



Friday 1 March 2024

Financial Markets Authority  
Level 5 Ernst & Young Building  
2 Takutai Square  
Britomart  
PO Box 106 672  
Auckland 1143

Level 2, 1 Grey Street  
PO Box 1179  
Wellington 6140


**By email:** [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz)

### **Proposed Fair Outcomes for Consumers and Markets**

This submission on the Financial Markets Authority (FMA) consultation on *proposed fair outcomes for consumers and markets* (the Consultation Paper) and the accompanying *fair outcomes for consumers and markets, a guide to outcomes focused regulation* (the Draft Guide) is from



We have developed this submission after participating in the FSC consultation process. We acknowledge and respect the views of other FSC members and agree with some of the FSC submission feedback. However, overall, we believe we have a more positive view of the Draft Guide and would like to see it progress. We have chosen to provide feedback on selected questions where our view is *substantially* different to that of the FSC membership.

 welcomes the FMA's approach to an outcomes-focussed supervisory approach. We also note that the Draft Guide has created uncertainty and confusion.

We welcome continued discussions and engagement.

Yours sincerely



1. Is the way we have described our outcomes focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.

Whilst we are aware that other firms are concerned the Draft Guide goes beyond the scope of existing or proposed legislation and/or introduces new and uncertain concepts, we feel the FMA's intent is clear. We see the opportunity for fair outcomes to be identified and measured as compatible with (not contradictory to) maintaining compliance with legislation and regulation now and in the future. We look forward to remaining innovative in our approach to helping our customers and to finding new ways to demonstrate fair outcomes.

We feel the FMA's Draft Guide encourages firms to focus appropriately on maintaining compliance with legislation and regulation, whilst also recognising this compliance effort may become 'compliance for compliance's sake' if firms do not also properly consider outcomes.

We also recognise the FMA's expectations extend to firms that are not captured by CoFI and that any future changes to CoFI will benefit from being underpinned by an approach such as this being proposed by the FMA.

We would welcome more clarity from the FMA on how it will seek to measure and monitor outcomes in its supervisory capacity.

2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?

3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?

4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?

5. What are your views on Outcome 3: Consumers receive fair value for money?

Determining and measuring value for money as an outcome for consumers will not necessarily be straightforward. We do however agree with the general sentiment that consumers should receive fair value for money.

It will be helpful to see practical real-world examples from the FMA of fair value for money across different sectors and scenarios (as well as examples of what the FMA considers unfair), to assist firms in developing approaches in this area.

6. What are your views on Outcome 4: Consumers can trust providers to act in their interests? We agree that an outcome should be that consumers feel they can trust providers to act in their interests.

7. What are your views on Outcome 5: Consumers receive quality ongoing care?

8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?

9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?

10. Is anything missing that should be included in the fair outcomes? Please explain.

We feel the scope of the five outcomes which are applicable to industry participants (as distinct from the two that relate to the market as a whole) appears reasonable.

11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?

We would build on our existing compliance programmes (including our Fair Conduct Programme) and create new benchmarking and monitoring to ensure we take a risk-based approach to recognise fair outcomes, identify unfair outcomes, and make any changes necessary now and in the future, to deliver fair outcomes.

Additional controls and processes including lead and lag indicators may be needed to supplement those which exist to prevent and detect breaches or errors and spotlight understanding and decisions which are reflective of the fair outcomes we desire.

12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?

We see the two as compatible (which we note diverges from the FSC's view). We understand the FMA's intent that "... *these are not rules ... they do not change firms' obligations*".

We believe that firms are better placed than regulators to determine what processes and actions are most appropriate to achieve the right outcomes for customers. We also believe that a focus on outcomes can be compatible with legal and regulatory compliance.

Meaningful examples of fair outcomes being achieved for customers would be helpful.

It will be useful for the FMA to provide further clarity on how it will seek to measure outcomes in its supervisory capacity. Consideration should also be given as to how consistency of application of the guidance will be achieved and monitored.

13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?

Consultation: Fair outcomes for consumers and markets

14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?

Current financial services laws clearly set out the expectations in terms of individuals and entities regarding misconduct.

We agree with the FSC submission that the Draft Guide is not the appropriate vehicle for influencing how the FMA should resolve misconduct.

15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?

16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?

17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?

Examples throughout the guidance should include all markets not just insurance and banks.

18. Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?



## **OVERARCHING COMMENTS ON THE FAIR OUTCOMES FOR CONSUMERS AND MARKETS**

The proposed outcomes set out by the FMA in its draft guidance 'Fair outcomes for consumers and markets' (the Draft Guide) are in themselves desirable objectives in principle. However, it is not clear what role the outcomes are intended to play and what they are intended to mean for the application of the underlying law, especially the recently enacted Conduct of Financial Institutions (CoFI) regime.

We consider there are issues in relation to mandate, ambiguity, and the relationship to legislation that need to be considered and we discuss these below.

Before progressing any further with this sort of approach it will be necessary for the FMA to address these issues. To be clear, our concerns are predominantly with how the outcomes would sit alongside regulatory regimes provided for in legislation and regulation, rather than with the desirability of the outcomes themselves. At present rather than particularly assisting to implement current obligations the Draft Guide just sets out different objectives. If instead the outcomes were presented by the FMA as matters they would consider when administering the regulatory regimes and undertaking its work, as is suggested in some parts of the consultation, we consider this would align better with the wider regulatory scheme.

All members of ICNZ are subject to the CoFI regime to the extent they provide insurance to consumers. There was extensive engagement between the Ministry of Business, Innovation and Employment (MBIE), the FMA and the insurance industry on how the CoFI regime would operate and what regulation and guidance might be required to support financial institutions to comply. Licensing opened in July 2023, and ICNZ members have invested significant time and resource in developing their Fair Conduct Programmes (FCPs) to support compliance with the fair conduct principle and its focus on fair customer outcomes. The FMA now proposes the Draft Guide which makes no reference to the CoFI regime or how it is intended to interact with it. We consider that in its current form the Draft Guide creates uncertainty and confusion and is unlikely to add value for consumers dealing with financial institutions who are subject to the CoFI regime.

If the FMA were to proceed with finalising the Draft Guide, we believe it should not apply to those financial institutions that are subject to the CoFI regime, and the CoFI regime should be given sufficient time to embed before any additional requirements or expectations are introduced.

If the FMA does intend for the Draft Guide to apply to financial institutions that are subject to the CoFI regime, the Draft Guide needs to be reworked to ensure it aligns with CoFI, does not introduce additional requirements and clearly demonstrates how the Draft Guide interacts with existing legislative frameworks.

We support ongoing conversations between the FMA and the financial sector on shared outcomes so long as that is in the context of how existing regulatory obligations are overseen and pursued.

### *Mandate*

It is not clear what the FMA's mandate is to issue the Draft Guide, if it is intended to impose new and additional obligations on providers. Without any clear link to the applicable legislative and regulatory obligations, it is difficult to understand how the legislation within the FMA's remit enables such an outcomes-based approach whereby the FMA unilaterally defines the desired outcomes. It is also not clear how the Draft Guide interacts with CoFI in particular. CoFI introduces a series of principles or outcomes, toward which providers' FCPs should be directed. Some of the outcomes in

the Draft Guide are directed toward *similar* outcomes, but there is certainly not complete alignment. That gives rise to a risk of confusion.

There is a contradiction between key statements in the Draft Guide that the outcomes are not rules and “do not create, replace or even supplement existing legal obligations” (p5) and the FMA’s expectations that those outcomes will be delivered by providers (“*demonstrably embed them in the way they operate*” (p5).

The consultation paper asks, “*how will you demonstrate ownership and delivery of the fair outcomes?*” (q11). The Draft Guide states “*These outcomes will inform how we exercise our role ... and approach to our supervisory and enforcement work*” [emphasis added] (p3).

The recent speech from Samantha Barass to the Financial Services Council<sup>1</sup> also includes this dichotomy when she stated:

*“The FMA’s focus on outcomes is in the first instance something for us. It is about our regulatory approach and the judgement we bring to our work as a regulator. It’s about us leaning even further into our engagement-led approach. It is about forward looking supervisory judgement that is risk-based and outcomes-focused.*

*The consultation is seeking your views on the outcomes that will guide our approach to exercising our regulatory powers and responsibilities. It will be risks to these outcomes that first and foremost guide our decision-making on how we use our resources. For our supervisory approach, we will use these outcomes, not detailed compliance requirements, to frame our discussions with and assessments of providers.” [emphasis added]*

How a provider and its Board are expected to reconcile these intentions is not clear.

Are providers expected for example to create a strategy and compliance framework for the outcomes? We note there would be no evident legal basis for this and the nature of the outcomes is not conducive to it (see further comments below). However, it would be difficult for entities to demonstrate “*ownership and delivery of the fair outcomes*” without doing so. Many entities are in the process of implementing the CoFI regime and the fair conduct principle that sits at its heart, which begs the question of how to view these overlapping but different proposed outcomes.

The FMA’s proposals are quite similar in sentiment to the UK’s Consumer Duty. The key difference between the two frameworks though is that the UK’s Consumer Duty was implemented through regulations and supporting guidance set out in the FCA handbook and not non-regulatory material. The FMA’s Draft Guide appears to overlay existing regulations with subjective expectations, which is not effective policymaking.

If the outcomes are instead intended to signal areas that the FMA is interested in or will focus its efforts on (e.g. education) when conducting its supervision, which we consider would be the most appropriate approach, then making this more explicit in the document would be useful for the regulated population by making the status of the outcomes clear.

### *Ambiguity*

Regulatory certainty supports effective and efficient compliance frameworks. Managing to outcomes is most workable when the outcomes are definitive and clear (e.g. avoiding worker harm or death under Health and Safety law) and these are often about avoiding negative outcomes.

---

<sup>1</sup> Speech by Samantha Barrass to the Financial Services Council Outlook 2024, 31 January 2024

Outcomes are far less certain when they are subjective in nature and more positive/aspirational, which the proposed seven outcomes generally are.

In his speech at the Financial Services Council's Outlook 2024 event earlier this year, the Minister of Commerce and Consumer Affairs Hon Andrew Bayly referred to *"a series of legislative and regulatory changes aimed at enhancing conduct by financial institutions"* and the impact that this *"layering of regulation and legislation"* has had which *"led to a lack of clarity for many market participants"*. Minister Bayly outlined some fundamental changes that the Government will be introducing within the financial services sector which are designed to lessen the burden on market participants, decrease complexity and avoid unnecessary compliance costs. We strongly believe that the Draft Guide will simply add another layer of complexity and result in unnecessary compliance costs contrary to what the current Government is trying to achieve.

The Draft Guide states the FMA wants to be *"clear about what we expect"* (p4), and beyond the issue of the basis for the outcomes discussed above, we do not see the outcomes meeting this objective. For example:

- The outcomes used value-based words (e.g. appropriate, suitable, fair, useful, easily, quality) that are not appropriately defined, and in some cases not used in the underlying legislation. Greater certainty and clarity would be required to make these implementable by entities. The Draft Guide would need to be much more specific in what the FMA is looking for. As currently drafted, it is likely there will be differing interpretations between providers and the regulator, and the outcomes will be interpreted as new requirements on financial institutions.
- The FMA's 'relevant issues and examples' are not very helpful in setting expectations but are more very broad and high-level principles that essentially repeat what the outcome says. E.g. the first example on page 6 refers to cryptocurrency which is not explicitly regulated in New Zealand. Many only refer to a specific regulatory regime or situation. This means examples are only illustrative and do not cover the full range of situations where the outcome would be relevant.
- The consultation paper states that *"everyone will have an intuitive sense of what 'fair' is and whether they have been treated in line with this"* (p13). The problem is that every individual consumer's definition of what is fair in the circumstances is likely different and may not always be a reasonable assessment of fairness in the circumstances.
- Expected outcomes change over time – even within a relatively short space of time – so focusing just on outcomes imposes an obligation on firms to anticipate the FMA's future interpretation of 'fair outcomes' and without clarity on how to assess those outcomes at the beginning.
- The consultation paper states that the FMA *"will require a mindset change to the way we act"* (p13). It would be helpful to see some practical examples of the changes to the FMA's operational practices that are intended here.

These issues would not be a concern if the proposed outcomes are simply intended to signal areas that the FMA is interested in or will focus on when conducting its supervision of current regulatory regimes.

#### *Relationship to legislative frameworks*

While we recognise the outcomes are intended to relate to a range of contexts that the FMA is the regulator for, the interrelationship with the fair conduct principle and the CoFI regime is most acute.



For general insurers it is the relationship with this part of the Financial Markets Conduct Act (FMCA) that is of particular interest.

As currently suggested in the Draft Guide, entities would seem for example to be expected to assess whether the outcomes should be explicitly covered in their FCP under the CoFI regime, (when they are well progressed in development and implementation) and would need to pivot making the timing particularly problematic. This would entail replacing adherence to a legislated requirement with adherence to the regulator's direction or expectation, which if it is the intent would appear to be a case of regulatory overreach. It is also unclear whether the FMA's intent is for compliance with CoFI to be sufficient furtherance of the proposed fair outcomes for consumers. We believe this is the only way the approach could be effective without substantial additional compliance costs, but if this is the intent, it should be clarified in the Draft Guide.

As shown in the table on the following page, the first five consumer-related outcomes overlap but also differ from the key elements of the fair conduct principle under CoFI.

In relation to those outcomes that are not related directly to the CoFI fair conduct principle the outcomes again risk over-reaching into new territory that has explicitly not been enacted in conduct legislation (particularly Value for Money). If fair outcomes were to be presented as a form of FMA expectation, they should be limited to align with the CoFI fair conduct principles on the rationale that firms already bound by CoFI can have confidence their FCPs are compatible and do not need revision.

Proposed Fair Outcomes	FMCA (Main Purposes and Additional Purposes in sections 3 and 4)	Fair Conduct Principle under CoFI (section 446C of the FMCA)
		(1) The fair conduct principle is that a financial institution must treat consumers fairly.
1. Consumers have access to appropriate products and services that meet their needs	No direct match	(2) The requirement to treat consumers fairly includes— ... (d) ensuring that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group);
2. Consumers receive useful information that aids good decisions	4(a) to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services:	(2) The requirement to treat consumers fairly includes— ... (c) assisting consumers to make informed decisions
3. Consumers receive fair value for money	3(b) promote and facilitate the development of fair, efficient, and transparent financial markets.	No direct match
4. Consumers can trust providers to act in their interests	No direct match	(2) The requirement to treat consumers fairly includes— ... (a) paying due regard to consumers’ interests; ... and; (e) not subjecting consumers to unfair pressure or tactics or undue influence.
5. Consumers receive quality ongoing care	No direct match	No direct match
6. Markets are trusted based on their integrity and transparency	3(a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and 3(b) promote and facilitate the development of fair, efficient, and transparent financial markets.	(2) The requirement to treat consumers fairly includes— ... (a) acting ethically, transparently, and in good faith
7. Markets enable sustainable innovation and growth	4(d) to promote innovation and flexibility in the financial markets.	No direct match

We also note that CoFI contains a detailed definition of “consumer”. However, the Draft Guide does not define consumer or clarify whether the CoFI definition of consumer applies. Reference to consumer in the Draft Guide would need to be read in the same way to avoid undue confusion.

## ANSWERS TO CONSULTATION QUESTIONS

**1. Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.**

As outlined in the overarching comments section of this submission, the purpose of the Draft Guide, its relationship to financial conduct legislation and other guidance issued by the FMA, and what it means for the FMA's expectations for providers needs to be further considered and clarified.

The Draft Guide states: *"These fair outcomes are not rules. They do not create, replace or even supplement existing legal obligations. Rather, focusing on the outcomes will assist firms to more easily meet those obligations in a way that achieves the purpose and intent behind them, as well as supporting regulatory compliance and helping to signal whether the regime is working as it should"* (p5). However, there is an expectation that the outcomes will be delivered. The Draft Guide states: *"Providers will need to take ownership of the fair outcomes and demonstrably embed them in the way they operate"* (p5). *"Over time, our regulatory conversations with firms will be built around the efforts they are making to achieve these outcomes. Providers will need to consider how they monitor and review their progress and how they articulate that to us"* (p13) and *"We will be interested in everything that firms are doing to achieve these outcomes. We will work to understand firms' viewpoints, the key risks or constraints, and the journey they are undertaking as they deliver these outcomes"* (p 13). There is a clear disconnect here that needs to be resolved. In our view this is best resolved by the fair outcomes being clearly focused on the FMA's work rather than as an alternative or additional framework for entities to comply with.

The Draft Guide states that by adopting an outcomes-focused approach the FMA wants to avoid a tick-box mentality. However, it is not outlined in the consultation document or evident to us that such a mentality is an issue within the market at the moment. In any event, it is important to allow the principles-based CoFI regime time to embed before assessing whether any additional response to a 'tick-box mentality' is required.

**2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?**

It is not clear how the proposed fair outcomes interact with legislation that the FMA is responsible for and consequently how it will bring any benefits for consumers, providers or markets.

For example, CoFI references a range of outcomes toward which financial institutions must direct their FCPs. The Draft Guide should clarify how the outcomes expressed in it relate to the outcomes expressed in CoFI. Where the outcomes in the Draft Guide go *beyond* the CoFI outcomes, the Draft Guide should be clear about how that is intended to be reflected in the FMA's supervision, monitoring and enforcement activity.

As currently drafted, for reasons outlined elsewhere in the submission, many providers will treat the Draft Guide as imposing additional compliance requirements, further increasing compliance costs which may ultimately be passed onto the consumer.

For providers, the ambiguity around the status of the Draft Guide and application of the outcomes may have the unintended consequence of stifling innovation. The outcomes can be interpreted as applying additional regulatory obligations, meaning providers may not feel that it is sufficient to satisfy themselves that they will be compliant with their legal obligations when developing new

products. A lack of clarity and certainty about their obligations may therefore result in providers taking a more conservative approach to the development of new products.

For consumers, in cases where they are aware of the outcomes, it may be confusing that the outcomes cannot be enforced directly. They may also be disadvantaged if there is a reduction in innovation or an increase in compliance costs for providers that is passed on to consumers in the cost of products and services.

**3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?**

We support the general proposition and aim of Outcome 1, however, CoFI already requires financial institutions to ensure that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group)<sup>2</sup>. It is unclear how the proposed Outcome 1 is intended to interact with this similar obligation and the associated minimum requirements for FCPs in s446J of CoFI.

*Accessibility*

‘Accessibility’ of financial products that meet diverse customer needs is an outcome that a single provider cannot be responsible for delivering. In the general insurance sector, business imperatives – including reinsurance capacity and prudential regulation – will mean that a single provider cannot meet the needs of the market *per se*. Rather, providers are required under CoFI to ensure that product and service design takes into account the likely requirements and objectives of target customers, not the public at large. There needs to be a recognition of the nuances and that insurers should be free to offer only certain products (for example only travel insurance or motor insurance) and that not all consumers will have access to insurance products and services that meet their needs due to cost and insurer risk appetite. Not recognising this risks undermining the wider market rather than supporting it.

The word ‘appropriate’ is also key in the draft outcome statement. In situations where the risk insured is high (e.g. high natural hazard exposure, high risk industry) or the policy owner is seen as a bad risk (e.g. fraudster, arsonist) insurance may be expensive or unavailable.

From a first principles point of view, it is important to recognise that not all risks are insurable and to be insurable a risk needs to have the following general attributes:

- Risk is pool-able (i.e. sufficient number of homogeneous exposures), meaning niche risks can be difficult to cover.
- Loss must be due to chance (timing and impact must be unexpected).
- Loss is definable, measurable and statistically predictable based on history and/or modelling (and therefore can be priced).
- Premium is affordable for enough customers to make the product viable.

Some types of risks are uninsurable or not fully insurable because the above factors are lacking or for reasons such as:

- The potential losses are too expensive (i.e. catastrophic for insurers) if it did happen – e.g. global pandemic, war.

---

<sup>2</sup> S446C(2)(d)

- Where the risk is too difficult to price accurately.
- Where reinsurance is not available (for example in relation to losses from terrorism or war).
- Where providing insurance is prohibited by law.

Also, an insurer may have made a legitimate business decision to target a particular type of product or segment of the market. Such a decision may have benefits for consumers, e.g. a simple product that is easily understood by the target market. This proposed outcome should not be considered to require an insurer to amend their product for consumers outside their target market. Enabling insurers to offer only certain products or to target certain parts of markets supports innovation and diversity in the market.

Finally, it is worth noting that ‘accessibility’ of financial products and services is *not* an outcome that is built into CoFI.

The general insurance sector would appreciate further clarity on the “accessibility” limb of this outcome, including (given the issues outlined above) how the FMA intends to approach this in light of these.

#### *Appropriateness*

We agree that the ‘appropriateness’ element of Outcome 1 is sensible. Broadly speaking, this element of Outcome 1 reflects one of the elements of the fair conduct principle described in CoFI (section 446C(2)(d)). The language of this element of the outcome should, however, use the language of CoFI for consistency and clarity.

In addition, Outcome 1’s reference to meeting consumer needs could be read as implying a view of suitability that is more relevant to personalised financial advice services than commoditised general insurance products. Customers’ needs change and customers have their own responsibilities to manage their insurance arrangements to meet those changing needs.

#### **4. What are your views on *Outcome 2: Consumers receive useful information that aids good decisions?***

Under CoFI an insurer must have an FCP that includes effective policies, processes, systems and controls for communicating with consumers about the financial institution’s services and products in a “*timely, clear, concise, and effective manner*”. Outcome 2 refers to information that must be “*useful*”, that is “*easily understood and digestible information that is material, accessible, timely and reliable*”. While these are similar concepts, they are different, and this creates complexity and uncertainty for regulated entities.

It is not apparent what the differences in language might mean for insurers and whether the intention would be to create additional requirements. There is no reference to the CoFI regime despite both the Draft Guide and the regime being designed to support fair outcomes. As noted elsewhere, this poses questions such as whether insurers would be expected (but not legally required) to incorporate this language into their FCPs.

We also note that different insurers use different channels to communicate with their customers and they should maintain the ability to do so.

We also note that unfortunately the availability of good information may not always lead to consumers making good decisions.

**5. What are your views on Outcome 3: Consumers receive fair value for money?**

An explicit focus by the FMA on fair value for money would be a material new development in the FMA's regulatory agenda and without any explicit legislative underpinning (outside the regulation of KiwiSaver). CoFI for example does not make any reference to fair value for money as an explicit legislative outcome. Again, this is not something that was included by Parliament in the CoFI regime. The wider context is to support competition in the provision of financial services and to regulate competition through the Commerce Act, as is recognised in objective 3(b) of the FMCA.

The value and pricing of financial products and services is a very challenging area to regulate, particularly in the absence of any specific regulatory framework for this.

We agree that "*Value needs to be considered from many dimensions*". Insurance products in particular respond to different types of risk and can be very complex, making it difficult to assess the value for money component, and in some cases this would need to be considered over a longer period of time. This may be particularly so when the policy covers a high severity but low probability event. The value of the product may only become truly evident to the consumer if the event occurs.

For insurance whether the premium represents fair value depends on the risk being insured and the terms provided. For example, broadly equivalent family homes could be subject to materially different premiums in different locations due to the varying natural hazard risk applying. Equally customers could be charged different premiums for similar motor vehicles on the basis of legitimate underwriting factors, such as their age or loss history.

Insurers also have a competitive overlay in their pricing that is on top of the technical risk. Insurers need to ensure an appropriate spread of risk (i.e. not too much in one place) so two identical risks in different locations may be charged differently. The consumer may not see this as fair value, but it is necessary to achieve prudent risk aggregation.

We suggest that a more practical positioning of this outcome would be to state that 'consumers should not be provided with products that firms assess as delivering poor value'.

**6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?**

We question whether the bundling of "*trust*" with providers "*acting in the consumer's interests*" in one outcome is the best approach. These are two different issues and 'trust' is a largely distinct aspect from acting in the customer's interest.

We note CoFI's fair conduct principle includes "*paying due regard to consumers' interests*". The inconsistency between the language used in CoFI and the language proposed here (i.e. "*act in their interests*") introduces uncertainty about the standards that will apply under the conduct regime. The broader language of Outcome 4 implies that an insurer's duties are being extended.

The more nuanced language used in CoFI recognises that entities such as insurers have their own interests. MBIE's Officials' Report to the Financial and Expenditure Committee on the Financial Markets (Conduct of Institutions) Amendment Bill notes "*Financial institutions also need to be able to reasonably consider their legitimate commercial interests. We do not see this as*

*inconsistent with the concept of fairness ...*".<sup>3</sup> We would agree that financial institutions should put customers at the centre of decision-making, however, an outcome that simply states "*customers can trust providers to act in their interests*" goes beyond this and fails to recognise the nuance in the CoFI language.

We also note the broad subject matter suggested to be covered by this outcome includes data security, disclosure, governance, systems, controls and financial strength. While we are aware that the FMA has sought to include some of these matters in FMCA licence conditions, which we have expressed concerns with in some cases, we still consider that data security issues fall clearly within the remit of the Office of the Privacy Commissioner under the Privacy Act 2020. Disclosure requirements are extremely broad and differ across the various financial institutions, many of which are driven by legislation outside the FMA's remit. An insurer's financial strength for example is a matter for the Reserve Bank of New Zealand to regulate under the Insurance (Prudential Supervision) Act 2010. While issues in these areas could have impacts for consumers, having multiple regulators involved in the oversight of the same matters (even if for slightly different reasons) just adds regulatory complexity and cost and should be avoided wherever possible. We note that Hon Andrew Bayly in his speech at the FSC Outlook 2024 event expressed the desire to remove duplication between regulators.

#### **7. What are your views on Outcome 5: Consumers receive quality ongoing care?**

Outcome 5 incorporates elements that would go beyond CoFI and/or do not mirror the language of CoFI, leading to uncertainty.

In 2021, MBIE published a consultation on regulations to support CoFI and treatment of intermediaries. This consultation specifically considered whether regulations were required for additional areas including claims, complaints and customers experiencing vulnerability (CEV) and subsequently MBIE determined regulation covering these areas was not required at this time. It is important to allow financial institutions time for CoFI to embed, and then assess whether there are further areas that should be addressed through regulation, guidance or specific market mechanisms that focus on particular areas of weakness, as opposed to widening the scope of compliance at this point in time through a guide when the industry is focused on preparing for the CoFI regime, particularly as the FMA says it is conscious of unnecessary regulatory burden.

We note the FMA's 'Insurance conduct and culture update: Fire and general insurers update' issued in July 2021 referred to in the examples for Outcome 5 did not consider the huge amount of work that insurers had undertaken in response to the FMA's review in 2019. It was also issued prior to the passing of CoFI which is designed to support fair customer outcomes. If this reference is retained, it is important that the Draft Guide acknowledges the substantial progress that has been made since the 2019 review.

The Draft Guide simply states: "*Consumers should be able to update, alter, switch or exit a product without encountering unreasonable barriers*". It is unclear how this outcome is intended to extend to insurance in the context of renewals and policy amendments.

---

<sup>3</sup> Para 20

**8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?**

The way this outcome is framed in the guide does not appear to be particularly relevant to general insurers that are not listed entities in New Zealand. Nevertheless, we note that it is a market-wide outcome and not one that a single provider can materially influence.

**9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?**

It is not apparent what the FMA intends under this outcome in relation to general insurance. Again, this is a market-wide outcome that is not within the control of any individual provider.

While we understand the FMA's desire to cover a range of aspects under the proposed outcomes, it is also not particularly evident how sustainable innovation and growth, while important, are particularly linked to fairness.

**10. Is anything missing that should be included in the fair outcomes? Please explain.**

As outlined above, there is no reference or alignment to the CoFI regime in the Draft Guide or how it is intended to interact with it. We recognise, however, that the FMA envisages the outcomes being applied to a wider set of entities than those regulated by CoFI.

As outlined elsewhere in this submission, we consider that the outcomes are more appropriately suited as matters to guide the FMA's activities.

**11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?**

It is difficult to reconcile this question with the statements in the guide that it does not add to providers' obligations. This question ("*demonstrate ownership*", "*delivery*") however implies that there is a duty to comply with the outcomes.

In short, we consider this would be regulatory overreach but could be resolved by revising any statements implying the outcomes are stand-alone expectations to make it clear that the document should be interpreted more squarely as setting out the FMA's own priorities and for focusing its supervision and enforcement etc. Putting firms on notice of the FMA's proposed approach would usefully give firms pause for thought when prioritising uplift of controls and internal reviews, even if the outcomes are not a form of expectations to be separately complied with by firms.

Also, if it was intended that providers comply with the outcomes (in addition to their existing legal obligations), then as well as identifying the basis for this, the high-level and subjective nature of the outcomes would make it difficult to design policies, procedures, systems and controls to deliver them.

**12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?**

The intent of the regulator adopting an outcomes-focused approach to its supervision of existing legal obligations ought to be to provide regulated entities with flexibility to manage their regulatory compliance and avoid a tick-box approach. This accepts that there are many different ways to achieve the same result and so encourages innovative approaches and enables the focus



to be on those areas that pose the most risk to consumers. However, there is always the risk that taking such an approach may lead to uncertainty for both regulated entities and regulators as to the appropriate level of compliance. It is for this reason that it is critical that the Draft Guide does support regulatory compliance. Given the uncertainty about the interaction with providers' legal obligations, we do not consider that the Draft Guide will support this.

We consider that the Draft Guide is likely to create confusion and uncertainty amongst providers as to whether it is by providers as imposing additional regulatory requirements and increasing providers' compliance burden.

Insurers are currently preparing to comply with specific CoFI obligations. It is not clear how the outcomes are intended to interact with CoFI or whether insurers' FCPs should be updated to incorporate them.

A number of the outcomes are about matters that are outside the control of any individual firm (i.e. Outcomes 1, 6 and 7). We are concerned how these outcomes would be expected to apply to any individual firm.

**13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?**

The regulator adopting an outcomes-focused approach to its oversight of the existing legislative and regulatory framework should reflect the need for a proportionate and risk-based approach to supervision and monitoring. Such an approach should make it easier for the regulator to focus on metrics of good customer outcomes without the need for an undue focus on how the regulated entity is achieving that. An outcomes-focused approach is sensible, provided that it is clear how supervisory, monitoring and enforcement activity will be directed and that the approach is tied to regulated entities' existing legal obligations.

The Draft Guide does not make that clear. It provides the outcomes that are a priority for the FMA, but little detail on how the FMA will supervise and monitor firms, beyond the fact that the FMA will focus on whether it is seeing the outcomes in the market and will respond proportionately where that is not the case. Further detail on how that will be achieved, and the interaction between this Draft Guide and CoFI, would promote certainty.

An outcomes-focused approach could appropriately inform where the FMA chooses to focus its supervisory, monitoring and educational resources. We recognise that a regulator has a discretion here. However, it must be against its legal obligations that a provider's conduct is measured.

**14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?**

Misconduct can only be defined by reference to a provider's legal obligations. The move to an outcomes-focused approach should not change this and should not apply a higher standard to providers than that set out in the law.

That said regulators do exercise discretion in how they enforce the law as noted above and we can see how an outcomes-focused approach could be used to inform how a regulator prioritises its use of its supervisory and enforcement resources to focus on conduct that creates the greatest

harm. Consistent with this, an outcomes-focused approach should also presumably mean a less stringent approach to technical breaches that do not result in material harm to consumers.

**15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?**

We do not consider that the Draft Guide will increase flexibility. This is because the purpose and status of the Draft Guide is unclear, in particular its relationship to providers' existing legal obligations, and is likely to be interpreted as imposing additional regulatory requirements on providers. The Draft Guide does not lessen a provider's duty to comply with the law.

There needs to be consistency between the Draft Guide and the legislation to enable certainty for firms to operate within an outcomes-focused regulatory environment.

An outcomes-focused regulator could offer reassurance to providers that technical breaches of regulations (that result in no or little harm) are unlikely to result in regulatory action where the relevant firm engages constructively with the regulator and has acted in accordance with reasonable regulator expectations.

**16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?**

This question is not applicable to ICNZ.

**17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?**

The Draft Guide includes only a few examples about general insurance. Although we recognise that it would be challenging to provide examples relating to the full range of financial products and services covered by each outcome, the lack of relevant examples limits the helpfulness of the Draft Guide for the general insurance sector. From our point of view, a document such as the Draft Guide would be improved by including more examples relevant to general insurance and how they relate to an insurer's existing legal obligations. We would be happy to engage with the FMA further if the FMA decides to include further examples.

It is also unclear to what extent the examples given can or should be read across from one sector to another. For example, under Outcome 3 'Consumers receive fair value for money' the FMA cites its 2020 research showing a lack of a significant relationship between the level of active management employed by KiwiSaver providers and the fees they charge. KiwiSaver fees are regulated.<sup>4</sup> Managers of KiwiSaver schemes are subject to a legal obligation not to charge a fee that is unreasonable and the concept of reasonableness potentially encompasses fairness. However, this example does not assist other sectors where pricing is not regulated in this way.

**18. Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?**

We refer to our comments above regarding the lack of clarity around the purpose of the proposed guidance, its relationship to legislation, and the extent to which it imposes new obligations on providers.

<sup>4</sup> Clause 2 of Schedule 1 to the KiwiSaver Act 2006.

Whilst the draft guidance refers to 'A Guide to the FMA's view of conduct' (February 2017), it does not specify whether this guidance is intended to replace it or if not, how the two will interact. This should be clarified.

## Feedback form

# Consultation: Fair Outcomes for Consumers and Markets

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz) with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: Friday 1<sup>st</sup> March 2024

Number of pages: 6

Name of submitter: [REDACTED] (Senior Manager, KPMG)

Company or entity: KPMG New Zealand

Organisation type: Professional Services Consultancy

Contact name (if different): [REDACTED] (Partner, KPMG)

Contact email and phone: [REDACTED]  
[REDACTED]

### Summary: Fair Outcomes for Consumers and Markets

KPMG has a wide range of experience and expertise in conduct and customer outcomes which includes extensive practical conduct experience from multiple jurisdictions. We understand the importance of the recent implementation of the Consumer Duty regime by the UK's Financial Conduct Authority (FCA) and its significant role in driving positive changes within the financial services sector. Furthermore, we acknowledge that numerous other jurisdictions are also shifting towards outcomes-focused regulation, and as a result, KPMG is supportive of the FMA's approach to outcomes-focused regulation.

The Draft Guide: Fair Outcomes for Consumers and Markets (the Guide) offers information and examples of intended outcomes, but we think our clients will need more clarity as to how the FMA will use these outcomes and what is expected of them as a result. In particular we think the Guide would greatly benefit from more diverse examples to enhance our clients' understanding of the outcomes. Additionally, providing further examples of activities that support firms in meeting these outcomes, along with guidance on how firms should determine these activities, would be beneficial. Furthermore, we think the Guide would benefit from an explanation of how the outcomes align with existing legislation.

Overall, we believe that the adoption of outcomes-focused regulation is a positive development that will ultimately benefit both consumers and firms in terms of improved customer outcomes and industry standards, but there is a need for additional clarification and guidance which we have set out below. This will help firms to ensure that they can effectively align to the expectations of the FMA and fully understand the outcomes in the Guide.

Question number	Response
1. <i>Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.</i>	<p>KPMG is supportive of the outcomes-focused approach set out by the FMA. We believe this outcomes-focused approach is positive and will benefit consumers and markets and provide useful guidance for our clients.</p> <p>We understand from recent speeches by the FMA that the purpose of the Guide is to set out how the FMA will use the outcomes in their supervisory activity, however this is not clear in the Guide itself. We think that this purpose should be made clear in the Guide itself as well as an indication as to how the FMA believe that firms should use this Guide to inform their own activities. For example, should firms use the Guide to check whether their Fair Conduct Programmes are aligned to the FMA's view of what the principles and outcomes mean? Additional information on the Guide's purpose and use would be helpful for our clients.</p> <p>The sentiment and purpose of the outcomes and what they are trying to achieve is clear, but we think some additional clarity is still required to demonstrate their use in practical terms. The Guide provides some useful examples and context for each outcome, however it would be helpful for our clients to have a diverse range of examples that demonstrate the application of the outcomes in different markets and products, as well as their practical operation. This would aid our</p>

	<p>clients in considering and understanding the outcomes in their daily operations. Drawing on our expertise in outcomes-focused regimes from various jurisdictions, we have witnessed substantial guidance and engagement with firms to ensure they have a clear understanding of the Regulator’s approach in those specific jurisdictions.</p> <p>We acknowledge that the FMA does not wish to prescribe how organisations should meet these expectations given each firm is different, however there may be a lack of clarity as to how they will be expected to demonstrate good outcomes to the FMA, if indeed this is the intention. The Draft Guide is described as “embedding a regulatory approach” but also states “These are not rules. They do not change firms’ obligations. They provide a focus for compliance and business efforts, supported by our existing legislative framework.” Whilst it is noted that the Draft Guide does not create a new set of ‘rules’, given the FMA’s explicit intention to measure firms’ ‘success’ and enforce against the outcomes, the FMA should consider including in the guidance what kind of evidence the FMA expects to see in relation to how a firm is delivering good customer outcomes. We believe that further clarity would be useful for our clients to understand how enforcement will be approached with specific examples of monitoring, supervision and potential enforcement for each relevant market.</p> <p>Additionally, there are several existing regulations that exist in the market, most recently the Financial Markets (Conduct of Financial Institutions) regime (CoFI) which underpin and overlap with some of the outcomes in this Guide. Further clarification is required to understand how this Guide will align with existing regulations. We recognise that some of the outcomes potentially extend the current CoFI requirements so our clients will require further clarity on how the outcomes will interact and operate alongside Fair Conduct Programmes that our clients are currently introducing.</p>
<p><b>2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?</b></p>	<p>Our global experience in supporting financial services organisations to drive good conduct and implement good customer outcomes principles, means we understand the benefit that regulatory guidance brings to supporting our clients to take practical steps to understand their customer journeys and improve outcomes for their customers.</p> <p>Having seen similar regimes implemented in other countries such as the UK we do know there have been benefits in particular for consumers in ensuring they receive fair outcomes. There is also a benefit for providers in ensuring they are aware of their end-to-end customer journey which in turn helps to improve the provision of services and leads to more positive customer experiences resulting in customer loyalty, improved brand and reputation and potentially improved internal processes and systems. The benefit to the market is that the improved standards of firms and for consumers in supporting positive outcomes can result in healthy competition and innovation in the market.</p> <p>The outcomes listed in the guidance help to ensure that consumer needs are met and that firms operate in a way that results in good outcomes that benefit the consumer but in the longer term will also benefit the market.</p>
<p><b>3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</b></p>	<p>For relevant firms this outcome has significant overlap with CoFI in relation to: S 446C What is the fair conduct principle; S 446J Minimum requirements for fair conduct programme; S 446D When fair conduct principle applies; and S 446G Duty to establish, implement, and maintain effective fair conduct programme.</p> <p>Whilst these elements of CoFI do address some of Outcome 1, the Guide states that availability of financial products and services should meet diverse consumer needs and include hard to reach customers. Additionally, the Guide states that there should be checks and balances to prevent consumers from accessing unsuitable products and services. Our clients would find it useful if the FMA provided additional guidance on how firms are expected to evidence meeting this outcome and how it aligns to legislation.</p>
<p><b>4. What are your views on Outcome 2: Consumers</b></p>	<p>Outcome 2 seems very aligned to the CoFI fair conduct principle: S 446C What is the fair conduct principle; and S 446H Duty to make information about fair</p>

<p><b><i>receive useful information that aids good decisions?</i></b></p>	<p>conduct programme publicly available; and CoFI requires communications with customers in a 'timely, concise and effective way'.</p> <p>We understand when implementing the Consumer Duty in the UK, firms had to review all their customer touchpoints and identify where information has been shared with consumers to ensure the information is appropriate for the consumer. The FCA also published FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty which provides comprehensive guidance on communication testing, examples of good and poor practice and sets the expectation that firms should consider communications at every stage of the product or service lifecycle. We recognise that guidance regarding advertising has been provided in 'Advertising offers of financial products under the FMC Act' in 2021. It would be useful for our clients to have some examples of what good and poor outcomes in relation to information looks like so they can benchmark their own communications and guidance on how they can consider how effective the information they provide is in aiding their customers' decisions.</p>
<p><b>5. <i>What are your views on Outcome 3: Consumers receive fair value for money?</i></b></p>	<p>The concept of fair value has been a key driver for regulatory change across multiple jurisdictions given it requires firms to consider their product pricing and fees and the perceived 'value' of the services and benefits customers receive in return. Fair value underpins the need for effective and continuous product governance and strong product monitoring disciplines. This outcome has some overlap with the Credit Contracts and Consumer Finance Act 2003 (CCCFA) which covers unreasonable fees.</p> <p>We believe our clients would benefit from further details from the FMA on how they expect firms to align to this outcome and how this will inform regulatory conversations. In particular, we understand that fair value requires robust product governance to ensure products are fit for purpose and represent fair value for consumers, as such any additional guidance the FMA can give in relation to product governance and monitoring would be helpful. Furthermore, our clients would benefit from further details and guidance on the specific nature of any value assessments firms should consider to support them in meeting this outcome.</p>
<p><b>6. <i>What are your views on Outcome 4: Consumers can trust providers to act in their interests?</i></b></p>	<p>We recognise that there is overlap with this outcome and CoFI: S 446C (2) The requirement to treat consumers fairly; S 446J Minimum requirements for fair conduct; and S 446K Financial institution must comply with incentives regulations. The Guide does state that firms should be operationally resilient which is required under CoFI Standard Condition 5, Business continuity and technology systems.</p> <p>However, the difference between business continuity and operational resilience is not well understood. While many firms will already have business continuity arrangements; operational resilience is still developing as a discipline. For example, operational resilience (as defined in the UK and Australia) is focused on "Critical Operations" or "Important Business Services", which are a small group of services which, if disrupted would cause the greatest impact to customers.</p> <p>Implementing operational resilience practices across all Financial Institution Services as defined under CoFI would be a much greater exercise, as these are much broader than "Critical Operations". An often-cited example is that getting a pre-approval for a mortgage would not be a critical operation for the purposes of operational resilience, as a customer could come back the next day or go to another bank if disruption prevented them from making a mortgage application. On the other hand, the settlements process would be considered a critical operation, as the consequences of not being able to settle on a house purchase are severe for a customer. Therefore, the settlements process should be prioritised for investment to make it as robust as possible and prioritised for restoration when there is disruption. However, under CoFI, being a creditor under a credit contract is a Financial Institution Service, so operational resilience would be required across all technology supporting all consumer credit processes.</p> <p>This distinction is important, because we are also aware that some of our clients who have Australian parents are required to comply with requirements from the Australian Prudential Regulation Authority in this space – CPS230 Operational Risk Management. We are keen to understand how this outcome will impact</p>

	<p>current work that is being conducted to address CoFI and APRA requirements and how these two regimes should work together.</p> <p>We understand from our global partners that when implementing the Consumer Duty, operational resilience was a complex and difficult area for firms in the UK to implement properly, who required external support in systems uplift, enhanced management information and reporting to ensure effective monitoring of customer outcomes. Accordingly, any further guidance on how this outcome will inform the FMA's supervision would be useful for our clients.</p>
<p><b>7. What are your views on Outcome 5: Consumers receive quality ongoing care?</b></p>	<p>We understand that when the FCA introduced Consumer Duty, a key driver was in relation to 'ongoing' care and the recognition that consumers were facing too many barriers when pursuing their financial objectives.</p> <p>Whilst we recognise it is crucial for both markets and consumers to provide and receive ongoing care, the standard of care differs for each product or service and the type of customer, and we believe further examples of 'quality ongoing care' are required to help firms understand how this would work in practice.</p> <p>Further clarification and guidance is required as to how the FMA will monitor this particular outcome and how this outcome will be used to engage in conversations with the FMA. There are current insurance examples within the Guide, but we believe further examples would be useful to see how the outcome will function in different markets.</p>
<p><b>8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</b></p>	<p>Outcomes 4 and 6 have significant overlap and whilst the FMA is using this Guide to inform the market about their supervision approach it would be useful to our clients to have details on the overlap and any clear differentiations in how these outcomes will inform the FMA's supervision approach. This will help firms understand what the FMA is specifically looking for in relation to Outcome 6 vs Outcome 4.</p> <p>We also recognise that there is underlying legislation with this outcome for example, the disclosure of corporate and investor information is covered by the Financial Markets Conduct Act 2013 (FMCA) so would benefit from insight into how the FMA will monitor and enforce this outcome with specific focus on its interaction with other legislation.</p>
<p><b>9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?</b></p>	<p>Whilst we recognise this outcome likely informs the FMA's approach to regulation rather than requiring specific action from firms for alignment, the Guide is currently unclear with regards to the expectations of individual providers. The outcome is broad and more specific guidance is required to understand how this outcome will either aide the FMA's supervision or provide clearer insight into how firms will be expected to confirm alignment to the outcome in their regulatory conversations.</p>
<p><b>10. Is anything missing that should be included in the fair outcomes? Please explain.</b></p>	<p>Whilst the outcomes clearly overlap with existing legislation such as CoFI, CCCFA and FMCA, it would be useful to provide a clear linkage to legislation that currently exists. Further clarity would also be useful in relation to how firms should evidence meeting the outcomes and how monitoring and regulatory conversations will consider these outcomes.</p>
<p><b>11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?</b></p>	N/A
<p><b>12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas</b></p>	N/A

<p><i>you will find challenging or where you have concerns?</i></p>	
<p><b>13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach? Consultation: Fair outcomes for consumers and markets</b></p>	<p>Our global insights show that there has been a shift in many jurisdictions towards a more outcomes-focused approach to regulation, most recently we have seen the UK's FCA implement the Consumer Duty regulation. UK firms must annually attest to compliance with the regime, and ensure that management information and reporting evidence, not only prevent poor outcomes for consumers but demonstrate that there have also been good outcomes for consumers. We have seen the FCA use regulatory conversations to provide examples of 'what good looks like' and provide a lot of guidance as to how they monitor and supervise firms in relation to outcomes.</p> <p>The Guide does not make it sufficiently clear how supervisory, monitoring and enforcement activity will be directed. Whilst we understand that the FMA is using the Guide to inform firms about its supervision, more specific guidance is required in relation to monitoring. Additionally, any consideration of compliance with these outcomes should be proportionate to the harm, or risk of harm that consumers could experience. Guidance on both poor outcomes and good practice examples would be useful to our clients so firms can learn from these and can continue to change and improve in how they deliver good outcomes for consumers.</p>
<p><b>14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?</b></p>	<p>Given our insights into regulatory expectations across multiple jurisdictions, we have witnessed a growing trend towards outcome-based regulations in various jurisdictions. Notably, the FCA's implementation of the Consumer Duty reflects their objective of establishing higher industry standards to safeguard consumers. To ensure compliance with Consumer Duty, there has been an increase in the FCA's monitoring activities and involvement with firms. These efforts are aimed at promoting the integration of the regime and identification of non-compliant practises. In cases of misconduct, the FCA may also hold both firms and individuals accountable, if deemed necessary.</p> <p>We recognise that this Guide currently does not address holding individuals or entities accountable for misconduct. If the FMA is intending to use the outcomes to enforce compliance and accountability, clear guidance and detail is required on how the outcomes are linked to underlying legislation where enforcement, and liability provisions would apply. It would be useful if the FMA could provide examples or guidance for how the FMA's Enforcement Policy would apply to these outcomes. In particular, considering issues such as harm, materiality, history of good conduct, and what the FMA will do when they see examples of firms not meeting the outcomes.</p>
<p><b>15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?</b></p>	<p>N/A</p>
<p><b>16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?</b></p>	<p>N/A</p>
<p><b>17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?</b></p>	<p>Whilst some examples are provided by the FMA we believe there should be additional examples in relation to each outcome of both good and poor outcomes. Having examples specifically tailored to various situations in multiple financial services markets and consideration of perhaps more complex scenarios or products would be useful. This would allow firms to understand some of the outcomes better but also consider how any examples impact their day-to-day operations.</p>



<p><b>18. Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?</b></p>	<p>Although the Draft Guide: Fair Outcomes for Consumers and Markets offers some information on outcomes, examples, and context, our clients would appreciate more comprehensive details. Presently, the Guide lacks clarity in terms of its intended purpose and the expectations it sets for firms. There is little information regarding how the FMA will monitor, supervise, and enforce these outcomes.</p> <p>Moreover, there seems to be an overlap between the outcomes stated in the Guide and existing legislation such as CoFI, FMCA and CCCFA, without a clear explanation of how they will effectively coexist. The Guide could benefit from providing practical insights on how the outcomes and existing legislation will intersect in practise.</p> <p>Moreover, in the UK, the FCA has released extensive guidance during the implementation phase of the Consumer Duty. They have also provided subsequent guidance on best practises and areas for enhancement in Consumer Duty implementation, aiming to offer additional insights into delivering good outcomes, for firms in the UK. While the Guide offers some examples, including additional examples for each outcome within different financial services markets and with more complex products/services and examples of good and poor outcomes would greatly assist clients in understanding and applying the stated outcomes.</p> <p>In conclusion, enhancing the clarity, monitoring, enforcement, and practicality of the Guide, alongside providing additional examples, would greatly benefit our clients and facilitate their comprehension of the intended outcomes.</p>
<p><b>Feedback summary</b> – We would be more than happy to meet and discuss with you about our feedback. Please do get in touch should you wish to discuss any of our comments.</p>	
<p><b>Please note:</b> Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>	



1 March 2024

Financial Markets Authority – Te Mana Tātai Hokohoko  
Attn: Consultation: Fair Outcomes for Consumers and Markets  
PO Box 1179  
**Wellington 6140**

[consultation@fma.govt.nz](mailto:consultation@fma.govt.nz)

## **Consultation: Fair Outcomes for Consumers and Markets**

---

In this submission IAG responds to the Financial Markets Authority – Te Mana Tātai Hokohoko (FMA) consultation on “Proposed fair outcomes for consumers and markets”, which commenced in November 2023. IAG is a member of the Insurance Council of New Zealand - Te Kāhui Inihua o Aotearoa (ICNZ) and contributed to ICNZ’s comprehensive submission on this consultation.

In submitting on this consultation we bring the perspective of a trans-Tasman general insurer that is subject to the existing *Financial Markets Contact Act 2013* (FMCA) regime, has recently implemented and been licensed under the Financial Advice Provider reforms, is currently implementing the Conduct of Financial Institution regime (CoFI) reforms, and is also subject to the ICNZ’s Fair Insurance Code and to conduct related obligations under the Earthquake Commission Act 1993/Natural Hazards Insurance Act 2023 regime when handling our customers’ claims as agents for Toka Tū Ake EQC.

### *Introduction*

Confident, fair and efficient interactions between insurers and their customers are a key feature of a healthy insurance market and we support appropriate customer focussed regulation. Recent years have seen a material expansion in the regulation of financial services and in the resourcing provided to the FMA to supervise and enforce these. We have generally supported these changes, in particular the introduction of the explicitly consumer focussed CoFI regime. For general insurers such as IAG these changes have also come alongside a number of ongoing legislative and regulatory changes outside of the FMA’s sphere, making it a particularly busy time for regulatory change and implementation.

We support the FMA’s use of outcomes as a touchstone to guide it in undertaking its role, however, we are concerned that taking them forward in the way suggested in the consultation will create unnecessary complexity and uncertainty in the wider regulatory framework, and is unlikely to add value for consumers dealing with financial institutions who are subject to the CoFI regime. The key issues with progressing the proposed fair outcomes as suggested in the consultation are related to the status of them, the overlap with existing legal requirements, and their subjective/aspirational nature. There are also issues with how some of the seven specific outcomes have been framed that need to be considered. A consequential matter to also be considered is how the fair outcomes would interact with the FMA’s existing material, both corporate strategy documents and previous guides.

In this submission we discuss these issues and suggest how the ideas embodied in the fair outcomes could be taken forward in way that avoids these issues. In short, we recommend the FMA should be clear that the

fair outcomes are matters it will use to provide a focus for prioritising its business and regulatory activities, and so regulated entities should be cognisant of them, but that they do not create a parallel quasi-regulatory framework that firms need to comply with in the same way they comply with legislation/regulation.

#### *Overarching comments*

As outlined in the consultation the proposed fair outcomes are not rules and do not change firms' obligations. The proposed fair outcomes would not be legislation or regulation, nor would they be guidance for complying with those specific obligations (e.g. CoFI) given their overarching and parallel nature. As such, the status of the proposed fair outcomes is not clear and ability for a different replacement document to be simply reissued by the FMA at a later date would also create uncertainty.

While the fair outcomes are not rules, it is nonetheless suggested in the consultation document that "Providers will need to take ownership of the fair outcomes and demonstrably embed them in the way they operate." It is this aspect of the proposed approach that would blur the distinction between law and a document issued by the regulator by suggesting that a guide document can create new obligations, as opposed to providing guidance on how legal obligations are complied with. It also begs the question of the basis for the regulator potentially judging firms against a non-legal standard.

The proposed fair outcomes would also overlap existing law to a material extent. In some cases they appear to reframe or extend existing legal requirements but in others put forward objectives that are not explicitly underpinned by existing law. The overlaps are particularly evident in relation to the recently finalised, now subject to review and yet to come into effect CoFI regime. We note also that the requirements under CoFI are not 'tick box' given that new obligations such as the 'fair conduct principle' are explicitly principled in nature. The regulator overlaying its outcomes-based framework over existing regulatory settings that have been deliberately put in place by Parliament, particularly the overlap with CoFI, would create further complexity and uncertainty for firms in seeking to comply with an increasingly complex and still evolving regulatory environment.

The proposed fair outcomes are explicitly framed using aspirational and value-based words (e.g., appropriate, suitable, fair, useful, easily, quality) that are either not unpacked with the necessary specificity to be applied an entity level, or left undefined. This may fit with them being used by the FMA to provide a focus for its activities, however, this aspect becomes very problematic if the outcomes are envisaged as matters that firms should comply with in their own right.

There are two primary reasons for this. First some of the fair outcomes speak to the whole market or system or customers' perceptions, matters ultimately beyond the control of individual providers. Secondly, the aspirational and subjective nature of them could lead to arguments about differences in judgement on whether an outcome is achieved, further complicated by then differing from regulatory obligations and likely being applied by the regulator to situations with the benefit of hindsight. We note ICNZ provides more detailed feedback on the seven specific outcomes in its submission.

Given the above issues, should the FMA propose the fair outcomes as matters they expect the firms they regulate to 'embed' this would create implementation and practical issues for these entities, as they are ill-suited for inclusion within providers' risk management and compliance frameworks, which focus on outputs and objective quantitative and contemporaneous measures.

IAG is in the midst of implementing the CoFI reforms, a key part of which is mapping adherence to the fair conduct principle and its five specific elements across the relevant parts of our business. Undertaking this process illuminates the issue between the statements in the consultation that the outcomes are not rules and "do not create, replace or even supplement existing legal obligations" on page 6 but that "providers will need to take ownership of the fair outcomes and demonstrably embed them in the way they operate" on page 7. On the one hand how could firms and their boards be confident something of this nature is being embedded without creating a compliance framework, however, the fair outcomes would not meet normal

requirements for compliance (e.g. a legal requirement or clear business objective) and the nature of the outcomes largely overlaps existing requirements and/or is as discussed above not conducive to compliance (e.g. subjective and not quantitatively measurable, beyond control of the individual entity to achieve etc.).

*Taking forward an outcomes centred approach*

Given the issues we have identified, while we see merit in considering outcomes, we recommend the FMA further considers how the proposed fair outcomes are presented and utilised. We consider using them as a focus for prioritising the FMA's business and regulatory activities would be most appropriate. On this basis they would be reflected in the FMA's corporate strategy documents, recognising this might require evolution or reworking of the existing strategic frameworks contained within those. It would also be appropriate to consider whether existing similar material (e.g. the FMA's 2017 guide to good conduct) needs to be retired to provide greater clarity.

Despite the concerns we have noted with aspects of the proposed approach, we support the FMA's ongoing efforts to put customer outcomes at the centre of regulator activity, and as indicated already we are committed to working with the FMA on the application of the evolving regulatory environment.

[REDACTED]  
[REDACTED]  
IAG New Zealand

## Feedback form

# Consultation: Fair Outcomes for Consumers and Markets

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz) with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: 1<sup>st</sup> March 2024

Number of pages: 3

Name of submitter: [REDACTED]

Company or entity: Financial Advice NZ

Organisation type: Professional Financial Adviser Representative Body

Contact name (if different): [REDACTED]

Contact email and phone: [REDACTED]

Question number	Response
Q1. Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.	<p>The description of the outcomes-focused approach to regulation is clear. It is also clear that there is no intention for this to be further regulation or rule-making. It is the description of approach.</p> <p>What is less clear is how our financial adviser members would go about practically demonstrating and evidencing this to the regulator either holistically or in relation of some of the individual outcomes. We are conscious of the regulator mantra – “show me, don’t tell me”.</p> <p>Our members have faced significant change over the last few years as the FSLAA licensing regime has been established. This has been at a cost – financial, time and, for many, stress. Implementing further systems and processes or evolving existing ones to measure and evidence incremental improvement for each of the outcomes will be an added burden.</p> <p>We understand that the outcomes-focused approach as described is for the entire regulated market however, we would prefer to see financial advisers asked to continue to focus on those outcomes where they can have the most impact – perhaps 1, 2, 4 &amp; 5 – areas addressed directly by FSLAA and the Code of Professional Conduct for Financial Services.</p> <p>Our suggested approach would minimise any additional burden of compliance without eroding the intent of the outcomes-focused approach. Many of our members are sole-practitioners or small advice firms with limited resources.</p>
Q2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers, and markets?	<p>The intent of the proposed approach is entirely appropriate and aligns well with the intent of our financial adviser members to care for clients / consumers.</p> <p>Measuring the outcomes will encourage a focus on them which can only be beneficial to consumers, providers and markets. Variance in approach and measurement may lead to a degree of confusion amongst consumers.</p> <p>Whilst there may be practical challenges in implementing an outcomes-focused approach, we consider it to be preferable to a rigid, rules based / tick box which typically leads to an enforcement focused regulator. We welcome the continued approach of the regulator in NZ of engagement with the sector and enforcement where appropriate to maintain a credible deterrent to poor behaviour.</p>

<p>Q3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</p>	<p>Increasing access for Kiwis to financial advice is important as research has shown how beneficial professional advice can be to both wealth and well-being.</p> <p>Financial advisers are already required to demonstrate the suitability of the products recommended and will have existing processes to be able to demonstrate this.</p>
<p>Q4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?</p>	<p>Financial advisers will have well developed advice processes to provide information and also help clients to understand their recommendations. This encourages informed client consent in relation to the recommendations that the adviser is making.</p> <p>We would suggest “Consumers receive useful information that aids understanding and good decisions”</p>
<p>Q5. What are your views on Outcome 3: Consumers receive fair value for money?</p>	<p>In terms of our financial adviser members, this outcome can be particularly subjective. Value is likely to be seen as a combination of the value of advice together with the value of the product – something that a financial adviser will be unable to influence much if at all.</p> <p>Clients often refer to “peace of mind” as a result of a good advice. This is difficult to measure or demonstrate.</p>
<p>Q6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?</p>	<p>This is a natural and appropriate outcome to include.</p> <p>Financial advisers will have existing processes to be able to demonstrate this.</p>
<p>Q7. What are your views on Outcome 5: Consumers receive quality ongoing care?</p>	<p>There has been a clear shift in recent years in the financial advice sector from a transactional approach of new product sales to much more of a long-term relationship approach with clients to meet their financial needs over their lifetime.</p> <p>This is an entirely appropriate outcome to include.</p>
<p>Q8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</p>	<p>While outcomes 6 &amp; 7 are essential to the overall intent of the outcomes-focused approach to regulation it is difficult to imagine instances of how our member financial advisers will be able to influence this in any meaningful way.</p>
<p>Q9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?</p>	<p>As above.</p>
<p>Q10. Is anything missing that should be included in the fair outcomes? Please explain.</p>	<p>The 7 outcomes provide an inter-linked and elegant focus on the consumer. This appears to capture all the necessary elements.</p>
<p>Q11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management, and operations, and how they work together?</p>	<p>This appears to be the crux of the matter. In relation to our member financial advisers, it will take time to understand and develop what is appropriate and proportional for their advice business as well as what is expected by the regulator.</p> <p>Incremental and continual improvement is essential within any business. This is already underway but of course not everyone in the sector is moving at the same pace even if it is in the same direction.</p> <p>As noted above we would prefer to see financial advisers asked to continue to focus on those outcomes where they can have the most impact – perhaps 1, 2, 4 &amp; 5 – areas addressed directly by FSLAA and the Code of Professional Conduct for Financial Services.</p> <p>Our suggested approach would minimise any additional burden of compliance without eroding the intent of the outcomes-focused approach.</p>
<p>Q12. If you are a provider of financial products or services, how will outcomes-focused regulation help</p>	<p>The outcomes-focused approach to regulation is entirely consistent with the principles-based approach of the FSLAA legislation that applies to our</p>

support your regulatory compliance? Are there areas you will find challenging or where you have concerns?	financial adviser members. In that regard, there ought to be little impact on regulatory compliance.  What is less clear is how our financial adviser members would go about practically demonstrating and evidencing this to the regulator either holistically or in relation of some of the individual outcomes.
Q13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?	As Q12 above
Q14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?	As Q12 above
Q15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?	It is difficult for regulation to require innovation from participants. It can, however, provide an environment that encourages it. The outcomes-focused approach to regulation is likely to foster such an environment.  Innovation is likely to grow access to, and demand for, quality advice that will make a material impact on the financial futures of clients.
Q16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?	N/A
Q17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?	Examples provide context and context is always helpful in developing thinking.
Q18. Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?	No
<b>Feedback summary – if you wish to highlight anything in particular</b>	
<b>Please note:</b> Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.	
<b>Thank you for your feedback – we appreciate your time and input.</b>	

## Feedback form

# Consultation: Fair Outcomes for Consumers and Markets

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz) with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: 1/3/2024

Number of pages: 2

Name of submitter: [REDACTED]

Company or entity: Good Shepherd NZ

Organisation type: Charitable microfinance provider and consumer advocacy organisation

Contact name (if different): [REDACTED]

Contact email and phone: [REDACTED]

Question number	Response
3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?	Many communities are excluded from markets because serving them with appropriate products and services is not commercially viable. In a commercial model, these people are effectively excluded from services that you have described her as 'essential to daily life.' We are unclear on how an outcomes-focused approach to 'appropriate products and services that meets their needs' is realistic for for-profit firms and whether this is a measure that is achievable.
5. What are your views on Outcome 3: Consumers receive fair value for money?	It will be imperative to include consumer groups in determining 'fair' in this context. Currently, low-income consumers pay a 'poverty premium' for many financial goods and services under the guise of commercial realities, undermining the concept of fair value for money.
12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?	As a provider of non-profit financial services, outcomes-focused regulation is a significantly more appropriate approach to the products and services we provide than a rules-based one. We welcome the FMA's approach to this, and believe it will foster innovation in the sector.
13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?	We believe the involvement of non-profit and consumer groups is critical to your supervision and monitoring approach, and your ability to build trust and credibility in your processes with the public. Consumer advocacy groups have different incentives and perspectives to both government and the financial sector and bringing this different lens to your processes will only strengthen them.
14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?	We note the outcomes focus on proportionality, and believe the FMA must apply a broad definition of what a proportional response to misconduct may be. The impact of misconduct on a significantly large transaction is obvious in purely financial terms, however the clients we work with can have their entire lives upended, their careers, health and vulnerability affected. Arguably, some of these low-income families are more severely affected than the high-value consumers who lose millions of dollars but never experience poverty-related disease. The FMA has articulated that financial services are essential to our daily lives, and it is therefore appropriate to apply more than purely financial lens to the impact of misconduct on consumers.



<p>15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?</p>	<p>Yes we believe this will support innovation.</p>
<p>16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?</p>	<p>Yes they are relevant.</p>
<p><b>Feedback summary</b> – We’d like to reiterate the importance of having consumer groups involved in defining fair outcomes, as well as in supervision and monitoring. We believe this is critical to the success of this approach.</p>	
<p><b>Please note:</b> Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>	
<p><b>Thank you for your feedback – we appreciate your time and input.</b></p>	

By email consultation@fma.govt.nz

Financial Markets Authority

FROM [REDACTED]  
DDI + [REDACTED]  
EMAIL [REDACTED]n@bellgully.com  
EMAIL [REDACTED]@bellgully.com  
DATE 1 March 2024

## Submissions in response to FMA Consultation: Proposed fair outcomes for consumers and markets

1. This submission has been prepared by Bell Gully in response to the Financial Markets Authority's (**FMA's**) consultation on proposed fair outcomes for consumers and markets dated November 2023 (**Consultation**).
2. We have significant expertise and experience in the law relating to the regulation of financial markets and welcome the opportunity to make submissions on the Consultation.
3. We do not propose to comment on all of the specific questions identified in the Consultation. Our focus has been on legal questions or matters that relate to our practical experience of advising clients on financial markets regulation, particularly on conduct and culture issues, regulatory investigations and enforcement proceedings.
4. The matters addressed in this submission are necessarily general in nature. As we explain, our primary concerns relate to the uncertainty of the FMA's proposed approach and the possible creation of a de-facto regulatory regime that does not have an underlying legal basis.
5. Many of the questions in the Consultation raise issues of operational detail and practical impact on which we expect regulated entities to have developed insights. We encourage the FMA to give careful consideration to their feedback.
6. The views expressed in these submissions are those of members of our firm involved in the review of the Consultation: [REDACTED]  
They do not necessarily represent the views of our clients.
7. Against that background, we set out our views on the questions posed in the Consultation in the **enclosed** schedule.

Yours faithfully

[REDACTED]

Partner / Associate

## Schedule

### Question 1

Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.

1. The FMA's proposed introduction of seven "fair outcomes" and an "outcomes-focused" approach to regulation will add another layer to an increasingly crowded regulatory landscape. The challenge will be to translate these ideas into a coherent and workable regulatory regime, recognising the raft of existing regulation that already covers similar but not identical territory (e.g. the Financial Markets Conduct Act 2013 (as extensively amended by the Financial Markets (Conduct of Institutions) Amendment Act 2022 and the Financial Services Legislation Amendment Act 2019), the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and Credit Contracts and Consumer Finance Act 2003).
2. In this context, we submit the FMA's draft guidance (the **Draft Guide**) and proposed introduction of a "fair outcomes" approach to regulation gives rise to a number of uncertainties. We consider that these uncertainties need to be addressed before market participants can properly understand and sensibly comment on the FMA's proposals.
3. In summary:
  - (a) The Draft Guide does not explain how, if at all, the FMA's proposed outcomes-focused approach differs from the FMA's existing regulatory approach (which it also describes as "outcome-focused"<sup>1</sup>). Nor does it explain what, if anything, will actually change should the approach in the Draft Guide be adopted.
  - (b) The Draft Guide states that working towards fair outcomes will, for some providers, be "a continuation of their focus on good customer outcomes" following the *[G]uide to the FMA's view of conduct (Good Conduct Guide)*. However, it does not explain whether, and if so how, the Good Conduct Guide will continue to be relevant. This is important given the substantial but asymmetrical overlap between the Good Conduct Guide and the Draft Guide. For example, the Draft Guide uses concepts such as "fair conduct", "fair outcomes" and "consumers". The Good Conduct Guide uses "good conduct", "good customer outcomes", and "customers". There is no explanation of whether these differently worded concepts are intended to mean the same thing.
  - (c) The Draft Guide also does not say anything about the Financial Markets (Conduct of Institutions) Amendment Act 2022 (**COFI**). There is no indication of how the FMA's proposed fair outcomes will interact with the COFI regime or the statutory principle of "treating consumers fairly". A comparison between the Draft Guide and the contents of s 446C of COFI confirms that the FMA's proposed "fair outcomes" do not neatly match how "treating consumers fairly" has been specifically defined in the legislation (see also our response to questions 2 to 7 below).
  - (d) In our view, the Draft Guide should address COFI and not doing so risks further confusion. We appreciate that the Draft Guide is intended to apply more broadly than COFI. At the same time, the overall coherence of the regulatory regime depends on there being consistency across key aspects of conduct regulation. COFI is the most

---

<sup>1</sup> See the six principles (intelligence-led and harm-based, outcome-focused, effective and efficient, consistent and transparent, flexible and responsive, and systems view) that are described as underpinning the FMA's current regulatory approach. [Regulatory approach | Financial Markets Authority \(fma.govt.nz\)](https://www.fma.govt.nz/regulatory-approach/).

significant source of conduct regulation in New Zealand, it has a statutory basis, and a considerable amount of work has already been undertaken by financial institutions to understand and operationalise its requirements.

- (e) The Draft Guide also does not say anything about how, if at all, the fair outcomes will interact with the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the guidance in the Responsible Lending Code. Like COFI, the CCCFA has created compliance standards that providers have worked hard to understand and meet. It would be helpful to understand how those standards feature in the FMA's view of fair outcomes. That is particularly important given the Government's recent announcement that regulatory oversight of the CCCFA will transfer to the FMA.
- 4. Finally, the Draft Guide states that the "fair outcomes" are not rules and do not create, replace or even supplement existing legal obligations. Yet, at the same time, the Draft Guide also states that "providers will need to take ownership of the fair outcomes", "demonstrably embed them in the way they operate", and "understand how their governance, leadership, management and operations can deliver the fair outcomes and where they need to make changes".
- 5. We would be concerned if the FMA was seeking to create a de-facto regulatory regime whereby the "seven fair outcomes" become prescriptive standards for every financial service and product provider to meet (e.g., by testing compliance with the outcomes via s 25 notices, attestations and thematic reviews). It would be helpful if the FMA could clarify that this is not the intention of the Draft Guide (see also our response to question 2 below regarding the proposed use of the fair outcomes in practice).

#### Question 2

What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?

- 6. As a starting point, the Draft Guide does not explain how the fair outcomes were formulated (e.g., who contributed to the development of the outcomes and what did they say?) Understanding the process by which that occurred would facilitate a more meaningful critique of the outcomes.
- 7. In addition, we consider further clarity is required on the intended scope, meaning and application of the FMA's proposed "fair outcomes".
- 8. In summary:
  - (a) We consider that the Draft Guide should make clear that the adoption of "fair outcomes" permits product and service providers to exercise judgment as to what is required in any given case and that the FMA will extend a degree of latitude to providers when scrutinising their decisions. In our view, businesses need to have confidence that "fair outcomes" will not be treated by the FMA as a prescriptive regulatory standard that can be used to second guess good faith decisions with the full benefit of hindsight. We suggest that the Draft Guide expressly provide that the FMA will not challenge good faith judgment calls that were made on the basis of the information available at the time.
  - (b) It is also unclear as to how the FMA proposes to employ the fair outcomes across the full spectrum of its activities (e.g., from Supervision through to Enforcement). It would be helpful if the Draft Guide could provide more detail of how exactly the FMA intends to use the fair outcomes across these functions.

- (c) On the one hand, we can see benefit in ongoing interactions with FMA Supervision being organised around fair outcomes (however they may be defined) in order to drive more meaningful regulatory conversations. However, we also have serious reservations about the role fair outcomes can properly play in an enforcement context. We would be particularly concerned if the FMA was to assess the conduct of market participants by reference to “fair outcomes”, identify those outcomes that have not been achieved in a particular case, and then reason backwards to find a legal breach for which it can take action. It would be helpful for the Draft Guide to clarify this is not the FMA’s intention.
- (d) The Draft Guide refers to “fair outcomes for consumers and markets” and states in terms that five of the seven outcomes are directed towards “consumers” (which is defined by COFI to be “retail” customers and not “wholesale” customers). We assume that this is deliberate and the FMA’s proposed consumer “fair outcomes” are not intended to apply to wholesale customers.<sup>2</sup> It would be helpful if the Draft Guide could clarify the exclusion of “wholesale customers” from the FMA’s proposed “fair outcome” regime.
9. Finally, it appears that a number of the proposed “fair outcomes” may not reflect the way in which the analogous concept of “treating consumers fairly” has been defined by statute (see s 446C(2) of COFI). In some cases, the “fair outcomes” purport to expand on or even cut across the deliberate policy settings that were adopted by Parliament following the lengthy consultation process that led to the enactment of COFI. We respectfully caution against the adoption of regulatory standards that have not have the benefit of a similar process of examination and debate.
10. We provide further detail on specific outcomes below.

**Question 3**

What are your views on *Outcome 1: Consumers have access to appropriate products and services that meet their needs?*

11. We repeat our general comments at Question 2 above.
12. Outcome 1 appears to involve similar considerations to s 446C(2)(d) of COFI. That is, the idea that relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group).
13. We assume that Outcome 1 is not intended to go further and impose a regulatory expectation that providers positively make available products and services that meet particular customer needs regardless of the countervailing considerations and suggest this is made clear in the Draft Guide. By way of illustration, we do not understand this outcome to mean that providers must offer products that are no longer economic simply because of a “need for access”, e.g., insurance in flood-prone areas. A substantive expectation of this nature would represent a significant change to existing regulatory settings and, in our view, would require a more extensive process of discussion and debate than the current Consultation allows.

---

<sup>2</sup> Whereas the Good Conduct Guide expressly applied to “customers” on the basis that wholesale and retail customers were entitled to expect good conduct from their providers, the Draft Guide adopts the different terminology of “consumer”, which is defined by legislation as comprising retail customers alone.

**Question 4**

What are your views on *Outcome 2: Consumers receive useful information that aids good decisions?*

14. We repeat our general comments at Question 2 above.
15. Outcome 2 appears to be closely aligned to s 446C(c) of COFI. That is, assisting consumers to make informed decisions.

**Question 5**

What are your views on *Outcome 3: Consumers receive fair value for money?*

16. We repeat our general comments at Question 2 above.
17. Outcome 3 has no direct comparator in s 446C(2) of COFI. On its face, Outcome 3 purports to permit the FMA to intervene in substantive questions of pricing and value. This would be a significant expansion of New Zealand's existing regulatory settings without any apparent legal basis.
18. To date, the FMA has confined its scrutiny of value for money to the KiwiSaver and managed investment schemes sector as well as examining how providers communicate with customers in relation to poor value products. This scrutiny has had an obvious statutory basis (e.g. KiwiSaver Act 2006, part 4 subpart 2 and part 2 of the Financial Markets Conduct Act)
19. In our view, a broader remit to examine pricing and value would not be an appropriate application of outcomes-based principles and would require a specific statutory basis. Pricing and value are not easy concepts to regulate, particularly in the absence of a detailed underlying legal regime. The United Kingdom's ongoing attempts to address value for money in the pensions industry illustrates the complexity of the issue, the difficulties in reliably assessing whether consumers are receiving value for money, and the need for primary legislation to facilitate effective regulation.

**Question 6**

What are your views on *Outcome 4: Consumers can trust providers to act in their interests?*

20. We repeat our general comments at Question 2 above.
21. Outcome 4 has no direct comparator in s 446C(2) of COFI. However, it does reflect some of the concepts in s 446C(2)(a), (b) and (d) of COFI. That is, the ideas of paying due regard to consumers' interests, acting ethically, transparently and in good faith, and not subjecting consumers to unfair pressure or tactics or undue influence.
22. We assume that Outcome 4 is not intended to go beyond these requirements and we suggest the Draft Guide makes this clear.
23. In our view, defining the outcome in broader terms risks an unwarranted expansion of how "treating consumers fairly" has been defined by primary legislation. MBIE's Conduct of

Financial Institutions Options Paper (April 2019) originally proposed the adoption of a duty to “consider and prioritise the customer’s interest, to the extent reasonably practicable” (see p 30). That duty was rejected in favour of a more moderate requirement that an institution pay “due regard to consumers’ interests” (see s 446C(2)(a) of COFI).

24. A broader unqualified requirement on providers to act in the interests of consumers also risks redefining the relationships that have been agreed between providers in their customers and imposing obligations that have been deliberately excluded. The references to “trust” and “acting in the interests of consumers” also import fiduciary concepts that will not reflect the relationship that providers have with their customers.
25. We respectfully suggest that the Draft Guide makes clear that Outcome 4 (and indeed every other outcome) does not change the nature of a provider’s relationship with its customers. Similar language has been included in guidance recently issued by the United Kingdom Financial Conduct Authority (FCA) in relation to their recent adoption of a new Consumer Duty (see FCA *Finalised Guidance: FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty (July 2022)* at [4.12].)
26. Outcome 4 also refers to having “appropriate disclosure, governance, systems, controls, and financial strength”. We expect that outcome is not intended to change or expand on existing prudential requirements and RBNZ supervision expectations in any way. We suggest the Draft Guide makes this clear.

#### Question 7

What are your views on *Outcome 5: Consumers receive quality ongoing care?*

27. We repeat our general comments at Question 2 above.
28. Outcome 5 appears to be closely aligned to s 446C(c) and (d) of COFI. That is, assisting consumers to make informed decisions and ensuring relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group).
29. However, the concept of “ongoing care” is unhelpfully vague. We expect this outcome is not intended to create positive obligations to take action where they do not already exist (e.g., the various existing requirements under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 to be a member of an approved dispute resolution scheme, the standard conditions for full licensing under the financial advice regime, the responsible lending obligations under the CCCFA, and the Fair Insurance Code that applies to members of the Insurance Council of New Zealand). We suggest the Draft Guide makes this clear.

#### Question 8

What are your views on *Outcome 6: Markets are trusted based on their integrity and transparency?*

30. We repeat our general comments at Question 2 above.

#### Question 9

What are your views on *Outcome 7: Markets enable sustainable innovation and growth?*

31. We repeat our general comments at Question 2 above.

**Question 10**

Is anything missing that should be included in fair outcomes? Please explain.

32. Please see our responses to Questions 1 to 9.

**Question 11**

If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?

33. N/A

**Question 12**

If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?

34. N/A

**Question 13**

Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?

35. Please see our responses to questions 1 and 2.

**Question 14**

Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?

36. Please see our responses to questions 1 and 2.

**Question 15**

If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?

37. N/A



**Question 16**

If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?

38. N/A

**Question 17**

What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?

39. N/A.

**Question 18**

Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?

40. Please see our responses to questions 1 to 9.

Friday 1 March 2024

Financial Markets Authority  
Level 5 Ernst & Young Building  
2 Takutai Square  
Britomart  
PO Box 106 672  
Auckland 1143

Level 2, 1 Grey Street  
PO Box 1179  
Wellington 6140

By email: [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz)

### **Proposed Fair Outcomes for Consumers and Markets**

This submission on the Financial Markets Authority (FMA) consultation on Proposed fair outcomes for consumers and markets (the Consultation Paper) and the accompanying fair outcomes for consumers and markets, a guide to outcomes focused regulation (the Draft Guide) is from the Financial Services Council of New Zealand Incorporated (FSC).

As the voice of the sector, the FSC is a non-profit member organisation with a vision to grow the financial confidence and wellbeing of New Zealanders. FSC members commit to delivering strong consumer outcomes from a professional and sustainable financial services sector. Our 119 members manage funds of more than \$95bn and pay out claims of \$2.8bn per year (life and health insurance). Members include the major insurers in life, health, disability and income insurance, fund managers, KiwiSaver, and workplace savings schemes (including restricted schemes), professional service providers, and technology providers to the financial services sector.

Our submission has been developed through consultation with FSC members and represents the views of our members and our industry. We acknowledge the time and input of our members in contributing to this submission. We also thank members of the FMA for attending our CoFI Focus Group on Tuesday 28 November 2023.

We welcome the opportunity to provide feedback on the Draft Guide. However, our members have concerns that introducing guidance in addition to, and immediately prior to the Financial Markets (Conduct of Financial Institutions) Amendment Act 2021 (CoFI) regime taking effect, does not provide sufficient opportunity to evaluate whether additional regulation or guidance is in fact required. They query how the Draft Guide sits with A Guide to the FMA's view of conduct, February 2017 (the 2017 Guide) and whether the Draft Guide adds further duplication and confusion in this space for the holders of existing licences issued by the FMA (for example fund managers).

If the FMA's intention in issuing this guidance is to provide the industry with clarity around the way they can expect the FMA to engage with firms, the guidance requires further clarity that this is the case. As it stands, for financial institutions (FIs) whether within the scope of CoFI or not, we consider the Draft Guide may create uncertainty and confusion and unnecessarily increase compliance costs. Our feedback on each of the seven proposed fair outcomes for consumers and markets is therefore premised on the overarching feedback that we consider the Draft Guide should not proceed at this time.

We welcome continued discussions and engagement. I can be contacted on [REDACTED] to discuss any element of our submission. In addition, please reach out to [REDACTED] if you would like to attend our CoFI Focus Group once again.

Yours sincerely

[REDACTED]  
[REDACTED]  
Financial Services Council of New Zealand Incorporated

1. Is the way we have described our outcomes focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.

The FMA's expectations in this Draft Guide regarding the importance of financial product and service providers meeting the outcomes are unclear. On the one hand, the Draft Guide is described as "embedding a regulatory approach" whilst on the other hand the Draft Guide states that "These are not rules. They do not change Financial Institutions' obligations. They provide a focus for compliance and business efforts, supported by our existing legislative framework." Of concern is the Draft Guide statements "These outcomes will inform how we exercise our role as a kaitiaki of financial markets and approach our supervisory and enforcement work" and "Over time, our regulatory conversations with firms will be built around the efforts they are making to achieve these outcomes. Providers will need to consider how they monitor and review their progress and how they articulate that to us". These statements appear to have the potential of creating and enforcing obligations that are not legislative requirements. It is difficult to see how this Draft Guide will drive enforcement if it does not create an obligation. Therefore, whilst the FMA notes that the Draft Guide does not create a new set 'rules', given the FMA's explicit intention to measure FIs' 'success' and enforce against the outcomes, we consider the Draft Guide creates a set of new expectations in all but name. In addition, we recognise and understand a number of these expectations extend beyond CoFI, incorporating overseas legislative conduct principles<sup>1</sup> not enacted by New Zealand Parliament, as for some of the proposed outcomes there is no existing legislative framework in place.

We are unclear how the Draft Guide will enable the FMA to identify, measure and evaluate a financial institutions' compliance with licence (including CoFI) requirements for the wide range of institutions subject to FMA oversight, including the FMA's monitoring and supervision approach. Our members are concerned the Draft Guide complicates an already uncertain regulatory landscape, particularly as it does not explicitly refer to existing legislative frameworks including the Financial Markets Conduct Act 2013 (FMCA) (including the new CoFI requirements when they take effect).

We are concerned the Draft Guide goes well beyond the scope of existing or proposed legislation and introduces new uncertain concepts such as access to products (please refer to our response to Question 3 below) that do not neatly align with what exists. If the guidance is to progress, we consider further documented detail is required from the FMA to clarify how its focus on its identified outcomes will operate alongside the legislation (including CoFI).

Licensing for CoFI opened in July 2023 and most FIs caught by the regime have been developing, finalising and seeking board approval of their Fair Conduct Programme (FCP) for many months. For existing license holders, for example MIS and DIMS providers, most have been for many years operating appropriately, and in alignment with the 2017 Guide. We consider the introduction of guidance relating to customer outcomes with no clarity on how this interacts with a FI's FCP, existing licence obligations, the FMCA and long after other CoFI guidance has been finalised, creates uncertainty, not only for the industry but also its customers.

We consider the purpose of the Draft Guide should be clarified as guidance on the FMA's engagement model and regulatory approach, rather than a set of outcomes that providers must demonstrate compliance with. If the Draft Guide is to progress, statements in the Draft Guide that imply rules or compliance requirements for FIs should be removed. For example, page 13 states "Over time, our regulatory conversations with firms will be built around the efforts they are making to achieve these outcomes. Providers will need to consider how they monitor and review their progress and how they articulate that to us". A further example on page 13, "We will be interested in everything that firms are

---

<sup>1</sup> Financial Conduct Authority, Consumer Duty, <https://www.fca.org.uk/firms/consumer-duty> | FCA

doing to achieve these outcomes. We will work to understand firms' viewpoints, the key risks or constraints, and the journey they are undertaking as they deliver these outcomes".

The Draft Guide currently risks creating ambiguity and the likelihood of different views and interpretation about whether a fair outcome is met, particularly between the FI and the FMA. Expected outcomes change over time, even within a relatively short space of time, and with a sole focus on outcomes it requires financial product and service providers to essentially predict the future and FMA expectations of outcomes without clarity on how to approach assessment. Guidance in this space may be helpful.

Outcome 5 in the Draft Guide covers areas such as claims, complaints and customers experiencing vulnerability (CEV). In 2021, the Ministry of Business, Innovation and Employment (MBIE) consulted on regulations to support CoFI and the treatment of intermediaries. This consultation specifically considered whether regulations were required for additional areas including claims, complaints and CEV. After considering submissions on this consultation, MBIE determined regulation covering these areas was not required. CoFI specifically provides for additional regulation which may be required once the regime has been embedded. We therefore consider it is vital to allow FIs time for CoFI to embed, and then assess whether there are further areas that should be addressed through regulation, guidance or specific market mechanisms that focus on particular areas of weakness. Widening the scope of compliance when the industry is focused on preparing for the CoFI regime is contrary to the noted FMA focus on reducing unnecessary regulatory burden.

It also appears that the outcomes, sometimes confusedly, are a mix of those that are directly influenced by the FMA and those that providers directly manage. For example, parts of Outcome 1 (access to a broad range of products) and 6 (market integrity) and Outcome 7 (markets enable sustainable innovation and growth) appear to be outcomes which the FMA or government have significantly greater direct influence over rather than individual providers or market participants. In contrast, product providers have more direct influence over Outcomes 2, 3 and 5 and may positively improve these outcomes for their own customers.

We encourage the FMA to provide further transparency on the purpose of this Draft Guide, and what it is trying to achieve over and above what the current legislative settings are. There is reference to numerous guidance documents in the 'Relevant issues and examples' sections of the Draft Guide, setting an expectation that the FMA's enforcement approach will also be based on this guidance which we consider also makes these guidance documents compliance requirements.

The Draft Guide applies to all providers of financial products and services regulated by the FMA. Therefore, clarity is sought on how this applies to all market participants as suggested. In addition, there are five outcomes directed at consumers, and two outcomes relating to markets, yet no definition of the consumer or the market.

2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?

The Draft Guide and introduction of seven new fair outcomes is not expected to bring material benefits to consumers, markets and providers as it is not regulation but an additional overlay. We consider this increases regulatory ambiguity and may drive the need for additional compliance resourcing for financial product and service providers (especially licence holders) with the associated costs indirectly passed on to consumers. The terms used in the Draft Guide are subjective and lack clarity around the scope of application. The FMA sets out what an outcomes focused approach will mean for consumers and for the

economy in the Draft Guide. We would expect the FMA to have spent considerable time consumer testing the proposed fair outcomes in advance of policy settings and the creation of this Draft Guide (to test the language used and the validity of the outcomes). We query the extent to which this has occurred and, if it had occurred, would like an opportunity to review that source data, including the policy development process behind the ambitions for the economy, including analysis and rationale for this approach.

Outcomes may not be subjectively 'fair' for every customer in every circumstance. It is not clear how the FMA will respond to this subjectivity and whether a holistic approach will be taken, including consideration of the prudential management obligations and practical realities of product design and operations.

Entities subject to the CoFI regime already addresses fair outcomes via the fair conduct principle for banks, insurers and non-bank deposit takers, including the requirement for each FI to develop a FCP and comply with the six conduct related licensing conditions. We consider that CoFI will already deliver significant benefits for both consumers and FIs. At this stage, prior to the implementation of CoFI, it is unclear what additional benefits the Draft Guide would provide.

If the CoFI regime fails to achieve the appropriate outcomes for a period after its commencement, it is at that stage that the FMA could consider introducing guidance such as this Draft Guide or extending the CoFI requirements.

### 3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?

The term 'access' introduces a new concept that goes beyond CoFI and its meaning is unclear. For example, does it mean that all financial product and service providers (or at least all licence holders) must provide a wide range of products and services to cater for all potential customer needs, or does it require financial product and service providers to ensure that their products and services are accessible to all New Zealanders. We consider neither would be a reasonable expectation, as it would be beyond the capability of any individual entity (except the very largest) and would have the unintended consequence of creating a barrier to small niche providers, stifling innovation, and reducing competition. Where, for example would it leave a small new KiwiSaver provider which has a specialised offering, or an insurer starting out with a home market only in part of New Zealand?

It is also unclear why the word 'appropriate' has been substituted for 'suitable' and if suitable is intended, then that is the term that should be used. We note there appears to be an inherent conflict between enabling consumers to have access while at the same time preventing consumers from accessing unsuitable products.

In contrast, CoFI requires FIs to ensure that the relevant services and associated products that the FI provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group)<sup>2</sup>. It is unclear how the proposed Outcome 1 interacts with this obligation and the associated minimum requirements for FCPs in section 446J of CoFI.

It is also unclear how the FMA proposes to monitor or support accessibility in practice, and we do not consider the reference to access relevant to the insurance sector. For example, private health insurance alone is not a 'necessity' as consumers can still access free healthcare via the public health system and life products need to be sustainable over the long term to provide policyholder security. Not all insurance

---

<sup>2</sup> Section 446C(2)(d) of the CoFI Act.

products are suitable for all customers and therefore it is difficult to promote this access concept universally. In addition, not all customers can get access to appropriate products, due to their personal, medical and occupational circumstances and cover may not be affordable or available. In addition, there are many sound reasons why a licensed fund manager may decide that its products should only be accessible to a subset of the available market.

There is a concern that 'access' to appropriate products and services could be perceived as an unreasonably broad requirement on participants to provide a wide range of products and services through multiple channels, as opposed to allowing the market to respond to the actual needs of consumers. The level of prescription contained in the definition of "access" could have unintended consequences of hampering future digital innovative and other access solutions if financial product and service providers consider these factors need to be specifically baked into digital offerings to consumers.

The Draft Guide refers to access as the "availability of financial products and services that meet diverse consumer needs, including their personal circumstances, preferences, goals, risk tolerance, and values". This is a broad range of criteria to take into account when considering consumer access. Unless a relevant regulated financial service is being provided by a FAP, a provider should not be expected to understand each customer in detail on this level. Ascertaining a customer's values, which customers themselves might not be aware of, will be difficult to do. The 'relevant issues and examples' in this section of the Draft Guide are also very broad discussion points and high level principles on the outcome theme. We suggest it would be more helpful to have examples of expected conduct from financial product and service providers rather than thematic issues.

We encourage further clarification on what expectations there are on financial product and service providers to understand a customer's values or we suggest removal of this requirement if the guidance is to progress.

#### 4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?

Outcome 2 is similar but not aligned to the CoFI fair conduct principle that requires FIs to 'assist consumers to make informed decisions' and the fair conduct programme requirement to communicate with customers in a 'timely, clear, concise and effective manner'. FAPs have similar obligations pursuant to the Financial Services Legislation Amendment Act 2019 (FSLAA) regime which is now part of the FMCA. To include an additional overlay via Outcome 2 of the Draft Guide creates uncertainty without adding sufficient value for consumers.

The explanatory detail used to further define 'information', 'useful', and 'all communications' is too broad and should be limited to communications that are provided by the relevant provider. The term 'influence' is problematic, and if kept, the focus should be on 'assisting' informed decision making. The term 'digestible' is also confusing.

The Draft Guide states 'Useful' refers to 'easily understood and digestible information that is material, accessible, timely and reliable, to support informed decision-making'. Again, this adds additional requirements to CoFI, and we consider the CoFI terms have a more clearly defined meaning when compared with the language in the Draft Guide, where we have concerns of inconsistency, uncertainty, and confusion. We also query the reference to 'good' as we understand this is being phased out in replacement for 'fair' as a more up to date expectation from the FMA.

If the Draft Guide is progressed, Outcome 2 should acknowledge that some financial products are inherently complex, such as life insurance, or utilise complex concepts, like medical definitions. For these products it may not be possible to produce easily understood and digestible information. We submit that for these kinds of products that consumers receiving information from a FAP should meet the expectations of this concept. We also submit that customers have a responsibility to read materials provided to them and take care to understand the products they are purchasing.

#### 5. What are your views on Outcome 3: Consumers receive fair value for money?

We consider that fair value for money as an outcome is extremely difficult to assess and suggest that it is excluded. Many managed investment scheme providers (for example KiwiSaver providers) have struggled with this concept despite the FMA's more detailed guidance, and it has arguably given rise to unintended consequences such as the low rate of investment by KiwiSaver providers in private assets. For other FIs such as insurers for whom this outcome would present a significant new requirement not reflected by duties or obligations in any existing legislation, the position will be even more challenging. In addition, some financial products that are designed to cater to specific consumer needs do not necessarily have the same value proposition as others. For example, health insurance.

The FMA's role as a regulator when it comes to pricing is limited to the transparency of pricing, and ability to compare prices. Outcome 3 introduces a much broader expectation for pricing, which potentially extends to the remit of the Commerce Commission. If there is a concern that providers are extracting quasi-monopoly rents, a proposed preferable solution is to focus on increasing competition, rather than to seek to introduce price guidance, which like so many examples of "rent control" throughout economic history will give rise to unintended and undesirable consequences, such as limiting choice and innovation.

Pricing and value for money are complex areas, especially when it comes to insurance when not only the upfront cost but the cost over the life of the policy must be considered when assessing value. Fair value is an outcome of an efficient and competitive market and pricing and value for money assessments will require complex calculations, technical analysis, debate, and review. It would be a significant extension of the current expectations on insurers and difficult to apply in an insurance context given different exclusions and benefits that can apply at an individual customer level.

We also note that the Draft Guide stipulates that 'value needs to be considered from many dimensions' and that 'while price can be a consideration, it is not the only factor'. If the Draft Guide is progressed, examples of what dimensions and factors that the FMA considers relevant will aid in furthering the sectors understanding as to what else to take into account when considering how to demonstrate fair value for money.

#### 6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?

Broadly, we consider the creation of Outcome 4 is unnecessary, and is yet another example of loosely worded requirements in the Draft Guide which contrast with the carefully developed balance in wording already in statute. For example, persons giving regulated financial advice under section 431K of the FMCA (the duty to give priority to client's interests) and the similar standard of care for licenced life insurers under section 87 of Insurance (Prudential Supervision) Act 2010 (IPSA). These legal obligations are also broadly replicated in the fair conduct principle established under CoFI, pursuant to section 446C. This requirement being repeated would not itself be an issue, however, the language is not the same. Therefore, ambiguity is created as to whether the FMA is expecting any difference between the evidence and controls required to satisfy the licensing conditions and how the FMA will monitor this outcome.



The inconsistency between language used in the Draft Guide “act in their interest”, in the FSLAA duty to “give priority “to the client’s interests and in CoFI, ‘paying due regard to consumers interests’ implies that Outcome 4 is broader. Again, this creates uncertainty and should be avoided. If the Draft Guide is given any weight, it is effectively overwriting the legislation passed by Parliament.

The ‘Trusted providers’ section of this Outcome is better suited to Outcome 6 as a market outcome, including the concept of operating resiliently, protecting data and the example that relates to cyber security.

We suggest the introduction of the term ‘asset’ is not required and therefore recommend it is deleted.

The final paragraph, of ‘Acting in the consumer’s interest’ should be deleted as this does not add anything and is confusing, particularly the very broad list of examples at the end regarding ‘disclosure, governance, systems, controls and financial strength.’ Financial strength ratings are covered under section 60, of the IPSA, regulated by the Reserve Bank of New Zealand (RBNZ). It is not considered appropriate to make a throwaway mention of this IPSA requirement in the Draft Guide. It is also unclear what is meant by ‘disclosure’ as there are different requirements on different FIs (most of which are not within the FMA’s remit) so incorporating this broad term without further clarity is considered unhelpful. CoFI has specific regulations prohibiting certain incentives which are designed to mitigate conflict of interest risks. Again, this unclear overlap is unhelpful.

We suggest references within the Draft Guide to areas of duplication (such as cyber security) or that clearly sit within the RBNZ’s remit (such as financial strength) will only serve to reinforce duplication.

#### 7. What are your views on Outcome 5: Consumers receive quality ongoing care?

Whilst we are broadly supportive of this Outcome in principle, we would prefer (if progressed) the use of fairness in this description to align with the fair outcomes principle of CoFI regime and the Code of Professional Conduct. Where a firm is in scope for CoFI, we would expect that meeting the CoFI requirements would enable that firm to satisfy the outcomes in the Draft Guide. However, whether the FMA agrees with this is not clear in the guidance. The standard of care required for products and services will largely depend on the nature of the product or service and the type of customer. ‘Quality’ would, therefore, have a myriad of interpretations. It is difficult to see how providers will be able to report on this in practice. We recommend deleting the word “quality” as it is subjective and not measurable.

We have concerns around what is meant by the inclusion of “effective” when describing how complaints and claims should be handled. We consider these concepts could be clarified to make it clear that effective resolution should be assessed from the perspective of the FI and the customer. As an example, when a claim is resolved within a FI’s ordinary turnaround times and in accordance with the policy wording, it is an effective resolution of the matter, even if the claim is declined, which most customers will not consider to be an effective resolution. Please also refer to our comments in response to Question 1 above on the references to claims, complaints and CEV within the Draft Guide.

The Draft Guide states, “Consumers should be able to update, alter, switch or exit a product without encountering unreasonable barriers.” There will be a range of circumstances where consumers will have barriers to existing products, including term deposits, KiwiSaver withdrawals and fixed interest homes loans. Requiring providers to apply and evidence a reasonableness test (for the purposes of the Draft Guide) across a wider range of products and services would create confusion where existing legislation allows the financial product and service providers to have the discretion to determine what is fit for

purpose. The suggestion that consumers should be able to 'alter' products without encountering unreasonable barriers appears overly simplistic. There are a wide range of design considerations in financial products including long term life insurance contracts that may impact the prudential management of life insurers if altered without due care and detailed analysis. Our members would be interested in understanding how the FMA will monitor this outcome in practice and whether additional obligations may be placed on providers distinct from obligations at point of sale.

We also query why insurance is singled out in the examples and suggest a more balanced approach. The FMA's Insurance conduct and culture update issued in July 2021 referred to in the examples for Outcome 5 did not consider the huge amount of work that insurers had undertaken in response to the FMA's review in 2019. It was also issued prior to the passing of CoFI which is designed to support fair customer outcomes. Therefore, we question the relevance given the industry has responded to the findings, delivered action plans to improve and legislation has been introduced to respond to the root cause of the issues identified in the 2019 review.

**8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?**

We consider 'Markets are trusted' is an overlap here with Outcome 4 'Consumers can trust providers'. Outcome 4 discusses data and operational resilience, including an example regarding cyber security. This part of Outcome 4 is better included in Outcome 6, if it is included at all (see our response to Question 4 above in relation to duplication between regulators).

**9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?**

It is unclear how this Outcome will be monitored and what the expectations are of individual providers. This is more of an opportunity for the FMA to influence financial services laws and regulations to ensure they keep pace with new FinTech innovations and Artificial Intelligence as well as work to continue to retire old financial services laws and regulations that are no longer relevant or useful.

More focus could be placed on innovation and, how the FMA considers that the outcomes would lead to innovation in our financial markets, products and services. Further explanation around the concept of 'sustainable' is also required. How will the risk of unnecessary regulatory burden having a negative impact on innovation be managed?

**10. Is anything missing that should be included in the fair outcomes? Please explain.**

Perhaps the biggest concern with the Draft Guide is that it does not clearly acknowledge the existing legislation under which the FMA operates. For example, under section 8 of the FMA Act, "The FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets". This combined with the purpose statements of the FMCA (set out in sections 3 and 4) demonstrate the careful balance Parliament intended, after a long a thorough process of development of the legislation. Parliament intended that the interests of "businesses, investors and consumers should all be given equal weight, however that is not evident in the Draft Guide.

In addition, alignment with the CoFI regime and other relevant fair dealing provisions under the FMCA must be factored into the Draft Guide to ensure providers are clear on expectations.

Further clarity is recommended on how far organisations need to go in proactively reassessing each customer and whether this is on an individual basis or at a group level. In addition, clarification is sought

on FMA tolerance levels as groups could represent tens of thousands of customers, and therefore the expectation would be the potential for a number of outliers receiving poor outcomes.

The FAP sector under the FSLAA provisions of the FMCA also plays a large role in fair outcomes for consumers. There is no mention of FAPs in the Draft Guide, it only focuses on ‘providers of financial products and services’. There are other participants who contribute to market outcomes such as industry associations.

11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?

If implemented, we consider that the Draft Guide should clarify that if our members who are licensed MIS fund managers, FAPs or subject to the CoFI regime, compliance with the applicable legislative and regulatory regimes should be sufficient to meet the expectations in the Draft Code. This approach is consistent with the FMA’s statement that “These are not rules. They do not change FIs’ obligations”. We recommend further clarification as elsewhere in the Draft Guide it is made clear that it will become the new yardstick against which the FMA’s supervision and enforcement decisions will be made.

Based on this assumption, our members would rely on their compliance programmes/FCPs (if applicable) to demonstrate ownership and delivery of fair outcomes. We expect that larger FIs within the scope of CoFI with internal legal and compliance functions would choose to prioritise the requirements of legislation over the draft guide, particularly for those that already have in place their own ‘customer outcomes’ principles. Other smaller FIs may try to achieve compliance with both the legislation and the guidance which would create confusion, potential unnecessary duplication or rework and increased compliance costs. If the Draft Guide were to proceed, it would be helpful if the outcomes could be more practically aligned with CoFI and the intended impact of delivering an effective FCP.

12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?

We do not consider the outcomes focused regulation, in its current form, will help support regulatory compliance of our members. Rather, it distracts from both the existing clarity and balance in the existing law (particularly the FMCA) and all the effort and uplift currently underway in relation to CoFI. Naturally the priority for our members is to comply with the current law, the issuance of guidelines at this time, which is not aligned and does not refer to CoFI fails to assist in supporting compliance.

This Draft Guide is considered to add complexity, confusion, and uncertainty. Some of our members are concerned business teams will be overwhelmed by the additional number of potentially misaligned requirements being placed upon them unless there is clarity and greater synergy of how the Draft Guide relates to existing law and CoFI in particular. There is a risk that the implementation of the outcomes in this Draft Guide will place further costs on our members which are likely to then be passed on to consumers.

13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach? Consultation: Fair outcomes for consumers and markets

Whilst members broadly support an outcomes focused approach to dealing with consumers, we consider the existing principles based FMCA and new CoFI regime will achieve this for applicable members and some may perceive that the Draft Guide creates the risk of another de-facto regulatory regime which has not been through the appropriate Parliamentary process. We are concerned that the Draft Guide may be interpreted to extend FMA's remit. We would encourage the FMA to document in the Draft Guide (if it is to be progressed) to make it clear that it outlines the FMA's approach to outcomes focussed regulation, and that it does not replace or extend existing regulation or legislation. To do this, any statements within the Draft Guide that imply market participants must demonstrate compliance with the Outcomes should be removed (see our response to Question 1 above).

We are concerned that the customer outcomes identified in the Draft Guide have not been built from detailed and extensive New Zealand consumer engagement. We expect that monitoring and supervising the proposed outcomes focused regulation will be challenging, as it would require provider specific consumer feedback and data to identify where outcomes have or have not been met. Our members' experience shows that providers and the FMA will struggle to gather clear data unless the outcomes themselves reflect the 'voice of customer'.

If the Draft Guide is implemented, it would be helpful to see the FMA recognising FIs demonstrating good conduct and focus on fair outcomes with this reflected in the FMA's use of its regulatory enforcement tools. A more collaborative approach to issues with FIs demonstrating good conduct would be more effective and efficient and benefit FIs, customers and the FMA.

14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?

We appreciate that the Draft Guide may be useful for market participants to understand the FMA's approach to supervising participants' compliance with current market regulation. However, if the FMA wishes to enforce the Draft Guide, similar to regulations, we would be very concerned as noted in response to Question 1 of this submission. Current financial services laws clearly set out the expectations in terms of individuals and entities regarding fair conduct and what is considered misconduct. The Draft Guide is not the appropriate vehicle for influencing how the FMA should resolve misconduct.

15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?

A principles based outcomes focused approach to regulation generally provides more flexibility for innovation compared with prescriptive regulation. However, in this case and the introduction of new expectations via additional guidance stifles innovation because it adds unnecessary complexity to the layers of existing legislative and regulatory requirements. The opportunity cost of seeking to understand and operationalise the Draft Guide is time and resources that could be spent on innovation. One meaningful way to support innovation would be to reduce the volume of regulatory change, regulatory burden, licence requirements and added complexity to existing regulations that providers are required to comply with to allow more opportunity for innovation.

16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?

This question is not applicable to our membership.

17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?

If the Draft Guidance is progressed, the FMA should include examples that provide for situations where less is required due to the simplicity of a product, or no vulnerability being experienced by a consumer. But these must be grounded in the applicable law, and not indicate scope creep. The examples in the Draft Guide focus more on what more is required by markets rather than on what needs to be done by financial product and financial service providers. More balance is needed in terms of the range of examples used to empower providers to take a risk based approach and do less or more where appropriate.

It would also be helpful to see examples where fairness cannot prevail. For example, insurance policies may not always be considered fair because the risks are pooled between consumers on the assumption some consumers will claim and some will not, resulting in different outcomes. An exception for the discriminatory nature of insurance is provided for under the Human Rights Act, and it would be helpful to see exceptions like this acknowledged via examples. Examples should also include all markets including KiwiSaver providers not just insurance and banks.

Our members consider that more practical examples for each outcome are needed. Whilst the current examples help clarify obvious cases, edge cases which could be a fair outcome from a FI's perspective may not be considered fair for all consumers are not catered for at all. We think that more real world examples are vital to making the guide meaningful for all FIs.

18. Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?

We appreciate the intentions behind the Draft Guide but as noted in this submission, it is confused and confusing, our members consider no further guidance or support is required and would prefer if the Draft Guide did not progress. We have concerns that the approach in the Draft Guide is predicated on an unspoken assumption that all financial product and financial services providers are large organisations with endless resources for compliance systems, where the decision making is distant from, but made paternalistically in the deemed interests of, the consumer. The Draft Guide risks making that the only model which can thrive, as layers of obligations and quasi-obligations from misaligned legal requirements and aspirational guidance makes it prohibitive for small to medium sized FI's to enter the market, innovate and compete with large incumbents, on a sustainable basis. Ironically, that then is to the detriment of consumers.

At the least, the FMA should delay the creation of further conduct related guidance for FIs subject to the CoFI regime until after CoFI comes in effect and the benefits of the CoFI regime have an opportunity to be realised and any future gaps evaluated. We suggest the FMA focus on providing support and guidance to small FIs by clearly defining what FIs can do to meet minimum CoFI requirements. If the Draft Guide is to progress, we suggest clarifying its relationship with the CoFI Act.

## Feedback form

# Consultation: Fair Outcomes for Consumers and Markets

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz) with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: 1 March 2024

Number of pages: 8

Name of submitter: [REDACTED]

Company or entity: Corporate Trustees Association

Organisation type: Industry association

Contact name (if different): [REDACTED]

Contact email and phone: [info@cta.org.nz](mailto:info@cta.org.nz) [REDACTED]

### Question number

### Response

1. Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain

The Corporate Trustees Association (CTA) understands and supports the overarching intent and objective of fair outcomes for consumers and markets. The draft guide outlines a regulatory change applicable to both the regulator and market participants, including licensed supervisors. Critically, for regulatory change to be effective, clarity of expectations is essential. Our responses to all questions in this submission reflect a desire for clarity of expectations for all parties.

While the CTA supports the overarching intent and objective of fair outcomes, in its current form, the draft guide is not clear in relation to the likely expectations the FMA will have of regulated entities. On the one hand it states the outcomes "are not rules" and "do not create, replace or even supplement existing legal obligations" – but then on the other it suggests that it does create new obligations, for example, when it says "[p]roviders will need to take ownership of the fair outcomes and demonstrably embed them in the way they operate".

To resolve this, the guide could usefully comment on the difference between FMA (i) applying an outcomes-focused lens to legal obligations (which we support), and (ii) using outcomes to create compliance expectations that go beyond the law (which we reject).

The guide could also comment on the accountability measures that FMA will put in place to monitor how its regulatory interventions track against the outcomes. The guide is clear about the outcomes expected of regulated

	<p>businesses but not about how regulatory process itself can influence fair outcomes.</p> <p>Licensed supervisors play a pivotal independent supervisory role, designed to augment regulatory arrangements and promote fair outcomes for consumers. The guide should reference these arrangements, for example in the introductory / framing material at the front of the guide.</p> <p>The description of the outcomes-focused approach lacks clarity and introduces ambiguity into regulatory expectations. While the concept of fair outcomes is emphasised, the lack of clear definitions and objective criteria leaves room for subjective interpretations by all participants. As a licensed supervisor, understanding how this focus on outcomes will be reflected in our work is challenging, particularly in assessing and ensuring alignment with regulatory expectations.</p> <p>We are particularly concerned that an outcomes-focused approach may result in hindsight-bias, particularly in relation to enforcement. This would erode the confidence of market participants and be unhealthy for the market as a whole. At its simplest, while outcomes-based <i>regulation</i> is a principle we support, we are concerned that outcomes-based <i>enforcement</i> runs contrary to foundational legal principles and fiduciary duty concepts which sit at the heart of the operation of the FMCA regime.</p> <p>We note the guide does not specifically address how it relates to existing guidance, expectations and rules e.g., CoFI, the FMA's 2017 conduct guide, the expectations set out in the reports resulting from the FMA/RBNZ inquiries into banking and insurance industry conduct, KiwiSaver/MIS value for money, and FMA's other regulatory guidance (e.g., the FMA's enforcement policy). This creates potential regulatory duplication and uncertainty. The uncertainty is exacerbated by the proposed changes to CoFI, the detail of which is still being worked through. If the guide is to be progressed, there may be merit in pausing that until there is more clarity about the future shape of CoFI. It may also be sensible for the guide to clarify its interrelationship with CoFI and the FMA's other regulatory guidance – and how this supports regulatory efficiency and effectiveness.</p>
<p><b>2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?</b></p>	<p>CTA broadly supports fair outcomes (for consumers and markets) being at the heart of everything FMA does.</p> <p>However, the seven outcomes could be presented in a manner that (i) more clearly distinguishes between</p>

consumer outcomes, markets outcomes and how those two categories interrelate, (ii) clarifies that they are not necessarily an exhaustive list of all fair outcomes in all circumstances, and (iii) discusses accountabilities when there are multiple product or service providers in the supply chain for a particular outcome.

The draft guide does make the point that a focus on fair outcomes does not mean that consumers are insulated from risks or that a product always makes money. That should be given greater prominence, including on the fair outcomes graphic itself.

Similarly, greater prominence should be given—including on the graphic—to the relevance of external circumstances (e.g. economic conditions) and customer vulnerabilities (e.g. poor health) to the consideration and application of fair outcomes. The outcomes are influenced by context and are not static.

Many of the fair outcomes entail highly subjective assessment. As one example, the guidance refers to “do the right thing”, when in fact determining “the right thing” in any circumstance can be highly subjective. Subjectivity results in uncertainty, which leads to reduced confidence for market participants. Noting that NZ is only a maturing market, the FMA should ensure that its approach enhances confidence for market participants, rather than erodes confidence and potentially leads to an aversion for healthy competition and innovation.

The guide refers specifically to a "focus on the outcomes that matter". It is important that the FMA recognise and clearly state that the outcomes and value "that matter" can include non-financial outcomes and value. The availability of choice is an important feature of an effective and competitive market. A key means by which choice can be achieved is through product features that may entail outcomes and value (such as environmental, social and governance features) which are not readily or directly attributable to a financial outcome. This distinction is important to support competition and innovation in the market and should be specifically addressed.

It is unclear as to how the FMA proposes to employ the fair outcomes across the full spectrum of its activities (e.g., from supervision through to enforcement). It would be helpful if the Draft Guide provided more detail of how exactly the FMA intends to use the fair outcomes across these functions.



**3. What are your views on Outcome 1:**  
*Consumers have access to appropriate products and services that meet their needs?*

Two factors worth mentioning in relation to “access” are barriers to entry and unnecessary compliance costs. The licensed supervisors’ frontline role, and their knowledge of their clients, can help establish whether access to products and services is being disproportionately impeded by these factors.

CTA would appreciate further guidance on what access to appropriate products and services means and how it is to be determined. For example, are managers/issuers expected to assess their investors’ knowledge, experience and understanding of products to make sure they are “appropriate”? If so, how rigorous is that assessment expected to be, and to what extent will that assessment (and any follow up action with potential investors) fall in scope of the regulatory regime for financial advice?

The example provided in this summary is an unusual one, noting the comments made above regarding financial and non-financial outcomes. As currently drafted, the guide implies that cryptocurrency is "bad" and the banking sector "good" for Māori communities. We are somewhat uncomfortable with using such broad demographic generalisations as a tool for assessing market health. Consumer behaviour and its interrelationship with demographics is an incredibly complex area and making generalisations could risk overlooking important factors influencing consumer behaviour and outcomes.

Given the complexity of this topic, the better point to make in the guide may well be around educating and lifting financial literacy.

By comparison, the outline of the supervision insights made by the FMA regarding complex financial products such as derivatives is a strong example of peripheral regulation done well. We agree this is a useful example to include in the guide.

As stated earlier, while the proposed fair outcomes aim to enhance consumer protection and market integrity, the emphasis on fair outcomes may introduce hindsight bias into regulatory assessments. The actions of organisations could be evaluated based on outcomes rather than intentions or efforts, unfairly penalising organisations for unforeseen outcomes. This approach could discourage innovation and risk-taking, as organisations prioritise avoiding regulatory scrutiny over pursuing novel solutions to address real consumer needs.

<p><b>4. What are your views on Outcome 2:</b> Consumers receive useful information that aids good decisions?</p>	<p>The draft guide could be read to imply that product and service providers are responsible for all channels of information about a product, even those they do not control. Information from ancillary sources will become increasingly relevant as artificial intelligence reinterprets publicly available information. Clarification would be appreciated regarding providers' obligations for those broader information sources.</p> <p>For licensed supervisors, ensuring compliance with this outcome may require significant resources and effort, particularly in terms of monitoring and assessing the quality of information provided to consumers. The subjective nature of "useful" information raises concerns about regulatory consistency and fairness in assessing compliance.</p>
<p><b>5. What are your views on Outcome 3:</b> Consumers receive fair value for money?</p>	<p>Value for money is not an absolute concept. The guide could acknowledge the work that managed investment funds and licensed supervisors have been undertaking to progressively strengthen best practice.</p> <p>As stated above, it is important that the FMA recognises and clearly states that the outcomes and value 'that matter' can include non-financial outcomes and value. Providing specific examples of this would support the implementation of the guide.</p> <p>There is a risk that the risk-averse behaviour induced by the emphasis on outcomes could stifle market dynamics and limit consumer choice, thereby harming market efficiency and competitiveness. Organisations may become overly cautious in pricing their products and services, fearing regulatory scrutiny and potential penalties for non-compliance.</p> <p>CTA would appreciate clarity on the scope of the value for money outcome. The existing FMA guidance on value for money relates to KiwiSaver and other managed funds. Does the FMA intend to broaden the scope of value for money to all entities it regulates?</p>
<p><b>6. What are your views on Outcome 4:</b> Consumers can trust providers to act in their interests?</p>	<p>This outcome risks rewriting the law in respect of providers' obligations. Appropriately managing conflicts of interest will not always be the same as acting in the consumers' interest.</p> <p>"Trust" is oversimplified in the draft guide to being only about the protection of customer assets and information.</p> <p>We recommend this outcome describes trust more generally and removes specific references to operational resilience and protecting assets and data. This would be more consistent with existing legal duties</p>

	<p>to act in investors' best interests. The licensed supervisors have a particularly relevant role in this respect. For example, the managed investments regime (including KiwiSaver) requires a licensed supervisor, independent of the manager (with significant and separate FMCA obligations to investors) to oversee the manager's compliance with its obligations to its customers. This model enables close monitoring and oversight of MIS managers' conduct and compliance and plays a central role in enhancing consumer trust.</p>
<p><b>7. What are your views on <b>Outcome 5:</b> Consumers receive quality ongoing care?</b></p>	<p>Although organisations may prioritise compliance with regulatory expectations over providing genuinely quality care — leading to a tick-box mentality and superficial compliance measures — the subjective nature of “quality” care raises concerns about regulatory consistency and fairness in assessing compliance.</p> <p>It would be helpful if this outcome could explore what is expected when there is no legal obligation for an ongoing service. For example, is alerting a customer whether and when to seek additional financial advice sufficient?</p>
<p><b>8. What are your views on <b>Outcome 6:</b> Markets are trusted based on their integrity and transparency?</b></p>	<p>We recommend that this outcome should not refer to “trust” because it risks being conflated with the consumer-focused Outcome 4. Perhaps use wording such as “Financial markets operate with integrity and transparency” or as one of the FMCA’s main purposes puts it: financial markets are “fair, efficient, and transparent”. That then distinguishes it from the five consumer outcomes which are principally about the other FMCA main purposes: the confident and informed participation of businesses, investors, and consumers.</p>
<p><b>9. What are your views on <b>Outcome 7:</b> Markets enable sustainable innovation and growth?</b></p>	<p>“Growth” has economic and political implications that go beyond “fair outcomes”. If it is to be used in this Outcome, the word “sustainable” should be moved to directly precede “growth”.</p> <p>“Sustainability” has been given a narrow financial meaning, rather than the contemporary use of the word that extends to having regard to non-financial factors.</p> <p>In the FMCA's purposes, “innovation” and “flexibility” are linked. It would be helpful to include financial market flexibility in this outcome because it underpins the concept of consumer choice that is central to a fair outcome.</p>
<p><b>10. Is anything missing that should be included in the fair outcomes? Please explain.</b></p>	<p>The draft guide should be worded in a non-exhaustive manner so that providers can add other relevant fair-outcome factors as they arise.</p>

<p><b>11.</b> <i>If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?</i></p>	<p>Acting as a licensed supervisor is a financial service. Licensed supervisors have a deep history operating under a statutory purpose to enhance investor confidence in financial markets and retirement villages. So at one level we are already well experienced in working with our clients on good conduct and fair outcomes for their investors. However, the guide provides an opportunity for licensed supervisors to continue to shift the conversation, with both regulator and supervised entities, formally away from “tick box” compliance focused on form and prescription to one where the customer outcome is paramount.</p>
<p><b>12.</b> <i>If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?</i></p>	<p>Licensed supervisors face two challenges if they are to give regulatory compliance a fair outcomes lens. The first is to build confidence that FMA will regard technical non-compliance in the light of fair outcomes. The second is to convey that confidence to managers of FMCA regulated schemes.</p>
<p><b>13.</b> <i>Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?</i></p>	<p>The guide represents a fundamental change. This will be a journey where mistakes will happen. There will need to be mechanisms to work through these mistakes with the FMA.</p> <p>We recommend that the guide refers to the role of supervisors.</p> <p>We recommend that the guide explains how it influences and/or extends the supervision and monitoring approach set out in other FMA guidance, for example Value for Money.</p>

<p><b>14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?</b></p>	<p>In the interests of transparency, some guidance on how FMA will apply a fair outcomes lens to its own actions would be helpful. In particular, an explanation on how the FMA deals with regulated entities that are implementing a fair outcomes approach will be appreciated. Providing specific examples of this would further enhance this guide, particularly given that no alternative to outcomes-focused regulation has been provided in the guide as a source of comparison to current FMA or other existing regulator practice globally.</p>
<p><b>15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?</b></p>	<p>Innovation will only benefit from a fair outcomes approach if FMA expectations are proportionate to the context (size of business, risk etc) and there is clarity and consistency to the interpretation and application of the approach.</p>
<p><b>16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?</b></p>	<p>Not applicable</p>
<p><b>17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?</b></p>	<p>Some positive examples about what already works well could be included as well as specific examples of what will change under this approach from the status quo in practice.</p>
<p><b>18. Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?</b></p>	<p>Fair outcomes and CoFI overlap. For financial service providers to which CoFI does not apply, concise guidance regarding FMA's expectations would be useful.</p>
<p><b>Feedback summary</b> – While our responses above identify several areas that require further consideration and development—especially in relation to the guide’s practical application—CTA and its members generally support a fair outcomes approach. However, to the extent that the approach goes beyond how FMA itself will prioritise its own work and assess regulatory risk, FMA must clarify its expectations of market participants. Those expectations should apply only in the context of existing law and should be imposed only on the basis of a carefully considered cost / benefit evaluation.</p>	
<p><b>Please note:</b> Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>	
<p><b>Thank you for your feedback – we appreciate your time and input.</b></p>	

Feedback form

**Consultation: Fair Outcomes for Consumers and Markets**

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz) with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: 1 March 2024

Number of pages: 6

Name of submitter: [REDACTED]

Company or entity: Responsible Investment Association Australasia (RIAA)

Organisation type: Industry association

Contact name (if different):

Contact email and phone: [REDACTED]

Question number	Response
<p>1. <i>Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.</i></p>	<p>RIAA thanks the Financial Markets Authority (FMA) for the opportunity to provide feedback on the proposed guide to its approach to outcomes-focused regulation.</p> <p>RIAA's response centres around its mission to promote, advocate for, and support approaches to responsible investment that align capital with achieving a healthy and sustainable society, environment, and economy. With over 500 members managing more than NZ\$40 trillion in assets globally, and with a membership base covering over 70% of the professionally managed assets in NZ, RIAA is the largest and most active network of people and organisations engaged in responsible, ethical and impact investing in our region.</p> <p>Every year, RIAA publishes consumer research in New Zealand, partnering with Mindful Money. This submission draws on the findings of the <a href="#">Voices of Aotearoa: Demand for Ethical Investment in New Zealand 2023</a> Report (RIAA's Consumer Research).</p> <p>RIAA <b>welcomes</b> the FMA providing insight into its approach to regulation and focus on demonstrating good conduct. Additionally, we agree that providers of financial products are best placed to efficiently deliver the 7 outcomes and take ownership. This encourages a focus away from a culture of compliance to a focus on how all areas of the organisation function effectively to deliver the outcomes within the individual context of each business.</p>

	<p>While the broad nature of this type of regulation has many benefits to support improved conduct, there is the possibility that this may increase uncertainty among legal and compliance staff who are required to advise management and boards as to their personal and organisational liability. Noting that this approach does not change the laws and consequences attached to the conduct relating to the outcomes, concerns around liability will remain and may impact decision-making. To assist, RIAA <b>recommends</b> that the FMA explain the metrics which may be used to measure the 7 outcomes; that is, how will the financial product providers and the FMA know when an outcome has been achieved? What elements will need to be evident to indicate that an outcome is realised?</p>
<p>2. <i>What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?</i></p>	<p>RIAA <b>supports</b> the proposed fair outcomes which recognises the primacy of consumers in ensuring a properly functioning financial system. Indeed, it is to be expected that where the consumer outcomes are met, the market is likely to be well functioning.</p>
<p>3. <i>What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</i></p>	<p>The needs of consumers change over the course of a lifetime and must adapt to the needs at the point in time. Specifically, RIAA notes that more and more consumers expect investments to be managed responsibly, rising to 74% in 2023.<sup>1</sup> Consumers are not only interested in avoiding harm, but they're also interested in investing for positive impact.<sup>2</sup> This trend is expected to increase with half the population considering switching to invest in ethical/ responsible funds in the next five years. Pa</p> <p>RIAA recommends that the FMA, in recognition of its significance, includes references to responsible investment in this outcome, e.g. "Access refers to the availability of financial products and services that meet diverse consumer needs, including their personal circumstances, preferences, goals, risk tolerance, and values <u>such as for responsible and ethical investing.</u>"</p> <p>RIAA notes that, while "the need for access may be a driver of market innovations", there remains a role for new policy and law reform to ensure consumers are protected and have access to the appropriate products. In this regard, RIAA <b>recommends</b> that the FMA works with other areas of the NZ Government to articulate clear and consistent product</p>

<sup>1</sup> Page 10, Coates, B., Banhalmi-Zakar, Z., Coulson, O., Hegarty, D. 2023, From Values to Riches 2023: Charting consumer demand for responsible investing in Aotearoa New Zealand, Mindful Money, Auckland & Responsible Investment Association Australasia, Melbourne

<sup>2</sup> Page 15, Coates, B., Banhalmi-Zakar, Z., Coulson, O., Hegarty, D. 2023, From Values to Riches 2023: Charting consumer demand for responsible investing in Aotearoa New Zealand, Mindful Money, Auckland & Responsible Investment Association Australasia, Melbourne

	<p>labelling standards to ensure consumers fully understand the appropriateness of the products they can access.</p> <p>RIAA has run the world's longest running certification program for responsible investments. The Responsible Investment <a href="#">Certification Program</a> is the leading initiative for distinguishing quality responsible, ethical and impact investment products and services in Australia and New Zealand. RIAA's certification symbol is used to differentiate quality, true to label responsible investment products which meet the <a href="#">Responsible Investment Standard</a>.</p> <p>RIAA has certified 176 products available to the New Zealand market (116 available in New Zealand only). Crucially, 64% of KiwiSaver funds are certified by RIAA.<sup>3</sup></p> <p>Alongside its partnership with the <a href="#">Centre for Sustainable Finance</a> who is advocating for the NZ sustainable finance strategy and green taxonomy, RIAA looks forward to supporting the NZ government to develop an industry-supported, globally-aligned product labelling framework. While RIAA's certification program has achieved much on a voluntary basis, RIAA <b>submits</b> that, without government endorsement or legislative backing, consistency and comparability will suffer to the detriment of consumers.</p> <p>Noting the importance consumers place on investing responsibly, RIAA <b>submits</b> that financial advice should be explicitly referenced in this outcome, including requiring responsible investment to be included in the necessary New Zealand Certificate in Financial Services (Level 5).</p>
<p><b>4.</b> <i>What are your views on Outcome 2: Consumers receive useful information that aids good decisions?</i></p>	<p>Informed decision making is fundamental to the proper functioning of the financial system and of the market generally. A lack of useful information can risk misaligned investments and, in responsible investment, increase the likelihood of greenwashing.</p> <p>RIAA's Consumer Research found that 44% of people reported not having enough objective information as one of the main barriers to investing in ethical and responsible funds (despite 78% of people wanting to do so). Consumers are also concerned about greenwashing –around half of the population. Consumers are looking for information that is independent, clear, trustworthy and comparable, as well as wanting more transparency. Most New Zealanders want to know what companies are in their investments.</p>

<sup>3</sup> Banhalimi-Zakar, Z., Herd, E., Goodwin, M., Pilawskas, P., Rowe, L., Seawert, A., Srivastava, P., Maniktala, M., Khoo, N., Polidori, M. 2023. Responsible Investment Benchmark Report 2023 New Zealand, Responsible Investment Association Australasia, Melbourne.



	As mentioned <a href="#">above</a> , RIAA <b>recommends</b> the FMA supports this outcome through articulating the need to adhere to a consistent labelling standard, such as the Responsible Investment Standard used by the RIAA Responsible Investment Certification Program.
5. <i>What are your views on Outcome 3: Consumers receive fair value for money?</i>	Transparency of fees and relevant incentive structures will empower consumers to understand the cost of the investments they have chosen and to determine for themselves whether they have received value for money. Expectations around transparency can also help to remove low value products from the market.
6. <i>What are your views on Outcome 4: Consumers can trust providers to act in their interests?</i>	See <a href="#">above</a> in relation to recommendations on financial adviser and qualifications.  See <a href="#">above</a> in relation to recommendations on fees.
7. <i>What are your views on Outcome 5: Consumers receive quality ongoing care?</i>	RIAA's Consumer Research shows that, for responsible investment, a relatively low level of respondents (27%) report that they receive regular information on ethical/responsible investment from their investment provider. Only 39% of these find the information useful.  RIAA <b>agrees</b> with the FMA that consumers need to be afforded fairness after the purchase of the investment product. This may also require consideration of different ways of communication to ensure the information is being received.
8. <i>What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</i>	RIAA <b>encourages</b> the FMA to support strong industry-led initiatives which help industry to achieve the chosen outcomes.  RIAA draws the FMA's attention to the <a href="#">Stewardship Code Aotearoa New Zealand</a> which is co-chaired by RIAA and the Centre for Sustainable Finance. The Code gives institutional investors a clear framework for using their influence to steer the companies they own on critical environmental, social, and corporate governance issues. This is an industry-led code which brings transparency and accountability to the practice of stewardship (also called active ownership).
9. <i>What are your views on Outcome 7: Markets enable sustainable innovation and growth?</i>	RIAA <b>submits</b> that one of the key methods in which this outcome can be achieved is through the FMA supporting the greater adoption of responsible investment. In addition, noting the extent to which NZ institutional investors have signed up to RIAA and its mission (216 as at 1 March 2024), this may also be one of the easiest.  RIAA notes that responsible investment by its nature has a longer-term focus and seeks to drive capital towards purpose – whether that is in growth areas which are beneficial to the

	economy (such as renewable energy) or to support the revitalisation of existing industry to ensure a long-term future.
<b>10.</b> <i>Is anything missing that should be included in the fair outcomes? Please explain.</i>	As detailed above, RIAA recommends the following are included in the fair outcomes: <ul style="list-style-type: none"> <li>• metrics;</li> <li>• inclusion of sustainability/responsible investing;</li> <li>• commitment to ensure consistency and comparability to support the outcomes, through supporting a product labelling regime in NZ, anchored to the industry standard set by RIAA's Responsible Investment Certification Program</li> </ul>
<b>11.</b> <i>If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management, and operations, and how they work together?</i>	N/A
<b>12.</b> <i>If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?</i>	N/A
<b>13.</b> <i>Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?</i>	N/A
<b>14.</b> <i>Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?</i>	N/A
<b>15.</b> <i>If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?</i>	N/A
<b>16.</b> <i>If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?</i>	N/A
<b>17.</b> <i>What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?</i>	As mentioned above, there is clear evidence that consumers are increasingly focused on investing their money responsibly. RIAA suggests specific sustainability examples

	for each outcome, which includes examples of good conduct which has achieved an outcome.
<b>18.</b> <i>Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?</i>	See above. RIAA looks forward to further briefing the FMA and other NZ Government agencies on the Responsible Investment Standard and Certification Program, which is a key process through which consumers are protected from greenwashing in the NZ market.

**Feedback summary**

**Please note:** Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

**Thank you for your feedback – we appreciate your time and input.**

1 March 2024

**Financial Markets Authority**  
Level 2, 1 Grey Street  
Wellington 6140

**By email:** [consultation@fma.govt.nz](mailto:consultation@fma.govt.nz)

[REDACTED]  
[REDACTED]  
[REDACTED]

Cygnus Law Ltd  
Level 12  
17 Albert Street  
Auckland

PO Box 105 973  
Auckland 1143

[cygnuslaw.nz](http://cygnuslaw.nz)

## CONSULTATION: FAIR OUTCOMES FOR CONSUMERS AND MARKETS

---

Thank you for the opportunity to provide submissions on FMA's proposed Fair outcomes for consumers and markets guide. Cygnus Law Limited's submissions are enclosed. Cygnus Law provides legal advice and support to a wide range of businesses in the financial services sector. These submissions are made on Cygnus Law's own behalf. [REDACTED] has over 20 years' experience as a corporate and commercial lawyer.

Yours sincerely  
Cygnus Law Ltd

[REDACTED]

[REDACTED]  
[REDACTED]



## Feedback form

# Consultation: Fair Outcomes for Consumers and Markets

Date: 1 March 2024

Number of pages: 9

Name of submitter: Simon Papa

Company or entity: Cygnus Law Limited

Organisation type: Law Firm

Contact name (if different):

Contact email and phone: [simon@cygnuslaw.nz](mailto:simon@cygnuslaw.nz); 09 309 3228

Question number	Response
<p>1. Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.</p>	<p>The way the outcomes described in the draft guide is not clear. The outcomes are mostly described at a high level of abstraction. Fairness itself is a moral concept and so it is inherently unclear as different people will interpret fairness differently. So we don't consider that the draft guide is correct when it says "We all know what is fair when we see it". This echoes the often quoted legal test espoused by Justice Potter Stewart in the United States Supreme Court in a 1964 judgment about whether a motion picture was "obscene". Justice Stewart said he wouldn't define obscenity and rather stated that "I know it when I see it...". The reason that that part of the judgment is often quoted is that it highlights that "I know it when I see it" falls fundamentally short as a way to regulate conduct. While the FMC Act includes "promote and facilitate the development of fair, efficient, and transparent financial markets" as a purpose, that serves as a high-level principle that is applicable to the regulation of markets as a whole. In contrast, in the draft guide "fairness" is being used as a primary tool to seek to directly influence conduct by financial service providers ("FSPs") across all aspects of their businesses. Efficiency and transparency are barely mentioned in the guide. As we highlight in these submissions, we consider that some of the fair outcomes are likely to result in a reduction in efficiency.</p> <p>One example of a fair outcome in the guide is that "consumers receive fair value for money" (in effect requiring that prices are fair). New Zealand operates a market economy. With some exceptions, markets are left to set prices rather than requiring providers of products or services to set "fair" prices. In practice fairness in pricing is determined by the interplay of market participants and their particular needs, resources and initiative. There is no reason to think that what an FSP thinks is "fair" with respect to prices will be shared by consumers. In fact there's almost always likely to be a divergence of view and markets operate to develop a degree of consensus. This is one example of how "fairness" falls short as a standard to regulate conduct.</p>

	<p>While fairness is applied as a legal standard in various parts of the law, it mostly relates to areas where moral considerations are paramount (e.g. law related to family matters) or is otherwise limited to areas of law where this can be applied in an objective way. An example of the use of a fairness standard in law is the unfair contract term (“UCT”) provisions in the Fair Trading Act. The Fair Trading Act excludes from the scope of the UCT law the core subject matter of a contract, and the upfront price. The reason for that is that those matters were assumed to be best left to the markets, not the law or regulators. However, the guide proposes regulating both those areas (via fair outcomes 1 and 3) by reference to vague fairness considerations. In our view the concept of “fairness” is inherently unsuited to address those matters. Any further elucidation of what fairness means in those areas is unlikely to resolve the central problem, which is that “fairness” falls fundamentally short as a standard to regulate conduct in those areas. For example the following clarification provides no further effective guidance- “Value needs to be considered from many dimensions.... Different approaches to different groups can be justified but they must be fair.” We are not going to propose improvements to such descriptions because we do not consider that the fair outcomes proposed are linked to existing laws (in most respects), and because we don’t consider they are amenable to more sound clarification for the reasons noted.</p> <p>For those reasons and others we don’t consider FMA has evidenced that some of the fair outcomes will, in fact, achieve better outcomes for consumers, FSPs or markets.</p>
<p>2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?</p>	<p>We don’t agree that fair outcomes are an appropriate tool in some areas to guide FMA’s approach to its role. In our view the guide is seeking to impose the fair outcomes as <i>de facto</i> legal standards. This is demonstrated in the following statements in the guide:</p> <ul style="list-style-type: none"> <li>• “Our monitoring activities will focus on whether we are seeing these outcomes in the market. This will inform our conversations with providers to help them understand whether they are on track. We plan to communicate to firms their level of conduct maturity on an ongoing basis, so they know if they have more work to do.”</li> <li>• “These outcomes will be the starting point for decision-making at the FMA. In particular, for our supervisory approach, we will use them as the basis for how we frame our discussions with and assessments of providers.”</li> <li>• “To support the delivery of this regulatory approach, we will make use of our full range of tools, including engagement, influence and advocacy. We will be proportionate and deliberate, which will be reflected in our supervisory and enforcement culture. Where we see unfair outcomes, we will consider the best use of our toolkit to respond.”</li> <li>• “Our monitoring activities will focus on whether we are seeing these outcomes in the market. This will inform our conversations with providers to help them understand whether they are on track. We plan to communicate to firms their level of conduct maturity on an ongoing basis, so they know if they have more work to do.”</li> </ul>

Those statements highlight that FMA is proposing to orient its whole operation to give effect to the fair outcomes including, as noted, via “These outcomes will be the starting point for decision-making at the FMA”, “how we frame our discussions with and assessments of providers” and “Our monitoring activities will focus on whether we are seeing these outcomes in the market”. However, as we note below, a number of fair outcomes are not linked to existing laws regulated by FMA.

A core part of New Zealand’s constitution is the Bill of Rights 1688. A key part of the Bill of Rights is in the very first section. This prohibits the King from passing laws without the consent of Parliament. This underpins NZ’s parliamentary system. In modern terms that means that the Government cannot pass laws without the consent of parliament. FMA is part of the State and so is subject to that constitutional provision. However FMA is in our view, in effect, attempting to create laws via the fair outcomes that are not based on existing laws or subordinate powers to make law. While we accept that the State can do things without express authorisation, including setting aspirational goals not supported by law, we consider that it is unconstitutional to use the full power of the State to give effect to standards that are not laws or implemented via statutory powers. FMA is proposing to give effect to the fair outcomes using its full resources and focus as noted above. The guide indicates that FMA plans to use enhanced monitoring and engagement as a means to induce particular conduct in individuals and organisations for purposes ancillary to compliance with, and enforcement of, actual laws. While this approach is common in some countries, in our view it would be illegal to do so in New Zealand.

FMA in other statements claims that the proposed fair outcomes are a “lens” that evidence compliance with law, so seeking to link the fair outcomes to actual law. However, as we note below, some of the fair outcomes have little, if any link, to existing law. We submit that the language of the guide needs to be changed to make it clear that the fair outcomes are aspirational goals and not mandatory requirements, where they are not linked to existing law. If the outcomes are linked to existing laws then the relevant laws should be stated in the guide, to support FSPs to much better understand the function of the fair outcomes.

In our view seeking to regulate financial markets through pervasive “fairness” standards undermines the rule of law, which is another underlying principle of New Zealand’s constitution. The rule of law not only requires that laws are passed appropriately (i.e. by approval of Parliament, directly or indirectly) but that they are clear and can be understood in advance. Just as (to quote Monty Python) “Strange women lying in ponds distributing swords is no basis for a system of government”, “I know it when I see it” is no basis for regulating financial markets. This substantially undermines the rule of law since it is inherently subjective; what “fairness” means will depend substantially on the person who is assessing its meaning at the time. Again this supports making the fair outcomes aspirational goals, if they are not clearly supported by, and referenced to, existing law.

	<p>We don't consider that FMA has validated how an outcomes-based approach will in fact achieve the stated objectives at reasonable cost. In the early 1990s New Zealand building law (via the Building Act 1991) was reformulated to be outcomes-based. That played a very significant part in causing the leaky building crisis that arose during the 1990s. That's not to suggest that an outcomes-based approach to regulation is not appropriate in some circumstances. Rather we are suggesting that it needs to be validated to confirm it is an appropriate approach, not assumed to be appropriate.</p>
<p>3. What are your views on <i>Outcome 1: Consumers have access to appropriate products and services that meet their needs?</i></p>	<p>We do not consider that the "access" section described in this fair outcome is appropriate. No part of financial markets law mandates what products and services should be provided by FSPs. Rather the law regulates financial products and services that are actually offered to, or purchased by, consumers. This is consistent with the Fair Trading Act's unfair contract term provisions. The Act excludes the core subject matter of the contract from the ambit of those provisions. The fact that the law does not impose an obligation to provide particular products and services to particular categories of people reflects that New Zealand operates a market economy. That is based on an understanding that there is no obvious reason to think that legislators and regulators are generally better than market participants at efficiently allocating resources within markets. In essence the "access" section of this fair outcome is seeking to replace the market as a tool for allocating resources. We do not consider that FMA is configured to regulate the financial products and services that should be provided or that it is appropriate to attempt to do so. FMA states in the guide that "Success will come from building the FMA's understanding of consumers' perspectives and experiences across different demographics." That is fine but we don't consider it will be appropriate for FMA to use that information to, as a key focus, seek to influence what financial products and services the market actually provides.</p> <p>Also FMA has provided no validation of why this fair outcome is required. The draft guide states that "Māori communities were more likely to buy into riskier investments such as cryptocurrency, and may have lower trust in the banking sector. This indicates that more needs to be done to improve access to appropriate products and ensure our financial system is accommodating of a te ao Māori worldview to encourage participation." We fully agree that that is a desirable goal. However the <i>Consumer Experience with the Financial Sector Survey 2022</i> research report, which is the basis for that statement, in no way validates that issues of poor financial decision making and poor financial outcomes arise because of failures in the conduct of FSPs. To state the obvious, correlation is not causation. It's likely that poor financial outcomes are largely a result of various factors outside of FMA's ambit including ingrained inequality. These are not matters that FMA can reasonably influence. We also suggest that FMA reconsider singling out particular groups as an example with respect to purchase of riskier investments. We appreciate that FMA does so with good intent. But the research report found that various groups, including Pacific Peoples and Indians, were equally likely to acquire such risky products. If FMA is seeking to improve confidence of such groups in the financial markets it</p>



	<p>is unhelpful, in our view, to selectively highlight specific groups when they are not obviously making worse financial decisions than others.</p> <p>We consider that the “appropriateness” element of the standard is generally suitable. However, we don’t consider the following is appropriate as a general requirement- “There is also a consumer protection element, for example, having checks and balances to prevent consumers from accessing products and services that are not suitable for them.” It’s not at all clear how that would be applied in practice. It appears to suggest that FSPs will have to pro-actively check suitability, which would likely require FSPs to provide financial advice. We don’t consider that is appropriate because it will often not be feasible for FSPs to pro-actively vet purchasers and it would likely be inefficient to do so in some cases. We suggest that it is better to focus on design of products and how they are described and marketed. Existing fair dealing law already provides a powerful tool to regulate such matters.</p>
<p>4. What are your views on <i>Outcome 2: Consumers receive useful information that aids good decisions?</i></p>	<p>We don’t have any comments on this fair outcome and consider it is generally appropriate.</p>
<p>5. What are your views on <i>Outcome 3: Consumers receive fair value for money?</i></p>	<p>We can see no basis whatsoever for that fair outcome except in relation to misleading and deceptive pricing and KiwiSaver fees. It essentially seeks to mandate that FSPs set “fair prices”. The fact that the guide attempts to avoid that term via equivalent concepts such as “equity in exchange of value” does not change the essence of what FMA is seeking to achieve. In most areas of law that FMA regulates price setting is not a matter within FMA’s ambit. There are limited exceptions including in the KiwiSaver Act, which prohibits “a fee that is unreasonable”. In our view FMA has neither the mandate nor the expertise to seek to regulate prices except in limited areas.</p> <p>Price setting and price discovery are a core function of markets. History is littered with examples of misguided and counterproductive attempts to regulate market prices. FMA has provided no cogent validation as to why it is necessary for FMA to get involved in the setting of prices and how that would actually lead to better market outcomes. The Commerce Commission has powers to regulate prices in some areas and to undertake market studies to identify potential market failures. As at the date of this submission the Commerce Commission is carrying out a market study with respect to retail banking in New Zealand to identify reasons for the consistently high profits of the large banks. Again we see no basis for FMA to replicate elements of the Commerce Commission’s functions or to think that FMA has the resources and level of expertise required to do so.</p>
<p>6. What are your views on <i>Outcome 4: Consumers can trust providers to act in their interests?</i></p>	<p>In our view it appears that the guide supports an assumption that markets primarily consist of FSPs and the regulator. As we note below, the guide does not properly acknowledge the existence and role of other market participants including financial advice providers. That does not enhance the integrity of markets but rather undermines integrity. Markets are complex systems with many interacting parts. By</p>

	<p>failing to properly acknowledge that the guide will weaken markets, if implemented as proposed.</p> <p>In the case of financial markets, information asymmetry (that is, one party to a transaction has more information than another) is often cited as a key example of a market failure justifying regulation. Markets themselves develop solutions (though imperfect) to address such asymmetry. An obvious example of such a solution is the independent financial advice sector, which acts as an intermediary between consumers and FSPs. The financial advice sector is now fully regulated and provides many consumers with advice and support with respect to acquiring and managing financial advice products. However, the draft guide doesn't even mention financial advisers except to highlight a 2018 report that criticised the conduct of a relatively small group of financial advisers with respect to advice on replacement life insurance. Rather, the draft guide promotes FSPs as the predominant conduit for the provision of information and advice to consumers. We consider it crucial that the guide acknowledges the important role the financial advice sector plays in financial markets and has as a stated goal of supporting the growth of the sector and the ability of consumers to get access to financial advice.</p> <p>The guide appears to reflect a view that consumers are passive recipients of financial products and services and cannot be trusted to make rational decisions for themselves, as exemplified in this fair outcome. The outcome does not focus on consumers but rather the activities of FSPs. None of the fair outcomes provide for or acknowledge the core role of consumers in markets. Our view is that this fair outcome should be focused on consumers. It should state as a goal that consumers have access to advice, information and education that helps to improve their financial literacy, decision making and financial outcomes. This will also help to address an issue the guide ignores, which is moral hazard. There are many studies that show that increasing safety of products and services (cars being one example) lead to more hazardous behaviour by the users of those products and services. By focusing excessively on FSPs the guide risks taking away consumer agency and empowerment with the result that moral hazard is increased.</p>
7. What are your views on <i>Outcome 5: Consumers receive quality ongoing care?</i>	We don't have any comments on this fair outcome and consider it is generally appropriate.
8. What are your views on <i>Outcome 6: Markets are trusted based on their integrity and transparency?</i>	We don't have any comments on this fair outcome and consider it is generally appropriate.
9. What are your views on <i>Outcome 7: Markets enable sustainable innovation and growth?</i>	We consider that this fair outcome is largely appropriate. We query why the standard focuses on "sustainable innovation". The further description of that provides no further helpful guidance as to what is intended. Our view is that FMA should place greater focus on innovation.

	<p>We consider that mandating fair outcomes in the manner proposed is not conducive to supporting or encouraging innovation. FMA states that innovation “risks excluding those who do not or cannot use certain forms of technology”. We agree that is an issue. This relates to the first fair outcome, which would involve FMA regulating what financial products and services are provided in the market. Again, we see no basis for FMA to involve itself in regulating what financial products services should be provided or their means of delivery. This is another example of where “fairness” simply doesn’t work as a standard to regulate conduct. There are various arguments for and against innovation and their effects on some parts of society but these are very complex matters with no clear right or wrong answers.</p> <p>The imposition of regulation often (but not always) stifles innovation rather than increasing it. The fair outcomes guide is, in effect, another form of regulation. It will further burden FSPs, who have faced a wave of regulation in recent years. Multiple FSPs have stated new regulations have taken up resources and management time that would otherwise have been focused on other areas including innovation. Also, additional regulation often makes it more difficult for new entrants (who are often more innovative) to enter markets. We are not suggesting that existing regulations are not appropriate (most are) or that new regulations should not be introduced to address specific issues. But the point comes where ever increasing regulation, no matter how well-intentioned, starts to impose costs (including through the stifling of innovation) that outweigh the value of any benefits the regulation achieves. The guide, in seeking to impose a fundamentally new way for FSPs to consider compliance, will impose very significant costs on FSPs including through requirements to comply with abstruse requirements such as “take ownership of the outcomes and consider how their leadership, management, governance and operations all work together to deliver them in a way that is most appropriate and effective within their business context”. It’s easy for FMA to write these words but it’s not at all clear what they mean in practice. By imposing abstract standards on thousands of FSPs, FMA will be imposing very significant costs on them with no evidence that there will be commensurate benefits. FMA has not provided any form of cost/benefit analysis to validate its approach in the guide, which we’d usually expect to see in any initiative to develop <i>de facto</i> legal standards of similar breadth and ambition. FMA provides no evidence to support its very ambitious statement that “outcomes-focused approach will encourage more engagement and dynamism in our financial markets – supporting an economy that New Zealanders have confidence to invest in, and is attractive to overseas capital, new ideas, and innovation. A focus on the fair outcomes and new ways of thinking required to support them should create more choice for consumers, and more competition and innovation in our financial markets, products &amp; services.” We consider that there’s a very real risk that this initiative will impose costs on thousands of FSPs, many of which are already highly regulated, that will exceed the value of resulting benefits to consumers. Those costs will ultimately be borne by consumers.</p>
10. Is anything missing that should be included in	See the answer to question 2 above.

<p>the fair outcomes? Please explain.</p>	
<p>11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?</p>	<p>NA</p>
<p>12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?</p>	<p>NA</p>
<p>13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?</p>	<p>See the answer to question 2 above.</p>
<p><b>Feedback summary</b></p> <p>We don't agree that fair outcomes are an appropriate tool in some areas to guide FMA's approach to its role. In our view the guide is seeking to impose the fair outcomes as <i>de facto</i> legal standards. We don't consider that is permitted by law. We submit that the language of the guide needs to be changed to make it clear that the fair outcomes are aspirational goals and not mandatory requirements, where they are not linked to existing law. If the outcomes are linked to existing laws then the relevant laws should be stated in the guide, to support FSPs to much better understand the function of the fair outcomes.</p> <p>We do not consider that the "access" section described in the "Consumers have access to appropriate products and services that meet their needs" fair standard is appropriate. This seeks to give FMA the ability to intervene in what products and services FSPs provide. However, no part of financial markets law mandates what products and services should be provided by FSPs. Rather the law regulates financial products and services that are actually offered to, or purchased by, consumers. We do not consider that FMA is configured to regulate the financial products and services that should be provided or that it is appropriate to attempt to do so.</p> <p>We can see no basis whatsoever for the "Consumers receive fair value for money" fair outcome except in relation to misleading and deceptive pricing and KiwiSaver fees. It essentially seeks to mandate that FSPs set "fair prices". The fact that the guide attempts to avoid that term via equivalent concepts such as "equity in exchange of value" does not change the essence of what FMA is seeking to achieve. In</p>	

most areas of law that FMA regulates price setting is not a matter within FMA's ambit. Price setting and price discovery are a core function of markets. History is littered with examples of misguided and counterproductive attempts to regulate market prices. FMA has provided no cogent validation as to why it is necessary for FMA to get involved in the setting of prices and how that would actually lead to better market outcomes.

The guide does not properly acknowledge the existence and role of other market participants including financial advice providers. By failing to properly acknowledge that the guide will weaken markets, if implemented as proposed. We consider it crucial that the guide acknowledges the important role the financial advice sector plays in financial markets and has as a stated goal of supporting the growth of the sector and the ability of consumers to get access to financial advice. Our view is that the "Consumers can trust providers to act in their interests" fair outcome should be focused on consumers. It should state as a goal that consumers have access to advice, information and education that helps to improve their financial literacy, decision making and financial outcomes.

We consider that mandating fair outcomes in the manner proposed is not conducive to supporting or encouraging innovation. The imposition of regulation often (but not always) stifles innovation rather than increasing it. The fair outcomes guide is, in effect, another form of regulation. It will further burden FSPs, who have faced a wave of regulation in recent years. Multiple FSPs have stated new regulations have taken up resources and management time that would otherwise have been focused on other areas including innovation.

FMA has not provided any form of cost/benefit analysis to validate its approach in the guide, which we'd usually expect to see in any initiative to develop *de facto* legal standards of similar breadth and ambition. We consider that there's a very real risk that this initiative will impose costs on thousands of FSPs, many of which are already highly regulated, that will exceed the value of resulting benefits to consumers. Those costs will ultimately be borne by consumers.

To: The Financial Markets  
Authority (FMA) Te Mana  
Tātai Hokohoko

On: Proposed fair outcomes for consumers and markets

1/03/2024

## Introduction

This submission is from Chapman Tripp.

## About Chapman Tripp

1. Chapman Tripp is a leading law firm with offices in Auckland, Wellington and Christchurch. Our firm acts for a range of market participants on most of legislation in Schedule 1 of the Financial Markets Authority Act 2011 (*FMAA*), across our financial services regulation and funds management, equity capital markets, debt capital markets, finance, corporate governance, litigation specialist practice groups.
2. Thank you for the opportunity to submit on Te Mana Tātai Hokohoko or the Financial Market Authority's (*FMA*) consultation on the Proposed fair outcomes for consumers and markets dated November 2023 (the *Consultation Paper*).
3. Our submission does not purport to represent the views of our clients.

## Introduction

4. We support FMA's transparency of its priorities and objectives when undertaking its role. We also support the FMA's desire to achieve measurable improvements for New Zealanders, by embedding a regulatory approach that puts outcomes for consumers and markets at the heart of its work.
5. However, in our view, as it is currently drafted, the Guide to outcomes focused regulation (the *Draft Guide*) would impose significant additional compliance burdens on the financial services industry without clear legislative authority, because the regulatory expectations proposed in the draft Guide are not always supported by corresponding requirements of primary or secondary legislation.
6. Some of the Draft Guide rationale for taking regulatory intervention could increase the risk of successful judicial review against FMA's decision making, whereas closer alignment with statutory criteria may avoid that outcome, and prevent undermining confidence in FMA as an effective enforcement body.
7. Having an 'outcomes-based' focus would not, in itself, necessarily lead to additional compliance burdens or potential judicial review. A purpose-based approach, for example, can often enhance the effectiveness of the law, and support the development of fair, efficient and transparent financial markets. Enforcing current laws solely when fair outcomes are not achieved would be consistent with a 'purpose-based' approach which is commonly adopted when interpreting statutory obligations and commonly touted as giving effect to the will of Parliament.
8. The 'public interest test' contained in the Solicitor-General Prosecution Guidelines likewise promotes fair outcomes through ensuring there is a demonstrative public interest when prosecuting breaches of the law.
9. However, additional compliance burdens, confusion and uncertainty comes when there is a misalignment of the targeted outcomes and the statutory obligations on

which they need to be based. Without an underpinning statutory base, some of the Draft Guide lacks the authority of Parliament, and risks being unenforceable, or amendable to judicial review, for being contrary to the Constitutional principle of the separation of powers (as embodied in *Fitzgerald v Muldoon* [1976] 2 NZLR 615). Only Parliament can determine the law, and where Parliament devolves power to the executive arms of Government under a delegated authority, there are limits on the exercise of that power, which are enforced by the Courts.

10. Accordingly, we suggest that the Draft Guide should clearly state that the 'fair outcomes' approach will be applied to filter FMA's enforcement decisions, and not as additional matters for financial market participants to ensure are achieved on top of the compliant behaviours required by law.
11. We note that when the Ministry for Economic Development, Innovation and Employment (*MBIE*) embarked on consultation in June 2010 on the securities law review (which ultimately resulted in the Financial Markets Conduct Act 2013 (*FMCA*)), MBIE specifically sought comment on whether New Zealand should adopt a 'treating customers fairly' overlay along the lines of the United Kingdom and Singapore approach. That overlay was not supported by consultation, and ultimately did not feature in the FMCA as enacted. We would be concerned if, contrary to that direction, FMA should try to introduce such an imprecise notion through its guidance, given the rejection of it as part of the 2010 – 2013 statutory reform process.
12. We instead prefer an approach that seeks to provide certainty on what the law is and which promotes innovation and flexibility in the financial markets.
13. Positively, there are currently statements in the Draft Guide that the desired outcomes are not rules (and do not change existing obligations) and some outcomes would naturally follow from meeting current legal obligations (as demonstrated by some of the examples). However, in contrast, other outcomes have no clear statutory basis and there are statements which indicate that the FMA is going to actively hold financial institutions accountable for fair outcome failures through 'robust conversations' and taking 'enforcement actions, where appropriate', when the FMA sees 'unfair practices'. This apparent inconsistency leads to debate and uncertainty as to the FMA's intent.
14. We suggest that FMA;
  - a. **clarifies the scope of each outcome** to ensure that it does not impose additional obligations on providers where there is no statutory basis,
  - b. **provides examples of what firms can do to meet FMA's expectations** (in respect of each outcome). If implemented, we also consider that the Draft Guide should identify when compliance with existing legislative requirement is sufficient to ensure delivery fair outcomes;
  - c. **clarifies which providers are legally required to provide fair outcomes and on which legal requirement the outcome is based.** In many cases, a fair outcome is supported by a legislative basis in at least a sector of the market (for example, KiwiSaver schemes have reasonable fees requirements, but these requirements do not apply universally). Likewise



different requirements apply only to financial advisers, insurers and other providers, but the Draft Guide does not distinguish between providers, causing confusions when it purports to extrapolate targeted laws across all financial service sectors; and

- d. **consider finalising the Draft Guide after the CoFI regime is properly implemented.** The legislative landscape for financial service providers is currently undergoing significant changes (in particular, the implementation of the CoFI Act regime). In our view, FMA should consider publishing the Draft Guide after those changes are more thoroughly embedded, and aligning the fair outcomes approach with CoFI's fair conduct obligations. This would ease the regulatory burden on those financial institutions and allow the FMA to justify the proposed outcomes approach on the current laws.

15. The feedback form with our full response to FMA's consultation questions is set out in the Schedule attached below.

## Schedule – Feedback Form

Feedback form	
Consultation: Fair Outcomes for Consumers and Markets	
<p>Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at <a href="mailto:consultation@fma.govt.nz">consultation@fma.govt.nz</a> with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. <b>Submissions close on 1 March 2024.</b></p>	
Date: <b>1 March 2024</b>	Number of pages: <b>7</b>
Name of submitter: <b>Chapman Tripp</b>	
Company or entity: <b>Chapman Tripp</b>	
Organisation type: <b>Law firm</b>	
Contact name (if different): <b>N/A</b>	
Contact email and phone: <b>[REDACTED]</b>	
Question number	Response
<p><b>1. <i>Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.</i></b></p>	<p>In our view, there is scope for the Draft Guide to be improved and provide more clarity on how the outcomes-focused approach will be reflected in FMA's work.</p> <p>The Draft Guide sets out the context of "outcomes-focused" regulation at the start and discusses what the approach means for FMA at the end.</p> <p>The primary source of confusion which needs to be addressed is that the outcomes-focused approach (and Draft Guide) appears to impose some rules and obligations which do not have a statutory foundation. Confusingly, it states</p> <ul style="list-style-type: none"> <li>• on page 1, 3 and 5, that the outcomes are not intended to be rules, however</li> <li>• the outcomes-focused approach does change existing obligations (and potentially imposes new ones) by introducing a new layer of conduct expectations. On page 13, FMA states that the approach will influence monitoring and supervision as well as enforcement. FMA also expects to engage in dialogue with firms to measure and assess delivery of these outcomes. It is unclear how these outcomes could be measured and delivered without imposing further compliance obligations on firms. We discuss this further in Q2 below.</li> </ul>

	<p>From a legal perspective, we also note that this section also suggests that the outcomes will become the “starting point” for decision making. This approach potentially introduces conflicts with the existing regulatory settings (further discussed in Q13, 14 and 15 below).</p>
<p><b>2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?</b></p>	<p>Our views on the specific outcomes are discussed in more detail below.</p> <p>In general, we consider that (in its current form) the proposed fair outcomes will be detrimental to compliant providers because it proposes new and ambiguous compliance burdens. The proposed fair outcomes will unlikely deliver material benefits (beyond what is already delivered by legislation).</p> <p>The outcomes themselves have been drafted using subjective language (and standards). While we acknowledge that the Draft Guide states creating new compliance obligations is not intended, FMA has indicated that providers are expected to “demonstrate ownership and delivery of the fair outcomes”. This means that firms will need to be prepared to demonstrate to FMA how it is achieving those outcomes (at an individual level), which may require more than demonstrating the providers compliance with current law. We discuss this in further detail in Q11.</p> <p>The outcomes have also been drafted in a manner that partially refers to existing legal obligations and regulatory terminology. This creates a partial overlap which introduces a degree of ambiguity (and complexity) in how those obligations should be interpreted. We discuss this in further detail in Q12.</p>
<p><b>3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</b></p>	<p>Outcome 1 introduces two new concepts of “access” and “appropriateness” of products and services. While these two words may have a basis in FMA’s general objectives and functions (as well as some specific purposes, for example, “availability” of financial advice under section 431B of the FMCA) these concepts will likely introduce uncertainty for providers as their meaning in individual providers contexts is illusive. In particular;</p> <ul style="list-style-type: none"> <li>individual firms have limited influence over products and services available to consumers in the wider market (i.e., outside of the firm’s own offerings). It is unclear what FMA’s expectations for individual firms are (in respect of Outcome 1), especially in relation to their expectations of</li> </ul>

	<p>FMA’s monitoring and enforcement of Outcome 1, and</p> <ul style="list-style-type: none"> <li>• “access” and “appropriateness” may not always be achievable. For example, with legacy products, providers may be forced to decide between “access” and “appropriateness”.</li> </ul> <p>Outcome 1 also does not acknowledge commercial limitations on providers (and their inability to achieve market outcomes).</p>
<p><b>4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?</b></p>	<p>Outcome 2 overlaps with existing disclosure requirements. There is a risk that this outcome would impose additional disclosure obligations (or prohibitions) where there is no specific legal requirement for certain firms.</p> <p>For example, under the CoFI Act, financial institutions will be required (specifically) to assist consumers to make informed decisions (under section 446C of the FMCA). Outcome 2, in effect, introduces another “similar” requirement which partially overlaps with the section 446C requirement (and which could apply to non-financial institutions too).</p> <p>In such cases, it will be useful for FMA to provide examples of when compliance with a regulatory requirement would meet FMA’s expectations for the outcome. We discuss this further below in Q17.</p>
<p><b>5. What are your views on Outcome 3: Consumers receive fair value for money?</b></p>	<p>Outcome 3 formalises FMA’s 2021 “guidance for manage fund fees and value for money” and 2022 “Value for Money Industry Report” and expands this principle to the wider financial services sector.</p> <p>From a legal perspective, this is a significant imposition of a regulatory obligation that previously applied only to KiwiSaver schemes under the KiwiSaver Act 2006.</p> <p>In terms of the monitoring of Outcome 3, FMA should consider the risk of a significant regulatory burden and capacity (both for providers and the FMA) discussed in the 2022 “Value for Money Industry Report”.</p>
<p><b>6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?</b></p>	<p>Outcome 4 overlaps with existing duties relating to customer interests, and potentially expands the requirement to new firms (where there is presently no specific legal basis).</p> <p>For example, financial advice providers have duty to give priority to client’s interest under section 431K of the FMCA. Outcome 4 adds an additional layer to this existing duty creating a “partial” overlap (resulting</p>

	<p>in ambiguity and potentially requiring financial advice providers to “update” their compliance plans).</p> <p>Outcome 4 also introduces the concept of a “trusted provider” which refers to the provider’s actions to safeguard its consumers’ assets and data, and be operationally resilient. Again, firms will have existing obligations in terms of cyber resilience (for example, under the Standard Conditions for financial advice providers). Since Outcome 4 mixes this concept with the concept of “acting in the consumer’s interests”, this potentially expands the definition of “interests” in respect of existing obligations (such as section 431K of the FMCA identified above).</p> <p>As mentioned for Outcome 2, it would be beneficial for firms to understand when compliance with a legislative requirement would satisfy FMA’s expectations for the outcome (discussed further below in Question 17).</p>
<p><b>7. What are your views on Outcome 5: Consumers receive quality ongoing care?</b></p>	<p>Outcome 5 does not adequately reflect the commercial factors underlying the dichotomy between providers and consumers, as well as the existing Consumer Guarantees Act 1993 regime (which is not administered by the FMA).</p> <p>Ongoing care, including the quality of such care, is generally derived from the contractual terms between the provider and consumer. Drivers include pricing of the service / product, but also includes more fundamental factors such as the nature of the product / services.</p> <p>The term “quality” is also not defined and adds an additional layer of conduct expectations (for example, in relation to “complaints”).</p>
<p><b>8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</b></p>	<p>It is not entirely clear what the expectations are of individual providers under Outcome 6.</p> <p>Based on our understanding, “integrity and transparency” can refer to (among other matters) an individual firms’ governance arrangement (i.e., via the reference to the RBNZ and FMA Governance Thematic Report published in 2023). If so, how FMA interprets the term “trusted” could become very significant and lacks precision. Trust is not easily earned and depends heavily on the subjective reaction of the consumer.</p> <p>There is also some potential overlap with the “trusted provider” concept (intentional or otherwise) in Outcome 4 when considering how this outcome might apply to an individual providers.</p>

<p><b>9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?</b></p>	<p>Again, it is unclear how this will be monitored and what the expectations are of individual providers.</p> <p>As discussed in Q3, individual providers will have limited ability influence whether the market itself is enabling sustainable innovation and growth.</p>
<p><b>10. Is anything missing that should be included in the fair outcomes? Please explain</b></p>	<p>As discussed above, what is missing in each of the outcomes is clear acknowledgement of the basis in existing legislative regime for the seven outcomes.</p> <p>While some outcomes may refer to (or use similar language) to existing legal requirements, there are no examples of when compliance with existing legal obligations would meet FMA's expectations under each outcome.</p> <p>Instead, this creates a "partial" overlap with existing requirements which make interpretation of those requirements more complex and introduces incrementally additional compliance requirements.</p> <p>If FMA considers that an outcome can never be reached by compliance with the existing legal obligation alone, this may also indicate that the outcome is imposing a new rule or requirement.</p>
<p><b>11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?</b></p>	<p>Chapman Tripp is not a provider of financial products or service, however we wish to respond to this question.</p> <p>As noted above, each of the outcomes rely on subjective terms and concepts. This means that, in effect, individual providers would need to "argue" how it is demonstrating ownership and delivery of the fair outcomes. This also means that demonstrating ownership and delivery of the outcomes would require significant investment in compliance processes (and that information about non-achievement those outcomes is recorded by the provider and remedial steps be taken). This is a significant issue for smaller firms, as well as larger financial institutions currently undertaking large regulatory change programmes (in response to the CoFI Act).</p> <p>Unfortunately, "fairness" is an imprecise notion, with scope for considerably subjectivity and different application even amongst a class of investors in the same product, depending on their different characteristics. By contrast, legislated minimum standards set some baseline conduct expectations that the FMA can legitimately seek to uphold.</p> <p>Use of subjective terms and concepts will also need to be applied to existing compliance requirements,</p>

	<p>which adds an additional layer of complexity (discussed below at Q12).</p> <p>If implemented, we consider that the Draft Guide should provide clarification on when compliance with existing legislative requirement should be sufficient to demonstrate ownership and delivery of the fair outcomes.</p>
<p><b>12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?</b></p>	<p>Chapman Tripp is not a provider of financial products or service, however we wish to respond to this question.</p> <p>The outcomes have been drafted in a manner which partially refers to existing legal obligations and shares similar terminology. This partial overlap introduces ambiguity (and potential misalignment) in how those obligations should be interpreted. For some firms, the outcome may even impose additional obligations where there is no specific legal requirement.</p> <p>For example, re-using the concept of “fair” may create potential overlap (and expand) existing concepts of fairness (for example, under the “fair conduct principle” in the CoFI Act and the Code Standards for financial advice providers) to all regulated firms.</p> <p>In practice, this means that some firms which comply with the requirements (prescribed in legislation) might find itself falling short of FMA’s expectations in terms of delivering the required fair outcomes.</p>
<p><b>13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?</b></p>	<p>While an outcomes-based approach might be a useful factor for the FMA when reviewing the overall effectiveness of its supervision and monitoring approach, it should not be the starting point of decision-making as described on page 13 of the Draft Guide.</p> <p>The starting point for FMA’s regulatory approach should be the legislative regime itself. This includes the FMA’s use of any legal powers (for monitoring, supervision and enforcement).</p>
<p><b>14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?</b></p>	<p>Our response to Q13 above (in relation to monitoring and supervision) also applies to Q14 (in relation to FMA’s enforcement activities).</p> <p>The thresholds for when misconduct (requiring enforcement action) occurs is prescribed in the legislative regime. Whether or not a breach has occurred should first be determined by the legislative regime itself (interpreted in accordance with established statutory interpretation principles), before</p>

	any purposive or “fair outcomes” based enforcement filter is applied.
<b>15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?</b>	<p>Chapman Tripp is not a provider of financial products or service, however we wish to respond to this question.</p> <p>In our view, the Draft Guide (in effect) adds an additional layer of conduct expectations which further complicates the existing financial markets conduct regulations. The increased compliance burden will likely reduce the incentive for innovation.</p>
<b>16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?</b>	Chapman Tripp is not a consumer group.
<b>17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?</b>	<p>The examples provided in relation to each outcome generally focus on “what <b>not</b> to do” (i.e., the negative), despite the outcomes themselves being framed almost entirely on “what to do” (i.e., the positive). This approach creates uncertainty.</p> <p>We suggest that examples of “what to do” (in respect of each outcome) are prepared and given primacy. This will better support the delivery of the outcomes (rather than avoid “non-delivery”).</p> <p>In particular, examples of when compliance of existing regulatory requirements would help individual providers demonstrate ownership and delivery of fair outcomes.</p>
<b>18. Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?</b>	<p>As stated above in our cover letter, the FMA should;</p> <ul style="list-style-type: none"> <li>clarify the scope of each outcome to ensure that it does impose additional obligations on firms where there is no legal basis,</li> <li>provide examples of what firms can do to meet FMA’s expectations (in respect of each outcome). If implemented, we consider that the Draft Guide should provide clarification on when compliance with existing legislative requirement is sufficient to demonstrate ownership and delivery of the fair outcomes, and</li> <li>consider finalising the Draft Guide after the CoFI regime is properly implemented. This would ease the regulatory burden on those financial institutions (and the firms it interacts with) and allow the FMA to base its objectives with a broader current legal basis.</li> </ul>



**Feedback summary** – *if you wish to highlight anything in particular*

**Please note:** Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

**Thank you for your feedback – we appreciate your time and input.**



[www.chapmantripp.com](http://www.chapmantripp.com)