15th June 2021

Financial Markets Policy
Commerce, Consumers and Communications
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
By email: financialconduct@mbie.govt.nz.

Regulations to support the new regime for the conduct of financial institutions: Insurance Brokers Association of New Zealand Inc submissions

1. Please find attached the submissions of the Insurance Brokers Association of New Zealand Inc (IBANZ) on the Ministry of Business, Innovation and Employment's Discussion document, *Regulations to support the new regime for the conduct of financial institutions* (April 2021).

2. IBANZ has over 100 member firms operating in the general (non-life) insurance market. IBANZ members employ approximately 5,000 staff of which approximately 2,500 staff are currently financial advisers.

3. IBANZ members place general insurance cover equating to approximately 50% of all general insurance premiums ($3.5 billion) for approximately 1 million New Zealand customers and for approximately 14 of the 30 general insurers operating in New Zealand. The total New Zealand gross written general insurance premiums in the 12 months to 30 September 2020 were more than $6.9 billion.[1]

4. Our members have high volume transactional businesses, with multiple advice conversations taking place on a daily basis, commonly consider a number of different insurance contracts underwritten by a range of insurers and have frequent cover placements. As general insurance policies are ordinarily renewed annually, our members will provide "regulated financial advice" under the new regime to their clients at least once a year, and commonly more frequently. For IBANZ members on average, 90% of advice is given to existing clients, and 10% of advice is given to new clients.

5. In the general insurance broking sector, up to 20% of clients may change insurers (i.e. replace their financial product) each year. This is a standard general insurance practice, and is undertaken to ensure the client receives the benefit of improved policy terms, coverage, conditions or pricing.

6. In addition, within the general insurance sector, there are different processes depending on whether financial advice is given to new clients or to existing clients and whether the advice relates to placement of new insurance cover, renewal of insurance cover or changes to existing insurance cover. Please let us know if you would like us to expand on any of the submissions made by IBANZ.

[1] Insurance Council of New Zealand Market Data. An additional approximately $400 million of cover was placed through Lloyds.

7. Please let us know if there are any issues with or you would like us to expand on any of the submissions made by IBANZ.

Regulations to support the new regime for the conduct of financial institutions

Your name and organisation

Name	Mel Gorham
Email	mel@ibanz.co.nz
Organisation/Iwi	Insurance Brokers Association of New Zealand Inc (IBANZ)

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

☐ The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at ***www.mbie.govt.nz***. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE's website because… [Insert text]

Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because… [Insert text]

Requirements for fair conduct programmes	
	Do you have any comments on the status quo i.e. no further regulations to support the minimum requirements for fair conduct programmes in the Bill?
1	Before recommending any regulations to support the new regime, MBIE should: - have regard to how financial institutions and intermediaries are already giving effect to the new regime's requirements and avoid imposing regulations where the market is adequately meeting those obligations; and - assess the impact of any proposed regulations to ensure that they do not impose impractical or over-burdensome requirements on financial institutions and their intermediaries. Overseas financial institutions, particularly insurers, will be assessing the operational implications and compliance cost of the new conduct regime and this will factor into their decision making as to whether to continue to offer products and associated services to New Zealand consumers. If those overseas financial institutions consider that the regulatory requirements are too burdensome, they may decide to cease offering products and services in New Zealand to the detriment of consumers, particularly given the heavy reliance on overseas capacity. In addition, if there are to be no Regulations to clarify the meaning of the draft Financial Markets (Conduct of Institutions) Amendment Bill (**Bill**) because the Bill now includes greater specificity of the expectations, then MBIE should consider clarifying the Bill's expectations by: • replacing "includes", with "means", when introducing the "fair conduct principle" criteria in the "fair conduct principle" definition in section 446B(2). Using "includes" heightens the uncertainty of the already vague and subjective "fairness" concept used in "treat consumers fairly". Section 446G(3) requires that financial institutions design their policies, processes, systems and controls "to ensure" their compliance with the fair conduct principle. If the fair conduct principle is open ended, financial institutions would be given an impossible task of "ensuring" compliance with an open-ended concept. If the provided list is incomplete, the Bill should include the omitted expectations, for clarity, or Regulations should close the gap. Guidance is an unsuitable and inefficient solution; and • including a "reasonable steps" overlay to section 446G(3) (as it does in section 431K for example) so that financial institutions are not required to design their policies, processes, systems and controls "to ensure" the financial institution's compliance with the fair conduct principle. Given the uncertainty attaching to "fairly", it is an unreasonable

	expectation to ask financial institutions to design processes (etc.) "to ensure" the principle is met. Fairness to one person is different to another. Currently, it is possible to envisage that financial institutions would be required to take unreasonable steps to satisfy the principle. All that should required is that financial institutions take reasonable steps to meet the objective. • clarifying section 446G(2) so that compliance with section 446M and any further prescribed requirements would be sufficient for the purposes of section 446G(3).
2	Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(a)?
	Please refer to the response to 1 above. Clarifications are needed to the Bill to obviate the need for Regulations.
3	Do you have any comments on the proposals regarding distribution of relevant services and associated products? We are particularly interested in how these proposals may be implemented.
	No comments.
4	Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(ac)?
	No comments.
5	Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(bb) to (bd)?
	Please refer to the response to 1 above. FSLAA intermediaries should be excluded entirely from sections 446M(1)(bb) to (bd)) for the reasons specified in IBANZ response to question 6 of the Discussion document: Treatment of intermediaries under the new regime for the conduct of financial institutions.
6	Do you have any comments on the proposal to specify further minimum requirements regarding remediation of issues? Are there any further specific remediation principles that should be specified in regulations?
	The remediation principles in any regulations should clarify that: (a) remediation has a broad meaning of "putting things right" and, as such, it does not necessarily require payment of compensation to affected consumers and can include where appropriate non-monetary responses (such as, apologies, corrective advertising and publicity campaigns); and (b) the nature of the remediation depends on all relevant circumstances of the particular case, including:

- the nature and extent of the loss, harm or poor customer outcomes that the consumers have been shown to have suffered as a result of the conduct;
- the nature and extent of the conduct that resulted in the loss, harm or poor customer outcomes; and
- the implications of undertaking any particular remediation on the financial institution and other consumers.

Recording the above principles would better ensure a more nuanced approach is taken to meeting the mediation requirements of the Bill.

	Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(be)?
7	Section 446M(1)(be) should be rewritten, as it is likely to have significantly broader effect than banning value or volume sales targets. The subparagraph does not reflect the comfort taken from the many reassurances given by the former Minister to the industry that it is only sales targets and soft commissions were to be affected. Because of those reassurances, IBANZ believes banning value or volume sales targets has drawn the headlines, and this paragraph has not attracted the adverse attention it requires. The subparagraph presupposes that incentives have "actual or potential adverse effects" on the "interests of consumers", and requires that financial institutions "design and manage" incentives to mitigate or avoid these effects "**so far** as reasonably practicable". Financial institutions will find it difficult to determine the extent they need to go to to meet this standard. Having been required to remove value or volume sales targets, there will be an assumption that section 446M(be) requires more. It would be helpful if Regulations would acknowledge that that linear commissions will often be sufficient to meet this requirement, and likewise having persistency clawbacks incentivises good customer outcomes through incentivising enduring sales. There is no recognition in section 446M(be) of a suitable balance which needs to be struck between the perceived interests of consumers and the need to adequately and appropriately reward intermediaries for their services in a commercially effective manner for providing valuable financial advice to customers. IBANZ understands based on MBIE's responses that the words "so far as is reasonably practicable" were intended to recognise that not all the perceived mischief of incentives could be removed practically, but the wording is unfortunate, and would be better replaced with an obligation to take "reasonable steps" as is used elsewhere in the FMCA. "So far as reasonably practicable" indicates that the financial needs to do everything it reasonably practically can do, rather than striking a suitable balance. A duty to mitigate or avoid "the actual or potential" adverse effects could be read as applying to mitigate or avoid both "actual" and "potential" adverse effects, which makes the drafting ambiguous and potentially even more far

	reaching. Sometimes "or" can read as "and", and particularly so in the context of words like "avoid". In addition to the acknowledgements sought above, IBANZ recommends replacing the words "or avoid the actual or potential" with "any", and excluding "immaterial" adverse effects, so the subparagraph reads: "take all reasonable steps to design and manage incentives to mitigate any material adverse effects of incentives on the interests of consumers".
8	Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(bf)?
	Please refer to the response to 1 above. Any communication obligations imposed should not be unreasonably burdensome, in the interests of maintaining a viable insurance industry.
9	Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(d)?
	Please refer to the response to 1 above.
10	Do you have any comments on the proposal to specify further minimum requirements regarding consumer complaints handling?
	No comments. IBANZ supports the alignment with the standard conditions for full financial advice provider licences.
11	Do you have any comments on the proposals to specify further minimum requirements regarding claims handling and settlement?
	Given its insurance purpose, the Earthquake Commission should be required to meet any minimum requirements regarding claims handling imposed on insurers, even if EQC is rightly not a licensed insurer for prudential reasons. If consumers' interests are really to be paramount, EQC should be held to the same standards when dealing with consumers directly or through employees or agents.
12	Do you have any comments on the proposed definition of 'handling and settling a claim under an insurance contract' means? If so, why?
	With respect to the activities specified in [101], subparagraph (e) should refer to "determining" an insured's entitlement rather than the "insurer's liability", under an insurance product.
13	Do you have any comments on the discussion regarding customer vulnerability?
	Given the inherent difficulties of defining with precision the term "vulnerable

	customer", and the uniqueness of each vulnerable customer's particular needs and circumstances, it seems unlikely that regulations could meaningfully flesh out the vulnerable customer related obligations in the new conduct regime. It would be desirable for there to be flexibility in how financial institution's respond to vulnerable customers' needs and time allowed for a market practice to develop with respect to this area. If financial institutions need further clarity about their vulnerable customer related obligations, it would be more helpful for guidance to be provided (similar to that issued by the United Kingdom Financial Conduct Authority) and developed in consultation with appropriate specialist organisations such as the Human Rights Commission, community groups and financial institutions.
14	Do you have comments regarding the option of including vulnerable consumers in section 446M(1A)? It is unnecessary to specify vulnerable customers as a separate factor to consider, because section 446M(1A) requires the financial institution to have regard to "the types of consumers it deals with", which will necessarily include vulnerable customers given that these are a specific type of consumer identified in the Bill. Rather than create a new vulnerable customers factor, the better approach (if it is considered that amendment is desirable) would be to amend section 446M(1A) as follows "the types of consumers it deals with (including vulnerable customers)". This would better reflect that: - financial institutions will need to consider the impact of any measures addressed at vulnerable customers on their wider consumer base and balance any conflicts or tensions between the needs of vulnerable customers and of the wider consumer base; and - there will be overlap between the needs of consumers as a whole and vulnerable customers, particularly given that some consumers may become vulnerable customers, whether temporarily or permanently, in the course of their relationship with the financial institution. Accordingly, it would not be desirable for financial institutions to be required to have regard to vulnerable customers separately from having regard to the types of its consumers it deals with, which inserting an additional vulnerable customer factor may encourage.
15	Do you think any further factors should be added by regulations to the list under section 446M(1A)? No.
16	Do you think any other regulations that could be made under new section 546(1)(oa) are necessary or desirable? Please provide reasons for your comments.

	Please refer to the response to 1 above.
	Sales incentives
	Do you have any comments on the Status Quo (no regulations)?
17	The Discussion paper notes (at [143]) that Cabinet has already made a decision to prohibit sales targets based on value or volume and, therefore, not making any regulations preventing sales targets would be inconsistent with this previous policy decision. IBANZ submits there is no need to go further than the Cabinet requires in the Bill and so "target" should be added into the "incentive" definition. This would ensure the powers conferred by the Bill do not go beyond Cabinet's intentions. While the force of the Paper's argument is accepted, the implementation of the Cabinet decision to prohibit sales targets needs to be moderated by the fact that after the Cabinet decision was made: (a) The new financial advice regime came into effect and in section 431K of the Financial Markets Conduct Act 2013 Parliament has permitted FSLAA regulated intermediaries latitude to manage conflicts of interest (including those relating to incentives) by requiring them to take all reasonable steps to ensure that the advice is not materially influenced by the interests of the person giving the financial advice or the interests of a person connected with the giving of the advice, and requiring disclosure of commissions so customers can see the commissions being paid and assess their degree of influence, if any on the advice they are receiving. (b) The Select Committee has recommended the insertion of section 546(5) which, if adopted by the House of Representatives, will obligate the Minister to make a recommendation for incentive regulations only if he or she has had regard to specific matters, including whether: - the regulations are likely to appropriately reduce or manage conflicts or potential conflicts between the interests of consumers and the interests of persons who would otherwise be entitled to receive incentives, or otherwise mitigate or avoid the actual or potential adverse effects of incentives on the interests of consumers; and - the likely effect of the regulations on the availability of financial advice, financial services and financial advice products and on the financial services industry generally. In seeking to implement the Cabinet decision, MBIE should adequately consider these subsequent developments and ensure that the resulting incentives regulations are consistent with them. In particular, MBIE should: - decide that the incentives regulations should not apply to FSLAA licensed intermediaries when they give regulated financial advice, because they are already obligated to manage the conflicts of interest

	associated with commissions under section 431K of the FMCA and disclose commissions to customers or, at the very least, impose lesser restrictions on them given section 431K and the disclosure regulations; - consider the extent to which the changes made by financial institutions and intermediaries to meet the Conduct and Culture review expectations (outlined in the response to 25 below) suggest that a narrower prohibition would be sufficient to appropriately reduce or manage (actual or potential) conflicts of interest, or to mitigate or avoid actual or potential adverse effects for consumers, of incentives, as required by section 546(5) if it is adopted; assess the likely effect of the proposed incentives regulations on the availability of financial advice (particularly independent financial advice), financial services and financial advice products and on the financial services industry generally, as will be required by section 546(5) if it is adopted. The incentives regulations should not go beyond the scope of the Cabinet decision. Accordingly, the regulations should not seek to regulate incentives generally, but rather only the sales target based incentives referred to in the Cabinet decision. As mentioned above, this could be achieved by adding "target" into the "incentive" definition itself. Accordingly: - the regulations should not cover sales-based metrics not involving targets; and - soft commissions should not be entirely prohibited where eligibility is not based on sales targets, especially those that may assist in improving customer outcomes, for example, training, education, computer applications and other business tools.
	Do you have any comments on the option to prohibit sales incentives based on volume or value targets?
18	So long as the incentive definition is amended to include the word "targets" and linear incentives are not prohibited, the proposed prohibition on sales targets can be managed.
	What would the likely impacts be for financial institutions, intermediaries and/or consumers of prohibiting sales incentives based on volume or value based targets?
19	The impact of the changes to remuneration structures would be significant. It would require intermediaries to: - grapple with their need to incentivise and retain their staff and intermediaries, as well as ensure they have sufficient income which justifies the payment of the incentives, having regard to the particularities of their businesses; - realise that it is easier said than done to remove or reduce sales-linked metrics and that they need to develop new information flows in order

	to inform additional non-sales metrics, which involves investment in new systems and processes; and - change their agreements and contracts to give effect to these changes, which in some cases has involved protracted commercial negotiations and relationship management. The insertion of section 546(5) by the Select Committee should require: - considering whether conduct gates, balanced scorecards for earning bonuses and other steps recently being adopted show that sales targets can be integrated into incentive structures without giving rise to material risks for consumers due to the controls adopted and, if so, draft suitable exclusions for these arrangements; - testing whether the prohibition as drafted will unintentionally capture incentive arrangements that should not be captured and, if need be, necessary exclusions drafted; and - identifying the cost implications for financial institutions and intermediaries to implement those changes in light of their experience in meeting the Conduct and Culture expectations, so as to ensure that the regulations provide adequate time for financial institutions and intermediaries to make further changes and to embed the changes they have already made. In undertaking this reconsideration, MBIE should take account of APRA's proposed approach in its *Prudential Practice Guide Draft CPG 511 Remuneration* (30 April 2021), for the reasons set out in the response to 17 above.
	Do you have any feedback on a more principle-based approach to prohibiting some incentives?
20	A principles-based approach is problematic. While it confers flexibility, it inherently creates uncertainty. Uncertainty rewards those who push boundaries at the expense of the compliant and risk-adverse. A more principles-based approach would prevent the incentives regulations acting as a single source of truth; requiring other sources to fill the void. The principles would need to be augmented by guidance and court decisions, which would be unsatisfactory. Guidance does not have the force of law and, therefore, can be ignored by the bold. Court decisions are an inefficient means to develop clarity about regulatory requirements: they are often fact-specific, it usually takes a long-time for any decisions, usually cases are sparse, litigation is resource-intensive, and leads to unfairness where the defendants genuinely may not have understood the regulatory requirements. Legislation is effective if it clearly signals its expectations so affected persons can comply with its expectations, and breaches can be easily enforced. Where principles based drafting leads to vagueness and uncertainty, it fails to meet these key purposes of legislation.

21	How could a more principles-based approach to prohibiting some incentives be made workable?
	For the reasons identified in the response to 20 above, a more principles-based approach should not be adopted.
22	If a more principles-based option was chosen, should there be some incentives specifically excluded?
	No. For the reasons identified in the response to 20 above, a more principles-based approach should not be adopted, and specific and clear drafting should be provided.
23	Do you think there are any other viable options other than what has been put forward by this discussion document? Please explain in detail.
	If a more principles based approach is adopted, there should still be clearly delineated prohibitions to elaborate on the principle, and the principles should operate only to permit incentives that would otherwise be prohibited – ie, provide some flexibility where it can be demonstrated that otherwise prohibited incentives do not create unacceptable risks through adequate controls being incorporated into the incentive design.
24	Are there sales incentives based on volume or value targets that should be excluded from the regulations (i.e. allowed to be offered/given)?
	Yes: as specified in the response to 17 above: - conduct gates, balanced scorecards, claw backs, and other steps recently being adopted by financial institutions and their intermediaries, show that sales targets can be integrated into incentive structures without giving rise to material risks for consumers due to the controls adopted; and - that such controls can be used to reduce risks to consumers to an acceptable level is supported by APRA's *Prudential Practice Guide Draft CPG 511 Remuneration* (30 April 2021) and the Australian Royal Commission. Accordingly, the regulations should exclude incentives based on volumes or value targets where the financial institution has incorporated adequate controls to reduce the risks to consumers to an acceptable level.
25	Do you think there are any types of incentives that should be excluded from the regulations? Please provide reasons for your comments.
	No. The regulations should not extend beyond the sales-target incentives referred to in the Cabinet decision.
26	Do you think that the scope of who can be covered by the regulations poses a risk of unintentionally capturing other intermediaries that are paid incentives

	but should not be covered?
	Subparagraph (b) could be too wide. As drafted, it would appear to capture back-room operations that are purely administrative in their nature and have no or limited consumer interaction -- for example, staff who process product applications, such as checking that the forms have been completed and uploading them into the system. To incentivise productivity, financial institutions and intermediaries may offer such staff bonuses dependent on them processing a prescribed number of successful applications, and may not have any other metric by which they can meaningfully use. Any such volume target bonuses do not seem to materially give rise to the risks to consumers that are the rationale for prohibition on sales targets.
	Do you agree/disagree that within financial institutions and intermediaries sales incentives regulations should apply to all staff? Why/why not?
27	While sales target based incentives can contribute to a culture where sales are prioritised over customer outcomes, as was found by the Hayne Royal Commission, the incentives regulations should apply only where it can be shown that a sales target gives rise to conflicts of interest or the risk of adverse effects for consumers. As noted in the response to 25 above, financial institutions and intermediaries may have staff whose roles do not give rise to such material risks, due to the nature of the services they perform and their limited interaction with consumers, and some form of sales target may be the only meaningful metric available to assess their incentive eligibility.
28	Do you agree/disagree that within financial institutions and intermediaries sales incentives regulations should only apply to frontline staff and their managers? Why/why not?
	No comments.
29	Do you think that external incentives should apply to any incentive paid to an agent, contractor or intermediary? Why/why not?
	No comments.
30	Do you agree that both individual and collective incentives should be covered? Why/why not?
	No comments.
31	Do you have any other comments on the discussion related to incentives?
	No comments.

Requirement to publish information about fair conduct programmes	
32	Is more detail needed to outline what information should be published regarding financial institutions' fair conduct programmes to assist financial institutions to meet this requirement, or to assist consumers in their interactions with financial institutions?
	No comments.
33	Do you have any comments on the options outlined above? What do you think the costs and benefits would be to financial institutions and consumers of the two options?
	No comments.
34	This discussion document outlines two options regarding the requirement to publish information about the fair conduct programmes. Do you have any other viable options?
	No comments.
Calling in contracts of insurance as financial products under Part 2	
35	Do you have any comments on the proposal to declare contracts of insurance as financial products under Part 2?
	No comments.
Exclusions of certain occupations or activities from the definition of intermediary	
36	Do you think it would be appropriate to exclude people who are subject to professional regulation from the definition of an intermediary (e.g. lawyers, accountants, engineers)?
	Exclusions should not be delineated by reference to profession (for example, lawyers, accountants, engineers and other professionals may sell insurance), but rather by reference to activity. The activities specified in section 546(4) provide appropriate exclusions (subject to the response to 25 above with respect to the narrowing of subparagraph (b)).
37	Do you think that any other occupations or activities should be excluded from the new proposed definition of an "intermediary"? If so, why?
	No.
Other comments	

IBANZ submits that:

1. FSLAA intermediaries should be excluded entirely from the Bill because FSLAA is a comprehensive piece of legislation which has been designed by MBIE for the same

purpose as the Bill. FSLAA has only recently commenced. It is too early to conclude that it has failed in achieving its common objective with the Bill and that additional requirements are needed. Extending the Bill to FSLAA intermediaries would cause unnecessary and substantial duplication, inefficiency, loss of productivity, confusion, additional FMA supervision costs and would adversely affect the availability of independent financial advice for consumers.

2. Consistent with Cabinet's intentions, regulating incentives should be limited to sales targets and soft commissions, and so the word "targets" should be added to the value and volume part of the incentive definition and soft commissions should be defined separately with exclusions for legitimate activities, such as training;

3. Failing to capture EQC within this Bill is unjustified (and appears to have arisen because EQC did not need to be licensed for prudential purposes as a Government body). EQC should be required to treat customers fairly for consistency between the public and private sector and for achievement of the intention of the legislation – fair treatment of customers. Recent litigation indicates that imposing fair conduct requirements on EQC is needed far more than further regulating insurers.

Yours faithfully

Privacy of natural persons

Melanie Gorham
CEO IBANZ Inc