

Short-Form Supplementary Departmental Disclosure Statement

Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Bill

A short form supplementary disclosure statement for proposed government amendments to a Bill seeks to bring together in one place some selected information to support and enhance the Parliamentary and public scrutiny of those proposed amendments.

It highlights certain significant powers or features in the proposed amendments that might be of particular Parliamentary or public interest and warrant an explanation.

It provides a limited supplement to the original disclosure statement for the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Bill, dated 7 February 2019, which can be found at this link

<http://disclosure.legislation.govt.nz/bill/government/2019/115>

This supplementary disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

12 August 2019.

Significant Legislative Features

Offences, penalties and court jurisdictions

1. Do the proposed amendments create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalties)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>The Bill provides for opt-in licensing of financial benchmark administrators by the Financial Markets Authority. Financial benchmarks can be generated from financial products or other securities (clause 22).</p> <p>Financial products are subject to the Part 2 fair dealing provisions of the Financial Markets Conduct Act 2013 (the “FMC Act”). This means that the FMA is the regulator of misleading and deceptive conduct in relation to financial products. Misleading and deceptive conduct in relation to securities that are not financial products (as defined by the FMC Act) falls under the Part 1 unfair conduct provisions of the Fair Trading Act 1986. The Commerce Commission is the regulator of the Fair Trading Act.</p> <p>Therefore, in the Bill as reported back, the FMA - the supervisor of licensed benchmarks - has the power to take action against misleading and deceptive conduct in relation to <i>financial products</i> for the purpose of manipulating a financial benchmark, but has no power to take action against misleading and deception conduct in relation to <i>other securities</i> for the purpose of manipulating a benchmark.</p> <p>Clause 22AA – introduced by the SOP – addresses this gap. It amends the definition of financial product to include a security that is used to generate a financial benchmark. This means that any security that is used to generate a financial benchmark is now subject to Part 2 of the FMC Act.</p> <p>Engaging in misleading or deceptive conduct when dealing in financial products may give rise to liability for a civil pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, three times the amount of the gain made or the loss avoided, and \$1 million in the case of an individual or \$5 million in any other case (section 490).</p> <p>By adding any security that is used to generate a financial benchmark to the definition of financial products – engaging in misleading or deceptive conduct when dealing with these securities may also give rise to liability for a civil pecuniary penalty.</p> <p>The Bill as reported back does not, and the SOP does not, amend the civil pecuniary penalty provisions of the FMC Act.</p>	
1.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice did not have any comments.	

Privacy issues

2. Do the proposed amendments create, amend, or remove any provisions relating to the collection storage, access to, correction of, use or disclosure of personal information?	NO
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Compulsory acquisition of private property

3. Do the proposed amendments contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4. Do the proposed amendments create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

5. Do the proposed amendments affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the burden of proof for offences

6. Do the proposed amendments:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for any offence or civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

7. Do the proposed amendments create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

8. Do the proposed amendments create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

9. Do the proposed amendments create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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10. Do the proposed amendments create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

11. Do the proposed amendments contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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