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Sustainable Impact

Issue 6

MinterEllisonRuddWatts.

Contents

Holly Hill
Partner and Sustainability Leader
Kaiurungi me te Kaitātaki Ukauka

Kia ora koutou

Over the last six months, much has been written and said in the media about whether the global Environmental, Social and Governance (ESG) agenda is waxing or waning. At MinterEllisonRuddWatts the picture is clear: we continue to see commercial and regulatory pressure grow here in Aotearoa New Zealand and around the world to ensure that organisations are resilient and addressing environmental and social challenges.

As a result, we are as busy as ever in our work to help business leaders navigate the legal, business and political ramifications of developing and implementing initiatives to achieve ESG and sustainable outcomes.

Sustainable Impact aims to show you what we see: the views and work of organisations and their leaders who continue to push Aotearoa New Zealand's sustainability ambitions forward in a variety of ways. In this issue we talk to people at the forefront of work across many dimensions.

Fonterra has taken the bold move of setting and publishing targets for its Scope 3 emissions. Director of Sustainability at Fonterra, Charlotte Rutherford and Senior Associate, Kate Cruickshank discuss Fonterra's sustainability journey, including the importance of taking time to understand the reasons behind a sustainability strategy.

Then we look at the topic of pay parity. While the majority can all agree that it is time we achieved gender and ethnic pay parity, even the best-intentioned businesses continue to face considerable barriers to achieving it. Partner June Hardacre looks at the increasing attention and scrutiny on businesses in this area, and outlines some areas of action for businesses looking to make positive progress.

We also sat down with the Supporters of Tiritiri Matangi to understand more about this internationally significant conservation success story, and their work to create an enduring sustainable legacy built around supporting and enhancing biodiversity on the island.

Finally, Partner Lloyd Kavanagh and Senior Associate Claire Brabant apply their microscope to one of Aotearoa New Zealand's largest challenges over the coming decade: how to finance to the transition to the low-emissions, climate-resilient future, envisioned under the Climate Change Response (Zero Carbon) Amendment Act 2019 and other initiatives.

We also provide a number of links to a range of sustainability-related content – well worth a click.

I hope that this issue of *Sustainable Impact* helps to shape your outlook and offers insight: driving progress in useful ways.

Fonterra's journey towards sustainability is a testament to the power of understanding the 'why' behind such initiatives. This approach ensures the co-operative's work to reduce emissions helps it to remain relevant, profitable, and inter-generational.

The importance of the "why" in sustainability

By Kate Cruickshank, Senior Associate, MinterEllisonRuddWatts

In its inaugural Climate Roadmap published in November 2023, Fonterra took the bold move of setting targets for its Scope 3 emissions.[1] What the co-operative decided to implement is an interesting story in and of itself, but the "why" is even more compelling.

Clearly articulating the "why" has been a key factor in helping Fonterra work on sustainability initiatives alongside its multiple stakeholders, including both farmer shareholders and customers.

MinterEllisonRuddWatts Senior Associate, Kate Cruickshank, sat down recently with Director of Sustainability at Fonterra, Charlotte Rutherford, to discuss Fonterra's sustainability journey, including the importance of taking time to understand the reasons behind a sustainability strategy.

Fonterra's Scope 3 targets

Fonterra is Aotearoa New Zealand's largest co-operative, owned by thousands of farming families, which is committed to being amongst the world's lowest-emissions, large-scale dairy suppliers. Its Climate Roadmap is the strategic path that will take it towards its 2030 targets and its ultimate ambition to be net zero by 2050.

Fonterra's Scope 3 (or indirect) emissions represent 93% of its FY23 emissions profile. The co-operative's emissions footprint is unique in that most (86%) of its emissions sit "on farm", i.e., with the farmer suppliers of the milk that Fonterra processes and sells on their behalf. Adopting a Scope 3 target was a big step for Fonterra because that target inevitably affects the personal businesses of those farmers – who are also its owners. There were understandably some brave discussions to be had.

[1] Indirect emissions occurring because of the activities of a Climate Reporting Entity but generated from sources it does not own or control. See Getting started on measuring your emissions » XRB.

The 2030 targets include:

50%

absolute reduction in Scope 1 and 2 greenhouse gas emissions from an FY18 base year

AND

30%

intensity reduction in Scope 1 and Scope 3 Forest Land and Agriculture (FLAG) greenhouse gas emissions from an FY18 base year. This 30% target is broken down into intensity reductions of:

- 7% through supporting farmers to adopt best practice farming
- 7% through scaled up and commercially viable novel technologies
- 8% from carbon removals from existing and new vegetation on farm
- 8% from historical land-use change conversions

Understanding the "why"

Rutherford says Fonterra spent as much time as farmers needed to talk through why the co-operative needed a Scope 3 target. Although there is a clear environmental driver for the decision, she says the discussions were more about the business – showing farmers how the co-operative could remain relevant, profitable, and inter-generational.

Aligning with customers' sustainability ambitions

Although Fonterra's customers are at varying stages in their sustainability journeys, Rutherford notes that most are "moving". Some customers, in particular multi-national companies such as Nestlé and Mars, want to partner with farmers and to engage and invest in enduring change on-farm. For example, farmers that meet achievements in Fonterra's "Co-operative Difference" programme receive an additional payment directly from Nestlé to acknowledge the contribution by those farmers towards Nestlé's targets. Mars has helped Fonterra launch a programme called "Greener Choices" which offers Fonterra farmers an incentive to buy products that help with on-farm sustainability.

One thing that helps give all of its customers confidence in Fonterra is the amount of data it has on each farm's carbon footprint. Not only does this help with climate analysis and reporting but it will also be invaluable for other sustainability issues such as biodiversity and implementation of regenerative agriculture practices. Rutherford is quick to point out that Fonterra is not resting on its laurels when it comes to its sustainability initiatives, including data capture and analysis. Making the process easier for farmers is a priority. The message from customers is clear: although Fonterra is amongst the lowest carbon dairy suppliers in the world, other organisations are catching up and Fonterra needs to keep adapting and innovating.

"Sustainability is becoming an increasingly important factor in obtaining funding and capital."

Charlotte Rutherford
Director of Sustainability, Fonterra

Rutherford lists the four key reasons "why" the target was necessary:

1. Fonterra's customers

Fonterra has many customers (both local and global) with ambitious sustainability targets of their own. Fonterra is a significant contributor to those customers' Scope 3 emissions. The ongoing ability to supply to those customers in the future was a key contributor to the decision to set a Scope 3 target.

2. Access to funding and capital

Sustainability is becoming an increasingly important factor in obtaining funding and capital, not only for large organisations, such as Fonterra, but also for its farmers' own businesses. A lot of funding is becoming dependent on sustainability planning and performance in terms of actions on-farm.

3. Regulatory requirements and litigation risk

Fonterra will issue its first mandatory climate-related disclosure report in 2024 as a climate reporting entity under the Financial Markets Conduct Act 2013. Separate to its legal obligations to disclose what it is doing to identify and manage climate-related risk, Fonterra is also conscious of the risk of time-consuming and costly litigation related to climate change including the potential for that to divert funds away from decarbonisation initiatives. It is important that organisations are doing what they say they are doing. Equally, there is a balancing act to ensure that the threat of litigation does not hamper sustainability ambition.

4. Strategy

One of Fonterra's three strategic choices is to be a leader in sustainability. Having a Scope 3 target was a critical factor in Fonterra putting its strategy into action.

Climate-related Disclosures

Fonterra produced its first set of Climate-related Disclosures on a voluntary basis in 2023. These were prepared to align, as far as possible, with the content that will be required under the Financial Markets Conduct Act this year. Rutherford says the voluntary disclosures were an opportunity for Fonterra to test the process and get feedback. She describes the process as "huge", saying the time and structure taken to embed climate-related risk analysis across the business was like nothing she'd seen before, "but in terms of moving a business quickly to start thinking about climate-related risk there probably isn't a better way to have done it."

Fonterra's journey towards sustainability is a testament to the power of understanding the 'why' behind such initiatives. This approach ensures the co-operative's work to reduce emissions helps it to remain relevant, profitable, and inter-generational.

As Fonterra continues to innovate and adapt to achieve its sustainability ambitions, it serves as a model for other organisations. Its commitment to transparency, as evidenced by its climate-related disclosures, and its ongoing efforts to engage with and support its farmers in achieving sustainability goals, underscore the co-operative's commitment to being a leader in sustainability.

Lessons learned

When asked for advice for other organisations starting out on their sustainability journey, Rutherford doesn't sugar coat it. She has four key pieces of advice:

1. **Be brave!**

   The journey towards a more sustainable future is hard, especially if you are trying to lead multiple stakeholders on that journey.

2. **Do not think there is an easy way to do it.**

   Transitioning from sustainability being a group of activities an organisation does, to being a key part of a business and its strategy will take significant time and resources. You need to be mindful of having the right data, the right language and talking with the right people.

3. **Break it down into manageable goals.**

   Fonterra has had positive feedback from its farmers that the Scope 3 target felt achievable because it was broken down into four different areas for reductions.

4. **Take your time with the "why".**

   Fonterra spent the best part of 2023 on the reasons behind its sustainability strategy. Once the "why" is embedded, then you can focus on the "what" and the "how".

As Fonterra continues to innovate and adapt to achieve its sustainability ambitions, it serves as a model for other organisations. Its commitment to transparency, as evidenced by its climate-related disclosures, and its ongoing efforts to engage with and support its farmers in achieving sustainability goals, underscore the co-operative's commitment to being a leader in sustainability.

Pay parity:
It's complicated

By June Hardacre, Partner, MinterEllisonRuddWatts

In 2024, we can all agree that it is about time we achieved pay parity. Despite this, even the best-intentioned businesses continue to face considerable barriers to achieving gender and ethnic pay parity. This is because, pay inequity is a systemic issue, caused in large part by historic notions about the value of work and the roles that different genders and ethnicities play in society.

The conversation around pay parity is growing, and there is increasing attention and scrutiny on businesses in this area. Addressing pay parity is something businesses must consider and prepare for.

Equal pay vs pay equity

The term "pay parity" is used to refer to two distinct, but often confused, issues: equal pay, and pay equity:

Equal pay refers to two people doing the same work being paid the same, regardless of variables (other thant merit) such as gender or ethnicity. It is what people typically think of when talking about pay gaps.

Pay equity seeks to address the historic undervaluation of work traditionally carried out by women and other minority groups, such as nursing, childcare, and teaching.

While equal pay addresses being paid the same for the same work, pay equity is where different work is paid the same if the work involves equal efforts, responsibilities, and skills.

Legal avenues for employees

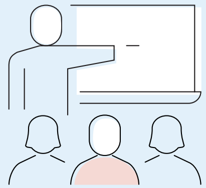
Employees who believe they are not receiving equal pay have several legal avenues available to them. These include making an equal pay claim under the Equal Pay Act 1972, an unjustified disadvantage claim under the Employment Relations Act 2000, or an unlawful discrimination claim under the Human Rights Act 1993 (this option is also available to contractors).

As for pay equity, women who believe the work they perform has been subject to sex-based undervaluation, may bring a claim through the Equal Pay Act 1972. Doing so will commence a bargaining process between the employee (or their union) and the employer. Since the pay equity framework came into force in November 2020, 13 pay equity settlements have been reported to the Ministry of Business, Innovation and Employment (MBIE).

While work traditionally carried out by ethnic minorities may also be subject to historic undervaluation, there is currently no framework in Aotearoa New Zealand for pay equity claims to be made in the case of historic ethnic-based undervaluation of work.

The push for legislative change

We are seeing a local and global push for pay parity. This is consistent with the increased focus within the business community on ESG (environmental, social, and governance) reporting and prioritising the people side of sustainability.



Pay gaps in Aotearoa New Zealand in 2023

The gender pay gap

8.6%

The wāhine Māori pay gap

14.3%

The Pacific women pay gap

15.2%

Based on the Household Labour Force Survey statistics in 2023. As reported by the Ministry for Women. We have not included data on the ethnic pay gap because no such data is readily available.

Pay parity:
It's complicated

In August 2023, the then Labour-led Government made a commitment to legislate mandatory pay gap reporting. This commitment followed similar trends in Australia, France, Spain, and Sweden, where mandatory pay gap reporting has been legislated. However, we do not expect mandatory pay gap reporting to be a priority for the current Government, given its focus on de-regulation. We are unlikely to see legislative change in this area in the near future.

We are seeing positive changes to legislation to achieve pay transparency. This ultimately improves pay parity as it removes traditional barriers and "taboos" on talking about pay. In December 2022, Australia passed legislation which prevents employers from using pay secrecy terms in employment contracts. A comparable Bill, the Employment Relations (Employee Remuneration Disclosure) Amendment Bill, was introduced in New Zealand Parliament on 20 March 2024, (read more here).

We anticipate the pay parity discussion in Aotearoa New Zealand progressing in the years to come, regardless of whether legislative change takes place.

Why is pay parity so complicated?

Despite the push towards pay parity, achieving pay parity is not straightforward and there are a number of barriers to making improvements in this space:

1. Achieving pay parity requires addressing the disproportionate representation of women and ethnic minorities in lower valued roles, such as support and administrative roles. It also requires considering whether lower paid roles are valued less because of the traditional undervaluation of work done by women and ethnic minorities, or because they are objectively of lower value to an organisation.

2. In respect of gender pay gaps, these are partly caused by the longstanding cultural expectation that women perform most of the unpaid labour, such as home maintenance and care of children. This means women have less time to carry out paid work, so are more likely to have periods of unemployment and/or part time work. These periods of unemployment and/or part time work can hamper career progression for these women, making it harder for women to be placed in senior and higher paying roles.

3. There is a perception that working towards pay parity would hamper the pay progression for men and ethnic majorities. I.e., if women and ethnic minorities have their pay increased to close a pay gap, less money will be available to pay their male and European counterparts, so these workers may experience reduced pay progression and lower wages generally. In turn, there is a perception that reduced pay progression and lower wages for men and ethnic majorities could impact the productivity and morale of these workers, and inadvertently act as a 'dis-motivator' for them. If this were the case, presumably any drop in productivity among these workers would be offset by increased productivity by those who have experienced an increase in pay to close a pay gap. Nonetheless, this perception may be stalling improvements in the pay parity space for some organisations.

4. The current financial climate means that many businesses are facing significant cost pressures, with job cuts becoming increasingly common. These cost pressures further complicate achieving pay parity.

Steps businesses can take now

Due to pay parity requiring systemic change, achieving pay parity within your business is a long game; there is no quick fix and businesses need to be proactive.

Identify the issue

We recommend taking account of your business's current state of affairs – to address the issue, you need to be aware what it is. Conduct an audit to identify any gender and ethnic pay gaps within your organisation. This could also include conducting a pulse check to determine your employees' views on these issues, and their views on the business's approach to them.

Recruitment

Look at who you are recruiting and which roles within the business your new recruits are filling. To combat systemic issues, your organisation could consider offering work experience programs to individuals in underrepresented groups.

Addressing the impact of gender and ethnicity

The status quo has long been to not proactively consider identity-based factors, such as gender and ethnicity, when looking at pay. With this approach we have seen pay gaps for women and ethnic minorities. Unless women and ethnic minorities are not as good at their jobs as their male and European counterparts – which of course is not always the case– proactively addressing the impact that gender and ethnicity have on a person's pay must be needed to achieve pay parity and truly merit-based pay.

Accordingly, we encourage organisations to proactively consider the impact that gender and ethnicity may be having on staff remuneration.

Benefits

Salary increases are not the only way to compensate employees who are affected by pay gaps. You may consider other benefits such as bonuses, company cars, flexible working arrangements, increased KiwiSaver contribution, additional leave, and discounted memberships.

Compensating employees through a variety of measures allows time for your organisations' pay to catch up to a parity level, whilst still recognising the existence of these issues and remedying them as much as possible.

Pay transparency

Pay transparency is another tool being used to combat pay parity issues. While there is no mandatory reporting requirement in Aotearoa New Zealand, there are various voluntary avenues available to businesses, should they want to participate:

- Mind the Gap is a New Zealand pay gap registry, which over 100 businesses have published their pay gap data on.
- The 2023 NZX Corporate Governance Code encouraged issuers (particularly issuers within the S&P/NZX 50 with more than 50 employees) to provide gender pay gap information either on their website or in their annual report.[1]

Participating in these initiatives can assist businesses to identify where they are falling short with pay parity and create collective accountability among businesses.

Concluding remarks

Pay parity is a nuanced issue, but one we predict will become more important to Aotearoa New Zealand employees in the years to come. Because of this, you should consider what your business can do to address pay parity issues, to ensure your workforce feel valued and is paid fairly, thereby mitigating your litigation risk.

Better pay parity will also be a point of pride and difference in some organisations where the fight for talent continues.

As a firm, MinterEllisonRuddWatts has reported our pay gap information since 2022. Our pay gap is as follows:

	2024	2023	2022
Employee gender gap	4.8%	4.0%	8.0%
Employee ethnicity pay gap*: Māori	-1.5%	5.0%	12.4%
New Zealand's average pay gap:	8.6%	9.2%	9.1%
Legal staff gender pay gap	-9.5%	-9.4%	-11.1%
Pasifika	17.4%	24%	4.1%

1 NZX Corporate and Governance Code, April 2023.

Supporting a world-class sanctuary at Tiritiri Matangi

Just an hour from downtown Auckland lies an island sanctuary that is home to an unrivalled range of wildlife. Tiritiri Matangi, like many islands in the Hauraki Gulf, has had many lives – as a prime fishing site for early Māori inhabitants, a sheep and cattle farm, a lighthouse site and a military base. Today it is a world-class wildlife sanctuary, a haven where kiwis roam as one of many flourishing bird species, living alongside geckos, weta, and tuataras.

The sanctuary would not be what it is without the Supporters of Tiritiri Matangi (Supporters), formed in 1988 to raise funds to support the conservation work for the island. Today, under the responsibility of the Department of Conservation (DOC), the island is co-managed with the Supporters, whose work includes guiding, track maintenance, research, fundraising, and managing the Visitor Centre and shop. More than 1,500 members of the Supporters work across five main areas of activity: nature conservation, cultural conservation, insight, inspiration, participation, and providing opportunities for people to be involved.

Last year, MinterEllisonRuddWatts began partnering with the Supporters of Tiritiri Matangi as part of the firm's community investment programme. *Sustainable Impact* spoke with Chairperson of the Supporters, Ian Alexander, and Operations Manager, Debbie Marshall, to understand more about their work to create an enduring sustainable conservation legacy built around supporting and enhancing biodiversity on the island.

A four-pronged mission

Ian Alexander says that the mission has four main components.

"Our first job is to conserve and enhance the natural and cultural heritage of the open sanctuary at Tiritiri Matangi. Our second role is to conduct and support research of potential benefit to the sanctuary. Thirdly we're here to provide financial, material and physical support for the work on the island, and fourthly we work to educate and inspire visitors and others to become advocates: supporting opportunities for people of diverse interests to participate."

Debbie Marshall adds that it is important for the Supporters to understand their value and role as kaitiaki of the island.

"We are here to care for the island. The work that the volunteers and paid members do comes from respecting the flora and fauna and the people of the of the island.

"Our volunteers do a wide range of things. We have a wonderful education plan to inspire visitors, providing opportunities for them to be involved in our biodiversity and infrastructure – as well as sharing the experience through our guiding volunteer programme. This is all underpinned by kaitiakitanga and a sense of achievement of what's been achieved on the island."

A conservation success story of international significance

The Supporters have done an enormous amount of work on the island. So, how do they approach conservation on the island, and how do they galvanize their support over the long haul?

Ian Alexander says that Tiritiri Matangi is seen as a conservation success story of international significance largely because of the enthusiasm, motivation and interest of its volunteers.

"There is a huge range of projects happening all the time. Most of these initiatives come from people who have ideas of what sort of bird or gecko could come to the island. They then investigate, get evidence, and go through a long and detailed process before something new can be introduced.

"Then there's the work of our infrastructure team who are always looking at maintenance needs, keeping the island up to a state where the public can visit safely."

He adds that the biodiversity group has ongoing projects, surveying creatures like the tuatara, plus the many regular kiwi counts.

Debbie Marshall adds that other birds being monitored include seabirds.

"We have ongoing monitoring of penguins, diving petrels and other seabirds during the breeding season. We also have ongoing work in the marine environment, including planktons and sea grasses. We're lucky to have a volunteer marine scientist who regularly does that work. We provide information evenings for members to share knowledge and opportunities for people to put their hand up to help."

Many biodiversity and habitat restoration successes

When Ian Alexander first came onto the island 20 years ago, there were only 100 takahe in Aotearoa New Zealand, he says. Now there are more than 500 takahe and the island contributed to building those numbers.

"There have been some really good gains made, but it's quite slow. Planting 283,000 trees and flaxes over the 1984 to 1994 period has been another area of success – bringing back the flora has enabled bringing back a huge number of endangered and rare birds. One of the greatest success stories is that the island has become a breeding place for birds that we can then

translocate to other sanctuaries around New Zealand."

He cites a particular success story, supporting a programme to lift the numbers of a little bird called the hihi.

"Early settlers destroyed the hihi's habitat, so they flew offshore. About 29 years ago DOC realised that it was important that these birds didn't disappear, so they chose a couple of places, one being Tiritiri Matangi, to start a breeding programme. We supported it by installing nesting boxes and feeding stations for the birds, and continue with the help of Chelsea Sugar Refinery providing raw sugar."

The hihi programme has been successful, and last year's breeding season, 300 chicks hatched. Without the programme, major sanctuaries like Zealandia in Wellington and Rotokare in Taranaki wouldn't have these birds.

Debbie Marshall adds that the island is also home to a Takahe recovery project, among many others.

"Takahe is one of New Zealand's threatened species. They are incredibly territorial and you can't have a lot of them in one place or they will fight each other. We've got two families on the island and every second year or so the chicks are translocated."

Relying on volunteers and pro bono legal advice

The takahe can also be a happy distraction for volunteers, says Marshall. She talks of a time recently when a MinterEllisonRuddWatts team was track clearing on the island, something she describes as "one of those thankless tasks that is never done".

The last team that came to volunteer saw the northern takahe family on their way to the work site. While working trimming harakeke, the takahe family came to visit and stayed – it seemed that they were keen to supervise the work.

"We really appreciate all the of the support and advice MinterEllisonRuddWatts gives us as one of our key partners. It's really important for us to access good quality legal advice to support the development and operations on the island," says Debbie Marshall.

> "We want it to go on forever. So keeping the funding going, keeping the people coming, keeping the inspiration, the participation, all of that, is really important to all of us."
>
> **Debbie Marshall**
> Operations Manager, Tiritiri Matangi

Funding the future

As the flora grows and the numbers of birds, reptiles, and invertebrates increase on Tiritiri Matangi, it is helping to repopulate sanctuaries across Aotearoa New Zealand.

As visitor numbers increase, the challenge for the island's guardians is to manage visitor numbers and safeguard the magic of wandering amidst birdsong on quiet forest paths. Several projects are in the pipeline, including developing a new field centre and accommodation for researchers and visitors.

"We have consent to build a 30-bed field centre and accommodation area which has been a huge undertaking – with much more work to come. A major track renewal is also needed for one of the main guiding tracks which is now 25–30 years old and is showing some deterioration. DOC has said that to renew it would cost $500,000, and the field centre will also cost several million dollars over its staged development. It does require a lot of funding to keep our operations going."

Debbie Marshall agrees, adding that the work the Supporters are doing on the island is not something that is ever going to be finished.

"We want it to go on forever. So keeping the funding going, keeping the people coming, keeping the inspiration, the participation, all of that, is really important to all of us."

Sustainable investment:

Overcoming barriers to KiwiSaver providers investing in private assets

Authored by Lloyd Kavanagh, Partner and Claire Brabant, Senior Associate at MinterEllisonRuddWatts

One of Aotearoa New Zealand's largest challenges, over the coming decade, will be how to finance to the transition to the low-emissions, climate-resilient future, envisioned under the Climate Change Response (Zero Carbon) Amendment Act 2019 and other initiatives.

That will include both climate-change mitigation initiatives like increased renewable energy generation, and climate-change adaption initiatives such as more resilient building and transport infrastructure. The Secretary to the Treasury in 2022 cited New Zealand's Climate Change Commission as estimating at least $34 billion of additional investment across key areas of the economy is needed by 2035[1].

A key question is what part the investments by New Zealand's KiwiSaver providers may play, particularly given a key part of any private sector financing will take the form of non-traded equity (referred to as private assets). According to The Centre for Sustainable Finance: Toitu Tahua (CSF)[2], to date, there has been a very low exposure to private assets in KiwiSaver schemes to date, which differs markedly from global patterns where retirement savings funds in many countries are significant investors in less liquid asset classes. G20 governments plan to rely more on private investment to develop green and transformative infrastructure. Institutional investors, such as pension funds, are expected to double their allocation to private market assets over the next five years, with non-listed infrastructure investments likely to increase substantially. By contrast, that will not be the case in Aotearoa New Zealand unless historical patterns in KiwiSaver investment change.

1 Speech delivered by Caralee McLiesh, Secretary to the Treasury, at the Financing and Investment session at the Climate Change and Business Conference, Auckland, 19 September 2022.

2 See the technical working group of CSF Partners publication Investing in Private Assets: Joint Paper on Key Recommendations to Reduce Barriers and Challenges for KiwiSaver Funds to Invest in Private Assets, May 2023 (CSF Recommendations Paper)

Building on those concerns, CSF commissioned MinterEllisonRuddWatts and Chapman Tripp, to consider the legislative and regulatory barriers that may be contributing to the low rates of investment in private assets by KiwiSaver providers, and issue a joint opinion of their conclusions.

While the joint opinion confirmed there were no outright legal barriers preventing KiwiSaver providers from investing in private assets, it identified three key disincentives that may be actively discouraging KiwiSaver providers, and contributing to the disparity compared to overseas pension funds.

These disincentives are:

- the need to maintain liquidity to meet account portability obligations and permitted early withdrawal entitlements, and meet regulator expectations;
- the practical requirement for daily pricing of assets, to support that liquidity; and
- the requirement for fees not to be “unreasonable”, which is bench-marked primarily by reference to publicly traded investments.

In particular, the joint opinion focussed on the mandatory obligations under the KiwiSaver Act 2006 to transfer member account balances from one KiwiSaver scheme to another within ten business days of a request, and members’ entitlements to various early permitted withdrawals and the fact these entitlements cannot be waived (including with member consent). That means providers prefer assets that can be sold rapidly in the event of member transfers. It is not possible for members to contract out of that transfer right, even if they want to.

The increasing regulator expectations for liquidity management were also examined. The view of the co-authors was that the perceived need for liquidity would be increased by the current Financial Market Authority’s (FMA) Liquidity Risk Management Good Practice Guide (soon to be updated), because the range of liquidity management tools generally available to other managed investment scheme (MIS) managers (for example, fund suspension or redemption gates) are not capable of being utilised by KiwiSaver providers, due to the overriding entitlement to account portability or permitted early withdrawal mechanisms under the KiwiSaver Act 2006.

The opinion also examined the requirement for daily pricing (a necessity where a fund allows applications, redemptions, or other withdrawals, on a daily basis) and the potential for equity considerations between investors if private assets are not able to be valued sufficiently frequently.

The perceived focus of the FMA on low manager fees was also raised as another significant feature potentially discouraging private asset investment, compared to market-traded investments. The potential cost associated with making private asset investments (because of the relative complexity in managing and administering these assets) meant providers who did so may need to charge fees commensurately higher than, and therefore comparatively “out-of-step” with, benchmarks set by reference to those funds with solely market-traded investments, which could make those fees vulnerable to classification as “unreasonable”. This was thought to be one of the most powerful facts, especially for larger providers.

The opinion went on to propose changes to the existing KiwiSaver regulatory environment, to help address the disincentives, including:

- tackling liquidity bias, by enabling investors to opt out of account portability and early withdrawal entitlements with appropriate disclosure and investor consent;
- allowing for the creation of “private asset funds” within KiwiSaver schemes with long-term investment horizons;
- establishing a more efficient means of accommodating and adopting long-term asset valuation methodologies into KiwiSaver scheme trust deeds; and
- greater FMA recognition that higher fees are legitimately associated with private asset investment including clarification that such fees would not be “unreasonable”, and may be justified by expected higher returns.

The joint opinion also called on regulators and the Government, as well as providers, to play a role in acknowledging and addressing the potentially unintended effect of current regulatory settings nudging providers away from private investments.

The authors of the legal opinion readily acknowledge that the legal impediments are not the only reasons why less than 2% of the approximately $100 billion in total value of KiwiSaver funds are invested in unlisted shares, far less than retirement savings scheme providers in other jurisdictions, eg 18% of Australian superfunds in private assets. Other factors include, as identified in the CSF Recommendations Paper, KiwiSaver managers' capacity and capability to undertake private investment, the organisational and market challenges posed by private assets, and KiwiSaver members' expectation and financial literacy. But the legal impediments are, in their opinion, clearly a factor. If addressed, that would contribute to both New Zealanders benefiting from investment options that have the potential to deliver higher financial returns, and which may also bring long-term positive environmental, social, and economic outcomes for Aotearoa New Zealand and the planet.[3]

As MinterEllisonRuddWatts Senior Partner, Lloyd Kavanagh, a co-author of the opinion, said: "At a time when New Zealand needs large amounts of capital to build sustainable infrastructure, it seems unfortunate that some of the KiwiSaver regulatory settings are having the unintended consequence of discouraging some providers from investing in private assets. As a result, New Zealand trails well behind other countries, such as Australia, both in the proportion of retirement savings invested in private assets, and the returns earned by those retirement savings."

Kavanagh commented that "modifying the legal and regulatory environment to reduce those disincentives would serve a dual purpose of delivering better long-term value to KiwiSaver members and providing local capital to build much-needed infrastructure – especially to meet the risks and opportunities presented by climate change."

Chief Executive at the Centre for Sustainable Finance: Toitū Tahua, Jo Kelly also comments: "Many KiwiSaver investors have long investment horizons (20 plus years), but they have little option to take advantage of their long investment horizon by way of investing in private markets. This means many New Zealanders aren't benefiting from investment options that can provide potentially higher financial returns and may also bring long-term positive environmental, social, and economic outcomes."

The opinion comes at a pivotal moment for the KiwiSaver regime (now almost 17 years old), with funds under management now over $100 billion, and the Minister of Commerce and Consumer Affairs, Hon. Andrew Bayly, proposing a review of the KiwiSaver settings later this year.

CSF's goal is to enable a resilient, sustainable Aotearoa New Zealand, and its work is anchored in the Sustainable Finance Forum's 2030 Roadmap for Action, which calls for changing mindsets, transforming finance and financing transformation. Its concern is that while much of the required investment to achieve this end is necessarily in non-traded private assets, most KiwiSaver schemes remain invested in highly liquid, market-traded investments, with little-to-no private market exposure. Making it easier for KiwiSaver providers to invest in private assets could help direct more domestic capital into investments like renewable energy, climate solutions, and social housing, which would benefit both KiwiSaver members and Aotearoa New Zealand. MinterEllisonRuddWatts and Chapman Tripp are both partners of the CSF.

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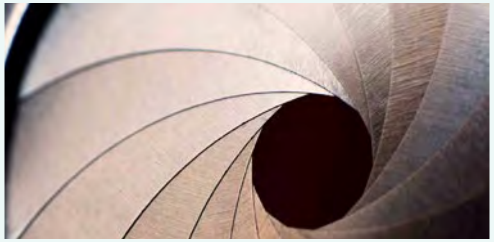
>
> **Lloyd Kavanagh**
> Partner, MinterEllisonRuddWatts

Copies of the joint opinion and the recommendations paper can be found on the [CSF website](). Commerce and Consumer Affairs Minister Andrew Bayly has also received a copy of the opinion.

3 See SCF Recommendations Paper (ibid).

Sustainability resources

Sustainability is more important than ever as we strive to protect our planet and ensure a better future for generations to come. Below you will find a collection of weblinks to some of MinterEllisonRuddWatts' recent thought leadership discussing sustainability in all its forms.



Zero In

Achieving Aotearoa New Zealand's ambitious net-zero targets will require a collective effort and collaboration is key.

MinterEllisonRuddWatts is sitting down with Aotearoa New Zealand's leading organisations to zero in on the opportunities and challenges they are encountering and overcoming on their (and the country's) decarbonisation and sustainability journey.

Solar energy in New Zealand

Utility or grid-scale solar farms are set to play a key role in the electrification of Aotearoa New Zealand's economy. Although few farms are currently operating, grid-scale solar accounts for approximately half of the new generation interest in Transpower's pipeline and makes up the largest share of advanced projects. This is a comprehensive article series on utility-scale solar developments here, in this country.

EU/NZ FTA: Seizing opportunities through compliance

In this paper, MinterEllisonRuddWatts and Export NZ recap the key opportunities presented by the EU/NZ free trade agreement and the importance of EU regulatory compliance generally. We also provide an overview of some of the EU laws, and consider the potential implications for Aotearoa New Zealand exporters of goods and services.

Other articles

Measures to update the wholesale electricity market

Greenwashing dos and don'ts

Sustainable Impact Issue 5

Aote

MinterEllisonRuddWatts is taking an active role in Aotearoa New Zealand's sustainability journey.

We are passionate about helping to shape Aotearoa New Zealand's future, and we believe in using our collective skills, time and resources to make a positive impact for our people, our clients, our communities and our planet.

Sustainable Impact is a collection of articles highlighting Aotearoa New Zealand's progress towards a sustainable future, curated by our firm. To discuss any of the themes or topics in this issue, please get in touch.

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