



## COVERSHEET

<b>Minister</b>	Hon Dr David Clark	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	<b>Financial Markets (Conduct of Institutions) Amendment Bill: Supplementary Order Paper</b>	<b>Date to be published</b>	11 July 2022

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
June 2022	Financial Markets (Conduct of Institutions) Amendment Bill: Supplementary Order Paper	Office of the Minister of Commerce and Consumer Affairs
9 June 2022	Cabinet Legislation Committee – Minute of Decision [LEG-22-MIN-0104]	Cabinet Office

### **Information redacted**

**NO**

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## In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

## Supplementary Order Paper to the Financial Markets (Conduct of Institutions) Amendment Bill: Approval for presentation

### Proposal

- 1 I seek Cabinet's approval to present the attached supplementary order paper (**SOP**) to the Financial Markets (Conduct of Institutions) Amendment Bill (**Bill**) to the House of Representatives.

### Background to the Bill

- 2 The Bill introduces a conduct licensing regime for banks, insurers and non-bank deposit takers (collectively **financial institutions**). Under the Bill, financial institutions will be required to treat consumers fairly (the **fair conduct principle**), and must establish, implement and maintain effective fair conduct programmes to ensure that they comply with the principle. They will be required to be licensed in respect of their conduct towards consumers, and the Financial Markets Authority (**FMA**) will monitor and enforce the regime.
- 3 The new regulatory regime contained in the Bill is principles-based, intending to drive positive industry conduct and culture change to ensure the fair treatment of consumers. It is not a rules-based regime which focuses on prescribing how outcomes must be achieved. It needs to have a high degree of flexibility as it will apply to a range of financial institutions and the diverse range of business models and distribution arrangements used by those institutions.
- 4 The Bill was reported back to the House in August 2020. The second reading of the Bill was completed on 12 May 2022 and it is currently awaiting Committee of the Whole House.
- 5 On 9 February 2022, Cabinet approved changes to be made to the Bill via a SOP in relation to the treatment of third-party intermediaries, the application of the Bill to the Lloyd's insurance market and the treatment of vulnerable consumers [DEV-22-MIN-0003 refers]. The main purpose of the changes was to ensure that the Bill is workable in its application to a range of financial institutions and to the diverse range of business models and distribution arrangements used by these institutions.

### Policy in this SOP

#### *Changes to provisions relating to intermediaries*

- 6 The Bill as currently drafted sets certain prescriptive requirements on financial institutions to train and manage or supervise their intermediaries (e.g. third

party distributors or advisors). I have had feedback from industry that these requirements may not be appropriate in all circumstances and could lead to undesirable structural changes in the market if intermediaries reduce the number of institutions they work with. This could reduce competition and consumer choice.

- 7 Cabinet agreed to make changes to address these concerns by making the Bill's provisions relating to intermediaries more flexible and less prescriptive, and by limiting the scope of who is caught as an intermediary [DEV-22-MIN-0003 refers]. The SOP makes the following changes to the Bill to give effect to these decisions:
  - 7.1 removes the obligations on financial institutions to train and manage or supervise their intermediaries;
  - 7.2 inserts instead requirements for financial institutions to:
    - 7.2.1 ensure that the distribution methods they use, including distribution through intermediaries, are consistent with the fair conduct principle,
    - 7.2.2 monitor the consistency of those methods with the fair conduct principle, and
    - 7.2.3 regularly review their distribution methods and remedy any issues;
  - 7.3 inserts a requirement for financial institutions to have regard to the legal obligations that its intermediaries have (for example, in the case of financial advice providers, conduct duties under subpart 5A of Part 6 of the Financial Markets Conduct Act 2013);
  - 7.4 removes intermediaries from the obligation for certain persons to follow procedures or processes that are necessary or desirable to support the financial institution's compliance with the fair conduct principle. This general provision is not needed for intermediaries now that the distribution requirements above have been inserted; and
  - 7.5 amends the Bill's definition of 'intermediary' so that it now only covers intermediaries who are involved in the distribution of a financial institution's products and services to consumers (parties involved in preparatory services or assisting in administering or performing the services are no longer covered as intermediaries).

*Remove obligations to train, and manage or supervise, agents*

- 8 In the course of drafting these provisions, it was identified that further changes are required to the Bill's obligations in relation to agents of financial institutions. Agents are third parties who have authority to act on behalf of financial institutions, for example, when providing products or handling claims.

- 9 Feedback from stakeholders indicated that, similar to intermediaries, the Bill's current requirements for institutions to train and manage agents may not be appropriate in all circumstances and there is a lack of certainty over whether and when persons are acting as agents. This could give rise to unintended regulatory burden and compliance costs.
- 10 Cabinet has authorised me to make additional policy decisions consistent with the policy intent of its previous decisions [DEV-22-MIN-0003 refers]. I therefore propose to remove the obligations on financial institutions to train and manage or supervise their agents. This means that these obligations now apply only in relation to employees, rather than to intermediaries and agents as well. Institutions will still have obligations to ensure they have general processes and procedures in relation to their agents. However, removing the prescriptive requirement fits with the principles-based nature of the regime generally and avoids prescriptive requirements continuing to apply to those intermediaries that are also agents, which would not be consistent with previous Cabinet policy decisions.

*Lloyd's insurance market*

- 11 The SOP also makes the following changes to the Bill in relation to the Lloyd's insurance market to ensure the equivalent treatment of this uniquely structured market to traditional licensed insurers [DEV-22-MIN-0003 refers]:
- 11.1 it ensures that the Bill's core conduct obligations will apply to Lloyd's managing agents (who are in the best position to meet these obligations) and not to underwriting members;
- 11.2 it ensures that minimum conduct programme requirements for Lloyd's managing agents can be prescribed in regulations, and that exemption regulations can specify the consequences of breaching terms and conditions of an exemption; and
- 11.3 it provides for the regulation-making powers set out in paragraph 24 below.

*Vulnerable consumers*

- 12 The Bill requires financial institutions to have regard to certain matters when developing their fair conduct programmes, including the types of consumers that they deal with. The SOP changes the Bill to add a reference to consumers in vulnerable circumstances [DEV-22-MIN-0003 refers].

*Other changes*

- 13 The SOP makes other minor or technical changes and other changes to improve the drafting of the Bill, including in particular:
- 13.1 clarifying the territorial scope of the Bill;

- 13.2 removing the requirement for financial institutions to provide a copy of their fair conduct programme to the FMA (noting that the FMA can request fair conduct programmes as needed using existing powers);
- 13.3 ensuring that any enhancements or improvements identified as necessary to a financial institution's services or products are made available within a reasonable time;
- 13.4 adding "timely" to the requirement for financial institutions to communicate with consumers in a clear, concise, and effective manner;
- 13.5 removing a requirement that employees be a "fit and proper person" as there is an existing requirement that they be competent to carry out the work for which they are engaged;
- 13.6 enabling financial institutions to have regard to the types of agents that are engaged to carry out work, their authority, and the nature of that work;
- 13.7 ensuring the definition of 'intermediary' captures situations where financial institutions act as intermediaries of providers who are not themselves financial institutions;
- 13.8 deleting an amendment that was made to the Credit Contracts and Consumer Finance Act 2003 to include an information-sharing provision, because a similar provision has been enacted in the Commerce Amendment Act 2022.

### Impact analysis

- 14 Two Regulatory Impact Assessments are relevant:
  - 14.1 A Regulatory Impact Assessment was prepared and submitted at the time that Cabinet considered and approved the policy to be implemented through the SOP [DEV-22-MIN-0003 and [Regulatory Impact Statement: Financial Markets \(Conduct of Institutions\) Amendment Bill – Further policy decisions](#) refer].
  - 14.2 An earlier Regulatory Impact Assessment was also prepared and submitted to support the introduction of the Bill [DEV-19-MIN-0237 and [Regulatory Impact Statement: Regulatory regime to govern the conduct of financial institutions](#) refer].
- 15 No additional Regulatory Impact Assessments are required because no further policy approvals are required for the amendments to the Bill made through the SOP.

### Compliance

- 16 The SOP complies with the following:

- 16.1 the principles of the Treaty of Waitangi;
- 16.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
- 16.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to the paper);
- 16.4 the principles and guidelines set out in the Privacy Act 2020;
- 16.5 relevant international standards and obligations; and
- 16.6 the [Legislation Guidelines](#) (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

### **Consultation**

- 17 The Treasury, FMA, RBNZ, and Commerce Commission have been consulted on this paper. The Department of the Prime Minister and Cabinet (Policy Advisory Group) has been informed.
- 18 MBIE has completed extensive consultation in developing the policy underlying the SOP, including the release of two discussion documents in April and May 2021. The feedback received was used to inform final policy proposals.
- 19 MBIE has carried out targeted consultation with industry stakeholders and legal experts on the text of the SOP in April 2022.

### **Binding on the Crown**

- 20 The SOP does not change the application of the Financial Markets Conduct Act 2013 to the Crown. The Financial Markets Conduct Act will continue to bind the Crown as set out in section 15 of that Act.

### **Creating new agencies or amending law relating to existing agencies**

- 21 The legislation does not create any new agencies or amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

### **Allocation of decision-making powers**

- 22 The SOP does not involve the allocation of decision-making powers between the executive, courts or tribunals.

### **Associated regulations**

- 23 Regulations will be needed to fully implement the changes made in relation to Lloyd's, as well as to give effect to Cabinet's decisions on other regulations to be made under the Bill [DEV-22-MIN-0003 refers]. These will be developed once the Bill has been passed.

- 24 The SOP makes the following changes to the regulation-making powers in the Bill:
- 24.1 regulations may prescribe requirements for a Lloyd's managing agent's fair conduct programme and making information about the programme publicly available;
  - 24.2 regulations may impose terms and conditions on Lloyd's, a Lloyd's underwriter or a Lloyd's managing agent in connection with the Bill's licensing exemption for Lloyd's underwriters;
  - 24.3 the ability for regulations to provide that fair conduct programmes must not, or are not required to, impose obligations in relation to an intermediary is extended to also apply to non-intermediary agents of a financial institution.

### **Other instruments**

- 25 The SOP does not include any provisions empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

### **Definition of Minister/department**

- 26 The SOP does not contain a definition of a Minister, department or chief executive or any equivalent positions.

### **Commencement of legislation**

- 27 The SOP does not make any changes to the commencement of the Bill.

### **Parliamentary stages**

- 28 The Bill holds a category 2 priority on the 2022 Legislation Programme (must be passed within the year). The Bill completed its second reading on 12 May 2022 and is currently awaiting Committee of the Whole House. This SOP should facilitate the passage of the Bill through its remaining stages of the House.
- 29 The SOP should be presented in the week of 20 June 2022 and third reading should take place in the week of 27 June 2022. I wish to act quickly to address the known risks of consumer harm in the financial sector.
- 30 The Bill also needs to be in place before the end of June 2022 in order that new FMA funding and industry levy regulations can commence on 1 September 2022. Cabinet has previously noted that the commencement of these levies on 1 September 2022 gives rise to a possible risk of under-recovery of levies by the Crown in the 2022/23 financial year [DEV-22-MIN-008 refers]. Any further delay will increase the amount of under-recovery.

## Proactive Release

- 31 This paper will be published on MBIE's website within 30 business days of decisions being confirmed by Cabinet, subject to withholdings as appropriate and consistent with the Official Information Act 1982.

## Recommendations

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

- 1 **note** that the Financial Markets (Conduct of Institutions) Amendment Bill completed its second reading on 12 May 2022 and holds a category 2 priority on the 2022 Legislation Programme (must be passed within the year);
- 2 **note** that on 9 February 2022 the Cabinet Economic Development Committee agreed [DEV-22-MIN-0003 refers]:
  - 2.1 to make the Bill's provisions relating to intermediaries more flexible and less prescriptive, and to limit the scope of who is caught as an intermediary;
  - 2.2 to ensure that the Bill's provisions relating to agents are consistent with the approach taken to intermediaries;
  - 2.3 to ensure the Bill applies broadly equivalent treatment to the Lloyd's insurance market as traditional licensed insurers; and
  - 2.4 to add a reference to consumers in vulnerable circumstances to the Bill's provisions requiring financial institutions to have regard to the types of consumers they deal with;
- 3 **note** that the attached Supplementary Order Paper will give effect to the decisions referred to in paragraph 2 above, as well as certain minor and technical decisions made by the Minister of Commerce and Consumer Affairs following consultation and drafting;
- 4 **agree** to the presentation of the Supplementary Order Paper in the House (PCO 22342-1/3.0)
- 5 **agree** that the Government propose that the Bill be enacted by the end of June 2022.

Authorised for lodgement

Hon Dr David Clark  
Minister for Commerce and Consumer Affairs