New Zealand Law Society
Te Kāhui Ture o Aotearoa

Financial Markets (Conduct of Institutions) Amendment (Duty to Provide Financial Services) Amendment Bill

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

3 July 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 Markets (Conduct of Institutions) Amendment (Duty to Provide Financial Services) Amendment Bill (**Bill**).

1.2 This submission has been prepared by the Law Society's Commercial and Business Law, Human Rights and Privacy, and Criminal Law Committees.[1]

1.3 The Bill proposes amendments to the Financial Markets (Conduct of Institutions) Amendment Act 2022 (**the Act**), to prevent registered banks 'debanking' or withdrawing banking services from 'New Zealanders, body corporates or companies, whose political views or outlook may not align with the sensibilities of that institution.'

1.4 The Law Society does not support the Bill and recommends it does not proceed. The Bill attempts to address complex issues without the benefit of policy development work. As well, or because of this, it presents major drafting and workability concerns.

1.5 The Law Society does not wish to be heard on this submission.

2 Policy work is required before proceeding to legislate on debanking

2.1 As drafted, the Bill will override the common law principle that businesses are generally free to choose their contractual partners and terminate relationships with reasonable notice.[2] It will also override existing contractual provisions to that effect. It is significant reform, seeking to address a complex issue.

2.2 In the Law Society's view, substantially more work is required to understand the scale of debanking in New Zealand, how competing rights and interests ought to be balanced, whether there are any other ways of addressing the issue, and what (if anything) is the appropriate legislative response. The absence of this analysis, which is reflected in the drafting of the Bill, is a consequence of this reform being attempted by member's bill, which means it has not had the benefit of a policy development process.

2.3 Without taking a policy position in respect of de-banking, the Law Society urges that before any legislative response is pursued, a full policy process is completed, which identifies, at a minimum:

(a) The precise policy problem that needs to be addressed, existing legal controls (including the common law, and the prohibited grounds of discrimination under the Human Rights Act 1993 (**HRA**) which already apply), and whether the scale of the identified problem in New Zealand warrants legislative intervention. We note this should include analysis of the reasons for account closure in New Zealand, with both domestic and international analysis (discussed further in section 3 of this submission) indicating that it is not for the reasons on which this Bill is premised.[3]

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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 *Targa Capital Ltd v Westpac New Zealand Ltd* [2023] NZHC 230; *Bank of New Zealand v The Christian Church Community Trust* [2024] NZCA 645.

3 A review undertaken by the Reserve Bank of New Zealand – Te Pūtea Matua has found that common reasons for deposit takers to offboard customers include customers failing to meet AML/CFT

(b) The rights and obligations of both customers and banks, and how those ought to be balanced. While a customer's rights to freedom of expression and freedom of thought, conscience and belief are commonly raised in the context of debanking, a bank's right to freedom of expression and freedom of association also require consideration.

(c) The range of potential options available to address the identified policy problem, including non-legislative options. We note here that debanking and derisking have been the subject of considerable attention internationally, and this may be informative.

(d) If an obligation to provide financial services is to be imposed, the precise boundaries of that obligation. For example, whether it applies to both individuals and legal entities (i.e. both personal and business services), whether it applies to debanking of an existing customer or the provision of services to a new customer (or perhaps applies differently), and the extent of the financial services that a bank is obliged to provide.

(e) The potential implications for other regulatory obligations owed by banks, including Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) and financial sanctions. Some of these are discussed further below.

2.4 At present, the Bill does not engage with these issues, and nor does the advice prepared by the Ministry of Justice on the consistency of the Bill with the New Zealand Bill of Rights Act 1990, which addresses only the rights implications of the proposed offence provision.[4]

3 'Valid and verifiable commercial reason'

3.1 Proposed section 446JA(2) would permit a financial institution to withdraw or refuse to provide services to a consumer, or treat a consumer less favourably, in two circumstances:

(a) Where there is a valid and verifiable commercial reason; or

(b) Where the provisions of another enactment require or permit the financial institution to do so.

3.2 Debanking has been the focus of attention in other jurisdictions. In 2023, the United Kingdom's Financial Conduct Authority (**FCA**) undertook a review of account closures, noting that 'the information we have received so far does not suggest that accounts have been closed because of the political beliefs or views lawfully expressed by account holders.'[5] Rather, accounts had primarily been closed due to a bank's tolerance for risk ('derisking'). As noted by the FCA, reputational risk may be a legitimate commercial reason.

3.3 Australia has also looked into appropriate policy responses to debanking issues. In June 2023, the Australian Government acknowledged that 'banks are commercial enterprises and must manage their own risks and resources', and agreed to progress policies:[6]

(a) requiring banks to collect data on debanking practices;

requirements, involvement in fraud or criminal activity, bankruptcy or insolvency and abusive behaviour towards staff (see Reserve Bank of New Zealand – Te Pūtea Matua *Financial Inclusion Practices: Insights from the Deposit-taking sector* (11 December 2024) at 29 and 31).

4 Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Financial Markets (Conduct of Institutions) Amendment (Duty to Provide Financial Services) Amendment Bill* (11 March 2025).

5 Financial Conduct Authority (UK) *UK Payment Accounts: access and closures* (September 2023).

6 The Australian Government Treasury *Government Response: Potential Policy Responses to De-banking in Australia* (June 2023).

(b) to promote transparency and fairness in relation to debanking (for example, by requiring banks to document reasons for debanking, to provide those reasons to customers, and to give customers notice of their intention to terminate banking services); and

(c) requiring banks to publish guidance on withdrawing banking services for digital currency exchanges,

rather than seeking to prohibit debanking as proposed in this Bill.

3.4 These indicate a significant workability issue with the Bill, and a critical consideration for any future attempt to provide a legislative response to debanking. 'Valid and verifiable commercial reason' is undefined and likely to introduce uncertainty, and the standard that must be met to 'verify' the 'valid' reason is unclear. Indeed, the word 'verifiable' means 'capable of verification'. It is unclear whether the reason is one that the bank has to have verified or whether it would be enough that the reason was one capable of verification, whether or not the bank has taken steps to do so.

3.5 As drafted, the Bill also appears to presume that the grounds set out in proposed section 446JA(1)(b)(ii) to (iv) cannot also meet the exception at (2)(a). However, the climate-related disclosures regime, environmental, social, or governance considerations, and the industry of an organisation are matters that can legitimately inform a registered bank's risk assessment and management decisions. These factors are increasingly recognised as presenting material financial risks that can negatively impact a bank's financial stability, credit risk and long-term viability. In this regard, the potential effect of the Bill on the stability of the financial system should also be considered.

3.6 Additionally, the Bill may result in banks concluding that they are required to continue providing banking to consumers, where there is what most would consider a good reason not to continue providing banking services, but which cannot be easily categorised as a 'commercial reason' or 'required or permitted by any other enactment'.

3.7 For example, in *Targa Capital Ltd v Westpac New Zealand Ltd*,[7] Westpac New Zealand Limited (**Westpac**) notified Targa Capital Limited (**Targa**) it would be withdrawing from providing banking services to Targa and closing their accounts. Targa disputed Westpac's entitlement to do so. Targa was associated with Mr Alexander Ambrov, who was designated an oligarch with close ties to Russia's president. As such, a number of nations, including Australia and the United Kingdom, imposed targeted financial sanctions and a travel ban upon Mr Ambrov following Russia's invasion of Ukraine in March 2022. Mr Ambrov was designated due to his position as the co-founder of Russia's largest steel company. New Zealand chose to impose a travel ban on Mr Ambrov and his immediate family, but not financial sanctions.

3.8 Westpac conducted a review and risk assessment regarding its provision of ongoing banking services to Targa. The assessment identified three significant risks that led to the decision to withdraw those services. First, there was a regulatory risk, as other overseas entities or employees within the Westpac Group might be seen as violating the regulatory sanction laws of their respective countries. Second, due to the potential violations of the sanction laws imposed by other nations involving Westpac Group entities, there was a contractual risk, as Westpac could be deemed in breach of contractual obligations with third party suppliers.

7 *Targa Capital Ltd v Westpac New Zealand Ltd* [2023] NZHC 230.

Third, there was a capital markets risk. The perception that the Westpac Group might be violating sanctions could adversely affect its access to offshore financial markets.

3.9 Targa's application for an injunction to prevent Westpac from terminating the banking relationship was declined. The Court found that it was 'not seriously arguable that Westpac unreasonably assessed its exposure to contract risk and capital markets risk from continuing its relationship with Targa,' Westpac was 'entitled to have regard to its own legitimate commercial interests' and 'a court should be reluctant to find that a party has unreasonably assessed its own commercial interests.'[8]

3.10 Under the Bill, however, it is not clear that the national sanction regime would suffice to enable Westpac to withdraw banking services from a company associated with Mr Ambrov, despite the clear financial risks in continuing to do so and the requirement to follow the sanctions regimes of countries with associated branches of the parent company. Westpac would be required to rely on the 'valid and verifiable commercial reason' exception, but it is not clear that would apply, or would be sufficiently certain so as to limit the risk of litigation.

4 Drafting issues, if the Bill is to proceed

4.1 Notwithstanding the Law Society's view that the Bill should not progress, we set out below several drafting concerns that would need to be addressed for the present Bill to be enacted in a workable form.

Proposed section 446JB – the offence provision

4.2 As described by the explanatory note to the Bill, new section 446JB provides the 'teeth' to the duty, by inserting a criminal offence for contravening the prohibition described in new section 446JA. This offence imposes a penalty of either a fine not exceeding $50,000 or a term of imprisonment of up to three months for an individual, or a fine not exceeding $500,000 in the case of a body corporate.

4.3 The Law Society agrees with the Ministry of Justice that this would, and should be, interpreted as an implied mens rea offence.[9] However, we are of the view that the offence provision is unworkable, premised as it is on new section 446JA. It is not possible to separate the operation of the criminal offence from the uncertainty of the substantive provision. The factors listed in new section 446JA(1)(b) are too broad to support criminal liability, particularly to the serious level of potential imprisonment.

4.4 Where legislation establishes criminal liability, the conduct that is captured must be sufficiently clear. In the Law Society's view (and for the reasons set out above), the factors listed in new section 446JA(1)(b) cannot provide the clarity and certainty necessitated by potential criminal sanction.

4.5 The Law Society recommends that new section 446JB is removed.

8 *Ibid*, [50], [69].
9 Above, n 3.

Section 21 of the HRA

4.6 Proposed section 446JA(1)(b)(i) is unnecessary. Discrimination in the provision of financial services, on the grounds listed in section 21 of the HRA, is already prohibited.[10] Further, the inclusion of this provision could be interpreted as providing a carve-out, which could permit a service provider to discriminate on a prohibited ground where there is a valid and verifiable commercial reason for doing so.

4.7 We presume that it is not the policy intention of the Bill to create such a carve-out, and we therefore recommend that new section 446JA(1)(b)(i) is deleted. If it is not deleted, we recommend the addition of a clarification that nothing in the Bill affects the prohibition on discrimination as set out in the HRA.

Interpretation

Financial institution

4.8 While registered banks do fall within the definition of a 'financial institution' under the Financial Markets Conduct Act, the definition is broader than just registered banks and includes other financial service entities such as insurers and licensed non-banking Deposit Takers (**NBDT**), that are in the business of providing one or more 'relevant' services.[11]

4.9 This means new section 446JA would operate as inclusive of *all* financial institutions, not just registered banks. It is unclear whether this is intentional; however, we suggest that the wording used in new section 446JA(1) be re-drafted to clearly identify the target institution for the provision as registered banks rather than all financial institutions.

Financial services

4.10 The term 'financial services' is defined in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 and can even apply to changing foreign currency. Use of the term 'financial services' would include an unworkably broad range of decisions, and include individual products which are designed for specific circumstances and to suit specific consumers.

4.11 We consider it is unlikely that this breadth of services was intended to be captured by the Bill and recommend that the use of this term be reconsidered. It may be more appropriate that the Bill simply ensures access to essential banking services.

Wholesale or retail consumer

4.12 Section 446JA(3)(b) provides that, for the purposes of section 446JA, a consumer is "a wholesale or retail consumer." These are not familiar terms under the Act, and raise further ambiguity.

4.13 The labels 'wholesale' or 'retail' ascribe to the nature of a sale, not the type of consumer. It is likely this would risk conflating the financial institution's service with the end user's legal status. Further, body corporates or companies aside from small businesses are not typically considered 'consumers' for the purposes of the financial services legislative framework. The nature of the relationship between a financial institution providing financial services to a

10 Section 44, HRA.
11 Section 446E, Financial Markets (Conduct of Institutions) Amendment Act 2022.

commercial entity and the commercial entity in question is one of contract and commercial law and so consumer law protections do not typically apply. The Law Society suggests reconsideration of where the provisions are to be located.

Nāku noa, nā

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