MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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COVERSHEET

Minister	Hon Dr David Clark	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill: Approval for Introduction	**Date to be published**	25 May 2021

List of documents that have been proactively released		
Date	**Title**	**Author**
8 April 2021	Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill: Approval for Introduction	Office of the Minister of Commerce and Consumer Affairs
8 April 2021	Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill: Approval for Introduction – Minute of Decision	Cabinet Office

Information redacted **YES / ~~NO~~** *[select one]*

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Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill: Approval for Introduction

Proposal

1 This paper seeks approval for the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill (**the Bill**) to be introduced on 13 April 2021, with a view to a first reading by 15 April.

Policy

2 In August 2020, Cabinet agreed to introduce mandatory climate-related disclosures for listed issuers, and large registered banks, non-bank deposit takers, licensed insurers and registered managed investment schemes [DEV-20-MIN-0151 and CAB-20-MIN-0375 refer].

3 The policy is consistent with the Government's decision in December 2020 to declare a climate emergency, committing to urgent action on reducing emissions. It responds to concerns that although many businesses face significant climate-related risks:

3.1 most are not aware of those risks or the impact that climate change has on their businesses, strategies and financial position; and

3.2 most are not disclosing useful or complete information to investors, lenders and insurance underwriters about climate-related risks and opportunities.

4 The main aims of the policy are:

4.1 to provide investors, creditors and insurance underwriters with the information they need to make well-informed decisions; and

4.2 to move to a position where climate change risks and opportunities are routinely considered in business decisions.

5 The disclosure regime will be based on the recommendations made by the Task Force on Climate-related Financial Disclosures (**TCFD**) in June 2017, which is acknowledged from diverse sources to be international best practice. The Bill provides for the External Reporting Board (**XRB**), which is the independent Crown entity that issues financial reporting standards, to issue climate reporting standards. The standards will be underpinned by the 'qualitative characteristics of useful information' outlined in the XRB's Conceptual Framework for Financial Reporting:

5.1 If the information is to be useful, it must be relevant and faithfully represent what it purports to represent.

5.2 The usefulness of information is enhanced if it is comparable, verifiable, timely and understandable.

6 Monitoring and reporting on disclosures and enforcement is also an essential part of the policy. The Financial Markets Authority (**FMA**) will be responsible for these functions.

7 Cabinet also agreed that large Crown financial institutions (**CFIs**) will be required to disclose their climate-related financial risks and opportunities. This decision applies to the Accident Compensation Corporation, Guardians of New Zealand Superannuation, Government Superannuation Fund Authority and National Provident Fund. It is being implemented by way of Letters of Expectations to the CFIs, not through the Bill.

Aspects of the Bill that are likely to be contentious

8 There are good indications that the Bill will be largely supported. Three-quarters of submitters on a joint Ministry of Business, Innovation and Employment (**MBIE**) and Ministry for the Environment (**MfE**) discussion paper published in 2019 supported the proposals. The response after the policy was announced by the Minister of Climate Change in September 2020 was also largely positive.

Broader application

9 23 submitters on the MBIE/MfE discussion document stated that large private companies should also be required to make disclosures. 10 also suggested that high-emitting organisations should be included regardless of whether they are private or public. My view is that the largest gains can be obtained by focusing on financial market participants, so they remain the priority. In addition, applying climate disclosure requirements on large non-issuer companies raises wider issues because they are not required to publish their financial statements. Officials will publicly consult on possible wider private sector application after the legislation has been brought into force.

10 There may also be suggestions that public sector organisations should be required to disclose in accordance with the TCFD recommendations. Public sector entities as a whole are not captured by this regime because the purpose is to increase the efficiency and effectiveness of financial markets. In addition, the Minister of Climate Change and the Climate Change Commission can obtain information from a wide range of public entities (both central and local government) about their climate-related risks and opportunities under the Adaptation provisions that were added to the Climate Change Response Act 2002 through a 2019 Amendment Act.

Possible opposition

11 Some stakeholders took the view that government intervention is not needed at present. BusinessNZ stated that it “strongly adheres to the idea of travelling up the regulatory pyramid, that is, considering non-regulatory options first, moving ‘up the pyramid’ to generic light-handed options and introducing more stringent measures only if clearly warranted.”

12 I do not agree with this approach for two reasons:

12.1 Market-driven, voluntary reporting cannot achieve relevant, consistent, reliable and comparable information, which is what capital markets require.

12.2 The risks to biodiversity and humanity of delaying government intervention are too great. As the Productivity Commission stated more broadly in *Low-emissions Economy*, "Time is running out. Unlike other issues, climate change is a 'one-shot' problem with no luxury of 'coming back' to the political system for a re-try. The problem will, at some point, be too acute, have had too much impact, or be too late to reverse."

13 20 of the 100-odd members of BusinessNZ's Major Companies Group submitted on the MBIE-MfE discussion document. 17 supported the proposal, two did not express a clear view either way and one opposed it.

Application to registered managed investment schemes

14 Listed issuers, banks, non-bank deposit takers and insurers will make disclosures in relation to the reporting entity. This is not the case for managers of investment schemes. They will instead make disclosures in relation to each fund they manage because this reflects the information that investors need.

15 Some investment managers manage multiple funds, so they may have compliance cost concerns and challenges in accessing climate risk data for underlying investments. However, I consider that the proposed minimum of $1 billion of assets under management in aggregate for the Bill to apply is reasonable from a compliance cost perspective. This is because collecting data for an aggregate portfolio also provides all the necessary information to produce fund-by-fund disclosures, spreading the cost across the full range of funds.

Why a Bill is required

16 The Bill will amend the Financial Markets Conduct Act 2013 (**FMC Act**), the Financial Reporting Act 2013 (**FR Act**) and the Public Audit Act 2001.

17 The FMC Act is being amended to create a statutory obligation on 'climate reporting entities' to prepare climate statements. Part 7 of the FMC Act already requires them to prepare and publish financial statements in accordance with generally accepted accounting practice (**GAAP**). Those financial statements are a structured representation of the entity's financial position and financial performance. They disclose information about an entity's assets, liabilities, equity, income, expenses, changes in equity and cash flows.

18 The climate disclosure obligations will be implemented by way of a new subpart 7A of the FMC Act. The law will be clearer and climate disclosures will be more accessible if the financial statements and climate statements are not commingled.

19 The FR Act is being amended to, among other things:

19.1 enable the XRB to prepare and issue and climate-related reporting standards;

19.2 enable the XRB to issue best-practice guidance on integrated reporting that can be applied voluntarily by reporting entities; and

19.3 widen the XRB membership qualification provisions to reflect the expertise relating to its new responsibilities.

20 The Public Audit Act is being amended because a small number of the 200-odd climate reporting entities are 'public entities' as defined in section 5 of that Act (e.g. KiwiBank, Air New Zealand, Meridian Energy and Port of Tauranga). Consistent with the principles of the Public Audit Act, the Bill provides for the Auditor-General to be the service provider in relation to the assurance of greenhouse gas emissions disclosures by climate reporting entities that are also public entities.

Infringement offences

21 The Bill includes infringement offences in new Part 7A of the FMC Act:

21.1 for failing to keep climate related disclosure records in the prescribed manner (if any); and

21.2 for not making those records available for inspection without charge to the entity's directors, a supervisor, the FMA or other authorised persons.

22 These offences are the same, in substance, as two extant infringement offence provisions under Part 7 of the FMC Act, which relates to financial reporting. The fees for the Part 7 infringement offences are $7,500 and $12,500 under Regulations made under the FMC Act. The fees will be the same for the new Part 7A offences.

23 **The Ministry of Justice** considers that the proposed infringement offences in this proposal and the existing infringement offences in the FMC Act depart from the best practice for how infringement regimes are constructed. The proposed infringement fees are significantly higher than the guidance recommends ($3,000). The Ministry of Justice guidance sets this amount because infringement offences are penalties handed out by enforcement officers rather than a court.

24 The Ministry of Justice considers matters that require a more significant penalty to be best dealt with by way of the court where certain elements must be proven before the penalty is applied and to ensure the individual has the opportunity to raise evidence to defend themselves. While the bodies that may have to pay these penalties are large and well resourced, the Ministry of Justice considers that infringement offences are not appropriately used in this context.

25 Further, the Ministry of Justice considers that there is an issue of certainty in the provisions as there is nothing on the face of the legislation to demarcate when to apply an infringement offence or go by way of the full criminal offence.

26 I consider that there is a strong case for departing from the Ministry of Justice's guidelines because:

26.1 they are entirely in keeping with the liability regime under the FMC Act;

26.2 $7,500 and $12,500 fees are appropriate given the size of the regulated entities. Most of them own or manage assets in the billions of dollars;

26.3 Although the offences are not committed in high numbers, they are minor in the context of the FMC Act. A requirement to take cases to court, due to the

absence of infringement offences means that it is very unlikely that the provisions would be enforced by the FMA.

Outstanding policy issues

27 There are no outstanding policy issues.

Impact analysis

28 A regulatory impact statement was prepared in accordance with the necessary requirements. It was attached to the Cabinet paper that sought approval of the policy relating to the Bill [DEV-20-MIN-0151 and CAB-20-MIN-0375 refer].

Compliance

29 The Bill complies with each of the following:

29.1 the principles of the Treaty of Waitangi;

29.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;

29.3 the disclosure statement requirements. A departmental disclosure statement has been prepared and is attached to this paper;

29.4 the principles and guidelines set out in the Privacy Act 1993; and

29.5 the Legislation Guidelines (2018 edition). Officials obtained advice from the Legislation Design and Advisory Committee before the policy approvals were sought from Cabinet.

30 There are no relevant international standards and obligations.

Consultation with the public sector

31 MBIE has consulted with:

31.1 MfE, Ministry of Justice, Ministry for Primary Industries, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Treasury and Department of the Prime Minister and Cabinet

31.2 the XRB, FMA, Reserve Bank of New Zealand, and Energy Efficiency and Conservation Authority.

32 The Ministry of Justice's comments on infringement offences appear in paragraphs 23 to 25.

Stakeholder consultation

33 MBIE and MfE issued a discussion document in October 2019 outlining the policy of the Bill. 77 submissions were made, with around three-quarters supporting the proposals.

34 It was decided to not release an exposure draft of the Bill before introduction. This

decision reflects the urgent need to respond to the climate emergency. An exposure draft would have delayed implementation by several months.

35 The proposals in this paper have undergone consultation with the Government caucus and the Green Parliamentary caucus in accordance with the Co-operation Agreement.

Binding on the Crown

36 The Acts being amended by the Bill each state that the Act binds the Crown. The Bill does not make changes to those sections.

Creating new agencies or amending law relating to existing agencies

37 The Bill will not create a new agency.

38 The Bill will not amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

39 The Bill does not involve the allocation of decision-making powers between the executive, the courts and tribunals. It does:

39.1 broaden the XRB's standards-making powers under the FR Act; and

39.2 provide for the application of existing enforcement powers exercisable by the FMA under the FMC Act and the Financial Markets Authority Act 2011 in relation to climate statements.

Associated regulations

40 It will be necessary to make changes to the Financial Markets Conduct Regulations 2014. None of those changes are central to the Bill.

41 The XRB will need to issue at least one climate standard before the reporting regime comes into force. Section 27 of the FR Act, which is not being amended by the Bill, includes a 28 day rule requirement in relation to all standards issued by the XRB.

Other instruments

42 Section 25 of the FR Act, which is not being amended by the Bill, states that any standard issued by the XRB is a disallowable instrument. Hence, climate standards issued by the XRB under its broadened powers will be disallowable.

Definition of Minister/department

43 The Bill does not include a definition of department.

44 The Acts being amended by the Bill each include definitions of Minister or Ministers. The Bill does not amend those definitions.

Commencement of legislation

45 The Bill provides for the FR Act changes to come into force on the day after the date of the Royal Assent. The XRB will be able to issue climate standards from that date.

46 The FMC Act changes that relate to the disclosure regime will come into force no less than one year after Royal assent. This will provide climate reporting entities sufficient time to set up data gathering systems. It means that the disclosure regime will come into force for financial years commencing on or after a date to be determined in 2022, e.g. for financial years commencing on or after 1 July 2022.

47 The changes that relate to independent assurance of greenhouse gas emissions disclosures will come into force no later than two years after the Royal assent. This delay is needed to establish a system for regulating the assurance providers.

Parliamentary stages

Confidential advice to Government

49 I propose that the Bill be referred to the Economic Development, Science and Innovation Committee for four months.

Proactive Release

50 I intend to release the paper proactively within 30 business days. The content relating to the Legislation Programme will be redacted.

Recommendations

51 The Minister of Commerce and Consumer Affairs recommends that the Committee:

Confidential advice to Government

2 note that the Bill will introduce mandatory climate-related financial disclosures for listed issuers, and large registered banks, non-bank deposit takers, licensed insurers and managed investment schemes;

3 approve the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

4 agree that the Bill be introduced on 13 April 2021;

5 agree that the government propose that the Bill be:

5.1 referred to the Economic Development, Science and Innovation Committee for four months consideration;

6 note that the departmental disclosure statement is attached.

Authorised for lodgement

Hon Dr David Clark
Minister of Commerce and Consumer Affairs