

# **Financial Markets (Conduct of Institutions) Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

This Bill relates to the conduct of institutions in financial markets.

The purpose of the Bill is to improve the conduct of certain financial institutions in respect of services and products provided to consumers, thereby reducing the risk of harm to those consumers. To achieve this, the Bill makes amendments to the Financial Markets Conduct Act 2013 (the **FMC Act**), amongst other enactments, to ensure that certain financial institutions and their intermediaries comply with a principle of fair conduct and associated duties and regulations.

### **Introduction of conduct licensing regime for certain financial institutions**

The Bill creates a new regulatory regime for the general conduct of financial institutions and their intermediaries. This regime has been designed in response to recent reviews that have identified that certain institutions, particularly banks and life insurers, lack focus on good outcomes for customers and have ineffective systems and controls to identify, manage, and remedy conduct issues.

To address these issues, the Bill—

- requires financial institutions that are in the business of providing relevant services to obtain a licence under Part 6 of the FMC Act. The scope of the regime is intended at this stage to cover registered banks, licensed insurers, and licensed non-bank deposit takers and to apply broadly to all services and associated products provided by those institutions:
- requires financial institutions and intermediaries to comply with a fair conduct principle to treat consumers fairly, including by paying due regard to their interests. That conduct principle sets the framework for the regime and will require institutions and intermediaries to turn their minds to the fair treatment

of consumers in a broad range of circumstances, from early design of products and services to post-sale dealings:

- requires financial institutions to establish, implement, and maintain an effective fair conduct programme. That requirement is a way for financial institutions to operationalise the fair conduct principle through policies, processes, systems, and controls throughout every relevant part of their business, from the governance level to day-to-day interactions with consumers, whether those interactions are made directly or indirectly through intermediaries:
- requires financial institutions and intermediaries to comply with the fair conduct programme. This is aimed at ensuring that the chain of distribution of services and products is captured. That requirement is aimed at ensuring that institutions take responsibility from the top down. The requirement does not apply to a financial institution acting as an intermediary of another financial institution, or to an intermediary to the extent that it may be giving regulated financial advice. Those restrictions, however, do not limit a financial institution's obligations to have processes providing for appropriate control of or supervision over their intermediaries, including financial advice providers:
- requires financial institutions to ensure that intermediaries comply with the conduct programme. That obligation is aimed at ensuring that institutions take care that any intermediaries distributing their products or services are doing so responsibly. The obligation, however, does not apply to intermediaries that are financial institutions or financial advice providers:
- requires financial institutions and intermediaries to comply with regulations that regulate incentives. These regulations will be able to prohibit incentives based on volume or value sales targets:
- provides that financial institutions and intermediaries will be subject to the FMC Act's compliance and enforcement tools such as civil pecuniary penalties for contraventions of various obligations, and licensed financial institutions will be subject to licensing actions such as censure and the imposition of action plans:
- provides protection to employees and agents of financial institutions and intermediaries who report a contravention of a provision of the FMC Act or of the fair conduct principle to the Financial Markets Authority (the **FMA**). This will provide support and a clear process for people who may wish to report misconduct issues and help uncover any such issues under the new regime:
- provides for interactions between different regulatory regimes and regulators that arise as a result of the new conduct regime, including multiple pecuniary penalties for the same conduct, proceedings under different enactments, and licensing for conduct and prudential activity.

*Transitional arrangements*

The Bill allows regulations to be made to apply the licensing requirements to different classes of entities at different times (up to 4 years after the date on which the Bill receives the Royal assent).

The Bill also allows licence applications to be made before commencement of the provisions of the Bill and associated regulations, although the FMA may refuse to consider an application if it is made before a specified date or event or before a specified circumstance arises.

The Bill contains a regulation-making power to prohibit or regulate certain activities related to the offering or giving of sales incentives in connection with a relevant service or associated product. These regulations may apply to existing incentive arrangements and those entered into before the commencement of the regulations, but cannot apply to any incentive that is paid, is payable, or to which a person has become entitled before the commencement of the regulations.

**Other amendments**

The Bill includes other amendments to ensure that the licensing regime is implemented effectively across the multiple regulatory systems it affects. Those amendments include—

- an information-sharing power for the Commerce Commission to share with the FMA information it holds in respect of the Credit Contracts and Consumer Finance Act 2003; and
- minor amendments to other enactments.

**Commencement**

Most of the Bill will come into force on a date or dates specified by 1 or more Orders in Council, but no later than 2 years after the date of Royal assent. The deferred commencement allows regulations to be made to implement the Bill. The Bill's regulation-making powers and a power for the Commerce Commission to share information with the FMA come into force on the day after the Bill receives the Royal assent.

**Departmental disclosure statement**

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2019&no=203>

### Regulatory impact assessment

The Ministry of Business, Innovation, and Employment produced a regulatory impact assessment on 13 November 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

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

- <https://www.mbie.govt.nz/business-and-employment/business/financial-markets-regulation/conduct-of-financial-institutions-review/>
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

### Clause by clause analysis

*Clause 1* relates to the Title.

*Clause 2* provides that most of this Bill comes into force on a date appointed by Order in Council (but no later than 2 years after Royal assent). The deferred commencement allows regulations to be made to implement the Bill (for example, to prescribe requirements for fair conduct programmes and incentives).

Regulation-making powers in *clause 16* and a power in *clause 20* for the Commerce Commission to share information with the FMA come into force on the day after the Bill receives the Royal assent.

## Part 1

### Amendments to Financial Markets Conduct Act 2013

*Part 1* amends the FMC Act to introduce a new regime for regulating the conduct of registered banks, licensed insurers, and licensed non-bank deposit takers (**financial institutions**).

The main changes are in—

- *clause 6*, which requires a person to hold, or be authorised under, a market services license if they act as a financial institution; and
- *clause 9*, which inserts *new subpart 6A* into Part 6 to regulate the conduct of financial institutions.

In summary, *new subpart 6A*—

- establishes a new fair conduct principle for the conduct of financial institutions. The principle is that those institutions (and certain intermediaries) must treat consumers fairly, including by paying due regard to their interests:
- applies the principle to a broad range of financial services and associated products. This includes consumer contracts of insurance and consumer credit contracts. It covers most other financial services referred to in the Financial Service Providers (Registration and Dispute Resolution) Act 2008 when those services are retail services (*see new section 446F*):

- applies the principle to a broad range of circumstances, including designing, offering, and providing the services and all subsequent interactions with the consumer (for example, dealing with complaints). *See new section 446C*:
- applies the new principle to intermediaries in addition to financial institutions. Intermediaries are people who are involved in providing the services or products (for example, people who negotiate or otherwise arrange a contract). A person is covered only if they are paid a commission or other benefit by the financial institution or another intermediary:
- requires a financial institution to establish, implement, and maintain an effective fair conduct programme (*see new section 446G*). The programme is targeted at ensuring compliance with the fair conduct principle. The Bill sets out certain requirements for the programme (*see new section 446M*), and other requirements will be prescribed in regulations:
- requires the financial institution to make the programme available to the public, to the FMA, and to intermediaries (*see new section 446H*):
- requires financial institutions and intermediaries to comply with the programme (*see new section 446I*):
- requires financial institutions to take all reasonable steps to ensure that intermediaries comply (*see new section 446K*). This does not apply if the intermediary is a financial advice provider or another financial institution (*see new section 446L*):
- requires financial institutions and intermediaries to comply with regulations relating to incentives (*see new sections 446N and 446O*). An incentive is a commission, benefit, or other incentive that is offered or given to a person (A) for being involved in providing a financial service or product where A's entitlement to the commission or benefit, or the nature or value of the commission or benefit, is determined or calculated in any way by reference to the volume or value of the services or products.

*Clause 10* ensures that the new duties are enforced as civil liability provisions. This means, for example, that a contravention may give rise to a pecuniary penalty of up to \$5 million or 3 times the amount of the gain made or loss avoided. In addition, the FMA has a range of enforcement options, such as giving direction orders.

Under *new section 446R* and *clause 11*, a pecuniary penalty may not be imposed for a contravention of *new section 446I* or *446K* if the contravention relates to a failure to meet certain existing legal obligations. Instead, the penalties or other consequences that would otherwise apply for those failures continue to apply. In addition, the restriction on a pecuniary penalty does not prevent the FMA from exercising any of its enforcement powers.

Other, more minor, changes are summarised below.

*Clause 4* amends the interpretation section in the FMC Act to include definitions of key terms for the new regime (for example, financial institution, fair conduct principle, and fair conduct programme).

*Clause 5* amends the overview section for Part 6 of the FMC Act.

*Clause 7* extends the types of conditions that may be imposed on a financial advice provider's licence. The conditions are designed to ensure that consumers are treated fairly when a provider acts as an intermediary in relation to certain financial services and products.

*Clause 8* imposes a restriction on the FMA's power to suspend or cancel a licence held by a financial institution (*new section 409A*). The FMA cannot act without the Reserve Bank's consent. The Bank can withhold its consent if it is necessary for maintaining a sound and efficient financial system or insurance sector.

*Clause 12* allows civil liability orders under section 498 of the FMC Act to extend to a broader range of products (in particular, credit contracts and contracts of insurance).

*Clause 13* provides that a general defence to civil liability in section 499 of the FMC Act does not apply to a financial institution's duty to take all reasonable steps to ensure that an intermediary complies with its fair conduct programme.

*Clause 14* replaces section 506 to ensure that only 1 pecuniary penalty may be imposed for the same conduct. The amendment extends the provision to pecuniary penalties under other Acts as well the FMC Act.

*Clause 15* ensures that a pecuniary penalty cannot be imposed under the FMC Act if the person is already liable to a fine under the Credit Contracts and Consumer Finance Act 2003 for the same conduct.

*Clause 16* allows regulations to be made to support the new regime. These include regulations to regulate the conduct of financial institutions, including to—

- prescribe requirements for fair conduct programmes;
- prohibit or regulate any practice, activity, or other conduct in connection with offering or giving any incentive;
- impose conditions on licences relating to incentives.

*Clause 17* imposes certain procedural requirements for regulations that disapply certain requirements.

*Clause 18* and *Schedule 1* provide for transitional matters. These include—

- providing for how to deal with applications to act as a financial institution from existing banks, insurers, and NBDTs. In particular, a licence cannot be declined without the Reserve Bank's consent. The Bank can withhold its consent if it is necessary for maintaining a sound and efficient financial system or insurance sector;
- allowing regulations to provide that the new licensing requirement does not apply until a particular date for a particular class of persons;
- allowing applications to be dealt with before commencement;
- allowing new incentives regulations to apply to agreements entered into before the commencement of the regulations (but not to incentives that have already been earned before that commencement).

## **Part 2**

### **Other amendments**

*Part 2—*

- allows the Commerce Commission to share with the FMA information it holds in respect of the Credit Contracts and Consumer Finance Act 2003; and
- makes minor amendments to other enactments.





*Hon Kris Faafoi*

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**Consequential amendments**

**The Parliament of New Zealand enacts as follows:**

**1 Title**

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

**2 Commencement** 5

- (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. 10
- (3) However, any provision that has not earlier been brought into force comes into force on the second anniversary of the date of Royal assent.

## Part 1

### Amendments to Financial Markets Conduct Act 2013

#### 3 Principal Act

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

#### 4 Section 6 amended (Interpretation) 5

(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** 10

**financial institution** has the meaning set out in **section 446D**

**intermediary** has the meaning set out in **section 446E**

**licensed NBDT** has the same meaning as in section 4(1) of the Non-bank Deposit Takers Act 2013 15

(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** 20

#### 5 Section 386 amended (Overview)

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

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

#### 6 Section 388 amended (When provider of market services needs to be licensed) 25

After section 388(c), insert:

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

#### 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). 30 35

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

After section 409, insert:

<b>409A Restriction on suspending or cancelling licence to act as financial institution</b>	5
(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 licence holder is a registered bank or a licensed NBDT, that withholding the consent is necessary for maintaining a sound and efficient financial system:	10
(b) in a case where the licence holder is a licensed insurer, that withholding the consent is necessary for maintaining a sound and efficient insurance sector.	15
(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	20
<b>446A Overview</b>	
(1) This subpart provides for certain financial institutions and intermediaries to treat consumers fairly (including paying due regard to their interests) by—	
(a) requiring financial institutions to establish, implement, and maintain an effective fair conduct programme; and	25
(b) requiring financial institutions and intermediaries to comply with the programme; and	
(c) requiring financial institutions and intermediaries to comply with regulations that regulate incentives.	
(2) <b>Subsection (1)</b> is only a guide to the general scheme and effect of this subpart.	30
<i>Fair conduct principle</i>	
<b>446B What is the fair conduct principle</b>	
The <b>fair conduct principle</b> is that a financial institution (and an intermediary) must treat consumers fairly, including by paying due regard to their interests.	35

**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 of those services or products to a consumer; or
  - (c) provides any of those services or products to a consumer; or 5
  - (d) has any dealings or interactions with a consumer in connection with any of those services or products (for example, responding to a complaint or handling a claim under an insurance contract).
- (2) The fair conduct principle also applies when an intermediary is involved in the provision of any relevant service or any associated product to a consumer. 10
- (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— 15
- (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 20
  - (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: 25
    - (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* 30

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 35

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**) provides 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 <b>subsection (3)</b> ):	5
(iv)	acting as an intermediary for any services referred to in <b>subparagraphs (i) to (iii)</b> ; 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 <b>paragraph (a)(i) and (ii)</b> ).	10
(2)	A product is an <b>associated product</b> in relation to a relevant service if it is a financial advice product that a consumer acquires under the service.	
	<b>Example</b>	
	A company ( <b>A</b> ) provides the financial service of acting as an insurer. A contract of insurance entered into by A under the service is an associated product.	15
(3)	In this section, a service is a <b>retail service</b> 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.	20
	<i>Fundamental duties to meet fair conduct principle</i>	
	<b>446G Duty to establish, implement, and maintain effective fair conduct programme</b>	
(1)	Every financial institution must establish, implement, and maintain an effective fair conduct programme.	25
(2)	The financial institution must—	
(a)	ensure that the programme complies with <b>section 446M</b> ; and	
(b)	otherwise comply with the duty in <b>subsection (1)</b> in the prescribed manner.	
(3)	A <b>fair conduct programme</b> means policies, processes, systems, and controls that are designed to ensure the financial institution's (and any intermediary's) compliance with the fair conduct principle.	30
	<b>446H Duty to make fair conduct programme available</b>	
(1)	Every financial institution must ensure that a copy of its current fair conduct programme, and a copy of any material changes to the programme,—	35



- (a) are available for public inspection, free of charge and during normal office hours, at the New Zealand head office of that financial institution; and
  - (b) are published on an Internet site maintained by, or on behalf of, the financial institution at all reasonable times. 5
- (2) Every financial institution must notify the FMA of—
- (a) where the copy of the fair conduct programme is made available and published under **subsection (1)**; and
  - (b) material changes to the programme.
- (3) Every financial institution must take reasonable steps to ensure that intermediaries who will or may be involved in the provision of the financial institution's relevant services or associated products are notified of— 10
- (a) where the copy of the fair conduct programme is made available and published under **subsection (1)**; and
  - (b) material changes to the programme that are relevant to those intermediaries. 15
- (4) Information is not required to be made available or published under this section in the prescribed circumstances (for example, the regulations may provide for when commercially sensitive information may be redacted).
- (5) The financial institution must comply with this section in the prescribed manner. 20

**446I Duty to comply with fair conduct programme**

- (1) Each of the following must take all reasonable steps to comply with a financial institution's fair conduct programme: 25
- (a) the financial institution;
  - (b) every intermediary who—
    - (i) is involved in the provision of the financial institution's relevant services or associated products; and
    - (ii) knows, or ought reasonably to know, that they have obligations under the financial institution's fair conduct programme. 30
- (2) The financial institution and intermediaries must comply with that duty in the prescribed manner.
- (3) A financial institution or intermediary contravenes this section even if a failure to comply relates only to 1 consumer.

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**Example**

A bank (**B**) has an effective programme for its consumer credit business. While **B** generally complies with the programme, it fails to take reasonable steps to comply when lending money to a particular consumer (**C**). 35

B may have civil liability for the contravention.

**446J Fair conduct programme does not apply to other financial institutions acting as intermediaries**

- (1) If a financial institution (A) is an intermediary who is involved in the provision of the relevant services or associated products of another financial institution (B),— 5
- (a) A is not required to comply with B’s fair conduct programme; but
  - (b) A’s fair conduct programme must cover A’s involvement in the provision of B’s relevant services or associated products (to ensure, for example, that A follows procedures or processes that support B’s compliance with the fair conduct principle). 10
- (2) **Section 446I(1)(b)** is subject to this section.

**446K Duty to ensure intermediaries comply with fair conduct programme**

- (1) Every financial institution must take all reasonable steps to ensure that every intermediary that is involved in the provision of the financial institution’s relevant services or associated products— 15
- (a) complies with the duties imposed on intermediaries under the financial institution’s fair conduct programme; and
  - (b) otherwise acts in a manner that supports the financial institution’s compliance with the fair conduct principle. 20
- (2) The financial institution must comply with that duty in the prescribed manner.

**446L Duty to ensure intermediary’s compliance does not apply in relation to financial advice providers or other financial institutions**

Despite **section 446K**, a financial institution does not have a duty under that section in relation to an intermediary that is— 25

- (a) a financial advice provider (but *see* **section 403(4)(e)**, which allows conditions to be imposed on a provider’s licence relating to its involvement in the provision of relevant services or associated products regardless of whether the provider gives financial advice); or
- (b) another financial institution (but *see* **section 446J(1)(b)**). 30

**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—
- (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 35

- (b) requiring the following to follow procedures or processes that 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
  - (c) covering the matters referred to in **section 446J(1)(b)** (if the financial institution is an intermediary who is involved in the provision of the relevant services or associated products of another financial institution); 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.
- (2) Despite **subsection (1)**, a fair conduct programme—
- (a) must not impose on an intermediary that is a financial advice provider a requirement relating to the giving of regulated financial advice;
  - (b) must not impose on an intermediary a requirement of a kind prescribed for the purposes of this paragraph;
  - (c) is not required to impose on an intermediary 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 finan-

cial 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.

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B must comply with the regulations relating to incentives.

**446P Meaning of incentive**

(1) In this Act, **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—

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(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

(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.

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**Examples**

*Example 1*

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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.

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(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:

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**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.

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(b)	regardless of whether A's entitlement, or the nature or value, is determined or calculated by reference to a target or other threshold:	
	<b>Example</b>	
	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.	5
(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—	10
(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	15
(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	20
(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	
	<b>Example</b>	
	In example 1 in <b>subsection (1)</b> , A's bonus is \$5,000 if A is in the top 20% of sellers (based on the value of the premiums payable).	25
(e)	by reference to avoiding or preventing something in connection with the volume or value of the services or products involved; or	
	<b>Example</b>	
	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.	30
(f)	on a linear basis (that is, on a per service or per product basis).	
	<b>Example</b>	
	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— 5
- (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. 10

**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 or 446K** if the contravention arises only in relation to a failure to meet a legal obligation referred to in **section 446M(1)(a)**. 15

**446S Other definitions used in subpart**

In this subpart and section 546,—

**associated product** has the meaning set out in **section 446F(2)** 20

**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): 25
  - (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: 30
  - (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: 35
  - (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 5

**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) and (ca) of that Act apply and section 15(1)(b) and (c) of that Act must be disregarded); but 10
- (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 15
  - (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*); but 20
- (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** 25

**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 30

**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— 35
- (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**

**life insurance** means insurance of the kind described in section 84(1)(a) to (f) of the Insurance (Prudential Supervision) Act 2010 5

**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**— 10

- (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**.

**446T Protection of person who reports contravention or failure to comply** 15

(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 20
  - (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 25
- (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. 30

**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.
- (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). 5
- (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. 10
- (4) A certificate is effective only if— 15
- (a) the certificate is in a separate written document; 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. 20
- (2) A revocation is effective only in relation to a service provided after it is given.

**10 Section 449 amended (Part 6 services provisions)**

After section 449(3)(g), insert: 25

- (h) **sections 446G, 446H, and 446I** (duties to have effective fair conduct programme, to make it available, and to comply with it):
- (i) **section 446K** (duties relating to intermediaries):
- (j) **section 446N** (financial institution's duty to comply with incentives regulations): 30
- (k) **section 446O** (intermediary's duty to comply with incentives regulations).

**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**: 35

- 12 Section 498 amended (Terms of other civil liability orders)**  
In section 498(c) and (e), replace “financial products” with “financial advice products”.
- 13 Section 499 amended (General defences for person in contravention)**  
After section 499(3), insert: 5
- (4) Subsection (1) does not apply to a contravention of **section 446K**.
- 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** 10
- (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. 15
- (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. 20
- (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))** 25
- (1) After section 546(1)(d)(iv), insert:
- (v) in relation to a licence relating to acting as a financial institution, conditions that prohibit or regulate the offer or giving of incentives to any person in connection with a relevant service or an associated product: 30
- (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) 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 (including imposing duties on employees, intermediaries, and other agents): 5
    - (ii) monitoring outcomes for consumers, including whether consumers' interests are being had regard to:
    - (iii) how the services or products are designed: 10
    - (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: 15
    - (viii) the design and management of incentives and other remuneration (for example, managing the risk of poor consumer outcomes associated with incentives):
  - (ob) prescribing matters for the purposes of **section 446E(4)(b) and (c)**: 20
  - (oc) prescribing classes of service for the purposes of **section 446F(1)(b)**:
  - (od) prescribing circumstances for the purposes of **section 446H(4)**:
  - (oe) prescribing requirements for the purposes of **section 446M(2)(b) or (c)**:
  - (of) prohibiting or regulating 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: 25
  - (og) prescribing classes of contract for the purposes of **paragraph (b)(i)** of the definition of consumer credit contract in **section 446S**: 30
- Miscellaneous*
- (oh) prescribing the procedure of the code committee:
  - (oi) prescribing the procedure of the disciplinary committee:

(3) In section 546(2), replace “and (o)” with “(o), **(ob)**, **(oc)**, and **(oe)**”.

**17 Section 550 amended (Procedural requirements for regulations relating to exemptions, exclusions, and definitions)** 35

- (1) In section 550(1)(c), after “(db),”, insert “**(ea)**, **(eb)**”.
- (2) Replace section 550(2)(e) with:

<b>Financial Markets (Conduct of Institutions) Amendment Bill</b>	
Part 1 cl 18	
(e)	section 546(1)(o) and <b>(oe)</b> (regulations may disapply requirements):
(3)	After section 550(2)(e), insert:
(ea)	<b>section 546(1)(ob)</b> (regulations may exclude occupations and activities from involvement in provision of relevant services or associated products):
(eb)	<b>section 546(1)(oc)</b> (regulations may exclude services from being relevant services under <b>subpart 6A</b> of Part 6):
<b>18</b>	<b>New Part inserted in Schedule 4</b>
(1)	In Schedule 4, after clause 1(f), insert:
(g)	<b>Part 7</b> provides for transitional provisions relating to the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b> .
(2)	In Schedule 4,—
(a)	insert the Part set out in <b>Schedule 1</b> of this Act as the last part; and
(b)	make all necessary consequential amendments.
	<b>Part 2</b>
	<b>Other amendments</b>
	Subpart 1—Amendment to Credit Contracts and Consumer Finance Act 2003
<b>19</b>	<b>Amendment to Credit Contracts and Consumer Finance Act 2003</b>
	This subpart amends the Credit Contracts and Consumer Finance Act 2003.
<b>20</b>	<b>New section 113A inserted (Sharing of information and documents with Financial Markets Authority)</b>
	After section 113, insert:
<b>113A</b>	<b>Sharing of information and documents with Financial Markets Authority</b>
(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.

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Compare: 1986 No 121 s 48A

### 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

<b>Part 7</b>		
<b>Provisions relating to Financial Markets (Conduct of Institutions)</b>		5
<b>Amendment Act 2019</b>		
<b>91</b>	<b>Dealing with applications to act as financial institution from existing banks, insurers, and NBDTs</b>	
(1)	This clause applies to person (A) if,—	
	(a) immediately before the commencement of this clause, A is a registered bank, a licensed insurer, or a licensed NBDT; and	10
	(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 Act).	15
(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;	20
	(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.	25
(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)).	30
(6)	<b>Subclause (5)</b> 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.	

<b>92</b>	<b>Regulations may provide that licensing requirement does not apply until particular date</b>	
(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 <b>subclause (2)</b> (and those regulations have effect despite the commencement of <b>section 6</b> of the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b> ).	5
(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.	10
(3)	A date specified in those regulations must be on or before the fourth anniversary of the date on which the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b> receives the Royal assent.	
	<b>Example</b>	15
	The requirement for financial institutions to hold a market services licence comes into force on a particular date ( <b>date A</b> ).	
	However, regulations under this clause provide that the requirement does not apply to NBDTs until a later date ( <b>date B</b> ).	
	While the requirement applies to registered banks and insurers on date A, it only starts to apply to NBDTs on date B.	20
<b>93</b>	<b>Applications for financial institution licence may be made before commencement</b>	
(1)	A person may apply for a market services licence to cover the service of acting as a financial institution—	25
	(a) before the commencement of <b>section 6</b> of the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b> ; and	
	(b) if regulations under <b>clause 92</b> apply, before the date referred to in <b>clause 92(2)</b> .	
(2)	For the purposes of dealing with the application, any provisions of the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b> that are relevant to the matter and that are not yet in force, must be treated as if they were in force.	30
(3)	The FMA may refuse to consider the application if it is made—	
	(a) before a date specified by the FMA; or	35
	(b) before an event specified by the FMA has occurred; or	
	(c) before circumstances specified by the FMA exist.	
(4)	<b>Subclause (3)</b> ceases to apply to an application made after the later of—	

<ul style="list-style-type: none"> <li>(a) the commencement of <b>section 6</b> of the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b>; and</li> <li>(b) the date referred to in <b>clause 92(2)</b> (if the regulations made under that clause apply in relation to the applicant).</li> </ul>	5
<p>(5) This clause does not limit section 395(1A).</p>	5
<p><b>94 Incentives regulations may apply to existing agreements</b></p>	
<p>(1) Regulations made under <b>section 546(1)(of)</b> 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.</p>	10
<p>(2) <b>Subclause (1)</b> may apply even if an incentive is offered, given, or payable under an agreement entered into before either or both of the following:</p> <ul style="list-style-type: none"> <li>(a) the commencement of those regulations:</li> <li>(b) the enactment of the Financial Markets (Conduct of Institutions) Amendment Act <b>2019</b>.</li> </ul>	10
<p>(3) However, nothing in those regulations applies to—</p> <ul style="list-style-type: none"> <li>(a) any incentive that is paid or payable before the commencement of those regulations; or</li> <li>(b) any incentive that a person has become entitled to before that commencement (even if it is payable after that commencement).</li> </ul>	15
<p>(4) If the regulations apply to an agreement referred to in <b>subclause (2)</b>, compliance with those regulations does not—</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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.</li> </ul>	20
<hr/> <p><b>Example</b></p> <p>A company (<b>A</b>) acts as an insurer. A offers motor vehicle insurance to consumers. A car dealer (<b>B</b>) offers A's insurance to its customers when they buy cars. A is contractually obliged to give B an incentive based on the volume of A's insurance products that are sold.</p> <p>The contract providing for the incentive is entered into before commencement of the regulations.</p> <p>The regulations cannot apply to incentives that are payable before the commencement of the regulations. However, this clause allows the regulations to apply to incentives payable after commencement even though the contract was entered into before commencement.</p> <p>The regulations ban a certain incentive that would otherwise be payable under the contract.</p>	
<p style="text-align: right;">30</p>	30
<p style="text-align: right;">35</p>	35



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.

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## Schedule 2

### Consequential amendments

s 21

#### Financial Service Providers (Registration and Dispute Resolution) Act 2008 (2008 No 97) 5

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

(vi) 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** 10

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.