

Financial Markets (Conduct of Institutions) Amendment Bill

Government Bill

As reported from the Finance and Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the Financial Markets (Conduct of Institutions) Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

The bill seeks to amend the Financial Markets Conduct Act 2013 (the FMC Act) by ensuring that financial institutions implement a fair conduct programme that is designed to ensure that they comply with a principle of fair conduct.

This bill is one of the Government's responses to recent reviews of financial institutions which identified significant weaknesses in the conduct and culture of institutions in New Zealand's financial sector. The weaknesses identified can lead to poor outcomes for consumers, which can result in significant consequences, with the potential for harm at the broader societal and economic level. There are also significant power imbalances between financial institutions and consumers, which the regime hopes to mitigate.

The operation of the regime

This bill would establish a new regime to regulate the conduct of banks and insurers. Currently, banks and insurers are not regulated in relation to their overall conduct "as a bank", or "as an insurer".

The regime would cover all banks, licensed insurers, and licensed non-bank deposit takers (NBDT), and would apply broadly to relevant services and associated products

provided by those institutions. Relevant financial institutions would be required to obtain, or operate under, a licence under the FMC Act.

The bill would establish the fair conduct principle, which states that financial institutions must treat consumers fairly. The bill also clarifies what this principle means in practice.

Financial institutions would then be required to establish, implement, and maintain a fair conduct programme. A fair conduct programme would operationalise the fair conduct principle, and would involve financial institutions implementing the programme through effective policies, processes, systems, and controls. The programme would apply to all levels of the business, from governance level down to everyday interactions with consumers.

The regime would include specific regulations for performance incentives for staff and others who are involved in providing a service. The regulations may prohibit or regulate incentives based on sales targets.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Exemptions from obligations in the regime

A “licensed insurer” would be considered a financial institution for the purposes of the bill. This definition is broad, and would cover all participants within certain insurance markets. However, market structures for financial institutions can vary. Requiring all participants within certain market structures to gain a licence may be an onerous and costly administrative burden.

Furthermore, under some arrangements participants are subject to the oversight of an umbrella organisation that has developed a longstanding governance structure for overseeing conduct and culture risks. Enforcing this regime on those participants in such a market structure may be unnecessary.

We recommend inserting a regulation-making power into the bill. Our recommended change (clause 6A, section 389(4)) would allow regulations to be made that would exempt specified types of financial institutions from the requirement to hold a licence. This would be consistent with exemption powers in relation to other market services licences in the FMC Act.

The terms and conditions of this exemption would be specified in regulation. Therefore, appropriate obligations that would normally apply to licence-holding institutions would apply to exempt participants or associated bodies. A breach of the terms and conditions of the exemption would mean the exemption would no longer be in place, and the previously exempt financial institution would immediately be operating without a licence. We would prefer to see more flexibility, so that a breach of the terms and conditions of an exemption would not necessarily automatically discontinue the

entire exemption. Our recommended change would enable the FMA to give a graduated and proportionate response to a breach.

We believe it is important to extend the FMC Act's current safeguards regarding regulation-making provisions. This would be consistent with equivalent regulation-making provisions elsewhere in the FMC Act. We therefore recommend that a Minister must have regard to the purposes of the FMC Act, and be satisfied that the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the regulations.

Commencement of the regime

Clause 2 of the bill provides that the bill would come into force no later than two years after the Royal assent. We believe that a maximum transition period of two years is too short. By providing for a longer transition period (if one is needed), the bill would enable the Government to further consult on and develop supporting regulations. It would also give the industry adequate time to prepare for the regime.

We recommend amending clause 2(3) of the bill by replacing the word "second" with "third", so that the maximum length of the transition period would increase to three years from the date of Royal assent.

We also note that the bill enables the requirement to hold a licence to be phased in over a period of up to four years. We recommend that this be extended to five years.

Statutory review of the regime

There is no mechanism in the bill as introduced to review the regime that would be established by this bill. This would be a novel regime for the New Zealand financial sector, and the regime would interact with a number of other regulatory regimes. If issues were to arise with the regime, it would be important that these are addressed.

We recommend amending clause 9 to insert new section 446X. This statutory review clause would ensure that a review is commenced within five years, and be completed within seven years, after the regime comes into force.

Providing more clarity about the fair conduct principle

The bill as introduced does not place prescriptive legislative parameters on what it means to treat consumers fairly. The policy intent behind this was to avoid limiting the concept of "fairness".

Clause 9, new section 446B(1) states that a relevant consideration would be for institutions to pay "due regard to their [consumers'] interests". This is a high-level test, and is specific to only one aspect of fairness. Consequently, it provides little guidance as to what it means in practice to "treat consumers fairly".

To provide additional guidance on the concept of fairness, and how fair conduct programmes can ensure compliance with this concept, we recommend inserting a list of factors that are relevant to the concept of fairness.

This list would be non-exhaustive. Our intention is that the principle would reflect changing societal norms, and be sufficiently flexible to incorporate changes to products and services, as well as industry practices.

We recommend amending clause 9, new section 446B. Our amendment would create a list of aspects relevant to fairness that institutions should keep in mind when establishing, implementing, and maintaining fair conduct programmes (clause 9, new section 446B(2)). This list would include the existing requirements for institutions to pay due regard to the interests of their consumers. However, the list would also include other, specific factors that would help determine the concept of what it means to “treat consumers fairly”.

When incentives regulations may apply to an intermediary

Clause 9, new section 446E of the bill as introduced defines an intermediary as someone who is involved in the provision of a relevant service or product. This definition is deliberately wide. However, some submitters were concerned that this definition would inadvertently cover a range of persons, entities, and activities that have limited or no interaction with the consumer in circumstances where there would be potential for the kind of harm identified by this bill.

We were concerned that an overly broad definition of intermediary may result in incentives regulations applying in circumstances where the risk of potential harm is low.

We recommend amending clause 16(4) to insert new section 546(4). Our change would limit when a person is considered to be involved in the provision of a relevant service or associated product for the purpose of regulations that may prohibit or regulate incentives. The effect of this change would be that the regulations would only cover persons, entities, or activities that are directly involved in the chain of distribution for relevant products and services, or financial advice. That is, incentives regulations would not apply to activities such as claims management.

We note that the minimum requirements for fair conduct programmes would continue to relate to a broader range of involvement to ensure that there is no gap in when the fair conduct principle applies.

We have also recommended changes relating to whether an intermediary is required to comply with a fair conduct programme (see below).

The content of the fair conduct programmes

The bill as introduced does not prescribe the content of fair conduct programmes in detail. The majority of the requirements for the programmes would be established by regulations (although clause 9, new section 446M, sets out certain minimum requirements).

The purpose behind this approach was to delegate technical content and the details of programme implementation to regulations. Regulations could be altered over time as

the Government, the industry, and the regulator's understanding of what "good conduct" is develops.

We are concerned that leaving the details of the programmes to regulations would not provide certainty to the industry regarding the nature of the fair conduct programmes. We appreciate the need for flexibility in this regime. However, the content of the fair conduct programmes would be a key component of the regime, so we believe the nature of these programmes should be set out in primary legislation. It would not be appropriate for the bill to completely delegate this significant feature of the regime to regulations.

To provide additional clarity as to what the nature of the fair conduct programmes would be, we recommend amending clause 9 to insert new section 446M(1)(ab), (ac), and (ad). We also recommend inserting new section 446M(1)(bb), (bc), and (bd). This amendment is discussed below.

Our amendments would provide certain high-level requirements that fair conduct programmes would need to adhere to. The requirements would relate to the design of the programmes, the management of risks associated with a failure to comply with the fair conduct principle, and identifying conduct that fails to comply with the fair conduct principle.

However, we also recommend that a regulation-making power is included to preserve the ability for regulations to add any necessary additional requirements, or provide further details.

Availability of fair conduct programmes

The bill as introduced contains a duty for financial institutions to ensure that their fair conduct programmes would be publicly available (clause 9, new section 446H). The intention behind this provision was to enable consumers to take action if they felt a financial institution was in breach of its specific commitments in its fair conduct programme. Also, if the content of the programmes were publicly available, the FMA would be able to readily access it without needing to request it.

Some submitters were concerned that the fair conduct programmes would contain commercially sensitive information. The programmes would also be long, technical, and detailed, and therefore provide little value to a consumer.

We recommend amending this provision. Our amended clause 9, new section 446H would create a separate obligation on financial institutions to provide to the FMA their fair conduct programme. We believe that this obligation to provide the programme to the regulator would highlight the importance of the fair conduct programme.

We also recommend inserting new section 446HA. Our recommended change would require financial institutions to make a high-level summary of their fair conduct programmes publicly available. This would provide consumers with some general information about the standard of conduct they should expect from their financial institu-

tions. It would enable consumers to assess the conduct of financial institutions against this standard.

Clarifying the relevant threshold that would need to be reached for a financial institution to have not complied with its fair conduct programme

An institution would be liable if it failed to take all reasonable steps to comply with its fair conduct programme. Clause 9, new section 446I(3) states that an institution would contravene the section even if a failure relates only to 1 consumer.

The policy intent behind this provision is that a financial institution would contravene this section if it failed to take all reasonable steps to comply with its fair conduct programme. This could apply even if the failure to take all reasonable steps only related to 1 consumer.

We recognise that it is important for the regime to apply in respect of individual consumers. However, we believe that clause 9, new section 446I(3) creates uncertainty as to the intended interpretation of the section, and suggests that the threshold for the contravention of duty is extremely low. The provision could be wrongly interpreted to suggest that if 1 consumer was not treated fairly, the financial institution would be in breach of its obligation to take all reasonable steps to comply with its conduct programme.

We recommend deleting proposed section 446I(3). Deleting this provision would not affect the intent of the bill. For a breach to occur, the institution must fail to take all reasonable steps to comply with its programme, regardless of the number of consumers affected.

The duty on intermediaries to comply with the fair conduct programme

The bill as introduced would require intermediaries to comply with the conduct programmes of financial institutions for whom they are intermediaries (clause 9, new section 446I(1)(b)). The bill would also require financial institutions to ensure that any intermediaries comply with their conduct programmes (clause 9, new sections 446K and 446L).

The policy intent behind these requirements is to ensure that financial institutions exercise appropriate supervision and oversight over intermediaries. This would help ensure that improvements in conduct stemming from the programmes flow through to the “front line”.

Some submitters were concerned, however, that the provision would result in high compliance costs for financial institutions and their intermediaries. Currently, intermediaries often work with multiple financial institutions. A requirement to comply with multiple conduct programmes could lead to intermediaries either reducing the range of products they offer, or tying themselves to only one provider. This would undermine a key policy objective of the bill, as it could result in limiting consumers’

access to high quality, suitable financial products and services. It could also result in the paradoxical outcome of encouraging intermediaries to favour providers that offer the least onerous fair conduct programme requirements.

We recommend amending new section 446I and deleting new section 446K. We also recommend inserting clause 9, new section 446M(1)(bb), (bc), and (bd). Our recommended change would require institutions to include in their conduct programmes provisions for the training of intermediaries. Each financial institution would also be required to supervise the intermediaries it engages with, to ensure the intermediaries are supporting the institution's compliance with its fair conduct principle.

Definition of “consumer credit contract” should exclude loans to family trusts

The bill as introduced may include within the definition of a consumer credit contract some credit contracts where the debtor is a trustee of a family trust. This would allow, for example, home loans to family trusts to be within the definition of a consumer credit contract. Such loans to family trusts are excluded from the definition of a consumer credit contract under section 15(1)(c) of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).

However, the practical effect of including loans to family trusts within the definition in this bill would be that some banks may need to put some obligations on these loans that are similar to obligations in the CCCFA. This could include obligations in relation to the disclosure and responsible lending regime.

We are concerned that this could have the practical effect of bringing loans to family trusts within the CCCFA for banks and NBDT lenders, but not for other lenders.

We recommend amending the bill to more closely align the definition of “consumer credit contract” with the CCCFA definition. This would be done by amending the definition so that section 15(1)(c) of the CCCFA applies. Our amendment would therefore exclude credit contracts under which the debtor is a trustee of a family trust.

Consumer insurance contracts

The bill's definition of a “consumer insurance contract” requires the contract to be entered into by a New Zealand policyholder “wholly or predominantly for personal, domestic, or household purposes”.

This may exclude situations where an institution such as a bank is the master policyholder of a contract that provides general insurance for the benefit of consumers. This is a typical arrangement for providing travel insurance to consumers, for example. A bank would not come under the definition of a “consumer” for the purposes of a “consumer insurance contract”. A bank would be entering into an insurance contract for commercial purposes (for example, to provide its customers with travel insurance), and not for “personal, domestic, or household purposes”.

We recommend inserting clause 9, section 446S(2), to make it clear that this situation is intended to be covered. Our amendment would ensure that the definition of con-

sumer insurance contract applies to situations in which a policyholder has entered into an insurance contract for the purposes of providing insurance cover for other persons (being persons who have the benefit of the insurance cover for personal, domestic, or household purposes).

Incentives

The bill as introduced would enable regulations to be made that could prohibit the use of incentives related to financial services or products (clause 16, section 546(2)(of)). Some submitters were concerned that this would enable the Minister to ban all incentives. If so, it could affect the livelihood of financial advisers, and therefore negatively affect the availability of financial advice.

That is not the policy intent of the bill. We recognise that if the Government had intended a total ban on all incentives, it would have been more appropriate to do this through primary legislation.

However, we also recognise the need for regulations that would provide the regime with flexibility. Without this flexibility, there is a risk that institutions may design incentive structures that are problematic, but outside of the scope of a fixed prohibition.

We recommend amending clause 16 to insert section 546(5). Our amendment would create a requirement for the Minister to consider certain matters before recommending that regulations are made. Principally, the Minister must consider whether the matters covered in regulations would not more appropriately be dealt with in primary legislation.

Appendix

Committee process

The Financial Markets (Conduct of Institutions) Amendment Bill was referred to the committee on 12 February 2020. The closing date for submissions was 30 April 2020. We received and considered 59 submissions from interested groups and individuals. We heard oral evidence from 25 submitters.

We received advice from the Ministry of Business, Innovation and Employment, with assistance from the Financial Markets Authority.

Committee membership

Dr Deborah Russell (Chairperson)

Kiritapu Allan

Andrew Bayly

Rt Hon David Carter

Tamati Coffey

Hon Judith Collins (until 22 July 2020)

Hon Paul Goldsmith

Hon Todd McClay (from 22 July 2020)

Ian McKelvie (until 22 July 2020)

Greg O'Connor

David Seymour

Jamie Strange

Fletcher Tabuteau

Dr Duncan Webb

Hon Michael Woodhouse (from 22 July 2020)

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

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Kris Faafoi

Financial Markets (Conduct of Institutions) Amendment Bill

Government Bill

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Schedule 1

New Part inserted into Schedule 4

Schedule 2

Consequential amendments

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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.

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- (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 ~~second~~ third anniversary of the date of Royal assent. 5

Part 1

Amendments to Financial Markets Conduct Act 2013

3 Principal Act

This Part amends the Financial Markets Conduct Act 2013 (the **principal Act**). 10

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** 15
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** 20
licensed NBDT has the same meaning as in section 4(1) of the Non-bank Deposit Takers Act 2013
- (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: 25
(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: 30

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:

Exemption 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.

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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).

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

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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 ~~licence holder~~ 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 ~~licence holder~~ 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).

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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 ~~certain~~ financial institutions ~~and intermediaries~~ to treat consumers fairly ~~(including paying due regard to their interests)~~ by—

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- (a) requiring financial institutions to establish, implement, and maintain an effective fair conduct programme; and
 - (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. 5
- (2) **Subsection (1)** is only a guide to the general scheme and effect of this subpart.

Fair conduct principle

446B What is the fair conduct principle 10

(1) The **fair conduct principle** is that a financial institution ~~(and an intermediary)~~ must treat consumers fairly, ~~including by paying due regard to their interests.~~

(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 15
- (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; and
- (e) not subjecting consumers to unfair pressure or tactics or undue influence. 20

(3) **Subsection (2)** does not limit **subsection (1)**.

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 25
 - (b) offers to provide any ~~of those services or products~~ relevant service or any associated product to a consumer; or
 - (c) provides any ~~of those services or products~~ relevant service or any associated product to a consumer; or
 - (d) has any dealings or interactions with a consumer in connection with any ~~of those services or products~~ relevant service or any associated product (for example, responding to a complaint or handling a claim under an insurance contract). 30
- (2) The fair conduct principle also applies to a financial institution when an intermediary is involved in the provision of any ~~relevant service or any associated product~~ of the financial institution’s relevant services or associated products to a consumer. 35

- (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—

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- (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.

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Examples

Example 1

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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.

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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.

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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.

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- (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:	5
(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.	10
<hr/>		
	Example	
	A person (W) provides <u>maintains</u> 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.	15
	W is involved because W procured the contract. W is an intermediary.	
<hr/>		
(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:	20
(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	25
(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)):	30
(iv)	acting as an intermediary for any services referred to in subparagraphs (i) to (iii) ; but	35
(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.

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- (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

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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 ~~(and any intermediary's)~~ compliance with the fair conduct principle.

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~~**446H Duty to make fair conduct programme available**~~

- ~~(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,—~~
- ~~(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.~~
- ~~(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—~~

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- ~~(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.~~
- ~~(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.~~

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) ~~Each of the following must take all reasonable steps to comply with a financial institution's fair conduct programme:~~
- (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.~~
- (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).
B may have civil liability for the contravention.

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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.

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~~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),—~~
- (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).~~
- (2) ~~**Section 446I(1)(b)** is subject to this section.~~

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~~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—~~

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- ~~(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.~~
- ~~(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 —~~

- ~~(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)**).~~

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
 - (ab) designing, and managing the provision of, the financial institution's relevant services and associated products, including regularly reviewing—
 - (i) 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) 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
 - (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 5
- (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: 10
 - (ii) the intermediaries that are involved in the provision of the financial institution's relevant services or associated products; 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 in providing the financial institution's relevant services or associated products: 15

 - (i) the relevant services or associated products that the employee, agent, or intermediary will be involved in providing; 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 20
- (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— 25

 - (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 30
 - (ii) setting conduct expectations for those persons; and
 - (iii) establishing robust and transparent procedures or processes for dealing with misconduct by those persons; and 35
 - (iv) monitoring whether consumers have been treated by those persons in a manner that is consistent with the fair conduct principle; and

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- (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 clear, concise, and effective manner; and 5
- (e) ~~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~~ 10
- (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 15
- (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: 20
- (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; and 25
- (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
- (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)**). 30
- (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;~~ 35
- (b) must not impose ~~on~~ in relation to an intermediary a requirement of a kind prescribed for the purposes of this paragraph:
- (c) is not required to impose ~~on~~ in relation to an intermediary a requirement of a kind prescribed for the purposes of this paragraph. 40

- (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). 5

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. 10
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). 15

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. 20

446P Meaning of incentive

- (1) In this ~~Act~~ 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— 25
- (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. 30

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. 35

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— 5

(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. 10

(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. 15

(c) whether A is an intermediary or is an employee or agent of a financial institution or an intermediary. 20

(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 25

(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 30

(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 35

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).

- (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.

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- (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 10

- (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—

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- (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 20

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)**.

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446S Other definitions used in subpart

- (1) In this subpart and section 546,—

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:

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- (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 other-

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- wise, 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: 5
 - (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: 10
 - (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 15
- 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) ~~and (e)~~ of that Act must be disregarded); but 20
 - (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 25
 - (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 and~~ 30
 - (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 35
 - (ii) a contract that is subject to a certificate under **section 446V**
- 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**

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) 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.

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— 5
- (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 10
 - (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 15
 - (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 20

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. 25
- (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). 30
- (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. 35
- (4) A certificate is effective only if—

- (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

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- (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.

446X Review of subpart and licensing requirement for financial institutions

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(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

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(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

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(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).

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10 Section 449 amended (Part 6 services provisions)

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

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(h) **sections 446G, 446H, 446HA, and 446I** (duties to have effective fair conduct programme, ~~to make it available,~~ to provide it to the FMA, ~~to make information about it publicly 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):

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(k) **section 446O** (intermediary’s duty to comply with incentives regulations).

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)**”.

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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”.

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~~**13 Section 499 amended (General defences for person in contravention)**~~

~~After section 499(3), insert:~~

~~(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)

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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—

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(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.

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(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)

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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:

(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)**:

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(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:

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(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:

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(i) governance and management of conduct and risks associated with that conduct ~~(including imposing duties on employees, intermediaries, and other agents):~~

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(ii) monitoring outcomes for consumers, including whether consumers' interests are being had regard to:

(iii) how the services or products are designed and managed:

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(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:

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(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)**:

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(oc) prescribing classes of service for the purposes of **section 446F(1)(b)**:

~~(od) prescribing circumstances for the purposes of **section 446H(4)**:~~

(od) prescribing matters for the purposes of **section 446HA**:

(oda) prescribing factors for the purposes of **section 446M(1A)(f)**:

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- (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: 5
 - (og) prescribing classes of contract for the purposes of **paragraph (b)(i)** of the definition of consumer credit contract in **section 446S**:
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 - (oh) prescribing the procedure of the code committee: 10
 - (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)**”.
- (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: 15
- (a) negotiating, soliciting, or procuring contracts for the service or the acquisition of the product: 20
 - (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— 25
- (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— 30
 - (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 35
 - (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 under subsection (1)(c) to **(cb)** is a breach of section 388 (unless the terms of the exemption otherwise provide). 5
- 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)**”.
- (1A) In section 550(2)(d), replace “and (ca)” with “(ca), and **(cb)**”.
- (2) Replace section 550(2)(e) with: 10
- (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): 15
- (eb) **section 546(1)(oc)** (regulations may exclude services from being relevant services under **subpart 6A** of Part 6):
- 18 New Part inserted in Schedule 4**
- (1) In Schedule 4, after clause 1(f), insert: 20
- (g) **Part 7** provides for transitional provisions relating to the Financial Markets (Conduct of Institutions) Amendment Act **2019**.
- (2) In Schedule 4,—
- (a) insert the Part set out in **Schedule 1** of this Act as the last part; and
- (b) make all necessary consequential amendments.

Part 2 25

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. 30
- 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 5
 - (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. 10
- (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. 10
- (3) This section applies despite anything to the contrary in any contract, deed, or document. 15
- (4) Nothing in this section limits the Privacy Act 1993.
- 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. 20

Schedule 1
New Part inserted into Schedule 4

s 18

Part 7	
Provisions relating to Financial Markets (Conduct of Institutions)	5
Amendment Act 2019	
91 Dealing with applications to act as financial institution from existing banks, insurers, and NBDTs	
(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) 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.	

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).	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 <u>fifth</u> anniversary of the date on which the Financial Markets (Conduct of Institutions) Amendment Act 2019 receives the Royal assent.	
	Example	15
	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.	20
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—	25
(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.	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)	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).	5	
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 payable under an agreement entered into before either or both of the following:	10	
(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—	15	
(a)	any incentive that is 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 payable after that commencement).		
(4)	If the regulations apply to an agreement referred to in subclause (2) , compliance with those regulations does not—	20	
(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.	25	
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 B an incentive based on the volume of A's insurance products that are sold.			30
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 incentives payable after commencement even though the contract was entered into before commencement.			35
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) 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.

Legislative history

11 December 2019
12 February 2020

Introduction (Bill 203–1)
First reading and referral to Finance and Expenditure Committee