

CLIMATE CHANGE WORKING PAPER

Legislation to Ratify the Kyoto Protocol

This document provides additional information on issues relating to the Climate Protection Bill : Part I. It supports the consultation on climate change policy options.



New Zealand
Climate Change
Programme

Te Hōtaka
Rerekētanga
Āhuarangi o
Aotearoa

Published in October 2001 by
The Department of Prime Minister and Cabinet
New Zealand Climate Change Programme
PO Box 55, Wellington, New Zealand



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Other issues relating to the management of New Zealand's greenhouse gas emissions are discussed in the climate change working papers: *Domestic Emissions Trading, The Use of Projects, Negotiated Greenhouse Agreements, and Levies to Reduce Greenhouse Gases and Emission Charges and Land Use and Forest (Sinks) Sector*. Other working papers that are also available are: *Maori Issues* and *Assessment of Economic Modelling Work to Date*.

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Introduction

This working paper provides a more detailed look at the content of proposed legislation outlined in the “Kyoto Protocol Ratification Legislation” section of the Government’s climate change consultation document *Kyoto Protocol: ensuring our future*.

The Government has adopted a two-stage approach to Kyoto Protocol ratification, with passage of minimum legislation required for ratification (Part I) to be followed by later legislation specifying detailed policy measures (Part II). This staged approach will allow New Zealand to show environmental leadership by ratifying the Kyoto Protocol in time for the World Conference on Sustainable Development (Rio +10), while allowing time for full consultation on policy measures to manage New Zealand’s greenhouse gas emissions.

The Government proposes the Part I legislation will be introduced to Parliament in early 2002 following consideration of a National Interest Analysis¹ and a decision by Government on whether to ratify the Protocol. The enactment of Part I legislation and ratification of the Protocol will occur prior to September 2002. Part II will be introduced around the time of ratification for passage in 2003.

Minimum Legal Requirements for Ratification

It is well established constitutional practice that New Zealand only ratifies a treaty after it has in place the legislative and other measures that are necessary to enable full compliance with the Treaty once it enters into force for New Zealand. To allow ratification, Part I legislation must, at a minimum, provide for all the measures required to implement the legal obligations of the Kyoto Protocol that are not provided for in existing New Zealand law.

Under the Protocol, the primary legal obligation is that the Government must demonstrate that emissions of greenhouse gases during 2008 – 2012 do not exceed New Zealand’s total assigned amount. Under the Protocol, New Zealand has an initial quantity of emission units² stemming from our target.³ Additional units can be derived from carbon sinks⁴, from purchase of (or international trading in) emission

¹ Standing Orders require the presentation of a National Interest Analysis to Parliament prior to ratification and, typically, the introduction of any legislation necessary to give effect to the obligations being entered into. The National Interest Analysis reports on the obligations being entered into and, among other things, the social, economic, environmental and cultural implications of ratification.

² The term “emission unit” is intended to cover in an informal way the concepts of the assigned amount unit (“AAU”), the certified emission reduction unit (“CER”) earned from clean development mechanism projects in developing countries, and the emission reduction unit (“ERU”), earned through joint implementation projects with other nations with targets under the Protocol. All of these units may be added together to determine whether New Zealand has sufficient assigned amount.

³ New Zealand’s initial assigned amount is equal to five times the 1990 level of emissions.

⁴ Carbon sinks are natural or manmade systems that absorb carbon dioxide from the atmosphere, such as growing forests. To be considered a sink, the system must be absorbing more carbon dioxide than it is releasing. See working paper “Land Use and Forest (Sinks) Sector” for more details.

units, and through participation in project-based activities recognised under the Protocol.⁵

Minimum legal requirements to meet New Zealand's obligations under the Protocol are: a national registry to record holdings of emission units; a national inventory to record New Zealand's greenhouse gas emissions; and powers for the Crown to trade and manage holdings of emission units. Initially, under Part I, the Crown will be responsible for compliance. Stated another way, the Crown will be required to take responsibility for New Zealand's greenhouse gas emissions between 2008 and 2012 in excess of 1990 levels. If our emissions exceed our assigned amount, the Government will need to purchase emission units on the international market.

Before New Zealand will be eligible to trade on the international market for emission units, responsible bodies under the United Nations Framework Convention on Climate Change must be satisfied that New Zealand has established a valid registry and inventory system, and, prior to the first commitment period, has adequately reported certain required inventory information. Further requirements will include provision of inventory reports and their verification internationally.

Scope of Part I Legislation

It is important to note that Part I legislation will only relate to Crown management of responsibilities for and costs of Kyoto Protocol commitments, and does not provide for any devolution of responsibilities and benefits to sectors and individuals. Particularly, it should be noted that Part I powers to issue sink credits into the Crown account are given in the context of the Crown's assumption of any liabilities that may arise for sinks, pending later measures in Part II to devolve sink benefits and obligations to entities.

Content of Part I Legislation

It is anticipated that the Part I Climate Protection Bill will contain approximately 55 clauses. The later Part II Climate Protection Bill will be approximately 80 clauses, and will most likely take the form of an amendment to the Part I legislation.

Purpose and scope provisions

The opening provisions of the Part I Bill relating to purpose and scope will reflect that this Bill is the initial 'minimum' legislation for ratification. The stated purpose of the legislation will be to give effect to New Zealand's international obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to that Convention. When the Part I legislation is supplemented by the later Part II amendment relating to domestic measures, the purpose and scope sections will need to be amended.

Relationship to the Resource Management Act (RMA)

It is not necessary to have specific provisions on the interface with the RMA in Part I legislation, as the information-collection provisions of the Part I Bill are likely to be

⁵ Information collection and recording systems are also required to verify and account for assigned amount and emissions.

the only specific overlap. As discussed in the section on the inventory below, inventory information collection provisions are to be developed to reduce this overlap.

Crown Control of New Zealand's Compliance Equation

To enable ratification, the Part I legislation must provide the Crown with sufficient powers to enable it to control and ensure New Zealand is able to meet its "compliance equation". More specifically, the Crown must ensure that at the end of the first commitment period⁶, New Zealand has a sufficient assigned amount to cover New Zealand's actual emissions of greenhouse gases. This may require the Crown to purchase emission units on the international market in or after 2012, if domestic measures provided for in Part II have not by that time reduced emissions to the level of Crown holdings (including any proportion retained by the Crown of sink credits earned by New Zealand during the commitment period).

The legislation will provide that the Minister appointed by the Prime Minister with responsibility for New Zealand's compliance ("the Minister") will manage the Crown's holding of emission units on behalf of New Zealand. In accordance with international obligations, the Minister will issue the initial assigned amount into the Crown account in the registry, to be held as emission units.

The Minister will be able to add to or subtract from the assigned amount, in accordance with the international requirements, if New Zealand has increases or decreases in carbon sinks eligible for sink credits, and must add to or subtract from assigned amount where New Zealand buys, sells or cancels emission units.

The Minister will be able to buy and sell, or otherwise acquire or transfer, units on the international market. Transfer of units is restricted by the international requirement to retain sufficient holdings of assigned amount in the registry to comply with the "commitment period reserve". The commitment period reserve is equivalent to the lower of 90% of the Crown's initial assigned amount or five times New Zealand's emissions in the most recent year for which a reviewed inventory is available. As a matter of policy, the Minister will not purchase emission units that have been derived from nuclear projects.

National Registry

The legislation will provide for establishing and maintaining a national registry to ensure accurate accounting of the issuing, holding, transfer, acquisition, cancellation, retirement and carry-over of emission units. The Kyoto Protocol requires such a registry. Its primary function is to account for changes in New Zealand's assigned amount. A record of assigned amount is crucial for enabling New Zealand to demonstrate, internationally, compliance with its obligations under the Protocol (i.e. that New Zealand's greenhouse gas emissions do not exceed the assigned amount held in the registry). The choice of registry agency is discussed below in the section on institutional arrangements for the registry and inventory.

The form and content of the registry will be based largely on the technical guidelines that have been created under the Kyoto Protocol, and will be supplemented by elements usual to our domestic registries.

⁶ 2008 - 2012

Appointment of the Registrar

A Registrar of Emission Units will be appointed to maintain (or ensure the maintenance of) the register.

Form of the Register

Structure

The register will be in the form of an electronic database. The structure and data formats of the register will conform to technical standards adopted under the Kyoto Protocol for the purpose of ensuring the accurate, transparent, efficient and secure exchange of data between national and other registries and the transaction log maintained by the UNFCCC Secretariat.

Accounts

The registry will have at least one holding account for the Crown, and one cancellation account and one retirement account for each commitment period. At the end of the commitment period, the Crown will “retire” emission units held in its holding account to match New Zealand’s emissions of greenhouse gases. The retired units are placed in the retirement account. Each account will have a unique account number comprising the two-letter country code identifier for New Zealand and an account number unique to the New Zealand registry, which will be assigned by the Registrar.

The registry will also have one holding account for each legal entity authorised by the Crown to hold units. Even without more general devolution under a domestic emissions trading regime⁷, the Crown may wish to authorise certain legal entities to hold emission unit accounts. The legislation will provide for such authorisation for entities either individually or as a class. The detail of any application procedure and the criteria for acceptance could be set out in regulation. Technical guidelines under the Kyoto Protocol require that the national registry contain, amongst other details, an applicant’s name, address, telephone number, fax number and email address.

Units

A number of different units are provided for under the Kyoto Protocol. As well as Assigned Amount Units, representing initial allocations to parties to the Protocol with targets and additional Assigned Amount Units earned by recognised sink activities (also referred to as sink credits), there will be:

- Emission Reduction Units (ERUs) earned through ‘Joint Implementation’ emission management project activities with other countries with targets under the Protocol; and
- Certified Emission Reductions (CERs) earned through ‘Clean Development Mechanism’ emission management project activities in developing countries.

The register will record the holding in accounts of units created under the Kyoto Protocol. The legislation will define the ERU, CER and AAU. The legislation will

⁷ See working paper “Domestic Emissions Trading” for more information about a possible domestic emissions trading regime.

provide that these units are transferable, will provide for issuing, transferring, acquiring, cancelling, retiring and carrying-over units, and will specify the procedure for each.

Each unit will be held in only one account in one registry at a given time. Once transferred to a retirement or cancellation account, a unit cannot be further transferred. Units that have not been cancelled or retired may be carried over to a subsequent commitment period, provided that New Zealand is in compliance (i.e., has retired enough emission units to cover its emissions).

Each AAU will have a unique serial number comprising a code for the commitment period, the two-letter country code identifier of the Party of origin, the type of the unit (i.e. AAU) and a number unique to the AAU for the commitment period and party of origin, which will be assigned by the Registrar, consistent with international requirements.

Duties, Powers and Procedure of the Registrar

Transactions

The Registrar will effect issues, transfers, acquisitions, cancellations, retirements, carry-overs and other transactions in accordance with the procedure for the registration of transactions. The procedure and documentation for the registration of transactions by account holders and others will be prescribed by regulation where it is not otherwise dealt with under the primary legislation.

The Registrar will also be required, in accordance with the international rules, to record:

- the issue of assigned amount into the registry as AAUs
- the issue of any additions to an account holder's assigned amount as a result of eligible sink activities
- the conversion of AAUs held by the Crown into ERUs in recognition of Joint Implementation project activities conducted in New Zealand (by adding a project identifier to the serial number and changing the type indicator to indicate an ERU)
- the cancellation of AAUs equivalent to any subtraction from its assigned amount, as a result of activities related to sinks, by transferring AAUs to its cancellation account
- the retirement of emission units by the compliance deadline, in fulfilment of New Zealand's Kyoto Protocol commitment
- the carrying over of emission units not retired or cancelled for their use in the second or subsequent commitment periods

Where legal entities are authorised to hold accounts, the Registrar would act on the direction of an account holder to transfer units. Day-to-day operation of the register would be free of ministerial or departmental control.

In registering a transaction, the Registrar will create a unique transaction number for each transaction that originates from the New Zealand registry and must send a record of the proposed transaction to the independent transaction log operated by the UNFCCC Secretariat. The Registrar must terminate the transaction if the transaction

log indicates a discrepancy according to the Protocol rules (for example, if the transaction results in a breach of New Zealand's commitment reserve).

Technical Matters

A number of the technical requirements common to other domestic registries may also be included. For example:

- the Registrar will be empowered to delegate its functions, duties and powers to employees, or contract out certain functions
- the Registrar will be empowered to suspend the operation of the register if necessary
- the register will be evidence of the ownership of emission units
- transactions have no effect until registered
- there will be a procedure relating to refusal by the Registrar to register non-complying documents
- there will be a procedure allowing for the correction of the register, for example to correct minor errors as a consequence of international review.

Provision of Information

The registry will record all information required by the Kyoto Protocol (and certain other information that may be required domestically). The registry will provide a publicly accessible user interface through the internet to allow interested parties to query and view it. The legislation will set out the circumstances where confidential or private information (if any) about companies and individuals may be released – for example, as required under international obligations or for the purposes of prosecution.

The information recorded will include, for each account number: the name of the holder of the account; the type of account; the number and type of units held in the account; the commitment period with which a cancellation or retirement account is associated; the representative of the account holder using a number unique to that representative the full name, mailing address, telephone number, facsimile number and email address of the representative of the account holder.

For any Joint Implementation projects undertaken within New Zealand, the registry will also record: the unique name for the project; the country and town or region in which the project is located; the years in which units have been issued as a result of the project; a link to the downloadable electronic versions of all documentation relating to the project, including proposals, monitoring, verification and issuance of emission units where relevant, subject to confidentiality provisions contained in the Kyoto Protocol.

Finally, holding and transaction information relevant to the registry, by serial numbers, for each calendar year, will be recorded. A list of legal entities authorised to hold units within the New Zealand registry will also be included.

Offence Provisions and Penalties

The legislation will provide for individual account holders to be liable for offences and corresponding penalty provisions for non-compliance with the registry provisions.

Miscellaneous

Further provisions will be included in the legislation to provide for any technical or other details required to enable New Zealand to meet its international obligations. (which are expected to be finalised at the Conference of the Parties to the Protocol in November 2001). These and further technical provisions may be included in regulations.

National Inventory

A national system for estimating and reporting greenhouse gas emissions and removals by sinks is required to comply with the Protocol. New Zealand is already required to report national inventory data under the United Nations Framework Convention on Climate Change (UNFCCC) to the extent that its capacities permit.

The Ministry for the Environment (MfE) currently takes primary responsibility for reporting a national inventory of greenhouse gas emissions and removals by sinks to the Secretariat to the UNFCCC. The Ministry collects information from a variety of sources. This includes both mandatory and voluntary collection.

Although MfE already collates this information for the inventory, arrangements need to be formalised in Part I legislation because:

- for ratification of the Protocol, there needs to be certainty that the information can continue to be collected and used for the purpose of reporting emissions and removals and
- reporting requirements (including timelines and quality) under the Protocol will be stricter than under the UNFCCC.

The functions of the inventory agency in the Part I legislation will reflect international requirements. The primary function of the inventory is to estimate New Zealand's emissions by sources and removals by sinks of greenhouse gases covered by the Kyoto Protocol. The inventory will also be required to perform other functions such as:

- archiving test data, emission factors and other documentation;
- keeping records of changes that occur in the collection of data and use of methodologies and emission factors;
- implementing national verification systems; and
- co-operating with international review teams.

In addition to stating the functions of the national inventory in Part I legislation, the Part I legislation will include:

- data collection and monitoring provisions
- powers of the inventory agency (e.g. search and a limited power of seizure)
- offence provisions and penalties
- confidentiality of information provisions.

Data collection and monitoring

The exact identity of the persons required to supply information, and the type of information that must be supplied, would be specified in regulations. The legislation would set out broadly the boundaries of the regulation-making power, for example using a generic list of information types. The regulation-making power will need to be broad because the inventory needs information on a number of matters and from a number of different sources. For example, the inventory requires information on:

- direct emissions data
- volumes of fuel used
- volumes of fuel sold
- manufacturing processes, including by-products from manufacturing processes
- composition of the vehicle fleet
- the import and manufacture of products such as fridges, inhalers and solvents, and information (e.g., from retailers) on the end-uses of these items;
- waste composition, volume, amount of landfill gas extracted and combusted
- vegetation and soil compositions
- numbers of ruminants and other farmed livestock, areas of crops and amounts produced, amount of nitrogenous fertilisers used.

Some information on greenhouse gas emissions and removals by sinks is already collected under other legislation such as the Resource Management Act 1991, the Forests Act 1949, the Customs and Excise Act 1996, the Transport (Vehicle and Driver Registration and Licencing) Act 1986, the Statistics Act 1975, the Electricity (Statistics) Regulations 1996 and the Gas (Statistics) Regulations 1997. It is not desirable to require persons to submit information twice.

To avoid overlap before making regulations the Minister would be required to consider the following:

- whether the information is reasonably available to the inventory by other means, such as by voluntary collection, or by co-operation with another agency that already collects the information (e.g. local authorities holding emissions data under the Resource Management Act 1991)⁸;
- deficiencies with collecting the information using those other means, such as deficiencies in obtaining the required quality information and lack of certainty that the information will be provided.

It is proposed that the categories of persons who could be required to provide information to the inventory under regulations would include local authorities.

⁸ Before obtaining information from other agencies, the Inventory would need to be satisfied that the transfer of information from that other agency would not breach Privacy Act and confidentiality principles.

Powers of the inventory agency (search and limited powers of seizure)

Self-reporting under the regulations would be supplemented by powers of search and seizure, and corresponding offence provisions, if the correct information is not provided.

Powers of search and a limited power of seizure are needed to ensure compliance with statutory requirements regarding the provision of information. These powers would be needed, for example, to take samples of direct emissions, in order to check whether a company has correctly reported their emissions to the inventory. It is envisaged that officers of the inventory agency will need powers to:

- enter land or premises
- inspect the land or premises, including inspecting documents and business records (and to require production of such documents and records)
- copy written information and electronically stored data (with an additional provision to seize electronic data storage media to recover erased data, under tightly specified circumstances)
- carry out surveys, investigations, tests or measurements, and take samples.

There will be the usual safeguards on the exercise of these powers, such as carefully prescribing the purpose for which the powers can be exercised (for reporting under the UNFCCC and the Kyoto Protocol), reasonable notice to be given to landowners and occupiers, entry at reasonable times, and the need to produce authorisation for entry if requested (the exercise of the more invasive powers would require warrants issued under judicial authority).

Offence provisions and penalties

Offences would include failure to provide information, providing incorrect information, and obstruction or failure to provide documents or property for inspection when required. The person would have a defence if they had taken reasonable steps to provide the correct information.

Penalties would be monetary fines up to a maximum amount specified in the legislation.

Enforcement functions would be undertaken under the auspices of the inventory agency (perhaps using enforcement officers from another agency, depending on the final institutional arrangements for the inventory). The legislation would provide for prosecutions to be adjudicated at the District Court, with appeal to the High Court.

Privacy and the confidentiality of Information

The legislation will set out the circumstances where individual information (information about individual companies and persons) may be released. This is important because some information may be commercially sensitive. Generally only the employees of the inventory will be permitted to see individual information. In any publication, information must be arranged in such a way that *individual* information will not be able to be identified. However, these principles will be overridden in certain situations:

- information can be published in such a way that individual information is identifiable where international obligations require publication in that way (this may occur in sectors with a small number of firms), or where use of this information is necessary for the purposes of continuing international negotiations under the UNFCCC or Kyoto Protocol
- individual information can be made available to members of any international expert review team acting under Article 8 of the Kyoto Protocol
- individual information can be disclosed for the purposes of a prosecution or proposed prosecution.

International and domestic reporting requirements

A Minister (the Minister) appointed by the Prime Minister will be responsible, in consultation with other relevant Ministers, for reporting inventory and registry information required to the UNFCCC. These include the requirement to report annually on changes in the national inventory system, changes in the national registry, and information regarding minimisation of adverse impacts on developing nation Parties under Article 3.14 to the Protocol. Importantly, New Zealand will also be required to report information on additions to and subtractions from assigned amount (including sink credits issued for forestry activities).

The Minister will also be required to direct the Registrar of the national registry to report annually on the total of each type of emission unit issued, acquired, transferred, cancelled, retired or carried-over.

The registry and inventory could also be required under legislation to report annually to Parliament on their respective operations.

Institutional Arrangements for the Registry and Inventory and Crown Trading Functions

Inventory, registry and Crown trading functions are essentially separate, and it is possible for these functions to be exercised by separate bodies, or for two or all of these functions to be carried out by a single body.

The options for responsible bodies for each function include: an existing Government Department or Crown entity; a new branch of an existing Government Department; or a new Government entity. It is also possible for the responsible agencies to contract out some parts of their functions. In the case of the inventory agency the inventory function could be retained within the MfE (with powers to use enforcement officers from other agencies).

The Government is to make a decision on the treatment of institutional arrangements in the Part I legislation in November 2001.

Treaty of Waitangi Implications

Under Part I legislation the Crown will retain the benefits and obligations arising from Kyoto Protocol ratification. Part I does not devolve benefits or obligations to individuals and does not have effects on Māori that are likely to distinguish them from the population as a whole. Consequently, it is not proposed that reference be made to the Treaty of Waitangi in the Part I legislation. Policy options chosen for Part II legislation may have Treaty implications and would be subject to detailed consultation with Māori.

Process and Timeline for the Development of Part I Legislation

Consultation on matters relating to ratification, including on Part I legislation, will run from October to December and drafting instructions for Part I legislation will be sent to Parliamentary Counsel Office (PCO) by 15 November 2001. A Cabinet decision will be made in March 2002 on whether to ratify. This decision will be informed by consultation on the content of Part I legislation, within the broader ratification policy consultation. Assuming that the Government does decide to ratify, scrutiny of the Bill during the Select Committee process will also be informed by this consultation. The Select Committee process will provide an opportunity for further public input.

The development of Part I legislation is linked to consultation on the impacts of ratification, including the economic, social and cultural impacts of implementing Part I legislation. This will include examination of the National Interest Analysis (NIA) by Parliament. The NIA will note results of consultation on ratification and the proposed Part I legislation. Cabinet will be presented with a draft NIA when deciding whether to ratify. Select Committees must then consider the NIA prior to the introduction of the Part I Bill to Parliament.

The following is a list of some of the proposed key dates for development and enactment of Part I legislation:

Parliamentary Counsel Office drafts legislation	15 Nov – 15 Feb
Cabinet approval of draft legislation and NIA and decision on whether to ratify	15 Feb – 15 March
Introduction of legislation to house and referral to select committee	By 15 May 2002
Select Committee consideration	15 May – 1 Aug
Enactment	Late Aug 2002

Development of Part II legislation domestic policy measures is intended to progress in parallel with the development of Part I legislation. Part II legislation will be introduced around the time of ratification for passage in 2003.

Conclusion: Issues Raised by Part I Legislation

The basic elements of the Part I legislation (i.e. a registry, inventory and Crown powers to ensure compliance) are determined by the minimum requirements to ratify the Kyoto Protocol. Many of the technical details of implementation of the inventory and registry functions will also be determined by international guidelines under the Kyoto Protocol (e.g. the type of information regarding accounts and emission units that must be recorded in the national registry).

Other areas allow more scope to determine the best method to implement requirements. Some important issues for consideration raised by the legislation include:

- The nature and scope of inventory data collection provisions, including how best to avoid duplication of collection of data to minimise compliance and administrative costs of the inventory system
- How best to recognise the privacy and confidentiality of information about individuals and businesses held by the registry and inventory
- Determining the appropriate scope of any coercive powers for the inventory and registry to enable them to carry out their functions, and appropriate penalties for non-compliance.

The climate change consultation document “Kyoto Protocol: ensuring our future” discusses and invites submissions on the Part I legislation, ratification and policy options.