MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Andrew Bayly	**Portfolio**	Commerce and Consumer Affairs
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List of documents proactively released		
Date	**Title**	**Author**
28 August 2024	Cabinet Paper: Financial Services Reforms: policy decisions	Office of the Minister of Commerce and Consumer Affairs
28 August 2024	Cabinet Minute: ECO-24-MIN-0178 – Financial Services Reforms Policy Approvals	Cabinet Office
August 2024	Fit for purpose consumer credit law regulatory impact statement	MBIE
August 2024	Buy Now, Pay Later regulatory impact statement	MBIE
August 2024	Fit for purpose financial services conduct regulation regulatory impact statement	MBIE
July 2024	Submissions made on the Fit for purpose consumer credit law discussion document	Stakeholders
July 2024	Submissions made on the Fit for purpose conduct regulation discussion document	Stakeholders
July 2024	Submissions made on the Effective financial dispute resolution discussion document	Stakeholders

Information redacted **YES**

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Some information has been withheld for the reasons of confidential advice to government and commercial information.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Policy Committee

Financial Services Reforms: policy decisions

Proposal

1 This paper seeks policy decisions on a package of proposals to streamline and ensure the effectiveness of financial services regulation.

Relation to government priorities

2 The proposals in this paper respond to:

2.1 the Coalition Agreement between the National Party and the ACT Party to 'Rewrite the Credit Contracts and Consumer Finance Act 2003 (CCCFA) to protect vulnerable consumers without unnecessarily limiting access to credit',

2.2 the commitments to reform financial services regulation in the National Party's 100-point plan for rebuilding the economy, and

2.3 the Government's commitment to cut red tape and provide regulatory clarity to make it easier to invest and grow New Zealand's capital markets.

Executive Summary

3 In May 2024, Cabinet approved the release of a package of discussion documents [CBC-24-MIN-0031 refers]. These documents set out options for reforming the financial services regulatory landscape, with the objective of reducing red tape and compliance burden. Cabinet also invited me to report back by August 2024 with the outcomes of the consultation and proposed policy changes.

4 Following consultation, I am now seeking agreement to several policy proposals, some of which will require amendments to legislation.

5 In relation to *Fit for purpose consumer credit legislation,* Cabinet's decision to transfer responsibility for consumer credit from the Commerce Commission (the Commission) to the Financial Markets Authority (FMA) raises questions of whether the current consumer credit regulatory model is still appropriate and if the requirements are proportionate for lenders. This paper sets out my proposals. My proposals are to:

5.1 Regulate consumer creditors via a single market services licence, to simplify and streamline current regulatory arrangements.

5.2 Remove the due diligence duty and attendant personal liability for senior managers and directors.

5.3 Retain the consequences for failure to make initial disclosure or disclosure of agreed changes, but only where the borrower or the FMA can show the failure caused harm.

6 I also have a statutory obligation to review rules in the CCCFA that apply to high-cost credit. Following public consultation, I am not proposing any changes.

7 I also seek agreement to exempt Buy Now, Pay Later (BNPL) providers from the fee requirements in sections 41 and 44A of the CCCFA, with conditions that permit reasonable cross-subsidisation for defaults by other borrowers. This exemption reflects that the current fee provisions in the CCCFA are likely to constrain how BNPL providers calculate and charge default fees and could put their businesses in jeopardy.[1] The conditions I am proposing are aimed at providing bespoke protections against excessive default fees and future-proofing against potential unreasonable fee increases by BNPL providers. An alternative (which the Minister for Regulation prefers) is to exempt BNPL lenders from these fee requirements without any conditions. This approach would provide BNPL lenders with more flexibility in setting their default fees, but would not provide adequate protection for consumers. Furthermore, the regulator would be unable to take action if concerns about excessive fees arose without returning to Cabinet to seek necessary changes to the fee provisions (and any changes would not apply retrospectively).

8 In relation to *Fit for purpose financial services conduct regulation,* several legislative reforms have been made to financial markets conduct regulation over the past decade. While this has improved conduct and outcomes, it has also led to a complex regulatory landscape and some unnecessary compliance costs. I therefore propose to:

8.1 Simplify and clarify minimum requirements for fair conduct programmes.

8.2 Retain the current open-ended definition of the fair conduct principle.

8.3 Require the FMA to issue a single licence covering different classes of market services, including for consumer credit where applicable.

8.4 Allow the FMA to rely on an assessment made by the Reserve Bank of New Zealand (RBNZ) in some circumstances.

8.5 Introduce change in control approval requirements.

8.6 Introduce on-site inspection powers for the FMA.

[1] BNPL providers do not charge interest or other fees to consumers – except default fees. One BNPL provider considers that the default fee provisions in the CCCFA will limit it from charging late fees of more than $2, which it says is not suitable for its model and would require it to increase merchant fees (which is not possible while merchant contracts are running) or introduce interest charges.

9 I am also seeking agreement to progress some minor and technical amendments to the Financial Markets Conduct Act 2013 (FMC Act) and its associated regulations. Although these minor and technical amendments have not come out of the consultation process itself, they are related to the package in that they will also help to reduce red tape and regulatory burden.

10 In relation to *Effective dispute resolution,* financial dispute resolution schemes are not as effective as they could be. I therefore propose to:

10.1 Enhance the process for reviewing the schemes.

10.2 Commission work to create a shared front door for all schemes.

11 I intend to return to Cabinet later this year to seek additional policy decisions, including on consumer credit, ahead of introducing a Bill in December 2024.

Background

12 On 25 January 2024, Cabinet noted my intention to reform the regulatory landscape for financial markets in two phases [CBC-24-MIN-0013 refers]. This package of reform will remove undue compliance costs currently imposed on financial services and improve outcomes for consumers. Reform of financial services regulation is needed because the succession of new rules and requirements over the past decade has led to a duplication of the roles of the RBNZ and the FMA, unnecessary compliance burden for businesses, and overly prescriptive lending rules resulting in unintended impacts on consumers.

13 On 25 March 2024, Cabinet agreed to my proposals for the first phase of reforms, which have now all been delivered, namely:

13.1 exempting local authorities from the CCCFA, and removing duplicative reporting requirements from certain non-financial services – effective 25 April 2024,

13.2 revoking redundant exemptions from these regulations, relating to COVID-19 – effective 7 June 2024,

13.3 better aligning jurisdictional rules between the financial dispute resolution schemes – effective 18 July 2024, and

13.4 removing prescriptive affordability requirements from regulations made under the CCCFA, and updating guidance on assessing affordability in the Responsible Lending Code – effective 31 July 2024.

14 At that meeting, Cabinet also agreed to transfer all regulatory functions under the CCCFA from the Commission to the FMA [*EXP-24-MIN-0010* refers].

15 On 20 May 2024, Cabinet approved the release of the following three discussion documents and asked me to report back by August 2024 with policy proposals [CBC-24-MIN-0031 refers]:

15.1 '*Fit for purpose consumer credit legislation*',

15.2 '*Fit for purpose financial services conduct regulation*', and

15.3 '*Effective financial dispute resolution*'.

Proposals to ensure fit for purpose consumer credit legislation

16 MBIE received 37 submissions on the '*Fit for purpose consumer credit legislation* discussion document. My policy proposals are intended to promote an efficient and transparent credit market, ensure compliance costs are proportionate, and effectively protect the interests of consumers.

17 Access to credit can help consumers manage their living costs or support them in increasing their means but can also result in financial hardship. The following proposals will reduce the regulatory burden on lenders, while providing the FMA with effective tools to intervene where necessary to protect the interests of consumers.

18 I intend to come back to Cabinet later in the year to seek additional policy decisions.

I propose to transition consumer credit to a single market licence regime to simplify and streamline current settings

19 The FMA will be taking on new regulatory functions under the CCCFA. I propose that consumer credit providers no longer have to be certified. Instead, they will have to be licensed by the FMA. The FMA will have powers to monitor and take action against licensed consumer creditors that are the same as the powers it has for people who need a licence to provide licensed market services. These powers include the ability to set conditions on licences, censure, request action plans, give directions, require reports, and suspend and cancel licences.

20 I propose that the fair dealing and restricted communication provisions in Part 2 of the FMC Act apply to consumer credit rather than the Fair Trading Act 1986 provisions. The FMA can issue direction orders to address breaches of Part 2. The FMA can also order people to stop making restricted communications.

21 Applying this approach to consumer credit is consistent with my single licence proposal discussed below. It will enable the FMA to intervene early to better protect the interests of consumers and makes the regulatory landscape for credit more consistent with other financial services.

22 Creditors exempt from certification on the basis they are licensed by the FMA or RBNZ (i.e. all registered banks and non-bank deposit takers) will not be exempt from the requirement to hold a licence.

23 However, creditors currently exempt from certification under the Credit Contracts and Consumer Finance Regulations (e.g. vehicle dealers who have arrangements with a finance company) will be exempt from the requirement to hold a licence.

24 To make it easy for consumer creditors to transition to the new licencing framework, I propose to deem all existing consumer credit lenders who are either certified or exempt from certification (on the basis that they are licensed by the FMA or RBNZ) to be licensed, at no cost.

25 There are other possible changes I intend to consider to ensure the FMA has the flexibility to regulate the credit market effectively. This may result in me bringing further pragmatic and more technical proposals to Cabinet before introduction of this legislation.

Other proposals to enable an effective transfer from the Commerce Commission to the Financial Markets Authority

26 There will be some other changes necessary to facilitate the transfer, including incorporating provisions from the Financial Markets Authority Act 2011 (FMA Act) rather than the Commerce Act 1986 provisions. I propose to make additional consequential amendments where needed to avoid duplication or inconsistency.

27 As part of a smooth transfer process, I propose that the commencement, continuation, or enforcement of proceedings relating to the Commission's functions under the CCCFA may instead be carried out by or against the FMA without amendment.

28 Confidential advice to Government

I propose to remove directors and senior managers' due diligence duty and personal liability

29 I propose to remove the duty on directors and senior managers to undertake due diligence (section 59B) to ensure the lender's compliance with the CCCFA and the attendant personal liability. These settings contribute to overly conservative decision-making by lenders, which can negatively impact access to credit and increase compliance costs that are passed on to consumers.

30 The added scrutiny the FMA will be able to provide, through the proposed licensing model and other regulatory tools, makes the role of this duty and liability questionable. Directors and senior managers would still be personally liable where they were knowingly or deliberately involved in a contravention.

I also propose to retain the consequences for lenders failing to meet disclosure requirements but only where the borrower or the FMA can show the failure caused harm

31 The CCCFA requires lenders to disclose specified information to consumers to ensure they have what they need to make informed decisions before and during the loan. If the lender fails to do this, one of the consequences is that the lender is not entitled to the costs of borrowing until that failure is corrected (section 99(1A)). This applies only to initial and agreed variation disclosure.

32 Where the disclosure failure affected a large number of borrowers and was not discovered quickly, the scale of liability created by section 99(1A) could be significant (i.e. in the billions of dollars).

33 To address this, relief was made available from December 2019 to ensure any forfeiture is proportionate in view of the nature and effect of the failure and actions of the lender (sections 95A and 95B).

34 This relief is not available for disclosure failures that preceded the change in 2019. This means some lenders may have historical liability (from June 2015) that was not addressed. I understand there is a class lawsuit relating to this period that is currently before the court. It is being monitored by the RBNZ (as the prudential regulator of affected lenders), as the financial consequences could prove significant.

35 I propose to retain this form of liability for failure to meet disclosure requirements but ensure it only arises where the borrower or the FMA can show that the failure caused harm to affected borrowers. In practice, this would mean that section 99(1A) would only apply where harm was established; and sections 95A and 95B would then apply to determine forfeiture in a way that is proportionate.

36 This would continue to incentivise lenders to make sure they are properly disclosing information and remedying any failure to do so, while addressing the risk of excessive forfeiture for harmless failures. It would also transfer some litigation costs to affected borrowers or the FMA, should it intervene on the borrower(s) behalf. Although this could be seen as weakening protections for borrowers, the additional licensing and supervisory tools I have proposed above should enable the FMA to monitor disclosure practices and intervene effectively.

37 I have also considered whether lenders' concerns about historical liability for disclosure failures prior to December 2019 justifies retrospective intervention. Although backdating the relief could help to ensure a court is able to award proportionate compensation to affected borrowers, this change would raise constitutional and natural justice issues. As further analysis is required, I am not proposing any retrospective changes at this time.

I do not propose any immediate changes to the CCCFA disclosure requirements about the information that must be disclosed

38 I will continue to consider potential issues with requirements relating to variation disclosure and disclosure before debt collection. These disclosure requirements are subject to amendments proposed for Regulatory Systems Bills (one of which is currently before a Select Committee, Confidential advice to Government), which are expected to alleviate issues.

I propose to keep the annual interest rate that defines a high-cost consumer credit contracts to 50 per cent

39 High-cost consumer credit contracts are broadly defined as a contract with an interest rate of 50 per cent or greater. Additional requirements for high-cost credit contracts took effect in 2020 to protect consumers from the harm caused by accumulating excessive debts and repeat borrowing under these contracts. These include limits on the total costs of borrowing, a daily rate limit, restrictions to lend to some repeat borrowers, a prohibition on compound interest and a rebuttable presumption that default fees over $30 are unlawful.

40 I am required under the CCCFA to review the effectiveness of these provisions and consider whether the interest rate that defines a high-cost consumer credit contract should be reduced to a rate between 30 per cent and 50 per cent. The provisions have been very effective at reducing harm caused by the excessive cost of these loans, repeat borrowing and debt spirals as intended.

41 After public consultation, I propose to keep the interest rate at 50 per cent.

42 During consultation, I also heard about concerning debt collection practices. I am interested in exploring this issue further and will consider it in a review of the Fair Trading Act 1986, which I expect to commence next year.

43 I am also concerned that some lenders may be charging excessive default fees that do not comply with the CCCFA. My expectation of the regulator is that it works hard to identify breaches of the CCCFA and takes appropriate enforcement action where required. For default fees, this will mean that where borrowers do fall behind on their repayments, lenders should comply with the law.

I also propose to exempt Buy Now, Pay Later (BNPL) lenders from the fee requirements under the CCCFA

44 In October 2022, the then Cabinet Government Administration and Expenditure Review Committee agreed [GOV-22-MIN-0038] that BNPL contracts be declared to be consumer credit contracts under the CCCFA. The Regulations were made to protect BNPL consumers with more proportionate obligations on BNPL providers having regard to the nature of this type of credit and the lack of interest charged. The Regulations will come into effect on 2 September 2024.

45 I have heard concerns from BNPL providers that complying with the CCCFA's default fee provisions (sections 41 and 44A) would constrain how they calculate and charge default fees to an extent that could put their businesses in jeopardy. The CCCFA's default fee provisions limit default fees to reasonable amounts directly related to the costs incurred by the provider due to the default. These provisions were designed for traditional credit products that can recover other costs through interest charges.

Commercial Information

46 There are two options to mitigate this risk:

46.1 Option one: My preferred option is to exempt BNPL providers from sections 41 and 44A of the CCCFA, with conditions that permit reasonable cross-subsidisation for defaults by other borrowers. These conditions are aimed at providing bespoke protections against excessive default fees and future-proofing against potential unreasonable fee increases by BNPL providers. BNPL providers will also have to comply with section 41A that requires lenders to keep and review records about how default fees are calculated. This would enable the regulator to hold BNPL providers accountable for how they charge their default fees and to take action if it considers the default fees charged are excessive. This option is presented as option four (MBIE recommended option) in the *Regulatory Impact Statement Addendum: Buy Now, Pay Later Regulations.* Without these conditions, the regulator would be unable to take action if concerns about excessive fees arose without returning to Cabinet to make necessary changes to the fee provisions (and any changes would not apply retrospectively).

46.2 Option two: The Minister for Regulation's preferred option is to exempt BNPL providers from sections 41 and 44A of the CCCFA without any conditions. This would provide more flexibility and legal certainty to BNPL providers by not limiting what costs and losses can be recovered. However, this option would not provide any consumer protections against excessive default fees. If Cabinet chose this option, I would monitor the risk of excessive default fees, and if needed, come back to Cabinet in future to make necessary changes to the fee provisions. This option is presented as option five in the *Regulatory Impact Statement Addendum: Buy Now, Pay Later Regulations*.

47 Whatever the option chosen by Cabinet, the changes would be achieved by regulations made under section 138 of the CCCFA. Under both options, the Act and the Regulations will still apply to BNPL, requiring responsible lending practices, hardship policies, credit reports, and disclosure, ensuring protections to consumers and transparency of BNPL providers' policies.

48 Neither of the two options will come into force before 2 September 2024, when the current Regulations will take effect. I understand the Commerce Commission intends to take a pragmatic approach to enforcement in view of any position Cabinet takes on BNPL late fees.

Proposals to provide fit for purpose financial services conduct regulation

49 Officials received 37 submissions on the *Fit for purpose financial services* consultation document. Most submitters agreed that the overall approach and intent of New Zealand's conduct regulation was sound but that changes could be made to improve it.

50 I am now proposing changes to the Financial Markets (Conduct of Institutions) Amendment Act 2022 (CoFI Act), which will require banks, insurers and non-bank deposit takers (financial institutions) to comply with conduct obligations for the provision of core retail banking and insurance products and services to consumers. The CoFI Act is due to come fully into force on 31 March 2025; before this date, financial institutions will need to have applied for and obtained a licence from the FMA to continue providing these products and services to consumers. The changes I propose will streamline regulation and remove unnecessary compliance burden without impacting on the fair treatment of consumers.

51 I also propose making changes to improve the broader regulatory framework, including ensuring the FMA has effective monitoring powers.

I propose to retain the current open-ended definition of the fair conduct principle

52 The CoFI Act sets an overarching fair conduct principle (section 446C) that financial institutions must treat consumers fairly. The definition of what fair treatment includes is left open-ended. I consider that the current open-ended definition strikes the right balance between flexibility and certainty, and aligns best with the principles-based approach of the CoFI regime. It also aligns with the approach taken by other overseas jurisdictions, e.g. Australia. The fair conduct programme requirements in the CoFI Act will provide financial institutions with a high degree of certainty about what they need to do to comply with the CoFI Act.

I propose to simplify and clarify minimum requirements for fair conduct programmes

53 The CoFI Act requires financial institutions to establish, implement and maintain a fair conduct programme before applying for their conduct licence. The programme can include anything the financial institution considers relevant, but must include the minimum requirements listed in the Act (section 446J).

54 I believe it is essential all financial institutions have in place fair conduct programmes that cover the following aspects of their businesses:

54.1 How financial institutions engage appropriately with their clients and customers.

54.2 How financial institutions develop new policies and products to be fit for purpose and meet regulatory requirements.

54.3 Establishing transparent fee structures and charging arrangements particularly with intermediaries.

54.4 Development of an adequate complaints processes.

55 The CoFI Act largely covers the first two aspects, however I want to clarify that I consider it is necessary that fair conduct programmes should also include the following minimum requirements:

55.1 how financial institutions will apply, disclose and review fees and charges, and

55.2 how financial institutions record and resolve consumer complaints.

56 At the same time, I also want to reduce unnecessary prescription and compliance costs. Specifically, I propose to:

56.1 Remove the requirement that fair conduct programmes include policies, processes, systems and controls for enabling the financial institution to meet all of its legal obligations to consumers. This requirement is duplicative and has been perceived as requiring the 're-documenting' of existing procedures.

56.2 Adjust the requirements relating to training, supervising and monitoring employees. This will reduce prescription and clarify the purpose of these requirements (which is to ensure that fair conduct programmes consider how employees can be supported to ensure the financial institution fulfils its conduct obligations).

56.3 Remove the requirement to include methods for regularly reviewing and systematically identifying deficiencies in the effectiveness of the programme. The Act already requires that financial institutions "establish, implement and maintain effective fair conduct programmes".

56.4 Update the Financial Markets Conduct Regulations 2014 (FMC Regulations) to make equivalent changes to the minimum requirements for fair conduct programmes of Lloyd's managing agents, who have slightly different CoFI obligations due to the unique structure of the Lloyd's insurance market. They will differ to those applying to other financial institutions only to the extent necessary to ensure they are workable for the structure of the Lloyd's insurance market.

57 Importantly, I consider that while these changes will allow for more flexibility, they will not negatively impact on the fair treatment of consumers.

I propose to require the FMA to issue a single conduct licence covering multiple market services

58 Firms providing market services currently may need to hold multiple FMA licences (e.g. financial advice provider, manager of a registered scheme, derivatives issuer). CoFI will add an additional type of licence. Under the FMC Act, the FMA may issue different licences for each type of market service or alternatively may issue a single licence covering multiple types of market services. I have already set an expectation for the FMA to streamline its conduct licensing processes to reduce unnecessary compliance costs for firms, and the

FMA has indicated that it intends to move to the approach of issuing a single conduct licence.

59 The FMA can achieve this without legislative change, however there would be additional costs and difficulties that would arise (e.g. the FMA would potentially need the consent of each individual firm to consolidate existing licences). I consider legislative change to *require* the FMA to issue a single conduct licence covering multiple market services is necessary to enable a clean and efficient transfer to a single licence for all firms. The legislative change will provide a framework that supports the FMA to make operational changes to its licensing approach (e.g. to align standard conditions and regulatory returns) and will facilitate an efficient consolidation process for existing licences, avoiding costs and complexity for firms.

60 The majority of submitters supported making legislative amendments that would require the FMA to issue a single conduct licence covering multiple market services. The FMA also prefers this option as it avoids additional costs as stated above. Under this proposal, holders of existing licences under Part 6 would be deemed by legislation to hold a single licence.

I propose to enable the FMA to rely on an assessment by the RBNZ where appropriate

61 Both the FMA and RBNZ have regulatory oversight of financial institutions from their independent prudential and conduct perspectives. At times requirements may overlap; e.g. both regulators have an interest in the operational resilience of financial institutions.

62 I propose amending the FMC Act to provide the FMA with a broad power that, where appropriate, enables it to rely on work done or assessments carried out by RBNZ when assessing matters related to financial institutions. A reliance provision may be helpful if the proposed new FMA power for change in control approval requirements (discussed in paragraph 68) is agreed.

63 The consultation document also sought feedback on amending prudential legislation to introduce an equivalent provision allowing the RBNZ to rely on an assessment by the FMA. Submitters were generally supportive of this option, but amending prudential legislation is outside the scope of these reforms.

I propose to provide the FMA under the FMA Act with the power to conduct on-site inspections

64 I propose to provide FMA under the FMA Act with the power to conduct on-site inspections without prior notice. I intend for this power to be similar to the RBNZ on-site inspection power within the Deposit Takers Act 2022. This power would be used in limited circumstances (e.g. where giving notice would defeat the purpose of the visit or where urgency is required to prevent potential consumer harm), for the purpose of carrying out market conduct monitoring of financial market participants.

65 On-site inspections in these circumstances are a key part of the regulatory toolkit of conduct regulators internationally. The FMA's predecessor (the

Securities Commission) conducted on-site inspections and it was intended the FMA would be empowered to undertake them. However, a court decision in 2012[2] clarified that that this was not within scope of the information gathering powers that were translated across into the FMA Act.

66 I expect that the vast majority of on-site inspections would continue to be carried out with prior notice and the financial market participant's consent. The 'without notice' aspect of the power would only be used rarely, e.g. in circumstances where giving notice would defeat the purpose of the visit.

67 This power will be subject to the following safeguards to ensure the power complies with the New Zealand Bill of Rights Act 1990 and legislative guidelines relating to entering premises without a search warrant:

67.1 the FMA only being able to exercise the power at a reasonable time and in a reasonable manner consistent with the purpose of the power,

67.2 exclusions for inspections of private dwellings and marae, and

67.3 the FMA's authorisation of employees, or suitably qualified or trained persons, to carry out inspections.

I propose to introduce change in control approval requirements

68 Officials consulted on a proposal to introduce a change in control approval requirement for FMC Act licensed firms. This would mean that the prospective purchaser/owner of a firm would need to seek approval from the FMA in advance of the change in control taking place.

69 Currently, prudentially licensed firms require approval from the RBNZ in advance of a change in control. These firms do not need to seek approval from the FMA in advance. The FMA has advised that there have been instances where conduct issues regarding consumer treatment have developed as a result of changes made by new owners, and the FMA's ability to assess the change in advance and respond proactively has been limited.

70 Industry stakeholders generally opposed the introduction of these requirements due to concerns about regulatory burden and disagreeing that this power was relevant to the FMA's conduct remit, while consumer groups generally agreed that the FMA needs effective monitoring tools such as change in control approval requirements to prevent consumer harm.

71 I propose to introduce change in control approval requirements for firms licensed under Part 6 of the FMC Act. New Zealand's twin peaks model of regulation places equal importance on prudential and conduct considerations, and omitting the conduct assessment before a change in control takes place creates a regulatory gap. For example, a proposed transaction may comfortably satisfy prudential criteria (e.g. solvency) while still raising serious concerns about the post-sale treatment of consumers.

[2] *Perpetual Trust Ltd v Financial Markets Authority* (No 3) [2012] NZHC 2307.

I also propose a series of technical amendments to the FMC Act, FMA Act, and FMC

72 I also propose technical amendments to the FMC Act, the FMA Act and the FMC Regulations as set out in **Appendix 1**. These will cut red tape, improve the operation of the legislation and regulations, and reduce costs on business as well as costs to government. Changes to the FMC Regulations will be progressed through an Order in Council.

73 The minor amendments are in three areas:

73.1 Adjusting disclosure rules. I propose technical changes to the FMC Regulations to alter disclosure requirements in certain circumstances. For example, in response to industry concerns, I propose to extend the time within which managed funds must provide six-monthly statements to investors from 10 working days to 20 working days which will reduce compliance costs.

73.2 Regulatory change to embed certain FMA exemptions. I propose to make seven of the FMA's exemptions permanent by changing the FMC Act and FMC Regulations. Most of these exemptions have already been made for two five-year periods by the FMA and it is clear they are needed long-term, which is most efficiently done through regulatory changes. The exemptions relate to things like adjusting quarterly reporting requirements for schemes that are closed to new members and removing financial reporting requirements for notional schemes where the reports would have no meaningful information. The FMA has estimated this could avoid over $50 million in compliance costs per year for industry, as well as ensure resource savings for government.

73.3 Minor and technical changes that were to be progressed through the next appropriate legislative vehicle. These are minor and technical changes to keep the FMA Act and the FMC Act up-to-date. They include technical changes to terms or definitions and inconsistencies with the operation of the legislation.

Proposals to drive effective financial dispute resolution

74 Dispute resolution provides an important avenue for consumers to seek redress when issues arise with their financial service provider. Anyone providing financial services to retail clients must belong to an approved financial dispute resolution scheme. There are currently four approved schemes (the Schemes).[3]

75 The Schemes are not effective as they could be. Consumer advocates have pointed to inconsistencies in performance across the Schemes and consumer surveys have indicated there are inconsistencies in how effectively their services are reaching consumers (for example, while 49 per cent of consumers

[3] The Schemes are the Insurance and Financial Services Ombudsman Scheme, Financial Services Complaints Limited, the Banking Ombudsman, and the Financial Disputes Resolutions Service.

are aware of the Banking Ombudsman scheme, awareness of the other three schemes is much lower at 28 to 16 per cent).

76 Therefore, I consulted on:

76.1 options for improving scheme effectiveness, through measures which enhance accountability and consistency across schemes, and

76.2 options for improving consumer access and awareness of the schemes.

77 MBIE received 30 submissions on these issues, from the financial services industry, the Schemes, and consumer advocates and support organisations. I propose to progress with some actions now, and, as set out below, report back in later this year on issues relating to the governance of the Schemes, and key performance indicators (KPIs).

I propose to enhance the process for reviewing the schemes

78 The Schemes are required to undertake an independent review at least once every five years. The Schemes appoint different people to carry out these reviews, which happen at different times and under different processes.

79 Almost all submitters that commented on this issue noted that there should be greater consistency in how these reviews are carried out.

80 To achieve this, I propose providing the responsible Minister with a power to set terms of reference for these reviews (which can be used to ensure assessment against agreed KPIs), the form and manner of the resulting report, direct when they must take place, and determine the person who undertakes them. I expect the Schemes to continue to pay for the reviews.

81 This would allow government to approve a single reviewer, who could review all of the Schemes at the same time under a single process. I consider that this will result in more robust reviews, that better identify common issues and highlight where some schemes may be underperforming in relation to their peers. It may also better identify if there are issues requiring a scheme's approval to be revoked under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act).

I propose to report back about governance arrangements of the Schemes

82 Each of the Schemes are private entities. They are governed by boards (and in one instance, overseen by an advisory council) which contain a mix of consumer and industry representation, headed by an independent chair. Government does not have the power to direct or appoint scheme board members.

83 Many consumer advocacy groups submitted that government should have a greater role in who sits on the scheme boards to ensure greater independence of the Schemes from industry. Most other stakeholders did not agree.

84 I have discussed this issue with the majority of the Schemes to better understand their views, and canvass options for changes in this area. In general, they have agreed that changes to their governance arrangements could be beneficial to help ensure greater scheme independence. I have also asked officials to undertake further work on options in this area. I plan to report back to Cabinet on this issue later this year. This report-back will note any changes the Schemes may voluntarily make, or if any legislative changes which may be required to address independence of governance arrangements.

I propose to report back on options for enhancing reporting measures

85 The Schemes report on a mix of performance measures through their annual report, including on average times for resolving cases, the outcome of closed complaints and common complaint themes.

86 I consider this reporting could be improved to be more consistent across the Schemes and to provide better insight into scheme performance. I have discussed this issue with the majority of the Schemes. They agree that KPIs could be improved and have indicated they are open to making changes in this area. I will report back to Cabinet on this issue later this year, including on any legislative or non-legislative action which may be required to enhance scheme KPIs.

I plan to request the Schemes improve consumer access and awareness of financial dispute resolution

87 Many submitters, including the Schemes, consumer advocates and some industry representatives noted there are barriers to consumers accessing dispute resolution schemes, including:

87.1 consumers lacking knowledge of their rights, and the availability of dispute resolution,

87.2 a perception that complaining would not make a difference, and

87.3 difficulties navigating complaints and disputes processes (particularly when the consumer may be suffering stress due to financial hardship).

88 The Schemes must comply with a principle of accessibility under the FSP Act. In accordance with the principle, the Schemes should promote knowledge of their services and make their scheme easy to use. I plan to remind the schemes of this obligation and request they improve efforts in this area.

I have also instructed officials to look into options to help facilitate access to the Schemes

89 One of the access issues highlighted by stakeholders is that the multiple scheme model is confusing, and makes it hard for consumers to know which scheme to use. I have engaged with most of the Schemes on this including options for an online portal to act as a “front door” to direct consumers to the correct dispute resolution scheme. They are supportive of the proposal. I am

mindful of the tight fiscal environment, and will be investigating options for industry to fund the service.

I do not propose to initiate work on consolidation of the dispute resolution schemes

90 Consumer advocacy and support agencies strongly recommended that the Schemes should be consolidated into a single entity. This was not something that was consulted on in the discussion paper.

91 Scheme consolidation would be a fairly major step, requiring greater consultation and analysis to fully assess benefits and costs. I am not proposing that government carry out this work now and would instead prefer to make the more immediate amendments proposed in this Cabinet paper. I am confident that these proposals will make meaningful improvements to financial dispute resolution.

92 I am also aware that two of the schemes have been discussing a proposed merger, which would be a step towards consolidation of the schemes. If this merger goes ahead, it will go some way to simplifying the current dispute resolution landscape.

93 I note that the issue of consolidation could be revisited in future, if evidence from future reviews of the schemes points to any major issues that would require assessment of the current scheme model.

Cost-of-living Implications

94 Access to credit can help consumers manage their living costs or support them in increasing their means but can also result in financial hardship when unaffordable. The proposals are intended to reduce the regulatory burden on lenders while ensuring the interests of consumers are effectively protected.

Financial Implications

95 In March 2024, Cabinet noted that I would recommend fiscally neutral transfers within Vote Business, Science and Innovation for 2025/2026 and outyears to give effect to the transfer of regulatory functions under the CCCFA from the Commission to the FMA [CAB-24-MIN-0101 refers].

96 Confidential advice to Government

97 This amount is based on the historic costs to the appropriation of running this function, deducing the contribution from third-party fees to these costs. In 2024/2025 the Commission has budgeted for $0.302 million in CCCFA costs to be met from third-party fees. As the FMA will not collect certification fees, it will have less funding for CCCFA costs. While the FMA will collect licencing fees, these will be used for the licencing system itself and it is unlikely this revenue will be able to be used for other CCCFA costs.

98 I intend to review the FMA's funding requirements and levy after the transfer to ensure it is appropriately funded for its expanded remit. The Commission has a deficit estimated to be no more than $0.564 million on 30 June 2025 due to the expenses of the CCCFA's Fit and Proper Person certification system. Originally meant to be funded by certification fees, the system's transition to a licensing model under the FMA means those fees will not be collected. The Commission can offset this deficit with its $1.609 million in cash reserves.

99 I consider that the proposed amount to be transferred to the FMA and the proposal for the deficit be retained by the Commission balance the fiscal implications on both agencies. The total amounts I recommend transfer from appropriations funding the Commission to appropriations funding the FMA are:

($m)	2024/2025	2025/2026	2026/2027	2027/2028	2028/2029 & outyears
Commerce and Consumer Affairs: Enforcement of General Market Regulation (MCA) *NDOE* Enforcement of Consumer Regulation category	-	(5.629)	(5.779)	(5.779)	(5.779)
Commerce and Consumer Affairs: Litigation Funds (MCA) *NDOE* Commerce Commission Internally-Sourced Litigation category	-	(0.885)	(0.885)	(0.885)	(0.885)
Commerce and Consumer Affairs: Litigation Funds (MCA) Non-Departmental Other Expenses: Commerce Commission Externally-Sourced Litigation	-	(0.476)	(0.476)	(0.476)	(0.476)

Services and Advice to Support Well-functioning Financial Markets (MCA) *NDOE* Performance of Investigation and Enforcement Functions category	-	6.514	6.664	6.664	6.664
Commerce and Consumer Affairs: Financial Markets Authority Litigation Funds *NDOE*	-	0.476	0.476	0.476	0.476

Legislative Implications

100 Legislation is required to implement these proposals:

100.1 Confidential advice to Government

100.2 There will be some consequential changes required to the Credit Contracts and Consumer Finance Regulations and changes to implement my proposals relating to Buy Now Pay Later.

100.3 The proposals for financial services conduct regulation require amendments to the FMC Act and FMA Act. Confidential advice to Government

100.4 The proposals for financial dispute resolution schemes require amendments to the FSP Act. Confidential advice to Government I expect changes to this Act will be relatively minor.

100.5 Technical amendments to the FMC Regulations will require changes to secondary legislation that may be progressed independently of the primary legislative changes.

101 Confidential advice to Government

102 Confidential advice to Government These Bills are necessary to give effect to coalition agreement commitments to reform financial services.

103 Confidential advice to Government

Impact Analysis

Regulatory Impact Statement

104 Impact analysis requirements apply to and have been prepared for the following proposals:

104.1 Consumer credit legislation,

104.2 Financial services conduct regulation.

105 The Ministry of Business, Innovation and Employment's Quality Assurance Panel has reviewed the Regulatory Impact Statements.

105.1 Regarding the *Fit for purpose consumer credit legislation: Regulatory Impact Statement*, the Panel considers that it fully meets the quality assurance criteria. The Panel was satisfied with the problem definition, options identified, analysis undertaken and the consultation process.

105.2 A Regulatory Impact Statement addendum has been prepared for the change to the Buy Now Pay Later Regulations. The Panel considers that it fully meets the quality assurance criteria for Ministers to make informed decisions on the proposals in the paper.

105.3 Regarding the *Fit for purpose financial services conduct regulation: Regulatory Impact Statement*, the Panel considers that it fully meets the quality assurance criteria. The Panel was satisfied with the problem definition, options identified, analysis undertaken and the consultation process.

106 Regulatory Impact Statement exemptions have been provided for proposals to enhance the review of financial dispute resolution schemes, and for the technical amendments to the FMC Act 2013, FMA Act 2011, and FMC Regulations. The Ministry for Regulation and the Treasury's Regulatory

Impact Analysis team determined that the proposals are exempt from the requirement to provide a Regulatory Impact Statement on the grounds that they have no or only minor impacts on businesses, individuals, and not-for-profit entities.

Climate Implications of Policy Assessment

107 The policy proposals in this paper do not have any climate implications.

Population Implications

108 The consumer credit proposals in this paper are likely to affect different groups of consumers differently. The benefits of improved access to credit and greater efficiency are more likely to accrue to consumers who access credit from relatively sophisticated lenders (such as banks), are better informed of their financial situation and the implications of the credit, and better able to assert their contractual rights where necessary.

109 The potential for harm is likely to be greater for consumers who are made more vulnerable to poor financial decision-making, for example, as a result of financial stress (including poverty) and low levels of financial literacy. Māori, Pasifika, beneficiaries and disabled consumers are likely overrepresented in this population. At the same time, some of these consumers would benefit from improved access to credit as a result of proposals, if that credit is provided responsibly to meet genuine need.

110 Risks to these groups are intended to be mitigated in part by equipping the FMA with regulatory tools that enable it to intervene effectively to protect consumers.

Human Rights

111 The proposal for the FMA to have a power, at any reasonable time, to, without notice or consent, enter and remain on the premises of a regulated entity for the purpose of conducting an on-site inspection could be seen to limit the right to freedom from unreasonable search and seizure.

112 I consider this proposal to be consistent with the FMA's purpose to facilitate the development of fair, efficient, and transparent financial markets, and reasonable in the circumstances. The power will be subject to appropriate safeguards such as requiring that it be exercised at a reasonable time. Officials will be working with the Ministry of Justice to ensure that any concerns relating to the New Zealand Bill of Rights Act 1990 are addressed.

Use of external resources

113 No external resources such as contractors or consultants have been engaged and remunerated in relation to the proposals contained in this paper or the policy development process.

Consultation

114 The Treasury, the RBNZ, the Commission, the FMA, the Ministry of Justice and the Ministry of Social Development have been consulted on this paper.

115 In relation to the proposals for BNPL default fee provisions, my officials recommend option one (or option four as described in the RIS), which is to exempt BNPL providers with conditions that provide bespoke protections against excessive default fees. However, the Ministry for Regulation has a different view on this issue and makes the following comment:

116 The Ministry for Regulation noted that the *Regulatory Impact Statement Addendum: Buy Now, Pay Later Regulations* demonstrates that financial mentors are concerned about the risk of increasing BNPL default fees. However, there is limited evidence that providers will increase these default fees in this way if the matter is left to market forces. Competitive pressure in the market is managing this risk by setting the default fees at current levels, and the BNPL providers are already subject to unfair contract provisions under the Fair Trading Act. Option one (or option four as described in the Regulatory Impact Statement Addendum: Buy Now, Pay Later Regulations, a partial exemption conditional on compliance with a reasonable cross-subsidisation requirement) will therefore impose additional costs to the providers (including increased litigation risk relating to the uncertainty about the legal definitions of "reasonableness"), with no benefit other than maintaining current behaviour by BNPL providers. While the BNPL providers have indicated that they can live with option one, a better response would be an exemption (option two), with monitoring to enable future intervention if evidence of a problem arises (e.g. following a 3-year review). Both options are preferable to the other options set out in the RIS.

117 The Reserve Bank was consulted in the preparation of this Cabinet paper. It notes that, as the prudential supervisor, it continues to monitor any emerging financial stability risks associated with historic liabilities (referred to in paragraph 37). Reserve Bank will work with MBIE and the Treasury to ensure Ministers receive advice on financial stability implications of any liabilities (noting these could be large, as it understands, but more analysis is required).

Communications

118 I intend to announce these Cabinet decisions at the Financial Services Council conference on 4 September. It is important that I announce these decisions soon to provide certainty to industry, and to the staff affected by the transfer of the CCCFA function from the Commission to the FMA about matters relating to their future employment.

Proactive Release

119 I intend to proactively release this paper when I announce these decisions.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

1 **note** that in May 2024, Cabinet agreed to the release of three discussion documents on financial services reforms to consult on the costs and benefits of any changes to legislation to achieve fit-for-purpose regulation [CBC-24-MIN-0031];

2 **note** that Cabinet invited the Minister of Commerce and Consumer and Affairs to report back to Cabinet by August 2024 with the outcomes of consultation and proposed policy changes;

Consumer credit legislation

3 **agree** to align consumer credit regulation with the financial markets conduct regime by:

3.1 removing the certification regime under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and, in its place, applying the market services licence regime to providers of consumer credit contracts by adding it as a licensed market service under Part 6 of the Financial Markets Conduct Act 2013 (FMC Act);

3.2 exempting entities currently exempted from certification under the Credit Contracts and Consumer Finance Regulations 2004 from needing to hold a market services licence; and

3.3 having the fair dealing and restricted communication provisions in Part 2 of the FMC Act apply to consumer credit (rather than the Fair Trading Act 1986), and CCCFA disclosure breaches being grounds for a stop order.

4 **agree** to provide for effective transfer of the regulator function to the FMA, including the ability for FMA to continue proceedings,

Confidential advice to Government

5 **agree** to deem all creditors who are currently required to be certified, or are exempt from certification on the basis they are licensed by the FMA or RBNZ, to have a market service licence as would otherwise be required by the decision in recommendation 3.1;

6 **agree** to other changes to the CCCFA, FMC Act, the Financial Markets Authority Act 2011 (FMA Act) and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act) that are necessary or desirable to reflect Cabinet's decision to transfer all regulatory functions under the CCCFA to the FMA;

7 **agree** to remove the due diligence duty and attendant personal liability for all consumer credit providers (section 59B) on the basis the duty duplicates

equivalent obligations under the FMC Act, they will remain subject to personal liability where the individual is involved in the contravention, and these providers will be monitored by the FMA under the licensing regime;

8 **agree** to limit the effect of section 99(1A) of the CCCFA (that a borrower is not liable for the costs of borrowing in relation to a period of non-compliant disclosure) to cases where a person, including the FMA, can show the borrower was harmed by the failure to make initial or agreed variation disclosure;

9 **agree** to make regulations under section 138(1)(ab) of the CCCFA exempting Buy Now Pay Later lenders from having to comply with provisions in the CCCFA relating to unreasonable fees (such as sections 41 and 44A), **either**:

9.1 with conditions that provide bespoke protections against excessive fees, while allowing some cross-subsidisation for defaults by other borrowers;

OR

9.2 with no conditions attached.

10 **agree** to keep the current definition of a high-cost credit contract in section 45C of the CCCFA at an interest rate of 50 per cent or more;

11 **note** that I intend to come back to Cabinet later in the year to seek additional policy decisions on consumer credit;

12 Confidential advice to Government

Financial services conduct regulation

13 **agree** to amend the fair conduct programme minimum requirements in the FMC Act (as amended by the Financial Markets (Conduct of Institutions) Amendment Act 2022) to:

13.1 remove the requirement that fair conduct programmes include policies, processes, systems and controls for enabling the financial institution to meet all of its legal obligations to consumers;

13.2 adjust the requirements relating to training, supervising and monitoring employees to reduce the level of prescription;

13.3 remove the requirement to include methods for regularly reviewing and systematically identifying deficiencies in the effectiveness of the programme; and

13.4 insert requirements for fair conduct programmes to include policies, processes, systems and controls relating to applying, disclosing, and reviewing fees and charges, and recording and resolving consumer complaints;

14 **agree** to amend the Financial Markets Conduct Regulations 2014 (FMC Regulations) to make equivalent changes to the minimum requirements for the fair conduct programmes of Lloyd's managing agents;

15 **agree** to amend the FMC Act to:

15.1 require the FMA to issue a single licence covering the market services that a firm has been approved to provide under Part 6 rather than having the ability to issue separate licences; and

15.2 provide that existing holders of licences for the provision of market services under Part 6 are deemed to hold a single licence;

16 **agree** to amend the FMC Act to enable the FMA to rely on work done or assessments carried out by RBNZ when performing its functions on matters relating to financial institutions where appropriate;

17 **agree** to amend the FMA Act to provide that the FMA will have a power, at any reasonable time, to, without prior notice, enter and remain on the premises of a financial markets participant for the purpose of conducting an on-site inspection to carry out market conduct monitoring of the financial market participant's compliance with conduct obligations;

18 **agree** to amend the FMC Act to require the proposed controller of a firm licensed under Part 6 of that Act to obtain regulatory approval from the FMA prior to the proposed change in ownership or control of the licensed firm taking effect;

19 Confidential advice to Government

Technical amendments to the FMC Act, FMA Act, and FMC Regulations

20 **note** that this paper provides an opportunity to reduce the regulatory burden and compliance cost on businesses by addressing a number of technical issues in the FMC Act, the FMA Act, and the FMC Regulations;

21 **agree** to the minor policy changes set out in Appendix 1;

22 **note** that the policy changes to FMC Regulations will be progressed separately through an Order in Council;

Financial dispute resolution schemes

23 **agree** to amend the FSP Act to:

23.1 require that independent reviews carried out by approved financial disputes resolution schemes be undertaken by a reviewer determined by the Minister responsible for the FSP Act;

23.2 provide the Minister responsible for the FSP Act with a power to set terms of reference for such reviews, and the form and manner of the resulting report; and

23.3 provide the Minister responsible for the FSP Act with a power to direct the schemes to undertake the review at a particular time;

24 **note** I will report back to Cabinet on issues relating to governance arrangements of and enhancing the reporting metrics used by the financial dispute resolution schemes later this year;

25 **note** that I am investigating non-regulatory options for improving access and awareness of financial dispute resolution, including:

25.1 options for an online portal that directs consumers to the correct scheme; and

25.2 advising the schemes of my expectation they make improvements in this area, in line with Schemes having to comply with a principle of accessibility under legislation;

26 **note** many stakeholders proposed consolidating or reducing the number of schemes, this is a significant step, and I would prefer it be looked at in future, should any major issues appear with the current scheme model;

27 Confidential advice to Government

28

Financial implications

29 **note** that in March 2024, Cabinet [CAB-24-MIN-0010 refers]:

29.1 agreed to transfer all regulatory functions under the CCCFA from the Commerce Commission to the FMA; and

29.2 noted the Minister of Commerce and Consumer Affairs will recommend fiscally neutral transfer within Vote Business, Science and Innovation for 2025/2026 and outyears to give effect to the transfer of those functions;

30 **approve** the following fiscally neutral adjustments totalling $28.410 million over the forecast period to provide for the transfer of all regulatory functions under the CCCFA from the Commerce Commission to the FMA, with no impact on the operating balance and net core Crown debt:

	$m – increase / (decrease)				
Vote Business, Science and Innovation Minister for Commerce and Consumer Affairs	**2024/25**	**2025/26**	**2026/27**	**2027/28**	**2028/29 & Outyears**
Multi-Category Expenses and Capital Expenditure: Commerce and Consumer Affairs: Enforcement of General Market Regulation (MCA) *Non-Departmental Output Expenses:* Enforcement of Consumer Regulation	-	(5.629)	(5.779)	(5.779)	(5.779)
Multi-Category Expenses and Capital Expenditure: Services and Advice to Support Well-functioning Financial Markets (MCA) *Non-Departmental Output Expenses:* Performance of Investigation and Enforcement Functions	-	6.514	6.664	6.664	6.664
Multi-Category Expenses and Capital Expenditure: Commerce and Consumer Affairs: Litigation Funds (MCA) *Non-Departmental Other Expenses:* Commerce Commission Internally-Sourced Litigation	-	(0.885)	(0.885)	(0.885)	(0.885)

Multi-Category Expenses and Capital Expenditure:					
Commerce and Consumer Affairs: Litigation Funds (MCA)					
Non-Departmental Other Expenses:					
Commerce Commission Externally-Sourced Litigation	-	(0.476)	(0.476)	(0.476)	(0.476)
Non-Departmental Other Expenses:					
Commerce and Consumer Affairs: Financial Markets Authority Litigation Funds	-	0.476	0.476	0.476	0.476

31 **note** that the Commerce Commission incurred a CCCFA-specific deficit for the Fit and Proper Person certification system which was to be paid for by third-party fees which is estimated to be $0.564 million on 30 June 2025;

32 **note** that the Commerce Commission will not be able to continue to collect Fit and Proper Person certification fees with which to pay down the $0.564 million deficit once the CCCFA function transfers to the FMA and changes to a licencing scheme;

33 **note** that the deficit can be paid from the Commerce Commission's uncommitted cash reserves, which is estimated to currently be $1.609 million;

Further policy decisions

34 **invite** the Minister of Commerce and Consumer Affairs to report back to Cabinet later this year to seek any further policy decisions as needed;

Legislative implications

35 **authorise** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations;

36 **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes, consistent with the policy intent of this paper, on issues that arise during the drafting of the Bills and regulations.

Authorised for lodgement

Hon Andrew Bayly

Minister of Commerce and Consumer Affairs

Appendix 1: Additional policy decisions on technical amendments to Financial Markets Conduct Act 2013, Financial Markets Authority Act 2011, and Financial Market Conduct Regulations 2014

#	Topic	Status quo and reason for change	Policy decision sought
Financial Market Conduct Regulations 2014 (FMC Regulations) – Disclosure rule adjustments			
1	Closed-ended schemes – mandatory annual meetings requirements	Close-ended schemes must hold an annual meeting no later than six months after their balance date, unless a unanimous written resolution received (Regulation 92). Meetings are not always needed (e.g. an inactive forestry scheme). Relying on a unanimous resolution is impractical because some participants will not respond. Flexibility should be provided to allow schemes to waive meeting requirements to avoid unnecessary costs. In these instances, the requirement is costly for the scheme and investors.	Allow the manager of a closed-ended scheme to waive meeting requirements for a calendar year if it is in the interests of the scheme, subject to the supervisor's consent with safeguards and notification requirements.
2	Confirmation information – align with date for annual report	There are timing differences between when annual reports are provided (four months after a scheme balance date, and sent to members within 28 days) and when annual confirmations are provided (three months afterward balance date), (Regulation 71). This applies to KiwiSaver schemes, superannuation schemes and workplace savings schemes. This different timing can mean businesses incur costs from sending two separate reports. Aligning these two reports would remove these costs.	Extend member annual confirmation information dates from three months after the balance date to four months to align with the current timing for the annual reports.
3	Replacement product disclosure statement (PDS) issued near quarter-end: difficulties providing updated fund data and completing risk indicator for managed investment schemes	Lodging a replacement PDS triggers a requirement to immediately update the fund data on the register with data mostly as at the end of the last quarter (Regulations 40 and 42). This applies to managed investment schemes. The register is normally updated with quarter-end data after the 20th working day of the quarter end. It often takes up-to 20 working days to collect and verify the necessary quarter-end data. This creates a problem if a PDS should be updated within 20 days after quarter-end due to a material change. Fund managers must stay off-market until the data is available so the PDS can be completed. If quarter-end data is not yet available, it would be better if a fund can release a PDS to notify the market of the material change without including updated fund data.	Provide that fund data need only be updated when the next fund update is filed, not upon lodgement of replacement PDS.
4		PDS must contain a risk indicator calculated using weekly returns over five years ending on the most recently completed quarter (Regulations 40 and 42). Managers do not have sufficient time to prepare the data to update this risk register where a replacement PDS must be lodged shortly after the quarter's end. This is because the weekly	Allow the fund manager to select the previous quarter's risk indicator if the replacement PDS is fewer than 20 working days from the quarter end.

		returns are often not available for two to three weeks, which means data is either not yet available or it causes unnecessary time pressure to prepare it for this disclosure rule.	
5	Confirmation information for managed funds	Fund managers (except KiwiSaver, superannuation and workplace savings) must provide six-monthly statements to members no later than 10 working days after the last day of each six-monthly reporting period (Regulation 68). By comparison, KiwiSaver schemes and superannuation schemes have three months to provide equivalent statements. The tight timeframe for managed fund providers creates extra compliance costs, and risks of mistakes. Extending this timeframe would reduce these costs and risks. The timeframe should still be shorter than KiwiSaver schemes.	Extend the confirmation information time period for managed fund providers from 10 to 20 working days.
6	Disclosure of counterparties' names in equity swap transactions	The names of counterparties to equity swap transactions are required to be disclosed as part of the substantial product holder disclosure requirements. These interests are captured by regulation 132, which includes interests in derivatives that are cash-settled long options or give the counterparty (in economic substance) the financial benefits of the underling quoted voting product. The Financial Markets Authority (FMA) heard that disclosing names of counterparties often shares commercially sensitive information and is taking no action for breaches of this rule. Market practice now often omits counterparty names. The FMA sees no public interest in, nor harm to investors, if this information is not disclosed. Disapplying this disclosure rule should better align with Australia which is relevant for dual-listed securities.	Omit the requirement to disclose the full names of counterparties in the substantial product holder notice form in this situation.
Financial Markets Conduct Act 2013 (FMC Act) – Embedding FMA exemptions			
7	Licensed independent trustee	The FMC Act (section 131(3)) test for an independent director for licensed independent trustees (scheme supervisors for restricted schemes) is broad and strict, deeming persons to be non-independent if they are directors of bodies corporate related to employers accessing the scheme, administrators or managers. This does not work in practice for a body corporate sole, and has an unintended consequence for 44 workplace savings schemes. Industry advise there would be an unnecessary compliance cost of approximately $50 million (per annum) to restructure affairs for technical compliance. The FMA has granted two 5-year class exemptions providing regulatory relief, the current exemption is the Financial Markets Conduct (Licensed Independent Trustees of Restricted Schemes) Exemption Notice 2021, which expires in 2026.	**Amend the FMC Act** to incorporate the effect of the Financial Markets Conduct (Licensed Independent Trustees of Restricted Schemes) Exemption Notice 2021.

		Amending the Act will save industry the costs associated with technical compliance as well as saving the FMA and PCO (Parliamentary Counsel Office) time and resources required to renew the exemption every five years.	
8	Financial reporting – notional funds for managed investment schemes (MIS)	Under section 461A of the FMC Act, managers of multiple funds need to prepare financial statements for each scheme. However, financial statements for notional schemes have no meaningful information for investors. A notional scheme is one that has no assets of its own but comprises a number of funds that are separate legal entities, with no cross-liabilities, registered together as one scheme. FMA has granted two 5-year class for this matter. The current exemption is the Financial Markets Conduct (Financial Statements for Schemes Consisting Only of Separate Funds) Exemption Notice 2022, which expires in 2027. 48 schemes rely on the exemption. Financial statements for notional schemes are an unnecessary compliance cost and should not be required.	**Amend the FMC Act** to incorporate the effect of the Financial Markets Conduct (Financial Statements for Schemes Consisting Only of Separate Funds) Exemption Notice 2022.
9	Financial reporting - overseas subsidiary balance dates	Under section 461(3) of the FMC Act, Financial Market Conduct reporting entities must have the same balance date as their subsidiaries. Some entities have subsidiaries overseas where that jurisdiction determines the balance date (i.e. out of its control) or regulatory approvals (seen as an unnecessary compliance cost) are needed to do this. This timing requirement is technical and unnecessary in some circumstances. FMA has granted two 5-year class exemptions that provide relief in this situation. The current exemption is the FMC (Overseas Subsidiary Balance Date Alignment) Exemption Notice 2021, which expires in 2026. Domestic financial reporting standards are sufficient (consolidated group statements, and International Financial Reporting Standard IFRS10 covers this situation) and investor confusion is unlikely. Making the exemption permanent will remove unnecessary costs for industry, the FMA and PCO.	**Amend the FMC Act** to incorporate the policy contained in the FMC (Overseas Subsidiary Balance Date Alignment) Exemption Notice 2021.
10	Takeovers Panel – Substantial product holder relief	When entering enforceable undertakings during a Code or Scheme of Arrangement takeover, the Panel is caught by the substantial product holder provisions in ss276 to 279 of the FMC Act because the enforceable undertaking gives it a relevant interest in quoted voting products of the listed issuer that comprises 5% or more of that class of quoted voting product. This would normally require NZX-notified substantial product holding updates. FMA has provided two 5-year exemptions. The current exemption is the Financial Markets Conduct (Takeovers Panel) Exemption Notice 2020, which expires in 2025. Making the exemption permanent will remove unnecessary costs for industry, the FMA and PCO.	**Amend the FMC Act** to incorporate the policy contained in the Financial Markets Conduct (Takeovers Panel) Exemption Notice 2020.

FMC Regulations – Embedding FMA exemptions			
11	Disclosure and reporting requirements for restricted schemes	The FMC Regulations impose quarterly reporting requirements on schemes such as annual fund updates and confirmation information. Some of the disclosure and reporting requirements are not relevant to restricted schemes (which are specifically registered as a restricted scheme) because they have different characteristics to other MIS (e.g. restricted membership, or are run not-for-profit). An FMA exemption currently provides relief from quarterly fund updates (including limit breaks and related party transactions) to allow restricted scheme managers to provide tailored meaningful updates, reducing unnecessary costs producing information that is higher relative to the size of the scheme and not useful to members. The current exemption is the Financial Markets Conduct (Restricted Schemes—Disclosure and Reporting) Exemption Notice 2022, which expires in 2027. The alternative requirements for restricted schemes, as set out in the conditions of the FMA exemption should be made permanent. This would ensure restricted scheme members receive meaningful information without unnecessary compliance costs. It would also remove future costs on industry, the FMA and PCO from further exemptions.	**Amend the FMC Regulations** to incorporate the policy contained in the Financial Markets Conduct (Restricted Schemes—Disclosure and Reporting) Exemption Notice 2022.
12	Custodian assurance reports for restricted schemes	The FMC Regulations require MIS custodians to obtain an annual assurance engagement with a qualified auditor within four months of the MIS's relevant date. Most restricted schemes use an internal custodian and outsource their management functions and custodial compliance functions, such as investment settlements, record-keeping, reporting and bank account management to third party administration managers. For schemes with outsourced management functions, the administration manager's assurance engagement adequately addresses the key risks to scheme property. The further information in the custodian assurance report is not as valuable, generally focussing on the receipt and review of reports by the trustees. The FMA has granted 5-year class exemptions providing regulatory relief. The current exemption is the Financial Markets Conduct (Restricted Schemes—Custodian Assurance Engagement) Exemption Notice 2020, which expires in 2025. It would remove costs for industry, the FMA and PCO if the exemption was made permanent so that administrator's assurance engagement report may be used instead of the custodian assurance report.	**Amend the FMC Regulations** to incorporate the policy contained in the Financial Markets Conduct (Restricted Schemes—Custodian Assurance Engagement) Exemption Notice 2020.

13	Disclosure requirements for wholesale investors in kauri bonds	Kauri bonds are debt securities denominated in New Zealand dollar issued domestically by foreign issuers. Issuers use standard offer documents across multiple jurisdictions, and need certainty of wholesale offers regulatory compliance. New Zealand regulations require warnings and investor acknowledgements for wholesale investors over $750,000. Overseas issuers may stop offering Kauri bonds in NZ if they are required to comply with country-specific regulations. This is because overseas issuers want to have standard offer documents that are not jurisdiction specific. The loss of Kauri bonds would have a significant effect on investment opportunities for New Zealand businesses. FMA has granted two 5-year exemptions waiving those features. The current exemption is the Financial Markets Conduct (Wholesale Investor Exclusion—$750,000 Minimum Investment in Kauri Bonds) Exemption Notice 2021, which expires in 2027. This exemption was last renewed in 2021, which noted no risks from renewing the exemption. Making the exemption permanent will remove costs for industry, the FMA and PCO.	**Amend the FMC Regulations** to incorporate the policy contained in the Financial Markets Conduct (Wholesale Investor Exclusion—$750,000 Minimum Investment in Kauri Bonds) Exemption Notice 2021.
Financial Markets Authority Act 2011 (FMA Act) – other technical changes			
14	Section 4(1)(c)(i) – definition of "financial markets participant"	The FMA may exercise certain powers over "financial markets participant". The definition of this term has ambiguity because the way the FMC Act defined 'related', which means corporations related to individual (as opposed to corporate) members of its regulated population would not be financial markets participants for the purposes of section 30 of Corporations (Investigation and Management) Act 1989. A small change could confirm the intended policy position that "financial markets participant" includes relationships between an individual and a body corporate that is a financial markets participant.	**Amend the FMA Act** to make it clear that "financial markets participant" includes body corporates related to an individual that is a financial markets participant.
FMC Act – other technical changes			
15	Section 6 – definitions of "financial product" and "financial advice product"	Both "financial product" and "financial advice product" are defined in the FMC Act. There is some minor confusion because financial advice products covers advice on a wider group of products than just "financial products". It includes insurance and consumer credit contracts. This confusion could be removed by renaming "financial advice products", without modifying the definition.	**Amend the FMC Act** term "financial advice product" so that it no longer refers to "advice"; e.g. it could be "financial markets conduct product".

16	Sections 304 and 456 – keeping records	Section 304 requires listed issuers to keep an interest register at their registered office or other place in New Zealand. Section 456(2) requires Financial Markets Conduct reporting entities to keep records in New Zealand that will enable the preparation of financial statements. These requirements should be modernised to allow for digital record keeping and the use of cloud services that may not be geographically located within New Zealand.	**Amend the FMC Act** so that the relevant records must be kept in either New Zealand, Australia or another country approved by regulations.
17	New provision	The FMC Act creates doubt as to whether the FMA may grant an exemption in relation to custodian assurance engagement obligations in relation to a 'relevant period' that has commenced before the exemption is granted. Section 561A of the FMC Act clarifies the position for exemptions from financial reporting obligations under Part 7 and climate related disclosure requirements under Part 7A. The absence of an equivalent provision for custodian assurance engagements obligations creates doubt.	**Amend the FMC Act** to provide that exemptions from custodian assurance engagement obligations may apply in a way that is consistent with the current section 561A provisions for exemptions from financial reporting and climate statements.
18	Clause 19, Schedule 1 – same class exclusion	Schedule 1, clause 19 provides that the FMC ACT's standard disclosure requirements do not apply for offers of: • financial products; or • options (the right to buy financial products if certain events happen) if the products or options are the same class as those already listed on a licenced market for at least three months. Approximately 270 offers relied on the same class exclusion between 2014-19, averaging 45 per year, and those offers raised approximately $19.8 billion. There are inconsistencies between how the provisions work for financial products and options. For an offer of sale of financial products, offeror must have reasonable grounds to believe the products will be listed. This same requirement should apply to an offer of sale of options.	**Amend the FMC Act** to align the treatment of the issuer and offeror in case of option on-sales (clause 19(1A) of Schedule 1) with the treatment of the issuer and offeror of financial products (clause 19(1) of Schedule 1).