Rothbury Insurance Brokers Group
HSBC Tower, Level 25, 188 Quay Street, Auckland 1010
PO Box 1596, Shortland St, Auckland 1140
T: 09 580 8455 **F**: 09 579 1294 **W**: www.rothbury.co.nz

INSURANCE BROKERS SINCE 1950

Friday 18 June 2021

Financial Conduct
Financial Markets Team
Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON 6140

Dear Sirs,

Consultation: Conduct of Financial Institutions

Attached please find a submission of the above Bill from Rothbury Insurance Brokers Limited ("Rothbury"). We are the largest majority New Zealand owned general insurance broker in New Zealand and a licenced Financial Advice Provider.

We aim to consistently provide personal service and quality advice to our clients. Our role means we hold financial institutions to account for their conduct toward consumers and pursue fair treatment by general insurers of our clients.

Key points contained in our submission include:

1. General insurance brokers —

   (a) are appointed by clients and not financial institutions. We are independent of the insurers who will be subject to the provisions contained in the Bill. The Bill should differentiate between independent brokers and the parties appointed by a financial institution or subject to their control.

   (b) 'level the playing field' for our clients by negotiating and advocating on their behalf. Our independence is crucial to our ability to do this. This Bill should not require brokers to follow practices or meet standards set by financial institutions. This would undermine the objectives of the Bill and create a legislative conflict of interest to the detriment of consumers.

   (c) deal with many different insurers to obtain the most suitable terms and pricing available for each consumer. Requiring brokers to meet requirements set by many different financial institutions' fair conduct programmes would also create an unreasonable compliance burden and may create further conflicts.

(d) are subject to the Financial Services Legislation Amendment Act 2019 ("FSLAA") and the *Code of Professional Conduct for Financial Advice Services*. We are already sufficiently regulated as to conduct toward consumers.

(e) already have our own policies, procedures, systems and controls designed to ensure fair conduct toward consumers (for example: training).

2. Financial institutions should —

(a) take into account the controls that an independent intermediary has when structuring their own fair conduct programmes; and

(b) be able to rely on an intermediary being regulated by FSLAA and therefore meeting prescribed standards of conduct; and

(c) be required to provide full details of their fair conduct programmes to independent intermediaries, to allow monitoring of financial institution compliance by the intermediary on behalf of consumers; and

(d) monitor outcomes for consumers to inform intermediaries if they believe that a gap in conduct risk management exists (when both parties are considered as a whole) and refer any unresolved issues to a regulatory authority for guidance.

3. Financial institutions should *not* be required to —

(a) specify particular policies, procedures, systems or other controls that an independent intermediary must have (such as training); or

(b) assess the effectiveness of independent intermediaries' conduct controls, where the intermediary is regulated under FSLAA; or

(c) set expectations for intermediaries as part of their fair conduct programmes.

4. The definition of "consumer" for general insurance advice and intermediation currently extends to businesses and forms of insurance which are inconsistent with common understanding of the term – i.e. individuals receiving products or services for personal or household or domestic purposes.

"Consumer" should have the same meaning throughout the Bill and this should be consistent with other consumer legislation – for example the Consumer Guarantees Act 1993.

5. Regulations should be limited to —

(a) the purpose and context of the Bill at the time placed before Parliament; and

(b) matters directly relevant to conduct toward consumers.

6. Commissions paid to general insurance brokers by insurers are a method of remuneration that NZ consumers are comfortable with. There is no evidence showing commissions to encourage misconduct by general insurance brokers. This has been reinforced by requiring open disclosure of commissions under FSLAA.

   Regulation of commissions has the potential to cause significant changes to the existing structure of the general insurance broking industry and the availability of general insurance advice to consumers. Any regulation of incentives should therefore be required to be based on evidence that misconduct toward consumers is otherwise likely.

7. A regulatory framework already exists for reporting concerns about misconduct and regulatory non-compliance – i.e. the Protected Disclosures Act 2000. The Bill should not create an additional framework which is inconsistent with this.

Rothbury appreciates the opportunity to submit our comments on the Bill and in particular the treatment of intermediaries.

We welcome any questions about our submission and the points contained herein.

Yours sincerely

Privacy of natural persons

Roger Abel
Managing Director

Rothbury Insurance Brokers Limited Submission to Ministry of Business, Innovation and Employment:

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

Your name and organisation

Name	Roger Abel
Email	Roger.abel@rothbury.co.nz
Organisation/Iwi	Rothbury Insurance Brokers Limited

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

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

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

I do not want my submission placed on MBIE's website because it contains commercially sensitive information or inferences, including but not limited to trade secrets, the disclosure of which may prejudice Rothbury's commercial position.

Please check if your submission contains confidential information:

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

I would like my submission to be kept confidential because disclosure may prejudice Rothbury's commercial position

Objectives

Do you have any comments on the objectives regarding the treatment of intermediaries?

1

The Discussion Document does not recognise the role of independent general insurance brokers in holding financial institutions to account for their conduct to consumers.

General insurance brokers are intermediaries who are appointed by the client and not the financial institution. They monitor the actions of insurers and will, in future, also consider the published requirements of fair conduct programmes. This will help general insurance brokers negotiate and advocate for their clients, including consumers.

General insurance brokers provide expert knowledge of insurer products and pricing to assist their clients to select the most suitable general insurance product for their needs. They do not sell products on behalf of insurers. They instead negotiate offer terms with multiple insurers on behalf of clients.

This promotes fair treatment of consumers by:

(i) addressing information asymmetry between insurers and consumers; and
(ii) encouraging price competitiveness between insurers; and
(iii) improving the ability of consumers to make informed decisions by matching detailed product terms to each consumer's individual needs.

The relationship between general insurance brokers and insurers is competitive and sometimes adversarial, as general insurance brokers seek the best result for their clients, which may at times be in opposition to the interests of the insurer. This requires that general insurance brokers remain independent of insurers, neither responsible for nor supervised by them.

Paragraph 20 of the proposals states that *"The overall objectives of the intermediaries' obligations are to ensure that consumers are being treated fairly, and that financial institutions are meeting their responsibility to consumers under the fair conduct principle, regardless of distribution channel."*

This should not be able to be read as assigning to insurance intermediaries the responsibility for fair conduct by insurers. Insurance intermediaries are responsible for their own conduct and the role they play promotes fair conduct by others, by acting as agents of consumers. Publication of the requirements of the fair conduct programmes of insurers will assist this.

Legislation also must not give insurers power over general insurance brokers, as this would create the potential for conflicts of interest to arise which would undermine the legislation and act to the detriment of consumers.

In setting the objectives for regulation of the conduct of intermediaries, it is vital to recognise that **general insurance brokers are independent of insurers and maintaining this independence is a necessary condition for successful regulation of conduct toward consumers**.

Option 1: 'Amend definition of intermediary to focus on sales and distribution'	
2	Do you have any comments on Option 1: 'Amend definition of intermediary to focus on sales and distribution'?
	Rothbury supports narrowing the definition to focus on sales and distribution, where the legislation applies to general insurance. The definition should be restricted to parties directly involved in sales & distribution. Intermediaries who are financial advisers are already regulated through the changes introduced by the Financial Services Legislation Amendment Act ("FSLAA"). The revised definition will capture persons involved in non-advised sales & distribution. Rothbury agrees with regulating this group, but additional regulation for financial advisers is not required.
3	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?
	We believe a narrower definition as discussed above is sufficiently comprehensive to capture all sales & distribution methods within general insurance. We suggest this can be effected by deletion of 446E(3)(b) combined with amendment to 446E(1)(a) to the effect that a person must be "directly involved".
Option 2: Refine scope of who is covered as an agent	
4	Do you have any comments on Option 2?
	Rothbury supports amendment of 446E to narrow the definition of an intermediary. We similarly support further amendment to more clearly restrict the inclusion of "agents" to the activities directly concerned with the provision of services by the financial institution. It is also important to distinguish between authority to act for the financial institution and the authority to act for a consumer: • when negotiating the terms of coverage for an insurance contract, or dealing with an insurer in respect of a claim, or in general, a general insurance broker is acting as agent of the consumer; • in the limited activity of receiving monies to be paid to the insurer, insurance intermediaries are deemed by legislation to act for the insurer. The Bill should be explicit about which activities of intermediaries the financial institution may consider. Also, advice-giving intermediaries, their employees and their agents are sufficiently regulated as to conduct by FSLAA. They do not need to be covered by the employee and agent definitions in the Bill.

5	Do you think Option 2 would adequately exclude advisory services (e.g. lawyers, accountants) and other service providers to the financial institution who are not involved, directly or indirectly, in providing any part of the financial institution's relevant service or associated products to consumers?
	No. Employees and agents of intermediaries which are regulated by FSLAA should not also be captured by the employee and agent definitions in this Bill.
	Do you think any explicit exclusions are needed for particular occupations or activities? If so, which ones, and why?
6	Please refer above: (i) Employees and agents of intermediaries which are regulated by FSLAA should also be excluded as the regulatory obligations of FSLAA extend to those employees and agents. (ii) Insurance intermediaries who are deemed to be appointed as agents of an insurer for limited activities (per the example in response to question 4) should not be considered as agents for any other activities because those other activities are not part of the delivery of services of the insurer.
Option 3: Minimal changes to intermediaries obligations (remove 446M(1)(b) only)	
	Do you have any comments on Option 3: 'Minimal changes to intermediaries obligations'?
7	The preceding section of the Discussion Document *"Objectives"* is written as if the intermediary is 'selling' on behalf of the financial institution. This is false in the case of general insurance brokers who are not captured intermediaries of any insurer and who advise the client about which policies to select after considering suitable options offered from among all available financial institutions. This means that general insurance brokers are independently responsible for their own processes, training, conduct, monitoring, risk management and compliance. Financial institutions' responsibility to monitor the distribution of their products of an independent intermediary should be limited to observation only and **not be accompanied by any legislative requirement for intermediaries to comply with financial institutions' requirements** as this would undermine the objectives of the legislation, as explained in response 1 above. Monitoring could extend to confirming that each intermediary has a risk management programme which includes consideration of risk and controls with respect to conduct toward consumers by the financial institution. It must not extend to assessing the effectiveness of this or requiring change to an intermediary's risk management programme. This would undermine the independence of brokers and introduce the conflict of interest explained in section 1, by discouraging intermediaries from negotiating as assertively for consumers. Financial institutions should also be able to rely on FSLAA regulation in respect of independent intermediaries who are regulated financial advice providers.

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?

8

Intermediaries who are not restricted to distribute a single financial institution's products & services should be excluded entirely from 446M(1)(bb) because each such intermediary is independently responsible for its own training.

- FSLAA and the *Code of Professional Conduct for Financial Advice Services* already require training to an appropriate standard; and
- the financial institution cannot "require" specific training without undermining intermediary independence.

Intermediaries who are not restricted to distribute a single financial institution's products & services may be excluded from 446M(1)(bc). Alternatively, the section could be amended to require the financial institution to satisfy itself that independent intermediaries have processes which include training (but without requiring specific training determined by the financial institution).

Intermediaries who are not restricted to a given financial institution should be excluded from 446M(1)(bd), as an intermediary is independently responsible for its own conduct risk management.

It is not necessary to add further regulation to intermediaries subject to FSLAA. The Bill could include a requirement for financial institutions to confirm that intermediaries involved in distributing its relevant services or associated products have a risk management programme which extends to:

- address that financial institution's compliance with the fair conduct requirement; *but*
- without the financial institution requiring specific controls or thresholds.

Specifically, that the intermediary has policies, procedures, systems and controls designed to:

(a) identify, monitor and manage risks associated with conduct of the intermediary that may cause an institution to fail to treat consumers fairly;

(b) identify instances of a financial institution failing to comply with its fair conduct programme and inform the financial institution of this;

(c) ensure that the intermediary's employees are trained about (i) and (ii) above and the financial institution's relevant services or associated products; and

(d) ensuring compliance by the intermediary and its employees involved in giving regulated financial advice with the *Code of Professional Conduct for Financial Advice Services* in relation to the financial institution's relevant services and associated products.

To support this, under 446M(1A)(e), financial institutions should also explicitly be able to take into account the policies, processes, systems and controls that each intermediary has referred to in (i) to (iv) above.

Rothbury also recommends that a financial institution be able to take into account, for purposes of 446M(1)(be), the incentives offered by an intermediary to its employees and agents. This recognises that the intermediary may choose to not pass on incentives received, as a way to avoid conflicts of interest with, for example, giving financial advice.

For example, brokerage paid to an intermediary by an insurer based on insurance contracts it intermediates may not directly benefit a financial adviser employed by that broker, *therefore* the financial institution can have regard to this in negotiating the terms of brokerage incentives because it will not create a conflict of interest with respect to consumers' interests.

Rothbury also recommends the legislation retain provisions that:

- ensure the independence of general insurance brokers; and
- prevent 446M being interpreted as conferring power on financial institutions to make requirements which may undermine the purpose of this legislation or FSLAA.

For example: restoring 446M(2)(a) in an ehanced form:

Despite subsection (1), a fair conduct programme —

(a) Must not impose on an intermediary —

(i) that is a financial advice provider a requirement relating to the giving of advice;
(ii) that negotiates terms for the financial institution's relevant services and associated products a requirement restricting the terms that may be negotiated or disclosed;
(iii) that makes claims under any consumer insurance contracts provided or offered by the financial institution a requirement restricting the claims that may be made; or
(iv) any other requirement restricting the intermediary from acting in a consumer's interests.

Option 4: More significant changes to intermediaries obligations

Do you have any comments on Option 4: 'More significant changes to intermediaries obligations'?

Please refer responses to Option 3, above.

Rothbury agrees with the following proposals for the reasons noted:

9

- Removal of a financial institution requiring intermediaries to follow procedures or processes identified by the financial institution – 446M(1)(b)

  Reason: this undermines the independence of general insurance brokers in negotiating and advocating for clients. For example: in adversarial claims situations the financial institutions could dictate how these processes behave and impose onerous requirements generally. This creates a conflict with consumer interests.

- Removal of a financial institution requiring training for intermediaries (of any kind) which is specified by the financial institution – 446M(1)(bb)

  Reason: independent intermediaries are responsible for their own training programmes. Financial advice providers are already required to have comprehensive training by the *Code of Professional Conduct for Financial Advice Services*. Imposition of further training requirements by financial institutions would be an unreasonable imposition of cost for independent intermediaries dealing with a large number of financial insurers.

- Removal of a financial institution checking the level of understanding of intermediaries of training specified by the financial institution – 446M(1)(bc)

  Reason: financial advice providers are already required to have comprehensive training by the *Code of Professional Conduct for Financial Advice Services*. Meeting requirements of multiple financial institutions would create potential for conflict and impose substantial additional costs for general insurance brokers who deal with many insurers.

- Removal of any requirements to "manage or supervise" independent intermediaries – for example 446M(1)(bd)

  Reason: this would undermine the independence of general insurance brokers in negotiating and advocating for clients, particularly in adversarial claims situations. Financial institutions could dictate how these processes behave and impose onerous requirements generally. This creates a conflict with consumer interests.

However, there are also some issues to consider about the suggested alternatives in paragraph 62:

a. A financial institution must not be able to "require" specific training as this undermines the intermediary's independence. Training in some common products and services also may not be necessary for experienced financial advisers. A financial institution should be able to rely upon a financial advice provider's compliance with the *Code of Professional Conduct for Financial Advice Services* in respect of the competence, knowledge and skill of its financial advisers.

   A financial institution could be required to "offer" training in its products and services and to check that the intermediary has a training programme.

b. A financial institution should not set "conduct expectations" for intermediaries as these may create conflict between financial institutions or with other regulations. General insurance brokers deal with a large number of financial institutions. Incorporating conduct expectations from all of these would impose unreasonable costs on the intermediaries to ensure compliance and evidence compliance to insurers. Conduct expectations for intermediaries are more appropriately defined in regulations as principles, for example, FSLAA.

c. A financial institution's obligation to "monitor" intermediaries in relation to a financial institution's fair conduct programme needs to be more specific about what is monitored and where responsibility lies. A financial institution could "confirm"

that an intermediary has processes, policies, systems and controls designed to achieve the purposes listed in (a) – (d) of our response to the preceding question.

A financial institution should not be responsible for assessing the effectiveness of these. If the financial institution has a concern, it should be addressed by the intermediary's internal risk management or regulatory authorities.

d. An independent intermediary is not appointed by the financial institution and therefore the financial institution is not responsible for individual instances of misconduct by the intermediary.

A financial institution can only observe the design of an intermediary's controls from an external perspective. It cannot adequately assess their effectiveness in practice. A financial institution can observe outcomes for consumers and should inform the intermediary of any observations which indicate a cause for concern.

These issues could potentially be appropriately dealt with by introducing a definition for an "independent intermediary". For example, an intermediary which:

- is not obliged to distribute any minimum value or proportion of any specific financial intermediary's relevant services or associated products; and
- is not precluded by agreement with any party from distribution of any other financial institutions' products & services.

What do you think the level of responsibility should be for financial institutions' oversight of intermediaries? For example, "*managing or supervising* the intermediary to ensure they support the financial institutions compliance with the fair conduct principle", or "*monitoring* whether the intermediary is supporting the financial institution's compliance with the fair conduct principle", or something else?

10

Financial institutions cannot have an ability to "manage" or to "supervise" intermediaries without the intermediaries losing independence and affecting their ability to advocate for the client in an adversarial situation. **Giving an insurer this power would amount to legislatively creating a conflict of interest against consumers.**

For example, an intermediary who is perceived by an insurer as 'too aggressively' negotiating for insurance terms or the acceptance of claims on behalf of their clients may attract more restrictive management and supervision by an insurer.

General insurers therefore cannot have an ability to require changes in how general insurance brokers act without undermining the objectives of the legislation.

Financial institutions should be obliged to "monitor" outcomes for consumers of their products and identify where negative outcomes may be due to a characteristic of the distribution process which is inconsistent with the fair conduct principle. They should also be obliged to notify an intermediary of any pattern of negative consumer outcomes which they assess was caused or materially contributed to by an intermediary.

However, financial institutions cannot be responsible for assessing the reasonableness nor effectiveness of an intermediary's actions.

	What standard do you think financial institutions should have to oversee their intermediaries to?
11	Financial institutions should not have a responsibility to "oversee" intermediaries to any set standard as the intermediaries are not responsible to nor managed by the financial institution. General insurance brokers are appointed by the client and financial institutions must remain obliged to deal with the appointee selected by a client as the intermediary who will best represent their interests. Financial institutions should monitor the outcomes for consumers, identify the causes of negative outcomes and be obliged to inform intermediaries of systemic issues related to the intermediary. Financial institutions must not have any ability to compel an intermediary to take specific actions or approve actions taken by the intermediary.
Option 5: Distinguish between FSLAA and non-FSLAA intermediaries	
	Do you have any comments on Option 5: 'Distinguish between FSLAA and non-FSLAA intermediaries'?
12	The legislative and regulatory requirements of financial advice providers, financial advisers and other parties subject to FSLAA are an effective framework for ensuring fair conduct toward their clients in respect of the relevant services and associate products that they distribute. There is value in introducing a definition linked to this status and only applying some provisions to intermediaries who are not subject to FSLAA. FSLAA provides robust regulation for intermediaries who advise consumers and therefore legislates to protect consumer interests in sales and distribution of financial products. As noted in several responses above, the independence of an intermediary (such as a general insurance broker) is of paramount importance to promoting ongoing fair conduct by the financial institution. Intermediaries who are appointed by the consumer and are unrestricted by a financial institution, ensure fair conduct by the financial institution. Where a risk is perceived in relation to a 'captured' intermediary, legislation should oblige financial institutions to supervise and control these captured intermediaries only.
13	How far do you think financial institutions' oversight of FSLAA intermediaries under Option 4 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)?
	Financial institutions could be obliged to confirm that each intermediary has a risk management programme which includes consideration of risk and controls with respect to conduct toward consumers by the financial institution.

	This must not extend to assessing the effectiveness of controls or requiring change to an intermediary's risk management programme as it would undermine the independence of the intermediary. Financial institutions should be obliged to "monitor" outcomes for consumers of their products and identify where negative outcomes may be due to a characteristic of the distribution process which is inconsistent with the fair conduct principle. They should also be obliged to notify an intermediary of any pattern of negative consumer outcomes which they assess was caused or materially contributed to by an intermediary. Financial institutions must not have any ability to compel an independent intermediary to take specific action or approve actions taken by the intermediary.
Obligations in relation to employees and agents	
	Do you have any comments on the proposals regarding obligations in relation to employees and agents?
14	General insurance brokers may be considered agents of an insurer for limited activities should not be considered as agents for any other activities, because those other activities are not part of the delivery of services of the insurer. For example, general insurance brokers may be considered agents of an insurer for the purposes of receiving money due to the insurer from the insured and due to the insured from the insurer, under the Insurance Intermediaries Act 1994 section 2(2). Employees and agents of intermediaries which are regulated by FSLAA should also be excluded as the regulatory obligations of FSLAA extend to those employees and agents, whether as agents of a regulated financial advice provider and/or as financial advisers in their own right.
	Do you think there should be a distinction drawn between employees and agents? Why/why not?
15	Both employees and agents who are FSLAA intermediaries should be excluded entirely because they are already sufficiently regulated as to conduct and subject to comprehensive regulation under the Financial Markets Conduct Act 2020 and the *Code of Professional Conduct for Financial Advice Services.*
	Do you think any amendments should be made to the obligations in 446M(1) that would apply to employees and agents?
16	Please refer our response to questions 8 and 9 in particular. Employees and agents of independent intermediaries should be excluded to the same extent as the entities they represent.

17	Do you have any other comments or viable proposals?
	Please refer below.

Other comments

A. Definition of Consumer – 446S(1)

The definition of "consumer" has a different meaning for different uses in the Bill. For general insurance advice and intermediation it is not constrained to individuals or to personal, domestic and household insurance contracts – subparagraph (c) refers to the same elements as define a "retail client" for financial advice (since the commencement of FSLAA). For example: most small and medium businesses will be "consumers" for providing financial advice or an associated product but not, for example, consumer lending.

Since the commencement of changes introduced by FSLAA, Rothbury has identified all existing "retail clients" and provided proactive disclosure of information to them. This showed the difference between the a "retail client" and persons who would generally be considered a "consumer" by the public or by other legislation (e.g. the Consumer Guarantees Act 1993).

It includes business insurance products which are not for personal or household or domestic purposes. Policies such as directors & officers' indemnity, professional indemnity, statutory liability cover and public liability insurance would be included as "consumer" associated products under subparagraph (c) of the "consumer" definition.

"Retail client" definitions are inappropriate for regulating conduct in respect of general insurance and general insurance brokers as **they are drafted in terms of client characteristics relating to financial investment activity and not general insurance**. This produces outcomes which may be unintended consequences of using the same definitions for all financial products and services.

The aims of the Bill will be more effectively met if the definition of "consumer" is consistent within the Bill and with common understanding of that term by the public (as defined in existing consumer legislation). The definition should focus on an individual's consumption of financial products and services for personal, household and domestic purposes.

Rothbury recommends amending part of the definition of consumer in section 446(1) as follows:

(c) *(i) an individual who receives the service for personal, domestic or household purposes*
(ii) an individual who is offered the service for personal, domestic or household purposes

(and consequently deleting the redundant definition of *retail client)*

B. Publication of Fair Conduct Programme Content – 446H

As noted in Rothbury's response to question 1, general insurance brokers hold financial institutions to account for their conduct toward consumers. We do not sell products on behalf of insurers. We act on behalf of consumers by providing expert knowledge, assisting clients to select a suitable product, negotiating terms with multiple insurers and advocating on behalf of clients in making claims.

We will more effectively advocate for consumers in relation to insurers' conduct with the knowledge of each insurer's fair conduct programme. However, it is proposed elsewhere to remove financial institutions' obligation to publicly disclose the detail of fair conduct programmes. This has been justified partly by the assessment that they would be *"long, technical, and detailed, and therefore provide little value to a consumer"*.

General insurance brokers have the ability to understand fair conduct programme information and monitor the conduct of insurers against this. Publication of the detail of fair conduct programmes would allow intermediaries to highlight to financial institutions when they may not be in compliance with their own fair conduct programme. It would also promote consistency in higher standards by public comparison. The Minister may specify by regulations any particular information that may be redacted due to commercial sensitivity where appropriate.

We recommend section 446H be expanded to also require a financial institution to provide a copy of its fair conduct programme to any person upon request.

We recommend that financial institutions be obliged to advise intermediaries appointed by consumers of material changes to their fair conduct programme.

C. Scope of Regulations – section 546

Section 546(2)(oa) allowing prescription of requirements for fair conduct programmes via regulations without limitation creates a significant risk that such regulations may exceed what Parliament intends. An argument is offered that "changing societal norms" may alter what is understood by "fairness". We submit that a core definition of the Act is a matter for Parliament to address after public consultation about those societal changes.

Specific areas where a limitation to regulations is justified include:

(a) Adding conditions to market services licences for intermediaries – regulations need to preserve equivalency among intermediaries' licences, except where there is a material weakness in a specific intermediary of controls protecting fair conduct that remains unrectified;

(b) Requiring insurers to make requirements of intermediaries – this should be excluded as it interferes with intermediaries' independence and therefore their ability to pursue fair conduct by insurers;

(c) Requiring insurers to consider additional factors in designing their fair conduct programmes – this should be limited to factors which are relevant for conduct;

(d) Regulating incentives – this should require that the thing prohibited is likely to result in a breach of the fair conduct principle.

D. Protected Disclosures – Section 446T

The Protected Disclosures Act 2000 provides an existing framework for giving protection to persons wishing to disclose serious wrongdoing. Breach of the FMCA would constitute serious wrongdoing and activate those protections, therefore it is unnecessary to include similar provisions under this Act.

The provision to provide legislative protection for reporting concerns directly to the FMA, without requiring them to first report the conduct through an existing whistleblower programme, is inconsistent with the Protected Disclosures Act. This requires the whistleblower to utilise an organisation's protected disclosure framework, where such exists. It also denies the financial institution or intermediary the opportunity to respond to concerns or potentially to clarify its compliance with the fair conduct principle and thereby avoid unnecessarily reporting.

The prohibition on any action "as a result of" the employee or agent "having made the report" is also broader than the application of the Protected Disclosures Act (section 18). This may be construed as protecting the reporter from the consequences of participation in the actions they are reporting.

We recommend deleting section 446T as an existing framework exists under the Protected Disclosures Act 2000.

E. Incentives

As noted in "C" above, it is proposed that regulations could prescribe or prohibit components of incentive structures for intermediaries. This would allow the Minister to require significant changes to incentive structures.

The current structure of remuneration of general insurance brokers includes commission paid by insurers and fees charged by the broker. This structure has evolved over time and suits the needs and preferences of consumers. There is no evidence that current structures in general insurance create any negative impacts for consumers as a group, whether in New Zealand or from the Hayes Commission in Australia.

Also, general insurance policies are renewed annually, unlike most other intermediated financial products and services. This creates a competitive environment between brokers and between general insurers. It also creates crucial differences with respect to life insurance and other long-running products:

(i) General insurance brokers do not receive 'trail' commissions but must be retained by the consumer each year to earn further income; and

(ii) Consumers are not discouraged from changing insurer each year by losing cover from changes in circumstances since the cover was taken out (in contrast to, for example, new medical conditions that arose since a life insurance policy began).

The disclosure of commissions and fees relating to financial advice is now required following the commencement of the Financial Services Legislation Amendment Act. If consumers have any reservations about commission structures in particular, clarity about these will, over time, result in pressure to adjust these.

Since 15th March 2021, Rothbury has executed a strategy of proactively advising all consumers and other clients with policies arranged by us of the same information they would have received if FSLAA had commenced by the time they received advice about their policies (over 47,000 clients). Following this, we did not receive any feedback that indicates consumers are dissatisfied with incentive structures. In contrast we received a significant number of responses indicating that client understood, expected and are content with a predominantly commission-based incentive structure.

We therefore submit that it would be inappropriate to require changes to general insurance incentive structures without consideration by Parliament, with the opportunity for industry and public submissions. It is also inappropriate to allow regulations to limit incentives without compelling evidence of consumer detriment.

Rothbury recommends deleting section 546(2)(of), (4) and (5).

Alternatively, an additional requirement could be added to require evidence that the limitation to be imposed is necessary to prevent misconduct in breach of the fair conduct principle.

For example, to append to section 546(5):

(e) *is satisfied, based on reasonable evidence, that each of the parties that receive the benefit of (or may receive the benefit of) any incentive that will be prohibited or regulated by the regulations, will otherwise engage in conduct that does not treat consumers fairly.*