



## PROACTIVE RELEASE COVERSHEET

<b>Minister</b>	Hon Simon Watts	<b>Portfolio</b>	Climate Change
<b>Name of package</b>	Proactive release of NZ ETS market governance briefings	<b>Date to be published</b>	17 December 2025

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
23 April 2025	<a href="#">BRF-6137: Emissions Trading Scheme Market Governance Platform Reporting Requirements</a>	Ministry for the Environment
10 July 2025	<a href="#">BRF-6470: Amendments to Market Governance Platform Reporting Requirements</a>	Ministry for the Environment
9 October 2025	<a href="#">BRF-6768: Penalties for breaches of NZ ETS market governance provisions</a>	Ministry for the Environment

### Information redacted **YES**

Any information redacted in this document is redacted in accordance with the Ministry for the Environment's policy on proactive release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

### Summary of reasons for redaction

Some information has been withheld under the following sections of the Official Information Act 1982 from:

#### *BRF-6470: Amendments to Market Governance Platform Reporting Requirements*

- Section 9(2)(b)(ii) to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information
- Section 9(2)(d) to avoid prejudice to the substantial economic interests of New Zealand

#### *BRF-6768: Penalties for breaches of NZ ETS market governance provisions*

- Section 9(2)(d) to avoid prejudice to the substantial economic interests of New Zealand



# Briefing: Emissions Trading Scheme Market Governance Platform Reporting Requirements

Date submitted: 23 April 2025

Tracking number: BRF-6137

Sub Security level: In-Confidence

Actions sought from Ministers		
Name and position	Action sought	Response by
To Hon Simon WATTS <b>Minister of Climate Change</b>	<p><b>agree</b> that platform providers in the NZU secondary market be required to report Platform Reporting Information to MfE at or shortly after the close of every business day</p> <p><b>agree</b> that platform providers be required to report this information in a format specified by MfE</p> <p><b>agree</b> that if a platform is unable to determine a closing bid or closing offer price, the platform will be required to apply its own commercial best effort to provide a fallback price</p> <p><b>agree</b> that the requirement for platforms to provide Platform Reporting Information to the Government apply to all NZU platform trades, including on and off the platform</p> <p><b>authorise</b> officials to issue drafting instructions to the Parliamentary Counsel Office to give effect to these requirements</p>	2 May 2025

## Actions for Minister's office staff

**Return** the signed briefing to the Ministry for the Environment ([advice@mfe.govt.nz](mailto:advice@mfe.govt.nz)).

## Key contacts at Ministry for the Environment

Position	Name	Cell phone	First contact
Principal Author	Sarah Croxford		
Responsible Manager	Susan Baas	027 223 2658	✓
General Manager	Mark Vink	021 176 2243	

## Minister's comments

# Emissions Trading Scheme Market Governance Platform Reporting Requirements

## Recommendations

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We recommend that you:

- a. **agree** that platform providers in the NZU secondary market be required to report the following Platform Reporting Information to the Ministry for the Environment at or shortly after the close of every business day:
- i. Closing bid and closing offer price;
  - ii. Price and volume of the final trade of the day;
  - iii. High and low traded price of the day; and
  - iv. Total volume of New Zealand Units transacted on the day
- Yes | No
- b. **agree** that platform providers be required to report this information in a format specified by the Ministry for the Environment
- Yes | No
- c. **agree** that if a platform is unable to determine a closing bid or closing offer price, the platform will be required to apply its own commercial best effort to provide a fallback price
- Yes | No
- d. **agree** that the requirement for platform providers to provide Platform Reporting Information to the Government apply to all trades enabled by platform providers, including on and off the platform
- Yes | No
- e. **authorise** officials to issue drafting instructions to the Parliamentary Counsel Office to give effect to these Platform Reporting Information requirements as part of the Climate Change Response (Market Governance and Other Integrity and Efficiency Changes) Amendment Bill
- Yes | No

## Signatures

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Mark Vink  
**General Manager**  
**Markets**  
Date: 23 April 2025

Hon Simon WATTS  
**Minister of Climate Change**  
Date:

# Emissions Trading Scheme Market Governance Platform Reporting Information Requirements

## Purpose

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1. This briefing seeks your agreement to the New Zealand Unit (NZU) price and volume information that Emissions Trading Scheme (ETS) trading platform providers will be required to report to the Government, as part of market governance improvements agreed to by Cabinet on 31 March 2025. Cabinet authorised you to determine the details of this trading information [CAB-25-MIN-0086.01 refers].

## Background

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2. On 31 March 2025, Cabinet agreed to ETS market governance changes, including requirements for trading platform providers to report NZU price and volume information to Government ('Platform Reporting'), requirements for market participants to record trading information into the Emissions Trading Register ('Register Reporting'), new market conduct prohibitions, and market monitoring powers.
3. Cabinet also authorised you and the Minister of Justice to make decisions about penalties for failing to meet new market governance requirements. We are working with other agencies to develop options for appropriate penalties and will provide you with advice in the next two months.
4. To progress practical implementation of Platform Reporting, this briefing seeks your approval of the information we recommend platform providers be required to report to the Government ('Platform Reporting Information'). We recommend you agree to these requirements now, so that officials can issue a first tranche of market governance drafting instructions to Parliamentary Counsel Office (PCO), with further drafting instructions on penalties to follow when ready.

## Analysis and advice

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5. Platform Reporting requirements currently capture four privately owned New Zealand platform entities<sup>1</sup> that facilitate NZU transactions between ETS participants. Additional providers could enter the market in future and would be captured by Platform Reporting requirements.
6. In line with market data collection practices in other markets, we recommend that platform providers be required to report the following Platform Reporting Information to the Ministry for the Environment (MfE). This information will be required for all trades that

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<sup>1</sup> Carbon Match; Commtrade, operated by Jarden; emsTradepoint, operated by Transpower, and Neon, operated by Marex.

are enabled by platform providers (including on and off the platform), at or shortly after the close of every business day, in a format specified by MfE:

- a. Closing bid and closing offer price;
  - b. Price and volume of the final trade of the day;
  - c. High and low traded price of the day; and
  - d. Total volume of NZUs transacted on the day.
7. If a platform provider is unable to determine a closing bid or closing offer price, they will be required to apply best efforts based on their commercial knowledge of the market, to provide a fallback price.

## **Purpose of Platform Reporting Information requirements**

8. Platform Reporting is an early first step towards improved market governance. This trading information will improve market monitoring and Government understanding of market operations in the interim until Register Reporting can be implemented, by providing the Government with:
- a. better access to and visibility of traded market information, which Government can monitor for any unusual trading activity, such as unusually large or unusually priced trades leading up to an ETS auction or market sensitive announcement;
  - b. the ability to start to better understand market dynamics, including to better inform policy decisions and understand how current policy impacts markets.
9. Platform Reporting will be implemented as soon as requirements are passed through the Climate Change Response (Market Governance and Other Integrity and Efficiency Changes) Amendment Bill (CCRA Bill), planned for mid-2026. In the medium term, Register Reporting, and the anonymised, aggregated publication of Register Reporting information by Government, will provide market transparency for the public of all over-the-counter trading. However, Register Reporting cannot be implemented until the future state Register is ready.
10. The listed Platform Reporting information is available in comparable international carbon markets (such as Europe and the UK) and are commonly regarded as basic data points that are readily available in most financial markets globally (examples include NZX indices, S&P500, FTSE, and various commodities such as Brent and WTI Oil). The Government having access to this information is critical for market understanding and market monitoring, and will align with Government with a standard level of data visibility that is generally available in other financial markets.

## **Impacts on NZU Trading Platforms**

11. We anticipate that the Platform Reporting Information requirements will have minimal cost impact on trading platforms, given the platforms' known existing capability and functionality. We expect that developing and delivering reports containing trading price

and volume information to the Government may create one-off costs of a maximum of \$25,000 in total for all four platform providers.

12. Once systems are in place to automate daily reporting, we do not expect platform providers to face any ongoing cost impact from these reporting requirements.
13. The Government currently purchases some market data from the platforms and these contracts will end. However, Platform Reporting will not affect platforms' ability to sell market data to global data service providers or research shops.

## **Next steps**

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14. Subject to your agreement, officials will issue drafting instructions to give effect to these requirements to PCO. Market governance changes will be progressed as part of the CCRA Bill.



## Briefing: Amendments to Market Governance Platform Reporting Requirements

Date submitted: 10 July 2025

Tracking number: BRF-6470

Sub Security level: In-Confidence

MfE priority: Urgent

Actions sought from Ministers		
Name and position	Action sought	Response by
To Hon Simon WATTS <b>Minister of Climate Change</b>	<b>Agree</b> to amend platform reporting requirements to apply to on-platform trades only <b>Note</b> that MfE intends to use the separate market governance information gathering power to request information about over-the-counter trades from market participants	17 July 2025

Actions for Minister's office staff
Return the signed briefing to the Ministry for the Environment ( <a href="mailto:advice@mfe.govt.nz">advice@mfe.govt.nz</a> ).

Appendices and attachments
N/A

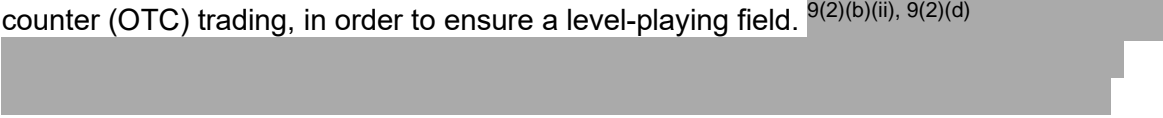
Key contacts at Ministry for the Environment			
Position	Name	Cell phone	First contact
Principal Author	Grace Smart		
Responsible Manager	Susan Baas	027 223 2658	✓
General Manager	Mark Vink		

Minister's comments

# Amendments to Market Governance Platform Reporting Requirements

## Key messages

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1. On 31 March 2025, Cabinet delegated you authority to determine the details of platform reporting requirements, as part of new market governance settings. We provided you with advice in April 2025 about platform reporting and recommended that the requirements apply to trades facilitated by platform providers both on- and off-platform.
2. After market governance changes were announced in late May, several stakeholders contacted us and we spoke to the four platform providers and a few other stakeholders.
3. In those discussions we heard that a consistent approach is needed for the reporting requirements on platform providers and other market participants that facilitate over-the-counter (OTC) trading, in order to ensure a level-playing field. <sup>9(2)(b)(ii), 9(2)(d)</sup>  

4. The stakeholders agreed that government will also need to collect information about OTC trades in order to monitor the market effectively.
5. Having considered this feedback, we now recommend changing the platform reporting requirements so that they would only apply to on-platform trades. Subject to your agreement, we will update our drafting instructions to PCO to reflect this approach.
6. To gather information on OTC trades, we intend to use a separate market governance information gathering power to collect information from a selection of platform providers and other market participants.
7. This will support the level playing field discussed above, as government will be collecting information about both on-platform and OTC trades from a range of market participants. This approach will also provide government with improved trading data until full reporting of all trades is able to be implemented through the Emissions Trading Register.
8. Attendees may raise this issue with you at the NZU Market Forum on 17 July 2025, which is covered by BRF-6451.

## Recommendations

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We recommend that you:

- a. **agree** to amend the platform reporting requirements that you previously agreed to on 26 April 2025, so that these requirements only apply to on-platform trades

Yes | No

b. **note** that Ministry for the Environment intends to use the separate market governance information gathering power approved by Cabinet to gather information about over-the-counter trades from platform providers and other market participants

## Signatures

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Mark Vink  
General Manager

**Markets**

**09/07/2025**

Hon Simon WATTS

**Minister of Climate Change**

**Date:**

# Amendments to Market Governance Platform Reporting Requirements

## Purpose

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1. The purpose of this briefing is to seek your agreement to amend the approach to platform reporting requirements that will form part of new market governance settings, so that the reporting requirements only apply to trades that occur on-platform.


## Background

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2. On 31 March 2025, as part of new market governance settings, Cabinet agreed that NZU trading platform providers would be required to report NZU price and volume information to the government. Cabinet delegated authority to you to determine the details of the information that would be required to be reported [CAB-25-MIN-0086.01 refers].
3. We provided you with advice on 23 April 2025 about the detail of these platform reporting requirements [BRF-6137 refers]. You agreed that platforms would be required to report, at or shortly after the close of every business day:
  - a. Closing bid and closing offer price
  - b. Price and volume of the final trade of the day
  - c. High and low traded price of the day, and
  - d. Total volume of NZUs transacted on the day.
4. At the time, we recommended that these reporting requirements apply to all trades enabled by platform providers, including on and off the platform. Off-platform trades are OTC trades facilitated by platform providers.

## We recommend platform reporting requirements only apply to on-platform trades

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5. After the market governance changes were announced, several stakeholders contacted us and we spoke to the four platform providers and a few other stakeholders. 9(2)(b)  
(ii), 9(2)  
(d)  


1. We also heard that requesting information about OTC trades only from platform providers would provide the government with incomplete information. The stakeholders agreed that government will need to collect information about OTC trades from a range of market participants to support its market monitoring function.

6. In response to this feedback, we now recommend changing the platform reporting requirements so that they would only apply to on-platform trades.
7. As part of the market governance changes, Cabinet also agreed that the Ministry and the Environmental Protection Authority (EPA) would have the power to require market participants to provide them with information for the purpose of monitoring the NZU market.
8. We intend to use this power to request information about OTC trades from a selectively designed group of platform providers and other market participants on a discrete basis, to supplement the daily platform reporting requirements. We discussed with stakeholders that such a request would need to be designed to provide government with the most useful information, and stakeholders may be able to assist with the design.
9. These steps will provide government with improved trading data until full reporting of all trades is able to be implemented through the Emissions Trading Register.
10. Attendees at the NZU Market Forum on 17 July [BRF-6451 refers] may raise this with you. If asked, we recommend you note the need for an even playing field, and you encourage stakeholders to work with the Ministry to design an approach that enables it to gather information efficiently and effectively.

## **Next steps**

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11. Subject to your agreement, we will update our drafting instructions to PCO to reflect this approach to platform reporting requirements.



## Briefing: Penalties for breaches of NZ ETS market governance provisions

Date submitted: 09/10/2025

Sub Security level: In-Confidence

MfE priority: Urgent

### Actions sought from Ministers

<i>Name and position</i>	<i>Action sought</i>	<i>Response by</i>
To Hon Simon WATTS Minister of Climate Change	<b>Agree</b> to penalty regime outlined in this briefing	13 October 2025

### Actions for Minister's office staff

Forward this briefing to: Minister of Justice

Return the signed briefing to the Ministry for the Environment ([advice@mfe.govt.nz](mailto:advice@mfe.govt.nz)).

### Appendices and attachments

1. Additional options considered

### Key contacts at Ministry for the Environment

<i>Position</i>	<i>Name</i>	<i>Cell phone</i>	<i>First contact</i>
Principal Author	Angela Christensen		
Responsible Manager	Susan Baas	027 223 2658	✓
General Manager	Kirsty Flannagan		

### Minister's comments

# Briefing: Penalties for breaches of NZ ETS market governance provisions

## Key messages

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1. In March 2025, Cabinet agreed to market governance provisions for the New Zealand Emissions Trading Scheme (NZ ETS) and the secondary market (New Zealand Unit (NZU) market) [CAB-25-MIN-0086.01 refers]. Cabinet also delegated decision-making authority to you for penalties to ensure compliance with the new market governance requirements, in consultation with the Minister of Justice. We have worked with the Ministry of Justice, Ministry for Primary Industries, Environmental Protection Authority (EPA) and Financial Markets Authority (FMA) on the proposals in this briefing.
2. The proposed market governance penalty regime is designed to be low-cost to administer, while still providing a proportionate response to non-compliance with the new market governance requirements. The proposed regime reinforces the market governance provisions, which will support market credibility, confidence, and greater investment certainty.
3. While these penalties are new in that they apply specifically to market governance provisions, similar penalties already exist under the Climate Change Response Act 2002 (CCRA), the Financial Markets Conduct Act 2013 (FMCA), and other related legislation such as the Fair Trading Act 1986 (FTA). This approach ensures alignment between penalties for the NZ ETS and the NZU market and existing commercial and financial markets law in New Zealand.
4. The regime will support the Ministry for the Environment (MfE), as the market monitor, and the FMA, as the regulator for market misconduct, to enforce the rules effectively by setting clear penalties. Cabinet agreed that MfE and EPA would be market monitors and that agencies would carry out these functions within baseline funding. MfE is considered the appropriate agency to enforce the administrative penalties because it will receive the relevant trading information from market participants and can carry out the required functions within its existing baseline funding. When Register reporting is implemented, MfE may delegate some or all of this role to the EPA. The FMA will be enabled to use their existing enforcement toolkit.
5. Implementation of the penalty regime is intended to be staged. Penalties in relation to platform reporting, requirements for platforms to maintain records, market participants providing information to the market monitor, and market conduct will be implemented first. A short grace period of one month is proposed between platform reporting requirements coming into effect and the associated penalties being enforced. This will give platform providers time to establish systems to report daily information to the government.
6. As market conduct obligations are of a more serious nature, with similar prohibitions already existing in other financial markets legislation, no grace period is proposed for penalties related to market misconduct. The penalties proposed for market misconduct are also significantly stronger than the administrative and infringement penalties proposed elsewhere. This highlights the risks that market misconduct poses to the operation and integrity of the NZU market. These penalties align with those in the FMCA.

7. Register reporting penalties will be required in future, once Register reporting is able to be implemented. We propose a regulation-making power is added to the CCRA now, so that an infringement regime for Register reporting can be established once those reporting provisions are in place.
8. Subject to your agreement to the recommended penalty regime - in consultation with the Minister of Justice - we will issue drafting instructions to the Parliamentary Counsel Office (PCO) for incorporation into the Climate Change Response Act (Adaptation, Efficiency and Effectiveness) Amendment Bill (the Bill) alongside the other market governance changes. The Bill is scheduled to be introduced to the House later this year.

## Recommendations

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We recommend that you:

- a. **agree** to forward this briefing to the Minister of Justice and seek his feedback on the proposals to inform your decisions

Yes | No

*Platform reporting – failure to report price and volume information to the government*

- b. **agree** to an administrative penalty that increases with each occurrence of non-compliance:
  - first-time breach: a penalty of \$8,000
  - second-time breach: a penalty of \$16,000
  - subsequent breaches: a penalty of \$24,000 per breach
  - the amount will reset to the first-time breach level after a 12-month period has passed without further breaches

Yes | No

- c. **agree** the Ministry for the Environment will publish details of any non-compliance:

- the name of the platform provider
- the section under which the penalty was imposed
- the amount of the penalty
- the date on which the last payment for the penalty was due and, if the penalty has been paid in full, the date on which it was paid in full

Yes | No

- d. **agree** to a grace period of one month between the platform reporting requirement coming into force and the penalty taking effect

Yes | No

*Platform reporting – failure to maintain a history of trading information*

- e. **note** that Cabinet agreed in March 2025 that platform providers would be required to retain records of trades
- f. **agree** platform providers will be required to keep records of trading information for seven years

Yes | No

- g. **agree** to an administrative penalty that increases with each occurrence of non-compliance:

- first-time breach: a penalty of \$12,000
- second-time breach: a penalty of \$24,000
- subsequent breaches: a penalty of \$32,000 per breach
- the amount will reset to the first-time breach level after a 12-month period has passed without further breaches

Yes | No

- h. **agree** the Ministry for the Environment will publish details of any non-compliance:

- the name of the platform provider
- the section under which the penalty was imposed
- the amount of the penalty
- the date on which the last payment for the penalty was due and, if the penalty has been paid in full, the date on which it was paid in full

Yes | No

*Register reporting – failure to record trading information in the Register*

- i. **agree** to a regulation-making power in the CCRA for an infringement offence regime for Register reporting

Yes | No

- j. **note** we will provide advice on an infringement offence regime at a later date when Register reporting is implemented

- k. **agree** the Ministry for the Environment will have responsibility for publishing details of any non-compliance with Register reporting requirements when they are implemented

Yes | No

*Failure to provide information to the market monitor*

l. **agree** to an administrative penalty that increases with each occurrence of non-compliance:

- first-time breach: a penalty of \$8,000
- second-time breach: a penalty of \$16,000
- subsequent breaches: a penalty of \$24,000 per breach
- the amount will reset to the first-time breach level after a 12-month period has passed without further breaches

Yes | No

m. **agree** participants will be required to keep records of trading information for seven years

Yes | No

n. **agree** the Ministry for the Environment will publish details of any non-compliance:

- the name of the participant
- the section under which the penalty was imposed
- the amount of the penalty
- the date on which the last payment for the penalty was due and, if the penalty has been paid in full, the date on which it was paid in full

Yes | No

o. **agree** that for administrative penalties, a person will not be liable to pay an administrative penalty if the Ministry for the Environment is satisfied that a compliance breach occurred through no fault of the person, and a limitation period will apply so that a penalty cannot be imposed for a breach that occurred more than four years ago

Yes | No

p. **agree** that there will be a prohibition on double jeopardy, meaning a person cannot receive more than one administrative penalty for the same conduct

Yes | No

q. **agree** that a review process will be provided for, to enable market participants the right to request a review of a penalty imposed and to bring an appeal to the District Court subject to the outcome of a review

Yes | No

r. **agree** that the chief executive as defined under section 4 of the Climate Change Response Act 2002 may seek to recover debts for administrative penalties due to the Crown in a court of competent jurisdiction, including administrative costs incurred in its recovery

Yes | No

- s. **agree** that following any penalty review processes, the Ministry for the Environment will transfer the money from administrative penalties into the New Zealand Debt Management Office Bank account held by the Crown

Yes | No

*Price manipulation of New Zealand Units (NZUs)*

- t. **agree** to a criminal offence where the person knew their actions or omission would have, or would be likely to have, the effect of manipulating the price of NZUs.

- imprisonment not exceeding 5 years for an individual, or a fine not exceeding \$500,000, or both
- in any other case a fine not exceeding \$2.5 million

Yes | No

- u. **agree** to a civil pecuniary penalty not exceeding the greatest of:

- three times the amount of the gain made or loss avoided
- \$1 million in the case of an individual
- \$5 million in any other case

Yes | No

- v. **agree** that the Financial Markets Authority, as the regulator will have the discretion to choose whether to pursue a criminal or civil pecuniary penalty for price manipulation of NZUs, noting the criminal offence has a higher threshold for prosecution, of the person knowing that their actions or omission would have, or would be likely to have, the effect of manipulating the price of NZUs

Yes | No

- w. **agree** that there will be a prohibition on double jeopardy, meaning a person cannot receive both a criminal fine and civil pecuniary penalty for the same conduct for price manipulation of NZUs

Yes | No

*False, unsubstantiated and misleading conduct*

- x. **agree** to a civil pecuniary penalty not exceeding the greatest of:

- three times the amount of the gain made or loss avoided
- \$1 million in the case of an individual
- \$5 million in any other case

Yes | No

- y. **agree** that a person will not be liable for these criminal and civil pecuniary penalties if:

- the conduct was in line with accepted market practices and for a proper purpose
- the breach was due to reasonable reliance on information supplied by another person, or other means beyond the person's control, provided they took reasonable precautions and exercised due diligence to avoid the contravention
- they made all appropriate inquiries, took all reasonable steps, and genuinely believed that their statement was not false or misleading

Yes | No

- z. **agree** that the Ministry for the Environment will be the regulator responsible for administering the administrative penalties for platform reporting, register reporting, and failure to provide information to the market monitor, and the Financial Markets Authority will be the regulator responsible for administering the criminal and civil pecuniary penalties for price manipulation and false, unsubstantiated, and misleading conduct

Yes | No

- aa. **agree** for the Ministry for the Environment to issue drafting instructions to the Parliamentary Counsel Office to amend the Climate Change Response Act 2002 to give effect to these decisions

Yes | No

## Signatures

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Susan Baas  
Manager – Market Assurance and  
Operations

**Climate Change Mitigation and  
Resource Efficiency**

**8/10/2025**

Hon Simon WATTS  
**Minister of Climate Change**  
**/09/2025**

# Briefing: Penalties for breaches of NZ ETS market governance provisions

## Purpose

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1. This briefing seeks your agreement to a penalties regime to enforce the New Zealand Emissions Trading Scheme (NZ ETS) market governance provisions.

## Background

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2. On 31 March 2025, Cabinet agreed to market governance provisions for the NZ ETS and the New Zealand Unit (NZU) market. Drafting instructions to give effect to these decisions have been issued to the Parliamentary Counsel Office (PCO) for legislative drafting, and cover the following areas:
  - **Platform reporting requirements** for platform providers to report daily trading information to government and maintain a history of trading information
  - **Register reporting requirements** for market participants to record trading information into the New Zealand Emissions Trading Register (the Register)
  - **Requirement for market participants to provide information to the market monitor upon request**
  - **Market conduct obligations** that prohibit price manipulation of NZUs and false, unsubstantiated, and misleading conduct in relation to buying, holding or selling NZUs.
3. Cabinet noted that appropriate penalties would need to be created in legislation to ensure compliance with these new market governance requirements and delegated decision-making authority for these penalties to you, in consultation with the Minister of Justice [CAB-25-MIN-0086.01 refers].

## We recommend a penalty regime that is proportionate and simple to administer

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4. The market governance provisions set clear reporting and conduct expectations for NZU market participants. NZU market participants are NZ ETS participants and anyone else who chooses to buy and sell NZUs as a financial investment. The provisions introduce conduct rules and prohibitions consistent with financial markets and are designed as a light-touch, low-cost regulatory system, to strengthen market credibility and establish clear standards.
5. The accompanying penalty regime will establish the consequences for breaching these market governance provisions. The penalties need to provide a sufficiently meaningful

response to poor behaviour, to maintain and improve confidence in the market's integrity and the overall effectiveness and stability of the NZ ETS.

6. We considered a range of penalty options for each market governance provision and assessed them against a set of criteria (see **Appendix 1**). We discounted penalties that were not proportionate to the offence, not consistent with other legislation, not cost effective, or that were administratively burdensome.
7. The proposed penalties regime is designed to respond effectively and efficiently to breaches of the market governance provisions. The penalties align with existing provisions in the Climate Change Response Act 2002 (CCRA), the Financial Markets Conduct Act 2013 (FMCA), and other related legislation, such as the Fair Trading Act 1986.<sup>1</sup> This ensures that the penalties prescribed for the NZ ETS and the NZU market align with existing commercial and financial markets law in New Zealand.
8. The proposed penalties regime includes administrative and infringement penalties, as well as civil pecuniary and criminal penalties. This combination ensures proportionate consequences for non-compliance. Further detail on these penalties is provided below.

#### *Administrative penalties*

9. Administrative penalties are instant fixed monetary penalties enforced by the regulator. This makes them an effective deterrent against non-compliance. They are typically used for conduct that is too serious for an infringement offence<sup>2</sup>, but not serious enough to warrant court action. Administrative penalties are also efficient and cost effective, as they generally avoid court proceedings and they will be administered directly by the chief executive of the Ministry for the Environment (MfE)<sup>3</sup>, similar to penalties issued by the EPA under section 134 of the CCRA.
10. Existing administrative penalties in the CCRA have a review and appeal process for decisions made by the EPA.<sup>4</sup> The process provides a formal avenue for review of decisions and gives a person the right to appeal to the District Court, ensuring the principles of natural justice are upheld. The same review and appeals process would be used for the new administrative penalties.
11. In addition, if MfE is satisfied that the compliance breach occurred through no fault of the person, such as they tried to comply but there was a system outage, a person is not liable to pay a penalty. A limitation period will also apply, so that no penalty can be issued if the breach is identified after more than four years has passed from when it occurred.
12. Money from penalties will be held by MfE until the period for requesting a review has passed or, if a review has been requested, until the review has been completed. Once

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<sup>1</sup> For example, the CCRA uses administrative penalties such as in section 134. The penalties proposed for failing to meet platform reporting requirements and failing to provide information to the market monitor are comparable to those in s129 and s259 of the CCRA. The penalties for violating the prohibitions against price manipulation and false, unsubstantiated, and misleading conduct in relation to buying, holding, or selling NZUs are comparable to those in s269 and s385 of the FMCA.

<sup>2</sup> Infringement penalty is a fee typically less than \$1,000 and can be challenged and moved to court.

<sup>3</sup> As defined in s 4, CCRA.

<sup>4</sup> Sections 144-146, CCRA.

MfE is satisfied that the penalty will not need to be refunded, it will be transferred to the New Zealand Debt Management Office Bank account held by the Crown.

13. Any administrative penalties for breaches of market governance provisions constitute a debt to the Crown. Therefore, MfE may also seek to recover administrative penalties owed to the Crown through the courts. This includes associated administrative costs incurred in the recovery process, such as filing fees. This would only apply to administrative penalties for:
  - failing to meet platform reporting requirements
  - platforms failing to maintain a history of trading information
  - failing to provide information to the market monitor.

It does not apply to market conduct penalties, which remain the responsibility of the FMA.

### **Penalty for failing to meet platform reporting requirements**

14. Cabinet agreed NZU trading platform providers would be required to report daily trading information to the government at the close of every business day and you made further decisions about the detail of this reporting [BRF-6137 refers].
15. Lack of market information poses risks to market integrity. We recommend implementing administrative penalties for platforms that fail to provide this information, with increasing penalties for each occurrence. This reflects the severity of harm that could be caused, particularly over consecutive days where the potential harm increases. Without it, the government will not have the necessary data to understand and monitor current trading activity in the market. <sup>9(2)(d)</sup> [REDACTED]  
[REDACTED] Visibility of market information through platform reporting will deter this.
16. The purpose of the administrative penalty is to encourage compliance, rather than punish criminal behaviour. It is appropriate in this context because the regulator can clearly determine whether a breach occurred – intent does not need to be established. Either the required information was provided, or it was not.
17. The proposed administrative penalty, to be administered by MfE, is structured as follows:
  - first-time breach: a penalty of \$8,000
  - second-time breach: a penalty of \$16,000
  - subsequent breaches: a penalty of \$24,000 per breach
  - the amount will reset to the first-time breach level after a 12-month period has passed without further breaches.
18. In addition to the monetary penalty, MfE will publish details of the non-compliance. This aligns with the role undertaken by the EPA to publish details of other non-compliance under the CCRA, such as the failure to surrender or repay New Zealand Units by the due date. The details published would be:

- the name of the participant
  - the section under which the penalty was imposed
  - the amount of the penalty
  - the date on which the last payment for the penalty was due and, if the penalty has been paid in full, the date on which it was paid in full
19. We propose a grace period of one month between the platform reporting requirement coming into force and the penalty taking effect. This will give platforms time to ensure a system is in place to provide daily information to the government.

### **Penalty for platforms failing to maintain a history of trading information**

20. Cabinet agreed that platform providers would be required to maintain records of trades. We recommend that the timeframe for maintaining these records is seven years. This information must be made available upon request by MfE, as part of their market monitoring responsibilities. If a platform provider fails to maintain these records and cannot produce the required information upon request, we recommend that an administrative penalty will apply.
21. We recommend these administrative penalties are higher than those proposed for platform reporting. This reflects the seriousness of failing to keep records, which could prevent the government from conducting a thorough audit in cases of suspected misconduct, posing a risk to NZU market integrity.
22. The proposed administrative penalty, to be administered by MfE, is structured as follows:
- first-time breach: a penalty of \$12,000
  - second-time breach: a penalty of \$24,000
  - subsequent breaches: a penalty of \$32,000 for each successive breach
  - the amount will reset to the first-time breach level after a 12-month period has passed without further breaches.
23. MfE will publish details of the non-compliance, as for platform reporting breaches described in paragraph 18.

### **Penalty for failing to record trading information in the New Zealand Emissions Trading Register**

24. We propose an infringement offence regime to address failures to record trading information in the Register and for this information to be accurate, alongside MfE publishing details of non-compliance. We recommend assigning legislative responsibility for the infringement offence regime and publishing details of non-compliance to MfE. MfE is well placed to undertake these functions within its existing baseline funding. However, MfE may delegate these powers to the EPA, which may be more appropriate given the EPA's operational role in managing the Register.
25. Infringement offences are reserved for low-level offences, designed to deter relatively minor conduct, and do not justify the full imposition of the criminal law. Infringement

offences prevent the courts from being overburdened with a high volume of relatively straightforward and low-level offending.<sup>5</sup> Infringement fees are typically less than \$1,000.<sup>6</sup>

26. While both the infringement offences and administrative penalties relate to administrative requirements for NZU market participants and trading platforms – specifically, to either record or maintain a history of trading information – the failure of a trading platform to maintain such information is more serious. This is because trading platforms are systemically important to the NZU market as their records cover a broader range of trades than those recorded in the Register by any individual participant or entity.
27. Once Register reporting is ready to be implemented, the infringement offence regime will be established through regulations. Section 30M of the CCRA sets out when the Minister can make regulations for infringement offences and lists the maximum fines and infringement fees. We would propose a regulation-making power to make infringement offences for Register reporting is added to the CCRA.

### **Penalty for failing to provide information to the market monitor**

28. NZU market participants will be required to provide trading information to the market monitor upon request for the purpose of monitoring the NZU market and NZU auctions. In alignment with the requirement for platforms to maintain records, NZU market participants will also be required to keep records of trading information for seven years. If an NZU market participant fails to comply without reasonable excuse, an administrative penalty will apply.
29. The administrative penalty is proportionate to the harm caused by non-compliance as this information is necessary for the government to monitor and investigate suspected market misconduct. Failing to provide this information could undermine the ability to conduct a thorough investigation and to determine whether a more serious violation, such as NZU price manipulation has taken place.
30. Given the similarity to platform reporting obligations, which is also about providing information to the government for market monitoring, the same administrative penalties are proposed:
  - first time breach: a penalty of \$8,000
  - second time breach: a penalty of \$16,000
  - subsequent breach: a penalty of \$24,000 for each successive breach
  - the amount will reset to the first-time breach level after a 12-month period has passed without further breaches.
31. MfE will publish details of non-compliance as described in paragraph 18, ensuring transparency and reinforcing accountability.
32. Only one administrative penalty will be able to apply to the same conduct to avoid issues of double jeopardy. For example, if a platform provider failed to maintain a history of

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<sup>5</sup> <https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/compliance-and-enforcement-2/chapter-25>

<sup>6</sup> *ibid.*

trading information and therefore failed to provide this information to the market monitor when requested, only one penalty would apply. This will be set out in internal guidance to ensure a consistent approach.

### Penalty for violating the prohibition of NZU price manipulation

33. Cabinet agreed to prohibit price manipulation in the NZU market, with the FMA responsible for regulatory enforcement. Cabinet also agreed that the FMA will use its existing powers under the FMCA to respond to equivalent misconduct [CAB-25-MIN-0086.1 refers].
34. The penalty proposed for NZU price manipulation is significantly stronger than the administrative and infringement penalties proposed elsewhere. This highlights that price manipulation poses systemic risks to the operation and integrity of the NZU market. Additionally, NZU price manipulation could have a *mens rea* element – wilful or deliberate offending – which is typically addressed under criminal law in New Zealand.
35. The proposed penalty for breaching this prohibition gives the FMA discretion to pursue either a criminal or civil pecuniary penalty, consistent with the FMCA approach to market manipulation.<sup>7</sup> Table 1 below provides examples of analogous penalties set out in the FMCA.

**Table 1: Examples of analogous penalties in FMCA**

Provision in FMCA	Penalty
Section 269 – <b>Criminal liability</b> for knowingly false or misleading appearance of trading	A penalty: <ul style="list-style-type: none"> <li>- in the case of an individual, to imprisonment for a term not exceeding 5 years, a fine not exceeding \$500,000, or both;</li> <li>and</li> <li>- in any other case, to a fine not exceeding \$2.5 million.</li> </ul>
Section 385(2) and (3)(b) – <b>Civil liability</b> for market manipulation	A pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction: <ul style="list-style-type: none"> <li>- 3 times the amount of the gain made or the loss avoided,</li> <li>- \$1 million in the case of an individual, or</li> <li>- \$5 million in any other case.</li> </ul>

36. In the FMCA there is a higher threshold for deciding to pursue criminal penalties, which will apply in cases when the offending involves a *mens rea* element (i.e. mental deliberation). Criminal proceedings carry the most serious consequences, including the possibility of conviction, and require a higher threshold of proof.
37. Civil pecuniary penalties are non-criminal monetary penalties intended to deter breaches of a regulatory regime and where the nature of the offending conduct does not warrant the denunciatory and stigmatising effects of a criminal conviction or imprisonment.<sup>8</sup> They are imposed through civil proceedings and do not require proof of intent. The FMA may

<sup>7</sup> Sections 269 and 489, FMCA.

<sup>8</sup> <https://ldac.org.nz/guidelines/legislation-guidelines-2021-edition/compliance-and-enforcement-2/chapter-26>

also use additional enforcement tools, such as stop and direction orders, alongside these penalties.<sup>9</sup>

38. The proposed penalty regime is as follows:

Criminal penalty, where the person knew their actions or omission would have, or would be likely to have, the effect of manipulating the price of NZUs –

- imprisonment not exceeding 5 years for an individual, or a fine not exceeding \$500,000, or both
- in any other case, a fine not exceeding \$2.5 million, where the person knew their actions or omission would have, or would be likely to have, the effect of manipulating the price of NZUs.

Civil pecuniary penalty not exceeding the greatest of –

- three times the amount of the gain made or loss avoided
- \$1 million in the case of an individual
- \$5 million in any other case.

While these civil pecuniary penalties may result in a higher fine than criminal penalties, criminal convictions carry significant consequences in addition to the monetary fine – the person may experience a loss of liberty (e.g. imprisonment) as well as acquiring the stigma of a criminal conviction.

39. When deciding whether to pursue a criminal or a civil pecuniary penalty, the circumstance of the case will be considered – the FMA may take into account factors such as trading history, the level of sophistication, the impact on others, and the public interest in pursuing court action. The criminal penalty also has a higher threshold for imposition, being that the person knew their actions or omission would have, or would be likely to have, the effect of manipulating the price of NZUs.
40. Currently, an estimated \$1-2 billion NZD worth of NZUs are traded annually on NZU market platforms. Price manipulation in a market of this scale would be significant, and, if systemic, could seriously undermine the integrity and stability of the market. This would have broader implications for the credibility of the NZ ETS. The proposed penalties reflect the seriousness of this potential harm and align with existing commercial and financial markets law. Therefore, many NZU market participants already face these penalties in other markets.
41. To ensure the penalty framework is fair and credible, the proposed penalty regime will include statutory defences for criminal and civil liability. These defences recognise that not all breaches stem from intentional or careless conduct – individuals may act responsibly but are affected by factors outside their control.

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<sup>9</sup> A stop order is a regulatory tool that the FMA can use to stop or prevent advertising or disclosure that confuses, or is likely to confuse consumers or investors, on matters that influence their investment decision. A direction order is a regulatory tool the FMA can use to direct a recipient to comply with the law and stipulate steps they must take by a given timeframe.

42. A person will not be liable if:
- the conduct was in line with accepted market practices and for a proper purpose
  - the breach was due to reasonable reliance on information supplied by another person, or other means beyond the person's control, provided they took reasonable precautions and exercised due diligence to avoid the contravention
  - they made all appropriate inquiries, took all reasonable steps, and genuinely believed that their statement was not false or misleading.
43. To ensure fairness and proportionality in enforcement, the proposed penalty regime will also include protections against double jeopardy. The FMCA contains a provision to prevent a person from being subject to both a criminal fine and a civil pecuniary penalty for the same conduct.<sup>10</sup> This safeguard is essential where serious misconduct may trigger both criminal and civil proceedings, as it avoids excessive punishment and upholds the integrity of the regulatory framework.

**Penalty for violating the prohibition of false, unsubstantiated, and misleading conduct in relation to buying, holding, or selling NZUs**

44. False, unsubstantiated, and misleading conduct can significantly impact the market, individual NZU market participants, or the public interest. The FMA will be responsible for enforcing this prohibition.
45. The NZU market includes both large institutional NZU market participants (e.g. energy companies) and smaller individual NZU market participants (e.g. small foresters). This variation in size and sophistication creates risks – not necessarily due to the large players themselves – but because small NZU market participants may lack the sophistication or resources to navigate the market effectively. This dynamic could attract opportunistic or predatory behaviour.
46. To address such conduct, we propose a civil pecuniary penalty based on the value of the false, unsubstantiated, or misleading behaviour. Given the potential for serious harm, a high penalty is justified and will send a clear signal that predatory conduct will not be tolerated.
47. We propose aligning this penalty with the regime for NZU price manipulation, as set out above, as well as the penalty for fair dealing provisions in the FMCA.<sup>11</sup>
48. The civil pecuniary penalty shall not exceed the greatest of –
- three times the amount of the gain made or loss avoided
  - \$1 million in the case of an individual
  - \$5 million in any other case.

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<sup>10</sup> Section 507, FMCA.

<sup>11</sup> Section 38(2), FMCA.

49. To ensure the penalty framework is fair and credible, the proposed penalty regime will include the same statutory defences as set out above at paragraph 42.
50. This approach ensures that the penalty reflects the seriousness of the misconduct and provides a strong deterrent to protect the integrity of the NZU market.

## **Resourcing for compliance activity is limited**

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51. Initial market monitoring and enforcement will be absorbed within agency baselines, with future choices to scale up these responsibilities. MfE will establish a small compliance and enforcement function to oversee the administrative penalties, alongside its role as market monitor, receiving trading information from platforms and other market participants. Cabinet agreed that agencies would implement the market governance provisions within baselines and MfE can fulfil this compliance function within baselines.
52. We have designed a penalty regime that is administratively simple and aligns with the existing functions of MfE, the EPA and FMA. However, prior to Register reporting being implemented, the ability of MfE and FMA to respond to either non-compliance with reporting requirements, or more serious market misconduct, may be limited. There may be scope to increase compliance functions when Register reporting is implemented and there is full access to trading information. Officials can provide further advice about any recommendations to further resource market governance compliance activity in the future, once the proposals have been implemented and we are able to review their effectiveness.

## **Next steps**

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53. Cabinet delegated you authority to make decisions about market governance penalties in consultation with the Minister of Justice. We recommend this briefing is forwarded to the Minister of Justice and you may wish to discuss its recommendations with the Minister before making final decisions.
54. Subject to your agreement to the recommended penalty regime, we will issue drafting instructions to PCO for incorporation into the Climate Change Response Act (Adaptation, Efficiency and Effectiveness) Amendment Bill alongside the other market governance changes.
55. Following PCO drafting, the Bill will proceed to the Cabinet Legislation Committee (LEG), before final approval by Cabinet. Officials will update the relevant ETS market governance Regulatory Impact Statement and provide this for Cabinet's information alongside the Bill. The Bill is scheduled to be introduced to the House by the end of this year.

## Appendix 1: Additional options considered

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1. Officials considered a range of penalty options for each market governance provision and assessed them against a set of criteria. The Ministry of Justice, Ministry for Primary Industries, Environmental Protection Authority (EPA), and Financial Markets Authority (FMA) were consulted.
2. We assessed the options against existing penalties in the Climate Change Response Act 2002 (CCRA), Financial Markets Authority Act 2011, Financial Markets Conduct Act 2013 (FMCA), Fair Trading Act 1986 (FTA), and Commerce Act 1986. Options were discounted based on being inconsistent with other legislation, inequitable between participants, not cost effective, difficult to implement, and unlikely to deter offending.
3. The summary below outlines the options considered for each market governance provision.

### Penalty for failing to meet platform reporting requirements

4. We considered the following options to enforce platform non-compliance:
  - a fine based on a formula using average daily trading volumes, with a minimum fine of \$500 to ensure that smaller platforms still receive a fine that is significant enough to encourage compliance
  - tiered infringement fees of \$2,500 or \$5,000, determined by the volume of NZUs traded on the platform, with an additional fee per business day of continued non-compliance
  - a fine up to a maximum amount of \$30,000, based on a list of defined considerations that the courts could consider to determine the appropriate penalty, such as the volume of NZUs traded on the platform, the number of times the platform has been charged for failing to comply, and whether the platform has made efforts to avoid, mitigate or resolve their failure to comply
  - a fixed administrative penalty that increases with each occurrence of non-compliance **(recommended option)**
  - a flat rate infringement fee of \$2,000 or a fine not exceeding \$6,000
  - publishing details of non-compliance **(recommended option)**.
5. We recommend an approach that combines an administrative penalty with the publication of platform non-compliance.
6. We discounted the other options because they did not sufficiently meet assessment criteria. While all options were comparable to some other existing penalties in relevant legislation, the options that were discounted were going to be difficult to implement and were not cost effective. This was because of the need to involve the courts in applying penalties, which imposes costs on the regulator and increases the length of time taken to resolve the non-compliance.
7. The options for different levels of penalties depending on the volume of NZUs traded were not chosen because the compliance burden of daily platform reporting is not

increased by the amount of trading that occurs on a platform. All platform providers are equally capable of complying with the requirement. By comparison, the recommended option is straightforward for MfE to implement, resolves non-compliance quickly, and it is clear for participants what the penalty amounts are.

8. Given that the regulator can clearly determine whether a breach of platform reporting requirements occurred and intent does not need to be established, an administrative penalty is an appropriate option to encourage compliance without imposing undue cost and administrative burden. In addition, the publication of non-compliance is already commonplace under the CCRA and adds an additional incentive for participants to comply with the regime.
9. Existing administrative penalties in the CCRA have a review and appeal process for decisions made by the EPA.<sup>12</sup> The same review and appeals process for decisions made by MfE would be used for the new market governance administrative penalties.

### **Penalty for platforms failing to maintain a history of trading information**

10. We considered the following options to address platform non-compliance:

- tiered infringement fees ranging from \$5,000 to \$7,500, based on the volume of NZUs traded on the platform, imposed per occurrence of non-compliance
- scaled monetary fines starting at \$2,500 and \$5,000 for two different tiers (based on platform trading size), increasing by 1.5x the amount of the previous penalty, per occurrence of non-compliance, with a cap
- scaled monetary fines as above, increasing by 1.5x the amount of the previous penalty, per occurrence of non-compliance, without a cap
- an administrative penalty that increases with each occurrence of non-compliance **(recommended option)**
- publishing details of non-compliance **(recommended option)**.

11. We recommend an approach that combines an administrative penalty with the publication of platform non-compliance.

12. Alternative options were not favoured due to lower ratings against the assessment criteria, relative to the preferred options. Most of the options were consistent with related legislation, however, some were difficult to implement and scored less on equitable outcomes between platform providers.

13. The tiered infringement fee, with tiers in place to account for trading volumes across platforms, risked disparate outcomes between platforms. It was also determined that separating platforms by volume was an inappropriate way to impose the penalty, given the potential for significant swings in trading volume across the different platforms.

14. The scaled monetary fines were not chosen, as they both required involvement from the courts, potentially resulting in significant administrative burden for the enforcement

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<sup>12</sup> Sections 144-146, CCRA.

agency. In comparison, the preferred administrative penalty is straightforward to implement. In addition, the publication of non-compliance is commonplace under the CCRA and it adds an additional incentive for participants to comply with the regime.

15. Existing administrative penalties in the CCRA have a review and appeal process for decisions made by the EPA.<sup>13</sup> The same review and appeals process for decisions made by MfE would be used for the new market governance administrative penalties.

### **Penalty for failing to record trading information in the New Zealand Emissions Trading Register**

16. We considered the following options to enforce non-compliance with Register Reporting requirements:

- tiered infringement fees, based on the value of the underlying NZU transaction
- a fine up to a maximum amount of \$30,000, based on a list of factors such as the value of the NZU transaction not reported, the number of times the participant had previously failed to comply, and specific circumstances that would make a high penalty disproportionate
- a fine that increases with each occurrence of non-compliance, for first time offending not exceeding \$8,000, second time offending not exceeding \$16,000, and subsequent offending not exceeding \$24,000 for each successive offence
- flat rate infringement fee (**recommended option**)
- publishing details of non-compliance (**recommended option**).

17. We recommend an approach that combines an infringement fee with the publication of non-compliance.

18. Other options were discounted as, relative to the recommended options, they did not favourably meet the defined criteria. In particular, the tiered (rather than flat) infringement fee, based on the value of the underlying NZU transaction, would be difficult to implement in the absence of trading information recorded in the Register. Elsewhere, the two options to impose a fine risked significant administrative burden for the enforcement agency and the courts.

19. By comparison, the recommended flat rate infringement fee will be relatively straightforward to implement. Also, as opposed to the harsher administrative penalties recommended to enforce the other information reporting requirements (e.g. for platforms to provide trading information daily), the violation of Register Reporting requirements is deemed to be less serious, making an infringement fee (less than \$1,000) proportionate to the offence.

20. We note, as acknowledged in the body of the briefing, that the recommended options will only progress once the necessary aspects of the Register are ready. In the meantime, a

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<sup>13</sup> Sections 144-146, CCRA.

regulation-making power will be added into the CCRA to enable these changes to be implemented in the future.

### **Penalty for failing to provide information to the market monitor**

21. We considered the following penalty options for the failure to provide information to the market monitor:

- a fine with a maximum penalty of \$12,000 for an individual, and in any other case \$24,000, that can be imposed at the discretion of the courts by applying a list of factors such as the severity of the breach, impact of the breach, culpability or intent, and previous history of compliance
- an administrative penalty that increases with each occurrence of non-compliance **(recommended option)**
- an additional penalty, as a *mens rea* offence, in cases where the failure to provide information was done with the intent to deceive and for the purpose of obtaining material benefit
- flat rate infringement fee of \$1,000 in the case of an individual, or \$2,000 in any other case
- publishing details of non-compliance **(recommended option)**.

22. We recommend an administrative penalty that increases with each occurrence of non-compliance, in combination with the publication of non-compliance by MfE. Relative to the other options, this approach is the most effective way of encouraging compliance without risking disproportionately harsh penalties for participants.

23. The other options for this penalty were discounted as they scored less against the set criteria, relative to the preferred option. For the penalty to be imposed by the court, based on a list of factors, this option risked significant administrative burden, with the associated *mens rea* penalty likely to be disproportionate to the underlying harm caused by the violation.

24. For the flat rate infringement fee, while this option was as straightforward to implement as the recommended option, it was concluded that the relatively low penalty – and the absence of a mechanism to increase the fee for repeated offences – could result in weaker compliance from participants, or in other words, being treated as ‘a slap on the wrist’ or the cost of doing business.

25. Publication of non-compliance is commonplace under the CCRA and it adds an additional incentive for participants to comply with the regime. Existing administrative penalties in the CCRA also have a review and appeal process for decisions made by the EPA.<sup>14</sup> The same review and appeals process for decisions made by MfE would be used for the new market governance administrative penalties.

### **Penalty for violating the prohibition of NZU price manipulation**

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<sup>14</sup> Sections 144-146, CCRA.

26. Officials considered the following penalty options for violating the prohibition of NZU price manipulation:
- either a criminal or civil pecuniary penalty, pursued at the discretion of the regulator **(recommended option)**
  - a *mens rea* offence with a fine not exceeding \$200,000 in the case of an individual, and \$1 million in any other case, without the potential for imprisonment
  - a penalty that makes directors personally liable.
27. We recommend an approach that allows the regulator to pursue either a criminal or civil pecuniary penalty, with the application of the criminal law in cases where a *mens rea* element (mental deliberation) is present in the offending. As explained in the briefing, this option best aligns with the approach taken under the Financial Markets Conduct Act 2013, and will allow the Financial Markets Authority discretion to pursue either penalty pathway.
28. While the recommended option will result in additional administrative burden for the enforcement agency and the courts, we believe this is necessary to ensure the requisite enforcement is in place for what amounts to a serious violation that, if left unpunished, could seriously jeopardise the integrity and stability of the NZU market.
29. The option for a *mens rea* offence without the potential for imprisonment was not considered to be as effective as the recommended option for deterring offending and does not align with existing penalties in the FMCA faced by participants in financial markets. The option for director liability, while likely to act as a strong deterrent, would impose significant administrative burden on the regulator. It was also not considered appropriate for the NZU market, where participants range from individuals through to sophisticated corporate entities.

#### **Penalty for violating the prohibition of false, unsubstantiated, and misleading conduct in relation to buying, holding, or selling NZUs**

30. Officials considered the following penalty options for violating the prohibition of false, unsubstantiated, and misleading conduct in relation to buying, holding, or selling NZUs:
- a civil pecuniary penalty dependent on the value of the false, unsubstantiated, or misleading conduct **(recommended option)**
  - a set penalty of not exceeding \$200,000 in the case of an individual, and in any other case not exceeding \$600,000, with specific reasons for why the defendant will not be liable, such as the violation being due to a reasonable mistake, the defendant believing that there was a right to payment, or reasonable reliance on information provided by another person
  - a *mens rea* offence, with a fine not exceeding \$300,000, alongside criminal liability
  - a penalty that makes directors personally liable.
31. We recommend a civil pecuniary penalty that is dependent on the value of the false, unsubstantiated, or misleading conduct. We note that, as opposed to the recommended penalty for NZU price manipulation, this option takes a civil penalty pathway and does not

provide the option for the FMA to take action under the criminal law. This option aligns with the penalty in the FMCA for contravening fair dealing provisions. It also provides for an equitable approach, given that the penalty is proportionate to the value gained through the false, unsubstantiated and misleading conduct.

32. The alternative options for this penalty were deemed to be less efficient and effective, relative to the recommended option. In particular, the option to pursue a set penalty not exceeding \$200,000 in the case of an individual, and in any other case \$600,000, with a list of reasons for why the defendant might not be liable, risked requiring significant involvement from the enforcement agency and the courts. The same rationale applied to the *mens rea* penalty, which by default requires a higher threshold of *knowingly* engaging in the prohibited behaviour.
33. The director liability option was discarded, for the reasons outlined in paragraph 27 above, as establishing director liability risked creating an additional layer of unnecessary compliance burden for these participants.