MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Regulatory Impact Statement: Climate-related disclosures regulations

Coversheet

Purpose of Document	
Decision sought:	To draft regulations to implement the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021
Advising agencies:	Ministry of Business, Innovation and Employment
Proposing Ministers:	Commerce and Consumer Affairs
Date finalised:	21 October 2022

Problem Definition

A new climate reporting regime has been introduced and will come into effect for financial years commencing on or after 1 January 2023. This impact assessment considers three problems in relation to the effective implementation of the regime:

1. reporting entities need certainty on the new record-keeping requirements so that they know what compliance requires
2. the regulator requires efficient access to inspect the records to ensure the disclosures comply with the regulatory framework, and
3. infringement fees for minor offences need to be set to support the enforcement of the regime.

Executive Summary

The market needs more information on how the climate impacts businesses

Climate change poses risks and opportunities to businesses. These include physical risks, such as greater coastal flooding, and the transition risks and opportunities that arise from legal, technology, market, and government policy changes made in response to climate change. But financial market participants do not currently have access to the information needed to assess and price these risks and opportunities. The lack of information can lead to mispricing of assets, market short-termism and the misallocation of capital, all of which risk the underlying stability and integrity of financial markets.

A new reporting regime was introduced in 2021

The Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 (**CRD Act**) was passed in October 2021 to address this information gap. Through amending the Financial Markets Conduct Act 2014 (**FMC Act**), the Financial Reporting Act 2013, and the Public Audit Act 2001, around 200 large financial institutions will be required to disclose the risks and opportunities that climate change poses to their business. The disclosures must be in accordance with standards to be set by the External Reporting Board (**XRB**) and lodged annually in a climate statement with the Companies Office. The

goal is to ensure that the effects of climate change are routinely considered in business and investment decisions. This will lead to more efficient allocation of capital and help smooth the transition to a more sustainable, low-emissions economy.

As part of these reforms, the reporting entities will be required to keep proper records that will enable them to ensure that their disclosures comply with the climate-related disclosure framework set by the XRB. Reporting entities must also make these records available for inspection to three types of person: the reporting entity's directors; the reporting entity's 'supervisor' (such as Guardian Trust or Public Trust); and the Financial Markets Authority (**FMA**) as the independent regulator. Where they fail to do so, they will commit infringement offences.

Three implementation problems

This impact assessment considers three problems in relation to the effective implementation of the regime. Reporting will commence for financial years commencing on or after 1 January 2023, which means the climate statements will be lodged in 2024.

The first two problems relate to record-keeping:

a) Climate reporting entities are uncertain about how to comply with the record-keeping obligations given the novelty of the new regime (**Problem 1**). This uncertainty risks unnecessary compliance costs for reporting entities, inadequate record-keeping, and enforcement difficulties for the regulator.

b) The legislation does not specify the manner in which the records must be made available for inspection to the three types of authorised record-inspectors: reporting entities' directors; reporting entities' supervisors; and the FMA (**Problem 2**). This uncertainty risks creating enforcement difficulties for the FMA in particular, as it must monitor all 200 or so entities e.g. one entity might make its records available only in physical form at its registered office, while another might make its records available through a file-sharing site.

The third problem relates to infringement fees. The FMC Act is designed so that infringement fee levels are set in secondary legislation. This means the four new offence provisions introduced by the CRD Act do not yet have associated fees set and the regulator is not able to issue an infringement notice for these offences (**Problem 3**). This will make minor offences difficult to enforce, which means that they will likely go unenforced due to the disproportionate costs of pursing court action. This will risk undermining the integrity of the regime.

Options to address the record-keeping problem (Problem 1)

For Problem 1, this impact assessment evaluates the status quo against three options. The first option involves making regulations that prescribe that the FMA may determine the manner in which records must be kept. The second option involves making regulations that directly prescribe the record-keeping obligations. The third option involves making mixed regulations i.e. regulations that, for some matters, empower the FMA to determine the manner in which records must be kept and, for other matters, directly prescribe the manner in which records must be kept.

Option	Government intervention?	Nature of government intervention
Status quo	No	n/a
1	Yes	Make regulations that allow the FMA to prescribe the manner in which records must be kept.
2	Yes	Make regulations that prescribe the manner in which records must be kept.
3	Yes	Make regulations that, for some matters, allow the FMA to determine the manner in which records must be kept but, for other matters, directly prescribe the manner in which the records must be kept.

Our evaluation has concluded that Option 2 is the most appropriate course of action. This option would be fastest in addressing the problem of CRE confusion and would avoid imposing costs on the FMA.

The choice of Option 2 does however raise the issue of what level of prescription the regulations should contain, for the matters they determine. The 'sub-options' examined are a principles-based approach; a prescriptive approach; and a combined approach.

Our evaluation has concluded that a combined approach would be the most appropriate sub-option as it balances the need for certainty (prescription) with flexibility (principles-based). Our targeted consultation revealed that in certain cases reporting entities valued a principles-based approach due to the novelty of the regime and recognising the differences between the reporting entities. However, at the same time, some level of prescription is desirable to help reporting entities meet their legal obligations.

Options to address the record-inspection problem (Problem 2)

For Problem 2, this impact assessment evaluates the status quo against three options similar to those examined under Problem 1: making regulations that prescribe that the FMA may determine the manner in which records must be made available; making regulations that directly prescribe the manner in which records must be made available; and making mixed regulations i.e. regulations that, for some matters, empower the FMA to determine the manner in which records must be made available and, for other matters, directly prescribe the manner in which records must be made available.

Our evaluation has concluded that Option 3 is the most appropriate course of action. This option would allow us to address the different positions of the authorised inspectors i.e. directors and supervisors being associated with only a few reporting entities will not be as affected by inconsistency in the way those entities make their records available. Option 3 would enable a solution under which Cabinet could set basic rules applicable to all authorised third parties but under which the FMA could set supplementary rules appropriate for its own inspection purposes.

Options to set infringement fees (Problem 3)

This impact assessment evaluates the status quo against two options for Problem 2. Both options would require government intervention to set infringement fees through secondary legislation. The first option involves a flat infringement fee of $1,000 for all four new offences. This is based on the Ministry of Justice's Guidelines for New Infringement Schemes. The second option involves setting the infringement fees at the same level as

existing fees for offences of a similar nature under the FMC Act, which range from $5,000 to $12,500.

Our evaluation has concluded that the second option is the most appropriate course of action. This option appropriately reflects the level of harm associated with the different offences, balancing affordability and deterrence in light of the target entities, and is aligned with comparable offences under the FMC Act.

Limitations and Constraints on Analysis

Our analysis of the options is constrained by the policy decisions and framework established by the primary legislation. The limitations include:

a) *Limited overseas experience to draw from*. Climate reporting is relatively new and New Zealand is one of the first countries to introduce a mandatory regime requiring reporting against a national standard. We therefore had limited experience to draw on from overseas.
b) *Time constraints*. The relevant sections in the primary legislation will come into force in October 2022, with reporting commencing for financial years in 2023.
c) *Consultation*. We decided to undertake a targeted consultation with a group of stakeholders rather than a full public consultation due to time constraints.
d) *Quantification issues*. It was difficult to quantify the scale of the problems as the analysis is focussed on a new regime that is not yet in force. We have assessed the problems based on views expressed by the regulator and a targeted group of stakeholders.

Responsible Manager

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26 October 2022

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	MBIE's Regulatory Impact Analysis Review Panel considers that the Regulatory Impact Statement partially meets the Quality Assurance Criteria.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The potentially disastrous effects of climate change for biodiversity and humanity are well documented. In 2018, the Intergovernmental Panel on Climate Change noted that human activities have already caused global warming of 1°C above pre-industrial conditions and are on track to cause at least 1.5°C warming between 2030 and 2052. Greenhouse gas concentration will continue to increase via positive feedbacks, such as melting permafrost and the release of stored methane, resulting in further delay of temperature-reducing responses.
2. Financial markets globally can play a major part in shifting investment away from emission-intensive activities and towards low-emission, resilient development pathways. However, this unprecedented economic transformation will require the disclosure of consistent, comparable, reliable, and clear information about climate-related risks and opportunities that are, for the most part, not being made available to investors at present.
3. In this context, the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 (the **CRD Act**) introduced mandatory climate-related disclosures for approximately 200 entities (referred to as climate-reporting entities or '**CREs**') that participate in New Zealand's financial markets. The CRD Act amends the Financial Markets Conduct Act 2013 (the **FMC Act**), the Financial Reporting Act 2013 and the Public Audit Act 2001.
4. The disclosures will focus on the impact that climate change has on the reporting entity, not the other way around. This is consistent with the approach taken by the Task Force on Climate-related Financial Disclosures, whose recommendations are acknowledged to be international best practice. Since the reporting regime is designed for financial market participants, the purpose is to ensure that investors have adequate information available to appropriately price climate risks and opportunities. The overall objective is to ensure that the effects of climate change are routinely considered in business and investment decisions.
5. The External Reporting Board (**XRB**) has been tasked with developing and issuing national standards for climate-related disclosures for New Zealand and the Financial Markets Authority (**FMA**) will monitor and enforce the regime.
6. Section 2 of the CRD Act provides for almost all of the Act to come into force on the earlier of:
    (i) a date or dates set by Order in Council or
    (ii) the first anniversary of the Royal Assent (assent having been given on 27 October 2021).
7. However, the XRB will determine when the climate-related disclosure requirements will come into force because there is nothing to comply with until the XRB issues at least one climate standard. In this regard, the XRB is aiming to complete its consultation on an exposure draft of the climate standards during 2022, with a view to issuing it in December 2022. Its current timeline provides for the standards to come into force for financial years commencing on or after 1 January 2023.[1]

[1] This would mean, for example, that a CRE with a balance date of 31 March, will be required to prepare its first climate-related disclosures in accordance with the XRB's standard(s) for the year ending 31 March 2024 and lodge them on the Disclose Register no later than four months after that date, i.e. by 31 July 2024.

What is the policy problem or opportunity?

8. This impact assessment concerns three policy problems generated by the recent climate-related disclosure reforms.

Problem 1: Reporting entities must keep proper CRD records

Status quo

9. Under new section 461V of the FMC Act, CREs must keep "records that will enable the climate reporting entity to ensure that the climate statements of the climate reporting entity comply with the climate-related disclosure framework". These are known as climate-related disclosure records (**CRD records**).

10. The legislation does not specify the information that must be kept in connection with the records or the format that the records must be kept in. The lack of legislative guidance within this novel reporting regime means that CREs are uncertain about what records they will need to keep to be compliant. It also creates enforcement difficulties for the regulator if there is ambiguity about the precise legal requirements.

Problem definition

11. The uncertainty regarding the CRD record-keeping obligations creates the following risks:

    a. unnecessary compliance costs on CREs due to an overly cautious approach of keeping excess amounts of information to ensure compliance

    b. inadequate record-keeping due to an overly lax approach which could undermine the robustness of the reporting regime, and

    c. enforcement difficulties for the FMA as regulator if the specific expectations of compliance are not clear to CREs.

12. In the absence of government intervention, we expect the FMA would prepare and issue guidelines on the record-keeping requirements in 2023, to provide further clarity on what is required to comply with the legal obligations.[2] FMA guidelines explain how the FMA interprets the law, describe the principles underlying its approach, give practical examples about how to meet obligations, and explain when and how they will exercise specific powers under legislation. FMA guidelines are not binding, but they help market participants to be confident they understand the FMA's approach and how the FMA interprets, and intends to apply, the law relating to its responsibilities.

13. Although guidelines will help reporting entities have more certainty about how to comply, they will not alleviate the enforcement difficulties for the FMA if a reporting entity does not follow the guidelines as the guidelines will not be legally enforceable.

14. We have included the expectation of future FMA guidance within the status quo when assessing the best option to address the problem.

15. It is difficult to quantify the scale of the problem, except to note that submissions during our targeted consultation with CREs picked up on the risks described. What we can say is that, in the absence of intervention, it is likely that there will be a material number of (unintentional) breaches in the early years of the new regime, as CREs adapt to the new rules.

[2] Under section 9(1)(a) of the Financial Markets Authority Act 2011, the functions of the FMA include "issuing … guidelines … about any matter relating to financial markets".

Problem 2: CRD records need to be available for inspection

Status quo

16. Under new section 461Y of the FMC Act, CREs must make their CRD records available for inspection at all reasonable times and without charge to certain listed parties, including the FMA.

17. The legislation does not specify the manner in which the records must be made available for inspection.

Problem definition

18. As with Problem 1, it is possible that, faced with doubt about how they must arrange for climate records to be inspected, CREs will over-comply. However, the costs of over-compliance would appear to be small and would mostly involve staff time ensuring that documents could, if requested, be transmitted electronically (as opposed to, say, made available at their headquarters in physical form).

19. The main issue for Problem 2 is – rather – one for the regulator. As part of its regulatory role, the FMA will be monitoring if the disclosures made by entities comply with the applicable climate standards. This monitoring may involve exercising powers under section 461Y of the FMC Act to request inspection of the records because the CRD records will be crucial for this assessment. If it is left up to each CRE to make available its climate records for inspection in the manner it chooses, then that would likely create inconsistency and hamper the FMA's ability to efficiently monitor compliance. For example, if some entities only make their records available in hard copy to be inspected at their offices, this could require unreasonable resourcing from the FMA to obtain the relevant information if it needs to be analysed using specific software.

20. As above, in the absence of government intervention, we expect the FMA would likely prepare and issue guidelines on the record-keeping requirements in 2023, to provide further clarity on how records should be made available for inspection.[3] However, the FMA would not be able to enforce its guidelines as they would not have the force of law. This again risks undermining the overall integrity of the regime as the independent monitoring and enforcement is a key reason for its robustness, which means the information disclosed can be trusted and relied upon by investors.

Problem 3: Setting infringement fees for new offences

Status quo

21. Among the changes introduced by the CRD Act is the creation of four new infringement offences under the FMC Act for certain minor breaches. These relate to:

    a. failure to keep CRD records in the prescribed manner (new section 461W(3))

    b. failure to make CRD records available in the prescribed manner for inspection (new section 461Y(3))

    c. failure to lodge a climate statement within the deadline (new section 461ZI(4))

    d. failure by a company that is a CRE to disclose in its annual report that it is a CRE (new section 461ZJ(4)).

Problem definition

22. Under section 513 of the FMC Act, if a person is alleged to have committed an infringement offence, the FMA may proceed in one of two ways: either it can file a charging document under section 14 of the Criminal Procedure Act 2011, or it can

[3] Under section 9(1)(a) of the Financial Markets Authority Act 2011, the functions of the FMA include "issuing … guidelines … about any matter relating to [financial] markets".

serve the person with an infringement notice. The recipient of the notice has the option to pay the fee or request a court hearing to decide the issue.

23. However, under section 515, to be valid an infringement notice must contain "the amount of the infringement fee". The FMC Act is designed so that certain matters of detail or prescription, like fees, are set out in the associated regulations rather than the primary legislation. Given this is a new fee, neither the FMC Act nor the Financial Market Conduct Regulations 2014 currently prescribe the fee for these infringement offences.[4]

24. The result is that, until such time as regulations prescribe the amount of the infringement fee, the FMA will, in the event of a breach of any of the four new infringement offences, only be able to take one type of enforcement action, namely filing a charging document.

25. This will mean that minor offences will be difficult to enforce as they will require remedies to be sought by the FMA through the courts. In most cases prosecution will be disproportionate to the harm caused by the offence and will incur fiscal costs on the taxpayer that significantly outweigh the benefits of prosecution.

26. It is difficult to quantify the scale of this problem. This will depend in part on what sort of level of compliance eventuates.

What objectives are sought in relation to the policy problems?

27. The objective of the new climate-related disclosures regime is to encourage entities to routinely consider the effects of climate change in business and investment decisions. In order to achieve this, the information disclosed on climate change must be reliable to be useful to investors to inform their decision-making. This reliability is created by good record-keeping (to verify the disclosures) and a robust enforcement regime (to encourage compliance and penalise non-compliance).

28. More specifically:

    a. the objective in respect of new section 461V of the FMC Act is to ensure that the CRD records kept, and the way they are kept, enable the CRE to ensure that its climate disclosures comply with the climate-related disclosure framework;

    b. the objective in respect of new section 461Y of the FMC Act is to ensure that the access third parties (for example, the FMA) have to the CRD records enables them to verify that a CRE's climate disclosures comply with the climate-related disclosure framework; and

    c. the objective in respect of the four new infringement offences is to ensure that they deter the type of conduct they are designed to deter, including conduct that is of low seriousness and that does not justify the full imposition of the criminal law.

[4] Schedule 22 of the Financial Market Conduct Regulations 2014 sets out the amount of the infringement fees for a number of other infringement offences under the FMC Act: see

Section 2(1): Deciding upon an option to address policy problem 1

What criteria will be used to compare options to the status quo?

29. For problem 1, we will assess the options against the (future course of the) status quo using the following criteria:

    a. **Effectiveness**: how well does the option address the problem described in the problem definition?

    b. **Timeliness**: how soon could the option be put in place and begin addressing the problems described in the problem definition?

    c. **Efficiency**: what are the costs imposed by the option on relevant parties, such as the regulator and the CREs?

What scope will the options be considered within?

Primary legislation options

30. Details regarding record-keeping are more appropriately dealt with at the level of secondary legislation. We have therefore not considered amending the provisions of the primary legislation dealing with record-keeping and establishing the new infringement offences. Those provisions were drafted on the basis of Cabinet policy decisions and it was anticipated by Cabinet that secondary legislation may be required to implement aspects of the new regime.

Non-regulatory options

31. The most obvious non-regulatory option to address problems 1 is for the FMA to issue non-binding guidelines under section 9(1)(a) of the Financial Markets Authority Act 2011. As noted in Section 1, we anticipate this will occur as the status quo develops in any case and we have therefore included it in our analysis of the status quo against the other options.

Consultation with stakeholders

32. For problem 1, the options considered against the status quo all involve the making of regulations under section 548(1)(p) of the FMC Act. Such regulations can only be made on the recommendation of the Minister of Commerce and Consumer Affairs after consultation with the FMA. Officials have therefore worked closely with the FMA in considering the pros and cons of different types of regulations.

33. We also consulted with a targeted group of CREs (including banks and insurers) and law firms. We contacted a total of 18 stakeholders comprising: four banks; five listed issuers from the energy, health, and primary sectors; four managed investment schemes; four consulting firms; and one legal firm. We received responses from 11 out of the 18 stakeholders contacted, which included eight written responses. Feedback from this consultation helped shape the options compared against the status quo.

Overseas experience

34. As has been noted in news headlines worldwide, the reforms introduced by the CRD Act are world leading.[5] As such, there is limited overseas experience to draw on, and what there is, is of limited value. For example, Australia's CRD regime is dissimilar to New Zealand's, and we understand at this stage it is largely voluntary.

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[5] See, for example, https://www.sciencealert.com/new-zealand-just-passed-a-climate-change-law-no-other-country-s-dared-to-tackle

What options are being considered?

35. New section 461W(1) of the FMC Act provides that every CRE "must keep the CRD records in the prescribed manner (if any)".

36. In this regard, under section 548(1)(p) of the FMC Act, the Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 549, make regulations "prescribing, for the purposes of any provision of this Act that requires a thing to be done in a prescribed manner …, the manner in which the thing must be done".[6]

37. This includes the possibility of prescribing (i) by whom, when, where, and how the thing must be done: (ii) the form that must be used in connection with doing the thing; (iii) what information or other evidence or documents must be provided in connection with the thing; (iv) requirements with which information, evidence, or documents that are provided in connection with the thing must comply; (v) that fees or charges must be paid in connection with doing the thing; (vi) that the FMA may determine or prescribe any of the matters under subparagraphs (i) to (iv).

38. In this context, we have identified three options for record-keeping rules, as follows:

Status quo

39. No regulations are introduced and non-regulatory options like the FMA issuing guidelines will be the main source of clarifying the manner in which CRD records must be kept.

40. In this regard, under section 9(1)(a) of the Financial Markets Authority Act 2011, the functions of the FMA include "issuing ... guidelines ... about any matter relating to [financial] markets". FMA guidelines are not binding, but they help market participants to be confident they understand the FMA's approach and how they interpret, and intend to apply, the law relating to their responsibilities.

Option 1 – Delegation

41. Under this option, regulations would be made under section 548(1)(p) prescribing that the FMA may determine the manner in which CRD records must be kept, for the purposes of new section 461W.

42. These FMA determinations would enforceable against CREs and, as they would not qualify as secondary legislation,[7] they would not need to be presented to Parliament.

43. Under this option, the FMA could potentially require that the CRD records the CRE keeps be kept, for example, in a particular language, in a particular jurisdiction, or for a particular length of time.

44. The FMA could be granted authority to set these requirements just for situations where the FMA is undertaking the inspection, or for situations where any authorised party (directors, supervisors, or the FMA) is undertaking the inspection.

45. For context, the power to make 'delegation' regulations of this type (relating to the manner in which a thing must be done) exists in only four statutes: the FMC Act; the Incorporated Societies Act 2022; the Legislation Act 2019; and the Credit Contracts and Consumer Finance Act 2003. No such regulations have yet been made, so there are no templates for us to follow.

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[6] Section 549 requires that the Minister first consult with the FMA.

[7] Section 548(5) of the FMC Act specifies only that the regulations made by the Governor-General qualify as secondary legislation.

Option 2 – Direct regulation

46. Under this option, regulations would be made under section 548(1)(p) directly prescribing the manner in which CRD records must be kept, for the purposes of new section 461W.

47. There are three main variations of this option, according to how prescriptive the regulations are.

Variation 1: principles-based rules

48. Under this variation, regulations would be made under section 548(1)(p) prescribing the manner in which CRD records must be kept, for the purposes of new section 461W, using high-level principles.

49. For example, the regulations might prescribe that:

> *Every CRE must keep appropriate CRD records that include information that can be used to verify the relevance, completeness, consistency, verifiability, and accuracy of reported data.*

50. As another example, the regulations might prescribe that:

> *Every CRE must keep CRD records in a jurisdiction that has data-protection rules comparable to those in place in New Zealand.*

51. It would be up to each CRE to decide for itself what specific actions to take in order to meet these high-level requirements. For instance, one CRE might – out of an abundance of caution – decide to keep its CRD records on servers based in New Zealand, while another might decide that the principle allows it to keep its records on servers based in Australia.

Variation 2: prescriptive rules

52. Under this variation, regulations would be made under section 548(1)(p) prescribing the manner in which CRD records must be kept, for the purposes of new section 461W, using a set of prescriptive requirements.

53. For example, the regulations might prescribe that:

> *Every CRE must keep all CRD records in New Zealand or Australia.*

54. As another example, the regulations might prescribe that:

> *Every CRE must keep all CRD records in English or Te Reo.*

55. This option would leave little if any discretion to CREs in terms of determining how they can meet their record-keeping obligations.

Variation 3 : principles + prescriptive rules

56. Under this variation, regulations would be made under section 548(1)(p) prescribing the manner in which CRD records must be kept, for the purposes of new section 461W, using a mixture of principles and prescriptive requirements. This approach would combine the principles-based and prescriptive requirements for the record-keeping rules to take into account where flexibility is desirable, and where certainty is needed to enable compliance.

57. For example, the regulations might require (using a prescriptive approach) that:

> *Every CRE must keep all CRD records in English or Te Reo.*

58. However, they might also require (using a principles-approach) that:

> *Every CRE must keep CRD records in a jurisdiction that has data-protection rules comparable to those in place in New Zealand.*

Option 3 – Mixed approach

59. Under this option, some matters would be delegated to the FMA for determination, while other matters would be prescribed directly in regulations.

60. In other words, regulations would be made under section 548(1)(p):

    a. directly prescribing the manner in which CRD records must be kept, for the purposes of new section 461W; but

    b. empowering the FMA to set additional requirements for how CRD records must be kept, for the purposes of new section 461W.

61. As for option 2, there would be a choice between different levels of prescriptiveness for the matters set directly by the regulations.

62. For example, the regulations might directly prescribe that:

> *Every CRE must keep all CRD records in New Zealand or Australia; or*
>
> *Every CRE must keep CRD records in a jurisdiction that has data-protection rules comparable to those in place in New Zealand.*

How do the options compare to the status quo/counterfactual?

63. We compare below, against the status quo, the high-level options of delegation to the FMA, direct regulation, and a mixed approach.

	Status Quo	Option 1 Delegation	Option 2 Direct regulation	Option 3 Mixed
Effectiveness in addressing problem of CRE confusion[8]	0 Even with FMA guidelines, there would remain a lack of certainty over what the law actually required in terms of CRD record-keeping	++ FMA would be well placed to determine the appropriate requirements and could adapt them rapidly, meaning that the risk of confusion amongst CREs would be well managed	+ Working with the FMA, Cabinet would be well placed to determine the appropriate requirements but would not be able to adapt them quickly as required. This means that, while the risk of confusion could be managed, it could reappear from time to time.	+ The risk of confusion amongst CREs about how to meet their record-keeping obligations would be managed. For matters delegated to the FMA, the FMA could rapidly adapt requirements where necessary. However, for matters set out in regulations, Cabinet could not rapidly adapt requirements.
Timeliness	0 The FMA would likely issue guidelines promptly on its interpretation of what the law required in terms of CRD record-keeping	- - Regulations would need to be made after section 461W enters into force (27 October 2022), then FMA rules would also need to be made	- Regulations would need to be made after section 461W enters into force (27 October 2022), but there would then be no need to await for additional FMA rules	- - Regulations would need to be made after section 461W enters into force (27 October 2022), then FMA rules would also need to be made (just for a more limited number of matters than under Option 1)
Efficiency / costs	0 There would be long-term costs for CREs that over-comply, and risks associated with under-compliance for other CREs e.g. prosecution	+ CREs would incur short-term costs adapting to FMA-set requirements, but would enjoy long-term gains from avoiding the costs associated with over-compliance and the risks	++ CREs would incur short-term costs adapting to government-set requirements, but would enjoy long-term gains from avoiding the costs associated with over-	+ CREs would incur short-term costs adapting to government-set and FMA-set requirements, but would enjoy long-term gains from avoiding the costs associated with over-

[8] See problem definition for Problem 1 at para 11

		associated with under-compliance. The FMA would incur costs in setting and amending the record-keeping requirements they set.	compliance and the risks associated with under-compliance.	compliance and the risks associated with under-compliance. The FMA would incur costs in setting and amending the record-keeping requirements they set (just for a more limited number of matters than under Option 1). CREs could find it confusing to have their record-keeping obligations set out in two different places (regulations and FMA determinations).
Overall assessment	0	+	++	0

Key

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

64. Based on the comparative analysis above, for problem 1, Option 2 (direct regulation) is the most favourable option. Option 2 would involve regulations made under section 548(1)(p) directly prescribing the manner in which CRD records must be kept, for the purposes of new section 461W.

65. The question then becomes which variation of Option 2 (as discussed above) should be preferred:

    a. principle-based rules;

    b. prescriptive rules;

    c. a combination of principle-based and prescriptive rules.

66. Our targeted consultation with stakeholders indicated strong support for a principles-based approach for certain rules regarding record-keeping. For example, in connection with what information or other evidence must be provided, CREs felt a principles-based approach is appropriate to reflect the fact that the risks and opportunities CREs face due to climate change will vary significantly. An energy company will have very different considerations, and therefore records, compared to a manager of an investment scheme. Further, many CREs felt it was too early to prescribe a list of requirements for the information to be kept with CRD records as reporting under the new regime has not commenced. Flexibility is desirable to allow the regime to develop and mature over time.

67. On the other hand, CREs during the targeted consultation supported a more prescriptive approach for certain rules. For example, we consulted on a rule which required CRD records to be kept in English and in New Zealand. This prescriptive approach provides certainty to CREs on requirements that do not require as much flexibility to be effective.

68. With this stakeholder feedback in mind, we note that:

    a. Under Option 2a (principle-based rules):

        i. CREs may remain confused about what records to keep due to high-level nature of principles, potentially resulting in over- or under-compliance.

        ii. On the other hand, when circumstances suggest a change in what records should be kept is appropriate (say, when new international guidance emerges), this very vagueness may mean that CREs have the flexibility to adapt their record-keeping, without waiting for a regulatory amendment.

    b. Under Option 2b (prescriptive rules):

        i. CREs will know precisely what records to keep;

        ii. However, when circumstances suggest a change in what records should be kept is appropriate, CREs will not have the flexibility to adapt their record-keeping, and will have to wait for a regulatory amendment.

    c. Under Option 2c (combined approach):

        i. for matters unlikely to change over time, CREs could enjoy certainty; and

        ii. for matters more likely to change over time, CREs could enjoy flexibility.

69. We conclude that Option 2c (a combination of principle-based rules and prescriptive rules) would be the most appropriate variation of Option 2.

What are the marginal costs and benefits of the preferred option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (CREs)	Short-term costs to CREs adapting to government-set and FMA-set requirements	Low	Medium
Regulator (FMA)	n/a	n/a	n/a
Others (eg, wider govt, consumers, etc.)	n/a	n/a	n/a
Total monetised costs	n/a		
Non-monetised costs	Low		
Additional benefits of the preferred option compared to taking no action			
Regulated groups (CREs)	Long-term gains from avoiding over- compliance and risks associated with under-compliance	Medium	Medium
Regulator (FMA)	Enforcement becomes easier (and so cheaper) for the regulator, as legal requirements are clear	Medium	Medium
Others (eg, wider govt, consumers, etc.)	Inasmuch as enforcement becomes easier, society should benefit as CREs take more account of climate-related issues.	Low (small but important contribution against climate change)	Medium
Total monetised benefits	n/a		
Non-monetised benefits	Medium		

Section 2(2): Deciding upon an option to address policy problem 2

What criteria will be used to compare options to the status quo?

70. For problem 2, we will assess the options against the (future course of the) status quo using the same criteria as for problem 1:

    a. **Effectiveness**: how well does the option address the problem described in the problem definition?

    b. **Timeliness**: how soon could the option be put in place and begin addressing the problems described in the problem definition?

    c. **Efficiency**: what are the costs imposed by the option on relevant parties, such as the regulator and the CREs?

What scope will the options be considered within?

Primary legislation options

71. Details regarding how CRD records should be made available to inspecting parties are more appropriately dealt with at the level of secondary legislation. We have therefore not considered amending the provisions of the primary legislation dealing with record-keeping and establishing the new infringement offences. Those provisions were drafted on the basis of Cabinet policy decisions and it was anticipated by Cabinet that secondary legislation may be required to implement aspects of the new regime.

Non-regulatory options

72. As for problem 1, the most obvious non-regulatory option to address problem 2 is for the FMA to issue non-binding guidelines under section 9(1)(a) of the Financial Markets Authority Act 2011. As noted in Section 1, we anticipate this will occur as the status quo develops in any case and we have therefore included it in our analysis of the status quo against the other options.

Consultation with stakeholders

73. As for problem 1, the options considered against the status quo all involve the making of regulations under section 548(1)(p) of the FMC Act. Such regulations can only be made on the recommendation of the Minister of Commerce and Consumer Affairs after consultation with the FMA. Officials have therefore worked closely with the FMA in considering the pros and cons of different types of regulations.

74. We also consulted with a targeted group of CREs (including banks and insurers) and law firms. We contacted a total of 18 stakeholders comprising: four banks; five listed issuers from the energy, health, and primary sectors; four managed investment schemes; four consulting firms; and one legal firm. We received responses from 11 out of the 18 stakeholders contacted, which included eight written responses. Feedback from this consultation helped shape the options compared against the status quo.

Overseas experience

75. As has been noted in news headlines worldwide, the reforms introduced by the CRD Act are world leading.[9] As such, there is limited overseas experience to draw on, and what there is, is of limited value. For example, Australia's CRD regime is dissimilar to New Zealand's, and we understand at this stage it is largely voluntary.

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[9] See, for example, https://www.sciencealert.com/new-zealand-just-passed-a-climate-change-law-no-other-country-s-dared-to-tackle

What options are being considered?

76. New section 461Y(1) provides that every CRE "must make the CRD records available, in the prescribed manner at all reasonable times for inspection without charge".

77. In this regard, under section 548(1)(p) of the FMC Act, the Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 549, make regulations "prescribing, for the purposes of any provision of this Act that requires a thing to be done in a prescribed manner …, the manner in which the thing must be done".

78. Once again, this includes the possibility of prescribing (i) by whom, when, where, and how the thing must be done: (ii) the form that must be used in connection with doing the thing; (iii) what information or other evidence or documents must be provided in connection with the thing; (iv) requirements with which information, evidence, or documents that are provided in connection with the thing must comply; (v) that fees or charges must be paid in connection with doing the thing; (vi) that the FMA may determine or prescribe any of the matters under subparagraphs (i) to (iv).

79. In this context, we have identified four options for record-keeping rules, as follows:

Status quo

80. No regulations are made and non-regulatory options like the FMA issuing guidance will be the main source of clarifying how records need to be made available for inspection.

Option 1 – Delegation

81. Under this option, regulations would be made under section 548(1)(p) prescribing that the FMA may determine the manner in which CRD records are made available, for the purposes of new section 461Y.

82. Under this option, the FMA could potentially require that the CRD records the CRE keeps be made available, for example, in a particular form and/or in a particular language.

83. The FMA could be granted authority to set these requirements just for situations where the FMA is undertaking the inspection, or for situations where any authorised party (directors, supervisors, or the FMA) is undertaking the inspection.

Option 2 – Direct regulation

84. Under this option, regulations would be made under section 548(1)(p) directly prescribing the manner in which CRD records must be made available, for the purposes of new section 461Y.

85. As was the case for problem 1, there are three main variations of this option, according to how prescriptive the regulations are.

Variation 1: Principles-based rules

86. Under this option, regulations would be made under section 548(1)(p) prescribing the manner in which CRD records must be made available, for the purposes of new section 461Y, using high-level principles. For example, the regulations might prescribe that:

> *Every CRE must ensure that all CRD records are, at all reasonable times, made available for inspection in an efficient manner to any authorised person*

87. It would be up to each CRE to decide for itself what specific actions to take in order to meet these high-level requirements. For instance, one CRE might decide that, to meet the 'efficiency requirement', it needs to set up systems enabling it to transmit its CRD records through an electronic file-sharing service, while another might decide that the principle allows it to send paper copies of documents by courier.

Variation 2: prescriptive rules

88. Under this option, regulations would be made under section 548(1)(p) prescribing the manner in which CRD records must be made available, for the purposes of new section

461Y, using a set of prescriptive requirements. For example, the regulations might prescribe that:

> *Every CRE must ensure that all CRD records are available for inspection by any person authorised or permitted by an enactment to do so:*
>
> *i. through a file sharing service,*
>
> *ii. on any business day, and*
>
> *iii. between the hours of 9am and 5pm.*

89. As another example, the regulations might prescribe that:

> *Every CRE must ensure that all CRD records are made available for inspection in written form in English or Te Reo.*

90. This option would leave little if any discretion to CREs in terms of determining how they can meet their obligation to make CRD records available for inspection.

Variation 3 : principles + prescriptive rules

91. Under this option, regulations would be made under section 548(1)(p) prescribing the manner in which CRD records must be made available, for the purposes of new section 461Y, using a mixture of principles and prescriptive requirements.

92. For example, the regulations might require (using a prescriptive approach) that:

> *Every CRE must ensure that all CRD records are made available for inspection in written form in English or Te Reo.*

93. However, they might also require (using a principles-approach) that:

> *Every CRE must ensure that all CRD records are, at all reasonable times, made available for inspection in an efficient manner to any authorised person*

Option 3 – Mixed approach

94. Under this option, some matters would be delegated to the FMA for determination, while other matters would be prescribed directly in regulations.

95. In other words, regulations would be made under section 548(1)(p):

a. directly prescribing the manner in which CRD records must be made available, for the purposes of new section 461Y but also

b. empowering the FMA to set additional requirements for how CRD records must be made available, for the purposes of new section 461Y.

96. As for option 2, there would be a choice between different levels of prescriptiveness for the matters set directly by the regulations.

97. For example, the regulations might directly prescribe that:

> *Every CRE must ensure that all CRD records are made available for inspection in written form in English or Te Reo; or*
>
> *Every CRE must ensure that all CRD records are made available for inspection in a readily understood form*

98. There would also be a choice around the scope of the FMA's delegated power.

99. For example, the regulations might prescribe that, in addition to the rules set out directly in the regulations:

> *The FMA may additionally prescribe the manner in which the records must be made available to any authorised person; or*
>
> *The FMA may additionally prescribe the manner in which the records must be made available to the FMA [but not to directors or supervisors].*

How do the options compare to the status quo/counterfactual?

	Status Quo	Option 1 Delegation	Option 2 Direct regulation	Option 3 Mixed
Effectiveness in addressing problem of accessing documents[10]	0 FMA guidelines being non-binding, there would l kely remain a lack of consistency across CREs in terms of how they made their CRD records available to the FMA	+ In terms of how CRD records should be made available to the FMA, the FMA would be well placed to determine the appropriate requirements and could adapt them rapidly, meaning that the risk of a lack of consistency across CREs would be well managed. However, the FMA has no particular expertise that would suggest it would be able to effectively determine the manner in which CRD records should be made available to other authorised parties (directors and supervisors)	+ Working with the FMA, Cabinet would be well placed to determine the appropriate requirements for CREs when making records available to all authorised third parties (directors, supervisors and the FMA) but would not be able to adapt them quickly as required.	++ Would enable a solution under which Cabinet could set basic rules applicable to all authorised third parties but FMA could set supplementary rules appropriate for its own inspections.
Timeliness	0 The FMA would l kely promptly issue guidelines on its interpretation of what the law required in terms of making CRD records available	- - Regulations would need to be made after section 461Y enters into force (27 October 2022), then FMA rules would also need to be made	- Regulations would need to be made after section 461Y enters into force, but there would then be no need to await additional FMA rules	- - Regulations would need to be made after section 461Y enters into force (27 October 2022), then FMA rules would also need to be made (just for a more limited number of matters than under Option 1)
Efficiency / costs	0 There would be long-term costs for CREs that over-comply, and risks associated with under-compliance for other CREs e.g. prosecution	+ CREs would incur short-term costs adapting to FMA-set requirements. The FMA would incur costs in setting and amending the requirements for making records available, but would enjoy long-term gains by avoiding the costs associated with records being made in an inconsistent manner by different CREs.	+ CREs would incur short-term costs adapting to government-set requirements. The FMA would enjoy long-term gains by avoiding the costs associated with records being made in an inconsistent manner by different CREs.	++ CREs would incur short-term costs adapting to government-set and FMA-set requirements. Directors and supervisors would benefit from consistency in the manner in which CRD records were made available to them. The FMA would incur costs in setting and amending the requirements for making records available (just for a more limited number of matters than under Option 1), but would enjoy long-term gains by avoiding the costs associated with records being made in an inconsistent manner by different CREs.

[10] See problem definition for Problem 2 at para 19

Overall assessment	0	0	+	++

Key

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

100. Based on the comparative analysis above, for problem 2, Option 3 (mixed approach) is the right approach. This is the option under which regulations would:
    a. directly specify some of the ways in which CRD records must be made available to all three categories of authorised third parties (directors, supervisors and the FMA); but also
    b. inasmuch as CREs make CRD records available to the FMA, empower the FMA to specify additional requirements for how those document should be made available.
101. Inasmuch as this conclusion means that the regulations will directly set requirements, the question then becomes whether those requirements should be:
    a. principle-based rules;
    b. prescriptive rules;
    c. a combination of principle-based and prescriptive rules.
102. For the reasons set out in section 2.1 above, we conclude that a combination of principle-based rules and prescriptive rules would be the most appropriate approach in that regard.

What are the marginal costs and benefits of the preferred option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (CREs)	CREs would incur short-term costs adapting to government-set and FMA-set requirements.	Low	Medium
Regulator (FMA)	The FMA would incur costs in setting and amending the requirements for making records available.	Low	Medium
Others (eg, wider govt, consumers, etc.)	n/a	n/a	n/a

Total monetised costs	n/a		
Non-monetised costs	Low		
Additional benefits of the preferred option compared to taking no action			
Regulated groups (CREs)	CREs would have more certainty about their obligations in terms of making CRD records available	Low	Medium
Regulator (FMA)	The FMA would avoid the costs associated with records being made in an inconsistent manner by different CREs.	Medium	Medium
Others (eg, wider govt, consumers, etc.)	Directors and supervisors would benefit from consistency in the manner in which CRD records were made available to them.	Low	Medium
Total monetised benefits	n/a		
Non-monetised benefits	Medium		

Section 2(3): Deciding upon an option to address the policy problem 3

What criteria will be used to compare options to the status quo?

103. For problem 3, we need to take a more graduated approach to reflect the fact that (for reasons set out below) the only options we are comparing against the status quo both involve setting infringement fees. This means we must consider the Ministry of Justice's Policy Framework for New Infringement Schemes – approved by Cabinet – which states that:[11]

> "[i]n setting infringement fees consideration must be given to the level of harm involved in the offending, the affordability and appropriateness of the penalty for the target group, and the proportionality of the proposed fee with the infringement fees for other comparable infringement offences."

104. We therefore take a two-step approach involving two different sets of criteria.

105. First, we will assess the broad option of 'setting infringement fees' against the status quo using the same criteria as for problems 1 and 2, that is:

    a. **Effectiveness**: how well does the option address the problems described in the problem definition?

    b. **Timeliness**: how soon could the option be put in place and begin addressing the problems described in the problem definition?

    c. **Efficiency**: what are the costs imposed by the option on relevant parties, such as the regulator and the CREs?

106. Second, if the broad option of 'setting infringement fees' is assessed as more favourable than the status quo, we will assess two sub-options (with different infringement fee levels) against each other. For this second step, we will use the following criteria:

    a. **Level of harm involved in the offending** – how well does the infringement fee reflect the seriousness of the offending?

    b. **Affordability and appropriateness of penalty** – is the infringement fee set at a level which is fair, taking into account the target group's ability to pay, but also renders an appropriate deterrence effect to incentivise compliance?

    c. **Proportionality** – is the infringement fee consistent with other fees for offences of comparable degrees of seriousness?

What scope will the options be considered within?

Primary legislation options

107. Details regarding infringement fee levels are more appropriately dealt with at the level of secondary legislation. We have therefore not considered amending the primary legislation dealing with record-keeping and establishing the new infringement offences. These new sections were drafted on the basis of Cabinet policy decisions. Further it was anticipated by Cabinet that secondary legislation may be required to implement aspects of the new regime.

Non-regulatory options

108. The most obvious non-regulatory option to address problem 2 is for the FMA to issue non-binding guidelines under section 9(1)(a) of the Financial Markets Authority Act

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[11] Available at APPENDIX: POLICY FRAMEWORK FOR NEW INFRINGEMENT SCHEMES (justice.govt.nz)

2011. As noted in Section 1, we anticipate this will occur as the status quo develops in any case and we have therefore included it in our analysis of the status quo against the other options.

109. For problem 2, we also briefly considered:

a. The non-regulatory option of increasing FMA funding, so that the regulator has the means to file charges for all breaches of infringement offence provisions. However, we discarded this option because:

i. it would promote (or at least appear to promote) the filing of charges (and so a higher financial penalty) when the conduct in question does not warrant it

ii. it does not address the concern that this would unnecessarily put pressure on the courts for minor offences, and

iii. we are unaware of any precedent in New Zealand where such an approach has been taken as an alternative to setting infringement fees.

b. Moral suasion – effectively, imploring CREs to meet their obligations under new sections 461W(3), 461Y(3), 461ZI(4) and 461ZJ(4). However, if the only 'fall-back option' for the FMA (where a CRE does not respond positively to the use of moral suasion) is the filing of charges in court, this would be unlikely to amount to a credible regulatory threat, especially where the CRE knew that the breach in question did not warrant court action (for example, because it was an inadvertent breach which was quickly remedied).

Consultation with stakeholders

110. We consulted with the FMA as well as with a targeted group of CREs (including banks and insurers) and law firms. We contacted a total of 18 stakeholders comprising: four banks; five listed issuers from the energy, health, and primary sectors; four managed investment schemes; four consulting firms; and one legal firm. We received responses from 11 out of the 18 stakeholders contacted, which included eight written responses. Feedback from this consultation helped shape the options compared against the status quo.

Overseas experience

111. As has been noted in news headlines worldwide, the reforms introduced by the CRD Act are world leading.[12] As such, there is limited overseas experience to draw on, and what there is, is of limited value. For example, Australia's CRD regime is dissimilar to New Zealand's, and we understand at this stage it is largely voluntary.

[12] See for example: New Zealand Just Passed a Climate Change Law No Other Country's Dared to Tackle : ScienceAlert

What options are being considered?

112. New sections 461W(3), 461Y(3), 461ZI(4) and 461ZJ(4) make certain conduct an infringement offence. In this regard, under section 548(1)(m) of the FMC Act, the Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 549, make regulations "setting the infringement fee for each infringement offence, which must not exceed $20,000".

113. In this context, in addition to the status quo, we have identified two options for record-keeping rules, as follows.

    a. **Status quo**: No regulations are made and the infringement fees for the new offences are not set.

    b. **Option 1 – Flat infringement fee of $1,000 for all offences**: Option 1 is based on the Ministry of Justice's Guidelines for New Infringement Schemes, which state that, as a general rule, an infringement fee should not exceed $1,000, unless in the particular circumstances of the case a high level of deterrence is required.

    c. **Option 2 – Infringement fees aligned with those for financial reporting breaches**: Option 2 recognises that Parliament has legislated for a maximum infringement fee of up to $20,000 for FMC reporting entities under section 548(1)(m) of the FMC Act, and that some infringement offences may therefore warrant a higher level of deterrence than $1000. Schedule 22 of the Financial Market Conduct Regulations 2014 prescribes the infringement fees for other infringement offences under the FMC Act. The following infringement offences from the FMC Act are of a similar nature to those we are considering in this impact assessment, and already have their infringement fee levels set:

New offence introduced by CRD Act	Existing offence under FMC Act 2013	Prescribed infringement fee[13]
Section 461W: failure to keep CRD records in the prescribed manner	Section 455: FMC reporting entities must keep proper accounting records	$7,500
Section 461Y: failure to make records available for inspection	Section 459: Inspection of accounting records	$12,500
Section 461ZI: failure to lodge a climate statement within the deadline	Section 461H: Lodgement of financial statements	$7,500
Section 461ZJ: failure to disclose in annual report that you are a CRE	Section 293: Listed issuers must make available information on substantial holdings	$5,000

[13] See schedule 22 of the FMC Regulations 2014.

How do the options compare to the status quo/counterfactual?

Stage 1: Infringement fee approach versus status quo

	Status Quo	Option 1 Set infringement fees
Effectiveness	0 The FMA may issue guidelines on its enforcement approach, but this is I kely to involve allowing a certain level of offending to go unpunished	++ FMA will have simple and cost effective mechanism for punishing and deterring minor breaches
Timeliness	0 FMA would likely issue guidelines within a few months	- Regulations would need to be brought into effect after sections 461W or 461Y enters into force, but 28 days after that the problem would be addressed
Efficiency / costs	0 If FMA chooses to prosecute, it bears costs of filing charges If it chooses not to prosecute, the integrity of the reporting regime may suffer if is never enforced	++ FMA need not consider costly filing of charges where issuing an infringement notice will suffice The integrity of the regime is maintained if low level offending is identified and penalised
Overall assessment	0	++

Stage 2: What level of infringement fee?

114. Because stage 1 has assessed the option of setting infringement fees as more favourable than the status quo, we assess below two options for the level of the infringement fees. We have set the assessment for the first option (Option X) at 0 and assessed whether the second option (Option Y) is better or worse than that option.

	Option X Flat fee of $1000	Option Y Fees based on those for financial reporting breaches[14]
Reflects level of harm	0 Flat fee by its nature means level of harm associated with different breaches is not taken into account	+ While not perfect (fee levels for financial reporting breaches do not appear to have been adjusted since 2014), this option at least attempts to reflect the level of harm associated with different breaches
Balances affordability and deterrence	0 Given the target group's financial means,[15] probably 'too' affordable, so unlikely to provide an appropriate level of deterrence. Would be seen more as a 'cost of doing business'.	+ More I kely to deter breaches amongst the target group, while remaining affordable
Proportionality with other offences	0 Not aligned with comparable offences in the FMC Act	++ Fully aligned with comparable offences in the FMC Act

[14] By way of reminder, these infringement fees are: $7500 (for breach of new section 461W); $12,500 (for breach of new section 461Y); $7,500 (for breach of new section 461ZI); and $5,000 (for breach of new section 461ZJ).

[15] By way of reminder, the target group (currently) comprises around 200 CREs, including registered banks, licensed insurers and managers of registered investment schemes.

Overall assessment	0	++

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

115. Based on the comparative analysis above, for problem 2, Option Y is the most favourable option. Option Y would involve regulations made under section 548(1)(m) of the FMC Act setting the infringement fee for each infringement offence, with those fees being based on the fees for equivalent infringement offences for financial reporting breaches.

116. Almost all stakeholders agreed with the proposal to align the new infringement fees with the levels set for financial reporting breaches. The one stakeholder who objected was a manager for an investment scheme who submitted that financial reporting is inappropriate for managed funds in the first place. The concerns raised were generally out of scope for the issues we were consulting on, which was to set fees for existing offences created by primary legislation, rather than question the appropriateness of the offences in the first place.

What are the marginal costs and benefits of the preferred option?

Affected groups *(identify)*	**Comment**	**Impact**	**Evidence Certainty**
Additional costs of the preferred option compared to taking no action			
Regulated groups (CREs)	CREs that commit minor breaches of the relevant sections are more l kely to face a financial penalty	Low (will only affect CREs that breach their obligations)	Medium
Regulator (FMA)	Small financial cost associated with issuing infringement notices	Low	Medium
Others (eg, wider govt, consumers, etc.)	n/a	n/a	n/a
Total monetised costs	n/a		
Non-monetised costs	Low		
Additional benefits of the preferred option compared to taking no action			
Regulated groups (CREs)	Avoids risk of facing court proceedings for breach that ought to be dealt with through infringement notice	Low (will only benefit CREs that breach their obligations)	Medium
Regulator (FMA)	Avoids risk of having to rely on costly filing of proceedings for minor breaches Reputational gains from being able to punish minor breaches efficiently	Low (unl kely to take many such proceedings)	Medium
Others (eg, wider govt, consumers, etc.)	Society need not bear the costs of unpunished breaches, and government reputation will not suffer	Low (small but important contribution against climate change)	Medium

Total monetised benefits	n/a
Non-monetised benefits	Medium (cumulation of several low benefits)

Section 3: Delivering an option

How will the new arrangements be implemented?

117. Secondary legislation will be needed to implement the preferred options of prescribing the record-keeping requirements and setting the infringement fee levels for the four new offences.

Confidential information entrusted to the Government

118. The appropriate legislative vehicle for the secondary legislation will ultimately be a decision for the Parliamentary Counsel Office. Confidential information entrusted to the Government

119. The FMA is the existing regulatory agency under the FMC Act and will be responsible for monitoring compliance with the new CRD reporting regime. The FMA is expected to issue guidance on the record-keeping requirements to provide further clarity on what is required to comply with the legal obligations.

How will the new arrangements be monitored, evaluated, and reviewed?

120. MBIE is the existing monitor for the FMA as regulator of financial markets and will continue in this role. It will continue to work with the regulator to log issues and ensure the new regime is operating successfully.

121. MBIE evaluates and reviews the laws it administers as part of its regulatory stewardship function.

122. Stakeholders with any concerns about the policy proposals will have the opportunity to raise these when the exposure draft of the regulations are released for public consultation early 2023.

123. Any issues or concerns that stakeholders have in relation to implementation or enforcement of the changes can be directed to the FMA.