19 June 2024

Financial Markets
Small Business, Commerce and Consumer Policy
Ministry of Business, Innovation & Employment
Wellington 6140

Submission on fit for purpose financial services conduct regulation

Introduction

1 This is Anthony Harper's submission on the Ministry of Business, Innovation & Employment's consultation on fit for purpose financial services conduct regulation.

2 Anthony Harper is a large New Zealand law firm, with over 30 partners and around 150 people operating out of our offices in Auckland and Christchurch. Anthony Harper has recognised expertise in a large number of practice areas, including in financial services law where are partners are ranked as among the best in the country.

Submission

3 There is now general acceptance that the CoFI framework works well overall. However, there is always room for improvement, and we support those proposals that will result in the removal of duplication and unnecessary prescription from the minimum requirements for fair conduct programme.

4 We strongly support the proposed consolidation of market services licences and greater coordination between regulators. We believe these changes will meaningfully reduce compliance costs for entities with multiple licences, or who deal with both the FMA and the Reserve Bank.

5 Our full submission is **attached**.

Further information

6 I would be pleased to discuss any aspect of this submission. I can be contacted on Privacy of natural persons or at Privacy of natural persons

7 Thank you for the opportunity to submit.

Yours faithfully
Anthony Harper

Nick Summerfield
Partner

Contact: Nick Summerfield Privacy of natural persons
Our reference: 035138-23-7742957-4

Submission on discussion document: *Fit for purpose financial services conduct regulation*

Your name and organisation

Name	Nick Summerfield
Organisation (if applicable)	Anthony Harper
Contact details	Privacy of natural persons

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Responses to discussion document questions

	Introduction
1	*Do you agree the proposed criteria are appropriate, given the objectives? Are there other criteria which should be considered?*
	We agree that the proposed criteria are appropriate, given the objectives. There are no other criteria that we believe should be considered.
	1: Options for CoFI Act reform **A. Options for amending minimum requirements for fair conduct programmes** *Option A1: Remove/amend some minimum requirements for fair conduct programmes*
2	*Do you support removing or amending some of the minimum requirements for fair conduct programmes? What are the advantages and disadvantages of this option?*
	We support the removal of those minimum requirements for fair conduct programmes (FCPs) which have, in the course of financial institutions preparing themselves for the regime, proven to be overly prescriptive or duplicative. We believe this would be consistent with the Government's objectives of this review, and with the principles-based nature of the CoFI regime. Removing these provisions will add flexibility and reduce compliance costs for financial institutions in preparing their FCPs (albeit many financial institutions have largely prepared their FCPs, and so may not benefit to the same extent). We see no disadvantage to this option, where the removal is of overly prescriptive or duplicative requirements and noting that section 446J merely sets out *minimum* requirements.
3	*Which requirements should be removed or amended, if any? Please explain what changes you would like to be made.*
	We agree with the potential changes set out in paragraph 30 of the discussion document, being: • the removal of section 446J(1)(a) (we particularly support this change, as in our view, section 446J(1)(a) goes well beyond conduct matters); • the removal of the unnecessary detail in subparagraphs 446J(1)(c)(i) to (iii); • the consolidation of subsections 446J(1)(e) to (h) (on this point, we suggest the best solution would be to retain section 446J(1)(e) as drafted and remove sections 446J(1)(f) to (h); alternatively section 446J(1)(e) could be amended to cover only agents, and section 446J(1)(h) retained, without the subparagraphs, to cover employees); and • the removal section 446J(1)(k), which we agree is unnecessary given section 446G(1). There are no other specific changes that we believe should be made.
4	*What would be the impact of removing or amending particular requirements (for example, on compliance costs for businesses)?*

	Removing or amending requirements would mean the regime is less prescriptive and would provide increased flexibility for financial institutions to draft an FCP that suits their particular business. We expect this would be especially beneficial to smaller financial institutions with simpler FCPs. The benefit of removing or amending particular requirements will be reduced by the timing of the current review (both insofar as many financial institutions already have well developed FCPs, and because under the proposed timing, the changes will not come into force until after CoFI commences). However, over the longer-term we still believe these changes will be beneficial.
5	*Do you have any other comments on the minimum requirements for fair conduct programmes?*
	We do not have any other comments on the minimum requirements for fair conduct programmes.
Option A2: Potential additions to minimum requirements for fair conduct programmes	
6	*What are the advantages and disadvantages of adding an express minimum requirement for fair conduct programmes relating to fees and charges?*
	Adding a new minimum requirement relating to fees and charges would ensure that all FCPs address fees and charges in the manner contemplated by the particular wording. However, our experience is that FCPs already cover fees and charges in a way that reflects the circumstances of the financial institution without this being an express minimum requirement. As a result, we see no advantage in adding this as an additional requirement. There are two significant disadvantages in adding this as a new minimum requirement: • additional compliances costs for financial institutions to review and update their FCPs to cover the new requirement, once introduced; and • the potential loss of flexibility to address fees and costs in a way that suits the particular financial institution (for example, paragraph 34(a) of the discussion document refers to the 'disclosure' of fees and charges, but for financial institutions that distribute via intermediaries, this may be of lesser relevance). As a result, we do not believe adding this requirement would be consistent with the Government's objectives for this review.
7	*What are the advantages and disadvantages of adding an express minimum requirement for fair conduct programmes relating to complaints processes?*
	Consistent with our views in our above response to question 6, we see no advantages in an additional minimum requirement relating to complaints, and disadvantages relating to compliance costs and a loss of flexibility. We do not believe adding this requirement would be consistent with the Government's objectives for this review.
8	*Do you consider that financial institutions already need to cover fees and charging arrangements and/or complaints processes in their fair conduct programmes under the current requirements?*

In our experience, financial institutions already address fees and charges, and complaints, in their FCPs. While it is not expressly included in section 446J, we believe that doing so is implicitly required by section 446G, on the basis that fee and charging arrangements and complaints processes are a key part of complying with the fair conduct principle (in the case of complaints, this is expressly captured by section 446D(1)(d)).

In addition, financial institutions are subject to other legislative requirements relating to fees and charges (principally financial advice and financial product disclosure requirements) and complaints (under the Financial Service Providers (Registration and Dispute Resolution) Act 2008).

Option A3: Remove all minimum requirements for fair conduct programmes

9	*Do you support removing all of the minimum requirements for fair conduct programmes from the legislation? What are the advantages and disadvantages of this option?*

We do not support the removal of all the minimum requirements for fair conduct programmes.

The key advantage of this option is that it would provide maximum flexibility for financial institutions to determine the content of their FCPs.

However, this would be at the expense of increased uncertainty, leading to a greater need for guidance from the FMA, greater risk of financial institutions being judged with the benefit of hindsight, and the potential for differing approaches across financial institutions.

Option A4: Retain minimum requirements for fair conduct programmes without change

10	*Do you support retaining the existing list of minimum requirements for fair conduct programmes without any changes? What are the advantages and disadvantages of this option?*

We prefer option A1 and do not support retaining the existing list of minimum requirements for fair conduct programmes without any changes.

The only advantage of this option is that it avoids the need for any change. However, in our view, this is outweighed by the benefits of option A1.

Proposal: proceed with Option A1 (remove/amend some minimum requirements)

11	*Do you support the proposal to remove and amend some of the minimum requirements for fair conduct programmes and not to proceed with the other options? Why/why not?*

We agree that option A1 is the preferred option and we support the proposal to proceed with option A1 (and none of the other options).

We explain our reasons in more detail in our responses to questions 2 to 10 above.

B. Options for amending fair conduct principle

Option B1: Keep the fair conduct principle open-ended

Option B2: Make the fair conduct principle definition exhaustive

Proposal: retain status quo (Option B1)

12	*Do you support the proposal to maintain the status quo in the definition of the fair conduct principle? What are the advantages and disadvantages of this option?*
	We support the elements of the fair conduct principle, as drafted, and do not believe any changes to the matters listed in section 446C(2) are needed. Altering the core components of the fair conduct principle at this stage of the implementation of CoFI would create uncertainty, and has the potential to impose significant additional cost by requiring financial institutions to consider the impact of any changes. This would not be consistent with the Government's objectives for this review. However, we do not support an open-ended definition of the fair conduct principle. We support option B2, by amending section 446C(2) to state that the requirement to treat consumers fairly "means" the existing list of matters in subparagraphs 2(a) to (3), and by removing section 446C(3). This would provide greater certainty for financial institutions, avoid 'scope creep', and avoid the risk of financial institutions being judged with the benefit of hindsight. We do not believe this proposal would unduly limit the application of the fair conduct principle, given the breadth of the matters listed in section 446C(2).
13	*Are there any additional clarifications that could be made to the definition of the fair conduct principle, or matters that you consider should be included or removed? Why or why not?*
	There are no additional clarifications that we believe could be made, and no matters that we consider should be included or removed.
14	*Do you have any other suggestions or comments in relation to the fair conduct principle?*
	We support an exhaustive list rather than the inclusive list (that is, we prefer option B2). See our comments in our response to question 12 above.
15	*Do you have any comments in relation to other areas of the CoFI Act that have not been covered in this section?*
	We have no comments in relation to other areas of the CoFI Act.
	2. Options for regulatory framework and powers
	C. Consolidating financial market conduct licences
	Option C1: Amend the FMC Act to require the FMA to issue a single licence covering different classes of market service
16	*Do you support the FMA being required by legislation to issue a single conduct licence covering one or more market services? What are the advantages and disadvantages of this approach?*
	We strongly support the proposal that the FMA be required to issue a single conduct licence covering one or more market services. The FMA's licensing remit has expanded over the years, and as a result there are now eight different market service licences. This would increase to nine if a separate consumer credit licence is adopted.

There is inherent duplication in the model, as the FMA considers some of the same points across different licence types.

While only a relatively small number of entities hold multiple market services licences, for these entities, we see significant advantages in terms of reduced complexity and associated compliance costs by moving to a single conduct licence.

We anticipate it would also make it easier for licensed entities to add additional licensed services to their licence. We see no disadvantages, with the exception perhaps of a one-off transitional impact on licensed entities as part of the licence consolidation.

17	*Could consolidating existing licences into a single conduct licence give rise to any unintended consequences or costs for existing licensed firms? If so, please explain with examples where relevant.*

We do not anticipate any unintended consequences or costs if existing licences are consolidated.

However, the FMA will need to be careful to ensure that consolidation does not impose a greater compliance burden than would otherwise be the case (for example, by requiring a licensed entity to provide assurances about services not included within its licence as part of regulatory returns).

18	*Are there any other matters that should be considered around market services conduct licensing?*

We are not aware of any other matters that should be considered around market services conduct licensing.

D. Enabling reliance on another regulator's assessment

Option D1: Amend legislation to enable the FMA and RBNZ to rely on an assessment by the other regulator where appropriate

19	*Should the FMC Act be amended to enable the FMA to rely on the RBNZ's assessment for appropriate matters? Please provide examples of any specific areas where you think this could be useful.*

We strongly support amendments to the FMC Act (and corresponding amendments to prudential legislation) to allow the FMA to rely on the assessment of the Reserve Bank of New Zealand, and vice versa, along with better co-ordination between the FMA and Reserve Bank in how they respond to matters.

In our view, better co-ordination including reliance on the other regulator, where appropriate, will have a significant impact in reducing the regulatory burden on entities regulated by both the FMA and Reserve Bank.

We think this could be particularly useful in the areas identified in the discussion document, namely fit and proper assessments and matters relating to business continuity, technology and cyber-security, and outsourcing.

We would encourage the FMA and Reserve Bank to identify any other areas where they could work together more effectively to reduce the regulatory burden on licensed entities (but without compromising their own individual remits). This could include practical matters, such as a single platform for reporting to both the FMA and Reserve Bank and co-ordination in "relationship" meetings with regulators.

20	*Should there be equivalent provisions enabling the RBNZ to rely on the FMA's assessment for appropriate matters? Please provide examples of any specific areas where you think this could be useful.*
	Yes, in order to maximise the benefits of this proposal we believe any changes should be mutual. See our further comments in our response to question 19 above.
21	*Are there any other improvements that could be made to the way the FMA and the RBNZ work together to reduce compliance costs and regulatory burden?*
	See our comments in our response to question 19 above.
	E. Ensuring the FMA has effective tools
	Option E1. Introduce change in control approval requirements
22	*Should change in control approval requirements be introduced into the FMC Act? Please explain your answer, including why the current approach does or does not work.*
	On balance, we do not believe there are compelling reasons for a change of control approval requirement to be introduced into the FMC Act. We see this as being more important in the prudential area, because a change of control can have a more significant direct impact on prudential stability. The FMA rightly has an interest in potential changes of control of licensed entities, but in our view, the current approach of notifying the FMA in advance (pursuant to regulation 191) works. The current approach provides the FMA with an opportunity to ask for more information about the transaction, if it is a matter of particular interest (and, in our experience, the FMA can ask questions) without the formality of a change of control approval process that would add complexity to M&A activity in the sector and has the potential to cause deal uncertainty. While we think the current approach works, we believe there would be benefit in the FMA issuing brief guidance on its expectations for notification of transactions, including the information it expects to receive, how it assesses that information, and indicative timeframes for any engagement with the FMA. Overseas purchasers, in particular, can struggle to understand the process as it has developed in a fairly informal way. Additional guidance would provide greater certainty for market participants.
23	*Should change in control approval requirements apply only to firms licensed to act as financial institutions, or to all firms licensed under Part 6 of the FMC Act? Why?*
	We do not support the introduction of a change of control approval requirement. However, if it was to be introduced, we suggest it should apply to all firms with a market services licence. This would be consistent with the proposed move towards a single licence.
24	*Do you have any other feedback on the change in control requirements option?*
	We have no other feedback on the change in control requirements.
	Option E2: Introduce on-site inspection powers for the FMA

25	*Should the FMA have the ability to conduct on-site inspections without notice? Please explain your answer, including why the current approach does or does not work.*
	We agree that the FMA should have the ability to conduct on-site inspections without notice. We understand the rationale for this proposal, as outlined in the discussion document, and acknowledge that the FMA is currently an "outlier" compared to the Reserve Bank and comparable overseas conduct regulators. However, we would expect this power to be exercised sparingly. Our support for the introduction of such a power is on the basis that it is subject to limits comparable with those imposed on the Reserve Bank – i.e. the power must be exercised at a reasonable time and in a reasonable matter, consistent with the purpose of the power.
26	*Should an on-site inspection power apply only to certain firms or in certain circumstances, e.g. to firms licensed under Part 6 of the FMC Act, or to all firms regulated as financial markets participants? Why?*
	We suggest the power should apply to all firms regulated as financial markets participants. Arguably, the FMA is more likely to need to exercise such a power to establish the compliance of an unlicensed market participant, rather than a licensed market service provider subject to regular ongoing supervision.
27	*What safeguards should be in place for on-site inspections without notice?*
	We do not have any comments on this question, beyond our general comment in question 25, to the effect that we would expect this power to be exercised sparingly and to be subject to limits comparable with those imposed on the Reserve Bank.
28	*Do you have any other feedback on the on-site inspection option?*
	We have no other feedback on the on-site inspection option.
Option E3: Introduce an expert report power for the FMA	
29	*Should the FMA have the ability to commission expert reports? Please explain your answer, including why the current approach does or does not work.*
	We agree that the FMA should have the ability to commission expert reports. We support the rationale for this proposal, as outlined in the discussion document, and acknowledge that it would bring the FMA into line with the Reserve Bank. We agree that the power should be aligned with the Reserve Bank's powers, as outlined in paragraph 125 of the discussion document.
30	*Should an expert report power apply only to firms licensed under Part 6 of the FMC Act, or to all firms regulated as financial markets participants? Why?*
	We suggest the power should apply to all firms regulated as financial markets participants, for the reasons outlined in the discussion document.
31	*What safeguards should there be for an expert report power?*

	We do not have any particular comments on this question. In practice, we agree that the FMA is not likely to seek an expert report unless circumstances genuinely warrant it.
32	*Is it appropriate that the firm concerned bear the cost of the expert report? Why / why not?*
	While we are concerned about the potential for compliance costs, our view is that it is appropriate that the firm concerned bear the cost of the expert report. On the assumption that the FMA is not likely to seek an expert report unless circumstances genuinely warrant it, it is reasonable that the relevant firm should bear the costs as a private matter, rather than it being (in effect) funded by the taxpayer.
33	*Do you have any other comments on the expert report power option?*
	We have no other comments on the expert report power option.
	3*:* Limitations and constraints on analysis
34	*Are there any other areas and options for change that we should consider that have not been addressed in this discussion document?*
	We do not wish to raise any other areas or options for change that MBIE should consider.
	4: Implementation
	35. Do you have any comments on implementation of these reforms?
	While we acknowledge the need to fit within the Government's other priorities, it is unfortunate that any resulting changes to CoFI are not likely to become law until 2026, after the regime commences. This means that processes, policies, systems, and controls designed to comply with the current requirements will already be embedded and will need to be subject to further review for alignment with any changes. This would be particularly problematic if (contrary to our comments in our response to question 11) amendments are made to add additional minimum requirements to FCPs. We suggest the changes to be made are clearly signalled at the earliest possible opportunity (however, we appreciate they will always remain subject to the uncertainty of the legislative process). If the preferred option(s) pursued do involve a removal of some requirements, we suggest the FMA should consider regulatory relief (by way of a "no action" approach) that would allow financial institutions to take advantage of the changes as they finalise and then maintain their FCPs in advance of implementation of the reforms.

Other comments

We have no other comments.