Time is running out:

The urgency of mandatory environmental disclosure in New Zealand Securities Market Law

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours)
University of Otago – Te Whare Wananga o Otago

4 October 2019

ACKNOWLEDGEMENTS

To Professor Shelley Griffiths, for your patience, pragmatism and encouragement in a vast topic. I have thoroughly enjoyed every one of our discussions both on and off topic throughout the year. Your guidance has been incredible in a task which often seemed unattainable.

To Lloyd Kavanagh, thank you for your practical advice in a topic which is inherently heavy in theory.

To my family, for your love, support and guidance which many people are not fortunate enough to have.

To the flat at 10a Elder. On the off chance you guys are reading this cheers for the best year to date.

To the wider 2019 SOULS Executive thank you for your ambition, energy and dedication to the last 12 months.

Finally, to all the friends I have made in the last five years. You have made studying at Otago an absolute blast.

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Preface

"Increasing transparency makes markets more efficient, and economies more stable and resilient"

- Michael R. Bloomberg, Chair, TCFD.[1]

Enhancing environmental disclosure is a framework to help combat climate change. The United Kingdom and Australia have both explored a mandatory approach towards climate-related risk reporting. This dissertation will examine the impact mandatory disclosure has had on overseas jurisdictions and will assess the practicality of New Zealand advancing a similar regulatory structure. It recommends New Zealand adopt a mandatory approach, modified to New Zealand's capital market characteristics and unique natural landscape. This is based on two primary principles. First, it will encourage capital allocation into companies which engage in effective corporate sustainability methods and act as a disincentive for investing in companies which do not. Second, unpriced climate-related financial risk and cost will be disclosed to shareholders consistently ensuring information asymmetry is mitigated and market efficiency is maximised. Due to mandatory environmental disclosure being a fast-developing area of the law, any further substantive analysis after the 1st of September 2019 has not been included.

[1] Financial Stability Board "FSB to establish Task Force on Climate-related Financial Disclosures" (press release, 4 December 2015).

Introduction

Climate change has reached unprecedented levels in 2019. The years 2015-2018 had the highest temperatures ever recorded[2] with urgent action being demanded from officials.[3] On the 27th of September 2019, a record number of protestors took to the streets in New Zealand[4] demanding urgent action on the escalating ecological emergency human civilisation is now faced with. Climate change is unlike anything else that humanity has had to deal with,[5] being framed as the "Tragedy of the Horizon."[6] The scientific consensus maintains the earth has already warmed and is likely to continue to do so for several decades to come.[7] Each generation has similar goals focused around technology, economic, social growth and development, which lead to an increased quality of life.[8] However, with resources becoming scarce and a depleting environment due to human activity, there is an increasing pressure on corporations to assess their impact on the environment. Business leaders have recognised climate change as a threat to their firm's viability.[9] The biggest challenges facing modern corporations are summarised as climate change itself, energy and fuel challenges, population growth, wealth dynamics, urbanisation trends, food security and ecosystem decline.[10] Rising sea levels, increased pollution and deforestation are in large part a result of corporate activity.

Unpriced climate risk and the costs of undisclosed externalities presents problems to financial markets. Analogies can be drawn to the Global Financial Crisis (GFC). Prior to the GFC, banks externalised certain risks and costs through a variety of structured financial products. The risk of securitised investments was not disclosed adequately to stakeholders, just as the environmental risk of investing in companies with climate risk is not fully understood. Improving environmental disclosure from publicly listed companies is a medium towards encouraging sustainable business practice and efficiently disclosing climate-related risks.

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[2] World Meteorogical Organization *WMO Statement on the State of the Global Climate in 2018* (WMO-No. 1223, 2019) at 6.
[3] María Fernanda Espinosa Garcés "*Statement* by the President of the United Nations General Assembly" (2019).
[4] The Guardian "Fresh Waves of Climate Strike take place around the world" (27th September 2019) The Guardian <www.theguardian.com>.
[5] McGuiness Institute *Final Draft Discussion Paper – The Climate Emergency, A New Zealand case study* (August 2019) at 12.
[6] Mark Carney "Breaking the tragedy of the horizon – climate change and financial stability" (Chairman of the Financial Stability Board, Lloyd's of London, 29 September 2015).
[7] Amanda Hindlian, Sandra Lawson, Sonya Banerjee, Dan Duggan, Michael Hinds *Taking the Heat Making Cities resilient to Climate Change* (Goldman Sachs, 2019) at 6.
[8] Victor Danciu "The Sustainability company: new challenges and strategies for more sustainability" (2013) 9(586) TAAE 8 at 10.
[9] Henderson, Rebecca M, Sophus A. Reinert, Polina Dekhtyar, and Amram Migdal *Climate Change in 2018: Implications for Business* (Harvard Business School, January 30 2018) at 1.
[10] Victor Danciu, above n 8, at 11-12.

A) *Worldwide shifts and stakeholder pressure*

Globally, there has been a steady shift in environmental reporting. After the GFC, the G20[11] established the Financial Stability Board (FSB), which sets out to identify and mitigate threats to the global financial system. Following the 2015 Paris Agreement,[12] the FSB created the Task Force on Climate-related Disclosure (TCFD), which provides a framework for reporting on climate change risk. Led by Michael Bloomberg, former Mayor of New York City, the TCFD includes members from global banking institutions, insurance companies, institutional investors, industrial and consumer products companies and experts on financial accounting and public disclosure. The TCFD developed a voluntary, consistent climate-related financial disclosure framework in 2017, which helps stakeholders understand material risk.[13] It splits climate-related risk into the risks associated with the transition to a lower-carbon economy and the physical impacts of climate change.[14] From this point onwards, countries within the G20 have seen increases in reporting requirements. In the United Kingdom (UK), it is now mandatory to disclose carbon dioxide emissions for publicly listed companies.[15] Despite these advances in overseas disclosure law, New Zealand is yet to include any mandatory requirements. By not being a part of the G20, there is naturally less international pressure on New Zealand to adopt global standards. However, recent evidence such as the Climate Change Response Amendment Bill 2019 illustrates a growing demand from New Zealand citizens to hold both private and public organisations to account.

Financial system participants, including financial regulators and central banks, can have a role in mitigating the financial risk of climate-related factors. This represents a shift in financial services now having the potential to mitigate climate change which has traditionally been the

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[11] The Group of Twenty (G20),is a collection of twenty of the world’s largest economies formed in 1999, was conceived as a bloc that would bring together the most important industrialized and developing economies to discuss international economic and financial stability. Its annual summit, a gathering of G20 leaders that debuted in 2008, has evolved into a major forum for discussing economics as well as other pressing global issues. One of the group’s most impressive achievements was its robust response to the 2008 financial crisis, but some analysts say its cohesion has since frayed. James McBride and Andrew Chatzky. “The Group of Twenty” (10 June 2019) Council on Foreign Relations <www.cfr.org>.

[12] In 2015 the Paris Agreement was adopted by parties under the United Nations Framework Convention on Climate Change (UNFCCC), which commits all countries to act on climate change.

[13] Task Force on Financial Disclosure *Final Report Recommendations of the Task-Force on Climate-related Financial Disclosure* (2017) at 5.

[14] At 5.

[15] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

government's responsibility.[16] The appetite from these organisations is further reinforced through the popularity of green bonds, reaching a total capitalisation of USD $221 Billion at the end of 2017.[17] A green bond achieves the same capital-raising ability as a normal bond.[18] However as distinct from other bonds, green bond funds go toward investments into projects or assets that can help society or mitigate climate change impacts.[19] In New Zealand, large corporations including the Auckland Council, Contact Energy, property company Argosy Limited and Westpac have all used green bonds to raise capital.[20] The growing popularity of green bonds within New Zealand will continue to have positive implications on our environment. However, Mark Carney, Governor of the Bank of England has stated green bonds alone will not be sufficient to finance the transition into a low carbon future.[21] Environmental disclosure in New Zealand can help assist in this transformation. Both have similar objectives in facilitating the efficient and fully costed allocation of capital by investors into low carbon activities and businesses which maintain a positive relationship with the environment.

B) The developing framework and response

Sustainability reporting has traditionally been voluntary with mandatory reporting on non-financial factors only emerging recently.[22] This has been met with strong interest from investors with an increased demand for accountability on the social, environmental and societal impacts of the company.[23] Sustainability reporting can be defined in various ways; however, as a general definition is environmental in nature, dealing with pollution, resource depletion and climate change.[24] Environmental disclosure was initially established to strengthen and encourage corporate accountability. It has now evolved to be more investor-orientated, highlighting and assessing risk disclosure and measurement.[25] This means businesses climate-

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[16] Reserve Bank of New Zealand *Safeguarding the future of our financial system In-principle decisions and follow-up questions on: The role of the Reserve Bank and how it should be governed* (June 2019) at 27.

[17] New Zealand Stock Exchange "Green Bonds" <https://www.nzx.com/services/listing-on-nzx-markets/debt/green-bonds>.

[18] A bond is a type of investment that represents a loan between a borrower and a lender. With bonds the issuer promises to pay regular interest payments to the investor at the specified rate. Bonds also be sold like stock.
Investment Industry Association of Canada *Bonds An introduction to Bond Basics* (2008) at 4.

[19] Olaf Weber and Vasundhara Saravade *Green Bonds Current Development and Their Future* (CIGI Papers, 2019) at 1.

[20] McGuinness Institute, above n 5, at 26.

[21] Mark Carney, Governor Bank of England "A New Horizon European Commission Conference: A global approach to sustainable finance" (Chairman of the Financial Stability Board, Lloyd's of London, 2019).

[22] Idil Kaya *The Mandatory Social and Environmental Reporting: Evidence from* France (Procedia -Social and Behavioral Sciences 299, 2016) at 206.

[23] At 208.

[24] Jason Thistletwaite *The Environmental Risk Disclosure Regime Navigating Complexity in Global Financial Markets* (CIGI Papers, NO. 47, October 2014) at 1.

[25] At 3.

related risks impact on an investors decision-making process, resulting in gaps in knowledge as the relevant information is not always disclosed. Executive members of large corporate organisations around the world possess considerable information about corporate environmental actions impacting investment valuations that are not available to the general public.[26] Jurisdictions have different views on how to address this information asymmetry. Some require specific disclosure requirements for what must be disclosed to be verified by an independent third party, and others having 'comply or explain' requirements.[27] New Zealand's current approach generally requires consideration[28] of material environmental, social and governance (ESG) factors, contrasting with other common law jurisdictions where this is mandatory.

C) Proposed regulatory response

Research suggests the number of New Zealand companies engaging in sufficiently detailed environmental disclosure is relatively low.[29] In light of this and international advances, mandatory climate-related disclosure was identified by the Productivity Commissioner as a critical action the government can and should take. The Productivity Commission has discussed the practicalities of this approach in depth.[30] Three broad options were proposed, including encouraging voluntary reporting via industry,[31] interpreting existing requirements as requiring disclosure[32] and establishing new government-mandated reporting requirements.[33] The government agreed with the Productivity Commissioner on these recommendations, stating investment needs to be directed towards low-emission investments to ensure the New Zealand economy remains resilient to the impacts of climate change.[34] Three further points of consideration were proposed by the government including:[35]

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[26] Ronald P. Guidry and Dennis M. Pattern "Voluntary disclosure theory and financial control variables; An assessment of recent environmental disclosure research" (2012) AF36 at 83.
[27] Jason Thistletwaite, above n 24, at 3.
[28] New Zealand Stock Exchange Listing Rules 2019, r 4.2.
[29] A test on NZX listed companies where a measure of at least three pages of sustainability information in a report was used 38 companies were found to be reporting out of a total 133. When this standard decreased to only one page the total figure of reporters rose to 52. Proxima *Towards Transparency Sustainability reporting practice in New Zealand* (2018) at 24.
[30] New Zealand Productivity Commission *Low Emissions Economy* (August 2018).
[31] At 195.
[32] At 196.
[33] At 197.
[34] New Zealand Government *Transitioning to a low-emissions future-The Government response to the Productivity Commission's Low* Emissions *Economy Report* (August 2019) at 6.
[35] At 6.

- Whether the Financial Reporting Act is the most appropriate means for implementing climate-related disclosure requirements.
- Consideration of the classes of entities the disclosure requirements should apply to.
- What, specifically, the disclosure requirements should require entities to disclose and whether the disclosures should be different for different classes of entities.

This paper will examine the environmental disclosure theory more broadly, taking into account these three government considerations. It is important to note environmental disclosure as a topic overlaps with other evolving areas of law such as banks treatment of climate risk, investment and pension funds, enhancements in directors duties and greenwashing. Where relevant to this dissertation these topics will be discussed, however, the primary discussion will be centred around climate-related disclosure.

Chapter I - Climate-related risk and disclosure theory

It is well-understood that relevant and material disclosure is fundamental to the efficient and fair function of financial markets.[36] The purpose of disclosure requirements is to deter insider conduct, market manipulation and secret dealings.[37] Further, it builds investor confidence, enables a diverse range of private sector stakeholders to monitor the institution and creates a well-informed market.[38] Investors need information to make investments, while capital markets need capital from investors to fund growth and expansion. This enables investors to make decisions about investments with a high level of confidence, being a key objective of securities law.[39] The valuation of equity on capital markets differs from tangible assets as it cannot be inspected and observed. An investor makes their investment decision solely on the material presented about the investment. The information helps investors allocate capital effectively and minimises speculation by linking the asset to the information disclosed.[40]

A) Fundamental market presumptions

Capital markets possess essential assumptions which elucidate how information publicly disclosed is converted into knowledge for the investor, which subsequently determines the traded stock price. How climate-related risk correlates with these fundamental presumptions presents new challenges to regulators.

1 The Efficient-Market Hypothesis (EMH):

The EMH holds that the value of stocks reflect all of the information from many different sources widely available in the securities market.[41] All the known information which has been disclosed to the market will impact the supply and demand of the stock which is then reflected in the current share price. If this is correct, the market value of a listed company would be very similar to the intrinsic value of that company.[42] The EMH assumes that all agents are rational

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[36] Itay Goldstein and Liyan Yang "Information Disclosure in Financial Markets" (2017) 9:101–25 at 102.

[37] Financial Markets Conduct Act 2013, s 273.

[38] Geoff Bascand, Deputy Governor "The effect of daylight: disclosure and market discipline" (*A speech delivered to members of the NZ Bankers' Association in Auckland, February 2018).*

[39] Troy A. Paredes' "Blinded by the Light: Information overload and its consequences for Securities Regulation" (2003) 81 Washington University Law Review 417 at 468.

[40] Jason Thistletwaite, above n 24, at 1.

[41] Marvin Pickholz and Edwards B Horahan "The Sec'S Version Of Efficient Market theory And Its Impact On Securities Law Liabilities" (1982) 39:3 Wash. & Lee L. Rev. 943 at 943.

[42] Augusta Degutis and Lina Nocickyte "*The Efficient Market Hypothesis: A Critical Review of Literature and Methodology"* (2014) 93:2 Ekonomika 7 at 7.

in their decision making.[43] It benefits financial markets by ensuring assets are accurately priced by the invisible hand of the marketplace which moves faster than any single agent.[44] Over time, the EMH theory has evolved so that it now reflects information, transactions, financing and agency costs.[45]

2 *Information Asymmetry (IA)*

IA occurs when some parties undertaking business transactions may have more information than other parties entering into the same transaction.[46] Informed agents can therefore make profits to the detriment of ill-informed agents.[47] For capital markets, an executive in a company may possess a greater level of knowledge towards the valuation of a stock than a reasonable investor if the information has not been disclosed. This could allow a manager to purchase more stock with the knowledge of certain internal factors which will increase the share price in the future. The average investor would not have access to the same information. Naturally, this leads to adverse selection which is an unproductive, inefficient or adverse result of a market exchange between a buyer and seller.[48] This situation can result in a deviation from low-quality stocks being sold at low prices and high-quality stocks being sold at high prices.[49] IA leads to economic inefficiency and a decrease in economic growth. Mitigating IA on capital markets through sufficient disclosure reduces the magnitude of periodic surprises about a company's performance, and therefore less volatility in the stock price.[50] Securities market law aims to minimise the asymmetry inherent in the underlying bargain through disclosure,[51] with the intention being to restrict the opportunity to take advantage of IA to a theoretical zero.[52]

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[43] Simon Deakin "The evolution of theory and method in law and finance" in Niamh Moloney and Eilìs Ferran and Jennifer Payne (eds) *The Oxford Handbook of Financial Regulation* (Oxford University Press, Oxford, 2015) 14 at 15.

[44] Andrew Ang, William N. Goetzmann and Stephen M. Schaefer *The Efficient Market Theory and Evidence: Implications for Active Investment Management* (Foundations and Trends in Finance, editorial board, 2010) at 1.

[45] At 4.

[46] Larissa Von Alberti-Alhtaybat "Mapping corporate disclosure theories" (2012) 10:1 JFRA 73 at 77.

[47] Etienne Farvaque, Catherine Refait-Alexandra and Dhafer Saidane *Corporate Disclosure: A review of its (Direct and Indirect) Benefits and Costs* (International Economics, 2011) at 11.

[48] Bandana Preet Kaur Jolly "Asymmetric Information- Cause of Market Failure" (2017) IJTRD 42 at 43.

[49] Larissa Von Alberti, above n 46, at 77.

[50] Brian J. Bushee and Christopher F. Noe "Corporate Disclosure Practices, Institutional Investors, and Stock Return Volatility" (2000) JOAR at 177.

[51] Shelley Griffiths "Trading Securities on Markets" in Susan Watson and Lynee Taylor eds *Corporate Law in New Zealand* (3rd edition, Thomas Reuters, Wellington, 2018) 1159 at 1160.

[52] At 1160.

B) Environmental disclosure theory

All information which is presented to the market will have a significant role over a firm's reputation within the community and subsequent valuation.[53] Environmental factors now help analysts predict and map firms' future earnings[54] which impact stock valuation. Therefore, a lack of disclosure about climate-related risk and cost externalisation could create information asymmetry between managers and users of this environmental information.[55] Practically, this means managers who share knowledge about a company's environmental exposure will have an advantage in predicting future fluctuations in stock prices compared to the average investor. This gap in knowledge contributes towards IA, hindering investor confidence, accurate valuations and subsequently reducing the capital flow generated to markets. It is logical, therefore that securities market law is largely motivated on the fact that more information is better than less.[56]

However, there are fundamental drawbacks to this approach. Large amounts of financial information in reports can result in information overload.[57] The process of analysing and interpreting financial data becomes more complicated as the quantity increases.[58] Further, its length can turn off reasonable readers[59] and hide important information.[60] From an investors point of view, this may involve a separate piece of climate-related information accompanying an already long annual report. It also remains unclear whether or not retail investors rely on corporate disclosure and if so to what degree.[61] Many investors also still depend on professional analysts to seek out the information and trade on this basis, causing them to be passive price takers.[62] Therefore, increasing disclosure does not necessarily reduce the amount of 'information informed' trading[63] which is traditionally a key benefit of disclosure law. The increased compliance costs of firms to increase disclosure must also be considered and

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[53] Walter Aerts "Corporate Environmental disclosure, financial markets and the media: An international perspective Ecological" (2008) 64:4 Ecological Economics 643 at 644.
[54] At 644.
[55] Ronald P. Guidry, above n 26, at 83.
[56] Troy A. Paredes, above n 39, at 418.
[57] Arthur J.Radin "Have We Created Financial Statement Disclosure Overload" (2007) The CPA Journal 1 at 1.
[58] Troy A. Paredes, above n 39, at 419.
[59] Arthur J.Radin, above n 57, at 1.
[60] Arthur J.Radin, above n 57, at 2.
[61] Amanda M. Rose "The Reasonable Investor of Federal Securities Law" (2017) 43:1 JCL 77 at 90.
[62] At 90.
[63] Etienne Farvaque, Catherine Refait-Alexandra and Dhafer Saidane, above n 47, at 11.

balanced in a cost/benefit analysis. The process of obtaining information for reporting is costly to the firm.[64] Even if a standardised approach can be taken to measure, the direct cost of this to firms remains a factor. Following the Sarbanes Oxley Act[65] introduction which increased disclosure obligations in the United States, 85 per cent of finance directors felt the cost associated with implementing its requirements outweighed the benefits, even four years after its adoption.[66]

C) Evolution of the reasonable investor

Despite these negative aspects of increasing disclosure, securities market law is directed at recognising and aligning with the interests of a reasonable investor. The aim is to prevent investors from valuing assets or investment opportunities incorrectly, resulting in misdirected capital or stranded assets.[67] In New Zealand, a reasonable person is someone familiar with the scope of the continuous disclosure requirement, the market within which it operates, the statutory consultation process and the publicly known circumstances.[68] New Zealand courts have failed to provide much guidance on what a 'reasonable' investor includes. In the United States, case law implies that the reasonable investor grasps market fundamentals including the time value of money, the peril of trusting assumptions and the potential for unpredictable difficulties to derail new products.[69] The United States case *Basic Inc v Levinson*[70] requires that "there must be a substantial likelihood that the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

This mainly draws on purely quantitative methods for company valuation with the most common methods of calculation extracting data from the balance sheet[71] and the income statement.[72] Therefore informational cost questions will be presented towards how to price climate-related risk. Qualitative environmental information cannot be substituted into a formula to determine the company value in the same way quantitative information can. The

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64 At 15.
65 Sarbanes Oxley Act 2002 United States.
66 Etienne Farvaque, Catherine Refait-Alexandra and Dhafer Saidane, above n 47, at 13.
67 New Zealand Productivity commission, above n 30, at 7.
68 *Auckland International Airport Ltd v Air New Zealand Ltd [*2006] 9 NZCLC,179 (HC) at [57].
69 Amanda M. Rose, above 61, at 90.
70 *Basic Inc v Levinson* 485 US 224 [1988] at [34].
71 Pablo Fernandez *Company Valuation Methods. The most common errors in valuation* (University of Navarra, IESE Business School) at 3.
72 At 6.

impact of information on share price is central to the EMH assumption. Determining how information such as total emissions per year has on a company's valuation presents new challenges to investors. However, these challenges are inevitable given the circumstances. Non-quantitative valuation methods are already reflected in current market practice. In the energy sector, the market allocates some value to active or imminent wells, particularly if drilling has commenced, and will assign significant value to the announcement of a discovery.[73] This information does not follow a pure quantitative approach. Climate-related risk is significant, and investors will adapt efficiently towards how they price this risk. Increasing disclosure would remove the information asymmetry present between what management know about the company and what investors know. More accurate prices would, therefore, be reflected in the market. Any fluctuations in the share price would be based on reasons relating to the firm rather than general market trends.[74] It is non-contentious that a reasonable investor is concerned with factors influencing the share price, and therefore environmental risk.

D) Different forms of disclosure

Both voluntary and mandatory disclosure are aimed at minimising the asymmetry inherent in the underlying bargain through disclosure.[75] Mandatory disclosure involves specific requirements towards when and what must be disclosed, while a higher degree of discretion is given towards voluntary disclosure. The debate between the two is controversial and has been examined for decades.[76] Mandatory disclosure reduces the wasteful transaction costs which occur when multiple parties are tracking down the same information.[77] It also limits informational asymmetries that exist between companies and investors.[78] Evidence suggests that voluntary disclosure can provide management with incentives to differentiate their successful firm from others[79] if they believe their company is undervalued.[80] Corporate voluntary disclosure, therefore, has the potential to promote transparency and investors interests to the same level as mandatory reporting.[81] However, there are fundamental

[73] *Haylock v Patek* [2011] NZCA 674 at [149].
[74] Etienne Farvaque, Catherine Refait-Alexandra and Dhafer Saidane, above n 47, at 11.
[75] For more on the benefits of disclosure see Shelley Griffiths, above n 51, at 1159-1160.
[76] Samir M. El-Gazzar and James M. Fornaro "*Voluntary versus Mandatory Corporate Disclosures on Management Responsibilities for Financial Reporting: An Empirical Investigation*" (2012) 3:2 Global Review of accounting and Finance 74 at 74.
[77] Troy A. Paredes, above n 39, at 421.
[78] Troy A. Paredes, above n 39, at 418.
[79] Samir M. El-Gazzar and James M. Fornaro, above n 76, at 89.
[80] Gordon Walker and Mark Fox "Globilisation: Meanings and Implications" in Gordon Walker, Brent Fisse and Ian Ramsy (eds) *Securities Regulation in Australia and New Zealand* (Second edition, Sydney, 1998) 3 at 58.
[81] Samir M. El-Gazzar and James M. Fornaro, above n 76, at 89.

limitations to this approach. The non-foreseeable nature of voluntary disclosure lacks consistency. A manager may elect to report on some material environmental factors removing this gap in knowledge, although, may choose not to report on other material information. There may be weak incentives to share information which the market participants demand, with the details disclosed, therefore not meeting investor needs.[82] Mandatory reporting would ensure all this information is disclosed and would remove the information advantage possessed by the established economic elite, where the corporate insiders usually belong.[83]

E) Historical development

The United States has contributed heavily to mandatory disclosure theory and developments around the world. Mandatory disclosure was first identified in 1844 when it was recommended that the disclosure of periodic accounts by joint-stock companies provided greater security for the investing public.[84] From this point onwards, there has been a general trend to increase the amount of mandatory disclosure for listed companies, mainly driven for the benefit of growing investor confidence in financial markets. Significant economic events have contributed toward this shift. There was little support for federal regulation and securities markets before the Great Crash in 1929. Following the Great Depression, President Roosevelt recommended that Congress pass legislation that would mandate full disclosure for the sale of securities.[85] This was achieved through the introduction of the Securities Act 1933[86] and the Securities Exchange Act of 1934,[87] which both had the intention of protecting investors[88] and increasing their confidence in capital markets. Prominent within this new legal proposal was to put the burden of telling the whole truth on the seller of securities, shifting from the caveat emptor rule at the time.[89] This new legislation had an immediate impact on public investor confidence with 1933 proving to be one of the best years in the Twentieth Century on Wall Street.[90]

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[82] Geoff Bascand, above n 38.
[83] Emilios Avgouleas *Financial Crisis, The Disclosure Paradigm, and European Financial Regulation: The Case for Reform* (Reading in International Financial Law, School of Law, University of Manchester Draft Paper, 1 June 2009) at 7.
[84] Proxima, above n 29, at 1.
[85] Daniel J. Morrissey 'The securities Act at its Diamond Jubilee: Renewing The Case for a Robust Registration Requirement" (2009) U. of Pennsylvania Journal of Business Law [Vol. 11:3] at 756.
[86] Securities Act 1933 United States.
[87] Securities Exchange Act 1934 United States.
[88] SEC v. Ralston Purina Co, 346 U.S. 119, 124 (1953).
[89] Larry Bumgardner *A Brief History of the 1930s Securities Laws in the United States- And the Potential Lessons for Today* (Graziadio School of Business and Management, Pepperdine University) at 3.
[90] Daniel J. Morrissey, above n 85, at 757.

1 *Influence of recent economic activity*

More recently, market activity has mirrored what occurred in the 1920s with Congress stepping in to pass the Sarbanes Oxley Act.[91] This followed the collapse of large companies such as Enron, Worldcom and Xerox.[92] The Sarbanes Oxley Act was centred around restoring investor confidence,[93] improving the reliability of financial information,[94] strengthening corporate governance[95] and reducing financial statement fraud.[96] Inadequate disclosure of financial products is also primarily blamed for the conditions which led to the GFC. Specifically, the risks associated with subprime mortgages[97] and the inadequate disclosure by financial institutions of their on-balance sheet and off-balance sheet exposures.[98] The GFC revealed how financial markets were exposed to significant information asymmetries relating to the housing market credit risk. Since this point, there has been an increasing international demand for public disclosure and transparency.[99]

2 *Sustainability reporting as a subset of regular disclosure*

The theory around what should be disclosed in financial markets has historically been based on financial reports rather than non-financial reporting of information. This stems from the valuation of companies being traditionally calculated by economic methods such as the discounted future earnings method.[100] Analysts have not truly investigated the effect of environmental risk on company's valuation until recently. Sustainability reporting can be traced back to the 1940s where Theodore J. Kreps argued that the standard profit and loss accounting approach to measuring companies performance was inadequate.[101] More specifically, environmental risk and its relationship with financial reporting first came to light

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[91] Sarbanes Oxley Act 2002 United States.
[92] John C. Coates IV "The Goals and Promise of the Sarbanes–Oxley Act" (2007) 21 Journal of Economic Perspective 91 at 91.
[93] Yousef Jahmani and William A. Dowling "The Impact of Sarbanes-Oxley Act" (2008) 6 Journal of Business and Economic Research 57 at 57.
[94] At 62.
[95] At 63.
[96] At 64.
[97] Emilios Avgouleas, above n 83, at 14.
[98] At 14.
[99] Geoff Bascand, above n 38.
[100] The discounted future earnings method involves companies using forecasts of future income over a period of time. The sum of this income will then be added together then discounted back to the current year by the company's cost of capital. This figure will be the company's current estimated value.
[101] Glendanique G.E *Minguel The evolution of sustainability reporting A case study of the airlines section* (University of Tilburg, Research Paper, August 2017) at 6.

in the 1970s.[102] The idea of voluntary disclosure further gained popularity after the Exxon Valdez oil spill off the coast of Alaska.[103] Following this, there has been a gradual increase in the demand for transparency and accountability due to global pressure for corporate accountability.[104]

3 Current direction of environmental reporting

The TCFD has been the key driver of current pressure. The core principles are based on governance, metrics and targets risk, risk management and strategy.[105] The majority of countries within the G20 have responded to the recommendations. However, as expected, this is occurring at different rates.[106] A study done by the TCFD in 2017 found that although disclosure of climate-related disclosure has increased, it is still insufficient for investors.[107] Specifically, the results indicate that only 25 per cent of companies included within the study, disclosed information aligned with more than five of the eleven TCFD recommendations.[108] However, there has been a ten per cent increase in climate-related risks and opportunities being disclosed.[109] More reporting standards have emerged in recent years. The Global Reporting Initiative was launched in 2000 and contains reporting principles and standards as well as an implementation manual on how to prepare the information.[110] Financial reporting is also addressed through the Sustainability Accounting Standards Board which aims to develop and disseminate sustainability accounting standards.[111] Further, the Carbon Disclosure Project aims to persuade companies to measure, manage, disclose and reduce greenhouse gas emissions.[112] Each highlights slightly different reporting and disclosure targets. Guidance has also been released for listed companies by the Sustainable Stock Exchange Initiative (SSE). Chaired by the London Stock Exchange (LSE), the SSE guides issuers[113] towards environmental, social

[102] Jason Thistletwaite, above n 24, at 2.
[103] Jason Thistletwaite, above n 24, at 2.
[104] Ngonidzashe Shuro and Lesley Stainbank "Sustainability Reporting in South Africa: A Comparative Study of the Mining and Manufacturing Industries" (2014) 5:25 MJSS 92 at 93.
[105] Task Force on Financial Disclosure, n 13, at 14.
[106] Dr Nina Seega *Sailing from different harbours G20 approaches to implementing the recommendations of the Task Force on Climate-related Financial Disclosures* (University of Cambridge, Centre for Sustainability Finance, May 2018) at 5.
[107] Michael Bloomberg *Task Force on Climate-related Financial Disclosures: Status Report* (Task Force on Climate Related Financial Disclosure, 2019) at 5.
[108] At 7.
[109] At 7.
[110] Global Reporting Initiative *Reporting Principles and Standard Disclosures* (August 2015) at 7.
[111] Climate Disclosure Standards Board "The Sustainability Accounting Standards Board" <www.cdsb.net >.
[112] Climate Disclosure Standards Board *CDP-CDSB Response to BIS Publications of Draft Regulations for Narrative Reporting* (2012) at 2.
[113] Sustainable Stock Exchange *Model Guidance on Reporting ESG Information to Investors a voluntary tool for Stock Exchanges to guide issuers* (January 2015) at 7.

and governance (ESG) factors. The frequency and variety of these reporting standards have contributed to the popularity and growing awareness of ESG reporting around the world.

F) Conclusion

EMH and IA require sufficient disclosure of information for financial markets. All relevant information is not currently disclosed to the reasonable investor. Strong evidence indicates the financial sector has not adequately considered non-financial information, exposing itself to an asset bubble driven by significant overvaluation.[114] There has been a growing trend in companies being required to disclose environmental factors as legislators become fully aware of the risks which are presented.[115] Financial regulation needs to strive towards making market users as well-informed as possible for trading decisions.[116] Increased disclosure does generate increased costs for firms. However, it is an inevitable trend in corporate reporting given the significant impact such non-financial information will have on the analysis, interpretation and ultimately the valuation of companies.

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[114] Jason Thistletwaite, above n 24, at 1.
[115] Jason Thistletwaite, above n 24, at 5.
[116] Ian Tunstall “Dealing in Global Financial Markets”(Lawbook Co, Sydney, 2006) 23 at 35.

Chapter II – New Zealand's current reporting framework

The New Zealand Government has received direct recommendations from the Productivity Commission in their recent report *Low Emissions Economy* [117] on amendments which could be made to the current framework. It is necessary to examine New Zealand's current regulatory approach to reporting and assess the practicality of these recommendations as well as overseas guidelines such as the TCFD. Different obligations arise for companies depending on whether they are publicly or privately held. Periodic disclosure[118] applies to listed and non-listed companies, while continuous disclosure only applies to listed companies. This is a critical distinction. Both have the potential to mandate environmental disclosure in different forms. The Companies Act 1993[119] and the Financial Reporting Act 2013 (FRA)[120] contain the periodic reporting requirements, while the Financial Markets Conduct Act 2013 (FMCA) and New Zealand Stock Exchange (NZX) listing rules govern the continuous disclosure obligations.

A) Periodic reporting obligations for listed and non-listed companies

The FRA provides for the issue of financial reporting standards having established the External Reporting Board (XRB) which is an Independent Crown Entity under the Crown Entities Act 2004. The XRB is responsible for financial reporting strategy and preparing and issuing both accounting, auditing and assurance strategies.[121] The board of the XRB appoint and monitor the New Zealand Auditing and Assurance Standards Board as well as being responsible for overseeing and implementing reporting standards for a variety of different entities. Both listed and non-listed entities must file an annual audited financial statement under the Companies Act if they are a large New Zealand company[122] or a large overseas company.[123] Large companies must prepare an annual report[124] and send a copy to every shareholder of the company.[125]

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[117] New Zealand Productivity Commission, above n 30.
[118] Periodic disclosure involves annual reporting of information which are generally produced in companies annual reports.
[119] Section 194–205.
[120] Section 19.
[121] External Reporting Board *Statement of Performance Expectation* (April 2018) at 8.
[122] A company is defined as large when assets are greater than $60million or revenue is exceeding $30million, 25 per cent or more overseas ownership (that are not subsidiaries) New Zealand Companies Office "Who Needs to Submit Financial Statements" Companies Register <www.companies-register.companiesoffice.govt.nz>.
[123] A company is defined as a large overseas company when business is carried out in New Zealand and assets are greater than $20million and revenue is exceeding $10million New Zealand Companies Office "Who Needs to Submit Financial Statements" Companies Register<www.companies-register.companiesoffice.govt.nz>.
[124] Companies Act 1993, section 208.
[125] Section 209.

If a company is a Financial Market Conduct (FMC) reporting entity these same reporting requirements apply, however they report under the FMCA. FMCA reporting entities encompass every person who is an issuer of a regulated product.[126] This includes publicly listed companies who must release a financial statement within four months after the balance date of the entity.[127] These statements need to comply with General Accepted Accounting Principles (GAAP)[128] and be signed off by two directors of the entity.[129] Every business which is an FMC must ensure that all financial statements that comply with the entity[130] are dated and signed by two directors of the entity.[131] These financial statements must then be audited by a qualified auditor[132] and the statements delivered to the Registrar for lodgement.[133] Once complete, the auditor's report will be released, and the financial statements will be made available to the public.

FMC reporting entities as well as large and listed companies all have a significant influence and market share in the New Zealand economy. Any amendments to periodic reporting therefore has the potential for substantial change in business disclosure and behaviour.

1 The rationale behind variable tier disclosure

Different tiers of entities have varying obligations, liability and public accountability. This is important as it reflects the magnitude of disclosure, dependent on the number of 'users' of the information. The statutory regime in New Zealand uses three indicators to drive who should prepare General Purpose Financial Reports (GPFR). They are based on public accountability, economic significance and separation of owners and members of the entity and its management.[134] Entities which are considered to have a higher level of public accountability include issuers of equity securities, managers to registered schemes, listed issuers, registered banks, licensed insurers, credit unions and building societies.[135] The accounting framework using the multi-standards approach is based on the 'user needs' as well as the relevant costs

[126] Financial Markets Conduct Act, s 451(a).
[127] Section 460(1)(b).
[128] Section 460(1)(a)
[129] Section 460(1)(b).
[130] Section 460(1)(a).
[131] Section 460(1)(b).
[132] Section 461D.
[133] Section 461(1)(H).
[134] Ernest and Young *An overview of the New Zealand financial reporting Framework Financial reporting guide* (December 2017) at 2.
[135] Financial Markets Conduct Act, s 461(k).

and benefits.[136] This is consistent with section 29 of the FRA where the purpose of tiers of reporting is to impose different reporting requirements for different classes. GAAP do not, therefore, apply to all companies uniformly. This leads to large[137] and FMC reporting entities having to comply with the three requirements (GPFR, audit and filing) as well as listed companies

2 *The tier system in depth*

For-profit entities are further split into a two-sector, multi-tier structure with different accounting requirements or standards applying to each tier.[138] Tier One includes entities that have "public accountability", as well as for-profit entities that are large (as outlined) and therefore apply Tier One accounting requirements.[139] Tier Two entities do not have "public accountability" and include for-profit public sectors that are not large. These distinctions are crucial as the tier level will dictate the various disclosure obligations. Entities which are characterised as Tier One must adhere to International Financial Reporting Standards (IFRS) while entities qualifying as Tier Two can adopt IFRS under a Reduced Disclosure Regime (RDR). Under the RDR framework, entities must still disclose information about the financial position, performance and cash flows of the company as a Tier One entity would. The user needs and cost-benefit principled approach,[140] means there are lower disclosure requirements for Tier Two.

Tier One reporters have a higher market value, presence and overall influence so the focus will be directed at them due to the greater potential for economic influence. The requirements of Tier One companies are prescribed by the Companies Act, FMCA and the FRA. Companies qualifying as Tier One which are listed, have obligations for their Product Disclosure Statement (PDS), periodic reporting obligations and continuous disclosure requirements. In contrast, non-listed Tier One companies are only required to undertake periodic reporting.

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[136] Financial Markets Authority *A guide to the Financial Markets Conduct Act 2013 Reforms* (November 2013) at 13.
[137] Above n 122.
[138] External Reporting Board *New Zealand Accounting Standards Framework* (December 2015) at 5.
[139] At 5.
[140] Vanessa Sealy-Fisher *Proposed Reduced Disclosure Requirements revisions for Tier 2 entities* (Chartered Accountants ANZ, May 2017) at 2.

B) *Further responsibilities for listed companies*

Listed companies are subject to additional legislation under the FMCA. The FMCA is the primary piece of legislation which regulates and promotes the sale of financial products within New Zealand. Financial products under the FMCA are debt securities, equity securities, managed investment products and derivatives.[141] The FMCA is founded on the core principles of conduct, governance and disclosure to promote confidence and participation in fair and efficient financial markets.[142] The Act responds in part to the ill effects of the GFC failings on New Zealand financial companies.[143] The previous Securities Act 1978 was seen as outdated, inefficient and out of pace with international regulations.[144] Working closely with the FMCA is the NZX listing rules.[145] The FMCA oversees all the potential financial markets within New Zealand, including the NZX. The NZX provides a marketplace where companies who wish to raise funds to expand are matched with investors seeking to invest funds[146] and gain a return. The NZX sets the rules for trading on its markets, the rules for issuers (including eligibility requirements) and disclosure obligations. Ultimately the FMCA prevails over the NZX listing rules which dictate the day to day activity of issuers of the market.

A secondary market is where securities are traded after the company has sold its initial offering to investors while a primary market occurs when a company first sells equity or bonds to a capital market.[147] Both markets have a significant emphasis on disclosure.[148] The distinction between listed and non-listed companies is crucial. Companies which are listed and are in the process of being listed are subject to increased disclosure requirements through the PDS and continuous disclosure obligations. These are governed by the NZX listing rules.[149] Guidance is also provided by the NZX Corporate Governance Code[150] and the NZX Environmental Social Governance (ESG) Guidance note.[151] The NZX code promotes corporate governance[152] and contains a set of 'comply or explain' recommendations under each principle. In contrast, the ESG Guidance notes operate voluntarily to provide issuers with resources for accessing more

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141 Financial Markets Conduct Act, s 7(1).
142 The main purposes of the FMCA are set out in s 3 and are supplemented by the additional purposes specified in s 4.
143 Taylor Burgess and Caitlin Hollings "Legislation Note Financial Markets Conduct Act 2013" (2014) 20 AULR 290 at 290.
144 Taylor Burgess and Caitlin Hollings, above n 143, at 291.
145 New Zealand Stock Exchange *Listing Rules* (1 January 2019).
146 Victoria Stace "regulation of exchanges" *Securities Law in New Zealand* (Lexis Nexis, Wellington, 2010) 353 at 357.
147 For more about the specific focus of secondary markets compared to primary see Shelley Griffiths, above n 51, at 1159.
148 Shelley Griffiths, above n 51, at 1159.
149 New Zealand Stock Exchange *Listing Rules* (1 January 2019).
150 New Zealand Stock Exchange *NZX Corporate Governance Code* (2019).
151 New Zealand Stock Exchange *Environmental Social and Governance Guidance Note* (December 2017).
152 Above n 150, at 3.

information about how to report on ESG factors.[153] These are interpreted alongside the NZX listing rules which are the only specific NZX prescriptive mandatory requirements.[154]

1 *Eligibility requirements for the NZX*

For companies wanting to list on the NZX, there are several specific requirements. The NZX is unique (compared to overseas jurisdictions) in not applying any prescribed eligibility requirements onto listed companies such as profit, working capital or net tangible assets. These requirements have strong alignment and are closely linked with the Australian Stock Exchange (ASX) rules. An issuer must apply to the NZX to be listed before it can conduct an Initial Public Offering on the NZX's market. NZX listing rules outline a select number of criteria which generally have to be present for the class of equity security to be considered for the exchange. This include the anticipated market capitalisation being at least $10million,[155] the NZX being satisfied that the securities held by "members of the public" represent at least 20 per cent of the securities on issue and that the applicant has an appropriate spread of equity security holders.[156] The intention is to ensure a sufficiently liquid market in the class of equity security.[157] When applying to be listed, the NZX has the absolute discretion to deny potential issuers listings without having to give any reasons for this refusal.[158] The NZX makes it mandatory to have at least three directors[159] and an audit committee which contains certain requirements.[160] After these procedural conditions have been met and a company is publicly listed on the stock exchange, ongoing operational obligations will then apply.

2 *Enforcement of provisions*

A liability system is essential to any regulatory regime, and its purpose must align with the objectives of the regime.[161] The Financial Markets Authority (FMA) is responsible for financial regulation and makes all enforcement decisions. They have the responsibility to enforce

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[153] Above n 151, at 3.
[154] Above n 151, at 4.
[155] New Zealand Stock Exchange *Listing Rules* Section 1.1.1(a)(i).
[156] Section 1.1.1(b)(ii)(b).
[157] Section 1.1.1(b)(ii)(b).
[158] Section 1.19.
[159] Section 2.1.1(b).
[160] Section 2.13.1.
[161] Shelley Griffiths "Two Markets Share Two Structures: Fair Dealing and Enforcement" in Susan Watson and Lynee Taylor eds *Corporate Law in New Zealand* (3rd edition, Thomas Reuters, Wellington, 2018) 1111 at 1112.

financial markets legislation through criminal prosecution, civil penalty proceedings and the use of administrative actions.[162] A liability regime must encourage timely and accurate disclosure, as well as restore confidence in market participants, by facilitating a general belief that wrongdoers will be deterred and punished.[163] The FMA has considerable statutory powers to enforce securities laws.[164] Therefore, these objectives ultimately give authority to the FMCA provisions. The powers were evident in *Financial Markets Authority v Honey*[165] where Mr Honey was charged under sections 243(1)(a) and 244 of the FMCA for insider trading. A former employee of an NZX-listed company disclosed inside information to another employee in the company, resulting in shares being sold. The case is important as it confirms the FMA is prepared to use criminal proceedings to deter and sanction serious misconduct which is intentional or reckless.[166] Specifically, the FMCA simplifies the previous structure considerably by adopting a system of escalating levels of liability. This ensures the enforcement response is proportionate to the contravention.[167] If an offer is made to the market and an offeror of the product has knowingly or recklessly made a defective disclosure, they can be criminally liable under the FMCA.[168] Typically this will result in an investor suffering a loss based on a misrepresentation about a financial product which has resulted in a decline in value. The court will determine the level of compensation, unless the decrease in value can be proved from another cause.[169] Defences will also apply if the offeror took all reasonable steps, reasonably relied on the information or made all enquiries which were reasonable at the time.[170]

3 Product Disclosure Statement

When an entity would like to issue shares to the public they must provide a PDS. The production of a PDS is released to provide relevant information that is likely to assist the non-expert person to decide whether or not to acquire the financial product(s).[171] The basic rule is that all offers of financial products for an issue, and certain offers for sale, will require disclosure through a PDS unless an exemption applies under the FMCA.[172] The PDS must

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[162] *Financial Markets Authority* Prosecution Policy at 3.
[163] Shelley Griffiths, above n 161, at 1115.
[164] Jesse Wilson and Taylor Wood *First criminal sentence puts spotlight on insider trading laws* (Bell Gully, 2017).
[165] *Financial Markets Authority v Honey* [2017] NZDC 12793.
[166] Jesse Wilson and Taylor Wood, above 164.
[167] Financial Markets Authority, above n 136, at 24.
[168] At 25.
[169] At 26.
[170] At 24.
[171] Financial Markets Conduct Act, s 59.
[172] Bell Gully *Financial Markets Conduct Act 2013 Overview for NZX Main Board Listed Companies* (2013) at 3.

disclose all material information,[173] however at the same time be clear, concise and effective.[174] The PDS will be no more than 60 pages for equities and must outline the key risks affecting the investment. There is nothing which states environmental factors must be disclosed. This is significant as the PDS serves as the investors first chance, and primary tool, to assess the company when it is being listed for the first time.

4 Continuous disclosure obligations

Continuous disclosure requires listed issuers (that are parties to the listing) to notify information about events or matters that amount to 'material information'[175] as they arise. That information must be made available to participants in the licensed market.[176] This approach differs from periodic reporting and must occur on a timely basis rather than waiting for the relevant reporting period.[177] Companies must release information 'promptly without delay'[178] if it is material[179] through the market announcement platform (MAP) which is a system administrated by the NZX to electronically process, release and store announcements about issuers and quoted financial products. There are some exceptions which apply to the 'materiality' rule such as when the information would be a breach of law[180] or the information is a trade secret.[181] The continuous disclosure obligation intends to provide the market with material information relating to the issuer, which protects the integrity of the market.[182] If this is achieved, it allows investors to stay up to date with any information which may impact their investment. Continuous disclosure also applies to information where an individual within the organisation knows or ought to reasonably know that the information is material,[183] or that it is not generally available to the market.[184]

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[173] Financial Markets Conduct Act 2013, s 57.
[174] Section 61.
[175] Section 59.
[176] Section 271.
[177] Shelley Griffiths, above n 51, at 1169.
[178] New Zealand Stock Exchange *Listing Rules* 3.1.1(a).
[179] Section 3.1.2.
[180] Section 3.1.2(a)(i).
[181] Section 3.1.2(a)(v).
[182] *Financial Markets Authority v Jackson* [2018] NZHC 2052, at [34].
[183] Financial Markets Conduct Act, s 234(1)(b).
[184] Section 234, s (1)(c).

5 *Materiality*

Companies must disclose material information under their continuous disclosure obligations and in their PDS statement. Material information is outlined as information, that a 'reasonable person would expect to have a material effect on the price of quoted financial products of the listed issue.'[185] The test, therefore, has two parts. Both 'reasonable person' and 'material effect' are not defined in the rules. NZX guidance notes advises a reasonable person is a person who commonly invests in securities and holds such securities for a period of time, based on their view of the inherent value of the securities.[186] Limited New Zealand case law suggests a reasonable person is someone familiar with the scope of the continuous disclosure requirement, the market within which it operates, the statutory consultation process and the publicly known circumstances.[187] The second part of the test is whether the information had a 'material effect.' The NZX guidance notes state that this will vary depending on the specific characteristics of the security and the issuer.[188] As a general rule, a price movement of above five per cent in a quoted security will be more likely than not to be treated by the NZX rules as evidence that the information has had a material effect on the price of those securities.[189] Although caution is needed as price fluctuations are highly dependent on the given stock and the liquidity of the security.[190]

Due to the unclear nature of 'material effect,' NZX rules encourage issuers to take a cautious approach when determining whether the information will have a material effect on the price of the quoted securities and therefore to disclose the information if unsure.[191] Ultimately information which is material to the issuer could cause decision-makers to adjust their investment portfolios.[192] This is the fundamental rationale for continuous disclosure, in addition to periodic disclosure. Continuous disclosure allows investors to become immediately aware of information which will potentially impact their investment and alter their capital allocation accordingly. With only periodic disclosure, valuable information would only become available

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[185] Section 231.
[186] New Zealand Stock Exchange *Guidance Notes Continuous Disclosure* (1 January 2019) at 7.
[187] *Auckland International Airport Ltd v Air New Zealand Ltd* [2006] 9 NZCLC, 179 (HC) at [57].
[188] New Zealand Stock Exchange, above n 186, at 7.
[189] At 7.
[190] At 8.
[191] At 8.
[192] *Basic Inc v Levinson* 485 US 224 [1988] at [47].

to investors during annual reports. Contrarily, continuous disclosure helps prevent insider trading by removing information asymmetry where periodic disclosure cannot.

C) The approach towards environmental disclosure

There is nothing within the FMCA, the NZX Listing Rules or the FRA which currently make periodic environmental reporting mandatory. The only area where it could be held to require environmental reporting is in section 211 of the Companies Act 1993. In this section the board must include information 'material for the shareholder' in their annual reports.[193] Although it does not explicitly outline reporting about climate change, the contents of what must be included in the annual report could be interpreted to include climate risk.[194] There is also the power in section 17(2) of the FRA where the Governor-General can authorise the XRB to issue financial reporting standards relating to matters including "the social, environmental and economic context in which an entity operates."[195] Although not binding, there is a compelling number of recommendations on how listed companies should disclose information. The NZX rules include a recommendation stating non-financial reporting "should include consideration of material ESG factors and practices" and other non-financial disclosure, such as a description of the performance of the issuer's business against its strategic objectives.[196] Recommendation 4.3 states that both financial and non-financial matters affecting financial reports should be discussed such as sustainability strategy.[197] Section 6.1 of the NZX Corporate Governance Code recommends that issuers should have a risk management and reporting framework which could involve reporting of ESG factors.[198] The 2019 Corporate Governance code also refers to the SSE, encouraging the issuer to discuss how ESG factors affect their financial performance.[199]

Despite these recommendations, only the NZX listing rules are mandatory.[200] The commentary sections are purely voluntary while the recommendations operate on a comply or explain[201] basis. Therefore, although companies may be asked to explain why they have excluded

[193] Section 211(a).
[194] New Zealand Productivity Commission, above n 30, at 196.
[195] Section 17(2)(a)(iii).
[196] New Zealand Stock Exchange *Listing Rules* (1 January 2019) recommendation 4.3.
[197] Above n 196.
[198] New Zealand Stock Exchange *NZX Corporate Governance Code* (2019) at 29.
[199] At 24.
[200] At 4.
[201] At 4

information about environmental risk, there is no mandatory requirement for them to disclose the information itself.

1 Climate-related risk and materiality

New Zealand case law is yet to explore whether 'material information' encompasses material environmental information under the NZX continuous disclosure rules. However, this is something which could likely occur in the near future and has recently been touched on in Australia. New Zealand has similar securities market law to Australia, meaning New Zealand courts are likely to look at Australian judgements for guidance if a similar factual scenario arose. *Abrahams v. Commonwealth Bank of Australia*[202] involves an Australian shareholder bringing legal action, arguing that material climate risk had not been adequately disclosed by CBA in their 2016 annual report. By excluding environmental information, the company was not giving a 'true and fair'[203] view of their financial position, and the director's report was not sufficient to allow investors to make an "informed assessment"[204] under the Corporations Act 2001. The shareholders requested an injunction to prevent CBA from omitting climate risk in their future reports. The case was dropped after CBA included in their 2017 annual reports an acknowledgement that climate risk has a significant impact on their operations. More recently, a pension fund member undertook legal action against the Retail Employees Superannuation Trust (REST) on the basis that REST has failed to provide sufficient information about climate change risks and REST's plans to mitigate those risks. The case *Mark McVeigh v Retail Employees Superannuation*[205] is still ongoing and its judgement is likely to be highly influential on how asset owners will address climate-related risk disclosure in the future. Although the Australian cases discussed above present different factual scenarios regarding the obligation of listed companies disclosing environmental risk, they illustrate how the courts are refining their definition and interpretation of what 'material risk' to investors should be.

D) Future Regulation

There has been an increase in momentum and pressure on officials to introduce mandatory environmental reporting in New Zealand. The Ministry for the Environment-Climate Change

[202] *Abrahams v Commonwealth Bank of Australia (2017)* FCA VID879.
[203] Corporations Act 2001 (Australia) s 297.
[204] Section 1017C.
[205] *Mark McVeigh v Retail Employees Superannuation* (2019) FCA 14.

Adaption Technical Working Group recommended that New Zealand follow the TCFD (in May 2018).[206] Chartered Accountants Australia and New Zealand (CA ANZ) also advocated for appropriate disclosure of financial climate risk based on international Task Force recommendations.[207] When setting standards, the XRB liaise with national and international organisations and harmonise with Australian standards where applicable.[208] Therefore, the pressure from CA ANZ could be influential. The New Zealand Productivity Commission released a report in 2018 recommending that New Zealand should move into a mandatory environmental disclosure regime.[209] The report acknowledged that the NZX ESG guidance (arguably) makes climate-related disclosure implicit in current reporting standards. However, more importantly, the Commission considered this would not be sufficient to achieve economy-wide disclosure consistently and credibility.[210] Three broad options were put forward to how New Zealand could best accomplish the goal of increasing entity attention to climate risk. These were summarised as encouraging voluntary reporting via industry, interpreting existing requirements as requiring disclosure and establishing new government-mandated reporting requirements.[211] The government released a response to this in August 2019, stating their agreement towards the necessity of material financial risks being disclosed.[212] When addressing the recommendation that mandatory disclosure should be implemented, the government has outlined more consideration is needed regarding to whether the FRA is the appropriate area for this.[213] The government also stressed that consideration should be made of classes of entities for disclosure. In addition, what specifically the disclosure requirements should require would need to be confirmed.[214] Thus, although the government understands there is a need to reconsider New Zealand's climate-risk disclosure, there are still a large number of obstacles and considerations before a new framework can be evaluated. Determining the best legal avenue must also be contemplated. It is important to note there has been no formal guarantee from the government that mandatory environmental reporting will be enforced.

[206] Bell Gully *The Big Picture: Climate Change Getting your business ready* (February 2019) at 18.
[207] At 18.
[208] Proxima, above n 29, at 8.
[209] New Zealand Productivity Commission, above n 30, at 197.
[210] Proxima, above n 29, at 6.
[211] New Zealand Productivity Commission, above n 30, at 195.
[212] New Zealand Government, above n 34, at 5.
[213] At 6.
[214] At 6.

Chapter III – Evolving global regulatory response towards environmental reporting

After considering New Zealand's recommendations, it is insightful to examine the treatment by other jurisdictions of environmental disclosure. Specifically, what frameworks have been used, the distinction in reporting class and what should be the content of the disclosure requirements. Countries all around the world have seen an increase in pressure to implement sustainability reporting. This has resulted in multiple countries introducing mandatory environmental reporting at a faster rate than New Zealand. Climate risk has developed from being seen as an external, public health and safety risk to an internalised corporate risk which needs to be adequately managed.[215] Investors, shareholders and public authorities who are directly impacted by disclosure are more experienced in litigation, possessing greater access to legal expertise.[216] From a global perspective, shareholders are no longer the only party interested in how a company operates.[217] It is largely accepted that strengthening disclosure will be useful not only to investors but market participants such as credit rating agencies, equity analysts and investment consultants.[218] Ultimately, this will improve the ability to price and value climate-related risks and opportunities enabling more informed and accurate investment decisions to take place.[219]

A) TCFD and stakeholder pressure

The pressure for companies to disclose climate-related financial risk has gained serious momentum since mid-2017 when the G20 Financial Stability Board's Task Force made a set of recommendations. In turn, this put pressure on rule-makers to meet investors demands and introduce some form of regulations which either encourages or mandates disclosure to provide greater confidence in capital markets. Countries within the G20 have felt a greater pressure to implement TCFD recommendations than countries outside of the G20, meaning different countries have addressed mandatory ESG reporting at different rates. In England for example, the Governor of the Bank of England warned that company directors could be

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[215] Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38 O.J.L.S 841at 860.
[216] Geetanjali Ganguly and Joana Setzer and Veerle Heyvaert, above n 215, at 859
[217] Other interested stakeholders include government (central and local), employees, suppliers, Non-Government Organisations (NGOs) and other entities. McGuiness Institute *Final Draft Discussion Paper – The Climate Emergency, A New Zealand case study* (August 2019) at 46.
[218] Securities and Futures Commission *Strategic Framework for Green Finance* (September 2018) at 3.
[219] At 3.

held liable for misleading investors about the business risks of climate change and failing to comply with legal reporting requirements.[220] In contrast, New Zealand has been very slow to adopt the TCFD recommendations.[221]Contact Energy is currently the only New Zealand-headquartered signatory basing its 2019 Annual Report on the TCFD recommendations.[222] At the start of 2019, more than 580 organisations worldwide were signatories to the TCFD, including close to 50 from Australia. As New Zealand is not part of the G20, local regulators and business leaders have experienced less international pressure to adopt these standards, despite the clear benefits of the TCFD applying to the New Zealand Market.

1 Response from leading Stock Exchanges

Governments such as those of South Africa and France[223] and more recently the UK have developed specific mandatory standards, while Australia and New Zealand have tended to keep their standards general and voluntary. France and South Africa provide good illustrations of countries who have adopted new rules. Article 173 of the French Energy Transition Law[224] is the most TCFD-compliant piece of legislation enacted by G20 members.[225] It requires companies to disclose financial risks related to the effects of climate change, the mitigating measures they adopt and the environmental impact of their activities.[226] Large companies in France have also had to provide non-financial reporting regarding social and environmental issues since 2001[227] with asset holders and investment managers being required to disclose climate-related financial risks and report on how ESG criteria are considered in their investment decisions.[228] In 2002 a report in South Africa also expanded the responsibility of corporate directors and boards, meaning they had to include information on sustainability in existing corporate disclosure. South Africa was the first country to use regulation to encourage

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[220] Accounting for Sustainability "The Commonwealth Climate and Law Initiative (CCLI)" < www.accountingforsustainability.org>.

[221] Although this figure has increased from two to twenty in 2018, it is still very low for international standards. McGuinness Institute, above n 5, at 69.

[222] Contact Energy *We're Making Life Better* (August 2019) at 18.

[223] Jason Thistletwaite, above n 24, at 6.

[224] French Energy Transition Law 2016 Article 173.

[225] Dr Nina Seega, above n 106, at 9.

[226] Securities and Futures Commission, above n 218, at 5.

[227] Idil Kaya, above n 22, at 209.

[228] Geraldine Ang and Hannah Copeland *Integrating Climate Change-related Factors in Institutional Investment* (Organisation for Economic Cooperation and Development, February 2018) at 31.

expanded disclosure, which adopted mandatory standards for listed companies on the Johannesburg Stock Exchange.[229]

2 *Litigation as a means for shareholder concerns*

Litigation has emerged as a critical driver of regulatory pressure by shareholders against corporate organisations for their environmental impact. Economies such as the United States and the United Kingdom have experienced an increasing number of actions brought against companies.[230] Legal action applies broadly to the treatment of climate change by large entities but has also become the subject of intense litigation explicitly relating to climate risk disclosure.[231] In 2015 the Hague District Court ruled a historic judgement in the case *Urgenda Foundation v The State of the Netherlands*.[232] Tort law was held to determine the minimum emission-reduction target for a developed state, based on the duty of care. Taking legal action against private individuals has also gained momentum in the United States. In New York, Peabody Energy Corporation has repeatedly denied the ability to predict the impact of potential climate change on its business. Peabody had violated state laws prohibiting false and misleading conduct in public financial filings.[233] The 2018 case, *People of the State of New York v. Exxon Mobil Corporation,*[234] involves allegations that Exxon had been misleading investors by applying a more conservative risk assessment of the company and the risks posed by climate change. The case concerns investigations on whether the assets had been significantly under-reported and the subsequent business risks. In December 2018, major shareholders of Royal Dutch Shell (including the Church of England and Robeco) demanded that Shell do more to tackle carbon emissions, arguing that its earlier goal of cutting emissions in half by 2050 did not go far enough. Succumbing to shareholder pressures, Shell announced that it would establish short-term carbon reduction targets, beginning in 2020, as well as becoming the first oil company to link executive pay to the carbon reduction goals. 2019 has seen the greatest number of international protests against climate change on record. If these

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[229] Jason Thistletwaite, above n 24, at 4.
[230] Jacqueline Peel, Hari Osofsky and Anita Foerster. "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41 MULR 793 at 825.
[231] Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, above n 215, at 859.
[232] *Urgenda Foundation v The State of the Netherlands* [2015] HAZA C/09/00456689.
[233] Letitia James New York Attorney General "A.G. Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclosure Risks Arising From Climate Change" (press release, 4 November 2015).
[234] *People of the State of New York v. Exxon Mobil Corporation* 452044/2018.

protests are an accurate representation of the public feeling, litigation is likely to continue unless action by regulators is evidenced.

3 Pressure from Non-Government Organisations

London law firm ClientEarth has a history of making complaints to the Financial Reporting Council (FRC) for large corporations environmental treatment. The allegations include SOCO[235] and Cairn Energy[236] failing to comply with legal obligations under section 414(C) of the Companies Act 2006[237] by not making adequate disclosure of climate change risks. The cases were closed without a full review because of the company's explanations combined with their proposal and pledge for future reporting.[238] In 2018, ClientEarth reported four major UK Businesses to the FRC over alleged failures to address climate change trends and risks in their accounts to shareholders. The increased amount of litigation presented to courts has not only pressured corporations to reconsider their environmental impact and disclosure but also forced courts to question the law on what must be disclosed. There appears to be an international trend of rulings favouring litigants.[239] Combined with multiple ongoing disputes at the time of writing, the sheer amount of interest will continue to put pressure on regulators to implement legislation to clarify disclosure obligations. The agitators, activists and organisations such as ClientEarth act on the premise that unless something is measured, you cannot manage it. As a result, they have a strong incentive for measurement and subsequent disclosure.

The United Kingdom and Australia present the best frameworks to compare and consider due to their similarities with the New Zealand stock exchange. Although there are some inherent distinctions such as New Zealand being smaller in market size, having fewer listed companies and a lack of environmental litigation it is crucial to investigate the ways other jurisdictions have treated the issue. It is only a matter of time before New Zealand shareholders take similar action.

[235] Client Earth *Referral to the FRC's Conduct Committee SOCO International Plc* (August 2016) at 3.
[236] Client Earth, above n 235, at 3.
[237] Companies Acts 2006 (UK).
[238] ClientEarth "Financial regulators failures increases investor risk" (18 October 2017) </www.clientearth.org>.
[239] *People of the State of New York v. Exxon Mobil Corporation* and *Abrahams v. Commonwealth Bank of Australia* VID879/201.

B) The United Kingdom as a leader in sustainability reporting

The UK is a global leader in environmental reporting. They have proactively engaged with the sustainable finance agenda with the government endorsing the TCFD recommendations.[240] The new LSE ESG Reporting Guidelines have also expressly acknowledged and welcomed the TCFD recommendations.[241] The impact climate change has had on security market risk has been a focus of the British Government. In July 2019, the UK Government published a new Green Finance Strategy.[242] This strategy puts in place guidelines to have integrated discussions over a range of finance and green topics. It states that the adoption of TCFD recommendations must be accelerated to match the scale of the environmental challenges faced.[243] A new target to reduce emissions by 2050 has also been set. This action means the UK is the first major economy in the world to include net-zero climate goals into law.[244] Accompanying this was the Bank of England identifying climate change as a material, yet unmanaged risk to financial stability.[245] Being in the G20 (and therefore, more pressure to implement the TCFD recommendations) combined with a significant demand from investors means the UK has been at the forefront of setting trends for environmental disclosure. A Labour MP candidate even indicated their willingness to delist companies from the LSE unless companies did enough to tackle climate change.[246] The extent of this pressure has contributed to the UK developing into a strong leader of environmental reporting. For example, the UK was the first country to make it mandatory for companies to disclose their greenhouse gas emissions in 2013.[247]

1 Form, Structure and the Companies Act

UK securities market law is governed by the Companies Acts 2006, The Financial Services and Markets Abuse Act 2000,[248] the Disclosure and Transparency Rules (DTR) and the EU Market Abuse Regulation. Energy-intensive firms participating in the emission trading schemes have also been required to report on their direct emissions since 2002.[249] There are

[240] Dr Nina Seega, above n 106, at 12.
[241] Securities and Futures Commission, above n 218, at 5.
[242] HM Government *Green Finance Strategy Transforming Finance for a Greener Future* (July 2019).
[243] At 17.
[244] At 5.
[245] Dr Nina Seega, above n 106, at 12.
[246] Financial Times "UK Labour Plan to delist companies to force action about climate change" < www.ft.com>.
[247] Samuel Tang and David Demeritt *Climate Change and Mandatory Carbon Reporting: Impacts on Business Process and Performance* (School of Business and Management, Queen Mary University of London, December 2017) at 438.
[248] The Financial Services and Markets Abuse Act 2000 (UK).
[249] Samuel Tang and David Demeritt, n 247, at 440.

multiple references to environmental risk in the Companies Act, especially to environmental obligations imposed on directors. Section 172 requires directors to act in the way they consider, in good faith, would be most likely to promote the success of the company.[250] Although this is a standard director duty, directors in the UK are explicitly required to do so having regard to the impact of the company's operations on the community and the environment.[251] Recent regulation has seen an expansion in what is required in the strategic and director's reports.[252] Annual strategic reports must now include how directors have carried out the obligations in section 172.[253] These are produced every financial year meaning stakeholders get regular updates on how directors are engaging in environmentally sustainable methods to promote the company.

Specific environmental disclosure obligations also apply to quoted companies. A quoted company is one which is listed on the stock exchange extending to European Economic Area states and the New York Stock Exchange.[254] Quoted companies must publish information to the extent necessary for an understanding of the development, performance and position of the company's business. This includes environmental matters and impact of the company's business on the environment.[255] The expansive nature of what companies must disclose indicates the intention of capturing a wide variety of entities to report on environmental risk.[256] This intention is further developed through unquoted companies now having to publish the report online.[257]

2 *Recent developments*

Although the UK is often at the vanguard of enhancing disclosure, it is the European Union who has taken the lead on requiring corporate social responsibility disclosure.[258] In 2014, the UK implemented the 2014 Directive by adopting new regulations amending the Companies Act. In response to the need to create domestic policy distinct from European Union (EU)

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[250] Companies Act 2006.
[251] Section 172(1)(d).
[252] Department for Business *Corporate Governance The Companies (Miscellaneous Reporting) Regulations 2018 Q&A* (Energy and Industrial Strategy, November 2018) at 7.
[253] This duty is laid out in Section 414CZA(1).
[254] Section 385(2).
[255] Section 414C(7)(b)(i).
[256] Section 172(1)(d).
[257] Section 426B.
[258] Tricia Dunlap, Rebecca Grapsas, Katrien Vorlat and Rainer Loges "Sustainability Disclosures in the EU After the 2014 Non-Financial Reporting Directive" (2014) 31 12 at 12.

requirements (as a result of the scheduled withdrawal from the EU), the UK Government has recently published details of its new Streamline Energy and Carbon Reporting (SECR) framework. The framework was introduced on 1st April 2019, requiring companies to report on carbon dioxide emissions and energy efficiency in their annual reports.[259] The new regulation will also cover UK-incorporated unquoted companies[260] and limited liability partnerships (LLPs).[261] The Companies Act grants power to the Secretary of State to make provisions to other matters that must be disclosed in a directors' report.[262] From this power, the 2018 Regulations also introduce requirements for large unquoted companies and LLPs to publish their annual energy use, total greenhouse gas emissions and other related information.[263] Under these new regulations, large unquoted companies must disclose their global emissions and at least one intensity ratio.[264] They also provide comparisons to previous year's figures for energy use and GHG emissions and the methodologies used in the calculation of disclosures.[265] Both unquoted companies and LLP's are required to disclose all of the requirements quoted companies are subject to, with the addition of UK energy use. Quoted and unquoted companies are exempt from these disclosure requirements if they have consumed forty megawatt hours or less during the respective period.[266] Environmental reporting is therefore notable for its binding nature within the UK. Where climate-related risks are material to the company they should be disclosed under UK legislation,[267] and where regulation requires, specific reporting of environmental implications must also be disclosed. These two determinates have proven to be a highly effective framework within the UK and it is likely the standard of disclosure will continue to increase as the pressure does.

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[259] HM Government *Environmental Guidelines: Including streamlined energy and carbon reporting guidance* (March 2019) at 25.

[260] Defined as having a turnover of 36million pounds or more, balance sheet total of 18million or more or 250 employees.

[261] Limited liability partnership must have at least 250 employees or an annual turnover greater than 36 million pounds ($47 million) and annual balance sheet total greater than 18 million pounds.

[262] Section 416(4).

[263] HM Government, above n 259, at 25.

[264] Intensity ratios compare the company's emissions data with an appropriate metric such as sales revenues, allowing comparisons of performance with other similar organisations. HM Government, above n 259, at 30-31.

[265] At 31.

[266] HM Government, above n 259, at 32.

[267] Companies Act 2006, s 414.

C) The Australian approach

The Australian investment community has illustrated a strong interest and subsequent pressure for environmental reporting. The Australia Government has welcomed the final report of the TCFD and encouraged stakeholders to carefully consider its recommendations. Suggestions have been made by the Australia Government that the Australian Securities and Investment Commission should review its high-level guidance on disclosure to ensure it remains appropriate.[268] Further, the Australian Prudential Regulation Authority has recognised climate change imposes 'foreseeable, material and actionable' financial risks on Australian companies and is engaging with companies on how they approach, measure and manage these climate-related risks.[269]

1 The Relevant Frameworks

The Corporations Act,[270] ASX listing rules[271] and the ASX principles and guidance provisions provide the companies reporting framework. Environmental Reporting in Australia takes a similar shape to New Zealand with the majority of obligations arising from the Corporations Act as well as both periodic and continuous disclosure under the listing rules. Despite these similarities with the New Zealand equivalent, there is other specific legislation requiring companies to report on environmental impact not present within New Zealand. The National Greenhouse and Energy Reporting Act 2007[272] was introduced to provide for the reporting and dissemination of information related to greenhouse gas emissions. It also provides for the greenhouse and energy audits.[273] The thresholds for companies are dictated by either specific facility or corporate reporting.[274] The facility threshold is measured at 25 carbon dioxide emissions or more for greenhouse gases (including scope one and two emissions), with production or consumption of 100 terajoules or more of energy. For corporate reporting, both the carbon dioxide figure and total terajoules amount for production and consumption double.[275]

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[268] Climate Change Authority *Review of the National Greenhouse and Energy Reporting Legislation A Consultation Paper* (July 2018) at 5.
[269] At 15.
[270] Corporations Act 2001 (Australia).
[271] Australian Securities Exchange, *Listing Rules*.
[272] National Greenhouse and Energy Reporting Act 2007 (Australia).
[273] Section 73.
[274] National Greenhouse and Energy Reporting "Reporting Thresholds" (17 January 2018) Clean Energy Regulator <http://www.cleanenergyregulator.gov.au>.
[275] Above n 274.

2 *Periodic Reporting under the Corporations Act*

Reporting requirements to prepare annual financial reports and directors reports apply to all disclosing entities, public companies, large proprietary companies and all registered schemes.[276] Companies which are listed have additional obligations under the ASX listing rules. Directors of listed companies are required to include information that shareholders would reasonably require to make an informed assessment of the entity's operations, financial position, business strategies and prospects for future financial years[277] as part of their annual reporting requirements.[278] Specifically, if the company's operations are subject to any particular and significant environmental regulation law of the Commonwealth or a state. If so, they must give details of the entity's performance concerning environmental regulation.[279] Directors duties under section 180 provide another area where environmental reporting should take place to ensure the directors do not face liability. In a recent speech Lord Sales stated that in Australia "well-documented corporate decisions, reflected in annual reports and disclosures, and a culture of seeking specialist advice on the environmental impacts of board decisions, are likely to protect directors from legal sanctions."[280] This comes in light of two reports by Noel Hutley. The 2016 report states that climate change risk may be relevant to a director's duty of care,[281] while the 2019 report addresses that the developments in scientific knowledge have elevated the standard of care expected of the reasonable director.[282]

3 *Additional listing rules for publicly traded companies*

The Australian Securities Exchange first adopted guidance in 2014 that required listed companies to disclose any environmental risks in addition to strategies to mitigate these risks.[283] These recommendations operate on a 'comply or explain' rule which is very similar to the NZX approach,[284] although some key differences apply. The prospectus in Australia (equivalent to

[276] Corporations Act, s 292.
[277] Section 299A.
[278] Section 292(1).
[279] Section 299(1)(e).
[280] Lord Sales, Justice of the Supreme Court "Keeping pace with environmental challenges" (Anglo-Australasian Law Society, Sydney 27 August 2019).
[281] Mr Noel Hutley SC and Mr Sebastian Hartford-Davis *Climate Change and Director's Duties* (The Centre for Policy Development and the Future Business Council, October 2016) at 2.
[282] Mr Noel Hutley SC and Mr Sebastian Hartford-Davis *Climate Change and Director's Duties* (The Centre for Policy Development and the Future Business Council, October 2019) at 2.
[283] Jason Thistletwaite, above n 24, at 4.
[284] NZX listing rule 4.2.

the New Zealand PDS) must disclose the risks of the company's business model and explicitly cite environmental and regulatory risk as categories of risk to be considered.[285] This contrasts with the NZX requirements for a PDS of disclosing material information,[286] with no mention of direct environmental impact. The ASX also provides specific reporting provisions for mining and oil corporations, including requirements to report on proven and probable mineral resources.[287] Regulatory Guide 247.66[288] states that it is likely to be misleading to discuss prospects for future financial years without referring to climate change and the material impact this has.[289] Further, reports suggest that the law requires an Office of Financial Regulation to include a discussion of climate risk when it could impact the entity's financial performance or disclosed outcomes.[290] This contrasts with the equivalent Companies Act in New Zealand where there is no direct mention to environmental disclosure, only areas where it may be implied in various sections.[291]

4 Continuous disclosure

Australia has a similar continuous disclosure regime to New Zealand which requires the release of material information when it becomes available if it affects the price or value of the securities issued by the company.[292] Section 677 states a reasonable person would expect to receive information if it has a material effect on the price or value of the securities.[293] Martin CJ, in the Supreme Court of Western Australia case *Jubilee Mines,*[294] defines 'materiality' in this context to occur where the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for or buy or sell those securities. *R v. Rivkin*[295] establishes that information will be material if it would likely influence a person who commonly invests in securities. Recent environmental litigation in Australia[296] raises questions towards whether this definition of materiality would include material

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[285] Australian Securities and Investment Commission *Regulatory Guide 228 Prospectus: Effective disclosure for retail investors* (August 2019) at 27.
[286] Financial Markets Conduct Act, s 57.
[287] Australian Securities Exchange *listing rules* Chapter 5.
[288] Australian Securities and Investments Commission *Effective disclosure in an operating and financial review* (August 2019) at r 247.6.
[289] Australian Securities and Investment Commission, above n 285, at 20.
[290] At 20.
[291] Section 211.
[292] Australian Securities Exchange *listing rules* Rule 3.1.
[293] The Corporations Act 2001 (Australia), s 677.
[294] *Jubliee Mines NL v Riley* (2009) WASCA 62.
[295] *R v. Rivkin* (2004) NSWCCA 7 at [51].
[296] See *Abrahams v Commonwealth Bank of Australia (2017)* FCA VID879 and *Mark McVeigh v Retail Employees Superannuation* (2019) FCA 14.

environmental risk. The frequency of references to environmental disclosure throughout Australian legislation indicates there is a high likelihood environmental risk is included within this definition. Specific obligations arise under the National Greenhouse and Energy Reporting Act 2007, Section 299(1)(e) of the Corporations Act 2001 and director's duties under section 180.

5 *Results of Regulation in Australia*

Although Australia does not have the extent of mandatory environmental reporting of the UK, the treatment of environmental disclosure is mandated at a greater level than in New Zealand. Mandatory environmental reporting will likely continue to grow in Australia given the consistency of pressure by stakeholders as evidenced by the frequency of litigation against corporations. On close inspection, recent regulatory changes have made a significant improvement to listed Australian companies. Reporting among ASX200 companies undertaking a meaningful level of reporting (rated at 'Moderate' or higher)[297] increased from 73 per cent to 76 per cent from 2017 to 2018.[298] There has been a general trend since the Australian Governance and Reporting Guidelines started recording in 2007 of more comprehensive reporting.[299] In 2019, 82 cents of every dollar listed in the ASX 200 is in companies which have detailed[300] or leading[301] reporting on climate risk.[302] Further, only sixteen companies on the ASX provide no ESG information.[303] These changes indicate regulation has had positive implications in Australia, although there is still a long way to go.[304] It is likely continued pressure by stakeholders will further contribute to this shift in market disclosure.

[297] Moderate defined as when ESG reporting is "supported by performance data which goes beyond one or two material risk areas." Australia Council of Superannuation Investors *ESG Reporting by the ASX200* (August 2019) at 9.
[298] Australian Council of Superannuation Investors, above n 297, at 9.
[299] Australian Council of Superannuation Investors, above n 297, at 12.
[300] Detailed defined as "The company identifies and provides detailed reporting of a range of material ESG risks and supports this discussion with performance data for multiple risks and at least one quantitative or qualitative target for a material risk is included." Australian Council of Superannuation Investors, above n 297, at 9.
[301] Leading defined as "The company provides comprehensive reporting of their material ESG risks and mitigation strategies." Australian Council of Superannuation Investors, above n 297, at 9.
[302] Australian Council of Superannuation Investors, above n 297, at 5.
[303] Australian Council of Superannuation Investors, above n 297, at 5.
[304] Australia Council of Superannuation investors *Corporate Sustainability Reporting in Australia An Analysis of ASX200 disclosure* (June 2018) at 8.

D) *Global Auditing Frameworks*

Auditing is the process of independent third parties assuring to shareholders and debt-holders that the information they receive from companies is fairly presented.[305] This is important as it provides verification, confidence and allows stakeholders to rely on the information that companies publicly disclose. Auditing financial information is highly procedural and there is a strong precedent for firms on how to audit given companies. Checking over sustainability reports which deal heavily with qualitative and quantitative financial claims present new challenges for auditors. When companies initially started releasing environmental reports there was no third-party opinion or assurance[306] so the reports did not have a significant degree of reliability. Countries such as South Africa and France have developed specific requirements for disclosure which must be verified and audited by a third party.[307] In Australia, reporters are encouraged to engage a registered greenhouse and energy auditor to confirm they comply with reporting requirements before submitting their reports.[308] Despite this, there is no legislative requirement to do so.[309] The Australian Clean Energy Regulator is responsible for administrating the audit framework.[310] In the UK, there is nothing in the Environmental Reporting Guidelines or statutory obligation to have environmental information audited. New Zealand also has little environmental auditing, although the XRB adopted the auditing standard ISAE 3410 in 2019 which includes assurance engagement on Greenhouse Gas (GHG) Statements. The standard has the objective of providing reasonable assurance that any GHG statement produced is free from material misstatements.[311] GAAP dictate how a large number of countries regulate auditing around the world and allows consistency among countries. Auditing of non-financial information presents difficulties among jurisdictions. Without a clear, consistent framework for independent third parties to check and compare environmental findings, problems arise when making comparisons between countries. It is likely that as environmental reporting becomes more prevalent in both periodic reporting and as part of continuous disclosure for listed and non-listed entities, regulators will look to adopt a more

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[305] Janet L. Colert and John Sr. Jahera, Jr "The role of the Audit and Agency Theory" 1988 4:2 JABR 7 at 10.
[306] Ngonidzashe Shuro and Lesley Stainbank, above n 104 at 94.
[307] Jason Thistletwaite, above n 24, at 6.
[308] Climate Change Authority, above 268, at 26.
[309] At 26.
[310] At 28.
[311] External Reporting Board *International Standards on Assurance Engagements (New Zealand) 3410* (NZ auditing and assurance standards board, 2016) at 9.

unified response. The perceived uncertainty of climate change means that scepticism from auditors will be particularly important to address and overcome.[312]

E) Conclusion

Different countries have implemented the TCFD recommendations and wider financial pressure to better price environmental financial risks through increased disclosure at different levels. Industry sectors from country to country have dictated the need for specific mandatory disclosure such as GHG emissions in Australia, however, the general trend of overseas regulators and courts (hinting towards 'materiality' encompassing environmental risk) is not replicated in New Zealand. Notably, New Zealand has less listed companies and contrasting sectors to the United Kingdom and Australia. However, these differences do not provide sufficient justification for New Zealand maintaining current regulation without looking to adapt and evolve our current disclosure requirements. Looking at offshore confirmation, it is a matter of when, not if, New Zealand will adopt a framework that has already proven its value and applicability in overseas jurisdictions.

[312] McGuinness Institute, above n 5, at 55.

Chapter *IV*– A New Zealand Perspective

Overseas jurisdictions have introduced mandatory environmental reporting in different ways through legislation. The universal disclosure framework applicable to New Zealand stems from two main parts. First, the specific mandatory requirements of GHG emissions which have been adopted overseas. Second, whether 'environmental risk' should be included in the definition of 'materiality' and therefore disclosed to investors in periodic annual reports and continuous disclosure requirements.[313] This chapter will investigate the practicality of whether these approaches can be adopted into New Zealand regulation and the area of legislation where this could be implemented.

A) New Zealand context

The New Zealand Government has set clear goals of reducing emissions to net-zero by 2050.[314] Although New Zealand is yet to formally adopt the TCFD recommendations, given recent activity, specifically the Climate Change Response (Zero Carbon) Bill 2019 there has been an overall increase in pressure to address climate risk disclosure. Adopting the TCFD guidelines has been recommended by the private sector as well as the public service departments, crown entities and state-owned enterprises.[315] Warren Allen, the CEO of New Zealand's External Reporting Board, says companies will be increasingly expected to adopt the TCFD recommendations, which will also establish an independent Climate Commission with the power to set emissions targets.

1 Considerations for reform

The success of overseas jurisdictions implementing environmental disclosure more succinctly and comprehensively than New Zealand is something to look to for guidance and evidence. However, there are significant differences among these countries when comparisons are made. Implementing a similar framework must be adjusted to New Zealand's specific environment. This includes New Zealand's cultural diversity, geographical isolation, ecosystems and natural

[313] The Financial Markets Conduct Act, s59.
[314] McGuinness Institute, above n 5, at 10.
[315] Ministry for the Environment *Adapting to Climate Change in New Zealand Recommendations from the Climate Change Adaption Technical Working Group* (May 2018) at 35.

resources which encompass our agricultural base.[316] These attributes, combined with New Zealand's market structure means a bespoke approach is required to address the way companies can tackle environmental concerns. Formally acknowledging the TCFD recommendations in the FMCA is one readily available avenue for achieving this. Further, providing a mandatory reporting framework, including a variety of climate-related risk disclosures is a more appropriate venue.

2 The New Zealand Market

New Zealand's economy is unique and presents issues other jurisdictions do not experience. The number of issuers on the NZX remains relatively low compared to foreign bourses, with only 165 listed companies compared to Australia's 2245 in August 2019.[317] This trend is unlikely to change with zero new listings in 2018 and 6 de-listings.[318] There has been a recent shift with some New Zealand businesses listing on overseas stock exchanges in preference to the NZX. A decrease in capital being raised on New Zealand financial markets reflects a bad state of health which has negative ramifications on the New Zealand economy. The generation of capital in primary markets is essential to fund business growth and expansion. This context should be considered when reading the new 2019 NZX listing rules. The updated rules have the intention of encouraging participation and removing costs by making it easier for companies to list and making it simpler and faster for companies to raise additional capital.[319] Implementing an increased disclosure regime may contribute further to these problems and deter future businesses from listing on the NZX. This would have the opposite impact of what the new listing rules intended. To put this into perspective, the NZX fee calculator states that a company with a market capitilisation of $100 million would pay around $100,000 to list and then $50,000 per annum.[320] In contrast, another significant stock exchange, the NASDAQ[321] has costs which are half this amount.[322] There are also other costs inherent in a listing status, including expenditure items such as audit, legal fees and governance-related charges.[323]

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[316] McGuinness Institute, above n 5, at 15.
[317] Australia Stock Exchange "End of Month Values" (August 2019) <www.asx.com.au>.
[318] Chapman Tripp *New Zealand Equity Capital Markets Trends and Insights* (2019) at 4.
[319] New Zealand Stock Exchange *Finalised Market Structure and Listing Rules Explanatory Paper* (2018) at 3.
[320] Wealth Morning "What's Killing New Zealand's Stock Market?" (7 May 2019) < www.wealthmorning.com>.
[321] The Nasdaq is an American stock exchange and is the second biggest stock exchange by market capitilisation in the world.
[322] Above n 321.
[323] Above n 321.

Continuing to increase the disclosure regime and therefore rising costs for the company may add to the disincentives for companies to list on the stock exchange. Other ways to raise capital, such as debt, may now seem relatively more attractive. There have already been increases in the disclosure requirements for directors. They are now required to disclose 'material information' when they ought to know about it, rather than previously only having to disclose once they came into possession.[324] New Zealand regulators have difficult circumstances to consider. Clear benefits of environmental reporting are evident on both the LSE in the UK and ASX in Australia. However, both of these stock exchanges are very different from the NZX. The NZX is faced with reductions in listings, while the ASX continues to experience increases with 132 new listings in 2018.[325] Implementing increased disclosure is problematic for New Zealand regulators given the recent contraction of NZX listed companies. However, the primary benefits of increased environmental disclosure and maintaining a modern approach to overseas jurisdictions is an inevitable change in New Zealand securities market law. The challenge lies in putting together a set of requirements which can achieve these broad objectives. Any such requirements must operate effectively in the New Zealand market context.

3 Recent regulatory pressure - Climate Change Response Amendment Bill

The Climate Change Response Amendment Bill reflects the goals New Zealand has in reducing carbon dioxide emissions. It also gives New Zealand a plan to adhere to and deliver on the Paris Agreement.[326] The Paris Agreement is a global initiative designed to combat the effects of climate change. New Zealand joined this agreement in 2015, helping to achieve the overarching goal of limiting the global average temperature increase to one and a half degrees above pre-industrial levels. The Bill also provides a framework for New Zealand to develop and implement clear and stable climate change policies that formed the basis of the Paris Agreement.[327] Several steps are proposed and targets are placed for reducing all greenhouse gases. At the time of writing the Bill is still in its second reading before going back into Parliament. Research undertaken proves that intense action towards climate change may slow economic growth in the short term, but delayed action is likely to cost New Zealand more overall.[328] In general, the Bill has received a large amount of support from the New Zealand

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[324] New Zealand Stock Exchange, above n 196, at 16.
[325] Kate Galpin "ASX review of sharemarket floats" (February 2019) <www.asx.com.au>.
[326] New Zealand Government *Climate Change Response (Zero Carbon) Amendment Bill: Summary* (May 2019) at 4.
[327] James Shaw "Climate Change Response (Zero Carbon) Amendment Bill" New Zealand Parliament <www.parliament.co.nz>.
[328] New Zealand Government, above n 326, at 7.

public and is likely to continue to receive this support moving forward. From a financial perspective, the Bill does not provide a standard for what New Zealand listed companies must disclose on climate-related financial disclosure. This could have been an opportunity for the government to address the climate-related disclosure issue. By refraining from including any mention of how this relates to disclosure, it may suggest environmental reporting is not something immediately on the government's mind. However, the Climate Change Response Amendment Bill is unlikely to be the best legislation to enact a new disclosure regime, even if this is something parliament is considering. The Productivity Commissioner does recommend that if environmental disclosure is to be included in legislation, the FRA would be the most appropriate area to implement these standards.

4 Current legislation across all sectors

Although this dissertation has focused on the reporting of listed companies, it is essential to address the disclosure obligations of other sectors within New Zealand. The Environmental Reporting Act 2015 governs public entity reporting. The Act forms the basis for the national climate framework, being split into five domains of air, atmosphere and climate, freshwater, land and marine. Disclosure of the Banking and Insurance Sector is covered by the Reserve Bank Act 1989. Aside from the FRA, licensed insurers have additional disclosure requirements imposed by the Insurance (Prudential Supervisor) Act 2010. The Reserve Bank is also a member of the Network for Greening the Financial System which has the intention of contributing to climate and environmental analysis and the Sustainable Insurance Forum. These all present frameworks where additional requirements for disclosure could be implemented.

Banking is an especially important sector as it dictates where capital is distributed throughout the economy. The Reserve Bank has the purpose of promoting the prosperity and wellbeing of New Zealanders and contributing to a sustainable and productive economy.[329] Maintaining public disclosure is central to the approach towards prudential regulation and supervision.[330] By influencing bank's behaviour, stakeholders can contribute towards its long-term viability[331] and direct the bank's lending requirements towards where they see best fit. The GFC generated

[329] The Reserve Bank Act, s1(a).
[330] McGuinness Institute, above n 5, at 8.
[331] Geoff Bascand, above n 38.

a global trend and an ongoing effort to improve public disclosure in the banking sector.[332] Central banks have internationally become more active on climate change.[333] The Bank of England is participating in the TCFD to increase the quality of information which is available to investors.[334] Whether the Reserve Bank should look to amend the requirements for how banks can help mitigate climate change remains unclear. The Reserve Bank released a climate change strategy[335] which expressed hesitation over whether the Reserve Bank's objectives enable it to take on this role.[336] Banks must consider a variety of risks in their reporting when assessing the financial system, and climate change is just one component in this basket of risks.[337] As just 'another risk,' climate change disclosure is likely to be an area that other pieces of legislation should regulate.

B) The different options presented

Three broad options have been proposed to New Zealand in a recent report.[338] These are to encourage voluntary reporting via industry,[339] to interpret existing requirements as requiring disclosure[340] and to establish new government-mandated reporting requirements.[341] The level of disclosure obligations in New Zealand vary from mandatory legislation, mandatory standards, comply or explain, opt-out, opt-in or purely voluntary.[342] Currently, NZX listed companies and large companies operate on a 'comply or explain' basis.[343] This dissertation recommends that both of these entity classes should join the mandatory framework on environmental disclosure which currently includes state-owned enterprises, oil and gas extractors, government departments and councils.[344] Further considerations as stated by the government in their response need to be considered. These include:[345]

- Whether the FRA is the most appropriate means for implementing climate-related disclosure requirements.

[332] Geoff Bascand, above n 38.
[333] Reserve Bank of New Zealand, above n 16, at 27.
[334] At 28.
[335] At 28.
[336] At 27.
[337] At 28
[338] New Zealand Productivity Commission, above n 30.
[339] At 195.
[340] At 196.
[341] At 197.
[342] McGuinness Institute, above n 5, at 100.
[343] At 100.
[344] At 100.
[345] New Zealand Government, above n 34, at 6.

- Consideration of the classes of entities the disclosure requirements should apply to.
- What, specifically, the disclosure requirements should require entities to disclose and whether the disclosures should be different for different classes of entity.

1 The practicality of the Financial Reporting Act

Annual reporting under the FRA deals primarily with periodic disclosure requirements and does not cover any continuous disclosure obligations surrounding listed companies. Therefore, if a listed company came into possession of 'material' climate-related information, there would be nothing within New Zealand legislation demanding this to be disclosed immediately. If the NZX continuous disclosure obligations were amended to provide guidance on when climate-risk should be included within 'materiality' this would be restricted to listed companies. Further, it is unlikely environmental information fits into the purpose of 'material information' for continuous disclosure requirements. Public announcements have historically included new shareholder details, corporate takeovers, asset acquisitions and disposals and dividend announcements.[346] These events are one-off, and it is evident when they must be disclosed. In contrast, climate risk is something which generally builds up over time, and therefore finding a point where it should be 'announced' presents challenges. Consequently, providing guidance on how continuous disclosure could cater to climate-related risk is unlikely something which could easily be included within legislation. One need look no further than the polysemy contained within the current section 232 test on material information.[347] Mandatory periodic reporting would be more effective if clear standards can be established. A consistent approach towards specific disclosure requirements would need to be enacted. This method would allow stakeholders to make well-informed decisions on alternative investments between sectors.

Currently, reporting of environmental risk is spread across the FRA, the Companies Act, and the NZX listing rules. This presents issues as a consistent approach for different reporting entities has not been achieved and cannot easily be followed. The complexity of the current framework, which mixes in a variety of voluntary guidelines limits the accessibility, consistency, completeness and connectivity of climate-specific information.[348] Implementing a universal statement of climate information could be included in the Climate Change Response

[346] Jurgita Stankeviien and Simas Akelaitis *Impact of public announcements on stock prices: relation between value of stock prices and price changes in Lithuanian stock market* (Kaunas University of Technology, 2014) at 539.
[347] Financial Markets Conduct Act, s 232.
[348] McGuinness Institute, above n 5, at 99.

Amendment Bill, the Companies Act or the FRA. Section 211 of the Companies Act could be modified to instruct a statement of climate information to be produced alongside the annual report. Various sections in the FRA could also achieve this same objective. Having the entity provide all the key environmental information in one place will help address the difficulties in the current legislation.[349] The FRA is the most appropriate as it can apply to listed and non-listed companies. It also works closely with the XRB, meaning climate disclosure could easily accompany annual reports. This approach would signal to investors the importance of interpreting the environmental information to the same level of precision as the financial reports.

After evaluating the international evidence which considers the market structure and reporting framework it is my recommendation NZ should adopt a mandatory approach through the FRA. This would be done by amending section 17 which outlines reporting standards that cover non-financial reporting. Section 17(1) would be split into two parts. It would cover both the mandatory requirements which are discussed below and the current optional reporting standards[350] being released periodically with the annual reports.

2 The relevant classes which will be impacted

The benefits inherent in increasing transparency could flow into other sectors of the New Zealand economy if a sufficient framework can be identified. A small proportion of total business capital in New Zealand is listed on the NZX. Therefore, to make the most efficient advancement, industries should be targeted which have the greatest ability to leverage change aside from listed companies. These consist of insurance, banking, investments and energy.[351] FMC reporting entities include a large proportion of the companies within these sectors, including issuers of regulated products,[352] registered banks,[353] credit unions[354] and building societies.[355] Currently, these entities all operate on a "comply or explain basis."[356] My recommendation is that this mandatory approach will apply to large entities,[357] NZX-listed

[349] McGuinness Institute, above n 5, at 99.
[350] Financial Reporting Act, s17(1).
[351] Ministry for the Environment, above n 315, at 35.
[352] Financial Markets Conduct Act, s451(a)
[353] Section 451(g).
[354] Section 451(i).
[355] Section 451(j).
[356] McGuinness Institute, above n 5, at 99.
[357] At 125.

companies and FMC reporting entities. The intention of targeting more than just listed companies is to influence a greater deal of economic activity in the New Zealand economy. Clarification of this proposal can be achieved on closer inspection of Fonterra; a multinational dairy co-operative in New Zealand. In 2018 Fonterra had a total of 22.2 million tonnes of carbon dioxide equivalent gases,[358] making it the largest emitter in New Zealand.[359] This amount has a significant impact on the environment. Therefore, it is in the best interest of the New Zealand economy that the methods Fonterra take to mitigate these impacts are made available to the general public. As a dairy co-operative, buying shares in Fonterra is restricted to farmers, although NZX listing rules still apply as Fonterra has debt listed on the NZX. Even if Fonterra was to de-list their debt and therefore not be obligated to report under the NZX listing rules, they still qualify as a 'large' entity meaning the FRA obligations under the recommended framework would apply. In this instance, Fonterra already produces a comprehensive sustainability report,[360] however this is done on a voluntary basis. The uniform approach recommended will ensure companies are not discouraged from listing on the stock exchange due to increased disclosure obligations. These recommendations represent a sufficient but not radical step in reporting, targeting three entity types that have a considerable impact on the New Zealand economy.

3 What should be disclosed

It is clear from overseas authority that formulating a universal environmental disclosure framework which applies consistently across all sectors, firms and markets presents challenges. Thus, adaptations are needed which allow for comparisons where possible. Different sectors face different environmental challenges and making it mandatory to report on factors which do not impact a certain sector is not practical. It will also increase compliance costs for firms. A sophisticated, direct and meaningful approach which does not overcomplicate the framework would incorporate a *Statement of Climate Information*. There is no universal precedent on what this would include, although overseas authorities provide guidance. Both the UK and Australia include mandatory reporting of GHG emission for listed companies.[361] Adopting a similar

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[358] Fonterra Co-operative Group Limited *Sustainability Report For the year ending 31 July* (Nov 2018) at 22.
[359] Joel MacManus and Anuja Nadkarni "NZ's biggest greenhouse gas emitters and their struggle to pollute less" (5th July 2016) <www.stuff.co.nz>.
[360] Fonterra Co-operative Group Limited *Sustainability Report* For the year ending 31 July (Nov 2018).
[361] HM Government *Environmental Guidelines: Including streamlined energy and carbon reporting guidance* (March 2019) at 6 and National Greenhouse and Energy Reporting Act 2007 (Australia).

approach and providing guidance such as the 2019 quick guide on *Measuring Emissions: A Guide for Organisations*[362] would give companies a clear target.

Proposed Statement of Climate Information:

Within this statement, there would be five to fifteen standards companies must report on, including both quantitative and qualitative aspects. Five of the standards will be market-wide (mandatory), while ten will be voluntary and sector-specific. A sample of five mandatory inclusions is demonstrated below. These have the intention of showing the company's commitment to a lower-carbon economy and the broad goal of measuring the company's overall impact on the environment. They will be produced with the periodic annual reports as instructed by the FRA. A sample of five pieces of disclosure I think could achieve these objectives have been included below.

- The company's impact on the environment. Past, present and future.
- The material risk the company has to climate change.
- Factors which would impact the given industry.
- The company's approach to sustainability.
- Commitment to achieving a carbon-neutral target.

New Zealand Salmon (NZKS) provides an illustrative example of how these standards would apply to a listed company. With a business model dealing with fish farming, the risk of rising seawater temperature is a material risk facing the company. This is already included in the 2018 report.[363] References could also be made to fish mortality rates due to climate change. NZKS has a strong approach to sustainability hoping to pass on their natural resources to the next generation in the same or better condition.[364] It is stated NZKS can contribute positively to a carbon-neutral target by 2050.[365] The set of standards could, therefore, easily be met by NZKS. It would be inefficient to require them to also report on specific GHG emissions, which are unique to the energy sector. On a broader level, NZKS was listed on the stock exchange in

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[362] New Zealand Government *Measuring Emissions: A Guide for Organisations 2019 Quick Guide* (2019).
[363] New Zealand King Salmon *Big Ideas Start Here* (2018) at 11.
[364] At 18.
[365] At 18.

2016 to fund future growth opportunities.[366] By having no extra disclosure obligations from being a 'large company' NZKS has no increased cost of compliance from becoming listed.

4 Summary of recommendation

A consistent approach applying to all sectors in the New Zealand economy would be the most appropriate response. Mandatory periodic disclosure introduced through the FRA covering the standards specified would achieve this objective. It would enable a mixture of the five mandatory standards and the ten voluntary requirements, based on the sector of the reporting entity. The increased disclosure will not result in a significant increase in information gathering costs for the entity nor unnecessary over reporting. On a separate level, to provide further guidance, the FMCA should adopt the TCFD recommendations as voluntary reporting guidelines for NZX listed companies.

C) Flow-on effects from implementing a framework

With increased disclosure, director's duties and their part in climate change risk raise questions. In Australia, there is a greater standard that is expected of a reasonable director[367] with this benchmark continuing to rise.[368] Due to the growing awareness of shareholders towards climate change risk, the exposure of 'individual directors' to climate change litigation is increasing.[369] Director's duties in New Zealand are imposed by the Companies Act and currently make no direct mention of climate change. However, if this recommendation is enacted, there is a high probability director's liability will follow a similar pattern to Australia.

1 Limitations of the approach

The recommended amendments for periodic disclosure will not impact some areas which have a large influence over the New Zealand economy. New Zealand's largest bank ANZ has claimed to be carbon neutral. However, as pointed out by climate campaigners, it has been lending to fossil fuel companies and sponsoring exclusive industry groups that enable the

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[366] New Zealand Stock Exchange *NZX IPO Masterclass- The New Zealand King Salmon Listing Story* (June 2017).
[367] Mr Noel Hutley and Sebastian Hatford Davis, above n 282, at 2.
[368] At 3.
[369] At 9.

advancement of coal, oil and gas projects that are causing climate change.[370] Although banks will fall under the definition of FMCA reporting entities, this will only require them to report on their emissions as a company, rather than report on the companies they lend money to.

2 *Checks and Balances*

An auditing standard would need to be implemented to provide assurance that the information being disclosed about the environmental implications is correct. An effective approach would be to formulate a domestic auditing and assurance standard on the specific climate-related disclosure which would be covered in the auditor's report.[371] Audit firms will be able to pick up trends and introduce tests, as they audit a wide variety of companies implementing the same reporting requirements. This standard would ensure companies do not use greenwashing as a means to take advantage of false reporting. Greenwashing occurs when companies disclose information painting them in a positive light without revealing the whole truth.[372] Theoretically, companies could be duplicitous in their reporting. They could elect to disclose to investors that they have very meagre rates of carbon dioxide, however omit to disclose that they are also taking part in a mining expedition. Having consistent independent auditors ensures this would not occur and applies an extra layer of reliability to the information that companies are disclosing.

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[370] 350 Aotearoa "Another blow for ANZ, as greenwash exposed" (23rd August 2019) Scoop <www.scoop.co.nz>.

[371] McGuinness Institute, above n 5, at 9.

[372] Frances Bowen and J. Alberto Aragon-Correa "Greenwashing in Corporate Environmentalism Research and Practice: The Importance of What We Say and Do" (2015) 27(2) Organisation & Environment 107–112.

Concluding remarks

Securities market law all around the world has been adapting and will continue to evolve to the challenges presented by climate-related risk. Informed investors are essential to financial markets. The pricing and circulation of capital have profound effects on the New Zealand economy. If mandatory periodic reporting is not introduced several issues will continue to increase. Investments will continue to flow into high GHG emission entities, with investors not being able to make appropriate and fully educated investment decisions. Information asymmetry between directors and stakeholders will broaden over material climate risk. Shareholders will likely look to litigation if companies continue to under disclose their environmental impact. This tendency is evident in Australia. The purpose of the FMCA is to promote the confidence and informed participation of businesses, investors and consumers[373] in financial markets and ensure they are fair, efficient and transparent.[374] Currently, large quantities of unpriced risk are present within New Zealand's financial markets, and therefore, the FMCA is not achieving its primary purpose.

The government has a clear goal of reaching a zero-carbon economy by 2050. Although green bonds have contributed towards this transition, they will not be sufficient to achieve the desired goal for carbon emissions.[375] This paper has established that there are several steps the government could implement to allocate capital more efficiently throughout the economy. Mandatory environmental periodic reporting through the FRA is a medium for achieving this transformation. Investors are more environmentally concerned. Companies need investment and will be encouraged to assess their sustainability. Introducing mandatory periodic reporting through the FRA is the most applicable area for these regulatory adjustments. The requirements would apply to the three entity types of listed, large and FMC reporting entities, representing an adequate step in enhancing disclosure more broadly.

"The costs of adjusting to climate change will become far greater the later we leave it, but our decision-making structures and cycles at the moment seem ineffectual as regards taking the decision now which might reduce impacts and costs tomorrow".

- Mark Carney [376]

[373] Financial Markets Conduct Act, s3(a).
[374] Section 3(b).
[375] Mark Carney, above n 21.
[376] Mark Carney, above n 21.

As Carney demonstrates, the indecision to alter current regulation to adjust to the challenges presented by climate change will be detrimental to New Zealand in the long term. The lack of international pressure towards New Zealand is a naïve reason not to amend legislation. Tourism is New Zealand's second-biggest export with our branding and profile encapsulating a clean green imagine being imperative to this. The GFC has shown the severe impacts which will occur if financial risks are externalised. Unpriced climate risk meets the same criteria. Investors are not adequately pricing climate risk into their investment decisions. Overseas jurisdictions have displayed a framework and expressed a competence to evolve their disclosure regulation. New Zealand is a step behind. Regulators are presented with an opportunity to formulate a model, based on similar overseas legislation, but adapted to the unique New Zealand economy and capital market. A sample mandatory *Statement of Climate Information* has been included.

The impact of climate change has never been more immediate than in 2019. Its severity means traditional government policies alone are no longer sufficient to combat the challenges the planet faces. History has elucidated the devasting impact unpriced climate risk and information asymmetries can have on the global economy if not regulated sufficiently as evidenced with the GFC. The urgency to engage businesses and facilitate the allocation of capital into low carbon-emitting resources in the economy has never been more paramount. Mandatory environmental reporting is a medium to achieve this objective, which is still yet to be fully explored. Time is indeed running out for the 'tragedy of the horizon.'

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