chapman tripp

Submission to the Ministry of Business, Innovation and Employment

Adjustments to the climate-related disclosures regime

December 2024 Consultation Paper

14 February 2025

Introduction

1 This submission responds to MBIE's consultation on proposed adjustments to the climate-related disclosures regime (*CRD*) under the Financial Markets Conduct Act 2013 (*FMCA*).

2 We are responding specifically to the following chapters of the consultation document:

2.1 Chapter 2 – options to adjust the New Zealand reporting thresholds for listed issuers and investment scheme managers;

2.2 Chapter 3 – current liability settings for climate reporting entities (*CREs*) and directors and options for change in relation to director liability; and

2.3 Chapter 4 – encouraging reporting by subsidiaries of multinational companies.

3 Our overall comments are provided below, with answers to the particular questions at **Annex 1**.

Chapter 2 – Thresholds

4 Chapman Tripp has engaged with MBIE, MfE, XRB and the FMA through the development and implementation of the CRD regime, and has supported a large number of climate reporting entities (**CREs**). We have observed both the burden that the regime has imposed on CREs, particularly smaller listed issuers, and also the significant positive impact that the regime has had on enhancing capability within organisations to understand, measure and manage climate related risk.

5 We do not take a position in relation to the thresholds applicable to listed issuers and fund managers. However, we do have a concern regarding the justifications for limiting the regime solely to listed issuers, as opposed to private entities of a similar size. Limiting the regime to listed issuers is contributing to real concerns that issuers will delist from the NZX or potential issuers will choose to access other forms of capital.

6 We note that if a change is made to the monetary thresholds as proposed under Options 2 or 3,[1] then this change should apply to both the issuers of listed capital and issuers of debt. The consultation document currently contemplates that only listed equity issuers would be subject to changes.

1 MBIE consultation document (Dec 2024): Table 3, page 17; "Options to amend the listed issuer reporting thresholds".

Chapter 3 - Liability Settings

Director Liability Settings

7 Although the consultation document is focused on addressing director liability, this is only one aspect of the liability regime for CRD in Parts 2, 7A and 8 of the FMCA. We agree that removing deemed director liability would significantly address many of the criticisms that have been made of the regime.

8 In overview, we consider that liability settings should be adjusted as follows, representing a hybrid of **Options 3** and **4**:

8.1 **deemed liability for contraventions of part 7A (per s 534) should be removed for directors by repealing s 534(1)(cb)**. This means that directors will not be deemed liable where the CRE is in contravention of the FMCA by having failed to keep proper CRD records as required; prepare CRD that complies with the Climate Standards; lodge CRD when required; or obtain and lodge mandatory assurance in relation to GHG emissions disclosures;

8.2 **accessory liability (i.e. for persons "involved" in a contravention by the CRE) should remain as per the status quo** (noting that there is a high bar for this to be met in any event);

8.3 **liability for unsubstantiated representations under s 23 for CREs, as well as any directors or employees involved as an accessory to a contravention of s 23 should remain as per the status quo, except in relation to scenario analysis,** on the basis that *"climate-related scenarios are [inherently] plausible, challenging descriptions of how the future may unfold",*[2] and it is therefore by definition difficult to demonstrate that any particular scenario has a "reasonable basis"; and

8.4 **a limited two-year safe harbour be established to prevent civil proceedings from being brought by third parties for contraventions of Part 2 FMCA (i.e. asserting that the CRD is misleading or unsubstantiated) in relation to disclosures of scope 3 GHG emissions; scenario analysis; and transition planning**, albeit with proceedings brought by the FMA and criminal liability remaining unaffected.

9 We note that primary liability for CREs under section 19 (prohibiting misleading and deceptive statements in CRD, including by omission) should be retained, albeit limited by the safe harbour noted above. As per the safe harbour which applies in Australia[3] the FMA would still

---

[2] FMA 2023 Sector Guidance, page 8" 'Climate-related scenario' is defined as: *A plausible, challenging description of how the future may develop based on a coherent and internally consistent set of assumptions about key driving forces and relationships covering both physical and transition risks in an integrated manner. Climate-related scenarios are not intended to be probabilistic or predictive, or to identify the 'most likely' outcome(s) of climate change. They are intended to provide an opportunity for entities to develop their internal capacity to better understand and prepare for the uncertain future impacts of climate change.*

[3] The Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024, cl 1707D(4).

be able to investigate CREs for contraventions of s 19 and 23, including in response to any concerns raised by third parties on their behalf, and there would be no safe harbour for criminal liability under ss 512 (general offence for *knowingly* making or approving false or misleading statements) or 461ZG (knowing failure to comply with the Climate Standards) of the FMCA.

Problem definition

10 We agree with "the problem" as defined in the consultation document at paragraphs 99-101. Chiefly, that:

10.1 an overly stringent liability regime is not suitable for the nature of climate reporting, which is new, as well as being inherently qualitative, forward looking and uncertain – we have observed on multiple occasions that this creates a chilling effect amongst boards and CREs when reporting, which works against the regime's purposes;

10.2 mandatory forward looking statements in CRD are more complex for a director to endorse than financial reporting in financial statements which, given their retrospective nature, deal with historical content, and are often audited;

10.3 the application of s 534 and the structure of the defences in Part 8 of the FMCA in practice requires all directors to be involved in the process to some degree, which makes delegation to management practically difficult to implement; and

10.4 there is far greater maturity of director expertise in relation to the preparation of financial statements. In contrast, the nature of disclosures is far more nascent in the CRD regime, and many directors lack that expertise given the regime's infancy.

11 We therefore submit that the extension of *deemed* liability to CRD is not appropriate, as compared to other corporate financial reporting.

12 We note that no equivalent deemed liability regime exists in Australia in relation to CRD. Instead, general director liability under the Corporations Act 2001 applies to sustainability reporting. These include director duties to act with care and diligence, in good faith, and ensuring that the company follows financial reporting rules (including sustainability reporting where part of financial disclosures) and not making or approving false or misleading statements (ss 180, 181, 344 and 1309). Directors must make declarations that the CRE has taken reasonable steps to ensure that the sustainability report's contents comply with the Corporations Act 2001 (and the declaration will require full compliance within three years), but there is no automatic liability if the CRE is in breach.[4]

Liability under s 23 (unsubstantiated representations)

13 Section 23 plays an important role in ensuring that content provided to investors is appropriately substantiated. We disagree with the proposal to disapply s 23 entirely in relation to CRD. It would run counter to investor confidence in the regime and its purposes if CREs and their directors were able to issue CRD without equivalent substantiation to financial statements, particularly in relation to statements as to

[4] ASIC Directors Declaration requirements <www.asic.gov.au/regulatory-resources/sustainability-reporting/for-preparers-of-sustainability-reports/what-should-your-sustainability-report-contain>

performance in the financial year in question (e.g. "current impacts" of climate change, or descriptions of current governance or risk management).

14 However, as above, we do support the disapplication of s 23 in relation to scenarios prepared by the CRE in order to inform the CRE's identified climate-related risks and opportunities and test resilience. Requiring substantiation of scenarios is difficult to achieve in practice. There is room for further consideration too as to whether s 23 might be more generally disapplied in relation to forward looking transition planning disclosures, and disclosures of emissions targets, as a CRE would still need to comply with the requirements of s 19 (no misleading statements). But we do not consider that that should endure past an initial safe harbour, as emissions targets and transition planning are critical aspects of CRD to demonstrate how a CRE is proposing to respond to the priority climate risk and opportunities it has identified, and should be subject to substantiation in the same way as other forward looking statements provided to the market (e.g. earnings guidance).

Annex – MBIE Questions:

Chapter 3: Climate reporting entity and director liability settings	
15	When considering the director liability settings, which of the four options do you prefer, and why?
	A combination of Option 3 and 4: deemed director liability is appropriate to remove, but accessory liability still plays an important role in ensuring directors (and senior executives) are appropriately exposed to liability if genuinely "involved" in a contravention (noting that this is a high threshold to meet under the Act). We also support Option 4 for a limited (two year) period.
16	Do you have another proposal to amend the director liability settings? If so, please provide details.
	We support the introduction of short-term protections for *both* CREs *and* directors in preparing CRD, equivalent to the Australian regime, as set out at paragraphs 8-9 above.
17	If the director liability settings are amended do you think that will impact on investor trust in the climate statements?
	As per paragraph 110 at page 30 of the consultation document; *"the objective is to ensure that directors have the right incentives to encourage robust and useful reporting."* Deemed liability, particularly in regard to forward looking statements, conflicts with these incentives and encourages a significant focus on process and procedure. Without such a focus on director liability, directors would be more likely to encourage transparent, innovative and fulsome reporting. This could increase investor trust over the medium to long term.

18	If you support Option 3, should this be extended so that section 23 is disapplied for both climate reporting entities and directors? If so, why?
	Not in perpetuity. We consider that the purposes of the regime would be better achieved by creating a temporary modified liability regime, to allow CREs and boards to acclimatise to the demands of the regime and to upskill, as per paragraph 14 above. We recommend that liability for CREs and directors/employees under section 23 (unsubstantiated representations) is removed solely in relation to scenario analysis on the basis that *"climate-related scenarios are [inherently] plausible, challenging descriptions of how the future may unfold",* and as such it is difficult for CREs, and directors, to be confident that there is a reasonable basis for scenarios, as required by section 23. We recommend carve outs to that exemption regime so that the FMA would retain the ability to investigate CREs for contraventions of s 19 and s 23, and no safe harbour for criminal liability with regard to knowingly making or authorising a statement that is false or misleading,[5] and knowing failure to comply with the climate standards.[6]
19	If you support Option 4 (introduce a modified liability framework, similar to Australia) what representations should be covered by the modified liability, i.e., should it cover statements about scope 3 emissions, scenario analysis or a transition plan, and/or other things?
	We support Option 4 in relation to scope 3 emission disclosures, scenario analysis and transition planning disclosures, as set out at paragraph 14 above.
20	If you support the introduction of a modified liability framework, how long should the modified liability last for? And who should be covered, ie., should it prevent actions by just private litigants, or should the framework cover the FMA as well? (Criminal actions would be excluded)
	We recommend that liability for CREs under s 19 (misleading and deceptive conduct) is retained but subject to a limited safe harbour for CRD published on or prior to the date that is two years after the date of enactment (i.e. a two year safe harbour period), which would protect CREs (and anyone sued as an accessory to a section 19 or s 23 contravention) solely from civil claims brought by third parties. As above, the FMA would still be able to bring proceedings against CREs for civil contraventions and criminal liability.

5 FMCA, s 512

6 FMCA, s 461ZG

Chapter 4: Encouraging reporting by subsidiaries of multinational companies	
21	Do you think that there would be value in encouraging New Zealand subsidiaries of multinational companies to file their parent company climate statements in New Zealand?
	No. We agree with the MBIE paper that this is likely to cause confusion as to the status of the climate statements (i.e. the extent to which they are subject to New Zealand legal requirements) and may be perceived as making New Zealand a less attractive place to do business. We also expect that there may be confusion amongst New Zealand subsidiaries and their parent companies as to whether filing on such a register is truly voluntary (as they may come across the register or statutory provisions dealing with it, if any, and be under the impression that it is mandatory). There would also be a question as to how parent climate statements prepared in languages other than English should be dealt with, even if filing is on a voluntary basis.
22	Do you think that, alternatively, there would be value in MBIE creating a webpage where subsidiaries of multinational companies could provide links to their parent company climate statements?
	See our comments in Question 21. Given the comment regarding the difficulty of recovering any associated register costs, we do not support MBIE investing to develop such a website if the costs are not going to be borne by those choosing to file.

Chapman Tripp
14 February 2025

chapman tripp

www.chapmantripp.com