

28 May 2021

Committee Secretariat
Economic Development, Science and Innovation Committee
Parliament Buildings
Wellington

Re: Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill

1. Please find **attached** the submissions of Lawyers for Climate Action NZ Inc. (**LCANZI**) on the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill (**Amendment Bill**).
2. We support the regime in principle, but in its current form it is not sufficiently wide-ranging, robust, or transparent to stimulate the required shift in investment flows to address the risks of climate change.
3. In summary, we recommend that this Committee revise the Amendment Bill to:
 - (a) **expand the scope of climate reporting entities** to include a wider range of entities. The current scope will be distortionary in the economy and does not allow for proper accountability and comparison across all sectors. In particular, exempting government agencies from the scheme would also be a fundamental failure of the government to lead by example.
 - (b) **encourage buy-in and future-proof the regime** by enabling entities to opt into the regime, and by providing a mechanism to expand the scope of the regime by regulation to avoid the need for primary legislation.
 - (c) **make data and modelling publicly available**. Without publicly available and consistent data and modelling, those entities that do not have the resources or technical expertise are being set up to fail. The government should require agencies that are best placed to prepare this data to publish standard data and modelling.
 - (d) **ensure transparency under the regime**. Due to the high level of public interest in climate reporting, climate statements should be made publicly available.
4. In addition, the proposed regime focusses on the material impact of climate change on entities, but not an entity's material impact on climate change. We recommend that this Committee consider the possibility of introducing the "double materiality" concept in the disclosure regime in future, and how it might be able to achieve this.
5. It is imperative that this regime is not seen by New Zealand business as a "waste of time" or a regulatory hurdle to be circumvented. We encourage this Committee to view the regime as a way to ensure that all New Zealand businesses have a collective revelation of the imminent and significant impact that climate change will have on them.
6. LCANZI requests the opportunity to appear before the Select Committee to address its submission in person. To discuss this further, please contact me on 021 632 260 or by email (president@lawyersforclimateaction.co.nz).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Jenny Cooper'. The signature is written in a cursive, flowing style.

**Jenny Cooper QC
President**

SUBMISSIONS

1. Introduction

1.1 Lawyers for Climate Action NZ Inc (**LCANZI**) is a non-profit group of over 300 lawyers. We advocate for legislation and policies to ensure Aotearoa New Zealand meets or exceeds its commitment under the Paris Agreement to achieve net zero carbon emissions as soon as possible and no later than 2050. More information about us can be found on our website: <https://www.lawyersforclimateaction.nz/>.

1.2 We welcome the opportunity to provide feedback on the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill (the **Amendment Bill**).

2. Executive summary

2.1 We support, in principle, the Amendment Bill and the introduction of mandatory disclosure requirements aligned with the framework provided by the Task Force on Climate-related Financial Disclosures (**TCFD**). However, we consider that the current form of the Amendment Bill does not evidence a strong enough commitment on the part of New Zealand to this global challenge, and improvements can be made.

2.2 In summary, we submit that:

- (a) the definition of *climate reporting entity* is too narrow and should be expanded to cover a wider scope of entities. The current scope will be distortionary in the economy and does not allow for proper accountability and comparison across all sectors;
- (b) the Amendment Bill should direct relevant government agencies to provide the data and guidance which climate reporting entities will need in order to comply. The availability of public data will encourage improved *climate statements* and make compliance costs more manageable for lower-resourced entities that are required to comply;
- (c) climate reporting entities should be required to seek assurance over both the metrics used by the organisation to assess climate-related risks and opportunities, and the assumptions and approach supporting scenario analysis. Scenario analysis is important to support the assessment of potential business implications of climate change, and for informing stakeholders about the strategic response taken to these risks and opportunities;
- (d) the purpose section of the Amendment Bill should be amended to recognise the wider group of stakeholders who have a legitimate interest in the impact of climate change on the entities they deal with;
- (e) the Amendment Bill should be drafted in a manner which will better facilitate expansion in the future to cover not only the impact of climate change on the business, but also the impact of business on climate change, as has been proposed in the European Union; and
- (f) the value of the penalties should be reduced for an initial period of the regime. The penalties currently proposed may be disproportionately heavy and counter-productive, leading entities to resist being included in the regime. It would be more beneficial to encourage entry into the regime and an understanding of the value of the regime without imposing disproportionate fear of non-compliance.

2.3 Our proposed modifications to the Amendment Bill (in 'mark-up' form), reflecting the substantive comments in this submission, are set out in the Annexure.

3. Definition of climate reporting entity

- 3.1 LCANZI supports comprehensive climate-related disclosures from a wide range of entities across all sectors of the economy. It is important for stakeholders to be able to assess the climate risk of the counterparties they deal with, and broad coverage will allow for comparisons of performance across all sectors, incentivising the rapid adoption of good practice and innovative solutions across the private, not for profit, and public sectors. Accordingly, we recommend that the definition of *climate reporting entity* is expanded to cover a wider scope of entities. We have set out in the Annexure proposed amendments to reflect this submission.
- 3.2 First, we recommend that government agencies which meet the prescribed financial threshold be included in the definition of *climate reporting entity*. In comparison to other entities, central and local government agencies and controlled entities have significant resources to comply with the proposed reporting requirements and are in a position to play an influential role in leading disclosure, as role models for the private sector. We cannot identify an adequate reason for excluding government agencies and consider that to do so would be a fundamental failure of leadership. Accordingly, we recommend that the organisations subject to adaptation reporting requirements in section 5ZW of the Climate Change Response Act 2002 should also be subject to reporting requirements under the Amendment Bill.
- 3.3 Second, we recommend that non-listed companies (that are “large” under the definition of the proposed section 461P) in the following sectors, that have been identified as being more likely to be financially impacted by climate change, are considered *climate reporting entities*: energy, transportation, materials and building and agriculture, food and forestry. These sectors have been highlighted by the TCFD as being at a higher financial risk from climate change than other non-financial sectors due to increased exposure to some transition and physical risks ([TCFD Supplemental Guidance for Non-Financial Groups](#)). Within New Zealand’s private sector, a very high proportion of activity is undertaken by non-listed entities. To only require listed companies to disclose, particularly where they have non-listed competitors, may lead to unintended and potentially detrimental consequences.
- 3.4 We submit that, as a minimum, the Amendment Bill should include a prescribed mechanism to facilitate the amendment of the definition of *climate reporting entity* in future. We have set out in the Annexure a proposed mechanism by which additional persons and/or classes of persons can be added to the regime by regulation, rather than by way of legislative amendment. We submit that government should take this step, after due consultation with relevant stakeholders, over the next five years as required to enable the New Zealand community to understand the impact that climate change will have on their enterprises. A consequential amendment is to amend the introductory wording of Part 7A and section 461O (as set out in the Annexure) so as to not inadvertently limit the future application of the regime.
- 3.5 In addition, LCANZI supports measures to encourage entities that are not considered *climate reporting entities* to comply with the requirements of the Amendment Bill and voluntarily identify as *climate reporting entities*. We therefore propose that a section be added which allows shareholders holding at least 5% of the shares in a company to opt that company in to the requirement to prepare climate statements, as is currently permitted in respect of financial statements and annual reports under section 207K of the Companies Act 1993. We have set out in the Annexure proposed opt-in provisions to reflect this submission. We submit that the Committee should request officials to advise as to the appropriate wording to allow members of other forms of legal person, for example limited partnerships or incorporated societies to have a similar ability to require their organisation to opt in. Consideration should also be given as to whether investors in managed investment schemes should also have a comparable ability to require their scheme to opt in.
- 3.6 While we maintain that the ultimate goal is for the regime to apply to all for-profit, not-for-profit and government entities, we consider that, initially, it should be limited to the abovementioned entities and agree with the financial threshold currently proposed in the Amendment Bill. This can be expanded in future, once precedents have been set by larger entities and more sufficient support and guidance is available. If the regime is too broad at the outset, it may result in large scale non-compliance, and in turn, unravel confidence in the regime.

4. Guidance and access to data

- 4.1 As stated in our submission on the discussion document for this topic, LCANZI considers that the role of government to guide, educate, monitor and report in respect of the regime will be critical.
- 4.2 We submit that the word *may* be changed to *must* in section 19A of Part 2 of Subpart 2 (as set out in the Annexure) so that the External Reporting Board (**XRB**) is mandated to issue such guidance. The availability of guidance will be crucial in assisting entities to comply with the proposed reporting requirements, and ultimately, to the success of the regime.
- 4.3 The Amendment Bill does not touch on the issue of access to data to support disclosures aligned with the framework provided by the TCFD. Access to data and baseline assumption scenarios and models for use in climate-related scenario modelling is fundamental to effective TCFD-aligned disclosures which support smarter, more efficient allocation of capital.
- 4.4 Further, we note the issue of access to data in the context of the environmental human rights of access to information and public participation in decision-making, and the significant public interest in climate change. Significant international progress is being made on access to quality climate data, particularly within the European Union. For example, the climate data store available from Copernicus Europe (the European Union's Earth Observation Programme), which provides information about the past, present and future climate including quality-assured information shared on a free, full and open access basis. (see here: <https://climate.copernicus.eu/climate-data-businesses>). The impact of the proposed regime will be more significant if the public have the ability to scrutinise disclosures.
- 4.5 The Amendment Bill should direct relevant government agencies to publish freely accessible data on the projected physical, economic and transitional impacts of climate change in New Zealand. This will be an essential resource for those climate reporting entities to assess the impacts on their activities and to comply with the Amendment Bill. Accordingly, LCANZI proposes that a section is added to the Amendment Bill requiring public entities with relevant climate databases, such as NIWA, the Ministry for the Environment, Treasury and the Ministry of Business, Innovation and Employment, to develop open-source climate-related data for the purpose of supporting disclosures under the Amendment Bill. We have set out in the Annexure proposed new provisions to reflect this submission.

5. Assurance and transparency

- 5.1 LCANZI supports the requirement for assurance for parts of *climate statements* relating to greenhouse gas emissions (section 461ZD). We note that the Amendment Bill provides that assurance engagements may cover other parts of *climate statements*, but this is not a requirement.
- 5.2 We consider that scenario analysis is hugely important to support the assessment of potential business implications of climate-related risks and opportunities, and for informing stakeholders about the strategic response taken to these risks and opportunities. LCANZI therefore recommends that following an initial period of reporting, *climate reporting entities* should be required to seek assurance not only over the metrics used by the organisation to assess climate-related risks and opportunities but also over the assumptions and approach supporting scenario analysis and portfolio analysis. This will help to strengthen scenario analysis as a tool to enhance critical strategic thinking and resiliency to plausible climate-related risks. We have set out in the Annexure proposed amendments to reflect this submission.
- 5.3 We also note the importance of climate-related disclosures to inform stakeholders. The Bill currently provides under s 461ZN for climate statements to be made available in a climate reporting entity's annual report, however, in order to recognise the public interest in climate change, the climate statements should be publicly available in a centralised online register. LCANZI recommends that an online register for disclosure statements be established in order to ensure stakeholders can easily access *climate statements* to assess the merits of an entities'

methods to considering its climate risks and opportunities. For example, the Australian Government's Online Register for Modern Slavery Statements houses Modern Slavery Statements provided by entities reporting under the Modern Slavery Act 2018. <https://modernslaveryregister.gov.au>. Further, LCAZNI recommends that climate reporting entities are required to make electronic disclosures which digitally 'tag' the reported information, so it is machine readable and easily searchable.

6. Definition of stakeholders

6.1 LCAZNI recommends that the purpose statement set out in section 19B be updated to reflect a broad definition of *stakeholders*, including employees, customers and the public. We have set out in the Annexure a proposed amendment to reflect this submission.

6.2 Reporting requirements should facilitate all key stakeholders to make informed decisions surrounding their investments and supplier or consumer behaviour, and to place scrutiny on those entities that do not comply with reporting standards or who engage in business activity that may be heavily impacted by climate change. Recognising this broader group of stakeholders is critical to ensuring the effects of climate change become routinely considered in business and investment decisions in New Zealand.

7. Double materiality

7.1 We also note that the proposed regime and Amendment Bill focus on the impact of climate change on entities but not entities' impact on people and the environment (beyond greenhouse gas emissions). International reporting obligations are increasingly shifting towards "double materiality" reporting, which requires an assessment of both. For example, the European Commission adopted a [proposal for a Corporate Sustainability Reporting Directive \(CSRD\)](#) on 21 April 2021, which strengthens the existing rules introduced by the Non-Financial Reporting Directive (**NFRD**), and lifts sustainability reporting to be on par with financial reporting. The CSRD proposal clarifies that "double materiality" reporting is required and:

- (a) extends the scope to all large companies and all companies listed on regulated markets (except listed micro-enterprises);
- (b) requires the audit (assurance) of reported information;
- (c) introduces more detailed reporting requirements, and a requirement to report according to mandatory EU sustainability reporting standards; and
- (d) requires companies to digitally 'tag' the reported information, so it is machine readable and feeds into the European single access point envisaged in the capital markets union action plan.

7.2 We recommend that this Committee consider the possibility of double materiality and be mindful of how and when this might be introduced in future.

8. Penalties

8.1 Penalties play an important role in incentivising compliance. However, if they are too heavy, especially in the introductory period of the new regime, they may lead to a number of unintended and counter-productive effects, as follows:

- (a) disproportionate resistance to entities being included in the regime – that is obviously unhelpful to getting the maximum possible number of New Zealand businesses thinking about the impact climate change will have on them;
- (b) unwillingness of third-party providers (including government agencies) to provide the data upon which disclosure will be based and to facilitate reliance on it by reporting entities, through fear of being joined as parties in the event that disclosure is found to be incorrect;

(c) undue conservatism and timidity on the part of entities within the regime in terms of assessing the potential impacts on their business and responding to them.

8.2 Instead, it is important that the regime encourages directors and executives to understand the value of climate-related risk reporting and facilitate open and honest conversations, without an overwhelming fear of non-compliance.

8.3 Accordingly, we submit that lesser penalties would be appropriate for an initial period of three years, while New Zealand develops confidence in compliance with the regime.

9. Final comments

9.1 LCANZI requests the opportunity to appear before the Select Committee to address its submission in person. To discuss this further, please contact:

Jenny Cooper QC

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ANNEXURE

Part 1

Amendments to Financial Markets Conduct Act 2013

...

7 New Part 7A inserted

After Part 7, insert:

Part 7A
**Climate-related disclosures ~~for certain FMC reporting entities with higher level of public~~
~~accountability~~**
Subpart 1—Overview, application, and interpretation

...

461O Meaning of climate reporting entity

- (1) In this Act, a person ~~who is an FMC reporting entity that, under section 461K, is considered to have a higher level of public accountability than other FMC reporting entities~~ is a **climate reporting entity** if that person is 1 or more of the following:
- (a) a listed issuer of quoted equity securities or quoted debt securities (or both) (but see **section 351(1)(ab)**);
 - (b) a registered bank that is large under **section 461P**;
 - (c) a licensed insurer that is large under **section 461P**;
 - (d) a credit union that is large under **section 461P**;
 - (e) a building society that is large under **section 461P**;
 - ~~(f) a company that is large under **section 461P**;~~
 - ~~(g) reporting organisations as defined by section 52W of the Climate Change Response Act 2002;~~
 - ~~(h) a company which has opted to be a **climate reporting entity** in accordance with subsection (3);~~
 - ~~(i) a person or class of persons prescribed by regulations to be a **climate reporting entity** for the purposes of this Act.~~
- (2) In this Act, a manager of a registered scheme is a **climate reporting entity** in respect of the scheme if—
- (a) the manager is a large manager under **section 461Q**; and
 - (b) section 461K(1)(b) applies to the manager in respect of the scheme.
- ~~(3) In this Act, a company opts to be a **climate reporting entity** if a shareholder of the company who holds, or shareholders of the company who together hold, not less than 5% of the voting shares, by written notice given to the company within the opting period in **subsection (4)** but not later than 5 working days before the end of that period, requires the company to comply with this Part in relation to the accounting period.~~
- (4) A shareholder of a company, or shareholders of the company, may require a company to opt to be a climate reporting entity in relation to an accounting period under **subsection (3)** at any time from the start of the accounting period until the close of the earliest of the following dates:
- (a) the date that is 6 months after the start of the accounting period;
 - (b) the date of the annual meeting to be held in the accounting period;

(c) in the case of an accounting period that is shorter than 6 months (as a result of the date of the registration of the company or a change of the balance date of the company), the balance date of the period.

(5) If a shareholder of a company requires, or shareholders of the company, require a company to opt to be a **climate reporting entity** under **subsection (3)**, the company must give notice in writing to the Registrar of that option within 20 days.

461P Meaning of large

(1) For the purposes of this Part, a registered bank, credit union, ~~or~~ building society, or other person (A) is **large** in respect of an accounting period if, as at the balance date of each of the 2 preceding accounting periods, the total assets of A and A's subsidiaries (if any) exceed \$1 billion.

(2) For the purposes of this Part, a licensed insurer is **large** in respect of an accounting period if at least 1 of the following paragraphs applies to the licensed insurer:

(a) as at the balance date of each of the 2 preceding accounting periods, the total assets of the licensed insurer and its subsidiaries (if any) exceed \$1 billion:

(b) in each of the 2 preceding accounting periods, the annual gross premium revenue of the licensed insurer and its subsidiaries (if any) exceeds \$250 million.

(3) However, if a registered bank, credit union, building society, ~~or~~ licensed insurer, or other person is an overseas company,—

(a) **subsections (1) and (2)** do not apply; and

(b) the overseas company is large for the purposes of this Part if its New Zealand business, or its group's New Zealand business, is large under **subsection (4)**.

(4) The New Zealand business of an overseas company or its group is **large** in respect of an accounting period if at least 1 of the following paragraphs applies (calculated as if the New Zealand business were an entity):

(a) as at the balance date of each of the 2 preceding accounting periods, the total assets of the New Zealand business exceed \$1 billion:

(b) the overseas company is a licensed insurer and, in each of the 2 preceding accounting periods, the annual gross premium revenue of the New Zealand business exceeds \$250 million.

(5) In this section, **overseas company** means a body corporate that is incorporated outside New Zealand.

...

Subpart 4—Assurance engagements

461ZD Assurance engagement required for ~~parts of~~ climate statements ~~relating to greenhouse gas emissions~~

(1) Every climate reporting entity must ensure that the climate statements or group climate statements that are required to be prepared under any of **sections 461W to 461Z** are, to the extent that those statements are required to disclose greenhouse gas emissions, the subject of an assurance engagement carried out by a qualified CRD assurance practitioner.

(2) **One year after the commencement of the Financial Sector (Climate-related) Amendment Act**, every climate reporting entity must ensure that the climate statements or group climate statements that are required to be prepared under any of **sections 461W to 461Z** are the subject of an assurance engagement carried out by a qualified CRD assurance practitioner.

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Subpart 5—Lodgement of climate statements

461ZN Lodgement of climate statements

- (1) Every climate reporting entity must ensure that, within 4 months after the balance date of the entity, copies of the following are delivered to the Registrar for lodgement:
 - (a) the climate statements or group climate statements that are required to be prepared under any of **sections 461W to 461Y**; and
 - (b) the assurance practitioner's report on those statements.
- (2) Every manager that is a climate reporting entity in relation to a registered scheme must ensure that, within 4 months after the balance date of the scheme, copies of the following are delivered to the Registrar for lodgement:
 - (a) the climate statements that are required to be prepared under section 461Z; and
 - (b) the assurance practitioner's report on those statements.
- (3) A climate reporting entity that contravenes this section commits an offence and is liable on conviction to a fine not exceeding \$50,000.
- (4) The offence in this section is an infringement offence (see subpart 5 of Part 8).
- (5) The Registrar must publish a free online searchable register of all lodged climate statements under **subsections (1) and (2)**.

...

16A Section 548 amended (Other regulations)

After section 548(c), insert:

- (ca) prescribing persons or classes of persons as a climate reporting entity under **section 461O(1)(i)**:

...

Part 2

Amendments to Financial Reporting Act 2013

...

25 Section 12 amended (Functions of Board)

(1) After section 12(a), insert:

- (aa) to prepare and, ~~if it thinks fit~~, issue climate standards for the purposes of any enactment that requires climate statements or group climate statements, or a statement, report, or other information to comply, or be prepared in accordance, with climate standards:

...

28 New sections 19A to 19DE and cross-heading inserted

After section 19, insert:

19A Guidance for purposes of non-financial reporting

- (1) The Board ~~may~~ **must** issue non-binding guidance that relates to non-financial reporting on 1 or more of the matters in section 17(2)(a)(i) to (iv).
- (2) The purpose of the guidance is to facilitate best practice reporting on those matters.
- (3) The guidance—
 - (a) must not be inconsistent with any financial reporting standard or authoritative notice; and
 - (b) must state that it is non-binding.

- (4) Subsection (1)—
- (a) applies regardless of whether an Order in Council is made under section 17(2);
 - (b) does not limit the general powers of the Board.

Climate standards

19B Purpose of climate standards and climate-related disclosures

The purpose of climate standards is to provide for, or promote, climate-related disclosures, in order to—

- (a) encourage entities to routinely consider the short-, medium-, and long-term risks and opportunities that climate change presents for the activities of the entity or the entity's group; and
- (b) enable entities to show how they are considering those risks and opportunities; and
- (c) enable investors, suppliers, customers, employees, the public, and other stakeholders to assess the merits of how entities are considering those risks and opportunities.

...

Data and modelling for climate statements

19E Government agencies to issue data and modelling for climate statements

- (1) Reporting organisations as defined by section 52W of the Climate Change Response Act 2002 may be required by regulations to publish such data and modelling to assist climate reporting entities with the preparation of climate statements.
- (2) The Board must make recommendations to the Minister as to the form, timing and scope of the required data and modelling that must be issued under regulations under subsection (1).

...

30A Section 50 amended (Regulations)

After section 50(ai), insert:

- (aj) prescribing the data and modelling that must be published by reporting organisations as defined by section 52W of the Climate Change Response Act 2002 under section 19E.