



Consultation Paper Submission

Climate-Related Financial Disclosure | 17 February 2023

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Overview

We thank the Treasury for the opportunity to make a submission in response to this Consultation Paper. The Consultation Paper raises several questions for consideration, and our submission responds to Question 5. We welcome the opportunity to make comments on regulatory design choices and considerations, focusing particularly on our recommendation to incorporate 'digital by design' ('DBD') principles¹ into the design of a new climate-related financial disclosure regulatory framework for Australia.

We recognise the potential advantages of adopting mandatory climate-related financial disclosure obligations for certain entities.² However, we are concerned about the ability of such entities to comply with these obligations in an efficient and cost-effective manner if key concerns surrounding compliance burdens and digital implementation remain unaddressed. Despite rapid digital transformation over the past few decades, the cost of administering and complying with regulatory requirements continues to place a significant burden on Australian businesses.³ We argue that Australia's regulatory frameworks should evolve to incorporate DBD principles in order to reduce compliance burdens and promote the flexible and scalable digital implementation of climate-related financial disclosure obligations.

In relation to Question 5, we make the following points:

1. We recommend the incorporation of DBD principles into the creation of a new regulatory framework for climate-related financial disclosure obligations, in alignment with the Treasury reform principles.⁴

¹ See, for example, European Commission, 'Better Legislation for Smoother Implementation: Digital-Ready Policymaking', *Joinup* (Web Page) <<https://joinup.ec.europa.eu/collection/better-legislation-smoother-implementation/digital-ready-policymaking>>.

² See, for example, Deloitte, *Clarity in Financial Reporting: Disclosure of Climate-Related Risks* (A&A Accounting Technical Report, February 2020) 8.

³ See, for example, Deloitte, *Get out of Your Own Way: Unleashing Productivity* (Report No. 4, 2014) <<https://www2.deloitte.com/au/en/pages/building-lucky-country/articles/get-out-of-your-own-way.html>>.

⁴ The Australian Treasury, *Climate-Related Financial Disclosure* (Consultation Paper, December 2022) 6.

2. We outline specific DBD considerations for the design of new climate-related financial disclosure regulation.

1. Incorporating DBD Principles into Regulatory Design

Whilst the creation of a new climate-related financial disclosure framework is vital to promote Australia's alignment with international climate commitments, it also provides the Australian Government with an opportunity to move towards its goal of promoting digital regulation⁵ through the incorporation of DBD principles. The current linear rulemaking process does not adequately take into account stakeholders' needs for digital implementation solutions for their regulatory compliance obligations. This lack of 'digital focus' is burdensome as it results in the need for 'repeated interpretation multiple times and in multiple stages throughout rule creation and implementation'.⁶ Such duplication increases the risks of misinterpretation in the digital conversion process, which may skew the original policy intent of drafters and cause inadvertent breaches.⁷ Thus, we recommend the inclusion of DBD principles at the outset of the regulatory design and drafting process.

Increasing regulatory compliance obligations have resulted in the rapid growth of the RegTech industry,⁸ which attempts to ease the burden on entities by providing digital compliance solutions.⁹ However, regulatory complexity and ambiguity can impede digitisation efforts and increase the risk of formulating code which does not accurately interpret and reflect the law.¹⁰ Therefore, changes to regulatory design are desirable to ensure a 'clear and common understanding about obligations for entities to disclose climate-related financial risk'.¹¹

⁵ See, for example, Scott Morrison's commitment to see 'within the next decade... legislation written in [computer] code': Institute of Public Administration Australia, 'Prime Minister's Address to the Australian Public Service' (Web Page, 19 August 2019) <<https://www.act.ipaa.org.au/2019-pastevent-primeminister>>.

⁶ James Mohun and Alex Roberts, *Cracking the Code: Rulemaking for Humans and Machines*, vol 42 (OECD Working Papers on Public Governance No 42, 12 October 2020) 31 <https://www.oecd-ilibrary.org/governance/cracking-the-code_3afe6ba5-en> ('*Cracking the Code*').

⁷ Ibid 31–2.

⁸ See, for example, the analysis of the growth trends of the RegTech industry by G Aarti, B Pramod and K Vineet, *RegTech Market: Global Opportunity Analysis and Industry Forecast, 2020-2027* (November 2020) 260 <<https://www.alliedmarketresearch.com/regtech-market>>.

⁹ Deloitte (n 3); Grand View Research, *RegTech Market Size, Share & Trends Analysis Report By Organization Size, By Application (Risk & Compliance Management, Identity Management), By Region, And Segment Forecasts, 2019 - 2025* (Industry Growth report, 2019) <<https://www.grandviewresearch.com/industry-analysis/regulatory-technology-market>>.

¹⁰ Alexandros A Papantoniou, 'RegTech: Steering the Regulatory Spaceship in the Right Direction?' (2022) 6(1) *Journal of Banking and Financial Technology* 1, 1.

¹¹ The Australian Treasury (n 4) 6.

For the purposes of this submission, DBD policymaking (sometimes referred to as ‘digital-ready’ regulation or the ‘better rules’ approach)¹² is a method of regulatory design rather than a coded output. As such, it can be differentiated from approaches to Rules as Code (‘RaC’) which involve creating a coded version of existing legislative and regulatory rules, or an official, machine-consumable version of coded rules developed in parallel with new regulation.¹³

DBD utilises a principles-based approach to consider digitisation from the beginning of the policymaking cycle and ‘ensure that [regulation] is ready for the digital age, future-proof and interoperable’.¹⁴ Attempts to create digital-ready regulation at the domestic level have highlighted several considerations, including the need to:

- Take a user-centric approach based on the business processes of key stakeholders to ensure that policy is ready for digital implementation in practice.
- Ensure alignment with existing digital policies and commitments.
- Focus on reusing existing concepts and data to allow for interoperability and consistency across policies.
- Incorporate multidisciplinary teams into the design process to keep pace with the evolving IT landscape and ensure a range of expertise and perspectives are captured.
- Focus on fostering innovation and technological solutions which are consistent with digital policy.
- Draft clear rules in concise, simple and precise language, where appropriate,¹⁵ to allow for digitisation in the more limited vocabulary of computer code.¹⁶

The successful adoption of DBD principles in regulatory design is evident in Denmark, which is a global leader in public sector digitisation.¹⁷ Denmark’s legislative commitment to ensure that all legislation

¹² See, for example, Tom Barraclough, Hamish Fraser and Curtis Barnes, *Legislation as Code for New Zealand: Opportunities, Risks, and Recommendations* (Report, BrainBox & New Zealand Law Foundation Information Law and Policy Project, March 2021) 1.

¹³ James Mohun and Alex Roberts, *Cracking the Code: Rulemaking for Humans and Machines* (OECD Working Papers on Public Governance No. 42, 2020) 16-8 <https://www.oecd-ilibrary.org/governance/cracking-the-code_3afe6ba5-en>.

¹⁴ European Commission (n 1).

¹⁵ This includes determining where open-textured, ambiguous and discretionary provisions are desirable and should be included.

¹⁶ European Commission (n 1); Monica Palmirani et al, *Legal Drafting in the Era of Artificial Intelligence and Digitisation* (Report, 2022) 96, 63.

¹⁷ Agency for Digital Government: Ministry of Finance, ‘Digital-Ready Legislation’ (Web Page) <<https://en.digst.dk/digital-governance/digital-ready-legislation/>>. Denmark’s achievements in digital transformation are evidenced by their placement as the top country in the EU Digital Economy and Society Index in 2017, 2018 and 2021: European Commission, ‘The Digital Economy and Society Index (DESI) - Shaping Europe’s Digital Future’ (Web Page) <<https://digital-strategy.ec.europa.eu/en/policies/desi>>. Denmark

enacted after July 2018 is 'digital ready' has resulted in increased legal certainty for citizens, more efficiency within the public sector, and greater compliance with rules and regulations.¹⁸ In a similar vein, we recommend the adoption of DBD principles for climate-related financial disclosure regulation in Australia.

2. DBD Considerations for Climate-Related Financial Disclosure Regulation

Investors worldwide are 'increasingly calling for high quality, transparent, reliable, and comparable reporting by companies on climate and other environmental, social and governance (ESG) matters'.¹⁹ Nuanced regulatory design is needed to give legal effect to this new climate-related financial disclosure framework in a way that aligns with DBD principles, the Australian Treasury reform principles, and successfully fulfils the needs of modern investors in assessing enterprise value.²⁰

Option 1: Incorporating Overarching Obligations into Legislation and Detail into Standards and Guidance

The Consultation Paper notes possible options for the position of overarching obligations within the regulatory framework. We recommend adopting an approach which **'incorporates the overarching obligations for climate disclosure (governance, strategy, risk management, targets, and metrics) into legislation and builds out further detail of those obligations through standards and guidance'**.²¹ This approach requires a consideration of the difference between digitising legislation, and regulatory standards and guidance, given that principles of statutory interpretation apply in different ways to non-legislative regulation.

In theory, it should be easier to digitise prescriptive regulatory standards and guidance than more complex legislation, as legislation is governed by mechanisms of legal accountability, including the courts' statutory interpretation function, under the separation of powers.²² Non-statutory regulation is not directly

also placed first in the UN bi-annual e-Government survey in 2018 and 2020: United Nations Department of Economic and Social Affairs, *Gearing E-Government to Support Transformation towards Sustainable and Resilient Societies* (United Nations e-Government Survey, United Nations, 2018).

¹⁸ Agency for Digitisation: Ministry of Finance, *Evaluation of the Effort to Make Legislation Digital-Ready* (Report, May 2021).

¹⁹ IFRS, 'International Sustainability Standards Board' (Web Page) <<https://www.ifrs.org/groups/international-sustainability-standards-board/>>.

²⁰ The Australian Treasury, *Climate-Related Financial Disclosure* (Consultation Paper, December 2022) 6.

²¹ Ibid 10.

²² Anna Huggins et al, 'Digitising Legislation: Connecting Regulatory Mind-Sets and Constitutional Values' (2022) 14(2) *Law*,

covered by these legal accountability mechanisms in the same way.²³ Thus, by incorporating the overarching obligations of climate-related financial disclosure into legislation, whilst placing further details into regulatory standards and guidance, the framework will benefit from the legal certainty of a legislative approach, as well as the relative ease of creating ‘digital ready’ non-legislative regulation.

This approach will allow for DBD principles to be incorporated into the climate-related financial disclosure framework from the outset of the regulatory design process. By building new legislative obligations, rather than relying on existing frameworks, policy makers will be able to incorporate DBD principles, including:

- The utilisation of concise, simple, and precise language in regulatory drafting, where appropriate,²⁴ to facilitate digital conversion into the more limited vocabulary of computer code.
- A focus on fostering innovation and technological solutions which are consistent with digital policy and reduce compliance burdens.
- The use of multidisciplinary teams to ensure a technological and user-centric focus of the new framework.

The Task Force on Climate-Related Financial Disclosures (‘TCFD’) has been endorsed by the leading Australian financial regulators: APRA,²⁵ ASX,²⁶ and ASIC.²⁷ The overall regulatory framework for climate-related disclosure should be broadly consistent with the TCFD, and the subsequent IFRS S2 Climate-Related Disclosures Exposure Draft (‘IS S2 ED’), which builds upon the TCFD recommendations and incorporates industry-based disclosure requirements derived from Sustainability Accounting Standards Board.²⁸ The TCFD recommendations are structured around four thematic areas that represent core

Innovation and Technology 1, 1.

²³ As Weeks notes, non-statutory regulation, commonly known as ‘soft law’, ‘amounts to a method of governing the general public that falls wholly outside the tripartite separation of powers: it does not require legislation, is not accountable in the usual manner of executive acts and it is generally irrelevant to considerations of courts exercising judicial review functions’: Greg Weeks, ‘Soft Law and Public Liability: Beyond the Separation of Powers?’ (2018) 39 *Adelaide Law Review* 303, 305.

²⁴ This includes determining where open-textured, ambiguous and discretionary provisions are desirable and should be included.

²⁵ Australian Prudential Regulator Authority, *Prudential Practice Guide: CPG 229 Climate Change Financial Risks* (Practice Guide, November 2021) 19 [50].

²⁶ Australian Securities Exchange Corporate Governance Council, *Corporate Governance Principles, Corporate Governance Principles and Recommendations 4th Edition* (Guidelines, February 2019) 28. See also Australian Securities Exchange, *Task Force on Climate-Related Financial Disclosures* (Report, 2021) 2

²⁷ Australian Securities & Investments Commission, *Effective Disclosure in an Operating and Financial Review* (Regulatory Guide No 247, August 2019) 20 [66].

²⁸ International Financial Reporting Standards, *Climate-Related Disclosures* (Web Page) <<https://www.ifrs.org/projects/work-plan/climate-related-disclosures/>>.

elements of how organisations operate: governance, strategy, risk management, and metrics and targets.²⁹ This user-centric approach is clear and consistent, whilst also being scalable and flexible depending on the size of the relevant entity. Thus, the TCFD is consistent with these aspects of DBD regulation and the Treasury reform principles.³⁰

However, as the TCFD framework currently stands, it is arguably not digital ready as it relies on organisations ‘describing’ their approach, which is inherently open-textured and does not lend itself to digital implementation given the relatively constrained language of machine-consumable code.³¹ Thus, we suggest that whilst the TCFD will likely form an effective base for the development of climate-related financial disclosure obligations, it will be necessary to develop additional prescriptive regulatory guidance which reflects the key elements of the TCFD in order for the new framework to be ready for digital implementation.

Option 2: Build on Existing Requirements

The abovementioned approach is more favourable than building on ‘existing requirements to disclose any material risks as part of an operating and financial review’,³² as there is no single framework governing the disclosure of climate-related risk in Australia. In the absence of a clear regulatory framework, there is arguably a greater risk of distortion in converting non-legislative regulatory requirements into machine-consumable code to facilitate digital compliance solutions. Some mandatory reporting requirements are established in corporations legislation and regulations. For certain firms, these provisions are supplemented by rules set by supervisory bodies such as APRA, the ASX and ASIC. The existing financial reporting regulatory architecture is complex and consists of legislation, regulatory guidance, listing rules, standards, standard setting boards, and professional bodies.

The intertextual nature of current climate-related financial disclosure obligations limits opportunities for effective digital implementation, as intertextual regulatory requirements are not readily compatible with

²⁹ See Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures* (Final Report, June 2017) 13–4 (*TCFD Final Report*).

³⁰ The Australian Treasury (n 4) 6.

³¹ Barraclough, Fraser and Barnes (n 12).

³² The Australian Treasury (n 4) 11.



the comparatively constrained vocabulary of computer code. Intertextuality increases the need for human interpretation, and creates an increased risk of a 'translation gap' when converting natural language regulation into machine-consumable code.³³ An increased need for human interpretation is contrary to the principles of DBD regulation and the Treasury reform principles, which highlight that the new framework should be designed in a way that 'as far as possible...minimise[s] compliance costs for Australian businesses that operate internationally', whilst also being 'scalable and flexible,' and providing a 'clear and common understanding about obligations for entities to disclose climate-related financial risk'.³⁴ We thus recommend the adoption of Option 1 above.

We hope that our submission assists the Treasury. For further information, please contact Associate Professor Anna Huggins at [REDACTED]

*** About QUT's Digital Media Research Centre**

The Digital Media Research Centre ('DMRC') at the Queensland University of Technology is a leading research centre in digital humanities and social science research with a focus on communication, media, and the law. This submission is based on research informing the Australian Research Council project entitled 'Optimising Digital Compliance Processes in the Financial Services Sector' (project LP210301088).

³³ Danielle Keats Citron, 'Technological Due Process' (2008) 85(6) *Washington University Law Review* 1249, 1260–3; Huggins et al (n 22) 17.

³⁴ The Australian Treasury (n 4) 6.