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Financial Markets Policy
Commerce, Consumers and Communications
Ministry of Business, Innovation and Employment

Emailed to: financialconduct@mbie.govt.nz

Dear Madam/Sir,

ICNZ submission on regulations to support the new regime for the conduct of financial institutions and treatment of intermediaries under this regime

Thank you for the opportunity to submit on Ministry of Business, Innovation and Employment's (**MBIE**) two separate discussion documents on:

- regulations to support the new regime for the conduct of financial institutions, and
- treatment of intermediaries under the new regime for the conduct of financial institutions.

By way of background, the Insurance Council of New Zealand, Te Kāhui Inihua o Aotearoa (**ICNZ**) represents general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand (**NZ**) general insurance market, including about a trillion dollars' worth of NZ property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property and directors and officers insurance).

ICNZ supports efforts to ensure good conduct in financial services. This is why we introduced the Fair Insurance Code (**FIC**) in 1994, which covers all our members' dealing with their customers and sets high standards to govern those dealings. It was recently reviewed and a revised version came into effect from 1 April 2020. We also support in concept the introduction of conduct legislation for financial services to ensure good conduct and fair treatment of customers is more widely achieved.

The remainder of this submission has two parts for each discussion document:

- comments and summary of positions, and
- responses to individual questions.

Comments and summary of positions

<u>Regulations to support the new regime for the conduct of financial institutions</u>

General comments about this regime

In considering whether regulations are required to support the new conduct regime, we believe there is a balance to be struck between:

- providing sufficient flexibility in minimum requirements of FCPs so that implementation can be adapted, taking into account the particular circumstances (including the complexity and scale of the relevant FI's operations, product/service and customer mix, culture and strategy), and the conduct risk that may arise, appreciating that the intention is for FIs not to adopt a narrow interpretation and/or compliance 'box ticking' approach to meeting these principles-based obligations, and
- requirements being sufficiently certain.

In making this submission we note that there are areas where requirements under the current Bill and/or proposed regulations overlap, have gaps, duplicate or are inconsistent, with existing requirements. These include:

- **Overarching regimes**: There are a range of duplicating/overlapping/inconsistent customer outcome focussed conduct obligations under the financial advice regime. We also note that terminology used in this regime and the financial advice regime do not always align.[1] In addition to some intermediaries, many relevant FIs are also financial advice providers under the financial advice regime (including a number of insurers). Licensed insurers are also already robustly regulated by the Reserve Bank of New Zealand, Te Pūtea Matua (**RBNZ**) as prudential regulator.
- **Incentives**: The broad principles-based fair conduct expectation regarding the design and management of incentives under s 446M(1)(be) of the Bill, the proposed prohibition for incentives under regulations, and the partial/inconsistent obligations regarding incentives under the financial advice regime.[2]
- **Treatment of insurance brokers as agents of the insured or insurer**: While generally an insurance broker is an agent of the insured/customer, there are differing approaches to this matter under this regime and under s 10 of the Insurance Law Reform Act 1977, where they are deemed to be agents of the insurer.[3]

These overlaps, gaps and inconsistencies will potentially lead to confusion, misalignment, unnecessary compliance costs and potentially inconsistent regulatory protection for consumers. These issues also highlight the importance of taking sufficient time to carefully consider these matters, noting that we understand the regime is not intended to come into effect until 2023 at the earliest.

The high-level nature of some of the proposals, the overlapping nature of some questions,[4] and the range of matters that still need to be worked through and developed, also mean it is difficult for us to comprehensively comment on any unintended consequences at this stage.

As earlier noted, it is not possible for us to provide definitive views on what specific requirements for intermediaries should be in regulations at this stage, because a major structural change to the Bill, regarding their treatment, is outstanding and resulting decisions regarding specific requirements are yet to be worked through. We refer to our responses to the second discussion document in these respects and suggest that further consultation occur on detailed requirements in regulation, once policy decisions have been made on the treatment of intermediaries, based upon the submissions received.

Next steps

Reflecting upon the comments above, it will be important for further consultation to be undertaken and guidance developed about the intended operation and interaction of the various requirements and the implementation of this regime more generally, with a reasonable lead in time from the finalisation of legislation, regulations and guidance to commencement. Also, in this context:

[1] For example, whereas the conduct regime turns on the definition of 'consumer', the financial advice regime distinguishes between 'retail' and 'wholesale' clients.

[2] Financial Services Legislation Amendment Act 2019 including the duty under s 431K to prioritise clients' interests, under Schedule 21A, Clause 4, the obligation to advise clients of any incentive that may be given, and under s 431R(4) the prohibition from giving or offering incentives that are intended to encourage, or have the effect of encouraging, a nominated representative from engaging in conduct that breaches a duty under ss 431I to 431P.

[3] We understand this matter is being considered as part of the review of Insurance Contract Law. ICNZ has previously argued that s 10 should be amended to remove this deemed agency and avoid any confusion that an insurance broker is anything other than the agent of the insured/customer. However, we understand another solution to this particular issue is being explored. We comment further on this matter in our responses to individual questions raised in each discussion document.

[4] See questions concerning the treatment of professionally regulated individuals as intermediaries or agents.

- Care needs to be taken to ensure that complexity and additional compliance costs are minimised (recognising these may be ultimately passed onto customers) and so that expectations are not unnecessarily or unduly onerous, complex, impractical or have significant unintended consequences (including ones that potentially undermine what the regime is trying to achieve). In this context, regard should be had to the relationship with other reforms that also significantly impact general insurers' capability to absorb change, including the outcomes of the reviews of Insurance Contract Law, the Earthquake Commission Act and EQC cap, the Insurance Prudential Supervision Act and Solvency Standards, the Fire and Emergency New Zealand levy regime, proposed climate change related financial disclosure requirements and the implementation of the IFRS 17 accounting standard.
- More generally (i.e. with reference to the broader financial services industry), regard needs to be had to the sequencing and interaction of this regime and the full licensing requirements for financial advice providers, given the period of 2022 and into 2023 appears to be key to both.

We support moving most of the specific fair conduct requirements currently set out under s 446M of the Bill to regulations as originally intended. We also support separate provisions with requirements for intermediaries. This will ensure the relevant requirements can be tailored, and more easily refined and updated at a later stage, as the regime is bedded in or circumstances change. This would also correct the currently proposed position where provisions of a similar nature and detail are inconsistently dealt with under the Bill or the regulations.

We would also welcome the opportunity to meet and further discuss these matters further, both immediately following this submission and once further refined proposals have been developed.

Lloyd's insurance market

Regarding section 7 of the discussion document on the Lloyd's insurance market, [5] we note that:

- Some of the challenges of applying this regime to the Lloyd's insurance market is a result of the policy decision to primarily focus this regime on the conduct of FIs, rather than casting a wider net and providing for consistent treatment of all relevant entities involved in the financial services industry and a range of distribution models.
- We anticipate that some of the challenges presented by the Lloyd's structure will be addressed via the regulation making power under s 389(4) of the Bill.[6] There may be other entities (either now or in the future) whose business structures similarly do not align well with the Bill's requirements and for whom licensing exemptions may also be appropriate. It would be helpful to understand what is being proposed in this regard and have the opportunity to comment on it.

Summary of positions

ICNZ has taken the following positions on each of the proposals set out in the 'Regulations to support the new regime for the conduct of financial institutions' (**FIs**) discussion document:

No.	Section	Positions
1.	Requirements for fair conduct programmes (**FCPs**)	While we support the FCP requirements, our preference is to avoid additional regulation where this is unnecessary. To this end, we agree that regulations are not required to support requirements under ss 446M(1)(a), 446M(1(ac), 446M(1)(be), 446M(1)(bf) or 446M(1)(d) of the Fair Market (Conduct of Institutions) Amendment Bill (**Bill**).[7] Given the importance of identifying and appropriately engaging with consumers who are in vulnerable circumstances, we consider that this should be explicitly referred to as a factor for FIs to have regard to when designing their FCPs, although it is unclear whether s 446M(1A) is the best place to address this.[8]

[5] Paragraphs 208 and 209 of the discussion document.

[6] To exempt a financial institution from a licensing requirement.

[7] Questions 2, 4, 7, 8, 9 and 13 of the discussion document respectively.

[8] Question 14 of the discussion document.

No.	Section	Positions
		In principle, we agree that further regulations to support requirements under ss 446M(1)(bb) to (bd) are unnecessary.[9] However, it is not possible for us to be definitive on this matter because a major structural change to the Bill, regarding the treatment of intermediaries, is outstanding. We refer to our responses to the discussion document regarding the treatment of intermediaries in this respect. While we support FCP requirements, we do not support the introduction of regulations to support requirements under s 446M(1)(ab), or regarding consumer complaints handling or claims handling and settlement.[10] We do not consider that it is necessary to add any other additional factors under s 446M(1A) or prescribe other FCP requirements under s 546(1)(oa) of the Bill.[11] Any proposed regulations regarding remediation need to be carefully considered and it is vital that FIs retain flexibility to respond appropriately in the circumstances.[12]
2.	Sales incentives	Given Cabinet has made a decision to prohibit sales targets based on value or volume, making regulations specifying the types of incentives that are prohibited provides some certainty on what the Government is looking to prohibit, which the status quo would not.[13] While in principle we are supportive of the preferred option described in the discussion document, to prohibit certain sales incentives based on volume or value targets, more detail is required to determine whether this option would be ultimately suitable.[14] While it is not possible to provide an accurate picture of the likely impact, given key elements remain uncertain, it stands to reason that, in so far as this is not already being addressed, prohibiting sales incentives based on volume or value based targets, will assist in mitigating conflict of interest risk and ensure consumers' interests are not adversely impacted. That said, this may also reduce sales of some products/service to consumers. Implementing changes to comply with these requirements will also add costs, particularly where significant system/process changes are required or it is necessary to renegotiate arrangements with independent third parties such as insurance brokers.[15] We do not support the alternative approach to prohibiting some incentives proposed.[16] If this was adopted, in our view, it would be necessary for an exhaustive list of excluded incentives to be identified to address its very broad potential application and the significant risk of unintended consequences.[17] We support modifications being made to the preferred prohibition option described in the discussion document.[18] In addition to the exclusions proposed in the discussion document, this should include exclusions for: • Appropriately weighted or structured volume or value based targets that form part of a broader package of metrics that need to be met as part of a balanced scorecard. • Volume or value based targets where it can be shown that any actual or potential adverse effects on consumers' interests have been mitigated or which have positive outcomes for consumers.

[9] Question 5 of the discussion document.

[10] Questions 3, 10, 11 and 12 of the discussion document respectively.

[11] Question 15 and 16 of the discussion document.

[12] Question 6 of the discussion document.

[13] Question 17 of the discussion document.

[14] Question 18 of the discussion document.

[15] Question 19 of the discussion document.

[16] Questions 20 and 21 of the discussion document.

[17] Question 22 of the discussion document.

[18] Question 23 of the discussion document.

No.	Section	Positions
		• Incentives related to the profitability, revenue or number of customers across a segment/business unit or overall business. • Referrals based on volume or value targets. [19] It should also be made clear that incentives to retain customers are not covered by the prohibition. We consider that only those in customer-facing roles and their direct managers should be caught by the prohibition,[20] which should apply to individuals whether they are an agent, contractor or intermediary.[21] In relation to collective incentives, we refer to earlier comments recommending that appropriately weighted or structured balanced scorecards and incentives related to the profitability, revenue or number of customers across a segment/business unit or overall business be excluded from any prohibition, noting that these may include collective incentives.[22] While we have not identified any unintentionally captured intermediaries at this stage, it may be that these are identified at a later point. [23] In line with the scope of the Bill, it should be confirmed that the prohibition only applies to consumer business. How this would operate in practice also needs to be worked through, noting the potential for market distortion otherwise.[24]
3.	Requirement to publish information about FCPs	We do not consider that it would be necessary or appropriate to prescribe further requirements in regulation regarding the publication of summaries of FCPs.[25]
4.	Calling in contracts of insurance as financial products under Part 2	We do not consider that it is necessary or appropriate to call in insurance as 'financial products' for the purposes of Part 2 of the Financial Markets Conduct Act 2013.[26]
5.	Exclusions of certain occupations or activities from the definition of 'intermediary'	Given the changes proposed in the discussion document regarding the treatment of intermediaries, we do not believe professionally regulated individuals such as lawyers and accountants should be captured within the definition of intermediaries.[27] However, if there is any risk they may be unintentionally captured, then they should be specifically excluded. At this stage we are not aware of any other occupations that should be excluded from the proposed definition of an 'intermediary'. However, s 446E(2) needs to be amended in several respects.[28]

[19] Questions 24, 25 and 27 of the discussion document.
[20] Questions 27 and 28 of the discussion document.
[21] Question 29 of the discussion document.
[22] Question 30 of the discussion document.
[23] Question 26 of the discussion document.
[24] Question 31 of the discussion document.
[25] Questions 32, 33 and 34 of the discussion document.
[26] Question 35 of the discussion document.
[27] Question 36 of the discussion document.
[28] Question 37 of the discussion document.

Further details and reasons for these positions are set out in the second part of this submission.

Treatment of intermediaries under the new regime for the conduct of financial institutions

The appropriate treatment of intermediaries

In determining the appropriate treatment of intermediaries under this regime, we consider that it is important to have regard to:

- The significant role intermediaries play in the consumer market for general insurance (by our estimate around 50% of all consumer general insurance products is intermediated, with an estimated 20% distributed through insurance brokers specifically).
- The fact that FIs such as general insurers may have limited ability to have oversight of, or provide input into, how independent third party intermediaries such as insurance brokerages conduct themselves.
- Ensuring good customer outcomes is a partnership between intermediaries and FIs,[29] and the need to ensure consistent fair conduct outcomes irrespective of who a customer deals with, and a level playing field between all relevant market participants. We expand upon these matters in response to question 6 of the discussion document.

Reflecting on the above, it will be important that FIs have an appropriate level of responsibility regarding intermediaries under the regime. We set out our preferred approach in this regard below, which involves a flexible and risk-based approach and one set of consistent principled-based requirements for all intermediaries.

We also support conditions being imposed on financial advice provider licenses of those acting as intermediaries of FIs to ensure consumers are treated fairly and reinforce the Bill's objectives. [30] Provided these conditions are appropriately utilised, and supervised/managed by the FMA this, in conjunction with the preferred approach described above, would go some way to addressing the matters raised above and concerns about insurance broker designed insurance products which are not currently captured under the Bill.

Summary of positions

ICNZ has taken the following positions on each of the proposals set out in the 'Treatment of intermediaries under the new regime for the conduct of financial institutions' discussion document:

No.	Issue	Position
1.	Option 1: Amend definition of intermediary to focus on sales and distribution	We support the proposal to amend the definition of 'intermediary' under s 446E of the Bill to focus on only those involved in sales and distribution of the relevant products/services and that this definition extend to those in either financial advice or non-advice sales roles.[31] In principle, we consider that the scope of the proposed definition of 'intermediary' is sufficiently comprehensive to capture the variety of sales and distribution methods and to avoid gaps and risks of regulatory arbitrage. However, it is not possible to be definitive on this matter given the limited information provided and the wide range of distribution models that may be involved.[32]
2.	Option 2:	We consider that the proposal to exclude from the definition of 'agent' those who

[29] Insurance Core Principle 19: Conduct of Business – Introductory Guidance sections 19.0.8, https://www.iaisweb.org/page/supervisory-material/insurance-core-principles-and-comframe/file/89018/iais-icps-and-comframe-adopted-in-november-2019.

[30] Under clause 7 of the Bill, which amends s 403 of the Financial Markets Conduct Act 2013 to permit the FMA to impose conditions on financial advice provider licensees acting as intermediaries of FIs.

[31] Question 1 of the discussion document.

[32] Question 2 of the discussion document.

No.	Issue	Position
	Refine scope of who is covered as an agent	are only involved in a very generalised way in the provision of the relevant product/service is appropriate.[33] However, it is difficult to accurately establish from the level of detail provided in the discussion document whether the proposal would adequately exclude advisory services and other service providers not involved, directly or indirectly, in providing any part of the FI's relevant products/services to consumers. Including explicit exclusions for particular occupations or activities would assist in this regard.[34]
3.	Part 2: Obligations in relation to intermediaries: Objectives	We support the objective set out in paragraph 43.a. but consider that the objective set out in paragraph 43.b. should be reframed to read "*minimise uncertainty and unnecessary duplication,* and maximise consistency between *regulatory obligations* for financial institutions, intermediaries and consumers (our amendments)." [35]
4.	Option 3: Minimal changes to intermediaries obligations	We do not support option 3 as the requirements on FIs are impractical and unworkable. This option would also have residual uncertainty and not achieve the identified objectives (as amended above) in our view.[36] If option 3 was to be pursued, we consider that ss 446M(1)(bb) and (bd) would need to be significantly refined and the requirement under s 446M(1)(bc) removed.[37]
4.	Option 4: More significant changes to intermediaries obligations	We agree with a greater number of requirements being removed as proposed under option 4. However, we believe the parameters of this option need to be adjusted and complemented to ensure this option works in practice and achieves the desired outcomes of the conduct regime. Our preferred option is a modified version of option 4 with the following features: • a tailored risk-based approach taking into account a variety of factors with reference to s 446M(1A) and the extent to which the relevant intermediary is already regulated, and • one set of consistent principled-based requirements for all intermediaries that includes requirements for training, oversight, setting conduct expectations and dealing with misconduct. These requirements should, on a consistent basis, only extend so far as the intermediary is involved in the provision of the FI's relevant products/services and as these are relevant to supporting the FI's compliance with the fair conduct principle. In progressing these matters, it will be important for guidance to be developed to expand upon and articulate specific expectations with reasonable timeframes for implementation. This is something that could be the subject of specific industry consultation through collaborative workshops involving both FIs, intermediaries and regulator representatives.
5.	Option 5: Distinguish between FSLAA and non-FSLAA	We consider that it would be inappropriate to determine which requirements would apply based solely upon whether an intermediary is regulated under the financial advice regime or not as proposed under this option. Conduct risks will be different based upon the specific intermediary concerned and this binary assessment ignores a range of other factors which we consider should also be taken into account.[38]

[33] Question 3 of the discussion document.

[34] Questions 4 and 5 of the discussion document.

[35] Question 6 of the discussion document.

[36] Question 7 of the discussion document.

[37] Question 8 of the discussion document.

[38] Question 12 of the discussion document.

No.	Issue	Position
	intermediaries	However, we would support conditions being imposed on financial advice provider licenses of those acting as intermediaries of FIs to ensure consumers are treated fairly and reinforce the Bill's objectives.
6.	Part 3: Obligations in relation to employees and agents	In principle, we support the proposed obligations in relation to employees and agents. However, some refinements to concepts are required,[39] and it would be premature for us to provide a view on whether a distinction should be drawn between employees and agents.[40] We do not consider amendments are required to the obligations set out in s 446M(1) that apply to employees and agents at this stage.[41]
7	Part 4: Other options considered	We are concerned that some of the proposals previously raised appear to have been dismissed without sufficiently robust analysis.[42]

Further details and reasons for these positions are set out in the second part of this submission.

Responses to individual questions

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

Question	Feedback
Requirements for fair conduct programmes	
1. 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?	In considering these changes there is a balance to be struck between: • providing sufficient flexibility in minimum requirements of FCPs so FIs can tailor implementation with reference to their particular circumstances (including the complexity and scale of their operations, product/service and customer mix, culture and strategy), the conduct risk that may arise, appreciating the intention is for entities not to adopt a narrow interpretation and/or pure compliance 'box ticking' approach to meeting principles-based fair conduct obligations, and • requirements being sufficiently certain. While we support the FCP requirements, our preference is to avoid additional regulation where this is unnecessary, as this may constrain flexibility without particularly increasing certainty. While regulatory guidance is welcomed in areas of uncertainty, we note this can add complexity and increase compliance costs if issued on an ad hoc basis without the opportunity for thorough consultation and requires businesses to respond at short notice. If regulatory guidance is to be developed in conjunction with, or as alternative to regulations, we suggest this be the subject of close consultation with reasonable timeframes for implementation. We also acknowledge that, inherent in this being a new regime, over time as it is bedded in, there will be additional areas where changes are required. We comment on each of the specific proposals to change the status quo below.

[39] Question 14 of the discussion document.
[40] Question 15 of the discussion document.
[41] Question 16 of the discussion document.
[42] Question 17 of the discussion document.

Question	Feedback
2. Do you have any comments on MBIE's proposal position that no regulations are needed at this time to support section 446M(1)(a)?	We agree that, at this time, no regulations are required to support s 446M(1)(a), noting that this provision is broadly descriptive and non-exhaustive in nature. Acknowledging that the intention is for this regime to overlay existing legislative requirements, and for policies/procedures implemented to meet these existing requirements to sit within FCPs and be drawn upon to satisfy fair conduct requirements, we believe relevant regulators (e.g. MBIE/FMA/Commerce Commission) should collaboratively work together and issue joint guidance on how they see the various requirements fitting together and their joint sectorial expectations in these respects, with an emphasis on avoiding duplication and inconsistencies, and minimising unnecessary compliance costs.
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.	We consider that s 446M(1)(ab) is sufficiently clear such that regulations are not required. We also consider the proposed regulations could inappropriately constrain a FI's assessment of the relevant consumers. In contrast, the current provision ensures there is flexibility. Flexibility is important as it allows arrangements to be put in place that are appropriate for each business, bearing in mind the wide variety of FIs (and products/services) covered by the Bill and means of distribution. We consider that the focus on 'likely consumers' under the proposed regulations would be unduly restrictive and cut across the existing more wide-ranging analysis entities undertake on an on-going basis to identify current and potential consumers and their needs, noting that user-groups change and that there needs to be flexibility to appeal to different groups over time. In addition to conduct considerations, this work is informed by commercial considerations, as services/products designed to meet consumer needs and preferences are generally more successful. Consistently, for clarity, we consider that there is merit in replacing the reference in the definition of the fair conduct principle set out in s 446B from 'likely consumers' to 'current or prospective consumers'. More generally, we believe that such a prescriptive approach could lead to a narrower and undesirable frame of reference for identifying relevant customers and their needs. This could result in inappropriate assumptions being made and gaps/blind spots in analysis. This could include: • Failing to consider the interests of individuals that fall outside the group of 'likely consumers' when something may be nonetheless suitable to them. • A product/service being sold to an individual that falls within the characteristics of the group of 'likely consumers' that is not actually suitable for them due to other circumstances (e.g. such as them being in a vulnerable situation). • Unnecessarily increasing compliance costs which may lead a FI to simplifying and restricting the way it sells products/services or to whom they distribute with, limiting consumer choice. As demonstrated by the extensive and lengthy consultation on the design and distribution obligations in Australia, this is a very complex area which could result in unintended consequences if not thoroughly considered. If these regulations were to be progressed, they would need to be extensively

Question	Feedback
	consulted on, noting that aspects of the NZ market are very different to the Australian one.[43] This would likely delay the progression and implementation of this regime. From the perspective of a FI with a large number of products/services, we would be concerned about any regulation that required policies, processes, systems and controls for "*identifying the likely consumers, and their likely requirements and objectives, for each relevant service and associated product.*" (our emphasis). Without resiling from the position above, if such a requirement was introduced, we consider that this should be adjusted to permit a combined assessment that takes into account common characteristics across products/services (e.g. all comprehensive motor vehicle or annual travel insurance policies for consumers). We note that ICNZ's general insurer members already have obligations under the FIC regarding the development and distribution of their products/services.[44] This emphasises the need for FIs in different sectors to be able to tailor FCPs specific to their businesses. The principles-based obligations under section 446M(1)(ab) would also apply in this context.
4. Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(ac)?	We agree that regulations are not required to support the operation of s 446M(1)(ac), noting that: • This provision provides a broad overarching requirement to identify and manage relevant conduct risks. • It is appropriate to provide flexibility in this respect given, as commented in the discussion document, different levels of maturity in risk management (including in terms of conduct risk) exist. • This approach enables implementation to be tailored to the FI's specific circumstances.
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)?	In principle we agree that regulations are not required to support the operation of ss 446M(1)(bb) to (bd), acknowledging the comment in the discussion document that the details contained in the new s 446M(1)(bd)(i) to (iv) were originally intended to be covered in regulations.[45] However, it is not possible to be definitive on this matter because a major structural change to the Bill, regarding the treatment of intermediaries, is outstanding. We refer to our responses to the second discussion document in this respect including our views on the appropriate level of responsibility FIs should have regarding intermediaries and supporting licensing conditions being applied to financial advice intermediaries of FIs to ensure consumers are treated fairly and reinforce the Bill's objectives. Putting that matter to one side, it is unclear to us how the current requirement under s 446M(1)(bd), for FIs to obtain reasonable assurance that each employee, agent or intermediary is 'competent' and 'fit and proper' would be satisfied and we believe these requirements should be redrafted and supported by guidance. 'Fit and proper' requirements are usually applied to a small number of senior individuals within a company (i.e. directors or senior managers)[46]or lawyers,[47]

[43] Where there are standardised products and a different range of perils insured.

[44] Clause 4, We'll develop, market, and sell our products responsibly.

[45] Paragraph 60 of the discussion document.

[46] For example, see the fit and proper requirements under s 36 of the Insurance Prudential Supervision Act 2010.

[47] See s 55 of the Lawyers and Conveyancers Act 2006.

Question	Feedback
	rather than to an entire workforce, those in customer-facing roles, or to agents or intermediaries. It is unclear what factors would be relevant in this broader context. For example, is the intention for an otherwise good employee to fail a 'fit and proper' requirement due to a minor historical offence that is unrelated to the conduct outcomes this regime is seeking to address? We are also concerned that these matters potentially cut across existing employment law,[48] or contractually negotiated arrangements, resulting in unnecessary inconsistencies and complexities for matters that are already being adequately addressed. We also note that the 'competent' and 'fit and proper' terminology would not be suitable when the relevant intermediary or agent is a legal entity rather than an individual/natural person.[49]
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?	Remediation of issues is a broad topic with numerous, and often complex matters to consider. Issues range from simple one-off, ad hoc issues through to widespread, complex, historical issues involving multiple products/services, distributors and/or systems. Different issues require different responses, and the scope of an issue may not become clear until it has been fully investigated. Accordingly, while we support the high-level principles-based guidance in s 446M(1)(a) and appreciate that the Government is trying to provide further clarity on what 'reasonable steps' are, we do not consider that proposed additional requirements are appropriate. The implications and value of any proposed regulations in this regard need to be carefully evaluated and it is vital that FIs retain flexibility to appropriately respond to each unique issue identified. We note that under the FIC,[50] ICNZ members must have appropriate internal assurance processes in place to enable them to monitor their compliance with this code, proactively report any significant breaches that they become aware of to ICNZ and provide code compliance reports to ICNZ if required.[51] If a significant breach is reported, it may be investigated by the independent Code Compliance Committee, who can then make a recommendation to the ICNZ Board on what action they should take.[52] The member can be reprimanded, fined and expelled for significant breaches of this code.[53] External dispute resolution schemes must also report significant breaches of this code to ICNZ. Inherent in these requirements is a transparent and robust process for identifying and remediating issues and ensuring they do not happen in the future. Without resiling from the above position that further requirements are not required, we note the following regarding each of the proposed remediation requirements set out under paragraph 66 of the discussion document:

[48] For example employee competency and duties of good faith and trust and confidence.

[49] For example, for a non-advice intermediary such as a motor vehicle dealer, it is difficult to envisage how a financial institution would obtain assurance that that entity was 'competent' and 'fit and proper'.

[50] Which sets out standards customers can expect from their insurer (including regarding their general conduct and claims and complaints) amongst other things, https://www.icnz.org.nz/fileadmin/Assets/PDFs/Fair_Insurance_Code_2020.pdf.

[51] Clause 30.

[52] Clause 32.

[53] Pursuant to clause 33, a significant breach is a breach of any part of the code, or a number of breaches of the code, that could bring the insurance industry into disrepute, and for which there is no reasonable explanation. For example, the following must be reported to ICNZ: (1) a claim still being unsettled after 12 months; (2) the handling of a claim or complaint causing serious hardship to the policyholder; (3) a member not complying with an order from an external dispute resolution scheme upholding a complaint against them.

Question	Feedback
	a. Review and remediation processes must be comprehensive, efficient, timely and transparent Whilst we support this in principle and believe ICNZ's members already approach remediation in this way (noting the comments made above about the FIC), what is considered 'timely', particularly for complex remediations, will vary and be and open to interpretation. *b. Review and remediation processes must be fair, equitable and transparent taking into account consumer's interests and needs, and FIs must take all reasonable steps to remediate all affected customers* While we support this in principle, as stated in the discussion document, it may not always be possible for compensation to be fair, equitable and transparent. For example, when customers are uncontactable, or do not respond, despite taking reasonable steps to do so. We also note that 'all reasonable steps' appears to be a higher threshold than 'reasonable steps' in section 446M(1)(ad). We consider 'reasonable steps' is a more appropriate threshold. *c. Once conduct that fails to comply with the fair conduct principle has been identified, FIs should take all reasonable steps to ensure that the misconduct ceases and that consumers are not continuing to be adversely affected* We support this in principle. However, as with (b) above, we consider that 'reasonable steps' is a more appropriate threshold. *d. Review and remediation processes must be adequately resourced* We agree in principle that remediation processes should be adequately resourced. However, a requirement to be 'adequately resourced' would be difficult to apply in such a complex and varied area and could be interpreted as a requirement to have a permanent remediation capacity, which may be inappropriate in the circumstances. Some issues may be appropriately addressed using BAU resourcing whilst others may need to be the subject of a specific project with dedicated resources attached. In addition, remediating certain issues may require resources with specialist skills which are not readily available (e.g. specialist external loss adjusters). It would also be very difficult to establish whether a remediation process was adequately resourced given the uncertainty and variability of issues that might require review and remediation and accordingly a requirement of this kind would increase uncertainty from a compliance perspective. A requirement to be adequately resourced is also arguably unnecessary as, if a FI's remediation processes were under resourced and this caused issues, it is likely to play out as a breach of some other obligation under the regime, for example, the overarching requirement under s 446M(1)(ad). *e. Adequate records of remediation processes* We support this in principle. *f. Communicating with customers about the progress and outcome of review and remediation processes in a clear, concise, timely and effective manner*

Question	Feedback
	Save for the reference to 'timely' and a need to be clear about the use of the term 'review', we support this option in principle, noting this language generally aligns with that used in the FIC,[54] and FMA's guidance on their view of conduct.[55] While it is important to communicate clearly with customers at appropriate times, and some issues may appropriately require regular progress updates (such as unresolved claims),[56] many may simply be resolved by one-off communication to the impacted customer(s) about the issue and how it was resolved. Mandatorily requiring progress updates in all circumstances would be unnecessary. It may also create uncertainty as to when it is appropriate (or not) to contact customers and expectations may differ. Complying with this requirement may also be difficult when an intermediary such as an insurance broker is involved as they may restrict insurer to customer communications. We expand upon this last matter in response to the second discussion document below. Importantly, it could be unnecessarily confusing and upsetting for customers to be contacted about an issue that is under 'review' before the FI has fully investigated it, properly understands how it impacts them and before the need to remediate has been determined. As acknowledged in the relevant discussion document, there are also added complexities when FIs are unable to contact customers after taking reasonable steps to do so. *g. Review of remediation processes to ensure conduct risks and issues are being adequately managed* We support this in principle.
7. Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(be)?	We agree that regulations are not required to support the operation of s 446M(1)(be), noting that a number of FIs have already made significant changes in this area. However, with a view to enhancing certainty, avoiding duplication, inconsistency in approaches and unnecessary compliance costs, it would assist if guidance was developed about the intended interaction between: • the broad principles-based expectations in this provision • any prohibition for incentives introduced under regulations, and • the obligations under FLSAA regarding incentives, including under s 431K to prioritise clients' interests, under Schedule 21A, Clause 4 to advise clients of any incentive that may be given, and under s 431R(4), the prohibition from giving or offering incentives that are intended to encourage, or have the effect of encouraging, a nominated representative from engaging in conduct that breaches a duty under ss 431I to 431P. More generally, it is unclear to us what evidence would be required to satisfy the current requirement under s 446M(1)(be) to mitigate or avoid the actual or potential adverse effects of incentives on the interests of consumers. We are also concerned that, as currently drafted, this requirement could be interpreted to mean that the payment of any commission, because the consumer effectively has to pay a higher premium, would be an adverse effect that could only be mitigated by no commission being payable. This

[54] See for example clauses 6 and 16.

[55] https://www.fma.govt.nz/assets/Guidance/170202-A-guide-to-the-FMAs-view-of-conduct.pdf, page 13 (communication).

[56] See clauses 17 to 18 and 22 of the FIC.

Question	Feedback
	requirement should be clarified to ensure this does not occur as we understand that this is not the intention. Please also see our feedback below on proposals to prohibit certain types of incentives.
8. Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(bf)?	We agree that regulations are not required to support the operation of s 446M(1)(bf) at this time. The overarching and interconnected nature of this requirement, and the variation in how different products/services are engaged with by customers, necessitate a high-level, principles-based and flexible approach being undertaken. However, consideration should be given to modifying requirements under s 446M(1)(bf) to reflect that in some cases, under the terms of their distribution agreements with intermediaries, insurers may have no ability to communicate directly with customers. We expand upon this in response to question 6 of the second discussion document below. This issue could be addressed by distinguishing between direct and intermediated distribution, with the requirement for the FI to communicate in an intermediated context being limited to the extent reasonably possible and with the intermediary also having responsibility in this respect.
9. Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(d)?	We agree that regulations are not required to support the operation of s 446M(1)(d). This section already provides a clear onus on FIs to have systems and processes to ensure their conduct programmes are fit for purpose on a continuous basis. We agree that it would not be appropriate to prescribe the regularity that programmes should be reviewed. To do so, would be unduly arbitrary, increase the perception that this exercise is a pure compliance 'box ticking' exercise, and undermine the dynamic nature of FCPs and the ability of FIs to review matters, as and when, appropriate. Reviewing elements of the FCP over time is likely to be more workable for FIs as well.
10. Do you have any comments on the proposal to specify further minimum requirements regarding consumer complaints handling?	Our members are already complying with the complaints handling requirements proposed in this discussion document by virtue of their compliance with existing legal requirements and accordingly we consider that these regulations and the associated compliance costs are unnecessary. Additionally, given the reference to complaints in s 446C(1)(d), and as s 446M(1)(a) already requires the FI to include in its FCP how it meets all its legal obligations to consumers including under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP**), providing specific complaints handling related detail in regulations would be unnecessary and potentially create uncertainty as to the application of overlapping legislative provisions, given the existing obligations of FIs and intermediaries. These include: • Requirements for all FIs to be a member of an approved dispute resolution scheme pursuant to the FSP. Each dispute resolution scheme requires participating members to have internal complaints handling services and to publicise the availability of that service. • Standard conditions for full licensing under the financial advice regime requiring a Financial Service Provider to have an internal process for resolving client complaints relating to their financial advice service that provides for: ○ complaints to be dealt with in a fair, timely and transparent manner, and

Question	Feedback
	○ records to be kept of all complaints and any action taken in relation to them (including the dates on which each complaint was received and any action taken). Also, the fair conduct principle applies to customer complaints,[57] and based on the current Bill, FIs would also be required to make a summary of their FCP publicly available, with sufficient detail included to assist consumers in understanding how to make a complaint.[58] General fair conduct requirements regarding remediation, monitoring and customer communications would also apply. We also note that detailed customer complaints handling requirements already apply to ICNZ's general insurance members under the FIC.[59] Without resiling from the above position, if further minimum requirements were to be introduced, to avoid confusing customers, unnecessary duplication, complexity, costs and overlap with dispute resolution scheme rules, any requirements related to matters dealt with via registration under the FSP should be mirrored or preferably removed.[60] Any requirements should also align with relevant ICNZ requirements, noting that this is longstanding and reflects good industry practice. Any definition of "complaint" should also mirror other existing requirements.[61]
11. Do you have any comments on the proposals to specify further minimum requirements regarding claims handling and settlement?	We do not believe further minimum requirements for claims handling and settlement are necessary or appropriate. The overarching fair conduct principle already applies to claims handling and sets high level expectations regarding conduct in all situations.[62] We note that other current provisions of the Bill are also relevant in this regard.[63] External dispute resolution providers also already ensure insurers are treating consumers fairly at claims time. Without resiling from the above position, if additional detail regarding claims handling and settlement were to be introduced, we consider: • It would be important to ensure that any such requirements are sufficiently high-level and general in nature that they can be applied to a range of different claims handling processes and claim types across the insurance industry (e.g. health, life and general insurance),[64] different consumer insurance products/services and approaches to claims handling (e.g. face-to-face, over the phone or online). • It would be most appropriate for these to be set out in guidance as general expectations, rather than requirements in regulations, due to the wide range of matters and complexity involved, and requirements that already exist.

[57] Section 446C(1)(d).

[58] Section 446HA(2)(a)(iii).

[59] Clauses 26 to 29. The FIC also clearly outlines the steps members will take for complaints. Further information about this process is also available on ICNZ's website, https://www.icnz.org.nz/fair-insurance-code/making-a-complaint.

[60] Given FIs are already be registered under the FSP.

[61] For example, under the FIC, a 'complaint' is defined as "*verbal or written advice that the customer is dissatisfied with the insurer's products or services, or the complaints handling process itself, and they expect something to be done about it*."

[62] Section 446C(1)(d).

[63] For example the requirements related to communicating with consumers under s 446M(1)(bf).

[64] By way of an example, please see an overview of the key steps that make up the claims process from a customer's perspective in a general insurance context in our submission on the Insurance (Prompt Settlement of Claims for Uninhabitable Residential Property) Bill (page 3 and 4), https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_submission_on_Insurance__Prompt_Settlement_of_Claims_for_Uninhabitable_Residential_Property__Bill_111220.pdf.

Question	Feedback
	• The references to 'fair' and 'timely' as proposed would be appropriate given the need to preserve flexibility and noting the central focus on 'fairness' underlying this regime and the FIC. • Consistent with other fair conduct obligations,[65] it would be useful to confirm that any claims handling and settlement requirements apply with reference to customers as a group, rather than with reference to a specific claim. • As this is a complex and varied area, it would need to be the subject of comprehensive consultation. Below we respond to each of the comments made about claims in paragraph 94 of the discussion document, noting that ICNZ previously engaged with MBIE on these matters as part of the Insurance Contract Law Review. *a. Claimants can experience long delays* Where delays occur these may be justified, or occur, for reasons outside an insurer's control. In relation to property claims this may include: • A change in ownership of the property, the illness or death of the customer or a change in the customers' requirements (e.g. changes to layout or materials). • Challenges with claims supplier availability (e.g. construction industry contractors, project management and materials, particularly when these need to be sourced overseas). This is a particular issue when the event/damage is of a large scale and/or there are difficulties or delays getting resources to the area impacted (e.g. because it is in a rural area that is hard to access). COVID-19 and related supply chain issues have presented further challenges in this respect. • The presence of asbestos at the property that needs to be carefully removed in accordance with stringent regulatory requirements. • Complexities associated with assessing and working through complex losses or additional/separate damage caused by aftershocks. This may necessitate council information and input, specialist loss adjusting and/or legal, engineering or architectural advice being obtained. • The customer challenging the insurer's claim decision, resulting in a review and/or the matter being formally disputed. This may ultimately lead to long-running litigation (including appeals) before the courts. • Challenges reaching agreement where multiple owners are involved, such as those involving cross-leases or other non-body corporate multi-unit developments. In some cases, matters may be further complicated because owners have different insurers, or some owners are uninsured. • Difficulties accessing information (e.g. from the Police or overseas). It is in insurers' best interests to accept and manage claims to completion as quickly as possible (within acceptable parameters) because: • this ensures they meet customers' expectations for prompt resolution and maintains a relationship of trust and confidence with them, supporting the long-term sustainability of their businesses • resolving claims promptly minimises insurers' exposure under time-based covers, and • until closed, a claim constitutes a liability on an insurer's balance sheet, attracting an undesirable element of uncertainty and a financial cost for outstanding claim liabilities under the Solvency Standard overseen by the RBNZ as prudential regulator.

[65] For example, see s 446M(1)(ab).

Question	Feedback
	Insurers' claims guidelines and reinsurance requirements also generally require that claims be promptly resolved. As detailed below, this is also something emphasised in the FIC. [66] Using the 2016 Hurunui/Kaikōura earthquake as a recent example, the insurance sector exceeded its own goal of having the majority of claims settled by the end of 2017, with 88% of all domestic claims being fully or partially settled by 31 December 2017. As at 30 November 2017, 96% of residential and commercial claims had been assessed one year on from the event, with 82% being fully or partially settled by then.[67] We note that customers can access internal and external complaints processes if they believe they have experienced, or are experiencing, unwarranted delays. *b. Claimants sometimes have their claims significantly underpaid* If claims are being significantly underpaid, which our members do not believe is the case, this would be a breach of the insurance contract, the duty of utmost good faith and the overarching requirement for FIs to treat customers fairly. Customers have existing remedies available to them should this occur. Care needs to be taken about how this issue is characterised. In our view, such issues are historic, noting that this has been the subject of extensive litigation. *c. Inadequate communication between insurers and customers* The Bill already requires FIs' FCPs to include effective policies, processes, systems and controls for "*communicating with consumers…in a clear, concise and effective manner*".[68] We acknowledge that there were communication issues in some instances following the Canterbury Earthquake Sequence due to the scale of this event. Since then, insurers have made changes and measures are in place to ensure this does not happen again. *Other comments* Under the FIC ICNZ's general insurer members are required to manage claims quickly, fairly and transparently and adhere to timeframes for responding to claims including providing regular progress updates to customers.[69] We challenge any implicit suggestion in paragraph 96 of the discussion document that the New Natural Disaster Response Model would mean customers' expectations are not being met. To the contrary, this change was specifically designed to improve the customer experience, with customers only needing to lodge one claim through their private insurer for natural disaster damage to their home and land.[70] Like private insurers, we do not believe a public entity such as the EQC would enter into such an arrangement, if it would not provide customers with a sufficiently high standard of service, particularly

[66] Clauses 16 to 18 and 22.

[67] https://www.icnz.org.nz/media-resources/media-releases/single/item/settlements-reached-for-82-of-kaikooura-claims/

[68] Section 446(m)(1)(bf).

[69] Clauses 16 to 18 and 22.

[70] The private insurer will then assess, manage and settle their claim in its entirety, including both components covered by EQC and the private insurer. This approach is much more efficient than one which requires customers to have to lodge separate claims with EQC and the private insurer, https://www.eqc.govt.nz/news/ndrm.

Question	Feedback
	in light of what was learned following the Canterbury Earthquake Sequence. As the earlier statistics show, this model was used very effectively to resolve claims following the 2016 Hurunui/Kaikōura earthquake. If specific requirements were introduced through regulation, we consider that provision should be made for claims handling and settlement requirements to sit with intermediaries in conjunction with, or independent to, those imposed on FIs themselves. This reflects that some intermediaries may have authority to handle and settle some claims.
12. Do you think there is need to define what 'handling and settling a claim under an insurance contract' means? If so, why?	We do not see a need to define what 'handling and settling a claim under an insurance contract' means. The range of products/services across the insurance market are so wide-ranging that any definition would need to be very broad and generic. Accordingly, the value it would provide is questionable. Without resiling from this position, if a definition was to be introduced (e.g. once a consideration of this matter had developed and the regime matured): • Consistent with comments made in response to the earlier question, it may make most sense for this to sit in guidance rather than regulations. • It would need to be high-level and have sufficient flexibility that it could be applied to a wide variety of circumstances (including claims across life, health and general insurance and a range of coverages and benefits). This is something that would need to be extensively consulted on. • Key elements that should be covered from a general insurance context include: o receiving formal notice of a claim from the customer and the insurer acknowledging this o the insurer assessing the claim and deciding whether it will be accepted o determining how the claim will be settled, and o finalising and paying the claim.[71] • It would assist if it was clearly stated within the definition what is included and excluded. • Careful attention needs to be taken to ensure it did not extend to claims fulfilment by other parties (e.g. the completion of repairs or reinstatement), noting that in the discussion document it is commented that, in addition to claims advocates and brokers, the intention is not to capture within this definition any persons acting on behalf of the insured. • While the definition from Australian legislation referred to in the discussion document has some relevant aspects, it would need to be modified to be suitable for the NZ context. Specifically, the reference to "*assist another person make an insurance claim*" would need to be removed as this relates to agents who act for customers in making claims (e.g. claims advocates and brokers).[72] While the inclusion of claims advocates is appropriate in the Australian context, given they are regulated there for conduct, this is not the case in New Zealand. In light of the comments made in the previous bullet point, the reference under paragraph 101. g. of the discussion document to "*satisfy*[ing] *the liability of an insurer under an insurance claim*" also appears problematic.

[71] Further details about these steps in a general insurance context are set out on page 4 of ICNZ's submission on the Insurance (Prompt Settlement of Claims for Uninhabitable Residential Property) Bill, https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_submission_on_Insurance__Prompt_Settlement_of_Claims_for_Uninhabitable_Residential_Property__Bill_111220.pdf.

[72] See paragraph 101.b. of the discussion document.

Question	Feedback
13. Do you have any comments on the discussion regarding customer vulnerability?	It is very important that FIs take all due care to identify and appropriately engage with customers in vulnerable circumstances (**vulnerable customers**). This is something that general insurers are particularly mindful of and that is reflected in the FIC.[73] This commitment was recently demonstrated by the work ICNZ's general insurer members did to support customers as the COVID-19 outbreak unfolded.[74] Also, we note: • The additional work insurers undertook together with the RBNZ and the FMA in 2020 in light of COVID-19 impacts. • Expectations for providers regarding vulnerable customers issued by the FMA in April and June 2020.[75] • The Consumer Vulnerability Framework issued by the Council of Financial Regulators (**CoFR**) on 29 April 2021, which sets out a common understanding of the characteristics of vulnerable customers.[76] • The FMA has indicated that further guidance on vulnerable customers will be included in its revised Guide to Good Conduct due to be released for consultation later this year. Considering the existing commitments and expectations, we consider that it is unnecessary to make any specific regulations regarding vulnerable customers. This approach provides flexibility which is appropriate given this is a relatively new and evolving area. We also note that various existing requirements under s 446M of the Bill will be relevant to identifying and appropriately engaging with vulnerable customers.[77]
14. Do you have comments regarding the option of including vulnerable consumers in section 446M(1A)?	Given the importance of identifying and appropriately engaging with vulnerable customers (as defined above), we consider that it is appropriate for this matter to be explicitly referred to in the fair conduct regime. However, given the consideration of vulnerable customers is relevant to a wide-range of matters across FIs' operations, consideration should be given to whether this reference would, instead of s 446M(1A), best sit under some earlier more principles-based provision under s 446M or at a high-level under the hierarchy of the Bill. If, notwithstanding the above, vulnerable consumers were to be referred to under s 446M(1A), it would not be appropriate to refer to them as a type of customer under s 446M(1A)(d). As identified by CoFR in their Consumer Vulnerability Framework,[78] focusing on 'circumstances' rather than 'types' of people is the best practice approach when engaging with vulnerable consumers given vulnerability is not necessarily a fixed condition. On this basis, if s 446M(1A)(d) was to be used (which we do not recommend), it could be amended less problematically as follows:

[73] See requirements under clause 22 of the FIC to identify and respond to vulnerable customers based on their individual circumstances. This includes reference to the Human Rights Commission's Best Practice guidelines for the prioritisation of vulnerable customers, https://www.hrc.co.nz/our-work/economic-and-social-rights/past-work/canterbury-earthquake-recovery/red-zones-report/best-practice-guidelines-prioritisation-vulnerable-customers/.

[74] See the 10 Core Insurances Principles pledged by ICNZ members to support customers during the COVID-19 crisis, which includes responding flexibly and responsibly to those in genuine financial hardship or who are vulnerable, https://www.icnz.org.nz/media-resources/covid-19/covid-19-news-single/item/new-zealand-insurers-agree-to-sector-wide-pledge-to-support-customers-during-covid-19-crisis.

[75] See https://www.fma.govt.nz/assets/Uploads/COVID19-CEO-Conduct-Letter-1.pdf and https://www.fma.govt.nz/assets/Uploads/CustomerVulnerability-ourexpectationsforproviders.pdf.

[76] https://www.fma.govt.nz/assets/CoFR/CoFR-Consumer-Vulnerability-Framework-April-2021.pdf.

[77] As outlined in paragraph 110 of the discussion document.

[78] Page 1, https://www.fma.govt.nz/assets/CoFR/CoFR-Consumer-Vulnerability-Framework-April-2021.pdf.

Question	Feedback
	(d) the types of consumers it deals with and any consumers who may be in vulnerable circumstances. (our amendments)
15. Do you think any further factors should be added by regulations to the list under section 446M(1A)?	As outlined in response to question 9 of the second discussion document, we consider that s 446M(1A) should be amended to emphasise FIs taking a tailored risk-based approach in meeting requirements with respect to intermediaries and to have explicit regard to the extent to which intermediaries are already regulated in making these assessments. In the event that further factors were identified at a later stage, we note that s 446M(1A)(f) provides for these to be added at a later date via regulations.
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.	We do not consider that it is necessary or desirable to make any other regulations under s 546(1)(oa) at this stage. Further regulations can be made later if appropriate in response to any issues that are identified.
Sales incentives	
17. Do you have any comments on the Status Quo (no regulations)?	While the status quo already includes a broad overarching obligation regarding the design and management of incentives,[79] and in response to the FMA and RBNZ's Conduct and Culture reviews, many FIs have already removed volume or value based incentives that pose risks to customers, we acknowledge that Cabinet has made a decision to prohibit sales targets based on value or volume. Accordingly, making regulations specifying the types of incentives that are prohibited provides some certainty as to what the Government is looking to prohibit, which the status quo would not.
18. Do you have any comments on the option to prohibit sales incentives based on volume or value targets?	While it is important to ensure that incentives are designed to mitigate actual or potential adverse effects on consumers' interests, and we are supportive of an option to prohibit sales incentives based purely on volume or value targets in principle, given comments made in response to question 17 above, more detail and refinement would be required to ensure it is ultimately suitable. We are also concerned by the broad way this option is currently framed, covering "*any incentive (whether monetary or non-monetary and whether direct or indirect) that is determined or calculated* in any way *by reference to the volume or value of relevant services or associated products, and which has* any *target component to it (broadly defined)*."[80] (our emphasis). The potential unintended consequences of a blanket prohibition need to be carefully analysed and we consider there will be some situations where incentives based on volume or value targets will be entirely appropriate, as any adverse impacts are mitigated, or which have positive outcomes for consumers. For example, our reading of this statement is that it would for instance prohibit even balanced scorecards (where any volume or value based targets would form part of a broader package of metrics including ones potentially focussing on consumers' interests and promoting good outcomes in this respect). As expanded upon in response to question 24 below, we believe that such

[79] Section 446M(1)(be).

[80] See paragraph 152 of the discussion document.

Question	Feedback
	arrangements should not be prohibited just because they contain a volume or value based target component.[81] Very specific definitions will also be required to clearly set out what constitutes an incentive based on sales volume or value targets. This will be especially important for incentives paid to employees. Questions to consider in this context include: • Whether a target based on segment/business unit or overall business, profitability (e.g. with reference to a loss ratio,[82] combined ratio,[83] market share or budgeted costs), revenue or number of clients could constitute a volume or value based target?[84] • What would be the position on a target based on numbers of submissions received (where submissions may not translate into sales but in general terms more submissions may mean more sales)? [85] • Whether incentives to retain customers would be excluded?[86] We advocate for the incentives described above to be excluded from any prohibition in our responses to questions below. Additionally, consideration should be given to the fact that some volume or value incentives may have benefits for both the intermediary and the customer. For example, they may involve training or software that enhances the skills of those selling products/services helping to mitigate risks to consumers. While we now understand that the intention is to apply any sales prohibition to arrangements between entities as well as to individuals/natural persons, [87] the uncertainty about this matter highlights the need for this to be clarified under the regime.
19. What would the likely impacts be for FIs, intermediaries and/or consumers of prohibiting sales incentives based on volume or value based targets?	Consistent with the comments made directly above, it is not possible for us to form an accurate picture of the likely impact of this prohibition given that important elements of this are unclear at this stage. Putting that matter aside, in general terms: • In so far as this is not already being addressed, prohibiting certain sales incentives based on volume or value based targets would assist in ensuring conflict of interest risks of this type are mitigated and consumers' interests are not adversely impacted, noting that this will help salespeople to treat all customers the same way (i.e. because they would not be

[81] Such a broad approach is inconsistent with the current approach in Australia where, when a balanced scorecard is involved, the focus is only on the part of the performance arrangement that is volume based. Where this occurs, the part that is volume based is presumed to be a conflicted remuneration. The onus will then be on the provider to show that it is not conflicted, taking into account all the circumstances. A performance benefit based only on non-volume-based criteria is not presumed to be conflicted remuneration https://asic.gov.au/media/4566844/rg246-published-7-december-2017.pdf, see paragraphs RG 246.156 and RG 246.158.

[82] The loss ratio represents the ratio of losses (including paid insurance claims and adjustment expenses) to premium earned. The loss ratio is calculated by taking insurance claims paid plus adjustment expenses and then dividing this by total earned premiums.

[83] The combined ratio is a measure of profitability used to gauge how well an insurer is performing in its daily operations. The combined ratio is calculated by taking the sum of incurred losses and claim-related and operational expenses and then dividing them by the earned premium. Investment returns are not included in this calculation.

[84] Our preliminary view is that they would not be captured as these matters only relate to sales indirectly.

[85] Our preliminary view is such matters would not fall within the scope of the incentive prohibition.

[86] We do not consider that they should be given these are not 'sales' related, although we note that the definition of incentive in s 446P(3)(e) of the current Bill refers to avoiding or preventing something with the example given of requests from consumers to cancel insurance contracts.

[87] Paragraph 185 of the discussion document suggests that this is the intention although other references in this document suggest this is not the case.

Question	Feedback
	incentivised the closer they got to a target). • That said, as targets are effective in motivating sales, it stands to reason that their removal could reduce sales of some products/services and reduce competitive pressures. In turn this could potentially negatively impact growth and profitability, and lead to reductions in the products/services available to customers, as businesses look to remain sustainable. This could, in turn, exacerbate concerns about underinsurance in NZ. • Implementing changes to comply with the prohibition would be an added cost where the prohibition was inconsistent with incentive arrangements in place, including any changes made in conjunction with the Culture and Conduct reviews, reiterating that (as outlined above) many FIs have already made significant changes in this regard. We expect that these costs would be highest where significant system/process changes are required,[88] and/or for those with intermediated distribution models, particularly where incentive arrangements need to be renegotiated with independent third parties (e.g. insurance brokerages). We provide feedback on the consequences of specific aspects of this proposal in response to other questions below.
20. Do you have any feedback on a more principles-based approach to prohibiting some incentives?	It would not be our preference to adopt the option described in the discussion document as the 'alternative approach: principle-based prohibition' to prohibiting some incentives (**Alternative Option**) because: • We expect this option would be significantly less certain and accordingly less straight-forward to implement from an operational perspective and that there would more difficulty demonstrating compliance.[89] • It may be challenging to reconcile two overlapping principles-based requirements regarding incentives (i.e. this prohibition and the general requirements under s 446M(1)(be)). • The uncertainty under this broad option may result in inconsistent approaches and consumer outcomes across the financial service industry and open up the potential for regulatory arbitrage. While some market participants may interpret this prohibition narrowly, others may interpret it broadly, effectively resulting in all incentives being removed,[90] and in turn potentially negatively impacting upon access to financial advice and the range of product/services consumers can choose from. We also note that such an approach does not align well with the relevant Cabinet decision in our view.[91] Without resiling from the position that a more principles-based approach is not supported, we acknowledge that this option would favourably empower FIs and intermediaries to: • adopt a risk-based approach, acting flexibly to allow target-based

[88] Noting that the scale of an insurer's operations and/or its setup, may mean that system/process changes required to implement any incentives prohibition would need to be applied across all business lines (i.e. business as well as consumer insurance products). We discuss this matter further in response to question 31 below.

[89] In particular, it may be very difficult to establish whether any incentive "…*could reasonably be expected to influence*…" the behaviour sought to be addressed.

[90] For example, if an insurer provides two products, with one having a higher commission rate than the other, this could be considered to influence the product that is offered to the consumer by the intermediary, such that it is interpreted as not being permitted. The same issue arises when different insurers provide different rates of commission. This would also be an issue where an insurance broker receives a commission when a product is sold via a platform (that could be a broker platform) as compared to a similar product that was not.

[91] The relevant Cabinet decision, referred to at footnote 6 on page 13 of the discussion document, records (at paragraph 16) that "*agreed to regulate sales incentives based on volume or value targets ...*"

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	incentives where actual or potential adverse effects on consumers' interests do not arise (e.g. non-customer facing roles) • mitigate any actual or potential adverse effects of target-based incentives so that negative outcomes do not arise • continue to use balanced scorecards that include volume or value based targets where the scorecard acts to mitigate conflict risks to customers and/or that are aligned with good customer outcomes, and/or • use target-based incentives that have positive outcomes for consumers (such as better trained advisers) or which support the long-term sustainability of a business (e.g. incentives for senior managers or directors).[92] However, we consider that it would be feasible to integrate these attributes into the preferred option described in the discussion document (given it includes a targeted prohibition and the principle based requirements under s 446M(1)(be)), which is our preference. We comment further on this below.
21. How could a more principles-based approach to prohibiting some incentives be made workable?	We refer to our comments to question 20.
22. If a more principles-based option was chosen, should there be some incentives specifically excluded?	As earlier indicated, one of the challenges with the Alternative Option (as defined above) is the very broad potential application and the significant risk of unintended consequences. To address these issues, at a minimum, we consider that it would be necessary for an exhaustive list of excluded incentives to be identified with substantial analysis and extensive consultation undertaken in this respect. The list of exclusions would need to be frequently reviewed and refreshed as market behaviour changed (e.g. new forms of incentives were developed).
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.	Please see our modified version of the preferred option to prohibit sales incentives based on volume or value targets described in the discussion document, which is our preference. We comment further on this below.
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)?	*Balanced scorecards* We consider that balanced scorecards, with appropriately weighted or structured volume or value based targets forming part of a broader package of metrics that need to be met, should be excluded from the regulations. Balanced scorecards involve a mix of metrics under different categories related to different areas of a businesses' and/or individual's performance which together determine whether an incentive is awarded. Common categories in balanced scorecards include customer, finance, risk, and people and culture. Each category has minimum and maximum weightings, with at least one goal

[92] We refer to comments made in and under paragraph 156 of the discussion document in this regard, in particular the reference to the threshold test "*reasonably be expected to influence…*".

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	in each. We understand that many businesses including some of ICNZ's general insurer members use balanced scorecards for incentives. Specific metrics related to customer outcomes that may be reflected in balanced scorecards include: • the individual's compliance with legal, quality assurance or other internal processes • the quality of the advice given by the individual • customer satisfaction with the individual • measures of customer loyalty or advocacy (e.g. the individual's Net Promoter Score) • the training undertaken by the individual, and • the number of complaints received about the individual or adverse external dispute resolution scheme rulings. The inclusion of such metrics is consistent with the consumers' interests and promotes good customer outcomes. The inclusion of these metrics can also address concerns about any volume or value targets also included in a balanced scorecard. For example, it could be that the ability to meet any such target is contingent upon customer-outcome based metrics (e.g. as above) being met as 'gate openers' or that such targets are not dominant factors in the overall scorecard, such that they could not be reasonably expected to adversely affect consumers' interests. In conjunction with management measures, such as not permitting an incentive to be paid or significantly reducing it, in response to poor conduct/a poor rating in the customer category (which as above, may be something reflected in the scorecard itself), balanced scorecards ensure growth of the business and customer outcomes are appropriately balanced and risks to customers from incentives based on volume or value targets are mitigated. Prohibiting balanced scorecards outright (i.e. because they contain volume or value based targets) would: • Be inconsistent with the approach adopted in other industries and the approach of financial services regulators in Australia and the United Kingdom, where it is acknowledged that balanced scorecards can be used to effectively mitigate conflict risks.[93] This may be particularly problematic for insurers operating in both Australian and NZ markets as they may be using the same systems, processes and operational procedures. • Unduly limit incentive arrangements that do not appropriately fall with the scope of this regime. In addition to the metrics that are consistent with the consumers' interests and promoting good outcomes outlined above, this would include metrics unrelated to consumer products/services, or profitability, revenue or number of customers across a segment/business unit or business as whole. *Targets where adverse effects are mitigated or which provide for positive outcomes* We also consider that any volume or value target should be excluded from the prohibition where it can be shown that: • any actual or potential adverse effects on consumers' interests have been

[93] See footnote 80 above for more detail about the approach in Australia. See https://www.fca.org.uk/publication/finalised-guidance/fsa-fg13-01.pdf and https://www.fca.org.uk/publication/thematic-reviews/tr14-04.pdf regarding the approach in the United Kingdom.

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	mitigated, and/or • which provide positive outcomes for consumers.[94] For example, this could include incentives that unlocks access to training, resulting in better trained advisers. *Retention targets and other comments* Additionally, we consider that there should be an explicit exclusion for any incentives related to retention targets for existing customers. Please also see our comments in response to questions 25 and 27 below. The above exclusions would empower market participants to proactively ensure good consumer outcomes alongside effectively meeting commercial growth and sustainability requirements, noting that these matters are also ultimately important from a consumer outcome perspective. We also note that such arrangements would continue to be subject to overarching requirements regarding incentives under s 446M(1)(be).
25. Do you think there are any other types of incentives that should be excluded from the regulations? Please provide reasons for your comments.	*Segment/business unit or overall business profitability, revenue or number of clients* Arguably metrics related to segment/business unit or overall business profitability (e.g. with reference to a loss ratio, combined ratio, market share or budgeted costs), revenue or number of clients would not be captured by a volume or value sales targets prohibition, and should not be in our view as the ability of an individual to influence the results would be minimal and at best these would only have a loose connection with sales targets.[95] However, as these may nonetheless have a relationship to sales targets, to clarify matters these should be explicitly excluded from the regulations. We note that such metrics may be broader than a FI's consumer business and/or or form part of a broader balanced scorecard. *Referral targets* We also believe that incentives for referrals made by a sales representative / intermediary based on volume or value targets (e.g. where the metric is assessed based on the number of referrals made, irrespective of whether there is ultimately a sale) should also be excluded. We do not believe that these create any actual or potential adverse effects on consumers' interests and are useful to addressing underinsurance issues as they facilitate customers accessing insurance. *Other* We support the exclusion of the types of incentives proposed in the discussion

[94] This is consistent with the current approach in Australia where the presumption that a volume based target is conflicted can be rebutted taking into account all the circumstances. For example, where it cannot reasonably be expected to influence the advice given by the individual. https://asic.gov.au/media/4566844/rg246-published-7-december-2017.pdf, see paragraph RG 246.160.

[95] For example, while new business may positively contribute to revenue and profitability, they may actually be detrimental in these respects. Other key contributors in this context include customer retention, operating costs, claims costs and investment returns. While new consumer customers would contribute to total new business numbers, that would also reflect commercial business, which depending on the insurer involved, may be more significant.

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	document including salaries, performance benefits not linked to sales targets, linear/flat-line sales incentives and remuneration based on aspects other than sales.[96] If such arrangements were prohibited, we believe there would be a serious risk this would negatively impact customers' access to valuable financial advice and the choice of a range of products/services available to consumers. As noted in the discussion document, linear sales incentives are considerably less risky than targets because they do not build a strong conflict of interest with the customer's interests the closer to the target they get. We also refer to our responses to questions 24 above and 27 below.
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?	We have not identified any other inappropriately captured intermediaries at this stage, noting that redefining 'intermediaries', as proposed in the second discussion document, would appear to reduce this risk.[97] For the avoidance of doubt, as indicated elsewhere, we do not consider it would be appropriate to capture professional adviser/experts such as lawyers, accountants and engineers within this definition as suggested in the discussion document.[98] We also refer to our response to question 36 below in this respect. As the scopes of proposals to prohibit sales incentives are very broad, and there is still a lot of detail about them to be worked through, it may be that unintended consequences (including unintentionally capturing other intermediaries) are identified at a later stage.
27. Do you agree/disagree that within FIs and intermediaries sales incentives regulations should apply to all staff? Why/why not?	We do not agree that the prohibition should apply to all staff/employees. This reflects that it is only those in customer-facing/frontline roles and their direct managers who either directly interact with customers and sell products/services or who can meaningfully influence the employees they manage to this end. We also consider that incentives based upon volume or value based targets are entirely appropriate for senior managers and directors. These support business growth and obligations to their boards and shareholders and are an important part of the long-term sustainability of businesses. We do not consider that there is any real risk of inappropriate top-down pressure being applied as these individuals can be expected to have a clear understanding of regulators' expectations in context,[99] and the importance of setting and maintaining an appropriate customer-centric culture throughout their organisations. We also note that existing principles-based expectations generally and those regarding incentives specifically,[100] would not be consistent with such conduct. Given virtually every business in any sector will have expectations on senior, customer-facing or all employees to meet sales targets, applying this prohibition to all employees, would move FIs further away from other sectors in the way they are managed. If the incentive regulations were to apply to all employees this may result in significantly greater disruption of employee arrangements and higher compliance costs, relative to if the prohibition was applied to customer-facing only roles.

[96] Paragraph 155 of the discussion document.

[97] In particular, option 1: Amending the definition of intermediary to capture sales and distribution activities only.

[98] Paragraph 179 of the discussion document.

[99] Particularly given a central focus in the Conduct and Conduct Review related to boards and senior management accountability.

[100] Section 446M(1)(be).

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	While we accept that the option advocated for is narrower than option 1 (applying the prohibition to all staff/employees), we cannot see how this would result in any significant risk of regulatory arbitrage as suggested in the discussion document.[101] Assessing whether someone is customer-facing or their manager is easily confirmed, based upon whether they directly engage with customers or manage someone who does.
28. Do you agree/disagree that within FIs and intermediaries sales incentives regulations should only apply to frontline staff and their managers? Why/why not?	We agree that, within FIs and intermediaries, sales incentives regulation should only apply to customer-facing/frontline staff/employees and their direct managers. The reasons for this are set out in response to question 27 above. As expanded upon in response to question 31 below, this approach would also greatly assist in ensuring that this prohibition is only applied to consumer-only business and accordingly avoid the distortions that would be otherwise created.
29. Do you think that external incentives should apply to any incentive paid to an agent, contractor or intermediary? Why/why not?	Given the policy decision includes prohibiting target-based sales incentives paid to individuals, it would be logical to apply this consistently regardless of whether they are employees, agents, contractors or intermediaries. We also consider that there would be a risk of regulatory arbitrage if such individuals were excluded. We note that: • As indicated in our response to question 15 of the second discussion document below, the treatment of 'employees', 'agents', 'contractors' and 'intermediaries' under the regime, and the interface between them, needs to be clarified. • In this context, intermediaries and agents will generally be corporate entities rather than individuals/natural persons. • While an intermediary such as an insurance broker is generally considered an agent of the insured/customer , by virtue of s 10 of the Insurance Law Reform Act 1977, they are also deemed to be an agent of an insurer. This creates issues that need to be addressed which are commented on elsewhere in this submission.[102] • As outlined in response to questions 26 and 27 above, the regulations should not capture professional adviser/experts such as lawyers, accountants and engineers.
30. Do you agree that both individual and collective incentives should be covered? Why/why not?	We refer to our responses to questions 24 and 25 above. In particular, recommendations that any prohibition should exclude the following, noting that these may include collective incentives: [103] • Balanced scorecards with appropriately weighted or structured volume or value based targets forming part of a broader package of metrics that need to be met. • Performance metrics related to segment/business unit or overall business profitability, revenue and number of clients. Without resiling from that position, in the event that those recommendations

[101] Paragraph 183 of the discussion document.

[102] See response to question 3 of the separate treatment of intermediaries discussion document we outline an issue this deemed treatment may cause.

[103] As defined in paragraph 185 the discussion document, which involves a unit of two or more individuals meeting a sales target, with each individual in the unit qualifying for a commission, benefit or other incentive.

Question	Feedback
	are not accepted, we consider that it would be appropriate to include collective incentives within the prohibition provided that the collective incentive would be permitted where it could be shown either that any actual or potential adverse effects on consumers' interests had been mitigated or which provide positive outcomes for consumers. Relevant considerations in this regard include, acknowledging comments made in the discussion document,[104] the size of the team/collective, the ability of an individual to influence the target result and the extent to which peer pressure or fear of letting the team down may play a role.
31. Do you have any other comments on the discussion related to incentives?	While we understand the intention is for the incentive prohibition to only apply to consumer product/services, this is something that should be clarified. Currently there is a risk that the prohibition could be applied to all incentives within a FI if they do some consumer business, regardless of whether the incentives relate to consumer or non-consumer business. It is unclear to us how a consumer only incentives prohibition would operate in practice. A relationship between a FI and intermediary and their incentive programme may relate to a range of products/services (both consumer and non-consumer related), which may be difficult to separate out for the purposes of applying any incentive prohibition. As above, there may also be metrics involved which are unrelated or which are broader than a FI's consumer business, including those that form part of a balanced scorecard, which ought to be permitted. In addition to going beyond the intention and scope of the Bill, applying this prohibition to non-consumer products/services may potentially distort the market between insurers that deal in both consumer and non-consumer business and those that only do non-consumer business. This is another area where it would be useful for more consultation to be conducted on the practicalities of implementation and guidance developed. Restricting any prohibition to frontline staff and their managers would greatly assist with an application to only consumer business. This is because the assessment of whether there was consumer business or not would have a much narrower focus than would otherwise be the case.
Requirement to publish information about fair conduct programmes	
32. Is more detail needed to outline what information should be published regarding FIs' FCPs to assist FIs to meet this requirement, or to assist consumers in interactions with FIs?	We do not consider that it would be necessary or appropriate to prescribe further requirements about what information needs to be included in the summaries of FCPs or how these should be presented. This would be an overly prescriptive requirement that would reduce the ability of FIs to act flexibly to produce summaries that reflect their specific businesses, products, services, brand propositions, scales, structures and cultures. It is not considered that consistency between summaries is desirable. The other risk with a prescriptive approach is that this exercise becomes a 'box ticking' compliance exercise. This would also limit the ability to adjust summaries as the regime evolves and matures. Additionally, this could result in these summaries becoming long and detailed compliance-heavy documents of limited use or value to customers and generate additional costs. Any uncertainty about expectations in this regard could be addressed via

[104] Paragraph 186 and 187 of the discussion document.

Question	Feedback
	engagement with the FMA and the issuing of guidance and best practice examples as the regime develops. We note the following regarding each of the proposed additional requirements set out under paragraph 196 of the discussion document: *a. Readability and presentation* Regulations around matters such as font, format and font size unnecessarily add compliance costs and complexity and are potentially problematic given information is now primarily presented in digital form. *b. Internal conduct systems* This is already covered by the current wording in the Bill. *c. Internal review and reporting* This is unlikely to be of any interest, or provide any benefit, to consumers. *d. Complaints process* This is already sufficiently covered by the current wording in the Bill and the existing complaints handling obligations discussed above.
33. Do you have any comments on the options outlined above? What do you think the costs and benefits would be to FIs and consumers of the two options?	We refer to our response to question 32 above.
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?	We are not aware of any viable options other than what has been put forward in the discussion document and refer to our response to question 32 above.
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?	We do not consider that it is necessary or appropriate to call in insurance as 'financial products' for the purposes of Part 2 of the Financial Markets Conduct Act 2013 (**FMC**). To explain: • As acknowledged in the discussion document "…*in practical terms, contracts of insurance are covered by Part 2*" already and ss 19 and 21 of the FMC already provide substantive coverage for misleading conduct regarding insurance.[105] While not covered under s 20 of the FMC, as this relates to 'financial products' rather than 'financial services',[106] s 21 of the FMC sets out the equivalent requirement for 'financial services' including

[105] Paragraphs 198 and 200 of the discussion document.

[106] See the definition of 'financial service' in s 6 of the FMC that refers to s 5 of the FSP which at s 5(1)(m) lists 'acting as an insurer'.

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	insurance. • It is unclear to us why insurance is proposed to be treated as a 'financial product', given all other products in this current definition are investment products. We envisage that this approach may create challenges and confusion, for instance, where specific requirements or issues related to investment product 'financial products' are intended to be targeted.[107] Confining 'financial products' to investment products enables a focussed regulatory response without having to carve out insurance or address this issue in some other technical/convoluted way. • We also question why contracts of insurance have been specifically identified to be called in as a 'financial product' but not other products related to a 'financial service' under s 5 of the FSP. For example, s 5 includes 'being a creditor under a credit contract' and 'being a registered bank'. If the same reasoning set out in the discussion document was applied to such matters, then loans and banking products could similarly be called in as 'financial products'. We do not support such an approach but raise it to illustrate the inconsistency and inappropriateness of these proposals. Any potential confusion, or procedural hurdle, in determining the appropriate regulator is overcome with reference to the Memorandum of Understanding between the FMA and Commerce Commission, under which it is acknowledged that from 1 April 2014 the FMA became the primary regulator of misleading and deceptive conduct regarding financial products/services.[108]
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)?	Given the changes proposed in the second discussion,[109] we do not believe professionally regulated individuals such as lawyers, accountants, engineers should be captured within the definition of intermediaries. If there is any risk these individuals may be unintentionally captured as intermediaries under this regime, then we agree that it would be appropriate to explicitly exclude them as the requirements relating to intermediaries (e.g. oversight, training, setting conduct expectations and dealing with misconduct) are not logical given their roles and the fact that they are already professionally regulated. Additionally, as noted in the discussion document,[110] these individuals' roles in the provision of the relevant products/services are likely to be minor and indirect.
37. Do you think that any other occupations or activities should be excluded from the new proposed definition of an "intermediary"? If so, why?	At this stage we are not aware of any other occupations that should be excluded from the new proposed definition of an 'intermediary'.

[107] For example, the FMA consultation in November 2020 on 'Proposed guidance: advertising offers of financial products under the Financial Markets Conduct Act 2013' had content that was in most part only relevant to investment products, with a focus on matters such as investment performance and forecasts, https://www.fma.govt.nz/compliance/consultation/proposed-guidance-on-advertising-offers/.

[108] https://comcom.govt.nz/news-and-media/media-releases/2014/commerce-commission-and-fma-sign-mou.

[109] See in particular option 1: Amending the definition of intermediary to capture sales and distribution activities only.

[110] Paragraph 205 of the discussion document.

Treatment of intermediaries under the new regime for the conduct of financial institutions

Question/prompt	Feedback
Option 1: Amend definition of intermediary to focus on sales and distribution	
1. Do you have any comments on Option 1: 'Amend definition of intermediary to focus on sales and distribution'?	We support the proposal to amend the definition of 'intermediary' under s 446E of the Bill so as to focus on only those intermediaries involved in sales and distribution of the relevant products/services. Individuals and entities involved in services that are preparatory to a contract being entered into, or administration and performance of a service or terms and conditions of a product/service, should not be considered intermediaries in our view. This change would rationalise the scope of the regime and avoid capturing a range of entities and individuals that do not engage with customers directly or whom the FI would be responsible for in any event. Including them would complicate the conduct regime unnecessarily without providing any additional protections for consumers as they essentially contribute to what a FI does through advice etc, rather than acting independently from them. Further details about the issues with the current broad approach are set out in our submission to the Select Committee on the Bill.[111] We are supportive of this definition extending to those in either financial advice or non-advice roles. Doing so ensures that the sale and distribution of products/services through the likes of travel agents, retailers, car dealerships and comparison websites, which may similarly give rise to conduct issues, are also appropriately covered under the regime. We also support the retention of the regulation-making power under s 446E(4) enabling prescribed occupations and activities to be excluded from the definition of 'involved'. Doing so ensures that the regime can be appropriately adjusted should issues come to light at a later stage.
2. Do you think the scope of the proposed definition of an intermediary is comprehensive enough to capture the variety of sales and distribution methods and to avoid gaps and risks of arbitrage?	In principle, we consider that the scope of the proposed definition of 'intermediary' is sufficiently comprehensive to capture the variety of sales and distribution methods and avoid gaps and the risk of significant regulatory arbitrage. However, it is not possible for us to be definitive on this matter due to the limited information provided and the wide range of distribution models that may be involved (including complex distribution using technology platforms and/or involving a number of parties in a chain). This is another area where it would be useful for more consultation to be conducted and guidance developed. This highlights the challenges of a regime that primarily focusses on the conduct of FIs, rather than casting a wider net with consistent treatment of all relevant entities involved in the financial services industry through a range of distribution models. Notwithstanding the above, we make the following technical/drafting points: • Section 446E(2) should be amended. This provision provides that a person is not an intermediary if they are only involved as an employee of the FI or intermediary. Accordingly, under this provision, whether an individual/natural person is an intermediary depends on whether they are an employee, with the type of contractual relationship between the individual and the FI/intermediary impacting upon the analysis of whether the individual is an intermediary or not. This narrow exclusion may also reduce a FI's flexibility to engage individuals on the basis that is most

111 https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_Financial_Markets__Conduct_of_Institutions__Amendment_Bill_300420.pdf, pages 8 to 10.

Question/prompt	Feedback
	appropriate in the circumstances (e.g. as agent or contractor rather than as an employee). We consider this provision needs to be amended to include natural person contractors or agents, as their role may be equivalent to that of an employee for the purposes of this exclusion.[112] • Consistent with comments made in response to the earlier discussion document regarding the incentive prohibition,[113] it needs to be clarified that the definition of 'intermediaries' under s 446E relates to both individual/natural people and entities.
Option 2: Refine scope of who is covered as an agent	
3. Do you have any comments on Option 2?	We consider that the proposal to exclude from the definition of 'agent' those who are only involved in a very generalised way in the provision of the relevant product/service (option 2) is appropriate. Consistent with this, we agree with remarks made in the discussion document,[114] that it would be inappropriate to capture within this definition those within advisory or other 'preparatory' services (e.g. lawyers, accountants), or other service providers whom, while they may be acting as agents for the FI, are not directly or indirectly involved in providing the relevant product/service to a consumer. One way to refine the scope of 'agent' could be to include only those agents who make decisions on behalf of the entity. That is, rather than someone who is simply carrying out a service for a FI. For example, a loss adjustor, who only provides the insurer with information to enable it to decide about a claim, or claims fulfilment provider, who only actions a rebuild, repair or replacement of an insured loss on the insurer's behalf. The concept of agency is also relevant in the context of intermediaries. For example, as well as being an agent for the customer, by virtue of s 10 of the Insurance Law Reform Act 1977, an insurance broker is deemed to be agent of an insurer 'during the negotiation of any contract of insurance'. For the purposes of the Bill, this may mean that the insurance broker is both an intermediary and the insurer's agent, which would be problematic. For example, it may be that despite being exempted from certain requirements as an 'intermediary', the broker is nonetheless brought back in as an 'agent', undermining the solution affected by the exemption. As part of the review of Insurance Contract Law, ICNZ has argued that s 10 should be amended to remove this deemed agency and it is fundamental that this is addressed directly in that context to avoid any confusion that an insurance broker is anything other than the agent of the insured/customer.[115] We note that there will be other situations where the intermediary is appropriately treated as the agent of the insurer (e.g. a tied agent). Given the potential for confusion and overlap between the definitions of 'intermediaries' and 'agents', we also consider it is necessary to either:

[112] To address this issue, in this context, it may assist to develop a definition of 'employee' that includes natural persons whether they are an employee or contractor, potentially along the lines set out under s 6 of the Employment Relations Act 2000.

[113] Question 18.

[114] Paragraphs 39 and 41 of the discussion document.

[115] The effect of ss 10(2) and (3) of the Insurance Law Reform Act 1977 is that intermediaries entitled to receive commission or other valuable consideration from the insurer, are deemed to be agents of the insurer, which has the effect of attributing knowledge of information the intermediary has received from the customer, to the insurer. Rather than deeming an intermediary to be an agent of the insurer, for the purposes of attributing knowledge, to avoid unintended consequences (due to intermediaries being deemed to be the insurer's agent), we consider that provision should simply be made for the insurer to be deemed to have awareness of the information the intermediary has received from the customer.
https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 16 to 18.

Question/prompt	Feedback
	• deem that intermediaries are not agents for the purposes of the provisions in the Bill, or • redraft the provisions relating to 'intermediaries' and 'agents' so that they do not overlap. Consideration also needs to be given to the appropriate treatment of independent third party entities who have delegated authority to underwrite business (and potentially to additionally manage claims) on the insurer's behalf. While such arrangements may be best described as agency relationships in legal terms, we consider that they are most appropriately treated under the regime as intermediaries (and ought to be deemed as such) given their role in distributing products/service is conceptually and practically distinct and involves direct facilitation and promotion, aligned with other intermediaries.[116] This reflects, as with other independent third parties distributing an insurer's products/services, there may be limits to the insurer's ability to provide oversight or input.[117] It also needs to be considered how FIs such as insurers would practically determine whether they are dealing with an 'agent' as opposed to an 'intermediary' in light of all the complexity described above.
4. Do you think Option 2 would adequately exclude advisory services (e.g. lawyers, accountants) and other service providers to the FI who are not involved, directly or indirectly, in providing any part of the FI's relevant service or associated products to consumers?	It is difficult to accurately establish from the level of detail provided in the discussion document whether the proposal would adequately exclude advisory services and other service providers who are not involved, directly or indirectly, in providing any part of the FI's relevant products/services to consumers. Including explicit exclusions for particular occupations or activities would clarify this matter. We consider that the description of possible 'agents' under the discussion document,[118] which includes "*parties involved in assisting with insurance claims handling or settlement",* is too broad. This could include, for example, an insurance broker, claims advocate or other persons assisting a consumer to lodge an insurance claim, even though the intention is that they should not be captured,[119] and they cannot accurately be described as an agent of the FI in our view as they work for the insured/customer and represent their interests in discussions with the insurer. We also question whether the likes of 'advisory' or other 'preparatory' services (e.g. lawyers, accountants), and other service providers to the FI, would actually be captured under the general law of agency because they would not be making any relevant binding decisions on the FI's behalf.
5. Do you think any explicit exclusions are needed for particular occupations or activities? If so, which ones, and why?	As indicated above, we consider that for certainty, explicit exclusions are required for particular occupations or activities. As a preliminary starting point, we consider that the following should be excluded, noting that it may be appropriate to exclude others as well: • Lawyers. • Accountants.

[116] See comments made in paragraph 30 of this discussion document describing the intention behind the definition of intermediary.

[117] These discrepancies also reinforce the challenges of working with a regime that primarily focusses on the conduct of FIs, rather than casting a wider net.

[118] Paragraph 37(a) of the discussion document.

[119] See comments made in paragraph 103 of the regulations to support the regime discussion document related to claims handling and settlement.

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	• Registered valuers. • Engineers. • Medical professionals. Each of these professions are subject to their own conduct regulations as part of their professional standards and may be difficult to reconcile or align with the obligations under a FI's FCP.
Objectives	

6. Do you have any comments on the objectives regarding the treatment of intermediaries?	We support the objective set out in paragraph 43.a. of the discussion document but consider that the objective set out in paragraph 43.b. should be reframed to read as follows (amendments underlined):
	
	"*minimise uncertainty and unnecessary duplication,* and maximise consistency between *regulatory obligations* for financial institutions, intermediaries and consumers."
	
	These amendments reflect that, in so far as intermediaries are involved:
	• the limitations of relying upon regulatory obligations on FIs alone to ensure fair conduct outcomes
	• ensuring good customer outcomes is a partnership between intermediaries and FIs,[120] and there is a need to ensure consistent fair conduct outcomes irrespective of who a customer deals with (e.g. FI or intermediary), and
	• the need to ensure a level playing field between all relevant market participants without a risk of regulatory arbitrage.
	
	In examining the appropriate treatment of intermediaries, expanding upon the matters outlined in the discussion document,[121] we consider it is particularly important to have regard to the following:
	
	• The significant role intermediaries play in the consumer market for general insurance - by our estimate around 50% of all consumer general insurance products is intermediated with an estimated 20% distributed through insurance brokers specifically.
	
	• The fact that FIs such as general insurers may have limited ability to have oversight of, or provide input into, how independent third party intermediaries such as insurance brokers conduct themselves. In general terms:
	  ○ Within the NZ general insurance market, intermediaries hold significant commercial power given their direct relationship with the customer and their independence. This gives them the ability to select which insurers they do business with and to what extent.
	  ○ As this regime requires FI's to have responsibilities in respect of each of the intermediaries it deals with, there is a risk that if these requirements are too onerous this could result in intermediaries limiting the number of FIs they work with, ultimately resulting in less choice for consumers.
	  ○ It should not be assumed that insurers are larger than, or of an equivalent size to, intermediaries. For example, in terms of scale, in contrast with a typical small intermediated insurer in NZ with 100 or

[120] Insurance Core Principle 19: Conduct of Business – Introductory Guidance sections 19.0.8, https://www.iaisweb.org/page/supervisory-material/insurance-core-principles-and-comframe/file/89018/iais-icps-and-comframe-adopted-in-november-2019.
[121] Paragraphs 44 to 52 of the discussion document.

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	fewer employees, operating from several offices, a large national brokerage will have many 100s of employees and operate from dozens of sites. If large brokerages operating in NZ were treated as insurers, they would be among the largest based upon the size of their General Insurance portfolios (based upon revenue). International brokerages operating in the NZ market would be an order of magnitude larger again at an international level. • A challenge some insurers may experience relates to intermediary information flows, recognising that many intermediaries are independent third parties. Expanding upon this: o Where an intermediary such as an insurance broker is involved, often they will be the only party a customer engages with regarding their insurances, noting that under the terms of distribution agreements, some insurers are limited or prevented from directly engaging with customers themselves. o The nature of the relationship between intermediaries and insurers means that insurers may have no direct access to the customer and lack visibility of what is specifically being communicated to them. o It may not be possible for insurers to simply include requirements in distribution agreements that provide them with more information about customer communications and/or a right to communicate with customers directly for the reason outlined above and as information flows are not considered essential to the performance of such arrangements. An intermediary may also not be prepared to enter a distribution agreement with an insurer. o Additionally, while each separate insurer has their own specific relationship with the intermediary related to the policies they offer and the insurance contracts entered into, there is a range of operational and other matters (such as issuing customer documentation, inputting information into systems and ancillary risk advice services) that individual insurers may have no awareness of. • Some insurance products will be designed and developed by insurance brokers themselves, noting that under the current Bill, intermediaries have no fair conduct obligations in this regard. In such situations: o Brokers generally submit these products to insurers to underwrite on a 'take it or leave it' basis, with insurers having limited ability to provide input into the parameters and terms and conditions of the cover offered. o As the products are broker led initiatives, insurers must decide whether the products are within their risk appetite. However, we understand that an insurer would primarily rely on the broker's assessment of product design and suitability/target market. o Given the context, whether these products are accepted by the insurer has historically been a primarily commercial insurance decision focussing on a risk assessment of profitability, sustainability and whether it fits within their risk appetite and/or reinsurance programme. • Additionally, as earlier indicated, some brokerages may also have a role in claims handling and settlement. This is also not something directly addressed in the current Bill. Drawing upon these matters together, and reflecting upon the fact that as proposed, intermediaries are not to be subject of fair conduct obligations themselves, careful consideration needs to be given to the extent to which it

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	would be feasible to rely upon FIs such as general insurers to these ends. Consideration should also be given to other regulatory mechanisms that could be used to address matters (such as those under the financial advice regime).
Option 3: Minimal changes to intermediaries obligations (remove 446M(1)(b) only)	
7. Do you have any comments on Option 3: 'Minimal changes to intermediaries obligations'?	We do not support option 3 because, for the reasons outlined directly above, the requirements on FIs appear impractical and unworkable. There would also be residual uncertainty if this option was implemented, and it would not achieve the identified objectives (as refined above) in our view. We consider that this option would perpetuate the one-sided approach to addressing conduct under the regime (i.e. FIs only) and we do not consider that this option would materially reduce the compliance burden in practical terms,[122] noting that, while the procedures/processes requirement would be removed, other onerous requirements remain. This option would also not address that it may not be possible to rely upon general insurers to 'manage or supervise' third party intermediaries such as insurance brokers. We expand upon this in response to question 10 below. Our preferred option is set out in response to question 9 below.
8. If Option 3 were pursued, do you think any other obligations in section 446M(1)(bb), (bc), (bd) or (bf) would need clarifying or amending? Why/why not?	Without resiling from the position above, if this option was pursued, we consider that training requirements under s 446M(1)(bb) and oversight requirements under s 446M(1)(bd) would need to be significantly refined and the requirements under ss 446M(1)(bc) and 446M(1)(bd)(i) removed. Please see comments in response to questions 9 and 12 below in this regard. In respect of s 446M(1)(bf), please see our response to question 8 of the first discussion document above.
Option 4: More significant changes to intermediaries obligations	
9. Do you have any comments on Option 4: 'More significant changes to intermediaries obligations'?	We agree with a greater number of requirements being removed (as proposed under this option), which go some way to address our concerns about the limits of general insurers ability to oversee or provide input into intermediaries affairs. However, we believe the parameters of this option need to be adjusted to ensure it works in practice and achieves the desired outcomes of the conduct regime. We believe this approach would also most closely align with the objectives set out in the discussion document (as amended).[123] Our preferred modified version of option 4 has the following features: *A tailored and risk-based approach* To appropriately determine the steps a FI should take to meet requirements under this regime, we consider that a variety of factors should be taken into account, adopting a tailored and risk-based approach focussing on the specific intermediary and circumstances involved. This should include: • Pursuant to s 446M(1A), the relevant products/services offered, the methods these products/services are provided to consumers, the types of consumers dealt with, the type of intermediary involved in providing the

[122] We expect this change would simply result in FIs attempting to impose procedures/processes requirements on intermediaries indirectly, to ensure they remain compliant with the remaining requirements they continued to be responsible for (i.e. supervision, management and training), without the express legislative backing to do so.

[123] See our response to question 6 of the discussion document.

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	relevant in products/services and the nature of their involvement. • The extent to which such intermediaries are already regulated (e.g. under the financial advice or other regimes).[124] *One set of consistent principles-based requirements* Drawing upon this risk-based approach, we believe that adopting a single set of consistent principles-based requirements for all intermediaries, as proposed under option 4, is most appropriate. Below we comment on each of the requirements proposed under option 4: 1. Remove procedures / processes requirement under s 446M(1)(b):[125] We support the removal of this requirement. As noted in the discussion paper,[126] and our response to question 8. above, we do not consider that this would be practical or workable. 2. Requiring training for each intermediary in the FI's relevant products/services (to the extent relevant to their involvement in the provision of the FI's products/services):[127] We believe that the specific steps involved to satisfy the training requirement should be flexible, adopting the same tailored risk-based approach referred to above, with reference to the specific circumstances involved. By way of illustrative examples, we envisage this could include: • For a large insurance brokerage financial advice intermediary, the insurer either reviewing training materials prepared by the brokerage themselves or providing limited support, given (1) their existing training obligations under the financial advice regime and comprehensive in-house training programme potentially in place, (2) the fact they may commonly interact with equivalent insurance product/service offerings provided by a number of insurers,[128] and/or (3) they may have developed the relevant products/services themselves.[129] In contrast, for a smaller financial advice intermediary with limited in-house training resources, this may involve a FI providing substantial training support on the relevant products. • If the intermediary has a large number of representatives selling the relevant products/services, providing training to the intermediary on a 'train the trainer' basis, with the intermediary's trainers once trained, going on to manage and train the pool of representatives with back-up insurer support. • If a particular product is only distributed online via the intermediary's

[124] To avoid unnecessary duplication, compliance cost and complexity.

[125] This specifically involves removing the requirement under s 446M(1)(b) for FIs to require intermediaries to "*follow the procedures or processes that are necessary or desirable to support the FI's compliance with the fair conduct principle*".

[126] Paragraphs 53 and 56 of the discussion document.

[127] This specifically involves removing the requirement for FIs to have effective processes etc. for (1) requiring training for intermediaries on the FI's FCP and "procedures and processes", under s 446M(1)(bb(ii)), and (2) checking that intermediaries have completed training and have reasonable understanding of it, under s 446M(1)(bc) and replacing these with a requirement for FIs to have effective processes etc. for requiring training of each intermediary in the FI's relevant products/services, to the extent relevant to the intermediary's involvement in the provision of the FI's products/services.

[128] In which case the focus of the training could be on areas where the particular insurer's offerings were different and details needed to be drawn out. This may contrast with training potentially provided to a non-advice intermediary, which may involve specific and detailed training on the particular product/service being sold, as well the requirement not to unintentionally provide financial advice.

[129] Which they are likely best placed to provide training on themselves.

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	website, with no other contact between the intermediary and the customer anticipated, limited training being provided. However, the insurer and the intermediary would work together to review the purchase path and contact points, ensure that all necessary information is provided to customers and that there is an escalation point with support available should queries arise. Please note that ICNZ's general insurer members are already well placed regarding the training requirement in s 446M(1)(bb)(i) given their existing training obligations under the FIC.[130] <u>3. Monitoring intermediaries to ensure they are supporting the FI's compliance with the fair conduct principle (rather than 'managing or supervising'):</u>[131] We agree with the shift from 'managing/supervising' to 'monitoring' in principle. Again this reflects an appropriate level of oversight given FIs may have limited oversight of how intermediaries conduct themselves, while still acknowledging that FIs should have some oversight of the ultimate distribution of their products/services. That said, it is unclear at this stage what 'monitoring' would involve in practical terms, how these would be applied in different types of distribution arrangements and how effective this monitoring and actions that arise from it could be. In this context and further to comments in response to question 6 above: • Some insurers may have difficulty obtaining information from some intermediaries that is of a sufficient quality or detail to be informative.[132] • When information is obtained, issues identified and feedback provided (e.g. via relationship meetings), it may be unclear what ultimately ended up happening. Things may be particularly challenging when an insurer is not permitted to interact with the customer themselves. • In a rare and extreme situation where an insurer decided to terminate a relationship due to misconduct, the intermediary would likely be able to find another insurer to work with. We envisage that: • Consistent with comments in the discussion document, the intention of this 'monitoring' requirement is not to interfere with the sales and advice interactions or to duplicate obligations under other regimes.[133] It would also not be the responsibility of a FI to 'monitor' an intermediary's compliance with their own obligations under other regimes. • As per our earlier remarks, the specific steps taken in undertaking monitoring would be flexible, adopting a tailored risk-based approach.

[130] See clause 7 which provides "[w]*e'll train our staff and our agents so they can fulfil our responsibilities to you. Their training will include the requirements of this code, privacy law and information about our products, and may also include principles of insurance and relevant consumer laws."*

[131] This specifically involves removing the requirement for FIs to have effective processes etc. for managing or supervising intermediaries to ensure they are supporting the FI's compliance with the fair conduct principle, under s 446M(1)(bd) and replacing this with a requirement for FIs to have effective processes etc. for monitoring intermediaries to ensure they are supporting the FI's compliance with the fair conduct principle.

[132] One of the challenges here is that, unlike life insurance where information relates to an individual insured person, for general insurance information is attributed to a wide range of assets or other insured exposures.

[133] See paragraph 50 of the discussion document.

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	4. Setting conduct expectations of intermediaries:[134] We agree with this conduct expectation requirement in principle, although the specifics of how these expectations would be set still needs to be worked through. Consistent with the above, we envisage: • That the specific conduct expectations set would be flexible, adopting a tailored risk-based approach, with regard to the specific circumstances involved. For non-advice intermediaries, this should include setting a clear expectation not to provide financial advice and where to refer a consumer who requires this. • These expectations would not extend to conduct requirements regulated under other regimes. In developing this requirement care should also be taken to ensure it is not unduly onerous for intermediaries to comply with multiple similar, but different, conduct requirements. Consistent with earlier remarks, if requirements are too onerous there is a risk this may result in intermediaries reducing the number of insurers they work with, ultimately reducing consumer choice. 5. Establishing robust and transparent processes for dealing with misconduct:[135] We agree with the requirement to deal with misconduct in principle, although the specifics of what 'misconduct' means and the appropriate steps that need to be taken where this is established would need to be worked through. We consider that what constitutes 'misconduct' should be a sliding scale,[136] depending on the circumstances involved, and the response proportional to the significance of the breach. Consistent with earlier remarks, in working through this matter, careful consideration needs to be given to the extent to which it would be feasible to rely upon FIs to resolve any misconduct issues that arise themselves. Regard would also need to be had to the extent intermediaries are subject to regulatory obligations and supervision by the FMA under other parts of financial services law. *Other features and comments* Additionally, we consider that: • All these requirements should be consistently framed so as to be limited to the extent relevant (1) to the intermediaries' involvement in the provision of the FI's relevant products/services, and (2) to support the FI's compliance with the fair conduct principle, noting that currently this is dealt with inconsistently under the Bill.[137] If requirements were more

[134] This specifically involves a requirement for FIs to have effective processes etc. for setting conduct expectations of intermediaries (refer to s 446M(1)(bd)(ii)).
[135] This specifically involves a requirement for FIs to have effective processes etc. for establishing robust and transparent processes for dealing with misconduct (refer to s 446M(1)(iii)).
[136] This contrasts with contractual misconduct which can generally be considered to have a high threshold triggering serious consequences such as the payment of specified liquidated damages or the termination of the arrangement.
[137] See, for example, difference references to such requirements under ss 446M(1)(bb) and (bd).

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	generally framed with reference to the intermediary's broader business, there is a risk that this would cut across conduct expectations under other regimes and not be sufficiently focussed on the issues this regime seeks to address. • Section 446M(1A) should be amended to emphasise FIs' taking a tailored risk-based approach in meeting these requirements and to have explicit regard to the extent to which intermediaries are already regulated.[138] In conjunction with the approach outlined above, as commented elsewhere, we also support conditions being imposed on financial advice provider licenses of those acting as intermediaries of FIs to ensure consumers are treated fairly and reinforce the Bill's objectives. In progressing these matters, like other areas of the regime where matters are still to be worked through in detail, it will be important for guidance to be developed to expand upon matters and articulate specific expectations with reasonable timeframes for implementation. This is something that could be the subject of specific industry consultation through collaborative workshops involving both FIs, intermediaries and regulator representatives with a view to expectations being set that are workable for all involved. Such an exercise would also enable regulators to clearly understand and identify any gaps in regimes and their own powers.
10. What do you think the level of responsibility should be for FIs' oversight of intermediaries? For example, "*managing or supervising* the intermediary to ensure they support the FIs compliance with the fair conduct principle", or "*monitoring* whether the intermediary is supporting the FI's compliance with the fair conduct principle", or something else?	We refer to our response to question 9 above, in particular comments under the headings '3. Monitoring intermediaries to ensure they are supporting the FI's compliance with the fair conduct principle (rather than 'managing or supervising')' and 'Other features and comments'. We also note that under the current s 446M(1)(be), reference is made to FIs 'managing' incentives in respect of intermediaries. Given the comments made in the discussion document and above, we additionally query whether such an obligation is appropriate in that context.
11. What standard do you think FIs should have to oversee their intermediaries to?	Consistent with earlier remarks, we consider that: • The specific standard FIs should adopt to oversee intermediaries should be tailored, adopting a risk-based approach, with reference to the specific circumstances involved including those outlined under s 446M(1A) and the extent to which intermediary are already regulated. • Such oversight would focus on product performance and related consumer outcomes, to the extent relevant to the intermediary's involvement in the provision of the FI's products/services. As above, we do not consider that this should extend to obligations regulated under other regimes. • If requirements were more generally framed (e.g. with reference to the intermediary's broader business), there is a risk that this would cut across

[138] To that end, s 446M(1A)(e) could be amended as follows: "*the types of intermediaries that are involved in the provision of its relevant services and associated products,* ~~and~~ *the nature of their involvement,* and the nature of regulation they are subject to*; and*".

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	other conduct expectations (e.g. under the financial advice regime) and not be sufficiently focussed on the issues this regime is seeking to address.
Option 5: Distinguish between FSLAA and non-FSLAA intermediaries	
12. Do you have any comments on Option 5: 'Distinguish between FSLAA and non-FSLAA intermediaries'?	*We do not support option 5* We do not support this option. We consider that determining what specific requirements apply purely based upon whether a financial advice or non-advice intermediary is involved, with more onerous requirements being applied for non-advice intermediaries, would not be appropriate. While we acknowledge that arguably there is a regulatory gap (as financial advice intermediaries are regulated and have conduct obligations under the financial advice regime when providing regulated financial advice to retail clients, whereas non-advice intermediaries are not, as they do not provide financial advice), it is important to note that conduct obligations under this regime are different to those under the financial advice regime. Non-advice sales will also be for simpler products/services than those supported by financial advice distributed via financial advice intermediaries. Additionally, it is common for non-advice intermediaries to operate as agents of the insurer / tied agents, such that general insurers may have greater ability to oversee or provide input. For these reasons, it should not be automatically assumed that non-advice intermediaries pose a greater risk to consumers. More generally, the important role non-advice intermediaries (e.g. car dealers, travel agents, retailers) play in conveniently distributing simple and affordable products/services to customers, and the potential negative impact this option may have in this respect, needs to be acknowledged. As proposed under this option, which requirements apply (i.e. financial advice or non-advice), is determined at an entity, not a distribution, level. Regulated financial advice entities may also do non-advice sales that would not be caught by this approach, giving them a competitive advantage and resulting in inconsistent consumer protection. There is also a risk that this approach could lead to a preference for non-advice distribution through financial advice intermediary channels (because requirements and accordingly compliance costs are less), ultimately reducing diversity in the market and options available to customers.[139] This approach may also further limit insurers' ability to oversee or provide input into financial advice intermediaries operations. This option also runs the risk of becoming a compliance 'box ticking' exercise. Stepping back, each intermediary (whether it be a financial advice one or not) will present different risks based on a range of factors (including the relevant products/services offered, the methods these products/services are provided to consumers, the types of consumers dealt with, the type of intermediary involved in providing the relevant in products/services and the nature of their involvement). As above, we consider that appropriately assessing risk in this context, and determining the steps that should be taken, should be tailored to the specific circumstances involved. We believe that the best approach here is to adopt a single set of principles-based requirements, with the FI adopting a flexible and risk-based approach, drawing upon matters described under s 446M(1A) and

[139] By way of example, motor vehicle dealers may sell motor insurance. However, they are unlikely to have any appetite to become a financial advice intermediary. Accordingly, as FIs are likely to limit their dealings to financial advice intermediaries, consumers will need to either visit a financial adviser prior to purchasing the car to arrange insurance or drive the vehicle off the yard uninsured.

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	the extent to which intermediaries are already regulated. *We support licensing conditions for financial advice intermediaries* While we do not support option 5, we would support the use of licensing conditions on financial advice provider licenses acting as intermediaries of FIs as outlined under this option, to ensure customers are treated fairly and to reinforce the Bill's objectives.[140] Provided these conditions are appropriately utilised, and supervised/managed by the FMA this, in conjunction with the modified version of option 4 described above, would go some way to addressing the concerns outlined in response to question 6 above. *Other comments* For completeness, below we comment on each of the proposed additional requirements for non-advice intermediaries set out under paragraph 72 of the discussion document: <u>(a) Checking that intermediaries have completed training and have knowledge of matters covered (refer to s 446M(1)(bc)):</u> We would not support such a requirement as we believe it is unnecessary and would be unduly onerous to complete training checks in all cases, without any apparent rationale for doing so. That said, we acknowledge that in line with a tailored risk-based approach, drawing upon matters set out in s 446M(1A), there may be situations where a FI considered it was appropriate to obtain some assurance that training had been completed.[141] However, as above, it is not appropriate to include this as a mandatory checking requirement in all cases. <u>(b) Obtaining assurance that intermediaries are 'competent' and 'fit and proper' to conduct work engaged for (refer to s 446M(1)(bd)(i)):</u> We envisage that the intention behind this requirement is to ensure that FIs have assurance that they are working with suitably reputable intermediaries. If that is correct, we agree that this is an important consideration. However, general insurers (and likely the majority of FIs) already undertake these checks through ordinary business due diligence and ongoing relationship management processes. Whilst we believe this requirement is unnecessary and would result in increased compliance costs, if this requirement was to remain (which is not our preference), we consider that the 'competent' and 'fit and proper' language used is problematic and would need to be replaced with language that closer aligns with the intention as described above. We outline the issues with this terminology in response to question 5 of the first discussion document above. Determining the threshold for 'reputability' and what is involved in obtaining the requisite 'assurance' would also need to be worked through. Consistent with earlier comments, we envisage this would be a case-by-case assessment adopting a tailored and risk-based approach with regard to the particular

[140] Paragraph 68 of the discussion document referring to clause 7 of the Bill, which amends s 403 of the Financial Markets Conduct Act 2013 .

[141] For example, if a conduct issue was identified that suggested further training was required or that training provided was not understood.

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	circumstances as outlined in s 446M(1A). Consistent with comments made in the discussion document,[142] care would need to be taken to ensure that FIs do not do more than is appropriate or that requirements do not lead to undesirable structural changes in the market.[143]
13. How far do you think FIs' oversight of FSLAA intermediaries under Option 5 should extend? For example, should it cover the general conduct of the intermediaries, or more narrowly on product performance and related consumer outcomes (or something else)?	Please see our response to question 12 above. To reiterate: • We consider that it would be inappropriate to determine requirements solely based upon whether the intermediary is financial advice regulated or not. • In our view, the specific standard FIs should adopt to oversee intermediaries should be flexible, adopting a tailored risk-based approach, with regard to the specific circumstances of the intermediary involved including those outlined under s 446M(1A) and the extent to which they are already regulated. If requirements were more generally framed (e.g. with reference to the intermediary's broader business), there is a risk that this would cut across other conduct expectations and not be sufficiently focussed on the issues this regime is seeking to address.
Obligations in relation to employees and agents	
14. Do you have any comments on the proposals regarding obligations in relation to employees and agents?	In principle, we support the proposals regarding obligations in relation to employees and agents. However, consistent with comments made earlier: • It is difficult to accurately establish from the level of detail provided in the discussion document whether the proposal would adequately exclude advisory services and other service providers who are not involved, directly or indirectly, in providing any part of the FI's relevant products/services to consumers. • We are concerned that, without clearly aligning the agent's services to the activity of the FI that is impacting customers, the concept may be too broad and open for misinterpretation. Many professional service providers (e.g. lawyers, accountants) will be subject to other conduct regulations as part of their professional standards that would be difficult to align with the obligations under a FI's FCP. It is appropriate to exclude professional persons who are already covered by their own industry's conduct requirements from the scope of a FI's responsibilities. • Consideration also needs to be given to whether groups of persons that are carved out of the 'intermediary' definition should also be carved out of the 'agent' definition for consistency. Otherwise, it may be that despite being exempted from certain requirements as an 'intermediary', these may be nonetheless brought back in as an 'agent', undermining the benefits of the exemption. The approach taken also needs to ensure that insurance brokers are not treated as agents of the insurer and consider how insurers would practically determine whether they are dealing with an 'agent' as opposed to an 'intermediary' (see comments regarding question 3 above in this respect).
15. Do you think there should be a distinction drawn between employees and	We consider that it would be premature for us to provide a view on this matter. As outlined in our responses to questions 2 to 5 and 14 above: • There are areas where the roles of an employee, agent, contractor and intermediary may overlap. Equally, in many cases these roles will be

[142] Paragraph 17. b. of the discussion document.

[143] The discussion document notes that examples of this have already been seen including FIs requiring annual audits of every intermediary by an independent third party, rather than doing conduct assessments on a risk-based basis.

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agents? Why/why not?	different. Consideration also needs to be given to how insurers would practically determine whether they are dealing with an 'agent' as opposed to an 'intermediary'. • Agency in particular is a complex area, specifically in the insurance context where, for example, 'intermediary' insurance brokers may be deemed to be agents of the insurer and there are a wide variety of business models that need to be worked through. • It is difficult to accurately establish from the level of detail provided in the discussion document whether the proposed treatment would be sufficient, and we note that in several respects descriptions provided of agents appear overly broad. The positions arrived at on 'intermediaries', 'contractors' and 'agents' should inform the appropriate approach to take regarding 'employees' and the interface between them. This is another area where it would be useful for more consultation to be conducted. As well as working through these complex issues and ensuring the approach adopted is workable, this will assist in reducing the risk of unintended consequences.
16. Do you think any amendments should be made to the obligations in 446M(1) that would apply to employees and agents?	We do not consider that, at this stage, amendments are required to the obligations set out in s 446M(1) that apply to employees and agents. However, as outlined above, we consider that the scope of 'agents' and the interaction between 'intermediaries', 'agents' and 'employees' needs to be clarified.
17. Do you have any other comments or viable proposals?	The comments in this section relate to remarks made under Part 4 of the discussion document regarding other options considered (paragraphs 80 to 84). Based upon the comments made in the discussion paper, we are concerned that the proposals for intermediaries to have their own FCPs or to be subject to a duty to co-operate with FIs in relation to FCPs appear to have been dismissed without a sufficiently robust analysis. The comments in paragraph 82 of the discussion document justify not extending fair conduct obligations onto intermediaries purportedly because the focus of the Bill is on conduct issues related to FIs only. However, a significant part of the Bill, related to regulating incentives, specifically provides duties for both FIs and intermediaries. We also question the reference to acting "*swiftly to address conduct related issues related to FIs*" in paragraph 83 given these matters were originally raised in 2018 and we understand the regime is not intended to come into effect until at least 2023. In our view, a little more time spent now to get the regime right would be a better approach and would reduce the risk that major reform needs to be undertaken at a later point to address any material gaps or unintended consequences. The argument is made in paragraph 83 that, because all FIs will be subject to conduct requirements under the new regime, it is unlikely that intermediaries could avoid compliance with conduct requirements. We do not believe this reflects the realities of the market. As indicated in response to question 6 above, general insurers may have limited ability to oversee or provide input into how intermediaries such as insurance brokerages conduct themselves. Also, it may be that agreements are not in place or that conduct requirements

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	are unable to be negotiated to be included within them, noting the significant market power intermediaries may have in this regard.[144] Additionally, FIs do not work in concert (to do so would raise competition concerns) and it should not be assumed that all will adopt fair conduct requirements to the same standard. It is also concerning that, based on the discussion document, both options appear to have been rejected on the same grounds. The two proposals are very different and we encourage consideration of them individually based upon their own specific merits.

Conclusion

Thank you again for the opportunity to submit on this matter. If you have any questions, please contact our Regulatory Affairs Manager by emailing Privacy of natural persons

Yours sincerely,

Privacy of natural persons

Tim Grafton
Chief Executive

Privacy of natural persons

Nick Whalley
Regulatory Affairs Manager

[144] In this context, it is also concerning that in this paragraph it is implied that if FIs do not include conduct requirements or expectations in agreements with intermediaries then the FIs would be in breach of their statutory obligations.