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21 June 2024

Financial Markets
Small Business, Commerce and Consumer Policy
Ministry of Business, Innovation & Employment
PO Box 1473
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New Zealand

Dear Sir or Madam

Fit for purpose financial services conduct regulation - discussion document - May 2024

1. Introduction

Bank of New Zealand ("BNZ") appreciates the opportunity to contribute to the review of the Financial Markets (Conduct of Institutions) Amendment Act 2022 (CoFI Act). BNZ agrees with most stakeholders that the overall intent and framework of the CoFI Act is sound and also agrees that there are parts of the regime design that could be improved to reduce unnecessary duplication and compliance costs.

BNZ is aware that the New Zealand Bankers Association (NZBA) is also submitting on the discussion document. BNZ has contributed to that submission and agrees with it. The purpose of this submission to highlight particular issues of interest to BNZ. To that end we have consolidated the questions in the discussion document into eight key questions and set out our thoughts in relation to those below.

2. KEY QUESTION 1: Should the minimum requirements for fair conduct programmes (FCPs) change? (Questions 2-11 of the discussion document)

BNZ supports option A1: Remove/amend some minimum requirements for fair conduct. We consider some minimum requirements should be changed but do not support removing all minimum requirements or leaving them "as-is". We consider option A1 is the best option as it retains clear standards of conduct and minimises duplication and unnecessary prescriptive detail.

We propose the following paragraphs of 446J should be considered for removal:

- 446J(1)(a) - this paragraph provides that the FCP must include policies, processes, systems and controls to enable a financial institution to meet all of its legal obligations to consumers. This seems unnecessarily duplicative to us as financial institutions are already required to comply with their legal obligations to consumers and it is not clear what additional benefit bringing these requirements into the FCP brings. In our view this may simply lead to in an internal compliance exercise to make sure all existing system policies, processes, systems and controls are duplicated in a financial institution's FCP with no discernible improved outcome for consumers or the financial institution.

- 1c - this paragraph requires financial institutions to identify, monitor, and manage risks associated with conduct that fail to comply with the fair conduct principle by meeting several prescriptive requirements including having defined roles, maintaining record keeping and requiring regular and comprehensive reporting. We consider that the requirements of this paragraph are too prescriptive and recommend that this paragraph is removed entirely or redrafted to be principal

based i.e. that financial institutions understand the potential risk areas for unfair consumer outcomes and apply suitable mitigants to address these.

- We consider paragraphs 1(f) to 1(h) are duplicative and could be covered by paragraph 1(e) which is much less prescriptive. 1(e) is also clear that it applies to where CoFI extends existing training requirements (for example competency requirements for providing advice should already be met) but there may be additional procedures and processes that employees/agents need to follow to meet the fair conduct principle.

- We consider 1(k) is unnecessary given section 446G already requires financial institutions establish, implement and *maintain an effective* FCP. To "maintain an effective" FCP financial institutions will need to regularly review the FCP and identify any deficiencies in the effectiveness of the programme.

We do not support option A2 to add new minimum requirements to section 446J(1) to:
a. applying, disclosing and reviewing fees and charges and/or
b. recording and resolving consumer complaints.

We consider both requirements are already covered either generally under CoFI or specifically under other legislation. For example, determining fees is a key aspect of product design and therefore covered in section 446J 1(b). And section 446H(2)(a)(Ii) makes reference to the requirement for a complaints process. In addition, financial institutions are already required under the CCCFA and FMCA to have clear consumer complaints processes and procedures. If there are any concerns that these are not being managed well by financial institutions, then that could be addressed by guidance rather than legislation.

We note option A2 will result in some rework for financial institutions. However, we consider this to be minimal given that financial institutions are required to regularly review their FCPs in any event. In our view the cost of any rework is outweighed by the benefits of an improved regulatory framework.

If the minimum requirements of FCPs set out in CoFI are amended, we recommend that the FMA considers reissuing its guidance on Fair Conduct Programmes from November 2022.

3. **KEY QUESTION 2: Is the fair conduct principle fit for purpose? (Questions 12-14)**

We broadly support the proposal to maintain the status quo in the definition of the fair conduct principle. However, we are not convinced that Section 446C(2(e) "***not subjecting consumers to unfair pressure or tactics or undue influence***" needs to be specifically included. This is because this concept already covered in the prohibition of unconscionable conduct under the Fair Trading Act 1986. Section 8(e) of the Fair Trading Act 1986 provides that "W*hen assessing under section 7 whether a person's conduct is unconscionable, a court may have regard to whether the trader subjected an affected person* ***to unfair pressure or tactics or otherwise unduly influenced an affected person***." Given one of the purposes of this review is to remove duplication across legislative obligations this would appear to justify the deletion of 2(e).

We also consider there is merit in introducing a new principle that would make it clear that financial institutions are required to treat consumers fairly over time and not just at point of sale. In our view, one of the aims of CoFI is to extend a focus on good conduct beyond 'point of sale' and consider the risk of consumer harm across the lifecycle of the products they have and so expressly including a principle to reflect this would be beneficial.

4. **KEY QUESTION 3: Is there anything else about CoFI that needs to change? (Question 15)**

We consider that the application of CoFI to "consumers" rather than "retail customers" which is the term used throughout the rest of the Financial Markets Conduct Act 2023 is confusing. It would be simpler for customers and financial institutions if one consistent definition was used throughout.

We recommend that the broad requirement on financial institutions to publish a summary of the key matters about its FCP set out in section 446H be reconsidered. We agree that public information about fair conduct supports the ability for consumers to make informed decisions, but we think this may be better met as a type of disclosure statement (like a sustainability report) about what the financial institution has done to meet the fair conduct principle and improve outcomes for consumers rather than a summary statement.

We consider summaries of financial institutions' FCPs are unlikely to be helpful to consumers to assist informed decision making. There is likely to be significant variances between financial institutions statements which will hinder the ability for consumers to make comparisons. For example - how does a consumer distinguish between a FCP summary that highlights five key aspects of its FCP compared with one that highlights ten? How is a consumer to make sense of these differences given financial institutions are ultimately subject to the same legal requirements. It is also unclear what reliance consumers and financial dispute providers can put on these summaries to ensure fair treatment in a particular scenario given they are just summaries.

In our view customers are most interested in the options that are available to them if they consider they have been treated unfairly. To address this, we consider it is more important that complaints processes continue to be very clear to consumers. If a summary statement is retained, we consider it vital that the FMA provides guidance about the form of the document to promote consistency across financial institutions' statements which would make it easier for consumers to make comparisons/decisions as required.

5. **KEY QUESTION 4: Does FMA licensing need to be simplified? (Questions 16- 18)**

We are supportive of a single conduct licence regime with additional financial services added to the primary licence as required. This would position conduct as the primary obligation for financial institutions and reduce the duplicative licence conditions that currently exist.

We also think that in time, CoFI should extend to all financial services organisations that provide financial products and services including the provision of credit. This would set a consistent level of conduct expectations throughout the financial industry. Financial institutions are very interrelated with organisations that are not currently covered by CoFI, for example referral models from banks to wealth firms and use of mortgage brokers etc which can create challenges in managing services levels.

In our view how the whole ecosystem shows up for consumers is essential and should be consistently grounded in the fair conduct principle. Currently, financial institutions are juggling, amongst other duties, responsible lending obligations, the requirements under the financial advice providers regime and CoFI requirements. Whereas entities not covered by CoFI can be more narrowly focused in their approach to good conduct. In our view the obligations under all consumer finance laws should be simplified and united under the fair conduct principle with all entities providing consumer finance services and products required to hold a "conduct licence". We appreciate that this would entail a considerable rewrite of the FMCA and CCCFA and suggest that this is approached slowly perhaps as a Phase 3 and not rushed under the proposed amendments to the CCCFA this year.

6. **KEY QUESTION 5: Should the FMA and RBNZ be able to rely on an assessment by the other regulator where appropriate? (Questions 19-21)**

   Yes we are supportive of any way to reduce overlap or duplication and standardise the information regulators require. Providing the same/similar information to both the FMA and RBNZ to assess separately undermines the efficiencies trying to be achieved in this review.

7. **KEY QUESTION 6: Should the FMA have a say in change of control applications? (Question 22-24)**

   Yes, we agree that the FMA should have powers to scrutinise the impacts of a change in ownership of a licensed firm on consumers before it takes place.

8. **KEY QUESTION 7: Should the FMA have power to conduct onsite inspections without notice? (Questions 25-28)**

   Yes, we consider this is appropriate in high-risk scenarios and with appropriate safeguards as described in the discussion document namely:

   - only being able to exercise the power at a reasonable time and in a reasonable manner;
   - consistent with the purpose of the power;
   - exclusions for inspections of private dwellings and marae;
   - the authorisation or approval of persons carrying out inspections (and these persons being well-trained and having requisite expertise);
   - confidentiality protections for information gained from inspection.

9. **KEY QUESTION 8: Should the FMA have power to require skilled persons reports? (Questions 29-33)**

   We question whether the FMA requires a power to require expert reports. The FMA already has broad general information gathering powers and, as noted in the discussion document, firms are usually willing to obtain third party reports if requested by the FMA. In our view, it would be more appropriate for the FMA to be involved in the instruction of such a report when they have requested it to ensure it meets the FMA's requirements.

All enquiries on this submission may be directed to Paul Hay, GM Regulatory Affairs at Privacy of natural persons

Yours sincerely

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Paul Hay
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