New Zealand Law Society
Te Kāhui Ture o Aotearoa

Financial Markets Conduct Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

19 June 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Financial Market Conduct Amendment Bill (**Bill**).

1.2 This submission has been prepared with input from the Law Society's Commercial and Business Law and Human Rights and Privacy Committees.[1]

1.3 The Law Society **wishes to be heard** on this submission.

2 General comments

2.1 This Bill is an omnibus Bill that proposes changes to the Financial Markets Conduct Act 2013 (**FMCA**) and the Financial Markets Authority Act 2011 (**FMAA**) by:

(a) amending the minimum requirements of the fair conduct programme;

(b) amending the licence regime to require only a single licence for multiple classes of market services;

(c) introducing new change in control approval provisions relating to changes in persons with significant influence and certain significant transactions; and

(d) inserting new powers for the Financial Markets Authority (**FMA**) to be able to undertake without notice on-site inspections.

2.2 The objective of the Bill, along with two other Bills collectively called the Financial Services reform package, is to:

(a) reduce red tape,

(b) minimise compliance costs, and

(c) improve outcomes for consumers.

2.3 The Law Society supports the intent to reduce the compliance burden on financial market participants, so long as the remaining regulations are effective and lead to improved outcomes for consumers. However, it is unclear whether the Bill will achieve its intended purpose of reducing the compliance burden on financial markets participants, given the minimal impact of the proposed changes to the fair conduct programme requirements, as well as the increased burden imposed by the proposed change in control requirements.

2.4 Overall, we consider the proposed amendments are largely appropriate. However, we do have some concerns regarding the drafting of certain aspects, which we address in our submission below. Where possible, we have suggested changes to improve both the workability and the clarity of the Bill.

[1] More information about the Law Society's Law Reform Committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2.5 We have more significant concerns about proposed new sections 28B, 28C, and 28D of the Bill. We recommend amendments to these sections to make them more consistent with equivalent provisions in other comparable search regimes.

3 Fair conduct minimum requirements

3.1 The amendments at Clause 19 concerning the minimum requirements of the fair conduct programme are intended to lessen the compliance burden on financial market participants. It is suggested that by reducing these requirements, the regime can become more flexible, leading to improvements in the provision of products and services and ultimately lowering costs for consumers.[2]

3.2 Most of the amendments contained in clause 19 are minor or technical. We query whether these changes will in fact reduce the compliance burden sufficient to provide the flexibility needed to expand the services and products available, or to lower costs for consumers as the Bill intends.

3.3 The Law Society also notes that clause 19(1) repeals section 446J(1)(k). The Regulatory Impact Statement (**RIS**) states that sections 446G(1) and 446J(1)(k) are similar, and officials considered that section 446J(1)(k) was an unnecessary duplication.[3] However, while sections 446G(1) and 446(1)(k) are similar, we consider there is a different purpose to the inclusion of setting out 'how' maintenance of the fair conduct programme is undertaken. Strictly speaking, maintaining a program is not the same as reviewing and identifying deficiencies in its effectiveness. In our view, it is preferable to continue requiring regular reviews to assess the program's effectiveness. Removing this requirement may lead providers to overlook the review aspect of maintaining an effective program, which could result in less effective programmes overall and increased risks for consumers. We therefore recommend that section 446J(1)(k) is not repealed.

4 Change of Control Provisions

4.1 The Bill introduces change in control approval provisions that require firms holding a licence under the FMCA, or authorised bodies, to obtain regulatory approval from the FMA before certain changes in firms take effect. This covers changes where another person obtains significant influence, defined as obtaining 25% of voting rights or the ability to appoint 50% of directors. It also covers significant transactions (asset sales) of a material part of the business and amalgamations. The purpose of this power is to ensure that a proposed restructure does not negatively impact on the interests of consumers from a conduct perspective and aligns with the prudential approach to changes in control.[4]

4.2 Clause 18 inserts the provisions for these approvals, alongside the technical amendments that outline the details of how the approvals may be made. The Law Society

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2 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Fit for purpose financial markets conduct regulation* (**RIS**) at [47] – [49].

3 RIS at [68].

4 Explanatory note; RIS at [163].

recommends the following drafting amendments, to improve clarity, certainty and workability for market participants:

(a) *New section 421A(1)* refers to the person needing to obtain consent prior to 'giving effect' to the transaction. It is not clear what the trigger is that would be considered 'giving effect' to the transaction. For example, we query whether entry into a sale and purchase agreement (**SPA**) is sufficient, and whether a conditional SPA would also meet that threshold.

(b) *New section 421C* prescribes that whether a transaction is significant or not turns on whether the transaction transfers 'all or a material part' of the business. However, subsection (3) leaves the determination of what a material part of the business is to regulations. The Law Society is of the view that this is unsatisfactory. Given this term forms the crux of the proposed requirement for approval, there should be clear and meaningful guidance for market participants as to what is going to be a 'material part' of the business for the purposes of this section. The Law Society considers that, as this is a decisive term for application of the provision, it should be defined in primary legislation, rather than left to regulations yet to be prescribed.

(c) *New section 421C(2)(a) and (b)(ii)* appear to require approval from the FMA where the intention is for a licensee or authorised body to acquire or dispose of part of its business where that will form a material part of the licensee's business, even if that acquisition is not relevant or governed by the FMCA licensing regime. It is not clear whether this is intended, in light of the intended aim of these provisions. Where the relevant part of the business relating to the acquisition or disposal is not governed by the licensing regime, and the FMA has no power to reverse or unwind that acquisition, such approval would appear to be unnecessary.

(d) *New section 421D* requires approval from the FMA for the amalgamation of a market participant, and as above, at (c), it is unclear whether that requirement exists where the amalgamation is not relevant or governed by the FMCA licensing regime. As above, such an approval would be unnecessary and would not align with the intended aim of the provisions.

4.3 Overall, the Law Society considers that the change in control provisions is likely to add a further compliance burden to market participants, which may be contrary to the intention of the Bill. We observe that the RIS indicates that allowing the FMA to rely on assessments conducted by the RBNZ will be progressed as a separate initiative.[5] We suggest that this approach may help reduce the duplication and additional compliance requirements that these provisions could create.

4.4 Given the significant impact these changes may have on transactions involving licensed providers, it will be essential to establish clear requirements and a process for granting approval, prior to the Bill coming into effect. This will be especially important as the 20-

5 RIS at p 5.

day working period for a decision from the FMA only commences once all information and reports reasonably required by the FMA to make the determination are received.

5 On-site inspection powers

5.1 Clause 56 of the Bill inserts new sections 28A to 28D, amending the FMAA to provide the FMA with the power to carry out an on-site inspection of a financial markets participant.[6] That power may be exercised if the FMA considers it 'necessary or desirable' for the purposes of doing one or more of the things set out in new section 28A, and may be carried out without notice. The only limit on this power is set out in new section 28B(2), which provides that the FMA must exercise the power only at a reasonable time and in a reasonable manner.

5.2 During an on-site inspection, the FMA may *require* any 'employee, director, or agent of the financial markets participant' to answer questions about records or documents, or supply further information and records reasonably required for the purpose of the inspection.[7]

5.3 Where, during the on-site inspection, the FMA finds evidence of conduct that constitutes or may constitute a contravention or an involvement in a contravention of any provision of financial markets legislation, it is not required to obtain a search warrant to continue exercising these powers.[8]

New Section 28B and section 21 of the New Zealand Bill of Rights Act

5.4 At present, the FMA has entry and search powers under section 29 of the FMAA, which can be exercised by consent or with a warrant. This proposed change, to enable warrantless entry and inspection, engages the right to be secure against unreasonable search and seizure, protected by section 21 of New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**).[9]

5.5 A search can of course be reasonable and therefore not breach section 21 of the Bill of Rights Act. When determining whether a search was reasonable, relevant factors include the nature of the place or object that was being searched, the degree of intrusiveness into the privacy of the person or persons affected, and the reason why the search was occurring.[10]

5.6 The Ministry of Justice's advice on consistency with the Bill of Rights Act concludes the proposed new powers are reasonable, and therefore consistent with section 21. However, the analysis provided is limited, and notes only briefly:

(a) The powers must be exercised at a reasonable time and in a reasonable manner;

(b) Dwellinghouses and marae are excluded;

6 New section 28B.
7 New section 28C.
8 New section 28D.
9 New Zealand Bill of Rights Act 1990, section 21.
10 *Hamed v R* [2011] NZSC 101 at [172].

(c) There will be a process (presumably internal to the FMA) for authorisation of those who can carry out inspections;

(d) The power is consistent with international standards and comparable to existing powers within other regulatory regimes.

5.7 It further sets out that the power is to be used only in limited circumstances, where the existing powers in section 29 of the FMAA would not enable the FMA to obtain the information. The RIS makes a similar assertion.[11]

5.8 While the Law Society agrees that the exclusion of dwellinghouses and marae is protective of privacy, there is limited analysis of the justification for the new powers (beyond assisting proactive monitoring) and no analysis of the drafting of the new provisions, which contain no prescribed limitations as to when they may be used instead of section 29 of the FMAA.

5.9 New section 28A would effectively allow an on-site inspection without notice for reasons so broad that they can encompass assessing a financial markets participant's policies, verifying compliance with obligations, or '*doing any other thing that is incidental and related to, or consequential on, any thing that the FMA does*' in relation to conduct regulation.[12] Further, the FMA is only required to consider an on-site inspection to be 'necessary' or (at a much lower threshold) 'desirable.' This, in our view, does not constitute a reasonable search power. We consider that the new sections 28A ought to contain a limiting provision that sets out precisely such a limitation as imagined in the Ministry of Justice's advice and the RIS.

5.10 The Law Society further notes that the Office of the Privacy Commissioner (**OPC**) raised similar concerns about the breadth of the on-site inspection power, and recommended that the new power should only be used where:[13]

(a) there is no legal ability to seek a warrant;

(b) the entity poses a significant risk to financial services clients;

(c) giving notice would defeat the purpose of the visit.

5.11 The Law Society endorses OPC's recommendation and further adds that these limits should be established in primary legislation rather than being left to the internal operational guidelines of the FMA, as it appears the Departmental Disclosure Statement (**DDS**) envisages. This is important because internal guidelines can be disregarded, amended, and replaced without public oversight and are only accessible to officials.

New section 28C & section 14 of the New Zealand Bill of Rights Act

5.12 As noted in the Ministry's Bill of Rights Act advice, new section 28C engages section 14 of the Bill of Rights Act, which has been interpreted as including the right not to be compelled to say certain things or provide certain information. New section 28C would

11 At page 52 – 53.
12 New section 28A.
13 Ministry of Business, Innovation and Employment *Departmental Disclosure Statement: Financial Markets Conduct Amendment Bill* (5 March 2025) at 9 (**DDS**).

empower the FMA to require a person to answer questions or provide information during an on-site inspection. The Ministry's Bill of Rights Act advice is limited: it concludes, without expansion, that the power is necessary to enable supervision of financial market participants and impairs the section 14 right no more than is reasonably necessary. Alternative, more rights consistent drafting, is not considered.

5.13 Section 133(3) of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (a regime which is cited throughout the RIS) is preferable in this regard. It provides that, during an on-site inspection:

(a) 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.

(b) Before an AML/CFT supervisor requires a person to answer a question, the person must be informed of this right.

(c) Nothing in section 133 requires any person to disclose privileged communications.

5.14 The Law Society recommends that similar provisions be included in new section 28C, particularly given clause 58 of the Bill, which extends criminal liability under section 61 to include failure to answer any questions or supply other information or documents.

New section 28D

5.15 New section 28D provides that if, during an on-site inspection, the FMA finds evidence of a contravention, it is not required to obtain a search warrant to continue exercising its on-site inspection powers. This provision is not addressed in the Ministry of Justice's Bill of Rights advice.

5.16 The Law Society considers that this provision is unnecessary, and notes that it is not replicated in – and goes further than – the comparable regimes with which the Bill seeks to align the FMAA. The extension of the inspection powers in this way could also be considered regulatory overreach. This is because the section:

(a) Is unclear about the circumstances that can trigger the continuation of a search without a warrant (other than finding potential evidence of a contravention);

(b) Introduces a new concept of 'continuing' a search, which adds uncertainty and risks legal complications;

(c) Risks enabling an open-ended search for any reason, contrary to existing legal principles on search procedures;

(d) Does not align with the purpose and principles of the Search and Surveillance Act 2012 (**SSA**);

(e) Is contrary to the warrant preference rule, which is a fundamental principle underpinning the SSA.

5.17 The Law Society recommends that new section 28D be deleted. This would have the effect of ensuring that warranted and warrantless search powers operate for the FMA as they do for other bodies with similar powers.

5.18 If the provision is not deleted, we recommend that limits be prescribed, in respect of both the circumstances which enable the power to be exercised, and the timeframe within which the power can be exercised. For example, a reasonable limit might be that the power is exercisable in circumstances where there is a reasonable suspicion that evidence may be destroyed.

Nāku noa, nā

David Campbell
Vice President