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By email to: fmibill@rbnz.govt.nz

FINANCIAL MARKET INFRASTRUCTURES BILL: EXPOSURE DRAFT

Dear Cavan,

We welcome the opportunity to provide a submission on the exposure draft of the Financial Market Infrastructures Bill.

This submission is made in our capacities as responsible for the operation of the NZClear settlement system and the Exchange Settlement Account System, both of which are FMIs that will fall into the regulatory regime proposed by the Bill.

The cover note to the exposure draft notes a particular interest in submitters' views on the offences and penalties. This submission is restricted to these matters.

The Bill places significant emphasis on criminal offences as the means to enforce non-compliance with many of the offences attracting significant fines as well as terms of imprisonment.

A criminal offence is the most serious sanction for contravening a legislative requirement with far-reaching consequences for those convicted. In our view, criminal sanctions should be imposed with care and only where necessary to fulfil the purposes of the criminal law – namely, deterrence, public denunciation and punishment for conduct that involves, or has the potential to cause, considerable harm to individuals or society. Similarly, we acknowledge that criminalising contraventions relating to the exercise of distress management powers would be appropriate where the contravention is intentional or reckless.

However, some of the conduct in the Bill's offence provisions does not appear to meet these high thresholds to be criminalised. For example, offences connected to FMI rules and rule changes and contingency plans (e.g. not publishing the FMI rules and not implementing a rule change attracting large fines). These are areas where an FMI operator and the FMI regulators should have shared objectives of ensuring the adequacy and effectiveness of the rules and contingency plans.

In such instances, criminalisation seems unnecessarily punitive way to compel compliance. In addition, it may have unintended consequences, such as deterring capable operators from participating in the industry.

One justification in the cover note to prefer criminal over civil penalties is the greater procedural protections afforded to a party that is being prosecuted for a criminal offence. In other words, that the procedural protections are needed to address a power imbalance between the regulators, as the enforcement agencies, and defendants. In our view, this consideration seems less relevant when dealing with sophisticated market participants like FMI's and their owners and operators.

In summary, we suggest that additional consideration be given to alternatives to imposing criminal liability to ensure that the mechanisms for enforcing compliance are proportionate and appropriate.

We hope this submission is a useful part of your consultation, and we would be happy to discuss this submission with you.

Yours sincerely



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Steve Gordon
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