend and why?

Yes, it is appropriate that entities provide qualitative, narrative reporting on climate-related risks and opportunities. For the reasons detailed elsewhere, in many areas, there are significant challenges around quantitative disclosure.

[1] KPMG and ASX. Adoption of Recommendation 7.4: Reporting on Environmental and Social Exposures. Analysis of disclosures made by listed entities between 1 January 2021 and 31 December 2021 at p.44. Available at: < https://assets.kpmg/content/dam/kpmg/au/pdf/2022/asx-corporate-governance-environmental-social-exposures.pdf>

Question 5—Transition plans and carbon offsets

(a) Do you agree with the proposed disclosure requirements for transition plans? Why or why not?

Yes, we believe it is reasonable for entities to disclose their transition plans, noting, as already stated, that an entity should be able to not disclose where disclosure is likely to result in 'unreasonable prejudice'.

(b) Are there any additional disclosures related to transition plans that are necessary (or some proposed that are not)? If so, please describe those disclosures and explain why they would (or would not) be necessary.

No.

(c) Do you think the proposed carbon offset disclosures will enable users of general purpose financial reporting to understand an entity's approach to reducing emissions, the role played by carbon offsets and the credibility of those carbon offsets? Why or why not? If not, what do you recommend and why?

No comment.

(d) Do you think the proposed carbon offset requirements appropriately balance costs for preparers with disclosure of information that will enable users of general purpose financial reporting to understand an entity's approach to reducing emissions, the role played by carbon offsets and the soundness or credibility of those carbon offsets? Why or why not? If not, what do you propose instead and why?

Yes.

Question 6—Current and anticipated effects

(a) Do you agree with the proposal that entities shall disclose quantitative information on the current and anticipated effects of climate-related risks and opportunities unless they are unable to do so, in which case qualitative information shall be provided (see paragraph 14)? Why or why not?

Yes. We have particular concerns around the need to make forward-looking statements in this respect, noting that Australian directors and corporations are exposed to particular liability risks. Please see our response to Question 12 for more detail.

(b) Do you agree with the proposed disclosure requirements for the financial effects of climate-related risks and opportunities on an entity's financial performance, financial position and cash flows for the reporting period? If not, what would you suggest and why?

Yes, arguably this is already required under the IASB's accounting standards. We note that in Australia, the Australian Accounting Standards Board and Auditing and Assurance Standards Board have already issued guidance on Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB Practice Statement 2.

(c) Do you agree with the proposed disclosure requirements for the anticipated effects of climate-related risks and opportunities on an entity's financial position and financial performance over the short, medium and long term? If not, what would you suggest and why?

Yes, although we believe this would benefit from some more illustrative guidance about how it is proposed that this requirement would interact with the accounting standards and how disclosure of financial impacts might occur when it does not meet, for example, recognition requirements under the accounting standards.

Question 7—Climate resilience

(a) Do you agree that the items listed in paragraph 15(a) reflect what users need to understand about the climate resilience of an entity's strategy? Why or why not? If not, what do you suggest instead and why?

Yes.

(b) The Exposure Draft proposes that if an entity is unable to perform climate-related scenario analysis, that it can use alternative methods or techniques (for example, qualitative analysis, single-point forecasts, sensitivity analysis and stress tests) instead of scenario analysis to assess the climate resilience of its strategy.

(i) Do you agree with this proposal? Why or why not?

Yes. Notwithstanding an increasing take up of TCFD reporting by larger entities, there are many entities which are yet to implement it, especially those not listed on market exchanges. Implementation of TCFD often takes several years to embed effectively and is not cost-effective for smaller entities, that could be subject to this Standard (depending on the final scope of application).

Some flexibility as proposed here is appropriate. A similar approach was taken by the Australian Prudential Regulation Authority which supervises institutions across banking, insurance and superannuation.[2] There should be recognition in the Standards that full adoption of the TCFD is likely to be an iterative process for entities – disclosure in year one of adoption is likely to be materially different in terms of quality and scale than disclosure in say year three.

(ii) Do you agree with the proposal that an entity that is unable to use climate-related scenario analysis to assess the climate resilience of its strategy be required to disclose the reason why? Why or why not?

Yes, climate-related scenario analysis should be the default position, effectively included on an 'if not why not' basis.

(iii) Alternatively, should all entities be required to undertake climate-related scenario analysis to assess climate resilience? If mandatory application were required, would this affect your response to Question 14(c) and if so, why?

No, see response to question (b)(i) above.

(c) Do you agree with the proposed disclosures about an entity's climate-related scenario analysis? Why or why not?

Yes, these align broadly with TCFD requirements.

(d) Do you agree with the proposed disclosure about alternative techniques (for example, qualitative analysis, single-point forecasts, sensitivity analysis and stress tests) used for the assessment of the climate resilience of an entity's strategy? Why or why not?

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[2] Prudential Practice Guide CPG 229 Climate Change Financial Risks. Available at: < https://www.apra.gov.au/sites/default/files/2021-11/Final%20Prudential%20Practice%20Guide%20CPG%20229%20Climate%20Change%20Financial%20Risks.pdf>

Yes.

(e) Do the proposed disclosure requirements appropriately balance the costs of applying the requirements with the benefits of information on an entity's strategic resilience to climate change? Why or why not? If not, what do you recommend and why?

Yes. While there will be significant costs for entities applying the disclosure requirements there is a broad expectation among stakeholders that larger and more sophisticated entities, such as financial institutions or those listed on stock exchanges, comply with the TCFD.

As noted in our response to Question 3(b), take up of the TCFD is relatively high amongst listed entities, but significantly less so in other sectors. In the AICD's ongoing consultation with directors, there is general acceptance of the need for entities to adopt the TCFD framework. The Exposure Draft sets out an appropriate Standard to allow for TCFD reporting.

Question 8—Risk management

Do you agree with the proposed disclosure requirements for the risk management processes that an entity uses to identify, assess and manage climate-related risks and opportunities? Why or why not? If not, what changes do you recommend and why?

No, we do not agree with the proposed disclosure requirements for the risk management processes that an entity uses to identify, assess and manage climate-related risks and opportunities. We do not believe the level of prescription in the Exposure Draft is necessary and that a more principles-based approach would allow entities to best communicate their risk management approach.

We note that paragraphs 4 to 6 of the Exposure Draft, which provide for disclosures around governance already includes disclosure on, *inter alia*, how the (board) and its committees consider climate-related risks and opportunities when overseeing the entity's strategy, its decisions on major transactions, and its risk management policies, including any assessment of trade-offs and analysis of sensitivity to uncertainty that may be required.

With respect to specific risk management proposals, in our opinion the Standard should align more closely to the wording in the TCFD and require disclosure of:

- the risk management processes for identifying and assessing climate-related risks;
- a description of how the entity determines the relative significance of climate-related risks in relation to other risks;
- how the entity makes decisions to mitigate, transfer, accept, or control those risks;
- how the entity prioritises climate-related risks;
- a description of whether they consider existing and emerging regulatory requirements related to climate change (e.g., limits on emissions) as well as other relevant factors considered;
- processes for assessing the potential size and scope of identified climate-related risks; and
- definitions of risk terminology used or references to existing risk classification frameworks used.

Question 9—Cross-industry metric categories and greenhouse gas emissions

(a) The cross-industry requirements are intended to provide a common set of core, climate-related disclosures applicable across sectors and industries. Do you agree with the seven proposed cross-industry metric categories including their applicability across industries and business models and their usefulness in the assessment of enterprise value? Why or why not? If not, what do you suggest and why?

We have some concerns about how entities might be expected to report the amount and percentage of assets or business activities vulnerable to transition or physical risks or aligned with climate-related opportunities as well as capital deployment. Given the difficult judgments involved, the reliability and accuracy of any figure would be questionable. These appear to be matters more suited to qualitative disclosures, as set out elsewhere within the Exposure Draft.

(b) Are there any additional cross-industry metric categories related to climate-related risks and opportunities that would be useful to facilitate cross-industry comparisons and assessments of enterprise value (or some proposed that are not)? If so, please describe those disclosures and explain why they would or would not be useful to users of general purpose financial reporting.

(c) Do you agree that entities should be required to use the GHG Protocol to define and measure Scope 1, Scope 2 and Scope 3 emissions? Why or why not? Should other methodologies be allowed? Why or why not?

(d) Do you agree with the proposals that an entity be required to provide an aggregation of all seven greenhouse gases for Scope 1, Scope 2, and Scope 3— expressed in CO2 equivalent; or should the disclosures on Scope 1, Scope 2 and Scope 3 emissions be disaggregated by constituent greenhouse gas (for example, disclosing methane (CH4) separately from nitrous oxide (NO2))?

(e) Do you agree that entities should be required to separately disclose Scope 1 and Scope 2 emissions for: (i) the consolidated entity; and (ii) for any associates, joint ventures, unconsolidated subsidiaries and affiliates? Why or why not?

No comment on matters (b) through (e).

(f) Do you agree with the proposed inclusion of absolute gross Scope 3 emissions as a cross-industry metric category for disclosure by all entities, subject to materiality? If not, what would you suggest and why?

Yes, we believe it is necessary to disclose Scope 3 emissions subject to materiality. In our discussions with directors, they acknowledge that stakeholders are increasingly demanding this information from entities. However, we note that in jurisdictions such as Australia there is currently limited reporting of Scope 3 and potentially limited gathering of Scope 2 information by many entities.

In our view, there will need to be an appropriate transition period to enable the creation of systems that will allow entities to capture reliable information to support accurate Scope 3 disclosure. It should also be acknowledged that timing constraints may be difficult to navigate, particularly where disclosures are made at the same time as the annual report. For example, an entity is unlikely to have all of its Scope 3 related data available in time, given it will be reliant on external inputs that may not yet be available.

Question 10—Targets

(a) Do you agree with the proposed disclosure about climate-related targets? Why or why not?

Yes, as this aligns with the TCFD.

(b) Do you think the proposed definition of 'latest international agreement on climate change' is sufficiently clear? If not, what would you suggest and why?

Yes.

Question 11—Industry-based requirements

(a) Do you agree with the approach taken to revising the SASB Standards to improve the international applicability, including that it will enable entities to apply the requirements regardless of jurisdiction without reducing the clarity of the guidance or substantively altering its meaning? If not, what alternative approach would you suggest and why?

Yes, although we note that there are still occasions when US-based measurements are used within the Standards e.g. square feet, pounds etc. In our opinion, the standards should be converted so that they solely use the metric system to allow international application.

(b) Do you agree with the proposed amendments that are intended to improve the international applicability of a subset of industry disclosure requirements? If not, why not?

(c) Do you agree that the proposed amendments will enable an entity that has used the relevant SASB Standards in prior periods to continue to provide information consistent with the equivalent disclosures in prior periods? If not, why not?

SASB standards are not widely used within Australia – see answer to question 3 (b) above.

(d) Do you agree with the proposed industry-based disclosure requirements for financed and facilitated emissions, or would the cross-industry requirement to disclose Scope 3 emissions (which includes Category 15: Investments) facilitate adequate disclosure? Why or why not?

(e) Do you agree with the industries classified as 'carbon-related' in the proposals for commercial banks and insurance entities? Why or why not? Are there other industries you would include in this classification? If so, why?

(f) Do you agree with the proposed requirement to disclose both absolute- and intensity-based financed emissions? Why or why not?

(g) Do you agree with the proposals to require disclosure of the methodology used to calculate financed emissions? If not, what would you suggest and why?

(h) Do you agree that an entity be required to use the GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard to provide the proposed disclosures on financed emissions without the ISSB prescribing a more specific methodology (such as that of the Partnership for Carbon Accounting Financials (PCAF) Global GHG Accounting & Reporting Standard for the Financial Industry)? If you don't agree, what methodology would you suggest and why?

(i) In the proposal for entities in the asset management and custody activities industry, does the disclosure of financed emissions associated with total assets under management provide useful information for the assessment of the entity's indirect transition risk exposure? Why or why not?

We understand that both Australian and global financial services entities are limited in their ability to accurately measure, and therefore disclose, financed and facilitated emissions due to a lack of data availability and methodology gaps. However, we are aware that there are global and domestic processes underway to try to achieve standardisation. This lack of an industry benchmark makes it impossible for comparable data to be produced currently. Accordingly, we would support an appropriately phased in approach.

Further questions on the specifics of the proposed disclosure requirements should be directed to financial services entities and their respective industry bodies.

Question 12—Costs, benefits and likely effects

(a) Do you have any comments on the likely benefits of implementing the proposals and the likely costs of implementing them that the ISSB should consider in analysing the likely effects of these proposals?

(b) Do you have any comments on the costs of ongoing application of the proposals that the ISSB should consider?

As already noted, the costs of introducing these arrangements in Australia will be significant. Australia currently lags jurisdictions such as the EU in the collection and reporting of non-financial information. There will need to be an appropriate transition period to allow for the establishment of systems, the testing of methodologies and the resolution of skills and workforce shortages to effectively report under the new ISSB standards.

Further, according to legal advice obtained from Herbert Smith Freehills, the operation of Australian laws and regulations, mean that Australian directors would be placed at higher liability risk than global counterparts were the Standards to be adopted under current arrangements. This is because of the requirement that forward-looking statements be made on reasonable grounds, as well as the operation of Australia's public enforcement of directors' duties and a facilitative class actions environment.

The Exposure Draft contains numerous examples where an entity would be required to make a forward-looking statement that would be very difficult to satisfy the reasonable grounds standards of Australian law. We believe that these matters are capable of being resolved at a jurisdictional level and do not require amendment of the Exposure Draft, however we consider they are important to bring to the ISSB's attention as they may hinder Australian market adoption.[3]

(c) Are there any disclosure requirements included in the Exposure Draft for which the benefits would not outweigh the costs associated with preparing that information? Why or why not?

Liability risks will need to be appropriately addressed in the implementation of the proposed Standard. In particular, we note that some investors have acknowledged the serious risk that legal liability considerations may undermine effective climate related reporting. In particular, the world's largest institutional investor, BlackRock, in the context of its recent submission to the SEC's climate disclosure consultation stated:

[3] This issue is covered in more detail in the AICD's response to Question 16 of the S1 Exposure Draft.

> ***Protections from liability**: the liability attached to climate-related disclosure should be commensurate with the evolving nature of that disclosure to encourage rather than discourage higher quality disclosure. **We urge regulators to adopt a liability framework that provides meaningful protection from legal liability for disclosures provided in good faith while standards continue to evolve**, and that gives companies the flexibility they need to develop their disclosures without imposing a chilling effect [emphasis added].*[4]

It is important to highlight that Blackrock's comments were made in an US environment with significantly less disclosure risk than the Australian market (see below).

As already noted, the challenges of introducing these arrangements in Australia will be significant. Australia currently lags jurisdictions such as the EU in the collection and reporting of non-financial information. There will need to be an appropriate transition period to allow for the establishment of systems, the testing of methodologies and the resolution of skills and workforce shortages to effectively report under the new ISSB standards.

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Question 13—Verifiability and enforceability

Are there any disclosure requirements proposed in the Exposure Draft that would present particular challenges to verify or to enforce (or that cannot be verified or enforced) by auditors and regulators? If you have identified any disclosure requirements that present challenges, please provide your reasoning.

There are no particular challenges around verification in the body of the Standard although we note that there will be assurance challenges around the provision of information from third-parties that, for example, may be used to calculate an entities Scope 3 emissions.

We are unable to comment on the verifiability of the matters contained in Appendix B, for the reasons set out in response to Question 3(b).

Question 14—Effective date

(a) Do you think that the effective date of the Exposure Draft should be earlier, later or the same as that of [draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information? Why?

As noted, the S1 Exposure Draft presents some greater complexities than S2. Accordingly, the effective date should either be the same or earlier than S1.

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[4] BlackRock submission to the SEC: Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22), 17 June 2022, available here.
[5] This issue is covered in more detail in the AICD's response to Question 16 of the S1 Exposure Draft.

(b) When the ISSB sets the effective date, how long does this need to be after a final Standard is issued? Please explain the reason for your answer including specific information about the preparation that will be required by entities applying the proposals in the Exposure Draft.

There will need to be a transitional period but in our view this issue is best resolved at a jurisdictional level taking into account relative maturity levels. In the Australian context, a minimum two to three year phase-in period may be appropriate.

(c) Do you think that entities could apply any of the disclosure requirements included in the Exposure Draft earlier than others? (For example, could disclosure requirements related to governance be applied earlier than those related to the resilience of an entity's strategy?) If so, which requirements could be applied earlier and do you believe that some requirements in the Exposure Draft should be required to be applied earlier than others?

Some of the qualitative disclosures around governance, risk and opportunity are capable of earlier disclosure than some of the quantitative measures, especially around Scope 3 emissions, or those involving scenario planning where practice is still relatively immature.

Question 15—Digital reporting

Do you have any comments or suggestions relating to the drafting of the Exposure Draft that would facilitate the development of a Taxonomy and digital reporting (for example, any particular disclosure requirements that could be difficult to tag digitally)?

No comment.

Question 16—Global baseline

Are there any particular aspects of the proposals in the Exposure Draft that you believe would limit the ability of IFRS Sustainability Disclosure Standards to be used in this manner? If so, what aspects and why? What would you suggest instead and why?

See our answer to Question 14 of the S1 Exposure Draft.

Question 17—Other comments

Do you have any other comments on the proposals set out in the Exposure Draft?

No.

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Advice

Liability risks associated with the proposed ISSB Standards

1. About this advice

The recent release of the International Sustainability Standards Board's (**ISSB**) consultation drafts of new sustainability- and climate-reporting standards[1] is a welcome development towards harmonised global reporting standards. However, in light of Australia's existing legal framework on financial reporting and directors' duties, the Australian Institute of Company Directors (**AICD**) has requested advice to seek to understand potential areas of liability or heightened risk for directors with respect to the ISSB Standards given the scope of the disclosures proposed.

In the still-developing ESG litigation environment, the ISSB Standards' requirements for forward-looking statements that are dependent on inherently uncertain matters (such as future technologies and market dynamics) are anticipated to create significant risk exposure for reporting entities and their directors in the absence of a 'safe harbour' for such statements. This advice outlines key areas of tension between the proposed ISSB Standards and directors' liability risks in the context of Australia's current legal framework for public corporate disclosures.

2. Executive summary

The proposed ISSB Standards will subject Australian reporting entities and their directors to a greater level of legal risk compared to their counterparts in other jurisdictions given the way in which forward-looking statements are regulated in this country.

Australia's current periodic reporting requirements are principally backward-looking in nature, which affords reporting entities a considerable degree of certainty over their disclosure and carries comparatively lower levels of disclosure risk. By contrast, the new ISSB Standards would require reporting entities to make an extensive range of forward-looking statements.

Under Australian law, forward-looking statements will be deemed to be misleading unless supported by reasonable grounds. Given the subject-matter of the disclosures proposed under the ISSB Standards, establishing 'reasonable grounds' is likely to pose considerable difficulty for directors in a number of areas, given the inherent uncertainty of dependencies such as market dynamics, energy transition challenges and the development of new technologies.

While the existing liability regime for public disclosures in Australia is well understood by reporting entities and their directors, the development of ESG-related litigation is embryonic, with the *ACCR v Santos* test case[2]

[1] IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information* (**IFRS S1**) and IFRS S2 *Climate-related Disclosures* (**IFRS S2**) (together, **ISSB Standards**).

[2] *Australasian Centre for Corporate Responsibility v Santos Limited*, Federal Court of Australia case NSD858/2021, filed on 25 August 2021.

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likely to provide impetus for further litigation if the applicant is successful in establishing that Santos lacked reasonable grounds for the statements about its 'net zero' roadmap in its 2020 Annual Report. Compounding the litigation risk faced by Australian reporting entities and their directors is Australia's facilitative class action regime, where disclosure breaches may result in a reporting entity becoming vulnerable to securities class actions.

This area of tension arises because, unlike a number of other jurisdictions, Australia lacks a 'safe harbour' defence for forward-looking statements made in good faith. In jurisdictions where safe harbour defences exist, it is comparatively easier for reporting entities and directors to disclose sustainability matters alongside forward-looking information on their expected impacts for the business and the business' proposed actions in response. In the context of the current regulatory regime in force in Australia, it seems likely that reporting entities and their directors would be subjected to a comparatively higher level of risk as compared to their international peers when disclosing against the ISSB Standards.

The proposed ISSB Standards also interact with existing Australian law in other ways that will need to be carefully considered by the authorities responsible for implementing them in Australia. For example, in the context of the proposed materiality threshold, there may be a narrowing of the difference between information requiring immediate disclosure under Australia's continuous disclosure regime and the broader sustainability reporting contemplated by the new regime. There are also complexities which will need to be addressed relating to whether compliance with the new standards will be mandatory under the *Corporations Act 2001* (Cth) (**Corporations Act**), whether expanding the scope of financial reporting to cover sustainability- and climate-related issues may require 'true and fair' sign-offs by directors, and whether directors' duties will adjust to reflect the heightened levels of reliance directors will need to place on technical and specialist input underpinning the proposed reporting.

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3. Nature and regulation of periodic reporting in Australia

Schedule 1 provides an overview of key periodic reporting obligations in Australia.

Currently, periodic reporting in Australia is largely focused on a backward-looking review of the previous reporting period. Relatively few of the reporting requirements under the Corporations Act, the ASX Listing Rules and the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (**ASX Recommendations**) are forward-looking, with a notable exception being s 299A of the Corporations Act (the operating and financial review (**OFR**) requirements).[3]

Forward-looking statements carry a higher level of disclosure risk than backward-looking statements. Under s 769C of the Corporations Act, where a person makes a representation with respect to any future matter

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[3] Relevantly, s 299A does also include a carve-out to disclosure which allows entities to omit material that would otherwise be included relating to their business strategies, and prospects for future financial years, if it is likely to result in unreasonable prejudice to the entity or consolidated group (e.g. likely to give third parties such as competitors or suppliers a commercial advantage, resulting in a material disadvantage to the entity).

(including the doing of, or refusing to do, any act), the representation will automatically be taken to be misleading if the person does not have reasonable grounds for making the representation. The subjective belief of the person at the time that the representation was made is immaterial, even if it was honestly held.

Similar provisions are included in s 12BB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 4 of the *Australian Consumer Law* (**ACL**) and, in the case of the ACL in particular, the person making the representation is also deemed **not** to have reasonable grounds unless they adduce evidence to the contrary. Accordingly, forward-looking statements place an evidential burden on the person who makes the representation to adduce evidence that there were reasonable grounds for making it.[4]

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4. 'Forward-looking' information required by proposed ISSB Standards

As currently drafted, the proposed ISSB Standards would require reporting entities to make an extensive range of forward-looking statements, which is likely to enhance disclosure risks for reporting entities and their directors. This risk is more pronounced given the disclosures contemplated are relatively novel or unusual in the Australian market.

Scope of forward-looking information to be disclosed

A non-exhaustive list of the forward-looking requirements under the ISSB Standards is set out at **Schedule 2**. At a thematic level, they require disclosures of the following:

- **Significant sustainability- and climate-related risks and opportunities.** The overarching purpose of the ISSB Standards is to require the disclosure of information about significant sustainability- or climate-related risks and opportunities to enable users of general purpose financial reporting to assess the effects of such risks and opportunities on the reporting entity's enterprise value.[5] This would require a description of any significant sustainability- and climate-related risks and opportunities that could reasonably be expected to affect the reporting entity's business model, strategy, cash flows, access to finance and cost of capital over the short-, medium- and long-term.[6]
- **Effect of those risks and opportunities on business model and value chain.** A reporting entity would be required to disclose information about its assessment of the current and anticipated effects of significant sustainability- or climate-related risks and opportunities on its business model. This would include a description of the current and anticipated effects of such risks and opportunities on its value chain, and a description of where in its value chain such risks and opportunities are concentrated.[7]
- **Effect of those risks and opportunities on strategy and decision-making.** The ISSB Standards require a reporting entity to disclose

[4] *Australian Competition and Consumer Commission v Woolworths Limited* [2019] FCA 1039, 37 [113].

[5] IFRS S1 [1], IFRS S2 [1].

[6] IFRS S1 [16], IFRS S2 [9].

[7] IFRS S1 [20], IFRS S2 [12].

information about the effects of significant sustainability- and climate-related risks and opportunities on its strategy and decision-making.[8] Compared to IFRS S1, IFRS S2 calls for more extensive forward-looking disclosures, including information about a reporting entity's transition plans, current and anticipated changes to its business model (e.g. changes in strategy and resource allocation, direct and indirect adaptation and mitigation efforts), and how these plans will be resourced.[9]

- **Effect of those risks and opportunities on financial position, financial performance and cash flows.** The ISSB Standards require a reporting entity to disclose information that enables users to understand the anticipated effects of significant sustainability or climate-related risks on its financial position, financial performance and cash flows over the short-, medium- and long-term, including how such risks and opportunities are included in its financial planning.[10] This would include, among other things, information about risks and opportunities for which there is a significant risk that there will be a material adjustment to the carrying amounts of assets and liabilities, and how the reporting entity expects its financial position and financial performance to change over time.[11]
- **Resilience.** IFRS S1 requires a reporting entity to disclose information that enables users to understand its capacity to adjust to the uncertainties arising from significant sustainability-related risks.[12] IFRS S2 sets out more extensive forward-looking disclosure requirements. Among other things, it requires a reporting entity to disclose information about the resilience of its strategy (including its business model) to climate-related changes, developments or uncertainties. Further, a reporting entity would be expected to use climate-related scenario analysis, and would be required to disclose the results of its climate resilience analysis to enable users to understand the implications of its findings for its strategy, and its capacity to adjust or adapt its strategy and business model over the short-, medium- and long-term.[13]
- **Targets.** IFRS S1 would require the disclosure of targets (which are, by definition, forward-looking) that a reporting entity has set to assess its progress towards achieving its strategic goals (including milestones or interim targets).[14] IFRS S2 would require a reporting entity to disclose its targets to mitigate or adapt to climate-related risks or maximise climate-related opportunities.[15] Compared to IFRS S1, IFRS S2 requires the disclosure of a broader range of details for each target.[16] Further, a reporting entity would need to disclose information regarding targets for its transition plan, including the

[8] IFRS S1 [21], IFRS S2 [13].

[9] IFRS S2 [13].

[10] IFRS S1 [22], IFRS S2 [14].

[11] IFRS S1 [22], IFRS S2 [14].

[12] IFRS S1 [23].

[13] IFRS S2 [15].

[14] IFRS S1 [32].

[15] IFRS S2 [20(d)].

[16] IFRS S2 [23].

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amount of its emissions target to be achieved through emission reductions within its value chain, and the intended use of carbon offsets in achieving those targets.[17]

5. Challenges with respect to establishing reasonable grounds

Many aspects of the proposed ISSB Standards require estimation or prediction of the impacts of risks and opportunities for the reporting entity, notwithstanding that those impacts are inherently unknowable and the relevant disclosure would be relatively speculative[18] – and for that reason, likely to be questioned as not being based on reasonable grounds (and therefore misleading). This appears at odds with Australian regulators' current expectation for companies' public disclosures to be supported by clearly demonstrable reasonable grounds.[19]

An example of a matter in respect of which it is likely to be challenging (and potentially impossible) for a reporting entity to establish reasonable grounds is the required disclosure of the 'anticipated effects [of climate-related risks] over the short, medium and long term' (IFRS S2 [14]), including:

- 'how [the reporting entity] expects its financial position to change over time, given its strategy to address significant climate-related risks and opportunities, reflecting its current and committed investment plans and their anticipated effects on its financial position (for example, capital expenditure, major acquisitions and divestments, joint ventures, business transformation, innovation, new business areas and asset retirements)'; and
- 'how [the reporting entity] expects its financial performance to change over time, given its strategy to address significant climate-related risks and opportunities (for example, increased revenue from or costs of products and services aligned with a lower-carbon economy)',

given the speed and breadth with which market dynamics are changing, challenges with respect to energy transition, policy uncertainty and dependence on the development of breakthrough technologies.

Additionally:

- while it has become reasonably common for companies to undertake (and publish the findings of) scenario analysis for climate impacts under different climate change scenarios, it is notable that those disclosures are typically bound by issue (i.e. climate) and do not require the reporting entity to present its granular view on anticipated outcomes (i.e. they are presented as possible scenarios rather than probabilities). The scale of analysis implied by the proposed ISSB Standards is considerably more ambitious given the broad application to sustainability-related risks and opportunities and the requirement for the estimation / prediction and disclosure of their *anticipated effects* for the reporting entity;

[17] IFRS S2 [13(b)].

[18] See e.g. IFRS S1 [79], which provides that '[a]n entity shall identify metrics it has disclosed that have significant estimation uncertainty, disclosing the sources and nature of the estimation uncertainties and the factors affecting the uncertainties.'

[19] See e.g. ASIC Regulatory Guide 170.

- while listed companies are already required to make forward-looking statements as part of their OFR, there is neither a legal requirement nor regulator expectation for granular disclosures in relation to inherently uncertain future matters; and
- while all companies need to include uncertain matters in their financial statements (e.g. provisions, impairments and contingent liabilities), these are subject to well understood accounting principles that are generally applicable to all reporting entities and have the benefit of full external audit, while the ISSB Standards call for highly company-specific disclosures which are usually only able to be subjected to limited external assurance (e.g. of data and performance).

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6. Implications of additional disclosure for reporting entities and their directors

Misleading statements and lack of safe harbour for forward-looking statements

Under s 1041H(1) of the Corporations Act, a person must not engage in conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive. This prohibition applies to the making of public statements by a company, as such statements could affect the value of its shares (and would hence be 'conduct in relation to a financial product').[20] Similar prohibitions are contained in s 12DA of the ASIC Act and s 18 of the ACL.

Litigation in this area is commonplace in Australia.[21] Further, directors and other persons could become personally liable to pay compensation for statements that are found to be misleading or deceptive, as s 1041I(1) of the Corporations Act provides that a person who suffers loss or damage by a contravention of s 1041H may recover against any person who is 'involved in' the contravention.

As outlined in **Section 3** above, a person is taken to make a misleading statement about a future matter in a periodic report or other disclosure if they do not have reasonable grounds for making it. This requirement extends beyond 'good faith' disclosure and creates potential liability risks for directors in the context of the extensive forward-looking disclosure required under the proposed ISSB Standards. Even where a reporting entity and its directors consider that their forward-looking representations are supported by 'reasonable grounds', this may be challenged in court with an allegation of 'greenwashing'. For example, proceedings were recently commenced by shareholders associated with the Australasian Centre for Corporate Responsibility (**ACCR**) against Santos, in which the ACCR is alleging (among other things) that the 'net zero representations' in Santos' 2020 Annual Report were misleading, and is challenging Santos' implied representation that it had a reasonable basis for making them.

Compared to their counterparts in certain other jurisdictions, reporting entities and officers in Australia are particularly exposed to this risk, because in Australia, there is no 'safe harbour' exemption which allows for the exclusion of liability by identifying a statement as a forward-looking

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[20] See e.g. *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211.

[21] See e.g. *TPT Patrol Pty Ltd v Myer Holdings Ltd* [2019] FCA 1747.

statement and including a proximate cautionary statement.[22] By way of comparison:

- in the US, a safe harbour exemption may be secured through identifying a statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. The safe harbour only applies to private civil suits and does not apply to civil and criminal enforcement actions brought by the Securities and Exchange Commission or other regulatory agencies, among other specific exceptions that apply; and
- in Canada, a person or company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information:
    - reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and
    - a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

Meanwhile, the position taken by the Australian Securities and Investments Commission (**ASIC**) is that the use of warnings and other cautionary language in respect of prospective financial information 'will not always be sufficient to prevent particular information being misleading and importantly will not, of itself, affect the requirement for there to be reasonable grounds to state the information'.[23]

Class action risk

A further source of potential risk for Australian reporting entities and officers is securities class action risk. Securities class actions are the most prevalent type of class action litigation in Australia, where the core allegations relate to asserted disclosure failures with respect to forward looking statements (such as guidance). The two primary factors contributing to the sustained growth in securities class actions in the last decade are:

- first, the procedural hurdles for commencing class actions in Australia are relevantly low, and therefore easy to meet; and
- second, an apparent surplus of capital willing to fund securities class actions, with both litigation funders and plaintiff law firms willing (and tending) to provide financial support to prosecuting securities class action claims.

Directors' duties

Directors and officers owe a duty of care, skill and diligence in relation to the performance of their duties, including with respect to the adoption and

[22] See Herbert Smith Freehills' article on the AICD's website at: https://www.aicd.com.au/board-of-directors/duties/engagement/class-actions-freehills.

[23] ASIC Regulatory Guide 170 *Prospective financial information* (April 2011) [RG 170.94].

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approval of financial statements[24] and other types of reporting. Expanding the scope of financial statements to include sustainability- and climate-related matters would broaden the range of matters that directors would need to consider in order to discharge that duty.

A failure to discharge that duty may result in a civil penalty up to the greater of:

- 5,000 penalty units (currently $1.11 million); or
- three times the value of the benefit derived and detriment avoided because of the contravention (if the value can be determined by a court).

In contrast with the position in certain other comparable jurisdictions (including, notably, the US and the UK) which rely relatively heavily on private litigants to enforce directors' duties (barring egregious breaches justifying criminal prosecution), Australian directors are subject to greater exposure to enforcement proceedings, as directors' duties in Australia are principally enforced by the publicly funded ASIC.

A further source of potential liability for Australian directors is that, for any breach of a legal requirement by a *company* (such as the making of misleading or deceptive statement in public reporting), it is possible that the company's *directors* may be found to have failed to discharge their own duty of care and diligence by failing to prevent the company's breach. ASIC has pursued directors for 'stepping stone liability' in this way on a number of occasions.[25]

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7. Additional areas of complexity with proposed ISSB Standards

There are a number of other areas of complexity for Australian directors with respect to the proposed ISSB Standards.

Status of the ISSB Standards and related sign-offs

Under the ISSB Standards, an entity is required to 'disclose information required by IFRS Sustainability Disclosure Standards as part of its general purpose financial reporting'.[26] This requirement applies to both sustainability-reporting under IFRS S1 and climate-reporting under IFRS S2.[27]

While the Australian Accounting Standards Board (**AASB**) is proposing to introduce the ISSB Standards as sustainability standards, separate to the Australian Accounting Standards (i.e. not as part of the current reporting regime under which reporting entities are mandatorily required to comply), it is consulting on whether as an alternative model, sustainability-related financial reporting requirements should be developed as part of existing Australian Accounting Standards (i.e. as part of an entity's general purpose financial statements).

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[24] *Australian Securities and Investments Commission v Healey* [2011] FCA 717 at [21].

[25] See e.g. *Australian Securities and Investment Commission v Cassimatis (No 8)* [2016] FCA 1023 (affirmed by the Full Bench of the Federal Court of Australia in 2020); *Australian Securities and Investments Commission v Vocation Limited (in liq)* [2019] FCA 807.

[26] IFRS S1 [72].

[27] Even though this requirement is located in IFRS S1, it is relevant to both IFRS S1 and IFRS S2 because both sets of standards are 'IFRS Sustainability Disclosure Standards'.

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While it is unclear to us whether the AASB currently possesses the power to implement sustainability disclosure requirements via the Australian Accounting Standards, we expect that (if able to be implemented) this would result in:

- disclosure against the proposed ISSB Standards (or other relevant 'sustainability-related financial reporting requirements') becoming mandatory under s 296 and 304 of the Corporations Act; and
- directors being required to provide a 'true and fair' sign-off in respect of the sustainability- and climate-related disclosures as part of their directors' declarations under ss 297 and 305 of the Corporations Act.

Given the volume of disclosures being required under the ISSB Standards, their complexity, and the uncertainty of some of the data that would need to be disclosed (e.g. anticipated effects of significant sustainability- and climate-related risks and opportunities on financial position, financial performance and cash flows over the short-, medium- and long-term), Australian reporting entities would face considerable difficulty in putting their directors in a position where they would be able to confidently provide a 'true and fair' sign-off on the reporting.

Directors' duties and reliance on others

Another point of uncertainty at present is whether (and if so, how) the scope of directors' duties in relation to financial reporting might adjust to encompass sustainability- and climate-reporting. While there is existing case law on directors' non-delegable duties with respect to considering financial reports (encompassing both their duty of care and diligence but also their statutory obligation with respect to the approval of the financial report)[28], it remains to be seen whether Australian courts would take a similar approach towards sustainability- and climate-related reporting and extend directors' non-delegable duty to these additional areas of reporting.

Relevantly, the proposed ISSB Standards will require considerable reliance on technical and specialist advice (e.g. methodologies for calculating greenhouse gas emissions, advice on the viability of technologies). In this context, there is also likely to be an unprecedented need for directors to rely on s 189 of the Corporations Act (*Reliance on information or advice provided by others*) with respect to the basis for Board approvals of reporting.

Inconsistency with existing reporting standards

The proposed ISSB Standards use concepts which are not currently reflected in the Australian reporting regime and which would need to be clarified or adapted to facilitate relevant reporting.

Materiality

As foreshadowed in **Section 3** above, many Australian entities are currently subject to limited requirements to include forward-looking statements in the OFR section of their directors' report. A difference between the ISSB Standards and the OFR requirements is the materiality threshold for reporting. The existing OFR requirements under s 299A of the Corporations Act require the disclosure of information that

[28] E.g. *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291.

shareholders would reasonably require to make an informed assessment of the reporting entity's operations, financial position, business strategies and prospects for future financial years. With respect to the prospects for future years, in Regulatory Guide 247 at [62], ASIC provides:

> 'It is important that a discussion about future prospects is balanced. It is likely to be misleading to discuss prospects for future financial years without referring to the material business risks that could adversely affect the achievement of the financial prospects described for those years. By 'material business risks', we mean the most significant areas of uncertainty or exposure, at a whole-of-entity level, that could have an adverse impact on the achievement of the financial performance or outcomes disclosed in the OFR. Equally, it may be appropriate to disclose factors that could materially improve the financial prospects disclosed.'

Additionally, ASX Recommendation 7.4 provides that an ASX-listed entity should disclose whether it has any material exposure to environmental or social risks, and if it does, how it manages or intends to manage those risks.[29] 'Material exposure' in this context means 'a real possibility that the risk in question could materially impact the listed entity's ability to create or preserve value for security holders over the short, medium or longer term'. In practice, many listed entities would satisfy this requirement either in their OFR or in a separate sustainability report.[30]

Unlike the OFR requirement and ASX Recommendation 7.4 (which are grounded by 'impact' on the achievement of stated outcomes), the proposed ISSB Standards call for much more granular disclosure of 'material information' about 'significant sustainability-related risks and opportunities'.[31] Materiality of information is expected to be determined by reference to whether 'omitting, misstating or obscuring that information could reasonably be expected to influence decisions that the primary users of general purpose financial reporting make on the basis of that reporting'.[32]

This appears more similar to the Australian test for continuous disclosure, under which information that 'would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of … securities'[33] is taken to be information that a reasonable person would expect to have a material effect on the price or value of securities (and hence needs to be immediately disclosed).

In the absence of clarification or adaption, there may be an unhelpful narrowing of the difference between materially price sensitive information requiring immediate disclosure to ASX, and information relating to entities' sustainability and climate-related risks and opportunities which – while important – is unlikely to have the same significance.

Lack of carve-out for commercially sensitive information

[29] The ASX Recommendations are not mandatory. In the event of non-compliance, a listed entity is required to explain the non-compliance (i.e. 'if not, why not').

[30] As is contemplated under Commentary to ASX Recommendation 7.4.

[31] ISSB S1 [2]. The same materiality threshold applies under ISSB S2 (see ISSB S2 [B5]).

[32] ISSB S1 [56].

[33] Corporations Act s 677(1).

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The OFR requirement under s 299A allows a reporting entity to omit information from the directors' report that would otherwise need to be included under s 299A(1) if the information is likely to result in unreasonable prejudice to the reporting entity.

However, the ISSB Standards do not provide for a carve-out for any material information about significant sustainability- and climate-related risks and opportunities that would be unreasonably prejudicial to the reporting entity. This is an issue that needs to be carefully considered by Australian standard-setters in order to appropriately balance investors' interest in the disclosure of those risks and opportunities on the one hand, and the protection of reporting entities' legitimate commercial interests on the other.

Need to monitor progress and assumptions

The ISSB Standards require the disclosure of climate-related targets,[34] and in relation to those targets, reporting entities are expected to disclose their performance against them, an analysis of trends or significant changes in their performance, revisions to those targets, and explanations for such revisions.[35]

The provision of periodic progress updates against publicly announced targets is not a new concept for corporate Australia. For example, under ASX Recommendation 1.5, ASX-listed companies are required to report on their progress against gender diversity targets. However, compared to those targets, the targets mandated by the ISSB Standards (e.g. targets set to mitigate or adapt to climate-related risks or maximise climate-related opportunities) are inherently subject to more uncertainty. This would in turn require a greater level of monitoring by reporting entities to ensure that their targets remain appropriate.

A further issue is the forward-looking nature of targets. By definition, forward-looking matters are subject to uncertainty – and sustainability and climate are areas that are subject to rapid change. For Australian listed companies, this could have the (perhaps unintended) effect of turning periodic disclosure documents (which the ISSB Standards are intended to apply to) into sources of ongoing continuous disclosure obligations. This is because the ASX Listing Rules require listed entities to immediately correct or prevent a false market, which could arise where an existing announcement subsequently becomes incorrect in a material respect. Should a reporting entity become aware that an announced sustainability or climate target can no longer be met (for example, due to a change in external factors), or the assumptions underlying those targets have changed, careful consideration would need to be given to the materiality of such information and whether there may be a false market in the entity's securities.

* * *

[34] IFRS S2 [23].

[35] IFRS S1 [33].

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Schedule 1

Overview of directors' responsibilities under current reporting regime

Core reporting obligations

Under s 292(1) of the Corporations Act, all disclosing entities, public companies, large proprietary companies and registered schemes must prepare and lodge audited annual financial reports and directors' reports. In addition, s 302 requires disclosing entities to prepare and lodge audited or reviewed half-year financial reports and directors' reports.

Financial reports

The annual and half-year financial reports are intended to provide information about an entity's financial position and performance and are required to include financial statements, notes to the financial statements and a directors' declaration about the statements and notes (ss 295, 303). They are also required to:

- comply with the Australian accounting standards and any further requirements in the *Corporations Regulations 2001* (Cth) (ss 296(1), 296(2), 304); and
- provide a true and fair view of financial position and performance (ss 297, 305).

Directors' reports

The annual and half-year directors' reports are intended to provide information about the entity's operations and activities, with the level of disclosure required depending on the specific type of reporting entity. At a high level, for listed entities, the directors' report would typically be required to include:

- 'general' information on the entity's operations and activities (s 299);
- additional 'general' information that members of the listed entity would reasonably require to make an informed assessment of the operations, financial position, and the business strategies, and prospects for future financial years, of the reporting entity (s 299A) (referred to as the OFR); and
- specific information about the entity (s 300) and, for listed entities which are companies, the remuneration of the entity's key management personnel (s 300A).

Notably, the objectives of the OFR requirements are to provide shareholders with a narrative and analysis to supplement the financial report and assist shareholders in understanding the operations, financial position, business strategies and prospects of the reporting entity. ASIC has published *Regulatory Guide 247 Effective disclosure in an operating and financial review* (August 2019) to assist companies in applying the relevant disclosure obligations underpinning the OFR.

Additional ASX requirements

Additional periodic reporting requirements are imposed on ASX listed entities under the ASX Listing Rules, and also, the ASX Recommendations, with the latter to be complied with on an 'if not, why not' basis. Those requirements are not detailed in this advice.

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Directors' duties with respect to periodic reporting

Under Corporations Act s 180, directors and officers owe a duty of care, skill and diligence.[36] This reflects a similar duty that directors owe at common law.

This duty encompasses directors' ultimate responsibility for adopting and approving a reporting entity's financial statements, and would equally require directors' care, skill and diligence with respect to other types of periodic reporting as well.

In practice, a reporting entity's financial statements would have the assurance of an external audit, while any non-audited periodic disclosures would be subject to a verification process to ensure its integrity.[37] Further, directors are 'entitled to delegate to others the preparation of books and accounts and the carrying on of the day-to-day affairs of the company'.[38] However, the *Centro* case confirmed that each director is ultimately responsible for the financial statements, and that this responsibility is non-delegable.

The Corporations Act imposes a further requirement that a financial report must include a declaration by the directors as to (among other things) whether, in their opinion, the financial statements and notes are in accordance with the Corporations Act, including the requirements referred to above.[39]

[36] A director or officer must exercise their powers and discharge their duties with the care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporations as, the director of officer.

[37] In the case of ASX-listed entities, the verification process should be disclosed under Recommendation 4.3 of the ASX Recommendations.

[38] *Australian Securities and Investments Commission v Healey* [2011] FCA 717 ('***Centro* case**').

[39] See ss 295(4)(d), 303(4)(d).

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Schedule 2

Overview of the ISSB Standards

Background to the ISSB Standards

In recent years, the number of international sustainability-related disclosure standards has grown significantly. In an effort to harmonise sustainability disclosures globally, the International Financial Reporting Standards (**IFRS**) Foundation announced in November 2021 the establishment of the ISSB as a 'sister' board to the International Accounting Standards Board (**IASB**). In the same way that the IASB is the body that creates international financial reporting standards, the ISSB is envisioned as a body that sets international sustainability- and climate-related reporting standards.

In March 2022, the ISSB published two exposure drafts of international sustainability and climate-related reporting standards:

- IFRS S1, which sets out draft standards for disclosing information that enables investors to assess the effect of significant sustainability-related risks and opportunities; and
- IFRS S2, which sets out reporting standards in relation to the identification, measurement and disclosure of an entity's significant climate-related risks and opportunities.

In a similar way that the IASB's IFRS are implemented in Australia through the AASB's Australian Accounting Standards, once the ISSB's IFRS S1 and S2 are in place, they are proposed to be implemented in Australia by the AASB with Australia-specific adjustments. AASB is currently consulting on the ISSB Standards to inform any possible future development of a separate suite of Australian sustainability reporting standards by the AASB.

Overview of forward-looking information required under the ISSB Standards

Set out below is a non-exhaustive overview of the key heads of information required under the ISSB Standards which may be forward-looking in nature.

IFRS S1
Objective
[1] The objective of [draft] IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information* is to require an entity to disclose information about its significant sustainability-related risks and opportunities that is useful to the *primary users of general purpose financial reporting* when they assess *enterprise value* and decide whether to provide resources to the entity. ... [5] Enterprise value reflects expectations of the amount, timing and certainty of future cash flows over the short, medium and long term and the value of those cash flows in the light of the entity's risk profile, and its access to finance and cost of capital. Information that is essential for assessing the enterprise value of an entity includes information that is provided by the entity in its financial statements and sustainability-related financial information.
[2] A reporting entity shall disclose material information about all of the significant sustainability-related risks and opportunities to which it is exposed.
[6] Sustainability-related financial information is broader than information reported in the financial statements and could include information about: … (b) decisions made by the entity that could result in future inflows and outflows that have not yet met the criteria for recognition in the related financial statements; (c) the entity's reputation, performance and prospects as a consequence of the actions it has undertaken, such as its relationships with people, the planet and the economy, and its impacts and dependencies on them; and …

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Core content
[11] Unless another IFRS Sustainability Disclosure Standard permits or requires otherwise, an entity shall provide disclosures about: … (b) strategy—the approach for addressing sustainability-related risks and opportunities that could affect the entity's business model and strategy over the short, medium and long term; … (d) metrics and targets—information used to assess, manage and monitor the entity's performance in relation to sustainability related risks and opportunities over time.
Strategy
[14] The objective of sustainability-related financial disclosures on strategy is to enable users of general purpose financial reporting to understand an entity's strategy for addressing significant sustainability related risks and opportunities. [15] To achieve this objective, an entity shall disclose information about: (a) the significant sustainability-related risks and opportunities that it reasonably expects could affect its business model, strategy and cash flows, its access to finance and its cost of capital, over the short, medium or long term (see paragraphs 16–19); (b) the effects of significant sustainability-related risks and opportunities on its business model and value chain (see paragraph 20); (c) the effects of significant sustainability-related risks and opportunities on its strategy and decision-making (see paragraph 21); (d) the effects of significant sustainability-related risks and opportunities on its financial position, financial performance and cash flows for the reporting period, and the anticipated effects over the short, medium and long term—including how sustainability-related risks and opportunities are included in the entity's financial planning (see paragraph 22); and (e) the resilience of its strategy (including its business model) to significant sustainability-related risks (see paragraphs 23–24).
[16] An entity shall disclose information that enables users of general purpose financial reporting to understand the significant sustainability-related risks and opportunities that could reasonably be expected to affect the entity's business model, strategy and cash flows, its access to finance and its cost of capital, over the short, medium or long term. Specifically, the entity shall disclose: (a) a description of significant sustainability-related risks and opportunities and the time horizon over which each could reasonably be expected to affect its business model, strategy and cash flows, its access to finance and its cost of capital, over the short, medium or long term; and …
[20] An entity shall disclose information that enables users of general purpose financial reporting to understand its assessment of the current and anticipated effects of significant sustainability-related risks and opportunities on its business model. Specifically, an entity shall disclose: (a) a description of the current and anticipated effects of significant sustainability-related risks and opportunities on its value chain; and (b) a description of where in its value chain significant sustainability related risks and opportunities are concentrated (for example, geographical areas, facilities or types of assets, inputs, outputs or distribution channels).
[22] An entity shall disclose information that enables users of general purpose financial reporting to understand... the anticipated effects [of significant sustainability-related risks and opportunities on its financial position, financial performance and cash flows] … Specifically, an entity shall disclose: … (b) information about the sustainability-related risks and opportunities identified in paragraph 22(a) for which there is a significant risk that there will be a material adjustment to the carrying amounts of assets and liabilities reported in the financial statements within the next financial year; (c) how it expects its financial position to change over time, given its strategy to address significant sustainability-related risks and opportunities, reflecting: (i) its current and committed investment plans and their anticipated effects on its financial position (for example, capital expenditure, major acquisitions and divestments, joint ventures, business transformation, innovation, new business areas and asset retirements); (ii) its planned sources of funding to implement its strategy; and (d) how it expects its financial performance to change over time, given its strategy to address significant sustainability-related risks and opportunities.

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[23] An entity shall disclose information that enables users of general purpose financial reporting to understand its capacity to adjust to the uncertainties arising from significant sustainability-related risks.
…

Metrics and targets

[32] An entity shall disclose the targets it has set to assess progress towards achieving its strategic goals, specifying:
(a) the metric used;
(b) the period over which the target applies;
(c) the base period from which progress is measured; and
(d) any milestones or interim targets.

IFRS S2

Objective

[1] The objective of [draft] IFRS S2 *Climate-related Disclosures* is to require an entity to disclose information about its exposure to significant climate related risks and opportunities, enabling users of an entity's general purpose financial reporting:
(a) to assess the effects of significant climate-related risks and opportunities on the entity's enterprise value;
(b) to understand how the entity's use of resources, and corresponding inputs, activities, outputs and outcomes support the entity's response to and strategy for managing its significant climate-related risks and opportunities; and
(c) to evaluate the entity's ability to adapt its planning, business model and operations to significant climate-related risks and opportunities.

Scope

[3] The draft Standard applies to:
(a) climate-related risks the entity is exposed to, including but not restricted to:
(i) physical risks from climate change (physical risks); and
(ii) risks associated with the transition to a lower-carbon economy (transition risks); and
(b) climate-related opportunities available to the entity.

Strategy

[8] To achieve this objective, an entity shall disclose information about:
(a) the significant climate-related risks and opportunities that it reasonably expects could affect its business model, strategy and cash flows, its access to finance and its cost of capital, over the short, medium or long term (see paragraphs 9–11);
(b) the effects of significant climate-related risks and opportunities on its business model and value chain (see paragraph 12);
(c) the effects of significant climate-related risks and opportunities on its strategy and decision-making, including its transition plans (see paragraph 13);
(d) the effects of significant climate-related risks and opportunities on its financial position, financial performance and cash flows for the reporting period, and the anticipated effects over the short, medium and long term—including how climate-related risks and opportunities are included in the entity's financial planning (see paragraph 14); and
(e) the climate resilience of its strategy (including its business model) to significant physical risks and significant transition risks (see paragraph 15).

[9] An entity shall disclose information that enables users of general purpose financial reporting to understand the significant climate-related risks and opportunities that could reasonably be expected to affect the entity's business model, strategy and cash flows, its access to finance and its cost of capital, over the short, medium or long term. Specifically, the entity shall disclose:
(a) a description of significant climate-related risks and opportunities and the time horizon over which each could reasonably be expected to affect its business model, strategy and cash flows, its access to finance and its cost of capital, over the short, medium or long term.
…
[10] In identifying the significant climate-related risks and opportunities described in paragraph 9(a), an entity shall refer to the disclosure topics defined in the industry disclosure requirements (Appendix B).

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[12] An entity shall disclose information that enables users of general purpose financial reporting to understand its assessment of the current and anticipated effects of significant climate-related risks and opportunities on its business model. Specifically, an entity shall disclose:
(a) a description of the current and anticipated effects of significant climate-related risks and opportunities on its value chain; and
(b) a description of where in its value chain significant climate-related risks and opportunities are concentrated (for example, geographical areas, facilities or types of assets, inputs, outputs or distribution channels).

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[13] An entity shall disclose information that enables users of general purpose financial reporting to understand the effects of significant climate-related risks and opportunities on its strategy and decision-making, including its transition plans. Specifically, an entity shall disclose:
(a) how it is responding to significant climate-related risks and opportunities including how it plans to achieve any climate-related targets it has set. This shall include:
(i) information about current and anticipated changes to its business model, including:
about changes the entity is making in strategy and resource allocation to address the risks and opportunities identified in paragraph 12. Examples of these changes include resource allocations resulting from demand or supply changes, or from new business lines; resource allocations arising from business development through capital expenditures or additional expenditure on operations or research and development; and acquisitions and divestments. This information includes plans and critical assumptions for legacy assets, including strategies to manage carbon energy- and water-intensive operations, and to decommission carbon-energy- and water-intensive assets.
information about direct adaptation and mitigation efforts it is undertaking (for example, through changes in production processes, workforce adjustments, changes in materials used, product specifications or through introduction of efficiency measures).
information about indirect adaptation and mitigation efforts it is undertaking (for example, by working with customers and supply chains or use of procurement).
(ii) how these plans will be resourced.
(b) information regarding climate-related targets for these plans including:
…
(ii) the amount of the entity's emission target to be achieved through emission reductions within the entity's value chain:
(iii) the intended use of *carbon offsets* in achieving emissions targets. In explaining the intended use of carbon offsets the entity shall disclose information including:
the extent to which the targets rely on the use of carbon offsets;
whether the offsets will be subject to a third-party offset verification or certification scheme (certified carbon offset), and if so, which scheme, or schemes;
the type of carbon offset, including whether the offset will be nature-based or based on technological carbon removals and whether the amount intended to be achieved is through carbon removal or emission avoidance; and
any other significant factors necessary for users to understand the credibility and integrity of offsets intended to be used by the entity (for example, assumptions regarding the permanence of the carbon offset).

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[14] An entity shall disclose information that enables users of general purpose financial reporting to understand... the anticipated effect [of significant climate-related risks and opportunities on its financial position, financial performance and cash flows] … Specifically, an entity shall disclose:
…
(b) information about the climate-related risks and opportunities identified in paragraph 14(a) for which there is a significant risk that there will be a material adjustment to the carrying amounts of assets and liabilities reported in the financial statements within the next financial year;
(c) how it expects its financial position to change over time, given its strategy to address significant climate-related risks and opportunities, reflecting:
(i) its current and committed investment plans and their anticipated effects on its financial position (for example, capital expenditure, major acquisitions and divestments, joint ventures, business transformation, innovation, new business areas and asset retirements);
(ii) its planned sources of funding to implement its strategy;
(d) how it expects its financial performance to change over time, given its strategy to address significant climate-related risks and opportunities (for example, increased revenue from or costs of products and services aligned with a lower-carbon economy, consistent with the latest international agreement on climate change; physical damage to assets from climate events; and the costs of climate adaptation or mitigation); and
...

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[15] An entity shall disclose information that enables users of general purpose financial reporting to understand the resilience of the entity's strategy (including its business model) to climate-related changes, developments or uncertainties—taking into consideration an entity's identified significant climate-related risks and opportunities and related uncertainties. The entity shall use climate-related scenario analysis to assess its climate resilience unless it is unable to do so. If an entity is unable to use climate-related scenario analysis, it shall use an alternative method or technique to assess its climate resilience. When providing quantitative information, an entity can disclose single amounts or a range. Specifically, the entity shall disclose:
(a) the results of the analysis of climate resilience, which shall enable users to understand:
(i) the implications, if any, of the entity's findings for its strategy, including how it would need to respond to the effects identified in paragraph 15(b)(i)(8) or 15(b)(ii)(6);
…
(iii) the entity's capacity to adjust or adapt its strategy and business model over the short, medium and long term to climate developments in terms of:
the availability of, and flexibility in, existing financial resources, including capital, to address climate-related risks, and/or to be redirected to take advantage of climate-related opportunities;
the ability to redeploy, repurpose, upgrade or decommission existing assets; and
the effect of current or planned investments in climate-related mitigation, adaptation or opportunities for climate resilience.

Metrics and targets

[20] To achieve this objective, [the objective of climate-related financial disclosures on metrics and targets] an entity shall disclose:
…
(d) targets set by the entity to mitigate or adapt to climate-related risks or maximise climate-related opportunities.

[21] An entity shall disclose information relevant to the cross-industry metric categories of:
…
(b) transition risks—the amount and percentage of assets or business activities vulnerable to transition risks;
(c) physical risks—the amount and percentage of assets or business activities vulnerable to physical risks;
(d) climate-related opportunities—the amount and percentage of assets or business activities aligned with climate-related opportunities;
(e) capital deployment—the amount of capital expenditure, financing or investment deployed towards climate-related risks and opportunities;
...

[23] An entity shall disclose its climate-related targets. For each climate-related target, an entity shall disclose:
(a) metrics used to assess progress towards reaching the target and achieving its strategic goals;
(b) the specific target the entity has set for addressing climate-related risks and opportunities;
(c) whether this target is an absolute target or an intensity target;
(d) the objective of the target (for example, mitigation, adaptation or conformance with sector or science-based initiatives);
(e) how the target compares with those created in the latest international agreement on climate change and whether it has been validated by a third party;
(f) whether the target was derived using a sectoral decarbonisation approach;
(g) the period over which the target applies;
(h) the base period from which progress is measured; and
(i) any milestones or interim targets.