

House of Representatives

Supplementary Order Paper

Tuesday, 21 June 2022

Financial Markets (Conduct of Institutions) Amendment Bill

Proposed amendments for the consideration of the Committee of the whole House

Key:

- **this is inserted text**
- **~~this is deleted text~~**

Note: This Supplementary Order Paper shows amendments to the Bill that are being proposed by the Minister for the purposes of consideration in Committee of the whole House. This document does—

- **NOT have official status in terms of unamended text**
- **NOT have the status of an as-reported version of the Bill.**

Explanatory note

This Supplementary Order Paper amends the Financial Markets (Conduct of Institutions) Amendment Bill. The Bill amends the Financial Markets Conduct Act 2013 (the **FMC Act**) to require a registered bank, a licensed non-bank deposit taker, or a licensed insurer to—

- hold a market services licence as a financial institution; and
- implement a fair conduct programme that is designed to ensure that it complies with a principle of fair conduct.

The more significant changes in this Supplementary Order Paper are explained below.

Lloyd's underwriters have been exempted from the requirement to hold a market services licence as a financial institution (*see clause 6A*, which amends section 389 of the FMC Act). Lloyd's underwriters are underwriting members of Lloyd's (which is a society incorporated by an Imperial Act known as the Lloyd's Act 1871). Those underwriters are treated as being licensed insurers under section 204 of the Insurance (Prudential Supervision) Act 2010.

This Supplementary Order Paper also makes the following changes in connection with the exemption:

- regulations may impose terms and conditions on the exemption. A term or condition may impose a requirement on Lloyd's, a Lloyd's underwriter, or a Lloyd's managing agent (*see new section 449A in new clause 10AA*):
- a Lloyd's managing agent (rather than a Lloyd's underwriter) is required to comply with the fair conduct programme requirements. A managing agent is a person who acts on behalf of 1 or more Lloyd's underwriters. Regulations may prescribe requirements for a managing agent's programme and making information about the programme publicly available (*see new section 446WA in clause 9*):
- the Financial Markets Authority (the **FMA**) may make a direction order for a contravention or likely contravention of a term or condition or of a fair conduct programme requirement. The direction may include prohibiting a Lloyd's underwriter from relying on the exemption. A range of other civil liability orders (for example, a pecuniary penalty order) are also available (*see clause 10*, which amends section 449 of the FMC Act to specify various provisions as civil liability provisions):
- it amends the Financial Markets Authority Act 2011 (the **2011 Act**) so that it specifies Lloyd's managing agents as financial markets participants (*see new subpart 1A of Part 2*). The 2011 Act gives the FMA certain functions in relation to financial markets participants (for example, to monitor their activities). As a financial markets participant, a Lloyd's managing agent may be required to pay a levy under section 68 of the 2011 Act.

This Supplementary Order Paper moves the definition of intermediary from *new section 446E* to *new section 446SA in clause 9*. Given the changes explained below, the

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definition is no longer a key definition. The definition of intermediary is also amended as follows:

- to be an intermediary, a person must be paid a commission or other consideration for the person's involvement in providing a relevant service or an associated product. The definition is amended when the person is itself a financial institution to refer to the commission or consideration being paid by any provider of the service or product (not just a financial institution):
- the definition of being involved in the provision of a relevant service or an associated product is clarified. In particular, references to carrying out preparatory services and assisting in administering or performing the service are omitted. The focus is now only on a person who arranges a contract for the service or the acquisition of the product or who gives regulated financial advice. The term arrange is defined broadly (in *new section 446S* in *clause 9*) to include negotiating, soliciting, or procuring the contract.

This Supplementary Order Paper makes significant changes to the minimum requirements for fair conduct programmes in connection with intermediaries and agents (*see new section 446M* in *clause 9*). In particular, certain requirements now apply only in relation to employees (rather than intermediaries and agents as well). The requirements relate to—

- initial and regular ongoing training; and
- managing or supervising those persons.

In addition, the requirement for certain persons to follow procedures or processes to support the financial institution's compliance with the fair conduct principle under *new section 446M(1)(b)* no longer applies in relation to intermediaries (but continues to apply to agents and employees). However, *see* the comment below about regulation-making powers.

However, the requirements for designing, and managing the provision of, the financial institution's relevant services and associated products have been strengthened by adding references to—

- providing for the distribution methods by which the services and products are provided to consumers to operate in a manner that is consistent with the fair conduct principle; and
- regularly reviewing the distribution methods.

The Bill already allows regulations to prescribe additional or more detailed requirements for fair conduct programmes (*see new section 546(1)(oa)* in *clause 16*). The changes in this Supplementary Order Paper relating to intermediaries and agents do not limit that power (that is, regulations may impose requirements in connection with intermediaries and agents). In addition, this Supplementary Order Paper clarifies that regulations can prescribe requirements relating to procedures or processes that intermediaries or agents must follow to support the financial institution's compliance with the fair conduct principle.

The Bill currently requires a financial institution to have regard to certain matters when considering what policies, processes, systems, and controls are effective (*see new section 446M(1A) in clause 9*). This includes having regard to the types of consumers that the institution deals with. This Supplementary Order Paper adds a reference to consumers in vulnerable circumstances. Having regard to that matter is consistent with the consumer vulnerability framework published by the Council of Financial Regulators (which is available on the FMA’s Internet site).

This Supplementary Order Paper also now requires a financial institution to have regard to the legal obligations that its intermediaries have. In particular, if an intermediary is a financial advice provider, subpart 5A of Part 6 of the FMC Act already sets out requirements with a view to ensuring the quality of financial advice (*see section 431B of the FMC Act*).

This Supplementary Order Paper also—

- clarifies the territorial scope of *new subpart 6A* of Part 6 of the FMC Act. That subpart applies to relevant services and associated products provided to consumers in New Zealand (*see new clause 5A and new section 446AA in clause 9*):
- removes a financial institution’s duty to provide a copy of the fair conduct programme to the FMA (*new section 446H in clause 9*):
- deletes *subpart 1 of Part 2*. That subpart amended the Credit Contracts and Consumer Finance Act 2003 to include an information-sharing provision. The provision is no longer required because a similar provision has been enacted in the Commerce Amendment Act 2022:
- includes minor or technical changes and other changes to improve the drafting of the Bill.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Supplementary Order Paper. It provides access to information about any material policy changes to the Bill and identifies any new significant or unusual legislative features of the Bill as amended.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=sop&subtype=government&year=2022&no=173>

Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced a regulatory impact statement on 1 February 2022 to help inform the new policy decisions taken by the Government relating to the contents of this Supplementary Order Paper.

A copy of this regulatory impact statement can be found at—

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- <https://www.mbie.govt.nz/dmsdocument/19335-financial-markets-conduct-of-institutions-amendment-bill-further-policy-decisions-regulatory-impact-statement-proactiverelease-pdf>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

The Honourable Dr David Clark, in Committee, to propose the amendments shown in the following document.

Hon Dr David Clark

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Government Bill

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cl 1

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Financial Markets (Conduct of Institutions) Amendment Act **2019**.

2 Commencement

- (1) **Sections 16 and 17 and subpart 1 of Part 2** come into force on the day after the date of Royal assent.
- (2) The rest of this Act comes into force on a date or dates to be appointed by the Governor-General by Order in Council, and 1 or more Orders in Council may be made appointing different dates for different provisions and for different purposes.
- (3) However, any provision that has not earlier been brought into force comes into force on the third anniversary of the date of Royal assent.
- (4) An Order in Council made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Part 1

Amendments to Financial Markets Conduct Act 2013

3 Principal Act

This Part amends the Financial Markets Conduct Act 2013 (the **principal Act**).

3A Section 5 amended (Overview)

After section 5(1)(f)(iii), insert:

(iiia) providing for financial institutions to treat consumers fairly, including by requiring those institutions to establish, implement, maintain, and comply with effective fair conduct programmes:

4 Section 6 amended (Interpretation)

- (1) In section 6(1), definition of **market service**, after paragraph (c), insert:
(ca) acting as a financial institution:
- (2) In section 6(1), insert in their appropriate alphabetical order:
fair conduct principle has the meaning set out in **section 446B**
fair conduct programme means a fair conduct programme under **subpart 6A of Part 6**
financial institution has the meaning set out in **section 446D**
intermediary, in **subpart 6A of Part 6**, has the meaning set out in **section 446E 446SA**

licensed NBDT has the same meaning as in section 4(1) of the Non-bank Deposit Takers Act 2013

Lloyd's means the society of that name incorporated by the Imperial Act known as the Lloyd's Act 1871

Lloyd's managing agent means a person who has the permission of Lloyd's to manage 1 or more syndicates and carry on underwriting and other functions on behalf of 1 or more Lloyd's underwriters

Lloyd's underwriter means an underwriting member of Lloyd's that is treated as being a licensed insurer under section 204 of the Insurance (Prudential Supervision) Act 2010

- (3) In section 6(1), replace the definition of **retail client** with:

retail client,—

- (a) in relation to a financial advice service or a client money or property service, has the meaning set out in clause 3 of Schedule 5:
- (b) in **subpart 6A** of Part 6, has the meaning set out in **section 446S**

5 Section 386 amended (Overview)

After section 386(1)(f), insert:

- (fa) **subpart 6A** regulates the conduct of financial institutions:

5A Section 387 amended (Territorial scope for licensing and other regulation of certain market services)

After section 387(1), insert:

- (1A) For the service of acting as a financial institution, *see*—

- (a) **section 446AA** (which provides for **subpart 6A** to apply to certain financial services and associated products that are provided to consumers in New Zealand); and
- (b) **section 446D** (which provides for registered banks, licensed insurers, and licensed NBDTs to be financial institutions).

6 Section 388 amended (When provider of market services needs to be licensed)

After section 388(c), insert:

- (ca) acting as a financial institution (*see* **subpart 6A**):

6A Section 389 amended (Exemptions from need for market services licence)

After section 389(3), insert:

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Exemptions for service of acting as financial institution

(4) A person is exempt from the licensing requirement under **section 388(ca)** in respect of a service to the extent that ~~the service is a prescribed exempt service.~~—

(a) the person acts as a Lloyd’s underwriter; or

(b) the service is a prescribed exempt service.

Regulations may prescribe terms and conditions of exemption

(5) The exemptions in **subsections (2)(b), (3)(b), and (4)(a) and (b)** are subject to the prescribed terms and conditions (if any).

(6) See **section 449A**, which relates to prescribed terms and conditions in connection with the exemption for Lloyd’s underwriters under **subsection (4)(a)**.

7 Section 403 amended (When FMA may impose permitted conditions)

After section 403(4)(d), insert:

(e) if P may be an intermediary in relation to the provision of any relevant service or associated product to consumers (as those terms are defined in **subpart 6A**), impose requirements to ensure that those consumers are treated fairly (and those requirements may relate to any aspect of P’s involvement in the provision of those services or products regardless of whether it involves P giving financial advice).

8 New section 409A inserted (Restriction on suspending or cancelling licence to act as financial institution)

After section 409, insert:

409A Restriction on suspending or cancelling licence to act as financial institution

(1) The FMA must not suspend or cancel a licence that covers the service of acting as a financial institution unless the Reserve Bank has given its consent.

(2) The Reserve Bank may withhold its consent only if the Reserve Bank is satisfied,—

(a) in a case where the licensee is a registered bank or a licensed NBDT, that withholding the consent is necessary for maintaining a sound and efficient financial system:

(b) in a case where the licensee is a licensed insurer, that withholding the consent is necessary for maintaining a sound and efficient insurance sector.

(3) This section does not prevent the FMA from exercising a power under section 403 or 414(2).

9 New subpart 6A of Part 6 inserted

After section 446, insert:

Subpart 6A—Regulating conduct of financial institutions

446A Overview

- (1) This subpart provides for financial institutions to treat consumers fairly by—
 - (a) requiring financial institutions to establish, implement, and maintain an effective fair conduct programme; and
 - (b) requiring financial institutions to comply with the programme; and
 - (c) requiring financial institutions and intermediaries to comply with regulations that regulate incentives.
- (2) **Subsection (1)** is only a guide to the general scheme and effect of this subpart.

446AA Territorial scope of subpart

- (1) This subpart applies to the provision of a financial institution’s relevant services or associated products to consumers in New Zealand.
- (2) For the purposes of **subsection (1)**, a relevant service or an associated product is provided to consumers in New Zealand if a consumer in New Zealand receives the service or product, unless the financial institution demonstrates that it has taken all reasonable steps to ensure that consumers in New Zealand may not receive the service or product.

Fair conduct principle

446B What is the fair conduct principle

- (1) The **fair conduct principle** is that a financial institution must treat consumers fairly.
- (2) The requirement to treat consumers fairly includes—
 - (a) paying due regard to consumers’ interests; and
 - (b) acting ethically, transparently, and in good faith; and
 - (c) assisting consumers to make informed decisions; and
 - (d) ensuring that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group); and
 - (e) not subjecting consumers to unfair pressure or tactics or undue influence.
- (3) **Subsection (2)** does not limit **subsection (1)**.

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446C When fair conduct principle applies

- (1) The fair conduct principle applies when a financial institution—
 - (a) is designing any relevant service or any associated product; or
 - (b) offers to provide any relevant service or any associated product to a consumer; or
 - (c) provides any relevant service or any associated product to a consumer; or
 - (d) has any dealings or interactions with a consumer in connection with any relevant service or any associated product (for example, responding to a complaint or handling a claim under an insurance contract).
- (2) The fair conduct principle also applies to a financial institution when an intermediary is involved in the provision of any of the financial institution's relevant services or associated products to a consumer.
- (3) **Subsection (1)(a)** applies only to the extent that the relevant service or associated product will be provided to consumers.

Key definitions

446D Meaning of financial institution

In this Act, a person is a **financial institution** if it—

- (a) is a registered bank, a licensed insurer, or a licensed NBDT; and
- (b) is in the business of providing 1 or more relevant services.

446E Meaning of intermediary

- (1) ~~In this Act, a person is an **intermediary** if—~~
 - ~~(a) the person is involved in the provision of a relevant service or an associated product to a consumer (*see* **subsections (3) and (4)**); and~~
 - ~~(b) the person is paid or provided a commission or other consideration in connection with that involvement; and~~
 - ~~(c) the commission or consideration is paid or provided, directly or indirectly, by or on behalf of any of the following:~~
 - ~~(i) the financial institution that provides the service or products;~~
 - ~~(ii) another person who is an intermediary in relation to the service or products.~~

Examples

Example 1

A bank enters into a master agreement with a company (**A**). The agreement provides for A to arrange home loans for the bank. It provides for a commission to be paid to A for arranging the home loans and for the processes to be followed by A.

A is an intermediary.

~~Independently of the bank, A arranges with mortgage brokers, including a person (B), for home loans to be arranged through A's master agreement. The mortgage brokers and A agree on the commission, and the support services, that A will give to the mortgage brokers for arranging the loans.~~

~~B arranges a loan with a consumer and submits the application through A's processes and the master agreement. The bank pays A a commission for the loan. A deducts a portion of the commission for A's involvement in arranging the loan and pays the balance of the commission to B.~~

~~B is also an intermediary.~~

Example 2

~~A broker arranges contracts of insurance for policyholders. The broker is paid only by the policyholders (and has no arrangement with insurers that directly or indirectly provides for these payments). The broker is not an intermediary.~~

- (2) ~~However, a person is not an **intermediary** if the person is involved only as—~~
- ~~(a) an employee of a financial institution; or~~
 - ~~(b) an employee of an intermediary.~~
- (3) ~~In this subpart, a person is **involved** in the provision of a relevant service or an associated product if the person does any 1 or more of the following:~~
- ~~(a) negotiates, solicits, or procures a contract for the service or the acquisition of the product;~~
 - ~~(b) carries out other services that are preparatory to that contract being entered into;~~
 - ~~(c) gives regulated financial advice in relation to the product;~~
 - ~~(d) assists in administering or performing the service or the terms or conditions of the associated product.~~

Example

~~A person (W) maintains an Internet site that gives consumers information about 1 or more insurance contracts. Consumers are able to take steps towards entering into those contracts using the Internet site. W receives a fee from the insurer when a consumer enters into a contract using the Internet site.~~

~~W is involved because W procured the contract. W is an intermediary.~~

- (4) ~~However, a person is not **involved** in the provision of a relevant service or an associated product merely because the person carries out 1 or more of the following activities:~~
- ~~(a) distributing an advertisement or other promotional material;~~
 - ~~(b) carrying on a prescribed occupation and acting in relation to the service or product in the ordinary course of carrying on that occupation;~~
 - ~~(c) carrying out a prescribed activity.~~

446F Meaning of relevant service and associated product

- (1) In this subpart, **relevant service**—
- (a) means any of the following:
 - (i) acting as an insurer;
 - (ii) being a creditor under a consumer credit contract;
 - (iii) any financial service referred to in section 5(1)(a), (ab), (d), (f) to (ia), (ib)(i) to (v), or (ic) to (l) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 where that service is a retail service (as defined in **subsection (3)**);
 - (iv) acting as an intermediary for any services referred to in **subparagraphs (i) to (iii)**; but
 - (b) does not include a service of a class excluded by the regulations (but those regulations may not exclude the services referred to in **paragraph (a)(i) and (ii)**).
- (2) A product is an **associated product** in relation to a relevant service if it is a financial advice product that a consumer acquires under the service.

Example

A company (**A**) provides the financial service of acting as an insurer. A contract of insurance entered into by A under the service is an associated product.

- (3) In this section, a service is a **retail service** if that service is or will be received by—
- (a) a retail client; or
 - (b) a class of persons where there is at least 1 retail client in that class.

Fundamental duties to meet fair conduct principle

446G Duty to establish, implement, and maintain effective fair conduct programme

- (1) Every financial institution must establish, implement, and maintain an effective fair conduct programme.
- (2) The financial institution must—
- (a) ensure that the programme complies with **section 446M**; and
 - (b) otherwise comply with the duty in **subsection (1)** in the prescribed manner.
- (3) A **fair conduct programme** means policies, processes, systems, and controls that are designed to ensure the financial institution's compliance with the fair conduct principle.

446H Financial institution must provide copy of programme to FMA

~~Every financial institution must provide the FMA with a copy of its fair conduct programme, and of any material change to the programme, before the programme or change comes into effect.~~

446HA Duty to make information about fair conduct programme publicly available

- (1) Every financial institution must ensure that the information about its fair conduct programme that is set out in **subsection (2)** is—
 - (a) published on an Internet site maintained by, or on behalf of, the financial institution at all reasonable times; and
 - (b) provided to any person who requests the information.
- (2) The information is—
 - (a) a summary of key matters about the fair conduct programme that is in sufficient detail to assist consumers to—
 - (i) be reasonably aware of how the financial institution will comply with the fair conduct principle; and
 - (ii) make informed decisions about dealings and interactions with the financial institution in relation to the relevant services and associated products that the financial institution provides; and
 - (iii) understand how to make a complaint about those relevant services and associated products; and
 - (b) all other prescribed information about the fair conduct programme.
- (3) The information must be provided under **subsection (1)(b)**—
 - (a) as soon as practicable but, in any event, within 5 working days after the financial institution receives the request; and
 - (b) free of charge.
- (4) The financial institution must otherwise comply with this section in the prescribed manner.

446I Duty to comply with fair conduct programme

- (1) Every financial institution must take all reasonable steps to comply with its fair conduct programme.
- (2) The financial institution must comply with that duty in the prescribed manner (if any).

446M Minimum requirements for fair conduct programme

- (1) The fair conduct programme must be in writing and include effective policies, processes, systems, and controls for—

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- (a) enabling the financial institution to meet all of its legal obligations to consumers, including under this Act, the Fair Trading Act 1986, the Credit Contracts and Consumer Finance Act 2003, the Consumer Guarantees Act 1993, and the Financial Service Providers (Registration and Dispute Resolution) Act 2008; and
- (ab) designing, and managing the provision of, the financial institution's relevant services and associated products to consumers, including regularly reviewing by—

- (iaa) providing for the methods by which the relevant services and associated products are provided to consumers (**distribution methods**) to operate in a manner that is consistent with the fair conduct principle; and

Example

A life insurer provides a life insurance product directly through its Internet site (**method 1**). It also provides the product indirectly through insurance brokers (**method 2**). The life insurer's fair conduct programme needs to provide for both method 1 and method 2 to operate consistently with the fair conduct principle.

- (iab) regularly reviewing whether the distribution methods are operating in a manner that is consistent with the fair conduct principle; and
 - (iac) ensuring that any deficiencies identified under **subparagraph (iab)** are remedied within a reasonable time; and
 - (i) regularly reviewing the relevant services or associated products that are provided to consumers on an ongoing basis to determine whether they are likely to continue to meet the requirements and objectives of those consumers (when viewed as a group); and
 - (ii) regularly reviewing whether enhancements or improvements in the financial institution's relevant services or associated products should be made available to those consumers (when viewed as a group); and
 - (iii) ensuring that any enhancements or improvements identified under **subparagraph (ii)** are made available within a reasonable time; and
- (ac) identifying, monitoring, and managing risks associated with conduct that fails to comply with the fair conduct principle, including—
 - (i) having clearly defined roles, responsibilities, and accountability arrangements in relation to identifying, monitoring, and managing those risks; and

- (ii) requiring records to be maintained that are sufficient to allow an assessment to be made of the financial institution's performance in complying with the fair conduct principle; and
- (iii) requiring regular and comprehensive reporting about those risks, and about failures to comply with the fair conduct principle, to the board or other governing body of the financial institution; and
- (ad) identifying conduct that fails to comply with the fair conduct principle and taking reasonable steps to mitigate any actual or potential adverse effects of the failure; and
- (b) ~~requiring the following to follow the procedures or processes that are necessary or desirable to support the financial institution's compliance with the fair conduct principle:~~
 - (i) ~~the financial institution's employees or agents;~~
 - (ii) ~~the intermediaries that are involved in the provision of the financial institution's relevant services or associated products; and~~
- (b) requiring the financial institution's employees and agents to follow the procedures or processes that are necessary or desirable to support the financial institution's compliance with the fair conduct principle; and
- (bb) requiring initial and regular ongoing training for each of those employees, ~~agents, and intermediaries~~ on the following matters to the extent that the training is relevant to their ~~involvement~~ work in providing the financial institution's relevant services or associated products to consumers:
 - (i) ~~the relevant services or associated products that the employee, agent, or intermediary will be involved in providing in respect of which the employee carries out work; and~~
 - (ii) the fair conduct programme and the procedures or processes referred to in **paragraph (b)** that the employee, ~~agent, or intermediary~~ must follow; and
- (bc) checking that each of those employees, ~~agents, and intermediaries~~ has completed that training and has a reasonable understanding of the matters that have been covered by that training; and
- (bd) managing or supervising each of those employees, ~~agents, and intermediaries~~ to ensure that they are supporting the financial institution's compliance with the fair conduct principle, and monitoring whether those persons are giving that support, including by—
 - (i) obtaining reasonable assurance that each employee, ~~agent, or intermediary~~ is competent and ~~otherwise a fit and proper person~~ to carry out the range of work for which they will be, or are, employed or engaged (in relation to the financial institution's relevant services or associated products); and

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- (ii) setting conduct expectations for those persons; and
 - (iii) establishing robust and transparent procedures or processes for dealing with misconduct by those persons; and
 - (iv) monitoring whether consumers have been treated by those persons in a manner that is consistent with the fair conduct principle; and
 - (be) designing and managing incentives to mitigate or avoid the actual or potential adverse effects of incentives on the interests of consumers, so far as is reasonably practicable; and
 - (bf) communicating with consumers about the financial institution's relevant services or associated products, ~~including to ensure that the institution communicates with consumers~~ in a timely, clear, concise, and effective manner; and
 - (d) ensuring that there are in place methods for regularly reviewing, and systematically identifying deficiencies in, the effectiveness of the programme; and
 - (e) ensuring that any deficiencies identified are promptly remedied; and
 - (f) complying with all requirements prescribed for the purposes of this section.
- (1A) In considering what policies, processes, systems, and controls are effective for the purposes of **subsection (1)**, the financial institution must have regard to the following:
- (a) the nature, size, and complexity of its business; and
 - (b) the relevant services and associated products it offers; and
 - (c) the methods by which it provides relevant services and associated products to consumers; and
 - (d) the types of consumers it deals with, including consumers in vulnerable circumstances; and
 - (e) the types of intermediaries that are involved in the provision of its relevant services and associated products ~~and the nature of their involvement; and~~, including the nature and extent of the following:
 - (i) their involvement; and
 - (ii) their legal obligations in connection with that involvement (for example, under subpart 5A in the case of financial advice providers); and
 - (ea) the types of agents that are engaged to carry out work in relation to the financial institution's relevant services or associated products, including the nature and extent of that work and of the authority of those agents; and
 - (f) any other factors that may be provided for in regulations.

- (1B) **Subsection (1)(a) to (e)** does not limit what may be prescribed by regulations under **section 546(1)(oa)** (in particular, those regulations may prescribe additional, or more detailed, requirements relating to the matters set out in **subsection (1)(a) to (e)**).
- (2) Despite **subsection (1)**, a fair conduct programme—
- (b) must not impose in relation to an intermediary or agent a requirement of a kind prescribed for the purposes of this paragraph:
 - (c) is not required to impose in relation to an intermediary or agent a requirement of a kind prescribed for the purposes of this paragraph.
- (3) **Section 546(1)(oa)** (which allows regulations to prescribe requirements for the programme) is subject to **subsection (2)**.

Duties relating to incentives regulations

446N Financial institution must comply with incentives regulations

Every financial institution must comply with the regulations made under **section 546(1)(of)** (which relate to incentives).

Example

A company (**A**) acts as an insurer. A offers motor vehicle insurance to consumers. A car dealer (**B**) offers A's insurance to its customers when they buy cars. A gives B a commission when A's insurance products are sold. A must comply with the regulations relating to incentives.

446O Intermediary must comply with incentives regulations

Every intermediary that offers or gives an incentive to any of its employees or agents or to another intermediary in connection with the provision of a financial institution's relevant services or associated products must also comply with the regulations made under **section 546(1)(of)** (which relate to incentives).

Example

From the example in **section 446N**, the car dealer (**B**), in turn, offers incentives to its sales staff to encourage them to sell more of A's insurance. B must comply with the regulations relating to incentives.

446P Meaning of incentive

- (1) In this subpart and section 546, **incentive**, in relation to a relevant service or any associated product, means a commission, benefit, or other incentive (whether monetary or non-monetary and whether direct or indirect) that is offered or given to a person (**A**) if—
- (a) the commission, benefit, or other incentive is offered or given to A in connection with A (directly or indirectly) being involved in the provision of the service or the products; and

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- (b) A's entitlement to the commission, benefit, or other incentive, or the nature or value of the commission, benefit, or other incentive, is determined or calculated in any way by reference (directly or indirectly) to the volume or value of the services or products.

Examples

Example 1

A person (A) is given a bonus based on A's individual performance in selling life policies. A's performance is measured by reference to the value of the premiums payable. The bonus is an incentive.

Example 2

A person (A) is a manager of a team of people who sell life policies. A will be entitled to a paid holiday if the team sells a certain number of life policies. The paid holiday is an incentive.

- (2) **Subsection (1)** applies—

- (a) regardless of whether A's entitlement, or the nature or value, is also determined or calculated by reference to 1 or more matters unrelated to the volume or value of the services or products involved:

Example

In example 1 in **subsection (1)**, A is only entitled to the bonus if a performance indicator relating to customer satisfaction is also satisfied. This factor does not prevent the bonus from being an incentive.

- (b) regardless of whether A's entitlement, or the nature or value, is determined or calculated by reference to a target or other threshold:

Example

A financial adviser is paid a commission based on a fixed percentage of premiums paid under insurance contracts arranged by the adviser. The commission is an incentive regardless of the fact that no target is involved.

- (c) whether A is an intermediary or is an employee or agent of a financial institution or an intermediary.

- (3) Determining or calculating a matter by reference to the volume or value of the services or products involved includes (without limitation) determining or calculating the matter—

- (a) by reference to the number of consumers to whom the services or products are provided or the number of contracts entered into (for example, the number of bank accounts opened, the number of credit cards issued, or the number of policies underwritten); or
- (b) by reference to any amount paid or payable in connection with the services or products (for example, fees, charges, commissions, interest, or premiums); or

- (c) by reference to any amount related to the services or products (for example, the amount of credit advanced under a consumer credit contract); or
- (d) by reference to a person's performance compared to others in relation to the volume or value of the services or products involved; or

Example

In example 1 in **subsection (1)**, A's bonus is \$5,000 if A is in the top 20% of sellers (based on the value of the premiums payable).

- (da) by reference to a person's performance in a period in relation to the volume or value of the services or products involved compared with their own performance in another period; or
- (e) by reference to avoiding or preventing something in connection with the volume or value of the services or products involved; or

Example

A deals with requests from consumers to cancel insurance contracts. A is paid a bonus for every consumer they convince to not cancel a contract.

- (f) on a linear basis (that is, on a per service or per product basis).

Example

A is paid a 5% commission for each life policy that A arranges.

Miscellaneous provisions

446Q FMA must obtain consent of Commerce Commission before commencing certain proceedings

- (1) The FMA must, before commencing a proceeding under subpart 3 of Part 8 for a contravention of this subpart, obtain the consent of the Commerce Commission if the FMA considers that the conduct in question is likely to contravene any provision of—
 - (a) the Credit Contracts and Consumer Finance Act 2003; or
 - (b) the Fair Trading Act 1986.
- (2) However, a failure to obtain consent does not affect any proceedings commenced by the FMA.

446R Pecuniary penalty order may not be made if failure relates only to certain legal obligations

A pecuniary penalty order may not be made for a contravention, or involvement in a contravention, of **section 446I** if the contravention arises only in relation to a failure to meet a legal obligation referred to in **section 446M(1)(a)**.

446S Other definitions used in subpart

(1) In this subpart and section 546,—

arrange, in relation to a contract for a service or for the acquisition of a product, includes to negotiate, solicit, or procure the contract

associated product has the meaning set out in **section 446F(2)**

consumer, in relation to—

(a) the relevant service of acting as an insurer or an associated product, means any of the following:

(i) a policy-holder under a consumer insurance contract or a contract of insurance that provides for life insurance or health insurance (or both):

(ii) any other person who is specified or referred to in a contract of a kind referred to in **subparagraph (i)**, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends:

(iii) a person who is offered insurance under a contract of a kind referred to in **subparagraph (i)**:

(b) the relevant service of acting as a creditor under a consumer credit contract or an associated product, means either of the following:

(i) a debtor under a consumer credit contract:

(ii) a person who is offered credit under a consumer credit contract:

(c) a relevant service referred to in **section 446F(1)(a)(iii)** or an associated product, means either of the following:

(i) a person who receives the service as a retail client:

(ii) a person who is offered the service and who would be a retail client if they received the service:

(d) a relevant service of acting as an intermediary for a service referred to in **paragraph (a), (b), or (c)**, means a person who is a consumer under that paragraph

consumer credit contract—

(a) has the same meaning as section 11 of the Credit Contracts and Consumer Finance Act 2003 (and for that purpose sections 12 to 14 and 15(1)(a), (c), and (ca) of that Act apply and section 15(1)(b) of that Act must be disregarded); but

(b) does not include—

(i) a contract referred to in section 15(1)(d) of that Act unless the contract is of a class prescribed by regulations made under this Act to be a class of consumer credit contract for the purposes of this definition; or

(ii) a lease referred to in section 16 of that Act

consumer insurance contract—

- (a) means a contract of insurance entered into by a New Zealand policyholder wholly or predominantly for personal, domestic, or household purposes (*see* **section 446U**); and
- (ab) also includes a contract referred to in **subsection (2)**; but
- (b) does not include—
 - (i) a contract to the extent that it provides for life insurance or health insurance; or
 - (ii) a contract that is subject to a certificate under **section 446V(1)**

contract of insurance has the same meaning as in section 7 of the Insurance (Prudential Supervision) Act 2010 (but does not include a contract of reinsurance within the meaning of that Act)

creditor has the same meaning as in section 5 of the Credit Contracts and Consumer Finance Act 2003

health insurance means insurance against a liability to pay fees or charges relating to the provision of a health service (within the meaning of section 5(1) of the Health Practitioners Competence Assurance Act 2003)

incentive has the meaning set out in **section 446P**

insurer means a person who—

- (a) carries on insurance business in New Zealand (within the meaning of section 8 of the Insurance (Prudential Supervision) Act 2010); and
- (b) enters into any 1 or more of the following with 1 or more New Zealand policyholders:
 - (i) a consumer insurance contract;
 - (ii) a contract of insurance that provides for life insurance or health insurance (or both)

involved has the meaning set out in **section 446E 446SA(3) and (4)**

life insurance means insurance of the kind described in section 84(1)(a) to (f) of the Insurance (Prudential Supervision) Act 2010

New Zealand policyholder has the same meaning as in section 6 of the Insurance (Prudential Supervision) Act 2010

relevant service has the meaning set out in **section 446F**

retail client—

- (a) has the same meaning as in section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008; but
- (b) does not include a person who has given a certificate for the service under **section 446V(2)**.

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- (2) For the purposes of **paragraph (ab)** of the definition of **consumer insurance contract** in **subsection (1)**, a contract of the kind referred to in this subsection is a contract of insurance to the extent that—
- (a) it is entered into by the policyholder in order to provide insurance cover for 1 or more other persons, or it is varied or extended in order to provide cover for 1 or more other persons; and
 - (b) those other persons are not parties to the contract; and
 - (c) those other persons have the benefit of that insurance cover wholly or predominantly for personal, domestic, or household purposes.

Example

A bank enters into a contract of insurance with an insurer.

The bank then offers credit cards to its customers that provide them the benefit of travel insurance cover under that contract.

The bank enters into the contract of insurance for commercial purposes. However, the contract is a consumer insurance contract to the extent that its customers have the benefit of the travel insurance cover for their personal purposes.

446SA Meaning of intermediary

- (1) In this Act, a person is an **intermediary** if—
- (a) the person is involved in the provision of a relevant service or an associated product to a consumer (see **subsections (3) and (4)**); and
 - (b) the person is paid or provided with a commission or other consideration in connection with that involvement; and
 - (c) the commission or consideration is paid or provided, directly or indirectly, by or on behalf of any of the following:
 - (i) the financial institution that provides the service or product;
 - (ii) if the person referred to in **paragraph (a) and (b)** is itself a financial institution, any other financial institution or person that provides the service or product;

Example

A bank (A) is involved in the provision of interests in a KiwiSaver scheme issued by an entity. The entity pays A a commission for that involvement. A is acting as an intermediary in relation to the Kiwi-Saver scheme.

- (iii) another person who is an intermediary in relation to the service or products.

Examples

Example 1

A bank enters into a master agreement with a company (A). The agreement provides for A to arrange home loans for the bank. It provides for a commission to be paid to A for arranging the home loans and for the processes to be followed by A.

A is an intermediary.

Independently of the bank, A arranges with mortgage brokers, including a person (B), for home loans to be arranged through A's master agreement. The mortgage brokers and A agree on the commission, and the support services, that A will give to the mortgage brokers for arranging the loans.

B arranges a loan for a consumer and submits the application through A's processes and the master agreement. The bank pays A a commission for the loan. A deducts a portion of the commission for A's involvement in arranging the loan and pays the balance of the commission to B.

B is also an intermediary.

Example 2

A broker arranges contracts of insurance for policyholders. The broker is paid only by the policyholders (and has no arrangement with insurers that directly or indirectly provides for the payments). The broker is not an intermediary.

- (2) However, a person is not an **intermediary** if the person is involved only as—
- (a) an employee of a financial institution; or
 - (b) an employee of an intermediary.
- (3) In this subpart, a person is **involved** in the provision of a relevant service or an associated product to a consumer if the person does either or both of the following:
- (a) arranges a contract for the service or for the acquisition of the product:
 - (b) gives regulated financial advice in relation to the product.

Example

A person (W) maintains an Internet site that gives consumers information about 1 or more insurance contracts. Consumers are able to take steps towards entering into those contracts using the Internet site. W receives a fee from the insurer when a consumer enters into a contract using the Internet site.

W is involved because W procured the contract. W is an intermediary.

- (4) However, a person is not **involved** in the provision of a relevant service or an associated product to a consumer merely because the person carries out 1 or more of the following activities:
- (a) distributing an advertisement or other promotional material:

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- (b) carrying on a prescribed occupation and acting in relation to the service or product in the ordinary course of carrying on that occupation:
- (c) carrying out a prescribed activity.

446T Protection of person who reports contravention or failure to comply

- (1) This section applies if an employee or an agent (**A**) of a financial institution or of an intermediary—
 - (a) reasonably believes that a person has, in relation to a relevant service or an associated product,—
 - (i) contravened a provision of this Act; or
 - (ii) otherwise failed to comply with the fair conduct principle; and
 - (b) reports that belief to the FMA.
- (2) If **A** makes the report in good faith,—
 - (a) no civil, criminal, or disciplinary proceedings may be brought against **A** as a result of **A** having made the report; and
 - (b) no person may terminate **A**'s employment or appointment as a result of **A** having made the report; and
 - (c) no tribunal, body, or authority that has jurisdiction in respect of **A**'s professional conduct may make an order against, or do any act in relation to, **A** as a result of **A** having made the report.

446U Presumption relating to consumer insurance contract

In any proceedings under this Act in which a party claims that an insurance contract is a consumer insurance contract, it is presumed that the contract is a consumer insurance contract unless the contrary is established.

446V Effect of certificate from policyholder or client

- (1) An insurance contract is not a consumer insurance contract if the policyholder (**P**) certifies in writing before entering into the contract that **P** is entering into it wholly or predominantly for business purposes.
- (1A) **Subsection (1)** does not apply to a contract referred to in **section 446S(2)**.
- (2) A person (**P**) is not a retail client in relation to a relevant service referred to in **section 446F(1)(a)(iii)** if **P** certifies in writing before receiving the service that **P** is receiving the service as a wholesale client (within the meaning of section 49(2) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008).
- (3) **Subsection (1) or (2)** does not apply if the financial institution, or the person who obtains the certificate, knew, or had reason to believe, at the time the certificate was given, that the certificate was false or misleading in a material particular.
- (4) A certificate is effective only if—

- (a) the certificate is in a separate written document that is separate from the insurance contract or the contract for the relevant service; and
- (b) P confirms that P has read and understood the consequences of giving the certificate (including that P will have fewer protections from unfair conduct).

446W Revocation of certification

- (1) A person may revoke a certificate given under **section 446V(2)** in relation to a relevant service by giving to the financial institution that provides the service a signed notification to that effect.
- (2) A revocation is effective only in relation to a service provided after it is given.

446WA Application of subpart to Lloyd’s underwriters

- (1) **Sections 446G, 446HA, 446I, 446M, and 446N** do not apply to a Lloyd’s underwriter.
- (2) However, **sections 446G(1), (2)(b), and (3), 446I, and 446N** apply to a Lloyd’s managing agent to the extent that they act as a managing agent in connection with any 1 or more of the following that are entered into with 1 or more New Zealand policyholders:
 - (a) consumer insurance contracts:
 - (b) contracts of insurance that provide for life insurance or health insurance (or both).
- (3) The following apply for the purposes of **subsection (2)**:
 - (a) the provisions referred to in that subsection (and **sections 446B, 446C, and 449(3)(h), (j), and (l)**) apply to the Lloyd’s managing agent with all necessary modifications as if it were the financial institution that is acting as the insurer:
 - (b) the Lloyd’s managing agent must ensure that—
 - (i) its fair conduct programme is in writing and complies with all requirements prescribed for the purposes of this subparagraph; and
 - (ii) information about its fair conduct programme is made publicly available in the prescribed manner:
 - (c) if the Lloyd’s managing agent contravenes any of **sections 446G(1), (2)(b), or (3), 446I, or 446N or paragraph (b)**, the managing agent has civil liability under subpart 3 of Part 8 for the contravention:

Guidance note

See section 449, which specifies the provisions referred to in **paragraph (c)** as Part 6 services provisions and, accordingly, civil liability provisions under section 485.

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- (d) if the Lloyd's managing agent contravenes or is likely to contravene any of **sections 446G(1), (2)(b), or (3), 446I, or 446N or paragraph (b)**, the FMA may exercise any 1 or more of its enforcement powers in respect of the matter (*see*, for example, the FMA's powers to make direction orders under section 468).
- (4) **Subsections (2) and (3)** apply regardless of where the Lloyd's managing agent is resident, is incorporated, or carries on business.

446X Review of subpart and licensing requirement for financial institutions

- (1) The Minister must—
- (a) commence a review of the operation and effectiveness of—
- (i) the licensing requirement under section 388 for the service of acting as a financial institution; and
- (ii) this subpart; and
- (b) prepare a report on that review.
- (2) The review must be commenced before the fifth anniversary of the day on which this subpart comes into force.
- (3) The Minister must, in carrying out the review,—
- (a) consider how effectively the licensing requirement and this subpart operate with other legislation and regulatory requirements that apply to financial institutions; and
- (b) ensure that the people and organisations that the Minister thinks appropriate are consulted.
- (4) The Minister must present a copy of the report to the House of Representatives as soon as practicable after the report has been completed (but, in any event, before the seventh anniversary of the day on which this subpart comes into force).

10 Section 449 amended (Part 6 services provisions)

- (1) After section 449(3)(g), insert:
- (h) **sections 446G, ~~446H~~, 446HA, and 446I** (duties to have effective fair conduct programme, ~~to provide it to the FMA~~, to make information about it publicly available, and to comply with it):
- (j) **section 446N** (financial institution's duty to comply with incentives regulations):
- (k) **section 446O** (intermediary's duty to comply with incentives regulations):
- (l) **section 446WA(3)(b)** (Lloyd's managing agent's duties relating to its fair conduct programme).
- (2) After section 449(4)(ka), insert:

(kb) **section 449A** (requirements relating to exemption for Lloyd’s underwriters):

10AA New section 449A and cross-heading inserted

After section 449, insert:

Requirements relating to exemption for Lloyd’s underwriters

449A Lloyd’s, Lloyd’s underwriter, or Lloyd’s managing agent must comply with term or condition of licensing exemption for Lloyd’s underwriters

If a term or condition prescribed under **section 546(1)(cab)** imposes a requirement on Lloyd’s, a Lloyd’s underwriter, or a Lloyd’s managing agent, Lloyd’s, the Lloyd’s underwriter, or the Lloyd’s managing agent (as the case may be) must comply with the requirement.

10A Section 468 amended (When FMA may make direction orders)

In section 468(1)(j), after “Part 9”, insert “or an exemption from a licensing requirement under section 546(1)(c) to **(cb)**”.

10B Section 469 amended (Terms of direction orders)

After section 469(2), insert:

(3) **Subsection (4)** applies if the FMA is satisfied that—

- (a) the relevant person is Lloyd’s or a Lloyd’s underwriter, and that, by engaging in any conduct, the relevant person has contravened, or is likely to contravene, **section 449A**; or
- (b) the relevant person is a Lloyd’s managing agent who, by engaging in any conduct, has contravened, or is likely to contravene,—
 - (i) **section 449A**; or
 - (ii) any provision of **subpart 6A** of Part 6 (as applied under **section 446WA**).

(4) A direction order may do any of the following (whether or not in addition to an order under subsection (1)):

- (a) in the case of a contravention, or likely contravention, by Lloyd’s, prohibit all or any Lloyd’s underwriters from relying on the exemption in **section 389(4)(a)**:
- (b) in the case of a contravention, or likely contravention, by a Lloyd’s underwriter, prohibit the Lloyd’s underwriter from relying on the exemption in **section 389(4)(a)**:
- (c) in the case of a contravention, or likely contravention, by a Lloyd’s managing agent who acts for 1 or more Lloyd’s underwriters, prohibit all or any of those Lloyd’s underwriters from relying on the exemption in **section 389(4)(a)**.

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11 Section 489 amended (When court may make pecuniary penalty orders)

After section 489(3)(a), insert:

(ab) in the circumstances referred to in **section 446R**:

12 Section 498 amended (Terms of other civil liability orders)

In section 498(c) and (e), replace “financial products” with “financial advice products”.

14 Section 506 replaced (Only 1 pecuniary penalty order may be made for same conduct)

Replace section 506 with:

506 Only 1 pecuniary penalty may be imposed for same conduct

- (1) This section applies if conduct by a person constitutes a contravention, or the involvement in the contravention, of—
 - (a) 2 or more civil liability provisions; or
 - (b) 1 or more civil liability provisions and 1 or more other pecuniary penalty provisions.
- (2) Proceedings may be brought against that person for the contravention, or involvement in the contravention, of any 1 or more of the provisions, but no person is liable to more than 1 pecuniary penalty for the same conduct.
- (3) In this section, a **pecuniary penalty provision** is a provision of another Act the contravention of which may give rise to civil liability to a pecuniary penalty.
- (4) **Subsection (2)** is subject to **section 446Q**.

15 Section 507 amended (No pecuniary penalty and fine for same conduct)

In section 507, after “the Fair Trading Act 1986,” insert “the Credit Contracts and Consumer Finance Act 2003,”.

16 Section 546 amended (Regulations for purposes of Part 6 (market services))

(1AA) After section 546(1)(ca), insert:

(cab) prescribing terms and conditions of the exemption for Lloyd’s underwriters under **section 389(4)(a)**, including any term or condition that imposes requirements on Lloyd’s, Lloyd’s underwriters, or Lloyd’s managing agents (see **section 449A**):

(cb) exempting (on terms and conditions, if any) services from the licensing requirement for providers of the service of acting as a financial institution for the purposes of **section 389(4)(b)**:

(1) After section 546(1)(d)(iv), insert:

(vi) in relation to a licence relating to acting as a financial institution, conditions that prohibit or regulate incentives, or the offer or giving of incentives to any person, in connection with a relevant service or an associated product:

- (2) Replace section 546(1)(oa) and (ob) and the heading above paragraph (oa) with:

Regulating conduct of financial institutions

- (oa) prescribing requirements for fair conduct programmes, including (without limitation) additional, or more detailed, requirements relating to the matters set out in **section 446M(1)(a) to (e)** or requirements relating to 1 or more of the following in connection with a relevant service or an associated product:
- (i) governance and management of conduct and risks associated with that conduct:
 - (ii) monitoring outcomes for consumers, including whether consumers' interests are being had regard to:
 - (iii) how the services or products are designed and managed:
 - (iv) dealing with consumer complaints:
 - (v) dealing with insurance claims:
 - (vi) communicating with consumers, including particular disclosure requirements and requirements for warnings:
 - ~~(vii) appropriate control or supervision over the involvement of intermediaries in the provision of the services and products:~~
 - (vii) procedures or processes that intermediaries or agents must follow to support the financial institution's compliance with the fair conduct principle:
 - (viii) the design and management of incentives:
- (ob) prescribing matters for the purposes of **section 446E(4)(b) and (c)**:
- (oc) prescribing classes of service for the purposes of **section 446F(1)(b)**:
- (od) prescribing matters for the purposes of **section 446HA**:
- (oda) prescribing factors for the purposes of **section 446M(1A)(f)**:
- (oe) prescribing requirements for the purposes of **section 446M(2)(b) or (c)**:
- (oea) prescribing matters for the purposes of **section 446SA(4)(b) and (c)**:
- (of) prohibiting or regulating any incentive, or any practice, activity, or other conduct in connection with offering or giving any incentive to any person, in connection with a relevant service or an associated product, including prescribing the manner in which an incentive may be offered or given:

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- (og) prescribing classes of contract for the purposes of **paragraph (b)(i)** of the definition of consumer credit contract in **section 446S**;
 - (oga) prescribing matters for the purposes of **section 446WA(3)(b)**:
 - Miscellaneous*
 - (oh) prescribing the procedure of the code committee;
 - (oi) prescribing the procedure of the disciplinary committee:
- (2A) In section 546(2), after “(ca),”, insert “**(cb)**,”.
- (3) In section 546(2), replace “and (o)” with “(o), **(ob)**, **(oc)**, and **(oe)(oc)**, **(oe)**, and **(oea)**”.
- (4) After section 546(3), insert:
- (4) ~~Regulations under **subsection (1)(of)** may apply in relation to an incentive that is or may be offered or given to a person (A) in connection with A (directly or indirectly) being involved in the provision of a relevant service or an associated product only to the extent that the involvement consists of 1 or more of the following:~~
- ~~(a) negotiating, soliciting, or procuring contracts for the service or the acquisition of the product;~~
 - ~~(b) carrying out other services that are preparatory to those contracts being entered into;~~
 - ~~(c) giving regulated financial advice in relation to the product.~~
- (5) The Minister may make a recommendation for regulations under **subsection (1)(of)** (which relates to prohibiting or regulating incentives) only if the Minister—
- (a) has had regard to the purposes of this Act and the fair conduct principle; and
 - (b) has had regard to whether the regulations are likely to—
 - (i) appropriately reduce or manage conflicts or potential conflicts between the interests of consumers and the interests of persons who would otherwise be entitled to receive incentives; or
 - (ii) otherwise mitigate or avoid the actual or potential adverse effects of incentives on the interests of consumers; and
 - (c) has had regard to the likely effect of the regulations—
 - (i) on the availability of financial advice and the availability of financial services and financial advice products; and
 - (ii) on the financial services industry generally; and
 - (d) is satisfied that the matters to which the regulations relate are not more appropriately dealt with in an Act.

- (6) ~~The breach of a term or condition of an exemption under regulations made prescribed under subsection (1)(c) to **(eb)**, **(ca)**, **(cab)**, or **(cb)** is a breach of section 388 (unless the terms of the exemption regulations otherwise provide).~~

17 Section 550 amended (Procedural requirements for regulations relating to exemptions, exclusions, and definitions)

- (1) In section 550(1)(c), after “(db),”, insert “~~**(ea)**, **(eb)**, **(eb)**, **(eba)**~~”.
- (1A) In section 550(2)(d), replace “and (ca)” with “(ca), and **(cb)**”.
- (2) Replace section 550(2)(e) with:
- (e) section 546(1)(o) and **(oe)** (regulations may disapply requirements):
- (3) After section 550(2)(e), insert:
- (ea) ~~**section 546(1)(ob)** (regulations may exclude occupations and activities from involvement in provision of relevant services or associated products):~~
- (eb) **section 546(1)(oc)** (regulations may exclude services from being relevant services under **subpart 6A** of Part 6):
- (eba) ~~**section 546(1)(oea)** (regulations may exclude occupations and activities from involvement in provision of relevant services or associated products):~~

18 ~~New Part inserted in Schedule 4~~ amended

- (1) In Schedule 4, ~~after clause 1(f), insert clause 1(1), insert as the last paragraph:~~
- (g) **Part 7** provides for transitional provisions relating to the Financial Markets (Conduct of Institutions) Amendment Act **2019**.
- (1A) In Schedule 4, clause 1(1), in the last paragraph (as inserted by **subsection (1)**), make any necessary consequential amendment.
- (2) In Schedule 4,—
- (a) insert the Part set out in **Schedule 1** of this Act as the last ~~part~~ Part; and
- (b) make all necessary consequential amendments.

Part 2
Other amendments

~~Subpart 1—Amendment to Credit Contracts and Consumer Finance Act 2003~~

19 Amendment to Credit Contracts and Consumer Finance Act 2003

This subpart amends the Credit Contracts and Consumer Finance Act 2003.

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20 ~~New section 113A inserted (Sharing of information and documents with Financial Markets Authority)~~

After section 113, insert:

113A ~~Sharing of information and documents with Financial Markets Authority~~

- (1) ~~The Commission may provide to the Financial Markets Authority any information, or a copy of any document, that the Commission—~~
- ~~(a) holds in relation to the exercise of the Commission’s powers, or the performance of its functions and duties, in respect of this Act; and~~
 - ~~(b) considers may assist the Financial Markets Authority in the exercise of its powers, or the performance of its functions and duties, under the Financial Markets Authority Act 2011 or any enactment listed in Schedule 1 of that Act.~~
- (2) ~~The Commission may use any information, or a copy of any document, provided to it by the Financial Markets Authority under section 30 of the Financial Markets Authority Act 2011 in the Commission’s exercise of its powers, or the performance of its functions and duties, in respect of this Act.~~
- (3) ~~This section applies despite anything to the contrary in any contract, deed, or document.~~
- (4) ~~Nothing in this section limits the Privacy Act 1993.~~

Compare: 1986 No 121 s 48A

Subpart 1A—Amendment to Financial Markets Authority Act 2011

20A Principal Act

This subpart amends the Financial Markets Authority Act 2011.

20B Section 4 amended (Interpretation)

In section 4(1), definition of **financial markets participant**, after paragraph (b)(iiib), insert:

- (iiic) a Lloyd’s managing agent (within the meaning of section 6(1) of the Financial Markets Conduct Act 2013):

Subpart 2—Consequential amendments

21 **Consequential amendments to other enactments**

Amend the enactments specified in **Schedule 2** as set out in that schedule.

Schedule 1
New Part inserted into Schedule 4

s 18

Part 7
Provisions relating to Financial Markets (Conduct of Institutions)
Amendment Act 2019

- 91 Dealing with applications to act as financial institution from existing banks, insurers, and NBDTs**
- (1) This clause applies to a person (A) if,—
 - (a) immediately before the commencement of this clause, A is a registered bank, a licensed insurer, or a licensed NBDT; and
 - (b) an application is made for a licence to cover A's service of acting as a financial institution (whether under an existing or a new licence and whether under section 395 or, by way of an application to vary the conditions of a licence, under section 404 of ~~the~~ this Act).
 - (2) To the extent that the application relates to A, the FMA must not decline the application unless the Reserve Bank has given its consent.
 - (3) The Reserve Bank may withhold its consent only if the Reserve Bank is satisfied,—
 - (a) in a case where A is a registered bank or a licensed NBDT, that withholding the consent is necessary for maintaining a sound and efficient financial system;
 - (b) in a case where A is a licensed insurer, that withholding the consent is necessary for maintaining a sound and efficient insurance sector.
 - (4) If the FMA has asked for the Reserve Bank's consent but the Reserve Bank refuses to give its consent, the FMA must accept the application (to the extent that it relates to A) even if it does not consider that 1 or more of the requirements referred to in section 396 or 400 are satisfied.
 - (5) The FMA may exercise a power under section 414(2) in respect of the requirements referred to in section 396 or 400 (without having to be satisfied under section 414(1)).
 - (6) **Subclause (5)** ceases to apply in relation to a person when the FMA first becomes satisfied that those requirements referred to in section 396 or 400 are satisfied in relation to the person.

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Amendment Bill**

Schedule 1

92 Regulations may provide that licensing requirement does not apply until particular date

- (1) The Governor-General may, by Order in Council, on the recommendation of the Minister ~~in accordance with section 549~~, make regulations for the purpose set out in **subclause (2)** (and those regulations have effect despite the commencement of **section 6** of the Financial Markets (Conduct of Institutions) Amendment Act **2019**).
- (2) The purpose is to provide that the requirement to hold, or be authorised under, a licence to provide the service of acting as a financial institution does not apply to a class of persons specified in the regulations until on or after a date specified in those regulations.
- (3) A date specified in those regulations must be on or before the fifth anniversary of the date on which the Financial Markets (Conduct of Institutions) Amendment Act **2019** receives the Royal assent.
- (4) The Minister must consult the FMA before making a recommendation under this clause.
- (5) Regulations made under this clause are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Example

The requirement for financial institutions to hold a market services licence comes into force on a particular date (**date A**).

However, regulations under this clause provide that the requirement does not apply to NBDTs until a later date (**date B**).

While the requirement applies to registered banks and insurers on date A, it only starts to apply to NBDTs on date B.

93 Applications for financial institution licence may be made before commencement

- (1) A person may apply for a market services licence to cover the service of acting as a financial institution—
 - (a) before the commencement of **section 6** of the Financial Markets (Conduct of Institutions) Amendment Act **2019**; and
 - (b) if regulations under **clause 92** apply, before the date referred to in **clause 92(2)**.
- (2) For the purposes of dealing with the application, any provisions of the Financial Markets (Conduct of Institutions) Amendment Act **2019** that are relevant to the matter and that are not yet in force, must be treated as if they were in force.
- (3) The FMA may refuse to consider the application if it is made—
 - (a) before a date specified by the FMA; or

- (b) before an event specified by the FMA has occurred; or
 - (c) before circumstances specified by the FMA exist.
- (4) **Subclause (3)** ceases to apply to an application made after the later of—
- (a) the commencement of **section 6** of the Financial Markets (Conduct of Institutions) Amendment Act **2019**; and
 - (b) the date referred to in **clause 92(2)** (if the regulations made under that clause apply in relation to the applicant).
- (5) This clause does not limit section 395(1A).

94 Incentives regulations may apply to existing agreements

- (1) Regulations made under **section 546(1)(of)** may provide that they apply to 1 or more classes of incentives offered, given, or otherwise payable on or after the commencement of those regulations.
- (2) **Subclause (1)** may apply even if an incentive is offered, given, or otherwise payable under an agreement entered into before either or both of the following:
- (a) the commencement of those regulations;
 - (b) the enactment of the Financial Markets (Conduct of Institutions) Amendment Act **2019**.
- (3) However, nothing in those regulations applies to—
- (a) any incentive that is given or otherwise paid or payable before the commencement of those regulations; or
 - (b) any incentive that a person has become entitled to before that commencement (even if it is given or otherwise payable after that commencement).
- (4) If the regulations apply to an agreement referred to in **subclause (2)**, compliance with those regulations does not—
- (a) place any party to the agreement or any other person in breach of the agreement, or make any of them liable for a civil wrong; or
 - (b) entitle any person to terminate or cancel an agreement, or to accelerate the performance of an obligation, or to impose a penalty or an increased charge, unless the regulations provide otherwise.

Example

A company (**A**) acts as an insurer. A offers motor vehicle insurance to consumers.

A car dealer (**B**) offers A's insurance to its customers when they buy cars. A is contractually obliged to ~~give~~ pay B an incentive based on the volume of A's insurance products that are sold.

The contract providing for the incentive is entered into before commencement of the regulations.

The regulations cannot apply to incentives that are payable before the commencement of the regulations. However, this clause allows the regulations to apply to

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Schedule 1

incentives payable after commencement even though the contract was entered into before commencement.

The regulations ban a certain incentive that would otherwise be payable under the contract.

A must no longer pay the incentive. A does not breach the contract by refusing to pay the incentive and B has no right to cancel the contract because of that refusal.

Schedule 2 Consequential amendments

s 21

Financial Service Providers (Registration and Dispute Resolution) Act 2008 (2008 No 97)

After section 5(1)(ib)(vi), insert:

(vii) acting as a financial institution:

~~Reserve Bank of New Zealand Act 1989 (1989 No 157)~~

After section 33, insert:

~~33A Consent to licence under Financial Markets Conduct Act 2013~~

~~If the FMA has asked for the Reserve Bank's consent under **section 409A** or **clause 91 of Schedule 4** of the Financial Markets Conduct Act 2013, the Bank must consider that request in accordance with that provision.~~

Reserve Bank of New Zealand Act 2021 (2021 No 31)

After section 202, insert:

202A Consent to licence under Financial Markets Conduct Act 2013

If the Financial Markets Authority has asked for the Bank's consent under **section 409A** or **clause 91 of Schedule 4** of the Financial Markets Conduct Act 2013, the Bank must consider that request in accordance with that provision.