Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill relates to the linkages between New Zealand's financial markets and international financial markets, in particular through derivatives markets. The purpose of the Bill is to enable New Zealand financial market participants to comply with international rules and therefore to continue to enter into derivatives and certain other types of financial instruments with important overseas financial entities. The Bill is an omnibus Bill, which amends a number of Acts to achieve this single broad purpose. The amendments are made in the context of 2 sets of international reforms. Specifically, the reforms relate to margin requirements for certain types of derivatives and to the administration of financial benchmarks (which are often referenced in derivatives).

The Bill—

- amends a number of Acts to remove impediments to compliance with foreign margin requirements for over-the-counter (**OTC**) derivatives. This will enable relevant New Zealand entities to continue to enter into certain types of derivatives with international counterparties, in order to, amongst other things, continue to effectively hedge the foreign currency risk associated with overseas funding programmes; and
- establishes a new licensing regime for administrators of financial benchmarks under the Financial Markets Conduct Act 2013. This will enable those benchmarks to be referenced in financial instruments (particularly derivatives) with important international counterparties.

Enabling compliance with foreign margin requirements for OTC derivatives

New rules are being implemented across Group of Twenty (**G20**) countries which require parties to certain types of derivatives to exchange collateral. This collateral is also referred to as "margin". These foreign rules apply to large New Zealand banks and other New Zealand entities, such as the Accident Compensation Corporation (**ACC**) and the New Zealand Superannuation Fund, either directly or by virtue of the rules becoming expected market practice internationally.

Some features of New Zealand law impede the ability of affected entities to comply with these rules, which in the event of default require posted collateral to be immediately available to the non-defaulting counterparty. Inability to comply with these rules may impact affected New Zealand entities' integration with international financial markets and have significant implications for New Zealand's financial system.

Part 1 of the Bill makes a number of amendments to the Reserve Bank of New Zealand Act 1989 (the **RBNZ Act**), the Corporations (Investigations and Management) Act 1989 (**CIMA**), the Companies Act 1993 (**Companies Act**), and the Personal Property Securities Act 1999 (**PPSA**) to enable compliance with these rules.

Key provisions of *Part 1* of the Bill—

- enable non-defaulting derivative counterparties to access posted collateral immediately (if the defaulting party is in statutory management under CIMA or voluntary administration under Part 15A of the Companies Act) or subject to a short stay of generally no longer than 2 days (if the defaulting party is in statutory management under the RBNZ Act):
- give priority under the Companies Act to the claims of derivative counterparties over those of preferential creditors, including the Commissioner of Inland Revenue and employees, in respect of claims over posted collateral comprised of accounts receivable. This ensures that posted collateral is treated the same regardless of whether the assets making up the collateral are accounts receivable or some other type of asset. Claims on posted collateral comprised of assets other than accounts receivable already have effective priority over preferential claims:
- give priority under the PPSA to the claims of derivatives counterparties over the claims of any other person with a security interest in posted collateral:
- clarify that in certain circumstances the transfer of title in collateral does not create a security interest for the purposes of the PPSA.

Application of amendments

In order to minimise any impacts on non-derivative creditors, the amendments set out above will only apply in tightly defined circumstances, specifically, where—

- a counterparty to the derivative transaction is a registered bank, the ACC, the New Zealand Superannuation Fund, or another entity prescribed by regulations; and

- the derivative meets certain requirements (such as being subject to a legally robust netting agreement); and
- collateral posted in relation to the derivative meets certain requirements, such as taking the form of a prescribed financial product (such as cash or certain types of investment securities).

Transitional arrangements

The amendments will apply to relevant derivatives entered into after the amendments have come into force.

Introduction of licensing regime for administrators of financial benchmarks

The Bill also establishes a licensing regime for administrators of financial benchmarks under the Financial Markets Conduct Act 2013 (the **FMC Act**). This regime is being introduced in response to new regulations developed by the European Union (the **EU**) in relation to the generation and operation of financial benchmarks. Other jurisdictions may implement similar regimes. The regulations have effect outside the EU as foreign jurisdictions and benchmark administrators in those jurisdictions must meet requirements in the new regulations in order for the benchmarks they administer to be used in important financial instruments with parties located in the EU.

New Zealand banks and other large private and public sector organisations rely on entering into various derivative instruments with EU counterparties that reference New Zealand benchmarks. These derivatives are critical for hedging, investment, and capital-raising purposes. If New Zealand benchmarks were not accepted in the EU and affected entities were not able to enter into these derivative instruments, this would have significant implications for the affected entities and New Zealand's wider financial system.

The new licensing regime for administrators of financial benchmarks will—

- provide additional assurance around the accuracy, integrity, reliability, and continuity of New Zealand benchmarks:
- ensure continued acceptance of New Zealand benchmarks in EU financial markets:
- avoid significant costs to the New Zealand economy that would arise if our benchmarks were not able to be used in the EU.

Part 2 of the Bill—

- enables the administrator of a financial benchmark to opt-in to obtaining a market services licence under Part 6 of the FMC Act. Supervision and enforcement of licence obligations will be carried out by the Financial Markets Authority (the **FMA**) and detailed licensing requirements will be set out in regulations. These requirements will in large part reflect what is required by the EU regulations in order for New Zealand's regulatory regime to achieve formal "equivalence" status:

- provides powers for the FMA to compel administrators of benchmarks to continue to generate, operate, or transfer a benchmark, and contributors to benchmarks to continue to contribute data or information to the benchmark administrator, for a specified period and in accordance with specified requirements. These powers are to be used to ensure the continued availability of financial benchmarks for a period of time in emergency-type situations. This will promote market stability while a smooth transition of a benchmark to another administrator or an orderly cessation of generation of a benchmark can be arranged. If an administrator or a contributor does not comply with a direction from the FMA, the entity may be subject to civil liability, including pecuniary penalties of $200,000 in the case of an individual or $600,000 in any other case.

Commencement

The amendments will come into force on a date or dates specified by 1 or more Orders in Council, but no later than 6 months after the date of Royal assent.

The Bill is expected to be fully in force by the end of 2019, but the commencement date or dates are to be appointed by Order in Council in order to ensure that the different parts of the Bill can come into force as soon as the related regulations are ready.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2019&no=115

Regulatory impact assessments

The Ministry of Business, Innovation, and Employment and the Reserve Bank of New Zealand produced a regulatory impact assessment on 16 May 2018, and the Ministry of Business, Innovation, and Employment produced a further regulatory impact assessment on 16 July 2018, to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

Copies of these regulatory impact assessments can be found at—

- https://www.mbie.govt.nz/assets/e3a8c15eb2/regulatory-impact-statement-a-nz-response-foreign-derivative-margin-requirements.pdf
- https://www.mbie.govt.nz/assets/b7886f254a/impact-summary-introduction-of-a-new-regulatory-regime-for-financial-benchmarks.pdf
- http://www.treasury.govt.nz/publications/informationreleases/ria

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides for the Bill to come into force on a date or dates appointed by Order in Council. The whole Bill must come into force no later than 6 months after the date of Royal assent. The reason for the deferred commencement is that regulations need to be made to give effect to some parts of the Bill (for example, licensing requirements for financial benchmarks).

Part 1
Amendments relating to derivative margins

This Part amends various Acts to ensure that parties to certain derivatives are not limited or prevented from exercising rights to enforce security interests over collateral that is posted for those derivatives. The collateral is property that a party to a derivative puts up to secure performance under the derivative.

Subpart 1—Amendments to Reserve Bank of New Zealand Act 1989

This subpart amends the moratorium provisions that apply when a registered bank is subject to statutory management under the Reserve Bank of New Zealand Act 1989. The moratorium provisions in section 122 of that Act prevent creditors and other persons from taking certain actions and exercising certain rights in relation to a bank that is in statutory management. In summary, *new section 122(9A)* (inserted by *clause 4*) provides that section 122 does not limit or prevent the exercise of any rights to enforce a security interest over collateral that was posted for a qualifying derivative if—

- the counterparties include at least 1 qualifying person; and
- the rights are exercised after a particular time; and
- at the time that the security agreement was entered into, the person that will exercise the rights did not know that the other party was insolvent.

Various key terms are defined in *new section 122A*, which is inserted by *clause 5*. These terms include—

- qualifying derivative. The term derivative has the same meaning as in section 8(4) of the Financial Markets Conduct Act 2013. However, it also includes certain forward contracts relating to currency (which would otherwise be excluded from being derivatives by the Financial Markets Conduct (Forward Foreign Exchange Contracts) Designation Notice 2017). Derivatives are financial products that are used to hedge financial risk (for example, a futures contract). A derivative is a qualifying derivative if—
  - the derivative is subject to a netting agreement or netting under the rules of a designated settlement system; and
  - the posted collateral is a financial product, an investment security, a negotiable instrument, or an intangible; and

- the counterparty's interest in the collateral is evidenced in writing:
- qualifying counterparties. This term includes registered banks, the Accident Compensation Corporation, the Guardians of New Zealand Superannuation, and operators of designated settlement systems. In addition, regulations may prescribe entities or classes of entities as qualifying counterparties (*see* amendments to the regulation-making power in *clause 6* (which amends section 173 of the Reserve Bank of New Zealand Act 1989).

Unlike the amendments in *subparts 2 to 4*, the amendments in this subpart require the security interest to be exercised only after a particular time (that is, there is a stay on the right to exercise the rights). The default time (before which the rights cannot be exercised) is the close of the day after the date on which the statutory management commenced. However, *new sections 122B to 122D* (inserted by *clause 5*) allow the Reserve Bank to reduce or extend this stay on the exercise of rights to enforce a security interest over posted collateral.

Clause 7 inserts transitional provisions into the Reserve Bank of New Zealand Act 1989 relating to these changes. These new provisions apply only to qualifying derivatives entered into on or after the changes come into force.

Subpart 2—Amendments to Companies Act 1993

Clause 9 makes similar changes to the provisions that apply when a company is in administration under the Companies Act 1993. Various provisions of Part 15A of that Act protect a company's property during an administration. For example, section 239ABC prevents a person during the administration of a company from enforcing a charge over the property of the company except with the administrator's written consent or with the permission of the court. In summary, the amendments in this clause provide that various provisions in Part 15A do not limit or prevent the exercise of any rights to enforce a security interest over collateral that was posted for a qualifying derivative if—

- the counterparties include at least 1 qualifying person; and
- at the time that the security agreement was entered into, the person that will exercise the rights did not know that the other party was insolvent.

Clause 10 inserts transitional provisions into the Companies Act 1993 relating to the changes made by this subpart. These new provisions apply only to qualifying derivatives entered into on or after the changes come into force.

Clause 11 amends the preferential claims provisions in Schedule 7 of the Companies Act 1993 (which apply during the liquidation of a company). Clause 2 of that schedule gives various claims priority over the claims of persons under certain security interests. In summary, the amendments in this clause provide that the change in priority does not apply to accounts receivable that are posted as collateral for a qualifying derivative if—

- the counterparties include at least 1 qualifying person; and

- at the time that the security agreement was entered into, the person that will exercise the rights did not know that the other party was insolvent.

Subpart 3—Amendments to Corporations (Investigation and Management) Act 1989

Clause 14 makes similar changes to those in *subpart 1*. That is, the changes allow a secured party to enforce a security interest over collateral that is posted for a qualifying derivative (despite a moratorium that is in place because the other party to the derivative is in statutory management). The main differences are that—

- the amendments in this subpart apply in the context of a statutory management of a corporation under the Corporations (Investigation and Management) Act 1989 (rather than a registered bank); and
- the restriction on exercising the rights only after a particular time does not apply.

Clauses 13 and 15 insert transitional provisions into the Corporations (Investigation and Management) Act 1989 relating to these changes. These new provisions apply only to qualifying derivatives entered into on or after the changes come into force.

Subpart 4—Amendments to Personal Property Securities Act 1999

Clause 18 amends the application section of the Personal Property Securities Act 1999 to clarify that the Act does not apply to a transfer of all right, title, and interest in and to the collateral posted for a qualifying derivative where there is no obligation to retransfer the same collateral.

Clause 19 inserts *new section 103B* into the Personal Property Securities Act 1999. This new section provides for the interest of a person in collateral posted under a qualifying derivative to have priority over other security interests if at the time that the security agreement was entered into, the person that will exercise the rights did not know that the other party was insolvent.

Clauses 17 and 20 insert transitional provisions into the Personal Property Securities Act 1999 relating to these changes. These new provisions apply only to qualifying derivatives entered into on or after the changes come into force.

Part 2
Amendments relating to financial benchmarks

This Part amends the Financial Markets Conduct Act 2013 (the **FMC Act**) to allow administrators of a financial benchmark to hold a market services licence.

An administrator can apply for a licence to act as an administrator of a financial benchmark, but is not required to do so. The granting of a licence and the enforcement of a licence are subject to the general provisions that apply to market services licences (*see generally* Part 6 of the FMC Act). There are 3 purposes of the new provisions relating to financial benchmark licences as follows:

- ensuring that the benchmark has integrity, and is accurate and reliable, by ensuring that the licence is subject to appropriate requirements, and ensuring that the Financial Markets Authority (the **FMA**) has powers to supervise and enforce those requirements:
- avoiding instability or disruption of financial markets by ensuring that the licence is subject to appropriate requirements, and giving the FMA powers of direction to licensees, authorised bodies, and contributors to financial benchmarks:
- ensuring that the benchmark can be referenced or otherwise used in international financial instruments by promoting the recognition of the benchmark in relevant overseas jurisdictions.

Clause 22 amends the interpretation section (section 6) by inserting 3 new definitions: financial benchmark, administrator of a financial benchmark, and contributor. In summary,—

- a financial benchmark is a price, estimate, rate, index, or value that is generated periodically from source material such as transactions or financial products, and is referenced for the purposes of calculating interest, prices, values, or other amounts, or measuring the performance of financial products:
- an administrator of a financial benchmark is a person who controls the generation and operation of a financial benchmark:
- a contributor is a person whose activities result in the provision of information or data that is used for the generation or operation of a financial benchmark.

Clause 23 amends the overview of Part 6 of the FMC Act contained in section 386.

Clause 24 amends section 390 to provide that a person may hold a market services licence to act as an administrator of a financial benchmark.

Clause 25 amends the principles that guide the exercise of the FMA's powers in section 393 to refer to the new purposes relating to licences to act as an administrator of a financial benchmark (*see new section 448B*).

Clause 26 amends section 396 to provide that a licence must be issued where the issue of that licence will promote either or both of the purposes set out in *new section 448B*.

Clause 27 amends section 403 to provide that a financial benchmark licence can be subject to conditions imposed by the FMA to achieve the purposes set out in *new section 448B*, for example, by ensuring the benchmark complies with applicable international requirements.

Clause 28 inserts *new subpart 7A of Part 6*, which applies to financial benchmark licences.

In that subpart, *new section 448B* provides for 2 additional purposes in relation to licences to act as an administrator of a financial benchmark. In summary, these purposes are—

- to ensure the accuracy, integrity, and reliability of financial benchmarks, and to provide for their continued availability; and
- to promote the recognition of those benchmarks in overseas jurisdictions.

These purposes are additional to the purposes set out in sections 3 and 4 of the FMC Act.

New sections 448C to 448J provide 3 additional powers of direction to the FMA.

New section 448C allows the FMA to direct a contributor of information or data that is used to generate or operate a financial benchmark to continue to provide that information or data in circumstances where—

- the FMA is satisfied that it is necessary or desirable in order to promote the purposes set out in *new section 448B*; and
- the contributor has ceased or is likely to cease providing that information or data.

The direction applies to information or data that is necessary or desirable for the generation or operation of the financial benchmark.

The direction may be made on terms and conditions the FMA thinks fit (*see new section 448I*), and may include a direction to provide that information or data to a person other than the administrator. *New section 448J* provides that no civil or criminal proceedings may be brought against a contributor by reason of the contributor having provided information or data in good faith and in accordance with a direction.

Where an administrator or an authorised body has or is likely to cease generating or operating a financial benchmark, then *new section 448D* allows the FMA to direct that person to—

- continue to generate or operate that benchmark; or
- cease the generation or operation of that benchmark; or
- transfer the generation or operation of that benchmark to a specified entity.

This power may only be used if the FMA is satisfied that it is necessary or desirable in order to promote the purposes set out in *new section 448B*.

The direction may be given on terms and conditions that the FMA thinks fit (*see new section 448I*), including requirements relating to—

- making changes to the rules, procedures, or documents by or under which the financial benchmark is generated or operated; or
- the provision of material (such as data, computer software, instructions, and methodologies) to another person, where that material is necessary or desirable for the generation, operation, or transfer of the financial benchmark. *New section 448J* provides that no civil or criminal proceedings may be brought against a person by reason of that person having provided material in good faith and in accordance with a direction.

The purpose of these new direction powers is to avoid disruption to market participants by ensuring that a financial benchmark can continue to be generated and refer-

enced or otherwise used on an ongoing basis. Where cessation is appropriate, the new powers ensure that a benchmark will continue to be available for a period of time and that the cessation will happen in an orderly manner.

New section 448G allows the FMA to give an interim direction where the FMA is considering whether to use a power under *new section 448C or 448D* and considers that giving an interim direction is necessary or desirable in the public interest. The FMA must notify the recipient of an interim direction as soon as is reasonably practicable (*see new section 448H*). This section allows the FMA to issue short-term directions in cases of urgency. It is similar to the FMA's power to make an interim stop order under section 465 of the FMC Act.

Clause 29 amends section 449 to provide that a breach of a direction under *new section 448C, 448D, or 448G* may result in civil liability, including a pecuniary penalty not exceeding $200,000 in the case of an individual or $600,000 in any other case.

Clause 30 amends section 451, to provide that the holder of a licence to act as an administrator of a financial benchmark will not be an FMC reporting entity by reason only of the fact that they hold that licence.

Clause 31 amends section 532 to provide that a decision of the FMA to give a direction under *new section 448C, 448D, or 448G* can be appealed on a question of law only.

Clause 32 amends section 546 to provide that conditions of the type provided for in *new section 403(4)* (*see clause 27*) may be prescribed by regulation.

Clause 33 amends section 548 to provide that certain prices, estimates, rates, indices, or values (or classes of the same) can be excluded from the definition of financial benchmark by regulation.

Clause 34 amends section 550 to provide that, before making a recommendation to make an exclusion from the definition of financial benchmark by regulation (*see clause 33*), the Minister must—

- have regard to the main and additional purposes of the FMC Act; and
- be satisfied that the extent of the exclusion is not broader than is reasonably necessary to address the matters that gave rise to the regulation.

Hon Kris Faafoi

Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act **2019**.

2 Commencement

(1) This Act comes into force on a date appointed by the Governor-General by Order in Council.

(2) One or more orders may be made under **subsection (1)** bringing different provisions into force on different dates.

(3) Any provision that has not earlier been brought into force comes into force on the expiry of the 6-month period that starts on the date of Royal assent.

Part 1
Amendments relating to derivative margins

Subpart 1—Amendments to Reserve Bank of New Zealand Act 1989

3 Principal Act

This subpart amends the Reserve Bank of New Zealand Act 1989 (the **principal Act**).

4 Section 122 amended (Moratorium)

After section 122(9), insert:

(9A) Nothing in subsection (1) limits or prevents the exercise of any rights to enforce a security interest over collateral that was posted for a qualifying derivative if—

(a) the counterparties to the derivative are—

(i) 2 qualifying counterparties; or

(ii) a qualifying counterparty and an overseas person; and

(b) the rights are exercised after the specified time; and

(c) in a case where the counterparty that defaulted under the derivative was unable to pay its due debts at the time when the security agreement that created the security interest was entered into, the counterparty that seeks to exercise those rights did not know that fact at that time.

(9B) *See* **section 122A** for definitions relating to **subsection (9A)**.

5 New sections 122A to 122D inserted

After section 122, insert:

122A Definitions of terms relating to qualifying derivatives

(1) For the purposes of **sections 122(9A), 122B, 122C, and 122D**,—

default time means the close of the day after the date on which the statutory management commenced

derivative means—

(a) a derivative within the meaning of section 8(4) of the Financial Markets Conduct Act 2013; or

(b) a forward referred to in section 8(4)(b) of that Act that is an agreement to do either or both of the following if the forward delivery or payment of the relevant amount of currency is to be made no later than the prescribed period after the time at which the agreement is entered into:

(i) buy or sell currency (whether New Zealand currency or not) at a rate of exchange determined on the date of the agreement:

(ii) exchange one currency (whether New Zealand currency or not) for another (whether New Zealand currency or not) at a rate of exchange determined on the date of the agreement

know has the same meaning as in section 19 of the Personal Property Securities Act 1999

overseas person means—

(a) a natural person who is not ordinarily resident in New Zealand; or

(b) an entity that is incorporated or established outside New Zealand

qualifying counterparty means—

(a) a registered bank; or

(b) the Accident Compensation Corporation (as continued by section 259 of the Accident Compensation Act 2001); or

(c) the Guardians of New Zealand Superannuation established under section 48 of the New Zealand Superannuation and Retirement Income Act 2001; or

(d) a specified operator; or

(e) any prescribed entity; or

(f) any other entity of a prescribed class

qualifying derivative, in relation to enforcing a security interest over collateral, means a derivative to which all of the following apply:

(a) the derivative is subject to—

(i) a netting agreement to which sections 310A to 310O of the Companies Act 1993 or sections 255 to 263 of the Insolvency Act 2006 apply; or

(ii) netting under the rules of a designated settlement system; and

(b) the collateral that is posted is—

(i) a financial product; or

(ii) an investment security, a negotiable instrument, or an intangible within the meaning of section 16(1) of the Personal Property Securities Act 1999; and

(c) the enforcing counterparty's interest in the collateral is evidenced in writing

security interest—

(a) has the same meaning as in section 17 of the Personal Property Securities Act 1999; but

(b) does not include an interest created by the transfer of all right, title, and interest in and to the collateral posted for a qualifying derivative where

there is no obligation to retransfer the same collateral on the payment or performance of the obligation that is secured by the posted collateral

specified time means—

(a) the default time; or

(b) an earlier or a later time specified by the Bank in a notice issued under **section 122B**

unable to pay its due debts, in relation to an entity, means the entity is unable to pay its debts as they become due in the normal course of business.

(2) For the purposes of the definition of overseas person, a natural person is **ordinarily resident in New Zealand** if that person—

(a) is domiciled in New Zealand; or

(b) is living in New Zealand and the place where that person usually lives, and has been living for the immediately preceding 12 months, is in New Zealand, whether or not that person has on occasions been away from New Zealand during that 12-month period.

122B Bank may reduce or extend stay on exercise of rights to enforce security interest over posted collateral

(1) This section and **section 122C** apply for the purposes of **section 122(9A)** (which relates to exercising rights to enforce a security interest over collateral that was posted for a qualifying derivative) in respect of a registered bank that is in statutory management (**A**).

(2) The Reserve Bank may, before the default time, issue a notice that states that the rights referred to in **section 122(9A)** may only be exercised on and after a time specified in the notice.

(3) The time that is specified may be—

(a) before the default time; or

(b) after the default time if the Bank is satisfied of all of the matters set out in **section 122C**.

(4) The notice may relate to all rights referred to in **section 122(9A)** in respect of A's property or to a class or classes of those rights.

(5) Despite section 140(2)(b), this section applies to an associated person or a subsidiary of a registered bank only if the associated person or subsidiary is itself a registered bank.

122C Matters Bank must be satisfied of under section 122B(3)(b)

The matters referred to in **section 122B(3)(b)** are that—

(a) A is able to meet all of the following liabilities as and when those liabilities become due and payable:

(i) A's liabilities under all netting agreements to which sections 310A to 310O of the Companies Act 1993 or sections 255 to 263 of the Insolvency Act 2006 apply:

(ii) A's liabilities in respect of security interests given over collateral posted for qualifying derivatives:

(iii) A's liabilities that are subject to netting under the rules of a designated settlement system; and

(b) A is able to pay its debts as they become due in the normal course of business; and

(c) either—

(i) A complies with the minimum capital requirements (if any) to which it is subject under conditions imposed under section 74; or

(ii) there are satisfactory arrangements in place to ensure that A meets all of its liabilities referred to in **paragraph (a)** as and when those liabilities become due and payable and those arrangements will remain in place until A complies with the requirements referred to in **subparagraph (i)** or the statutory management is terminated, whichever occurs first.

122D Publication and status of notice under section 122B

(1) The Bank must, as soon as practicable,—

(a) publish any notice issued under **section 122B** on an Internet site maintained by, or on behalf of, the Bank; and

(b) notify the issue of the notice in the *Gazette*.

(2) The notice may take effect at any time after it is published under **subsection (1)(a)**.

(3) The notice is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.

(4) The notice cannot be varied or revoked.

6 Section 173 amended (Regulations)

(1) After section 173(fa), insert:

(fb) prescribing entities and classes of entities for the purposes of the definition of qualifying counterparty in **section 122A**:

(fc) prescribing a period for the purposes of **paragraph (b)** of the definition of derivative in **section 122A**:

(2) In section 173, insert as subsections (2) and (3):

(2) The regulations under **subsection (1)(fb) and (fc)** must be made on the recommendation of—

(a) the Minister; and

(b) the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is responsible for the administration of the Companies Act 1993.

(3) For the purposes of **subsection (2)**, the Ministers must have regard to the following:

(a) the purposes of this Act, the Companies Act 1993, the Corporations (Investigation and Management) Act 1989, and the Personal Property Securities Act 1999:

(b) the effect of the regulations on—

(i) the maintenance of a sound and efficient financial system; and

(ii) the creditors of qualifying counterparties (in the case of **subsection (1)(fb)**); and

(iii) the integrity of statutory management, corporate insolvency, and personal property securities law.

7 Schedule 1 amended

In Schedule 1, after Part 1, insert the **Part 2** set out in **Schedule 1** of this Act.

Subpart 2—Amendments to Companies Act 1993

8 Principal Act

This subpart amends the Companies Act 1993 (the **principal Act**).

9 New section 239ABMA inserted (Enforcement of security interest over collateral posted for qualifying derivative)

After section 239ABM, insert:

239ABMA Enforcement of security interest over collateral posted for qualifying derivative

(1) Nothing in sections 239ABC, 239ABD, 239ABE, and 239ABG limits or prevents any person referred to in **subsection (2)** from enforcing a security interest over collateral that was posted for a qualifying derivative if—

(a) the counterparties to the derivative are—

(i) 2 qualifying counterparties; or

(ii) a qualifying counterparty and an overseas person; and

(b) in a case where the counterparty that defaulted under the derivative was unable to pay its due debts at the time when the security agreement that created the security interest was entered into, the counterparty that seeks to exercise those rights did not know that fact at that time.

(2) The persons are—

(a) the secured creditor:

(b) a receiver or person appointed as mentioned in paragraph (a), (b), or (d) of the definition of enforce in section 239ABK as that definition applies in relation to the security interest, or any of the security interests (even if appointed after the decision period).

(3) Terms and expressions defined in **section 122A** of the Reserve Bank of New Zealand Act 1989 and used in **subsection (1)** have in that subsection the same meanings as in that section.

10 Schedule 1AA amended

In Schedule 1AA, after Part 1, insert the **Part 2** set out in **Schedule 2** of this Act.

11 Schedule 7 amended

In Schedule 7, after clause 2(3), insert:

(3A) Subclause (1)(b) does not apply to accounts receivable that are posted as collateral for a qualifying derivative if—

(a) the counterparties to the derivative are—

(i) 2 qualifying counterparties; or

(ii) a qualifying counterparty and an overseas person; and

(b) in a case where the company was unable to pay its due debts at the time when the security agreement that created the security interest over the accounts receivable was entered into, the counterparty that has a claim under that security interest did not know that fact at that time.

(3B) Terms and expressions defined in **section 122A** of the Reserve Bank of New Zealand Act 1989 and used in **subclause (3A)** have in that subclause the same meanings as in that section.

Subpart 3—Amendments to Corporations (Investigation and Management) Act 1989

12 Principal Act

This subpart amends the Corporations (Investigation and Management) Act 1989 (the **principal Act**).

13 New section 2A inserted (Transitional, savings, and related provisions)

After section 2, insert:

2A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

14 Section 42 amended (Moratorium)

After section 42(9), insert:

(10) Nothing in subsection (1) limits or prevents the exercise of any rights to enforce a security interest over collateral that was posted for a qualifying derivative if—

(a) the counterparties to the derivative are—

(i) 2 qualifying counterparties; or

(ii) a qualifying counterparty and an overseas person; and

(b) in a case where the counterparty that defaulted under the derivative was unable to pay its due debts at the time when the security agreement that created the security interest was entered into, the counterparty that seeks to exercise those rights did not know that fact at that time.

(11) Terms and expressions defined in **section 122A** of the Reserve Bank of New Zealand Act 1989 and used in **subsection (10)** have in that subsection the same meanings as in that section.

15 Schedule replaced

(1) Replace the Schedule with the **Schedule 1** set out in **Schedule 3** of this Act.

(2) Section 73 is consequentially repealed.

Subpart 4—Amendments to Personal Property Securities Act 1999

16 Principal Act

This subpart amends the Personal Property Securities Act 1999 (the **principal Act**).

17 New section 21A inserted (Transitional, savings, and related provisions)

Before section 22, insert:

21A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

18 Section 23 amended (When Act does not apply)

After section 23(e)(xiii), insert:

(xiv) a transfer of all right, title, and interest in and to the collateral posted for a qualifying derivative (within the meaning of **section 122A** of the Reserve Bank of New Zealand Act 1989) where there is no obligation to retransfer the same collateral on the payment or performance of the obligation that is secured by the posted collateral.

19 New section 103B and cross-heading inserted

After section 103A, insert:

Priority of interests under qualifying derivatives

103B Priority of interests under qualifying derivatives

(1) The interest of a person (**A**) in personal property posted as collateral for a qualifying derivative has priority over any security interest (including a purchase money security interest) in the same personal property.

(2) However, if the debtor was unable to pay its due debts at the time when the security agreement that created A's interest was entered into, **subsection (1)** applies only if A did not know that fact at that time.

(3) Terms and expressions defined in **section 122A** of the Reserve Bank of New Zealand Act 1989 and used in this section (including the definition of security interest) have in this section the same meanings as in **section 122A**.

(4) This section overrides anything in this Act to the contrary (other than section 103A).

20 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in **Schedule 4** of this Act as the first schedule to appear after the last section of the principal Act.

Part 2
Amendments relating to financial benchmarks

21 Principal Act

This Part amends the Financial Markets Conduct Act 2013 (the **principal Act**).

22 Section 6 amended (Interpretation)

(1) In section 6(1), definition of **market service**, after paragraph (f), insert:

(g) acting as an administrator of a financial benchmark

(2) In section 6(1), insert in their appropriate alphabetical order:

administrator of a financial benchmark means a person that controls the generation and operation of a financial benchmark, including administering and applying the rules or procedures by which a financial benchmark is generated

contributor, in relation to a financial benchmark, has the meaning set out in **section 448C(4)**

financial benchmark has the meaning set out **subsections (6) and (7)**

(3) After section 6(5), insert:

(6) In this Act, a **financial benchmark** is a price, estimate, rate, index, or value that is—

(a) referenced or otherwise used for purposes that include 1 or more of the following:

(i) calculating the interest, or other amounts, payable under financial products or other securities:

(ii) calculating the price at which a financial product or other security may be traded, redeemed, or dealt in:

(iii) calculating the value of a financial product or other security:

(iv) measuring the performance of a financial product or other security; and

(b) made available to users (whether or not for a fee); and

(c) generated periodically from 1 or more—

(i) transactions, instruments, currencies, prices, estimates, rates (including an interest rate or exchange rate), indices, values, financial products or other securities; or

(ii) other interests or property (whether tangible or intangible).

(7) A **financial benchmark** does not include any price, estimate, rate, index, or value that is excluded (whether by class or in a particular case) by the regulations.

23 Section 386 amended (Overview)

After section 386(1)(g), insert:

(ga) **subpart 7A** provides for additional purposes relating to licences to act as an administrator of a financial benchmark, and additional powers in respect of licensees, authorised bodies, or contributors to financial benchmarks:

24 Section 390 amended (When providers of other market services may be licensed)

Replace section 390(1) with:

(1) In addition, a person may hold a market services licence—

(a) to act as a provider of prescribed intermediary services (for example, a person-to-person lending intermediary or a crowd funding intermediary if prescribed by regulations); or

(b) to act as an administrator of a financial benchmark.

25 Section 393 amended (Principles guiding the exercise of FMA powers)

Replace section 393(a) with:

(a) exercising the power must be necessary or desirable in order to promote 1 or more of the following:

(i) either or both of the main purposes specified in section 3:

(ii) any of the additional purposes specified in section 4:

(iii) in the case of a market services licence to act as an administrator of a financial benchmark, either or both of the additional purposes specified in **section 448B**; and

26 Section 396 amended (When licence must be issued)

After section 396(f), insert:

(g) in the case of an application for a licence to act as an administrator of a financial benchmark, the issue of a licence is necessary or desirable in order to promote either or both of the additional purposes set out in **section 448B**.

27 Section 403 amended (When FMA may impose permitted conditions)

(1) In section 403(2), replace "subsection (3)" with "subsections (3) and **(4)**".

(2) After section 403(3), insert:

(4) In the case of a licence to act as an administrator of a financial benchmark, a condition referred to in subsection (1) may also impose conditions to achieve the purposes set out in **section 448B** (for example, to ensure that the benchmark complies with applicable international requirements).

28 New subpart 7A of Part 6 inserted

After section 448, insert:

Subpart 7A—Additional regulation of licences relating to financial benchmarks

448A Application of subpart

This subpart applies to market services licences to act as an administrator of a financial benchmark.

448B Additional purposes for licences relating to financial benchmarks

(1) In relation to market services licences to act as an administrator of a financial benchmark, this Part has the purposes (in addition to those set out in sections 3 and 4) of—

(a) ensuring the accuracy, integrity, and reliability of financial benchmarks, and providing for their continued availability, to support the purposes set out in sections 3 and 4; and

(b) promoting the recognition of New Zealand financial benchmarks in overseas jurisdictions by ensuring that—

(i) those benchmarks comply with applicable international requirements; and

(ii) an administrator of a financial benchmark is subject to effective regulation when generating and operating those benchmarks; and

(iii) those benchmarks may be referenced or otherwise used in international instruments.

(2) This section does not limit section 3 or 4.

448C FMA's powers to direct contributor to provide information or data

(1) The FMA may exercise a power under **subsection (2)** if it is satisfied that—

(a) a contributor has ceased or is likely to cease providing information or data relevant to the generation or operation of the financial benchmark specified in a licence; and

(b) it is necessary or desirable in order to promote any of the purposes set out in **section 448B**.

(2) The FMA may, by written notice and otherwise in the prescribed manner, give a direction to a contributor requiring the contributor to provide information or data to a licensee, an authorised body, or another entity, where the provision of that information or data is necessary or desirable for the generation or operation of the financial benchmark specified in a licence.

(3) A direction may (without limitation) specify either or both of the following:

(a) requirements relating to the manner and form in which the information or data must be provided:

(b) the entity to which the information or data must be provided.

(4) In this subpart, **contributor** means a person whose activities have previously resulted in the provision of information or data to a licensee or an authorised body for the generation or operation of the financial benchmark specified in a licence.

(5) **Subsection (4)** applies regardless of where a contributor is resident, is incorporated, or carries on business.

(6) The contributor must comply with the direction (*see* subpart 3 of Part 8, which provides for civil liability for a contravention of this section).

448D FMA's powers to direct administration of financial benchmark

(1) The FMA may exercise a power under **subsection (2)** if it is satisfied that—

(a) a licensee or an authorised body has ceased or is likely to cease generating or operating a financial benchmark specified in a licence; and

(b) it is necessary or desirable in order to promote any of the purposes set out in **section 448B**.

(2) The FMA may, by written notice and otherwise in the prescribed manner, give a direction to a licensee or an authorised body—

(a) to continue to generate or operate the financial benchmark in a particular way; or

(b) to transfer or cease the generation or operation of the financial benchmark in a particular way.

(3) A direction may (without limitation) specify 1 or more requirements relating to the following:

(a) changes to the rules or procedures by which the financial benchmark is generated:

(b) changes to the documents under which the financial benchmark is generated or operated (for example, any compliance documents required by a condition of the licence):

(c) the orderly transfer of the generation or operation of the financial benchmark to another person:

(d) the orderly cessation of the generation or operation of the financial benchmark:

(e) the provision of material (including information, data, computer software, instructions, methodologies, formulas, or algorithms) to another person, where the provision of that material is necessary or desirable for the generation, operation, or transfer of that financial benchmark.

(4) The licensee or authorised body must—

(a) give the FMA all reasonable assistance to facilitate the continued generation and operation of the financial benchmark (or the orderly cessation of the financial benchmark); and

(b) comply with the direction.

(5) *See* subpart 3 of Part 8, which provides for civil liability for a contravention of this section.

448E Duration of direction

(1) A direction under **section 448C or 448D** must specify the period (not exceeding 12 months) during which the contributor, licensee, or authorised body must comply with the direction.

(2) The FMA may, by written notice, extend the period referred to in **subsection (1)** by a further period of not more than 12 months.

448F FMA must follow steps for giving direction

Sections 475 to 477 apply to a direction under **section 448C or 448D** as if the direction were an order under Part 8.

448G FMA may give interim direction pending exercise of power

(1) The FMA may give an interim direction (an **interim direction**) of the kind referred to in **section 448C or 448D** that is in force for the period referred to in **subsection (2)** if—

(a) the FMA is considering, at any time, whether it may exercise a power under **section 448C or 448D**; and

(b) the FMA considers that making an interim direction is necessary or desirable in the public interest.

(2) An interim direction is in force from the time at which it is given until the close of—

(a) the date that is 15 working days after the day on which it is given; or

(b) a later date specified by the FMA by notice to the person to whom the interim direction relates.

(3) For the purposes of **subsection (2)(b)**,—

(a) the FMA may specify a later date if the FMA is of the opinion that it is not reasonably practicable for it to complete its consideration as referred to in **subsection (1)(a)** within the 15-working-day period referred to in **subsection (2)(a)**; and

(b) the later date must be a date that is no more than 30 working days after the day on which the interim direction is given.

(4) The FMA—

(a) may act under **subsection (1) or (2)(b)** without giving the person to whom the interim direction relates an opportunity to make submissions to, or be heard before, the FMA in respect of the matter; but

(b) must, after acting under **subsection (1) or (2)(b)**, give that person or that person's representative an opportunity to make written submissions and to be heard on the matter.

(5) The person to whom the interim direction relates must comply with the direction (*see* subpart 3 of Part 8, which provides for civil liability for a contravention of this section).

448H FMA must give notice after giving interim direction

If the FMA gives an interim direction, the FMA—

(a) must, as soon as is reasonably practicable, give written notice to the person to whom the interim direction relates of—

(i) the terms and conditions of the interim direction; and

(ii) the reasons for the interim direction; and

(iii) any other information the FMA thinks relevant in the circumstances; and

(b) in the case of an interim direction to a contributor, must also give the written notice referred to in **paragraph (a)** to the relevant licensee in respect of the financial benchmark; and

(c) may also make the direction available on its Internet site; and

(d) may also give notice to any other person of those matters.

448I General provisions on FMA's directions

(1) The FMA may give a direction under this subpart on the terms and conditions that the FMA thinks fit.

(2) The FMA may vary a direction in the same way as it may give the direction under this subpart.

(3) The FMA may revoke a direction or suspend a direction on the terms and conditions it thinks fit.

448J Protection for persons in respect of provision of material, information, or data under this subpart

No civil or criminal proceedings may be brought against a person by reason of the person having provided material, information, or data in good faith and in accordance with a direction under this subpart.

29 Section 449 amended (Part 6 services provisions)

After section 449(4)(k), insert:

(ka) **section 448C, 448D, or 448G** (directions to a contributor or an administrator of a financial benchmark):

30 Section 451 amended (Meaning of FMC reporting entity)

(1) In section 451(b), after "scheme", insert "or a person referred to in **subsection (2)**".

(2) In section 451, insert as subsection (2):

(2) Despite **subsection (1)(b)**, a person who holds a licence under Part 6 is not an FMC reporting entity if—

(a) the licence only covers acting as an administrator of a financial benchmark; and

(b) the person is not a person referred to in **subsection (1)(a) or (c) to (k)**.

31 Section 532 amended (Appeals against other decisions of FMA on questions of law only)

After section 532(f), insert:

(fa) a decision under **section 448C, 448D, or 448G** (directions to a contributor or an administrator of a financial benchmark):

32 Section 546 amended (Regulations for purposes of Part 6 (market services))

After section 546(1)(d)(iii), insert:

(iv) in the case of a licence to act as an administrator of a financial benchmark, conditions of a kind described in **section 403(4)**:

33 Section 548 amended (Other regulations)

(1) After section 548(1)(d)(vii), insert:

(viii) excluding (whether by class or in a particular case) a price, estimate, rate, index, or value from being a financial benchmark for the purposes of **section 6(7)**:

(2) In section 548(2), replace "and (v)" with "(v), and **(viii)**".

34 Section 550 amended (Procedural requirements for regulations relating to exemptions, exclusions, and definitions)

In section 550(2)(f), replace "and (v)" with "(v), and **(viii)**".

Schedule 1
Transitional, savings, and related provisions for amendments to Reserve Bank of New Zealand Act 1989

s 7

Part 2
Provision relating to Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019

13 Provision relating to enforcing security interest over collateral posted for qualifying derivative

The amendments made by **subpart 1 of Part 1** of the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act **2019** apply only to qualifying derivatives entered into on or after the commencement of this clause.

Schedule 2
Transitional, savings, and related provisions for amendments to Companies Act 1993

s 10

Part 2
Provision relating to Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019

5 Provision relating to enforcing security interest over collateral posted for qualifying derivative

The amendments made by **subpart 2 of Part 1** of the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act **2019** apply only to qualifying derivatives entered into on or after the commencement of this clause.

Schedule 3
Schedule of Corporations (Investigation and Management) Act 1989 replaced

s 15

Schedule 1
Transitional, savings, and related provisions

s 2A

Part 1
Provision relating to Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019

1 Provision relating to enforcing security interest over collateral posted for qualifying derivative

The amendments made by **subpart 3 of Part 1** of the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act **2019** apply only to qualifying derivatives entered into on or after the commencement of this clause.

Schedule 4
Transitional, savings, and related provisions for amendments to Personal Property Securities Act 1999

s 20

Schedule 1AA
Transitional, savings, and related provisions

s 21A

Part 1
Provision relating to Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019

1 Provision relating to security interest over collateral posted for qualifying derivative

The amendments made by **subpart 4 of Part 1** of the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act **2019** apply only to qualifying derivatives entered into on or after the commencement of this clause.

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