BELL GULLY

SUBMISSION

to the

Ministry of Business, Innovation and Employment (MBIE)

on

Adjustments to the climate-related disclosures regime

February 2025

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Introduction

Bell Gully welcomes the opportunity to make a submission on the discussion document on adjustments to the climate-related disclosures regime released by MBIE in December 2024 (**Discussion Document**).

As a leading New Zealand law firm with deep expertise in financial services regulation, corporate governance, and ESG-related compliance, Bell Gully has advised a number of climate reporting entities (**CREs**) on their climate-related disclosure (**CRD**) obligations under the Financial Markets Conduct Act 2013 (**FMCA**).

Bell Gully supports a balanced and effective CRD framework that ensures clear, accurate and meaningful climate-related disclosures while maintaining appropriate liability settings for directors and CREs. In particular, while not wishing to detract from the importance of the climate objectives of New Zealand or diminish the need for change, we consider that directors should not be personally liable for climate-related disclosures. Imposing personal liability is disproportionate, unnecessary and is likely to drive a conservative approach to disclosure, undermining the effectiveness and purpose of the CRD regime: to encourage behavioural change towards the transition to a low-emissions, climate-resilient future.

We appreciate MBIE's willingness to consult on these issues and would welcome the opportunity to engage further on the detail of the proposed options and regulatory changes as policy development continues. We remain available to assist MBIE and look forward to ongoing discussions.

The views expressed in this submission are those of a number of our partners with relevant experience. They do not necessarily represent the views of our clients.

If MBIE has any questions concerning this submission or would like us to elaborate on any aspect of it, please contact:

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SUBMISSION

This submission focuses on certain aspects of the Discussion Document relating to our practical experience of advising clients on the CRD regime and broader financial markets regulation.

1. Challenges of Personal Liability

1.1 We support the proposal to remove personal liability for directors in relation to climate related disclosures.

1.2 In our view, imposing personal liability for directors under the CRD framework has contributed to the significant compliance costs of the CRD regime, and imposes burdens on CREs and their directors that are disproportionate and contrary to the purposes of the CRD regime.

1.3 In particular:

(a) **Personal liability is inappropriate given the subject matter of climate statements**

Climate-related disclosures inherently involve forward-looking statements, estimates, and assumptions based on evolving climate science, market conditions, and regulatory developments. Understanding the impacts and implications of climate change is challenging, involves grappling with a high degree of uncertainty, and, in many instances, longer time horizons than those considered in other contexts such as financial reporting. Holding directors personally liable is inappropriate given the nature of the disclosures, the specific technical expertise required in the preparation of the statements, and the necessary reliance on various inputs and factors beyond the directors' control.

(b) **Personal liability undermines the purpose of the CRD regime and drives conservative behaviour**

The stated purpose of the CRD regime is to "encourage" entities to routinely consider the risks and opportunities that climate change presents, and to demonstrate that to investors and other stakeholders.[1] That purpose does not require the imposition of personal liability on directors. On the contrary, the current liability settings incentivise CREs and their directors to take a cautious and conservative approach to disclosure, with a focus on engaging narrow statutory defences under the FMCA.

(c) **Personal liability deters directors, increases compliance costs, and could deter NZX listings**

Exposing directors to personal liability is likely to discourage qualified individuals from accepting board roles at CREs, particularly in sectors with significant climate-related exposure. This could lead to a reduced talent pool for governance positions, weakening corporate decision-making and overall board effectiveness. In addition, the high compliance costs associated with the regime (as CREs seek expert advice to mitigate liability) may result in the diversion of resources away from substantive climate-related initiatives. These costs hinder the efficient running of New Zealand businesses and could also disincentivise businesses from listing on the NZX (compared to, for example, the ASX where deemed liability provisions are not present). As the Discussion Document notes, climate reporting can be a barrier to listing on the NZX and creates a potential risk of regulatory arbitrage with Australia.

2. Recommended amendments

2.1 The CRD framework should promote high-quality climate disclosures while ensuring that liability settings remain proportionate and effective. Instead of imposing personal liability on directors, the focus should be on CRE-level accountability, supported by clear guidance and regulatory oversight to encourage accurate, meaningful, and forward-looking disclosures.

1 Section 19B of the Financial Reporting Act 2013.

2.2 We recommend:

(a) **Removing personal liability under section 534**

We support Option 3 in the Discussion Document, which would amend section 534 of the FMCA to no longer apply to climate-related disclosures. That section deems directors to have breached certain obligations relating to the preparation and lodgement of climate statements, where the CRE itself is in breach. In our view that deeming provision is inappropriate given that the preparation and lodgement of a climate statement is the obligation of the CRE and requires the collective involvement of a wide range of a CRE's stakeholders. It is not appropriate to characterise it as the sole responsibility of an individual director. The removal of the deeming provision would appropriately ensure that directors were not automatically deemed responsible for failures in preparing and lodging a statement by the CRE itself.

(b) **Relief from liability for Part 2 of the FMCA**

We also support amending the regime to provide that directors cannot be held liable for an unsubstantiated representation in a climate statement, under the fair dealing provisions in Part 2 of the FMCA. Unlike traditional financial disclosures, CRDs involve scientific assumptions and future projections that are inherently uncertain. Under the current liability settings, directors face significant risk simply for approving mandatory disclosures under the CRD regime that, despite being made in good faith and based on expert advice, may later be challenged as unsubstantiated. This risk is heightened because data quality and availability for CREs is expected to continue to improve over time and the landscape in relation to GHG emissions measurement standards and international best practice is constantly evolving. The potential for personal exposure under Part 2 is also likely to discourage open discussion and ambitious target-setting, leading to overly cautious disclosures that do not serve the regime's purpose of providing meaningful climate-related insights to investors and stakeholders.

We would, however, emphasise that the same approach should equally apply to the other key provisions under the fair dealing regime, including section 19 (misleading or deceptive conduct generally), section 20 (misleading conduct in relation to financial products), and section 21 (misleading conduct in relation to financial services). Given the forward-looking and evolving nature of climate-related disclosures, these provisions present similar risks of undue personal liability for directors, potentially deterring them from fully engaging with the development of the disclosures. Ensuring that directors are not personally liable under these provisions will help strike the right balance between accountability and effective governance, while still maintaining robust protections against any misleading or deceptive conduct by the CRE itself.

For the same reason, we support the suggestion in the Discussion Document that the same approach should apply equally under the Fair Trading Act 1986 (**FTA**). The FTA's core prohibitions (including sections 9-13) could create additional layers of liability in relation to CRDs. Aligning liability settings across both the FMCA and FTA will ensure consistency, reduce compliance burdens, and support the regime's objective of delivering high-quality, decision-useful climate information to investors and stakeholders.

(c) **Granting an enforcement moratorium**

In parallel with the above changes, we also support Option 4 in the Discussion Document, which proposes a temporary safe harbour provision to protect CREs and their directors from civil actions for a defined period. This measure would provide valuable breathing space for CREs and their directors as they continue to refine their climate reporting practices, while also giving directors greater confidence in approving climate statements without undue fear of litigation.

Given that the regime is still in its early stages and relies on evolving methodologies, a moratorium on civil claims would ensure that liability risks do not stifle the intended purpose of the CRD framework – which is to provide investors and stakeholders with meaningful and transparent climate information.

We note that in Australia, a safe harbour applies to certain categories of disclosures, specifically Scope 3 emissions, scenario analysis, and transition plans. However, we do not see a principled reason for restricting the New Zealand safe harbour in the same way. The same challenges of uncertainty, data availability, and evolving methodologies apply broadly across climate-related disclosures, not just these

specific categories. A broader safe harbour would better support the integrity and development of climate reporting practices while still maintaining investor confidence. That is particularly relevant given the challenging new elements of the reporting requirements that take effect as adoption provisions progressively fall away (including anticipated financial impacts disclosures which involve significant estimation uncertainty and require CREs to make predictions about the future).

As to the duration and scope of the civil claim moratorium, we recommend that it applies for at least the next two reporting periods, including retrospective protection for statements made in 2024. At the very least, the moratorium should exclude claims by private litigants, as the risk of opportunistic lawsuits could otherwise discourage open and ambitious climate disclosures. In principle, we also see value in excluding claims by the FMA during this period, ensuring that enforcement focuses on supporting compliance and capability-building in the early stages of the regime.

2.3 In summary, we recommend a combination of Option 3 and Option 4 in the Discussion Document. Together, these options strike the right balance between ensuring accountability for CREs and allowing directors to focus on meaningful oversight without unnecessary personal legal risk.

2.4 Importantly, we do not believe that these changes will result in any reduction in the level of care taken by CREs in preparing climate-related disclosures. The reputational consequences alone for CREs provide a strong incentive to ensure that climate statements are accurate, well-supported, and thoughtfully prepared. Investors, regulators, and other stakeholders will continue to scrutinise these disclosures, driving careful and responsible reporting. At the same time, removing personal liability will allow directors to be involved at a level more typical of a Board approval process, rather than engaging in excessive risk mitigation. This will make the process more efficient and less costly, while still maintaining high standards of governance and oversight.

3. OTHER MATTERS

3.1 While the focus of our submission is on director liability, we also note two additional points:

(a) We agree that it would be appropriate to set the reporting thresholds in secondary legislation, such as regulations, rather than embedding them in the primary legislation. Delegating authority to the Minister to adjust the thresholds in accordance with defined statutory criteria would provide the necessary flexibility to ensure the regime remains fit for purpose as climate reporting practices evolve. This approach would allow for timely adjustments in response to international trends, emerging best practices, and changes in market conditions, ensuring that New Zealand's climate disclosure framework remains aligned with global standards while avoiding the delays associated with legislative amendments. In our view, public consultation should be undertaken by the Minister before adjusting the reporting thresholds.

(b) We would also support the introduction of a "due diligence" defence for CREs in relation to the CRD regime and Part 2 of the FMCA. This would be similar to the due diligence defence in section 500 of the FMCA, which applies in the context of capital raising. The available defences in section 503 to Part 2 liability are only available to directors and are not available to the CRE. Given the complexity and evolving nature of climate-related disclosures, it is appropriate that a CRE should not be liable for a contravention if it can demonstrate that reasonable due diligence processes were followed. Introducing such a defence would balance the need for accountability with the practical realities of climate reporting, ensuring that entities that take genuine, diligent steps to comply with the framework are not unfairly penalised.

Once again, we thank MBIE for the opportunity to submit on the Discussion Document.

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