New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Finance and Expenditure Committee

on the

Financial Markets Conduct Amendment Bill

23 June 2025

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank (New Zealand) Limited
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank N.A.
- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Finance and Expenditure Select Committee (**Select Committee**) on the Financial Markets Conduct Amendment Bill (**Bill**). NZBA commends the work that has gone into developing the Bill.

5. NZBA strongly supports the objectives of the financial services reform which has led to the proposed changes in the Bill. Those objectives were to simplify and streamline the regulation of financial services (including reducing duplication and improving effectiveness), remove undue compliance costs for financial market participants and improve outcomes for consumers.

6. The Bill contains a range of changes. This submission addresses only the following changes, in particular highlighting areas where the proposed changes do not align with the objectives of the reform:

   6.1. the insertion of a new definition of "price" into the Financial Markets Conduct Act 2013 (**FMCA**);

   6.2. the changes to fair conduct programme minimum requirements;

   6.3. the single market services licence regime;

   6.4. the new Financial Markets Authority (**FMA**) significant influence, significant transaction and amalgamation approval regime;

   6.5. the new on-site inspection power for the FMA; and

   6.6. the proposed new exemption provision relating to time periods.

Analysis

<u>Proposed definition of "price"</u>

7. NZBA is concerned about the proposed inclusion of the new and multifaceted definition of "price" to be included in s 6 of the FMCA. That proposed definition reads: "**price**, in relation to a financial service, a relevant service (as defined in s 446F), or an FMC product, includes valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the supply of the service or the acquisition of the product, although ostensibly relating to any other matter or thing" (s 4 of the Bill).

8. NZBA seeks that the definition is removed or simplified.

9. The definition appears to be based on the definition of price from the Fair Trading Act 1986. There has been no previous consultation on this wording, nor does the Bill's explanatory note or the relevant Regulatory Impact Statement provide any background

on its inclusion or work undertaken to consider the appropriateness of its use in the financial services context. We have not identified a similar definition in equivalent financial services regulation in other jurisdictions such as the United Kingdom or Australia.

10. The definition is particularly concerning given the breadth of its proposed application across all references to price "in relation to a financial service, a relevant service (as defined in section 446F), or an FMC Product" in the FMCA. This gives rise to a heightened risk of unintended consequences and it is also not clear whether or not it is intended to apply in some instances. For example, the proposed broad definition of "price" does not make sense in the context of the insider trading provisions in Part 5 (Dealing in financial products on markets) of the FMCA.

11. To the extent that there is a continued desire to define "price" in anything other than a simple way (eg an amount paid for a service) either in the context of the COFI regime or more broadly, NZBA seeks further engagement with officials on this during the select committee process. If, for example, officials could share examples of the types of indirect valuable consideration ostensibly relating to another thing about which they are interested, NZBA may then be able to provide further feedback. As matters stand, NZBA can only repeat that the currently proposed definition risks being unclear and inconsistent with the intentions of the reforms to simplify and ensure the effectiveness of regulation. This will likely lead to compliance costs for financial market participants as they grapple with what the definition means and is intended to capture.

<u>Proposed changes to fair conduct programme minimum requirements</u>

12. Overall, the proposed changes to the fair conduct programme minimum requirements strike the right balance between retaining, removing and amending the requirements at s 446J of the FMCA. NZBA has two submissions only on the changes:

    12.1. proposed new s446J(1)(e) as amended by s 19(5) of the Bill - NZBA seeks that this sub-paragraph is refined to appropriately target its scope and, in doing so, avoid unnecessary compliance burden. The key concern is the use of the words “each of the”. In this regard, the amended (e) describes that a fair conduct programme must include effective policies, processes, systems and controls for “managing or supervising, and providing training to *each of the* financial institution’s employees to ensure that they are supporting the financial institution’s compliance with the fair conduct principle, and monitoring whether those persons have carried out that training and are giving that support”. However, there are some employees of financial institutions who would not need this sort of training. For example, because their roles do not intersect with any obligations under the COFI regime because they fulfil roles unrelated to financial services (eg building management/facility support roles) or because their roles do not intersect with the consumer activities caught by the COFI regime (eg they are bankers that only work with customers which are FMCA Wholesale). To address this issue, NZBA seeks that either the words "each of the" are removed from the clause or that the word "relevant" is inserted into the drafting (eg "each of the financial institution's *relevant* employees").

12.2. proposed amendment to s 446J(1)(j) as amended by s 19(7) of the Bill - while the NZBA is in principle content with the addition of a reference to price within this minimum requirement, it repeats its concerns about the definition of "price" proposed. The issues with that proposed new definition impact the clarity and workability of this amended requirement. NZBA, accordingly, repeats the need to remove or simplify that definition.

Proposed single market services licence regime

13. NZBA has previously expressed its support for the shift to a single market services licence regime in the FMCA. However, as previously noted, for this shift to be effective in streamlining the licensing regime it will need to be coupled with meaningful streamlining of the FMA's market service application process, reporting requirements and licence conditions. The FMA is currently consulting on streamlining its standard licensing conditions and NZBA looks forward to working with the FMA on this. If well implemented a single licence regime should enable a more holistic and efficient supervisory relationship between the FMA and licensees.

14. NZBA also considers that there are some aspects of the FMCA that require further consideration to effectively facilitate the shift to a single licence regime that may cover more than 1 market service. These are:

14.1. at s 399(3)(b) of the FMCA as amended by the Bill, the FMCA would provide that: " If a license covers more than 1 type of market service,- … the decision to add another market service or class of market services to a licence must be made on the same basis as a decision to issue a licence". This provision seems inconsistent with the proposal to streamline the licensing regime. If a licensee complies with its existing licensee obligations and is applying for the addition of a new market service, it is likely to be a duplicative exercise for the FMA to be required to consider the addition of the new service on the same basis as if issuing a licence. Rather, the FMA should only be required consider matters particular to that additional service. We recommend that s 399(3)(b) is amended accordingly.

14.2. the provisions relating to the variation of licence conditions and what steps the FMA can take when a condition has been contravened (ss 404-406, 408 and 414) do not obviously contemplate the shift to a single licence that covers more than one market service. For example, s 414(3) provides that the FMA may cancel a licence in certain circumstances. However, we would have thought in some circumstances it would be more appropriate for a particular market service licence to be removed from a licence rather than the licence being cancelled in its entirety. If the intention is that in those circumstances the FMA would instead vary the terms of a licensee's licence to remove the relevant market service, then we suggest that this is clarified.

<u>Proposed FMA significant influence, significant transaction and amalgamation approval regime</u>

15. NZBA opposed the introduction of the requirement, that was consulted on in 2024, for a licensee to obtain FMA approval for a change in control. NZBA's position remains that a change in control requirement should not be introduced to the FMCA.

16. NZBA's overarching observation is that the p<u>roposed FMA significant influence, significant transaction and amalgamation approval regime appears to be completely contrary to the objectives of this reform process. The stated objectives of the reform set out in the Explanatory Note to the Bill are to simplify and streamline the regulation of financial services (including reducing duplication), remove undue compliance costs for financial market participants, and improve outcomes for consumers. Introducing the FMA approval requirement will achieve none of those objectives, and in fact is likely to achieve the opposite outcome.</u>

17. In relation to the lack of need for the change, NZBA says:

    17.1. The existing change in control notification requirement (at regulation 191 of the Financial Markets Conduct Regulations 2014 (**FMCR**)) already provides the FMA with the information necessary to exercise its powers under section 414 of the FMCA, which include the power to suspend or cancel a licence if it has serious concerns with a proposed change in control (ie because there is a "material change of circumstances" which mean that the licensing requirements are no longer met). In contrast to prudential regulation, which tends to focus on quantifiable matters such as access to capital and liquidity, whether or not a change in control is likely to have an impact on the conduct of a licensee is a much more speculative assessment. Accordingly, NZBA considers it is only appropriate for the FMA to be able to oppose a change in control where there are clear and unequivocal concerns regarding the conduct of the licensee once the relevant transaction has been completed.

    17.2. As has been noted in the 2024 consultation and the Cabinet paper for the Bill, there is a large and diverse population of market services licensees. The last decade has seen ongoing merger and acquisition activity in the financial sector in New Zealand and it is likely that this will continue. In many cases, transactions will already require RBNZ, Overseas Investment Office and Commerce Commission consent to be able to proceed. Adding an additional regulator consent requirement will likely have a dampening effect on capital investment in the New Zealand financial sector.

    17.3. A change in control approval requirement would impose a higher standard for transfers of control of licensees than the standard which applies for being issued a market services licence. Section 396 of the FMCA sets out the circumstances in which the FMA must issue a licence to an applicant. Importantly and in contrast to the application requirements under the Deposit Takers Act 2023 (**DTA**) and the Insurance Prudential Supervision Act 2010, the matters specified in s 396 do not include information regarding the ownership and control of the applicant. While NZBA acknowledges that the FMA is required to consider the compliance history of relevant parties of an applicant under regulation 189 of the FMCR, that is a significantly narrower consideration than the ownership/control structure of the applicant itself.

18. If the FMA approval regime is to be retained, NZBA has concerns with the current proposal in the Bill as it is significantly broader than that which was consulted on in 2024 and does not seem consistent with the objective of avoiding unnecessary compliance burdens. In particular:

    18.1. The regime has a lower threshold for changes in ownership than what was consulted on in that it uses the concept of "significant influence" from the DTA (25%) rather than the existing FMCA definition of "control" (50%). If the "significant influence" threshold is used, the risk of having a stifling effect on merger and acquisition activity and capital investment in the financial sector is likely to be greater than if the "control" threshold is used. NZBA also submits that a transaction that does not result in a change in control is unlikely to result in the ability to have a material impact on the conduct of a licensee.

    18.2. The proposed regime includes approval requirements in respect of significant transactions and amalgamations (based on those in the DTA). The Cabinet paper asserts that these types of transaction "can have" the same outcome as transactions involving significant influence on conduct. See 1. above regarding whether transactions involving significant influence are likely to impact on conduct. NZBA also submits "can have" is the wrong threshold for determining whether to impose additional approval requirements on licensees and that further work is required to be undertaken to articulate a clear rationale (and evidence) for the impact of these types of transactions on conduct and, therefore, the need to regulate them. If a licensee disposes of a material part of its business, any purchaser would be required to hold the necessary licences to be able to conduct that business once acquired. Similarly, in the context of an amalgamation, the surviving entity would continue to be subject to the same licensee obligations. If, following such a transaction, the licensee fails to comply with any of its licensee obligations, the FMA would be able to exercise its supervisory powers in the usual course. Accordingly, it is not clear to NZBA that adding approval requirements for significant transactions and/or amalgamations is addressing any material conduct risk gap or a proportionate control.

18.3. The ability of the FMA to require the delivery of a suitably qualified report does not seem appropriate in the context of conduct regulation. As noted above, NZBA submits that a clear link between transactions involving significant influence, significant transactions and amalgamations, and conduct has not yet been established. Given conduct regulation tends to be more subjective and less quantifiable than prudential regulation, it is not clear to NZBA who a suitably qualified person to provide a report would be or what that report would cover (ie given the licensing criteria relatively narrow and any potential impacts of conduct would be difficult to sensibly assess). If a report is required by the FMA, there is no time by which that report needs to have been provided to the FMA by and the 20 working day requirement for the FMA to make a decision does not start until that report has been received. The inclusion of a qualified person report power has the potential to significantly slow down any FMA approval process.

18.4. The Cabinet Paper for the Bill notes that a class exemption power has been included to allow class exemptions to be prescribed for simple changes in control that may not require pre-approval from the FMA. While NZBA would support the need for exemptions if the FMA is granted approval powers, NZBA submits that it is more appropriate to design the scope of any approval regime upfront at the legislative stage than to merely seek to rely on the inclusion of an exemption power which may not be used (or may not be used effectively) in the future. There are some obvious examples which should not trigger the consent obligation or require an extensive class exemption process, and could instead simply be addressed in the primary legislation. For example, the Bill as currently drafted would require FMA approval for a change of control as part of a corporate restructure where there is no change in the ultimate ownership of the entity, or a short-form amalgamation where an immaterial subsidiary is amalgamated into a bank.

18.5. As noted above, NZBA considers it is only appropriate for the FMA to be able to oppose a change in control where there are clear and unequivocal concerns regarding the conduct of the licensee once the relevant transaction has been completed. As currently drafted the Bill seems to give the FMA broad discretion to oppose a change of control for any reason. Proposed section 421J sets out matters that the FMA must have regard to when considering a request for approval, but it does not constrain the basis on which the FMA could refuse to give its approval. This is inconsistent with section 396 which requires that the FMA *must* issue a licence if it is satisfied of the matters set out in that section. The FMA should similarly be subject to an obligation that it *must* approve a request for approval under subpart 3A if the matters set out in section 396 will remain satisfied – otherwise the process for obtaining FMA approval will be more onerous (and less certain) that obtaining a licence in the first place (which cannot be the intention).

Proposed new onsite inspection power

19. NZBA has previously not objected to the FMA acquiring onsite inspection power so long as appropriate checks and controls are in place. NZBA's view is that the checks and controls included in the Bill have not gone far enough. It seeks that the proposed wording of the power at section 25 of the Bill (which will insert ss 28A to 28D into the Financial Markets Authority Act 2011 (**FMA Act**) is amended to add further checks and controls.

When the power can be used

20. As drafted, the relevant provisions do not limit the use of the power to situations where there is no other more appropriate power or way of obtaining the information available. In this respect, while the regulatory impact statement for the Bill describes that the power is expected to be used in very limited circumstances, the drafting of the new power is not designed in this way. The result is that the power goes beyond what is necessary to support an effective financial markets regulatory system.

21. NZBA's concern arises particularly from:

21.1. the breadth of the purposes described in the proposed new s 28A; and

21.2. the description in the proposed new s 28B(1) that the FMA may carry out an on-site inspection if it considers it necessary *or desirable* for the purposes in s 28A (emphasis added).

22. Together these provisions enable a wide range of situation in which the FMA could use the power. For example, the power could on the plain reading of the Bill be used simply when the FMA decides it is desirable to assess the compliance of some aspect of a particular financial market participant's policies. In this regard, we do not think that the reference in s 28(2)(b) provides a sufficient protection to stop the overuse of the power given that the requirement that the FMA may exercise the power "only at a reasonable time and in a reasonable manner" can be read as simply referring to a reasonable time of day or a reasonable style of onsite inspection. That is, rather than it being read to require the FMA to assess whether it is an appropriate time to exercise the power against the background of either the relationship it has with the financial market participant generally or other alternative powers or approaches available.

23. NZBA is also concerned that the proposed sections are framed in a way that do not set up a base assumption that the power should be exercised with notice given.

24. Against this background, NZBA seeks that:

(a) the word "desirable" is removed from the proposed new s 28B(1);

(b) further details are included in the new sections to describe the factors the FMA is required to take into account before deciding that it ought to use the power; and

(c) the provisions expressly state that the power ought usually to be exercised on notice.

25. This could involve the proposed section 28B(1) and (2) being amended as follows:

28B FMA may conduct on-site inspection

(1) The FMA may enter and remain at any place to carry out an on-site inspection of a financial markets participant if the FMA considers it necessary ~~or desirable~~ for the purposes of doing 1 or more of the things referred to in section 28A.

(2) The FMA -

(a) prior to determining to exercising the power, must be satisfied that the exercise of the power is necessary in all the circumstances, including having regard to the FMA's ability to request information voluntarily and by way of notices pursuant to section 25 of this Act;

(b) may exercise the power only at a reasonable time and in a reasonable manner; and ~~but~~

(c) should give the relevant financial market participant notice of the intended exercise of the power, except when the FMA is satisfied that providing notice would undermine the intended purpose of the exercise of the power.

How the new power fits with other powers

26. NZBA also considers that the reference to the absence of a need for a search warrant at the proposed new s 28D is confusing. If that section is retained, this should be clarified to ensure that it is clear powers available under an onsite inspection power are narrower than under a search warrant. The onsite inspection power enables inspection only. It does not allow the copying or seizing of documents or records.

27. This leads to a more general point that it would be helpful, in the light of the amendments, to update the FMA Act to describe the relationship between different powers and how the onsite inspection power fits within the FMA's supervisory toolbox. For example, the NZBA's understanding is that:

27.1. the onsite inspection power enables the FMA only to request and review documents and records. If during or after an onsite inspection the FMA wishes to obtain copies of documents or to seize materials, it would need to use other powers to do so (eg. by seeking a search warrant or issuing a s 25 notice) or seek voluntary production; or

27.2. in terms of s 28C, the FMA may only ask questions of individuals relating to the documents and records to be inspected (eg. their whereabouts). Any substantive interviews would again require a s 25 notice or voluntary consent.

Protections and information for those subject to onsite inspections

28. Given onsite inspections will occur without notice and that a broad range of individuals and entities could be subject to them, NZBA seeks that a further protection is added that the FMA is required to provide information either in a notice in advance of the inspection or, if no prior notice is given in a notice to be provided on arrival at an onsite inspection which explains the scope of the inspection determined by the FMA to be necessary, the purpose of the inspection, the planned duration, the general nature of the FMA's onsite inspection powers and the privileges available to the person the subject of the onsite inspection and an outline of how any of those privileges may be claimed (where applicable) (compare s 103(4) of the Search and Surveillance Act 2012).

29. Related to this, NZBA seeks that further thought is given to whether the new proposed provisions are clear enough as to the rights and privileges of those who may be subject to an onsite inspection visit. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**AML/CFT Act**), for example, appears to have better taken into account and addressed the position from that perspective, rather than the focus being only on the power being given to the regulator. For example, section 133 of the AML/CFT Act reads as follows:

133 Matters relating to conduct of on-site inspections

(1) An AML/CFT supervisor may, at any reasonable time, enter and remain at any place (other than a dwellinghouse or a marae) for the purpose of conducting an on-site inspection of a reporting entity.

(2) During an inspection, an AML/CFT supervisor may require any employee, officer, or agent of the reporting entity to answer questions relating to its records and documents and to provide any other information that the AML/CFT supervisor may reasonably require for the purpose of the inspection.

(3) A person is not required to answer a question asked by an AML/CFT supervisor under this section if the answer would or could incriminate the person.

(4) Before an AML/CFT supervisor requires a person to answer a question, the person must be informed of the right specified in subsection (3).

(5) Nothing in this section requires any person to disclose any privileged communication (as defined in section 42).

Proposed new exemption provision relating to periods – proposed section 561B

30. Section 40 of the Bill contains a proposed new section 561B enabling the FMA to grant exemptions in relation to compliance with particular time periods. The proposed section 561B applies to obligations that relate to a period (such as periodic reporting obligations) but does not address the situation where compliance must occur within a specified period after an event (e.g. compliance obligations that are triggered by a transaction or a customer request). For consistency, section 561B could be amended to clarify that these events would be treated in the same way (i.e. an exemption would still be valid if it is granted after the trigger event, but before the end of the compliance period).