



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021

27/05/2021

Submission on the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (the **Bill**).
- 1.2 The Bill amends the Financial Market Conducts Act 2013, Financial Reporting Act 2013 and the Public Audit Act 2001 by introducing mandatory climate-related disclosure requirements for specified FMC reporting entities. The Bill sets out the mechanics of the new climate-related reporting regime, and the substance of the reporting requirements to be set out in applicable climate standards, which are to be prepared by the External Reporting Board (the **XRB**). The Bill also establishes a number of new offences for failing to comply with the new requirements.
- 1.3 The Law Society's submission focuses on:
- (i) some practical issues with the proposed timing for the new climate-related disclosure requirements to take effect; and
 - (ii) a drafting suggestion to clarify the relationship between the obligation to include certain information in a climate-reporting entity's annual report, and the Companies Act 1993 section specifying the information a company must include in its annual report (Companies Act 1993, section 211 (Contents of Annual Report)).
- 1.4 The Law Society does not seek to be heard but is happy to present orally if that would assist the select committee.

2. Practical issues raised by the proposed timing for the new climate-related disclosure requirements to take effect

- 2.1 The Law Society is concerned that the timeframe for the Bill's new climate-related disclosure regime to take effect may be too short.
- 2.2 Clause 2 sets out the dates on which the different parts of the Bill are to come into force. Clause 2(1) provides that Part 2 of the Bill amending the Financial Reporting Act 2013 (except its clauses 32(1) and 33) comes into force on the day after Royal assent. The remainder of the Bill comes into force on a date or dates to be set by Order in Council. However, clause 2(3) provides that:
- (a) any part of the Bill (except Part 3, subpart 1), including Part 1 amending the Financial Markets Conduct Act 2013) that has not come into force by the first anniversary of Royal assent will come into force then; and
 - (b) if Part 3, subpart 1 of the Bill amending the Public Audit Act 2001 has not come into force by the second anniversary of Royal assent then it comes into force on that date.
- 2.3 There are practical considerations that flow from the commencement dates set out in clause 2 of the Bill:

- 2.3.1 There is likely to be limited time for the XRB to develop effective climate standards and education of market participants so that those reporting entities that must comply with the new climate-related disclosure regime are able to do so confidently. The need to ensure this is done properly is particularly acute in circumstances where: (i) there is not an established body of practice in relation to the new climate-related reporting requirements; and (ii) failure to comply with those requirements carries with it significant potential liability (civil and criminal) for the climate-reporting entity and its directors. Where an entity or its directors have allegedly failed to comply with their new obligations, there are also likely to be related questions regarding whether a director has breached her duty under section 137 (Director's duty of care) of the Companies Act 1993.
- 2.3.2 The Law Society therefore encourages the Financial Markets Authority (the **FMA**) to work with the XRB to provide guidance for climate-reporting entities on the approach to: (i) interpretation of the climate standards (once released by the XRB); and (ii) enforcement of the new climate-related disclosure regime. This type of guidance is offered by other independent regulators, including for example, the Commerce Commission in relation to the Commerce Act 1986 and the Fair Trading Act 1986, and the NZX in relation to the NZX Listing Rules. The concern is that, without this type of guidance, directors may take an inconsistent approach to the new disclosure regime, which may undermine the Bill's intention that climate-related disclosure contain "consistent, comparable, reliable, and clear information about climate-related risks and opportunities".¹
- 2.3.3 It will also be important to ensure there are sufficient bodies that satisfy the requirements for approval by the FMA as "CRD assurance bodies".² The Law Society submits that it will be necessary to provide the FMA and the XRB with resources sufficient to: (i) deal with the new obligations contemplated by the Bill; and (ii) lead the significant education component of implementing the new climate-related disclosure regime introduced by the Bill. This is particularly important in an area where both science and practice continue to develop rapidly.

3. Adding express reference to new Part 7A of the Financial Markets Conduct Act 2013 in s 211 of the Companies Act 1993

- 3.1 The Law Society recommends including an express reference to the new Part 7A of the Financial Markets Conduct Act 2013 in section 211(1)(b) of the Companies Act 1993. This will facilitate compliance with the new obligation created by proposed section 461ZO(1) of the Financial Markets Conduct Act 2013.
- 3.2 Clause 7 of the Bill amends the Financial Markets Conduct Act 2013 by inserting a new Part 7A (Climate-related disclosures for certain FMC reporting entities with higher level of public accountability). The new Part 7A includes:

¹ Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill, Explanatory Note, p 1.

² The relevant requirements are set out in new Part 7A of the Financial Markets Conduct Act 2013, proposed s 461ZP

- a) Proposed section 461ZO(1), which obliges a climate-reporting entity that is required to prepare an annual report under the Companies Act 1993 (or any other enactment) to include a statement that the entity is a climate-reporting entity, as well as a link to the site where the following information can be found: (i) the entity's climate statements or group climate statements; and (ii) the assurance practitioner's report on those statements.³
- b) Proposed sections 461ZO(3) and (4), which make it an infringement offence to breach that obligation.

3.3 Section 211 of the Companies Act 1993 sets out the information that must be included in a company's annual report. Section 211(1)(b) of the Companies Act 1993 currently provides:

"211 Contents of Annual Report

(1) Every annual report for a company must be in writing and be dated and ... must—

...

(b) include any financial statements or group financial statements for the accounting period that are required to be prepared under Part 11, Part 7 of the Financial Markets Conduct Act 2013, or any other enactment ... :"

3.4 The Law Society recommends that section 211(1)(b) be amended as follows (additions underlined):

"211 Contents of Annual Report

(1) Every annual report for a company must be in writing and be dated and, subject to subsection (3), must—

...

(b) include:

(i) any financial statements or group financial statements for the accounting period that are required to be prepared under Part 11, Part 7 of the Financial Markets Conduct Act 2013, or any other enactment (if any), and;

(ii) any other information required under Part 7A of the Financial Markets Conduct Act 2013; and:"



Arti Chand
Vice President
 27 May 2021

³ Clause 24 of the Bill inserts, among other things, a definition of "Climate statements" into s 5(1) of the Financial Reporting Act 2013. The new definition provides that "**climate statements**, in relation to a reporting entity and a balance date, means the climate-related disclosures for the entity as at the balance date, or in relation to an accounting period ending at the balance date, that are required to be prepared in respect of an entity by an applicable climate standard". These "climate statements" are separate from an entity's "financial statements" (see Financial Reporting Act 2013, s 6 for the definition of "financial statements").