LAWYERS FOR
CLIMATE ACTION NZ INC.

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25 February 2025

Hon. Scott Simpson
Minister of Commerce and Consumer Affairs

By email

Tēnā koutou,

Re: Briefing to incoming Minister regarding potential changes to climate-related disclosures regime

1. Congratulations on your appointment as Minister of Commerce and Consumer Affairs.
2. You have become Minister at a critical time for the relatively new Climate-Related Disclosures Regime (**CRD regime**). As you will know, the previous Minister recently proposed amendments to the CRD regime. Those amendments include:
    a. Increasing the reporting threshold for Climate Reporting Entities (**CREs**), including for Listed Entities; and
    b. Reducing and/or removing directors' liability for climate statements.
3. We are writing to you on behalf of Lawyers for Climate Action NZ Incorporated. As you may recall from your meeting with Jenny when you were the opposition spokesperson for climate change, Lawyers for Climate Action was founded in 2019 to use the law to drive more effective climate action. Our members include King's Counsel, barristers, solicitors, and legal academics, including many lawyers who work intimately with the CRD regime. More information about us can be found on our website.
4. We agree that tweaking the CRD regime now that the first year of reporting has ended is justified where evidence suggests that improvements are warranted. However, we have serious concerns about the proposed amendments. In particular:
    a. they risk creating a **$28 billion blindspot** in New Zealand's public/listed capital markets, without creating any real compliance cost savings. The risks, and the unintended consequences that they would create, were not adequately considered by the Discussion Document.
    b. they will reduce alignment with Australia's CRD regime, as the coverage of New Zealand's CRD regime will be significantly smaller.
    c. they will not meaningfully incentivise listing on the NZX.

5. Weakening our world-leading CRD framework so quickly after its adoption in response to corporate lobbying would justifiably attract international criticism and would undermine confidence in New Zealand's policy direction.

6. The purpose of this letter is to outline our concerns with the reforms, and to also suggest alternative and simpler ways the CRD regime could be improved. Critically, we strongly encourage you to wait for the External Reporting Board's (**XRB**) consultation on possible differential reporting before deciding whether to make more drastic legislative amendments.

7. We would welcome the opportunity to engage with you and/or your officials further on any aspect of this letter.

Importance of the Climate-Related Disclosures Regime

8. Climate-related financial risks are significant and well-recognised. Our robust CRD regime plays an important role in New Zealand's transition to a low-emissions economy, helping ensure that New Zealand businesses and investors are well-positioned to respond to the risks and opportunities arising from climate change, attract capital, and compete in international markets. To this end, Aotearoa Circle and Chapman Tripp's 2024 report "Protecting New Zealand's Competitive Advantage" noted that:

    a. Climate and sustainability disclosures are widespread with 80% of New Zealand exports by value already going to markets that have mandatory ESG reporting in force or proposed;

    b. Private frameworks and standards are expanding to meet consumer and investor demand;

    c. Understanding and monitoring climate-related risks and opportunities are increasingly becoming "the price of admittance to the supply chain of some major corporates"; and

    d. ESG performance and reporting are increasingly playing a role in capital-raising.

Some Issues with Proposed Amendments

Blind spots in NZ's capital markets

9. The proposed amendments to the CRD regime would significantly reduce coverage, creating:

    a. a **$28.3B blind spot** in listed equities and debt, out of a total $245B (appx) market cap;

    b. Either a **$35B** or **$95b blindspot** for investment scheme managers for the two options proposed. The second option would represent a 51% reduction from current market coverage.

10. Particularly concerning are the types of investments that would be excluded. For the listed debt securities capital market alone, the proposed amendments would reduce coverage by approximately 14%, excluding the following listed debt securities from reporting:

    a. $4.8B of debt securities issued by utilities, which are heavily exposed to physical and transition risks;

b. $4.7B of debt securities issued by materials, industrials, and energy sector participants - which are the third largest source of New Zealand's total annual emissions;

c. $7.1B of debt securities issued by the financial sector, including banks, insurers, asset managers, and others.

11. These blind spots were not appropriately recognised in the discussion document. However, they would produce unintended consequences that need to be fully considered.

12. Our principal concern is that these changes will make it harder for New Zealand companies to attract capital, refinance existing debt, and/or raise new debt. International capital markets, lenders, funds, and underwriters are placing increasing emphasis on the need to understand climate risk and reduce financed emissions, in spite of political changes in the US. Companies in New Zealand that do not keep pace with these demands will face increased capital costs, an outcome that is at odds with the Government's wider growth agenda and the purpose of both the CRD regime and the Financial Markets Conduct Act 2013 (**FMCA**).

13. This will be a particular problem for the listed debt securities capital market, as we understand that a significant proportion of investment in listed debt is from offshore institutional investors, many of whom manage funds on behalf of clients who demand increasing climate risk and financed emission transparency. The blind spots created by these proposed changes will create a vacuum of information for those investors. Particularly concerning is the fact that they will exclude many energy, transport, and airport facilities - all of which are heavily exposed to climate risk.

They will not meaningfully improve incentives to list on the NZX

14. We understand that one of the driving reasons behind the former Minister's proposed amendments was a concern that the current settings are disincentivising listing on the NZX.

15. However, there is no robust evidence to support the contention that our CRD Settings disincentivise listing, and the proposed amendments would fail to eliminate the underlying and complex barriers to listing on the NZX. Concerns that the CRD settings discourage listing would be better addressed by extending the regime to unlisted companies, as is the case with Australia.

They will not achieve alignment with Australia

16. One of the largest mistakes in the discussion document is the assumption that the proposed amendments would bring about greater consistency with the newly introduced Australian CRD regime.

17. The reality is that the Australian regime will actually be more exacting than New Zealand's once fully implemented, and the proposed amendments would reduce how aligned New Zealand's CRD regime is with Australia's. In particular:

    a. Australia's CRD regime includes unlisted and public sector entities. To its detriment, New Zealand's existing CRD regime excludes both groups.

    b. Once fully implemented, Australia's CRD regime will cover large listed and unlisted entities with at least two of the following:

        i. >$50m consolidated revenue;

ii. >$25m consolidated gross assets; and/or

iii. >100 employees.

In contrast, New Zealand's proposed amendments include either introducing a cap for listed issuers with market capitalisation of more than $550m, or introducing a tiered system with $550m as the initial cap and a second cap of $250m from 2028.

18. Critically, this means that the former Minister's proposed reforms proceed on the false assumption that achieving greater alignment with Australia's CRD regime requires reducing the coverage of our CRD regime. In fact, the opposite is true. It also means that any contention that New Zealand's CRD settings disincentivise listing on the NZX as opposed to the ASX cannot be correct, and certainly will not be the case by the time Australia's new regime is fully implemented.

19. In any event, it is not clear why changes to New Zealand's CRD settings should be so driven by alignment with Australia. In our view, they should be set based on whatever is most likely to best achieve the objectives of the CRD regime in New Zealand.

Risk of Directors' Liability is Overstated

20. One of the proposed amendments involves reducing, or altogether removing, directors' liability for CREs' climate statements. This is a phantom issue and one which has been overstated. Court of Appeal authority makes it clear that directors who act with reasonable care have nothing to fear.[1] Directors will only be liable for negligence.

21. If any changes are made to address directors' concerns, penalties could be reduced, and greater support offered to directors on how to reasonably comply with the requirements of the regime. This would be better than removing liability and/or introducing a safe harbour, which would impair the effectiveness of the CRD regime and create unfair disparities between the liability of directors with mandatory reporting requirements and those who make voluntary statements.

The changes are too big, too soon

22. The CRD regime is still in its infancy. The relevant amendments to the FMCA only came into force on 27 October 2022, the XRB's relevant climate standards came into effect on 1 January 2023, and the first phase of CRD implementation ended at the tail-end of 2024.

23. While it is understandable that directors may feel some hesitancy with this new regime, it is not the first time a legal framework with potential penalties on directors has been introduced. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and the Credit Contracts and Consumer Finance Act 2003 are just two of many examples, as well as the Financial Markets Conduct Act 2013 and of course the Companies Act 1993. It would be premature to make such significant changes to the CRD regime at the first sign of discomfort from some Board directors and CREs. Rolling back CRD settings now would create significant sunk costs and inefficiencies for CREs who have already begun reporting and building internal capabilities.

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[1] *Prain v Financial Markets Authority* [2016] NZCA 298.

Next Steps

24. We strongly recommend that you:

    a. Wait for the XRB’s consultation on differential reporting standards before making any decisions on changes to the CRD regime.

       Differential reporting would likely be a far simpler response to the issues that some CREs have raised about the CRD regime. It would mean that CREs are treated in a more nuanced and appropriate way, rather than being treated the same.

       Waiting for the XRB’s consultation would also avoid spending tax-payer money on a major legislative and regulatory process when the XRB is already planning on consulting on proposed differential reporting later in 2025.

    b. Work with the FMA, XRB and your officials to develop a robust understanding of the need for change (to the extent it exists).

       The evidence and cost/benefit analyses supporting the proposed amendments are significantly lacking - failing, for instance, to identify the blind spots that the proposals would create in our capital markets and their associated economic consequences for New Zealand.

       Given the growing role that CRDs play internationally, changes must be made with caution and on the basis of strong evidence.

    c. Ensure that any reforms to the CRD regime align with and are driven by the purposes of the FMCA and the CRD regime.

25. We are happy to engage with you further about any of the issues raised in this letter.

Ngā mihi,

Jenny Cooper KC
President

Jessica Palairet
Executive Director