

March 1, 2024

Attention: Matthew Sabourin

Head of Intervention Design and Regulatory Policy

Sent by email: consultation@fma.govt.nz

Fair Outcomes for Consumers and Markets Consultation: Submission by Christians Against Poverty

Thank you for the opportunity to make a submission on this Fair Outcomes consultation.

CAP has been providing specialist debt solutions advice in Aotearoa for over 15 years to families that are experiencing financial hardship. Often with limited financial capability skills and with poor financial resilience, clients of CAP rely on firms to treat them fairly and to provide them products and services that are suitable and suitable for their requirements. Yet in CAP's experience, people in financial hardship, who are often vulnerable consumers, have been saddled with ineffective and unsuitable products and services. They appear to be designed to be very profitable for the firms but are of very limited value to the consumer themselves.

For this reason, Christians Against Poverty (CAP) supports the intention of the FMA's seven fair outcomes for consumers and markets. We hope this submission provides perspective on the issues relevant to those in most financial hardship in Aotearoa.

Only a few of the questions have been answered within this submission. This reflects the general suitability that CAP sees in the draft guide.

We welcome any questions or comments you may have on details within this submission.

Ngā manaakitanga, ngā mihi nui,



Christians Against Poverty

Date:	1 March 2024	Number of pages:	3 (including cover letter)
Name of submitter:	[REDACTED]		
Company or entity:	Christians Against Poverty		
Organisation type:	Not-for-profit, Building Financial Capability Sector, Debt Solutions Provider		
Contact name (if different):			
Contact email and phone:	[REDACTED]		

Question number	Response
1	The description of the proposed outcomes-focused approach is clear.
2	CAP is supportive of the proposed fair outcomes. Many people are stuck in an experience of financial hardship because they have financial products and services that are simply not appropriate for them or they often do not get the ongoing care that is appropriate for their circumstances. The proposed fair outcomes place a reasonable expectation on firms to put their customers at the centre of the design of their products and services.
3	<p>Outcome 1:</p> <p>Access is a very important concept, particularly for people that are restricted in some capacity from being able to access services. Firms have tended to respond to the challenge of access by increasing digitization, but the draft guide makes an excellent connection to hard-to-reach consumers.</p> <p>For the people in financial hardship that CAP serves, having access to essential services is vitally important. For example, having access to a basic bank account is very much an essential service for people; to pay bills, to receive a benefit or wages, to transact online. Yet currently, most of New Zealand's banks heavily restrict or even terminate access to a basic banking service for people entering insolvency.</p> <p>For this reason, CAP supports the references in the draft guide to Access and believes that for essential services, such as banking, "continued access" is a concept here that would strengthen fair outcomes.</p> <p>Appropriateness is referred to in the draft guide as suitability of a product in relation to its "entire lifecycle". This is extremely important so that fairness is considered as a consumer's circumstances may change. CAP notes that some financial products like overdrafts and credit cards or lines of credit may intentionally have no end date or maturity so we suggest that a clarification is made in the draft guide so that "lifecycle" incorporates those products/services with no maturation date. These products become no longer appropriate for people stuck in a cycle of fully drawing on their credit, being unable to pay off the debt.</p>
4	<p>Outcome 2:</p> <p>It is very encouraging to see the concept of information being Useful included in the draft guide.</p> <p>CAP produced a report¹ sharing our concern of the prevalent sale of add-on 'junk' insurance products that are sold with vehicle finance. CAP is concerned about the lack of useful and clear information provided to people when they purchase insurance products with vehicle finance. A lack of clear information on what is actually being insured will be a contributing factor to the Commerce Commission's findings that there was only a 1-15% probability of consumers' claims against their policies being paid out². For example,</p>

¹ [Vehicle Finance Report, CAP, 2022](#)

² [Motor vehicle financing and add-ons review, Commerce Commission, 2021](#)

	<p>'Mechanical Breakdown Insurance' is a product that is widely sold yet it often has such a large list of exclusions that it is hard to imagine how much of the vehicle is actually insured. The information related to the exclusions is buried on a back page in a very small font. Firms focused on fair outcomes would put this useful information in a more accessible and clearer format.</p>
5	<p>Outcome 3:</p> <p>Value for Money is important to the concept of fairness. The draft guide accurately notes that price is not the only factor. CAP also reported³ on this important point in relation to Add-On Insurances sold with vehicle finance. CAP often sees insurance products that could reasonably be described as of no value at all. As an example, one recent client of CAP had been charged \$3,100 for an insurance that had a maximum claim payout amount of \$3,000 (the client even had to pay an excess). The client wasn't even aware that there was a maximum claim payout amount. Had the firm focused on fair outcomes and value for money, it is unlikely that the client would have ever purchased it (perhaps the product would cease to exist entirely). CAP notes the relevance of this to the concept of appropriateness in Outcome 1 which rightly include the design of a product.</p>
6	<p>Outcome 4:</p> <p>CAP suggests that the term "trusted providers" could be clarified to more accurately describe the intended aim of Outcome 4. The term "trusted providers" isn't present in the Outcome title. This perhaps could be misconstrued as providers that have already earned the reputation of being 'trusted'; i.e., there are trusted providers and un-trusted providers. The aim of Outcome 4, though, seems to be that all providers should act in a way in which consumers can trust.</p>
7	<p>Outcome 5:</p> <p>It is encouraging to see the concept of 'responding appropriately' to consumers in vulnerable circumstances included in the concept of ongoing care. It is unfortunately all too common to see examples of consumers falling further into financial hardship, yet the lender's response falls short of 'appropriate'.</p> <p>For example, CAP sees many instances of people stuck with an overdraft or credit card that can never be paid off. While overdrafts are universally marketed as 'short-term' and 'flexible' access to 'temporary' credit to help people manage 'unexpected' interruptions to cashflow, the product is almost certainly no longer appropriate for someone has fallen into the never-ending maximum extension of their overdraft or credit card (see feedback on Outcome 1). Firms practicing quality ongoing care would proactively respond to help a customer discontinue the use of the now-inappropriate product.</p>
8	<p>Outcome 6: CAP has no comments on this section.</p>
9	<p>Outcome 7: CAP has no comments on this section.</p>
10	<p>Everyday banking has become an essential service for all New Zealanders in today's modern e-commerce economy. CAP encourages the FMA to consider including guidance for firms offering essential products and services (such as basic banking services) to comment on the higher expectation that essential service providers have to treat their broader consumer base fairly. While the challenges of providing a fair service to vulnerable people are more complex, it is vital that essential service providers consider the requirements and expectations of all New Zealanders who equally deserve fair outcomes.</p>
11-18	<p>CAP has no further comments on the remaining sections.</p>

³ [Vehicle Finance Report, CAP, 2022](#)

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 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: 5

Name of submitter: [REDACTED]

Company or entity: AMP Wealth Management New Zealand Limited

Organisation type: Financial Services

Contact name (if different): [REDACTED]

Contact email and phone: [REDACTED]

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>	<ul style="list-style-type: none">• AMP understands that outcomes will be a focus for the FMA and will permeate its work. This is consistent with AMP's commitment as a long-standing member of the industry to offering products that serve the interests of its customers.• We note that although the FMA is focused on outcomes, much of what is described in the consultation document is about the kind of conduct that the FMA expects of participants, which the FMA hopes will in turn lead to the kind of market outcomes that it wants to see.• While AMP understands the desire to avoid "tick-box regulation", it has some uncertainty about:<ul style="list-style-type: none">○ the legislative basis of the FMA's conduct/outcome expectations, and how these will interact with the sophisticated existing framework of legislation, regulations, guidelines and so on;○ the systemic objectives the FMA is looking to achieve and the concrete performance expectations on providers – for example, much of the guidance appears to be based on the statutory purpose of developing fair, efficient and transparent financial markets, but how this relates to the obligations of providers (who are already subject to a complex matrix of specific regulation) is unclear; and○ how enforcement will work in practice, which reflects the fact this is a new focus for the FMA. AMP looks forward to participating in a constructive dialogue over the coming months as this is rolled out.• Examples of the FMA's conduct expectations would be helpful for providers,• Further details about specific areas of uncertainty are set out in answers to questions below.
<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>	<ul style="list-style-type: none">• AMP prides itself on treating customers fairly, and on being a responsible participant in a fair market.• AMP does not expect that compliance with the FMA's new expectations would require a culture shift for the organisation, which already works hard to maintain a culture that promotes fair treatment and good outcomes for its customers and the market generally. AMP sees advantages in bringing the market as a whole up to that level, noting however that clarity is required around the FMA's expectations to ensure this regulation doesn't

	<p>result in unnecessary compliance costs (something that the FMC Act was originally trying to avoid)</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>	<ul style="list-style-type: none"> • We recognise that not all customers are the same and offer a diverse range of products to suit various customer profiles and risk tolerances. Customers can tailor the best combination of products to meet their financial goals using the services of AMP's advisers and other tools at their disposal. • AMP also actively communicates with customers using a number of different channels, including a focus on existing customers remaining with the right products and services over time. AMP prides itself on long-standing relationships of trust with its customers. • There is a risk of unclear regulatory obligations being overlaid over the commercial process of formulating and marketing products. AMP already tries to ensure that customers have access to a range of products that meet their needs. • AMP understands the FMA's concerns about the position of different groups, including underprivileged sectors of society who do not have access to the kind of products and information that they deserve. However, AMP considers this outcome would benefit from clarity around how providers' responsibilities interact with broader structural factors affecting certain groups. For example, if the FMA was expecting providers to actively design products in order to target under-privileged groups that could go well beyond providers' obligations under current regulatory settings and be problematic in practice. Private businesses should not be forced to provide products and services that are not commercially viable. This is a matter for government if there is in fact a need for a particular product or service that is not being provided by the market. • AMP has taken steps internally to build the organisation's capabilities from a te ao Māori perspective, including consulting and engaging with external parties. However, if accommodating a te ao Māori worldview is something the FMA expects from providers, it would be useful to have guidance from the FMA about what this means in the context of financial markets.
<p>4. What are your views on <i>Outcome 2: Consumers receive useful information that aids good decisions?</i></p>	<ul style="list-style-type: none"> • AMP places significant weight on ensuring that its customers are provided with the information they need to make informed decisions, both before acquisition and over the customer lifecycle (eg to avoid inertia and loyalty penalties). • AMP agrees that consumers require accurate and understandable information to make informed choices. This is already a core obligation under the existing regimes and AMP's view is that there is sufficient prescription already. • There is some uncertainty about the reference to "prospective" customers. If this refers to ensuring that customers are given appropriate information before they decide whether to acquire a product, then this is something that AMP already strives to do. If this means that providers would have an obligation to disseminate information to the market generally then that could be unclear and problematic. • It would be useful to understand from the FMA what it considers to be a "good decision" by a consumer and the process a consumer should follow, and to what extent a provider should be responsible for a consumer's decision.
<p>5. What are your views on <i>Outcome 3: Consumers receive fair value for money?</i></p>	<ul style="list-style-type: none"> • AMP generally supports the approach that the prices paid by customers should be reflective of the products and services they receive, in light of the purpose and features of those products and services. AMP offers a wide range of products and services. Our overall value proposition is providing wealth management to assist our customers to reach their financial goals, including an advice service, education programmes for customers around

	<p>financial literacy and wraparound tools for customers to access on demand.</p> <ul style="list-style-type: none"> • AMP also supports the FMA’s clarification that fair outcomes do not mean that consumers are insulated from risk, and that value needs to be considered from many dimensions. • We believe that value needs to be assessed from the perspective of the customer. AMP constantly monitors customer feedback from regular surveys and customer research, and uses that feedback to improve our products and to inform how best to provide value to customers. • One area that has been challenging for AMP is providing value to customers who choose to remain in our legacy products. We have created a Legacy Transformation Team to address this issue, with customers’ best interests at the forefront. Support from the FMA will be critical for us to meet the outcome of delivering value to these customers. • The consultation paper does not refer to the earlier Value for Money Guidance issued by the FMA and the relationship of that guidance to this outcome is not clear. It would be helpful to understand the statutory basis of the concept of “value for money” as applied by the FMA. If this is simply a focus on providers ensuring the value of their products and services are not misrepresented, then this should be made clear in any guidance. • The guidance suggests that taking different approaches to different groups can be justified but they must be fair – some concrete guidance around this expectation would be useful. • There is some uncertainty about how “value” will be assessed for compliance purposes. AMP considers greater clarity around the factors that will be relevant to whether a consumer receives value for money will be helpful to guide providers.
<p>6. What are your views on <i>Outcome 4: Consumers can trust providers to act in their interests?</i></p>	<ul style="list-style-type: none"> • AMP takes its statutory duty to act in the best interests of scheme participants as a fund manager seriously. • We expect the new Conduct of Financial Institutions (CoFI) Regulations will go towards achieving this outcome as providers review their existing remuneration structures and assess whether change is needed to comply with the Regulations. • AMP agrees that cybersecurity is a concern for all industries. Over the years we have implemented several tools to ensure the organisation is protected from cybersecurity risks. We note that while all organisations need to take cybersecurity seriously and have resilient systems in place, smaller organisations do not always have the budget to implement some of the more expensive cybersecurity solutions. • See answer to Question 7.
<p>7. What are your views on <i>Outcome 5: Consumers receive quality ongoing care?</i></p>	<ul style="list-style-type: none"> • AMP prides itself on putting the customer first in all our interactions. Our interactions with customers are based on their specific needs. Instead of working to a script, we focus our conversations to ensure we provide the right help to customers. • Customers are able to interact with us through a number of different channels, including phone calls, live chat, emails, and our My AMP app or portal. We also organise or suggest referrals to customers where they may need to discuss decisions relating to their investments in more detail. • AMP agrees that providers should work to support customers who are experiencing financial difficulty. All frontline staff receive training on vulnerabilities that may exist within our customer base, and we offer a range of assistance to customers who have been identified as vulnerable. We note that we can only offer to provide support to vulnerable customers if we have sufficient information to identify those customers. • We agree that a robust complaints process is important for ensuring quality customer care. All our frontline staff undertake

	<p>regular complaints training and refresher courses. Complaints are escalated to Team Managers and then to our dedicated and standalone Customer Response function, and AMP works to ensure that they are resolved satisfactorily. We also collect insights and trends so that we can improve our processes.</p>
<p>8. What are your views on <i>Outcome 6: Markets are trusted based on their integrity and transparency?</i></p>	<ul style="list-style-type: none"> • AMP agrees with the principle that integrity and transparency are fundamental for participants' trust in markets. • We agree that good governance is important to integrity and transparency. AMP has mechanisms in place for effective governance and is committed to continuous improvement. • See answer to Question 6.
<p>9. What are your views on <i>Outcome 7: Markets enable sustainable innovation and growth?</i></p>	<ul style="list-style-type: none"> • AMP supports the FMA's approach of allowing market solutions to deliver innovation and growth. • We consider that clear, consistent regulations and guidance are necessary to give providers the opportunity to innovate. While changes to regulations and guidance may be necessary, they also divert resources towards meeting these obligations and expectations, which limits the ability to be innovative.
<p>10. Is anything missing that should be included in the fair outcomes? Please explain</p>	<ul style="list-style-type: none"> • We have not identified anything further that should be included in the fair outcomes. We consider that some of the outcomes could be clearer and expressly aligned to specific statutory obligations to provide certainty to industry.
<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>	<ul style="list-style-type: none"> • The fair outcomes are aligned with the culture and approach taken by AMP, which already seeks to achieve fairness for customers in delivering its services. • AMP expects to document its existing work around these fair outcomes so that progress can be assessed internally. Given the FMA's articulation of these fair outcomes we also expect to see more targeted discussions in this areas and regular reviews of whether these outcomes are met.
<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>	<ul style="list-style-type: none"> • See answer to Question 11. • AMP appreciates the FMA's approach of not setting prescriptive criteria and giving firms the flexibility to implement the outcomes in line with their business models. However, this creates some uncertainty for firms trying to do the right thing and to comply with their obligations. There is a risk that more open-ended regulation will result in over-compliance out of caution, having a detrimental impact on the options / services available to consumers, and increases in costs that will be passed on to customers.
<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>	<ul style="list-style-type: none"> • The flexibility in the proposed outcomes-based approach means that not all firms will adopt the same procedures given the differences in their offerings and customer bases. • While AMP appreciates the FMA's desire to encourage firms to work out the ways in which their unique business can adapt to meet new expectations, there is a risk that this leaves significant uncertainty and resulting cost with firms who do not have the information they need to know. • We consider it will be helpful to have an ongoing dialogue about the fair outcomes between providers and the FMA to understand how these outcomes fit within different business models.
<p>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?</p>	<ul style="list-style-type: none"> • AMP welcomes guidance from the FMA on how a move towards a more outcomes-focused approach to regulation will influence how individuals and entities are held accountable for misconduct. • It would be good for the FMA to clarify what is meant by misconduct. We understand that by "misconduct" the FMA is referring to existing obligations (for example, insider trading), as opposed to not meeting the fair outcomes themselves.

	<ul style="list-style-type: none"> If not meeting one or more of the fair outcomes is intended to be an aggravating factor, we consider it will be important for a causative link between the outcome and conduct to be established to avoid hindsight bias or retrospective regulation. Guidance from the FMA on this would be helpful.
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?	<ul style="list-style-type: none"> See answer to Question 9.
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
17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?	<ul style="list-style-type: none"> Examples can be helpful to identify the kinds of matters the FMA considers relevant to each outcome. As discussed above, some of the examples do not necessarily have a clear relationship to the outcome. AMP supports the use of further examples of the kinds of things that would meet or fail to meet each outcome. It would be particularly helpful to include conduct at different ends of the continuum, and how the FMA could be expected to use its enforcement powers to respond.
18. Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?	<ul style="list-style-type: none"> AMP is comfortable that its culture and approach to business is consistent with the goals of outcome-based regulation but would like to see more concrete guidance given the responsibilities of the business and its board to implement the obligations. This might include: <ul style="list-style-type: none"> Enforcement guidelines. The current regulatory response guidelines are from 2016. It would be helpful to have a matrix demonstrating the FMA's approach to the assessment of compliance, what constitutes misconduct, how it would employ its monitoring approach, what first-time engagement would look like, its enforcement criteria when it comes to compliance with outcomes-based regulation, and so on. Case studies of conduct that does or does not meet the FMA's expectations or that would constitute misconduct. A legislative matrix, explaining how the proposed outcomes-based approaches fit within and has a statutory basis in the existing legislative framework.
<p>Feedback summary – AMP understands the purpose of fair outcomes regulation is to avoid “tick box regulation”, and welcomes the opportunity for providers to work towards these outcomes in a way that appropriate for the nature of their products, services, and customers. However, AMP considers it will be important for this flexibility to be balanced with predictability and certainty for providers to understand and meet the expectations of the FMA, and to avoid over-compliance which introduces unnecessary costs which are ultimately passed on to customers. AMP welcomes further dialogue with the FMA on this issue and is interested in participating in the pilot programme.</p>	
<p>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.</p>	
<p>Thank you for your feedback – we appreciate your time and input.</p>	

Confidential**Our reference**
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Wellington, New Zealand

8 March 2024

By email consultation@fma.govt.nz**Consultation: Proposed fair outcomes for consumers and markets**

- 1 This is DLA Piper's submission on the FMA's Consultation: Proposed fair outcomes for consumers and markets. DLA Piper is a global business law firm with offices in over 40 countries. In New Zealand, DLA Piper operates out of Wellington and Auckland. Contributing authors were [REDACTED]
Thank you for accepting this late submission.

General comments

- 2 We support the concept of fairness and the vision of a market delivering good outcomes for all participants – consumers, providers, and the broader economy. We also acknowledge the important and difficult role the FMA has in influencing market conditions to support that vision. However, we have concerns with the proposed outcomes-focused approach to regulation and how it is expressed in the draft guide. Our main reservations are:
- 2.1 Costs v benefits: Like any regulatory change, the guide and the proposed shift in regulatory approach will impose costs on the market as providers spend time and money understanding the change and taking action to address it. Given that cost, it would be helpful to understand why the change is being made (ie what problem the change is seeking to address and how the change would address that problem) so providers can understand the rationale and are best placed to respond. We are not sure this has been articulated in the FMA's work to date.
- 2.2 Hindsight bias and the fairness of judging based on outcomes: The FMA has formidable investigation and enforcement powers. The consequences of being subject to those powers can be severe. The suggestion that those powers would be exercised by reference to "outcomes" is concerning, particularly given outcomes are outside one's control and judged with the inevitable bias of hindsight. We think the better and fairer reference points are the more traditional measures of conduct (what one does) and intention (what one seeks to achieve). We are also uncomfortable with the implication that the risk attached to a failure to achieve an outcome sits solely or primarily with the provider. This seems unfair.
- 2.3 New regulatory uncertainty: We do not think it is entirely clear what the outcomes mean, who will assess them and how that assessment will be done. We worry about the new uncertainty this would introduce into the regulatory landscape, and the challenges this would create for providers and consumers. For providers, uncertainty would make navigating the landscape more difficult, increasing costs and risks. We expect this would suppress innovation and competition as providers divert limited resources from new ventures to compliance efforts or, worse, stay out of the market entirely due to risk. Competition (and by extension, innovation) is essential for a properly functioning market. For consumers, the knock-on effects would be less

choice, higher prices (or price regulation) and/or the need for government to enter the market as a provider. We would have difficulty supporting this.

- 2.4 Relationship with existing rules: It is also not clear to us how the outcomes relate to existing legal obligations and FMA guidance, including COFI and the 2017 conduct guide. The draft guide says the outcomes are not new rules and do not change or even supplement legal obligations. But elements of the outcomes are similar to (but not the same as) those legal obligations and, in practice, providers tend to treat FMA guidance as if they were rules anyway. So the discordance between the draft guide and existing law / FMA guidance creates confusion about what action one must, or should, or is expected to take. The issue is particularly evident with COFI given COFI addresses similar subject matter ("fair conduct principle" v "fair outcomes"), is currently under review, and its future shape is not yet clear.
 - 2.5 Legal basis: The outcomes-focused approach to regulation has been a feature of the UK's financial services regulatory regime for some time. Elements of that, in particular the Consumer Duty, bear a strong resemblance to the proposed outcomes in the draft guide. But the UK Parliament has conferred broad rule making powers on the FCA and, commensurate with that power, the FCA engages in extensive policy work and consultation before introducing new rules. In NZ, the FMA's formal rule making powers are much more limited and the policy basis for what appears to be a fundamental shift in regulatory approach is not apparent. We appreciate and support the FMA's function of issuing guidelines and making comments, but we think more is required before we could be confident that the guide would advance fair, efficient and transparent financial markets in the New Zealand context.
- 3 We therefore suggest the following:
- 3.1 Pause: Wait until the COFI rewrite is complete (or well advanced) before progressing further work on the guide. This will enable the two initiatives to work together, and mitigate the risk of inconsistency, duplication, and potential confusion.
 - 3.2 Explain: Explain the reason(s) for the guide. What problem(s) is the guide seeking to solve, what options were considered for solving it and why was the approach set out in the guide considered the best of those options? This would better enable market participants to understand the purpose and therefore respond to it.
 - 3.3 Reframe: Reframe the guide as a statement of how the FMA will assess products, participants, and market segments to identify why, where, and how to focus its regulatory attention – within the context of the law. Explain the factors the FMA will consider and the process/methodology it will apply. This would avoid the guide being perceived as imposing new and uncertain rules outside the existing legal framework while also providing useful guidance about the FMA's regulatory approach that positively influences market behaviour.
 - 3.4 Clarify: Minimise uncertainty by expressing ideas using language that is clear, consistent, and direct. Apply objective standards where possible and, where subjective standards are used, explain how those standards will be tested. Clarify the relationship between the guide, existing legal rules and other FMA guidance to bring more certainty to the status and meaning of the guidance. This would avoid wasted compliance effort and the potentially adverse consequences of adding unnecessary uncertainty into the regulatory landscape.

- 3.5 Consult further: Given the significant nature of the change, consult further before finalising anything.
- 4 We would welcome the opportunity to discuss our submission with the FMA.
- 5 To be clear, we are not necessarily against an outcomes-based approach to regulation – further thought would be required to determine if that is the right approach for NZ – but we do think the introduction of any outcomes-focused approach to regulation should have the following features:
- 5.1 An explicit legal basis: The current law does not provide for outcomes-based regulation; it is based on disclosure and conduct. While there is an argument that an outcomes-based regime could be accommodated through the FMA's discretion as to enforcement (on the one hand) and the FMA's exemption or no action powers (or on the other), it is not a natural fit under current law. Accordingly, seeking to apply it would come with legal risk.
- 5.2 Regulatory sandbox: Hand in glove with an outcomes-based approach to regulation is the idea that if providers are responsible for achieving certain outcomes, they must also have the freedom to choose how they go about achieving them ie the concept of the regulatory sandbox. While this is hinted at in the guide, again, it is not clear how this could be safely achieved within the current rules. A sandbox requires the ability to provide compliance relief on a basis, and within a framework, that seems much broader than the FMA's current exemption and no action powers. With that said, we think there is serious merit in exploring a regulatory sandbox and would welcome further conversations about this.
- 5.3 Independent arbiter: The FMA has the power to grant and revoke licences; it is effectively a gatekeeper to the market and recourse for FMA decisions is generally limited (and, where available, is expensive and uncertain). If NZ were to move to an environment where providers are judged based on subjective, outcomes-based measures, then, as a matter of fairness, the determination of market access and other existential matters for providers should be determined by an arbiter independent of the FMA.
- 6 If an overarching outcomes-based regulatory regime were to be implemented, this should be done through law reform and only after the normal rigorous policy and public consultation processes. If there were such a process, careful consideration should be given as to whether this approach is the right approach in the NZ context.

Responses to consultation questions

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.

- 7 We do not think so. We had difficulty understanding the proposed outcomes-focused approach and it was not apparent to us how the focus on outcomes would be applied by the FMA.
- 8 The language used to describe the approach and the FMA's role in that is high level and aspirational. While this goes some way to putting colour on the underlying philosophy, we think a more detailed and precise explanation is needed. The FMA's guidance has a material influence on market behaviour and, perhaps as a consequence of the FMA's licensing and enforcement powers, many providers treat the FMA's guidance as if it were law. It follows that

where the FMA issues guidance, there should be a strong preference for that to be certain and clear. Although the underlying philosophy is useful context, we think more detail is required.

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?

- 9 We support the ideas of fairness and seeking to calibrate market settings to provide good outcomes. We also acknowledge the role of the regulator in that calibration exercise, and the difficult and complex trade-offs that are sometimes required. However, we have a level of discomfort with a regulatory approach that uses outcomes as the starting point and some concerns about how the outcomes are described.

The outcomes basis

- 10 Outcomes are, by definition, judged in hindsight. This gives us pause in a few respects:
- 10.1 Once a bad outcome crystallises, the behaviour that contributed to that outcome has already occurred. At this point, it is too late to take action to change that behaviour. If prevention is better than cure, a regulatory approach based on outcomes seems flawed.
 - 10.2 Outcomes are not within the control of the provider. Provider conduct is just one factor that determines outcomes. External factors affecting outcomes could be as diverse as an unexpected change in the consumer's personal circumstances to market movements. Using outcomes as the basis for a regulatory standard seems unfair and risks hindsight bias.
 - 10.3 It implies that providers are guarantors of outcomes. Normally, guarantees need to be explicitly and voluntarily offered and, where provided, are for a specific and defined matter. However, the guide could be read as extending this to require providers to underwrite the proposed outcomes to all their customers.

Uncertainty

- 11 We support the intent behind each of the draft's seven outcomes. It is hard to argue against the intent and we would be surprised if anyone said, for example, that consumers should *not* have access to appropriate products and services that meet their needs.
- 12 However, if providers are to apply the guide, they need to understand what the outcomes mean in practice. That is not entirely clear from the current drafting, primarily due to its use of imprecise and subjective standards.
- 13 The "fair" standard is a good example. We might all know what fair is when we see it – but different people can reasonably have very different views about what is fair in any given situation (Is it fair to keep a performance fee legitimately earned in a bumper year if performance is poor in following years? Is it fair to impose a financial penalty on a co-operative for overcharging members when the financial burden of the penalty will be borne by those same members?). The same is true for the standards of "appropriate", "suitable", "useful", "quality", "integrity" and "sustainability".
- 14 In our view, this introduces too much uncertainty into the regulatory landscape. For the reasons set out above, we are worried about the challenges this will pose for providers, the cost to the market and potentially adverse downstream effects for consumers. This comment applies to all the outcomes.

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

- 15 The scope of "access" should be clarified. Is this an aspiration for the market as a whole or something that individual providers should be concerned about? If it's an aspiration for the market as a whole, then what (if anything) is the FMA expecting individual providers to do in response to it? If it's something individual providers need to concern themselves with then what is the extent of the expectation? For example, would a boutique fund manager specialising in New Zealand equity strategies be expected to offer, say, diversified funds? Or a life insurer be expected start offering health insurance?
- 16 The meaning of "appropriateness" (or "suitability") should also be clarified. How is suitability determined and by whom? And is it sufficient that a product "meets a consumer's needs" or is more required for that product to be "appropriate" / "suitable"?

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

- 17 This outcome introduces broad novel concepts in terms of "useful" and "aids good decisions" in a manner that creates some duplication and risks confusing pre-existing regimes. In particular, it appears to overlap substantially with the COFI duty to treat consumers fairly including by assisting them to make informed decisions. However, it appears to extend that obligation, potentially placing a heavy burden on providers.
- 18 The draft identifies life insurance replacement an example of how this might work, noting the FMA's 2018 *Thematic review of insurance replacement business practices* found instances of poor-quality advice where firms failed to advise customers that replacing their life insurance could lead to worse cover or loss of benefits. However, it is unclear to us how this new outcome would substantially assist the position under COFI and not risk confusion.
- 19 It is possible that a consumer provided with sufficient information to be "informed" may make a different view of what is a "good decision" from a provider. Placing an obligation on providers to achieve this objective assumes that there is an objective "good decision".

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

- 20 We have some concerns with this outcome. Value is a subjective concept and ultimately it is the role of the market to determine what is fair value. The regulatory regime supports that by requiring truthful disclosure of material information. Overlaying this by setting "fair value for money" as an explicit regulatory objective feels like a move towards price regulation.
- 21 The FMA's value for money initiative in the funds management sector has resulted in material additional compliance costs. It is not clear whether the cost has been justified by the result. We worry that this "fair value for money" outcome foreshadows an extension of that initiative to the wider market.

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

- 22 The "trusted provider" definition seems too narrow. It focuses on protecting customer data and assets, and operational resilience. We think trust is a deeper concept, including that the provider can be depended on to do their job properly and will, subject to the terms of the bargain struck with the consumer, diligently attend to the consumer's needs.

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

23 See our earlier comments.

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

24 See our earlier comments.

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

25 See our earlier comments.

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

26 See our earlier comments.

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?

27 Not applicable. While this is primarily an issue for providers, we think there may be merit in the FMA more clearly articulating how it expects providers to demonstrate ownership and delivery of the fair outcomes.

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?

28 Not applicable.

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?

29 See our earlier comments.

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?

30 See our earlier comments.

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?

31 Not applicable.

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?

32 While this is not applicable to us directly, these are matters we expect to be providing advice on. We have reservations that the outcomes are understandable and relevant for the reasons outlined in this submission.

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

- 33 Many of the examples seem to cite the FMA's previous publications. This information is already available so while it is useful to link the outcomes to the FMA's previous work it does not add significantly to the understanding of the outcomes.
- 34 What would be useful is hypothetical examples of how the FMA expects that it (as the regulator) and providers (as market participants) will respond to each outcome. These could usefully cover a range of common situations in which the FMA and providers find themselves in. For example, how is the "consumers receive quality ongoing care" outcome to be responded to in relation to customers who have low-interest transactional accounts with persistently high balances?

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

- 35 See our earlier comments.

Yours sincerely

DLA Piper 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 with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024. Extension to 15 March 2024**

Date: _____ Number of pages: _____
Name of submitter: [REDACTED]
Company or entity: Fisher Funds Management Limited
Organisation type: MIS, DIMS, FAP
Contact name (if different): _____
Contact email and phone: [REDACTED] [REDACTED]

Introduction

[REDACTED]

The [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Summary

The Fisher Funds group considers the current FMA consultation on proposed fair outcomes for consumers and markets to be part of an on-going evolution of the importance of good client outcomes.

We appreciate such insights into FMA's thinking and commend its engagement with the industry.

We note however that the primary legislation governing manager and market conduct remains the Financial Markets Conduct Act ('the Act'), introduced in 2013 and has not been materially amended since that time, other than incorporating and building on the obligations formerly contained in the Financial Advisers Act 2008.

The Act's focus, as it pertains to consumers (investors) is predominantly centered on the provision of information i.e. disclosures via product disclosure statements (PDS), fund updates and other material information filed on the Disclose Register. The Act is prescriptive when specifying the content and word count for PDS, requiring managers to adhere to certain information formats and text.

Ultimately the Act operates as the reference point for managers when considering their obligations and how they go about complying with them.

The proposed Guide could clarify further how the Outcomes dovetail with the obligations under the Act as the guide only goes so far as to state *'This is not a replacement for, not a rewriting of our rule book'* p.1 and again on p.3 that *'These are not rules'* and p.5 *"These fair outcomes are not rules'*.

We presume FMA's current *'rule book'* comprises the core legislative obligations of the Act and is an internal document operating in the background to inform FMA's use of its regulatory toolkit.

In our view, such a *'rule book'* and the Outcomes should coincide and must be referenced to and delimited by the Act. If the Outcomes are to be used by FMA to supplement or extend the Act, it should be made clear that they are intended more as a statement of regulatory aspiration rather than a mechanism for enforcing compliance with the Act.

Lastly, the *'Relevant issues and examples'* accompanying each stated Outcome are occasionally (a) too broad offering limited opportunity to gain a best practice uplift through understanding and replicating leading practices across financial services or (b) are FMA's interpretative statements of its position on certain matters, such as fees and commissions.

The Guide would benefit greatly from illustrating more objective examples of best practice relevant to each of the regulated sectors.

It would also benefit from being more firmly and overtly anchored in the existing regulatory framework i.e. the Financial Markets Conduct Act (2013).

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 Fisher Funds group supports good client outcomes and actively works to achieve them.</p> <p>Whilst we endorse good client outcomes driven by the manager and appropriate to that manager's business model, there is a risk that FMA's Outcomes-focused approach to regulation could result in uncertainty where there's not a very clear connection between its Outcomes-centered approach and the primary legislation - the Financial Markets Conduct Act (FMCA).</p> <p>Where the Guide seeks to supplement or extend existing legislation with expressions of desired behaviours, it makes it difficult for managers to both comply with this broader set of expectations and the legislation.</p> <p>In the event FMA perceives legislative shortcomings with FMCA, a better approach may be to engage with the industry to consider changes to the FMCA.</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>The proposed Outcomes broadly align with the Fisher Funds group's own conduct principles and can be seen as generally accepted statements of how all managers might see the FMCA regime working.</p> <p>It is difficult to speculate whether or not the Guide will, on its own merits, bring benefits for consumers, providers and markets.</p> <p>As stated above, where the Outcomes introduce uncertainty as to how the FMCA will be interpreted and/or applied, they may not benefit stakeholders to the extent envisaged by FMA.</p> <p>The Guide could benefit from illustrating particular examples of best practice / bad practice in each of the regulated sectors and how FMA would typically respond to them.</p>
<p>3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</p>	<p>Outcome 1 is aspirational and should be an intentional goal for providers, albeit modified for providers' business models and product offerings.</p> <p>Access may reflect a particular business model and few businesses will want to provide unfettered access to all their products.</p> <p>With respect to appropriateness, a business may choose to limit its offering to a single product or single suite of products and deliberately elect to make them available to only a target group, not all consumers e.g. It may have reasons for closing a product to new investors notwithstanding it continues to service the current product-holders.</p>

	<p>Additionally, whilst a certain product may be appropriate for a consumer, it may not actually be suitable.</p> <p>It's unclear whether 'appropriate' in the context of the proposed Guide is intended to be read as 'suitable'.</p> <p>At present, the FMCA does not directly address the issue of suitability at a product level. Instead, that obligation arises only where financial advice is provided as part of the product sale.</p> <p>This can be contrasted with the Conduct of Financial Institutions Act (CoFI) which bakes suitability into its provisions resulting in Outcome 1 being duplicative for banks and insurers.</p>
<p>4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?</p>	<p>The Fisher Funds group supports the proposition that consumers should receive and take into account all information that may be useful to them when making investing decisions.</p> <p>Anecdotally, many consumers receive but don't read the information provided to them prior to their product purchase.</p> <p>The FMCA sought to address this consumer behavioural trait by mandating a prescribed set of information (disclosures) be provided to clients in a pre-determined format and within word limits so that consumers could more easily compare the same product across different providers.</p> <p>Consumers are also entitled to receive and/or access a range of other useful information mandated by the Act e.g. annual statements, fund updates etc.</p> <p>With the FMCA so heavily weighted towards disclosure, it's not clear what other information this Outcome intends providers should provide.</p> <p>Lastly, the concept of 'good' decisions in the context of 'useful' information is unclear. Does it mean that even if all the disclosures required by the Act have been made but a client does not experience what they perceive as a 'good' outcome, that the provider will be deemed to have failed to meet the Outcome? For example, complaints received by KiwiSaver managers may relate to the restrictions on early withdrawals, especially those occasioned by financial hardship.</p>
<p>5. What are your views on Outcome 3: Consumers receive fair value for money?</p>	<p>The Fisher Funds group supports the provision of products and services which represent fair value for money.</p> <p>However, we recognise that 'fair' in this context is not an absolute concept but dependent on the particular business model of the provider e.g. some low-cost KiwiSaver managers may offer only robo-advice cf. the Fisher Funds</p>

	<p>group which operates a fully staffed, NZ-based team of frontline client service staff, further supported by a corps of financial advisers.</p> <p>It is the prerogative of each provider to determine both its business model and its pricing.</p>
<p>6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?</p>	<p>The Fisher Funds group operates with a high level of trust, as between the business and clients, and within employees of the business.</p> <p>Outcome 4 seems to take a rather limited approach to trust predicated on data security and the management of perceived conflicts.</p>
<p>7. What are your views on Outcome 5: Consumers receive quality ongoing care?</p>	<p>The Fisher Funds group supports the concept of a lifecycle focus for clients in our products and has implemented a client engagement pathway, supported by marketing and other outreach initiatives.</p> <p>Notwithstanding the above, 'quality' is a difficult concept to objectivise as it is commonly interpreted through the eye of the consumer and also reflects the provider's value proposition, which may or may not be properly understood by the consumer.</p> <p>Additionally, certain financial products may, by their nature, not include care which could or should be characterised as on-going i.e. share purchases or consumer-driven non-advised product purchases.</p> <p>The challenge within this Outcome is that there is no universal standard of 'quality' or 'care' and the examples provided could go further in assisting provider understanding.</p>
<p>8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</p>	<p>This outcome is primarily within the remit of FMA rather than market participants.</p> <p>FMA is responsible for enforcing the FMCA, including the Fair Dealing provisions, to prevent and/or prosecute certain types of market abuse behaviours.</p> <p>As such, this should be an objective for the FMA and its monitoring/enforcement teams rather than an 'Outcome' to be included in the Guide.</p>
<p>9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?</p>	<p>As with Outcome 6, this Outcome 7 is more generally within the purview of the FMA than market participants.</p> <p>Market participants and consumers rely on FMA to address scams, frauds, and other non-compliant behaviours which undermine the market's ability to grow and innovate.</p> <p>It is not an Outcome which managers can individually influence or be held accountable for and should be excluded from the Guide.</p>

<p>10. Is anything missing that should be included in the fair outcomes? Please explain.</p>	<p>The examples used seem to have more of a banking / insurance orientation at a time when these two industry groups are the subject of new conduct regulation in the form of the Financial Markets (Conduct of Institutions) Amendment Act 2022.</p> <p>There are few examples in the Guide which would enable managers of managed investment schemes to benchmark themselves against the Outcomes or best practices.</p> <p>Additionally, there appears to be only a tenuous connection between the Outcomes and the particular legislative obligations that underpin them.</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>The Fisher Funds group has had a conduct management programme (CMP) since 2019 where identified outcomes are tracked and reported.</p> <p>Each provider of financial products and services is likely to have a CMP or similar that enables them to gauge their consumer satisfaction and comparable market positioning.</p> <p>CMPs will reflect differing business models and the various target markets for providers and are unlikely to be the same across all providers.</p> <p>The Outcomes, as a whole, would provide better guidance and be more effective if they (i) referenced the relevant legislative provisions they support and (ii) set out examples of best (and not so good) industry practice that market participants could aspire to or otherwise adapt to their particular circumstances.</p> <p>Governance, leadership, management and operations would all benefit from the approach articulated in the paragraph above.</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>The Outcomes should not be confused with legislation, with the latter acting as the bedrock for providers' regulatory compliance.</p> <p>Conversely, compliance with the Outcomes could still result in non-compliance with the legislation.</p> <p>Accordingly, the creation, phrasing and emphasis given to the Outcomes by FMA, whilst well intentioned, has the potential to make regulatory compliance more opaque.</p> <p>This occurs as it's not clear how FMA will utilise or enforce the Outcomes and how they will use their regulatory enforcement tools to monitor and/or sanction non-compliance.</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>Any move to a more outcomes focussed approach, whilst on the face of it desirable, has the potential to throw up challenges when those Outcomes are not clearly anchored in the underlying legislation.</p>

	<p>Anchoring enables providers to better and more reliably assess themselves against known legislative obligations and to develop right-sized, consistent approaches to best outcome practices.</p> <p>It's unclear from the proposed Guide how the Outcomes will be used in monitoring and this has the potential to add uncertainty, time and cost to planned compliance programmes.</p>
<p>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?</p>	<p>As per the response to question 13, the challenge with Outcomes, as currently expressed in the proposed Guide, is that they appear to be predicated on a one size fits all basis whereas the industry is characterised by differing provider types, sizes and business models, a range of financial products and services, and separate target markets for their various products and services.</p> <p>The Guide is well-intentioned and forward looking but light on the substance of how the Outcomes will be applied in the event FMA detects 'misconduct', which in this context is construed as non-compliance with the Outcomes rather than non-compliance with the relevant legislation.</p> <p>This puts providers in a difficult position as they attempt to reconcile the Outcomes with their known legislative compliance obligations and has the potential to lead to uncertainty within the industry.</p>
<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>Such Outcomes focused regulation is ambitious and possibly lacks the certainty to support or promote innovation as it is more subjective and less concrete than the underlying regulation of the FMCA.</p> <p>Market participants generally rely on a high level of certainty to provide them with the confidence to innovate.</p> <p>As such, the Outcomes may not achieve their desired effect of increasing flexibility in individual business circumstances.</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>N/A</p>
<p>17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?</p>	<p>The examples appear to only lightly traverse most providers and their products with the result that they are not of particular relevance to any one provider type.</p> <p>As referenced in the sections above, whilst the Outcomes are aspirational from FMA's perspective and from many providers' standpoint, they lack the detail necessary to enable providers to benchmark themselves against their peers and to be guided by examples of what is best practice within their particular industry or product range.</p>

<p>18. Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?</p>	<p>The proposed Guide appears to have a greater focus on banks and insurers rather than other market participants and lacks clear and direct examples of how to achieve and/or transcend regulatory compliance by leveraging best practice learnings across the industry.</p> <p>The proposed Guide could operate as a useful reference for FMA when engaging with the industry and as a tool to achieve consistency in its monitoring visits / thematic reviews.</p> <p>In its current state, its efficacy is limited due to the lack of certainty in its proposed application, no clear alignment with source legislative obligations, and a lack of clarity as to how the achievement or otherwise of the Outcomes will feed into FMA enforcement activity.</p> <p>It is implied that not meeting the Outcomes could have adverse consequences for providers - FMA notes on p.13 that <i>'Where we see unfair outcomes, we will consider the best use of our toolkit to respond.'</i></p> <p>In the event FMA is of the view that the primary legislation is inadequate in delivering on objectives, then most providers would, for example, be happy to enter a dialogue to encourage lawmakers to review the FMCA so that it could better achieve the aspirations and expectations of providers, consumers, the market and the regulator.</p>
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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.

Please withhold name, email and mobile details and those sections marked 'not for release or publication'. Thank you.



SUBMISSION

to the

Financial Markets Authority

On the

Consultation: Proposed Fair Outcomes
for Consumer and Markets

About NZSOC

The New Zealand Society of Conveyancers (NZSOC) was established under the Lawyers and Conveyancers Act 2008. The NZSOC represents, promote, and regulate the conveyancing profession in New Zealand.

The Society's members consist of members practising on their own, members working for conveyancing firms, and members working for law firms.

The Society reports to the Ministry of Justice, with whom the Society consults on a quarterly basis.

Contact Details

Should you wish to discuss the content of our submission, please contact:

[Redacted contact information]

[Redacted contact information]

[Redacted contact information]

FEEDBACK FROM NZSOC

Introduction

The New Zealand Society of Conveyancers (Society) welcomes the opportunity to contribute to the discourse on enhancing impartial outcomes for consumers and markets in New Zealand.

As a Society we strongly advocate for fair client outcomes, to ensure consumers are treated equitably, and that markets operate with transparency and integrity.

The extension provided by the FMA has enabled the Society to submit our consultation document, of which we are very grateful.

As a Society, we are always eager to engage in constructive dialogue with the FMA and other stakeholders, as we believe this is extremely beneficial for clients, consumers, and our members.

Feedback

The New Zealand Society of Conveyancers is concerned that Westpac New Zealand Limited, ANZ Bank New Zealand Limited, and Southland Building Society are refusing to provide mortgage instructions to conveyancing practitioners when their customers are purchasing a property or refinancing their mortgage.

They are also unilaterally restricting the work they do allow conveyancing practitioners to complete should a mortgage be included within other transactions (example: security swap). The consequence being that only solicitors can provide full conveyancing services to customers of these banks who purchase or refinance, thereby limiting consumer choice and ultimately increasing their incurred costs.

The Society would like to see a clear comment from the FMA in it's proposed fair outcomes that encourages financial service providers to work with the advisers that their customers have already chosen to engage, instead of requiring them to engage a lawyer just for the purpose of assisting with certain documentation and security registration.

Looking at your wheel of outcomes within your consultation paper the Society considers the following noteworthy for you:

1. Consumers have access to appropriate products and services that meet their needs.

The establishment of the Lawyers and Conveyancer Act was to create a market that offers consumers choice of services in relation to conveyancing transactions, this includes financial transactions/facilities. Currently with above-named banks being able to freely create policies to limit consumers' access to mortgage-secured products: the Society does not believe that full choice and flexibility is available to consumers.

2. Consumers receive useful information that aids good decisions.

The Society often receives complaints from members that consumers are being told they must use a solicitor for documents/security registrations, and not conveyancing practitioners. This does not give consumers good or even correct advice in order for them to make informed decisions.

3. Consumers receive fair value for money.

In order for conveyancing practitioners to comply with these banks' requirements on behalf of consumers who are clients: they must engage agent law firms to act for the bank to handle their documents. The result of this is that additional unnecessary costs are incurred, with a recent survey of conveyancing practitioners indicating an average of \$47,746.39 per firm for these costs per annum. Consumers are correct to believe it is unfair for them to meet these costs, and the named banks should pay them if it is their policy to require solicitors to act for the bank instead of conveyancing practitioners.

We note that these banks do not demonstrate such restrictions with selling customers whereby ANZ, Westpac and SBS will directly instruct conveyancing practitioners to discharge their mortgages and attend to loan repayment.

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 with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: 15 March 2024

Number of pages: 13

Name of submitter: [redacted]

Company or entity: Finance and Mortgage Advisers Association of New Zealand and Finance Brokers Association of Australasia

Organisation type: Australian and NZ Industry Representative Bodies

Contact name (if different):

Contact email and phone: [redacted]

Question number	Response
See attached	

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.

Financial Markets Authority
New Zealand

Via email: consultation@fma.govt.nz

Consultation: Fair Outcomes for Consumers and Markets

The Finance and Mortgage Advisers Association of New Zealand in conjunction with the Finance Brokers Association of Australasia welcome the opportunity to make a submission to this consultation piece. We are an industry body representing 12,000 mortgage and finance professional members in Australia.

This submission is in two parts. The first part relates our observations from the Australian regulatory regime over many years. Our specific answers to the consultation questions are provided in the second part of our submission.

Introduction

The FBAA has worked alongside the Australian finance industry for decades. Through this time we have witnessed constant change. We have seen the introduction of a licensing and regulatory regime for financial services (financial advice, financial products provided to retail clients) and have seen it undergo enormous change over the 20 years it has been in effect. We have seen a secondary regime for consumer credit introduced in 2010 and have worked closely alongside industry and regulators as it has undergone significant evolution. We have closely observed the effect of regulation on industry and consumers. We have seen a best interests duty introduced into the financial services sector, enforced for several years and subsequently dropped because it was ineffective, only to see the consumer credit sector introduce a best interests duty at the same time that it was being abandoned by the financial services sector. We have seen the emphasis on disclosure change multiple times. At times it has been advanced as a primary consumer risk mitigation tool, at other times a consumer education tool, still other times an emphasis on greater disclosure only to see subsequent opinions advocate for less disclosure.

At the present time in Australia, we have a complex regulatory minefield straddling multiple regimes and involving dozens of pieces of primary legislation modified by thousands of instruments and

regulations. While much of what happens in Australia is well-intentioned, and some of it is good, it still does not prevent all negative outcomes. Businesses will continue to break the law and consumers still suffer loss for a range of reasons, including their own conduct.

In concluding a 3-year long review of the principal financial services legislation of the Corporations Act 2001, the Australian Law Reform Commission observed a litany of problems with the financial services legislation, drawing on references made to the framework over the years including describing it as “porridge”, “a legislative hydra”, “a maze” and many other colorful descriptions – none of which reflect well on it. Australian financial services laws are built on an incoherent legislative hierarchy resulting in substantive law being located inconsistently and unpredictably in primary legislation, delegated legislation or administrative instruments. In short, anything could be anywhere meaning users must look everywhere¹.

One of the main underlying reasons the Australian framework has become so burdened by poor design and complexity is that successive Governments have been coerced into changing the law in response to every issue and adding layers to try to close perceived loopholes rather than using the existing framework to take stronger action against wrongdoers. Much of the time, wrongdoing results from contravention of existing laws rather than the law itself being deficient.

No doubt the FMA would already be well informed about the Australian legislative landscape and the state of financial services regulation in Australia. Depending on where information is sourced from, some might even believe the Australian framework is robust and effective. Our hope in making this submission is that we are able to provide another perspective, one informed by working closely with Government and industry and where we have seen the impacts of previous decisions reverberate through the sector.

The notion of “fairness” is one more recently embraced in sectors of financial services. In our view, it has not been a forward step. Fairness is used in Australia as a ‘catch-all’ to justify certain outcomes where there are no other means to arrive at a desired conclusion. It is used to make awards against a party that has done no wrong or as a means of “balancing out” the respective financial strengths of parties through awarding payment of compensation against the party perceived to be in a stronger financial position than the other. It is being used to compensate consumers for hurt feelings or disappointment. This is creating inconsistency and leading to excessive and unsustainable levels of disputes against service providers. Extreme care needs to be taken if a concept as nebulous as ‘fairness’ is introduced into the arsenal of a regulator.

¹ Australian Law Reform Commission Rep 141 Confronting Complexity: Reforming Corporations and Financial Services Legislation Nov 2023, p54.

Australia has 2 primary regulatory regimes for financial products and services. The Australian financial services laws which are set out in the *Corporations Act 2001* and cover financial advice, investment products, superannuation and insurance and the Australian consumer credit regime which is covered by the *National Consumer Credit Protection Act 2009* which covers credit products such as mortgages, loans and leases. Numerous other pieces of legislation also impact on these. Our financial services laws refer to consumers as “retail clients”. The credit laws refer to them as “consumers”. We will use the term *consumers* to denote those groups that receive the benefit of consumer protections embedded in the various pieces of legislation.

The consumer credit regime has been in effect since 2010. It carries many similarities to the financial services regime which commenced in 2004. Rather than learn from the mistakes of the financial services regime, we are repeating them in the consumer credit regime. The consumer credit regime is also becoming layered by additional legislation, guidance, regulations and regulatory instruments and the regulator frequently changes its position/interpretation on key elements of the regime. Industry struggles to find the stability and predictability it needs in a regulatory regime.

Since the commencement of financial services regulation in Australia it has always been a condition of licensees to act efficiently, honestly and fairly. Fairness is, and has always been, accepted as a core principle of the delivery of financial services to consumers. Until recently, it has not been advanced as a basis for enforcement outcomes. We maintain it is a difficult concept to embody in a regulatory approach beyond accepting it as a broad guiding principle. It is extraordinarily difficult to define fairness because it is a subjective element. It is more often easy to identify an absence of fairness - such as where a vulnerable consumer is exploited, however we already have laws such as unconscionability to deal with such issues.

What is fair to one party is not fair to another. The greater number of subjective elements that are introduced to regulation of an industry, the greater the uncertainty it brings which in turn creates instability which in turn furthers the opportunity to apply fairness as it is defined by the person wielding the power at that time.

We have seen the effect of incorrect regulation which has left the financial advice industry in Australia in disrepair. The number of advisers providing financial advice to retail clients is lower than it has been in decades. This comes at a time when more clients need advice now than ever before. The cost of accessing financial advice is extremely high as advisers and licensees are burdened with excessive regulatory obligations and are subjected to a partisan and unfair external dispute resolution mechanism that results in significant cost increases across the board.

Many of the new compliance obligations introduced in recent years are in response to misconduct. What we often see is that misconduct involves entities breaking existing laws. Where the response should be to prosecute the breaches, successive Governments and regulators have instead added additional layers of obligations aimed at preventing the recurrence of that behavior. This impacts law-abiding businesses more heavily than those intent on breaking the law. Whatever laws are passed, those intent on breaking them will continue to do so, whilst those who were not responsible for the original misconduct continue attempting to comply with the additional obligations and take on more regulatory burden. Those burdened by the additional regulatory obligations were not the ones breaking the laws that triggered the additional obligations in the first place.

Australia's 20+ year history of financial services regulation provides useful insight into effective regulation: as much for what has gone wrong as for what has gone right.

Australia continues to struggle with finding the right balance between regulation of service providers and protecting consumers. In our view, it has focused too heavily on loss avoidance as the definition of consumer protection. It is inevitable that some retail clients, some consumers, will make poor decisions that cost them opportunity and money. One must take risk to gain rewards, and not all risk delivers positive returns. Some business ventures and investments fail. Some borrowers default on loan repayments. Some consumers use credit to purchase assets that become faulty. That is the nature of consumption and risk taking. For too long, Australian regulators have believed they need to prevent loss and have positioned themselves accordingly.

There are certain immutable truths that persist in the space where advisers deal with consumers. Disclosure as a primary risk tool fails in most situations. This is because:

1. Consumers do not have the appetite to engage with the finer details of what they are being told.
2. Financial literacy levels remain low because of a lack of education and in part because of point 1, above.
3. Consumers will place more emphasis on the positives and heavily discount the negatives (risks) when making a decision, meaning that even when risks are clearly disclosed, clients fail to see them or understand their relevance.
4. At a time where loss is incurred and compensation is a possibility, consumers will recall their experience very differently. Their version of events changes to support their potential claim. Disclosure often becomes immaterial at this point.

Safe and appropriate product design is a useful tool. In recent years Australia has been advancing product design and distribution rules aimed at trying to ensure products are designed appropriately.

This still does not guarantee that no consumer will acquire a product that is not suitable for them, or that a consumer will not experience poor outcomes. We cannot see how regulating for fairness can operate alongside a free market. Is it fair for a product provider to design a product that is not suitable for all types of person? Is it fair to permit a consumer to make their own choice about what products to access? Does it remain fair if they are able to choose the wrong product and sustain loss?

Outcome focused regulation is problematic. A fairness approach is enmeshed in outcome regulation. Outcome focused regulation begins at the end. Rather than examining the conduct of parties, a regulator starts with the outcome and if they want it changed, they retrofit an argument to achieve that outcome. Fairness is often used to deliver an outcome that cannot be substantiated by any identified breach of laws or other misconduct.

Unfortunately, in Australia, more and more, we are using a consumer's satisfaction level as the measure of the outcome. If a consumer is dissatisfied, then our regulators go looking for a mechanism to assuage the consumer. If a services provider has contravened a law and caused a consumer loss then the process functions as it should. Where a consumer is wronged by a provider that has contravened its obligations then there should be redress. However, where a provider has done no wrong but a consumer remains dissatisfied, the principle of fairness is introduced to justify making an award in favor of the consumer to raise their satisfaction level. This approach has led to a range of adverse outcomes including a dramatic increase in consumer complaints, increased costs to industry, uncertainty, frivolous, baseless and vexatious complaints clogging up the EDR system and consolidation of advisory services businesses. EDR costs are more easily absorbed by large institutions whereas small business operators can be crippled by such costs.

Many lessons can be learned from the Australian story where the regulatory regime is now extremely complex and at times struggles under the weight of its own complexity to deliver on its stated objectives. Unfortunately many changes made to Australian financial services laws have been made without proper consideration of the consequences. Many changes have been pushed through in response to perceived problems and the solutions proposed to address those perceived problems have created more serious and sustained issues. There is an inverse correlation between consumer access to financial services and excessive regulation. As regulation becomes heavier-handed and more inconsistent, the more consumers become excluded from accessing them.

Fairness and dispute resolution

At the core of FMA's priorities is "fair outcomes for consumers and markets".

Australia uses similar language in its singular External Dispute Resolution Scheme dispute resolution scheme AFCA. In recent years, AFCA has increased the emphasis it places on fair outcomes and is at a point now where it frequently orders compensation to investors and consumers for loss even where it has not been the fault of the service provider. AFCA is not bound by the rules of evidence, can take into account any information it feels relevant in hearing a matter and places considerably more weight on the complainant's perspective than that of the financial firm. We are seeing an alarming rise in determinations against financial firms where they have complied with all of their legal obligations and done no wrong but are having awards made against them in favor of consumers in the name of 'fairness'.

Fairness is a relative concept. A complainant may consider it fair that they receive compensation. A financial firm that has done nothing wrong might consider it fair they do not have to pay compensation or are not charged for a complaint that is brought unfairly, fraudulently or without merit.

What we see in Australia now is that there is very little protection for financial firms. Customers can initiate complaints with little or no information and on a very questionable basis, and the financial firm must make them an offer they are satisfied with or they can take their complaint to EDR. In effect, unless a consumer considers an offer to be fair, a financial firm cannot resolve a consumer dispute.

Lenders are faced with a myriad of situations they cannot fairly deal with where the perspective of fairness is that of the affected customer. Issues include customers complaining about the cost of their loan and demanding rate reductions, consumers deciding they have paid enough of their loan back and insisting the credit provider write off the balance, consumers ceasing to service loans over secured assets where the asset experiences breakdown or malfunction, consumers insisting on removal of legitimate credit inquiries from their credit file and consumers claiming hardship and insisting on repayment variations without adducing any reasonable basis for the claim. In all of these instances, where a consumer demands an outcome that they do not get, the consumer can lodge a claim with our EDR scheme seeking a "fair outcome". Financial firms are charged thousands of dollars for every claim regardless of whether they have done anything wrong or not and regardless of whether the outcome is in their favor or not. There are numerous published decisions of the AFCA scheme that show the application of the fairness principle. These published decisions highlight how

the subjective notion of fairness creates inconsistency because it is open to every decision maker to determine their own version of what is fair and the decision makers are not bound by precedent.

What we see in Australia is the major financial institutions setting their eligibility criteria such that it excludes all but those with near perfect financial circumstances. In the credit space, this has the effect of pushing customers with issues with their past credit history down to the secondary and tertiary markets (also known as near or shoulder prime and sub-prime) and increasing their cost of credit. This in turn creates dissention which manifests in complaints where consumers are prosecuting for better rates on their finances. Where a lender refuses to adjust the rate, the consumer can lodge a complaint with the EDR scheme which will cost the lender many thousands of dollars to defend regardless of whether they have done something wrong or not².

Many see a complaints regime operating in this manner as “fair” for the consumer. It is far from fair for the financial firm and has serious repercussions about how consumers access services in Australia.

We believe there are other, more objective principles which provide greater transparency, consistency and efficiency to markets. Fairness is a Pandora’s box which has potential to cause more problems than it seeks to address.

We would be pleased to share further insights or elaborate on any of the matters addressed in this paper.

Yours faithfully

[Redacted signature block]

² We recognise that AFCA rules state that the scheme cannot hear complaints that relate solely to the price of credit however it is common practice for advocates of complainants and for the scheme itself to re-frame complaints about the cost of services into something that falls within the scheme’s rules such as responsible lending or hardship.

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>An outcomes focussed approach is a more recent attitude that has been adopted by Australian regulators with questionable effect. We are seeing problems with the way it operates.</p> <p>The Australian regulatory system is underpinned by legislation. The legislation provides the framework within which financial services providers can operate to deliver their products and services to the market with certainty. This certainty is necessary to allow service providers to undertake their business activities with confidence that they know what they can, and cannot, do.</p> <p>To some extent, the legislation is given further 'colour' by guidance issued by regulators. This regulatory guidance is an expression by the various regulators about how they intend to interpret and apply the legislation to particular industries. Regulatory guidance used to be principles-based and supported by specific examples. Over recent years, regulatory guidance has become more prescriptive and at times exceeds the legislation. We have not viewed the 'evolution' of prescriptive guidance to be a positive development in Australian regulation. The line has blurred between legislation and guidance and more and more, regulators have attempted to enforce their own guidance rather than the law. Post the Royal Commission into Misconduct in the Banking and Financial Services Sector which ran from 2017-2019, some regulatory guidance has become enforceable. This of itself is a worrying development because it supplants the role of Parliament. For the most part however, much regulatory guidance remains only guidance and industry uses the law as its roadmap.</p> <p>Outcomes focussed regulation has the potential to destabilise the model of legislation acting as the primary compass for financial services. While the law is prospective, outcomes-focussed regulation is retrospective. Instead of determining whether an entity has complied with its obligations, an outcome focussed approach looks at the result of the conduct to determine whether it is consistent with the intention of the party making the assessment. This has the effect of causing enforcement bodies to ignore whether an entity has complied with the law and instead sees the conduct based on a set of unspoken ideals that may have developed well after the conduct occurred.</p> <p>Outcomes can be influenced by a wide range of factors. To name a few, this includes deficient legislative drafting, poorly framed guidance, misconduct, consumer behaviour and black swan events. The stability of the financial services sector is threatened where a provider is held accountable for outcomes where they are not the sole actor. We have seen the Australian dispute resolution framework devolve into a dysfunctional mess and this is largely because it bases its approach on desired outcomes and fairness rather than a proper application of the law.</p>

	Outcomes focussed analysis is appropriate to determine whether further legislative and regulatory reform should occur, but it is not appropriate for regulation itself.
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>As above, this has potential to destabilise markets and reduce services to consumers. Fairness is a subjective concept. What is 'fair' can turn on the individual merits of a particular matter or the attributes of the parties involved. Markets cannot be regulated on this basis.</p> <p>In the Australian external dispute resolution scheme AFCA, the notion of fairness is used to override the legal rights of financial firms, disregard evidence, ignore consumer conduct and failure to follow precedents resulting in a system that is heavily skewed towards complainants and one that provides no clear understanding for industry about how a matter might be decided.</p>
3.	What are your views on <i>Outcome 1: Consumers have access to appropriate products and services that meet their needs?</i>
	<p>This is a practical objective. Product design and distribution is a central part of consumer access to products and services. The notion of "appropriate" has been debated in circles for decades in Australia. It is a term which is more capable of objective analysis than the concept of fairness which makes it useful to include in a regulatory objective. The difficulty comes in defining the attributes of the people or groups to which certain products and services are appropriate.</p> <p>Where the term "appropriate" can be a useful expression to describe the products and services, it is important to also approach the assessment from the point of view of what <u>should</u> be appropriate for a particular person or group. If we allow consumers to define what is and is not appropriate, or we move the interpretation based on the person or group availing themselves of the service, we end up in a situation whereby an external party will define the appropriateness of a product or service based on the outcome. It has potential to produce results such as the financial advice being deemed appropriate where the consumer makes money but inappropriate where they lose money because their frame of reference is not the appropriateness of the advice but the outcome.</p> <p>It is important that the enforcement approach remains steadfastly objective</p>
4.	What are your views on <i>Outcome 2: Consumers receive useful information that aids good decisions?</i>

	<p>Disclosure is useful but the idea that consumers read and understand most of what they are told is misplaced. If a consumer cannot be told in a few simple sentences what they need to know, then everything else is lost.</p> <p>Australia is stuck between an historical, heavily disclosure-dependent regime, and a more modern, outcomes-based approach. The result is that firms are still being punished for disclosure failures at the same time they are being punished for poor outcomes. Where there is a disclosure failure, punishment is meted out for the failure. Where there is no disclosure breach, firms are punished for poor outcomes on the basis that consumers neither read nor appreciate disclosure. Lawmakers and regulators punish firms for defective disclosure while arguing that disclosure is not a defence to poor outcomes – even where these outcomes are caused or contributed to by consumer conduct.</p> <p>Disclosure and consumer education must remain central to a functioning regime. Leaving aside opportunistic product design and conduct that exploits consumers, appropriate advice and proper disclosure should be an absolute defence to allegations of breaches causing loss. The outcome of the advice is a function of a multitude of issues, many unconnected to the conduct of the services provider.</p>
5.	<p>What are your views on <i>Outcome 3: Consumers receive fair value for money?</i></p>
	<p>This is a challenging Outcome. What constitutes fair value is something uniquely specific to each individual. We do not believe it is possible to regulate for this outcome.</p>
6.	<p>What are your views on <i>Outcome 4: Consumers can trust providers to act in their interests?</i></p>
	<p>It is worthwhile looking to the Australian experience with the best interests duty. It was introduced into financial services law in 2014 and widely viewed as a complete failure, resulting in increasingly strong calls to remove the best interests duty for financial advice in favour of a fairer test. The financial services industry is dropping the best interests duty. Despite ample evidence of the shortcomings of a best interests duty for financial services, the Royal Commission held between 2017-2019, somewhat shockingly recommended a best interests duty be established for mortgage brokers. This was a complete mistake. So much so, that banks and other financial institutions were exempt from the obligation to act in a clients' best interest from the outset.</p> <p>We have a completely nonsensical regime in Australia where a mortgage broker is subject to a duty to act in the best interests of a client and facing fines of more than \$1.5m for a breach, where a bank can act with complete impunity and recommend its own products to a consumer regardless of whether the consumer is in a better product elsewhere and where switching would be counter to their best interests.</p>

	The laws in Australia make little sense. They are constructs of hubris and arrogance, knee-jerk reactions to non-compliance with existing laws and capitulation to political pressure.
7.	What are your views on <i>Outcome 5: Consumers receive quality ongoing care?</i>
	This recommendation makes sense insofar as a service provider should be required to account for the services rendered if they receive ongoing payments. It would not make sense to impose a positive duty on advisers to provide ongoing quality care unless requested to do so by the client. We would equate it to the fee disclosure obligations of Australia where financial advisers are required to disclose to clients what annual fees they receive and what services they have provided to the client to earn them – albeit there have been considerable difficulties posed by the management of this obligation.
8.	What are your views on <i>Outcome 6: Markets are trusted based on their integrity and transparency?</i>
	We make no submission on this Outcome.
9.	What are your views on <i>Outcome 7: Markets enable sustainable innovation and growth?</i>
	We make no submission on this Outcome.
10.	Is anything missing that should be included in the fair outcomes? Please explain.
	Any other matters are addressed in or opening statement.
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 make no submission on this Outcome.
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 make no submission on this Outcome.

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>We hold the view that outcomes should be used to inform future regulation but should not be a measure by which service provider conduct or products and services dispensed under an existing framework are judged. The Australian regulatory system is falling in on itself because it is confused about whether it should enforce compliance with existing laws or regulate based on outcomes.</p> <p>As has been observed by professionals of high standing including Commissioner Hayne from the Royal Commission, the Australian framework does not require more laws, it requires better enforcement of those that exist. An outcomes focussed approach punishes those that comply more heavily than those that circumvent their obligations or create business models intended to avoid legal obligations. There are too many variables that can impact outcomes. If large numbers of consumers are impacted by poor outcomes then either a services provider is breaking the law or the law is deficient. If individual consumers are experiencing poor outcomes this could merely be a function of free markets. No amount of regulation will abolish poor consumer outcomes in all instances.</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 with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024.**

Date: 28 March 2024

Number of pages: Six

Name of submitter: [REDACTED]

Company or entity: Forsyth Barr Limited

Organisation type: Forsyth Barr is a fully staff and New Zealand owned NZX firm. Through Forsyth Barr Limited, and various subsidiaries, we provide a full range of investment and wealth management services including portfolio management (DIMS), investment advice, sharebroking, research, investment banking, cash management, investment funds and KiwiSaver. Almost every part of our business will be affected by the proposed guidance set out in the Draft Guide.

Contact name (if different):

Contact email and phone: [REDACTED]

General comments

This is a submission by Forsyth Barr Limited (**FBL**) on the Financial Markets Authority's (**FMA**) Consultation on the proposed fair outcomes for consumers and markets dated November 2023 (**Draft Guide**).

We support fair outcomes – as a wealth management and advisory firm we are always thinking of how we can achieve good outcomes for our clients. However outcomes for which we are accountable to the FMA ought to be founded off existing legal obligations.

The Draft Guide says that the outcomes are not rules, and do not create, replace or even supplement existing legal obligations. However, the Draft Guide also notes that the FMA expects financial service and product providers (**Providers**) to '*demonstrably embed [the outcomes] in the way they operate*', noting also that the outcomes will '*sit at the heart of our regulatory approach and inform our engagement with industry*'. This creates a confusing and unsettling legal position for Providers – it effectively creates de facto obligations. Our view, for the reasons set out below, is that the outcomes (as presently drafted) are not legally enforceable and that the FMA should be very clear and upfront about the de facto extension of its mandate, together with the costs and benefits (if any) of extending the regulatory regime.

Legal obligations

As stated in numerous published articles already, the Draft Guide imposes expectations on market participants that are not reflected in the Financial Markets Conduct Act 2013 (**FMC Act**). We support those views and further note that if the outcomes are not founded off legal obligations, then it is incorrect to suggest that focusing on those outcomes will help firms meet their legal obligations (let alone in a way that achieves their stated purpose and intent).

In our view, the FMA must make it very clear where there are legal obligations and where there are not. We submit that FMA ought to also make it very clear who, from the vast array of Providers captured by the Draft Guide, those obligations apply to. Where there are no legal obligations, the FMA is merely acting as an 'influencer' and the role of the Draft Guide is restricted to setting the FMA's expectations in order to attempt to *influence* industry behaviour. The FMA must be very clear that in doing so, the Draft Guide is simply that, guidance, and that they are not imposing (or even clarifying existing) enforceable obligations. To suggest otherwise would be to elevate the outcomes in the Draft Guide to the status of law when they have not been through the appropriate channels and law making process.

Purpose and intent

The Draft Guide presupposes that the purpose and intent of the 'obligations' referenced in the Draft Guide are to deliver fair outcomes for consumers (noting that five of the seven outcomes are consumer focused). We acknowledge that fairness is referenced in the purposes of the FMC Act. However that is in the context of the market as a whole (i.e. promoting and facilitating the development of 'fair, efficient and transparent financial markets') not as a purpose in and of itself justifying the introduction of outcomes based regulation focusing on fair outcomes to consumers.

Legal basis for the 'outcomes'

The language in the Draft Guide bears a resemblance to the principles based regime in the United Kingdom – most specifically the rules around 'Treating Customers Fairly' and the more recent Consumer Duty. However, the United Kingdom has a different legislative framework to what we have in New Zealand. In the UK the FCA has a general rule making power. The FMA does not. Instead the FMA's 'law' making powers (to the extent it has any), are restricted to the granting of exemptions or designations. In this context, it would seem that the Draft Guide has been prepared with more of a view to UK law than to New Zealand law and the policy development that led to the current regime.

As part of the re-write of New Zealand's securities law (which ultimately led to the repeal and replacement of the Securities Act 1978 and Securities Markets Act 1988 with the FMC Act) the Ministry of Economic Development (as it then was) specifically considered whether, in addition to the specific regulatory framework created by securities legislation, a principles based overlay along the lines of that in the United Kingdom should apply. This would require those providing financial services to retail customers, at any point in the value chain, to do so in a manner which treats those customers fairly. Ultimately however, this approach was not adopted into our legislative framework. The reasons for this were not included in the subsequent regulatory impact statement (due to its already large size and complexity) however it is clear that the notion of an overlay of fairness to consumers similar to what is provided for in the United Kingdom was considered and ultimately rejected.

If the FMA wishes to re-open this matter for consideration, we respectfully suggest that it follows the appropriate channels and raise the matter with MBIE for consideration in the context of legislative change rather than short circuit that process through the introduction of guidance which imposes an expectation on financial product and service providers to demonstrably embed outcomes for which there is no legislative basis.

Ultimately we are accountable to the market and to consumers for our outcomes, not to the regulator.

Apparent lack of due process

If a regime such as what is proposed was to be included in legislation, there would be considerable policy work supporting it along with a comprehensive regulatory impact analysis. This would appear to be absent. Is the proposed new de facto accountability framework demonstrably beneficial in the context of the likely costs imposed? What is the regulatory failure that the approach seeks to remedy? What other approaches were considered? What are the likely consequences of further raising regulatory hurdles?

Our responses to the specific questions in the consultation are set out below.

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>	As noted in our introductory comments it's not clear how the proposed outcomes will fit within the current legislative regime. Where there are no legal obligations we consider that the FMA must be very clear that the outcomes are not binding on Providers and that it is simply seeking to influence industry behaviour in a particular way. There should be no expectation or de facto requirement to be accountable in any way to the FMA for meeting outcomes that have no basis at law.
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>See previous comments. Given the uncertainty regarding the legal enforceability of the proposed outcomes we can't comment on what benefits there may be for consumers, providers and markets. What is apparent however, is that the expectation to embed the proposed outcomes into business practices will impose additional compliance costs on Providers in circumstances where there has been no clearly defined benefit.</p> <p>We note that one of the purposes of the FMC Act is to avoid unnecessary compliance costs. We appreciate that all compliance comes at a cost, however, the costs associated with embedding outcomes into a business which have no legal basis would certainly be an <i>unnecessary</i> compliance cost.</p>
3. <i>What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</i>	New Zealand's financial services regime is largely a disclosure based regime. With some exceptions, Providers are free to provide products and services to whomever they choose, provided they hold any necessary licences and disclose the information required or considered necessary for investors to make an informed decision.

	<p>Access</p> <p>We query whether “access” is the issue here or whether it’s more about investor education. If so, outside of financial advice providers (if the investor chooses to use one) it’s not the role of Providers to educate the wider New Zealand public regarding the risks associated with certain investments and what other products are available. Indeed this is an express statutory function of the FMA under the Financial Markets Authority Act 2011</p> <p>Appropriateness</p> <p>The Draft Guide defines appropriateness as referring to <i>“the suitability to a consumer of a financial product or service through its entire lifecycle. This includes the design, offer and distribution of a product or service, through to post-sale interactions. Suitable sales, advice and review processes that meet the needs of consumers are critical to this. 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”</i>.</p> <p>The role of the Provider is to clearly, concisely and accurately describe the financial product or service on offer. It is then up to the customer to decide based on that disclosure if it is appropriate for them. Outside of derivatives, there is no legal requirement on the product provider to determine suitability. Adding in a layer of suitability requirements more generally will add to costs and often detract from the user experience.</p> <p>In our view, as presently drafted, this outcome creates significant legal uncertainty.</p>
<p>4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?</p>	<p>Initial disclosure</p> <p>There is already an extensive disclosure regime prescribed by the FMC Act and FMC Regulations. This regime requires prescribed information to be contained in the PDS and all ‘material information’, not otherwise contained in the PDS, to be included on the Register Entry. Information in the PDS is required to be worded and presented in a clear, concise and effective manner and the PDS must be given to investors before accepting an application or issuing or transferring a financial product.</p> <p>In our view the additional requirement of “useful” (which is defined to mean “easily understood and digestible information that is material, accessible, timely and reliable, to support informed decision-making”) adds nothing to the current regime other than confusion regarding the correct legal test regarding what is required to be included in offer disclosure documentation.</p> <p>To the extent that investors may have found it difficult to make informed decisions about ethical investing and weaknesses in the disclosure around such matters, we consider that the current regime already adequately deals with this. If ethical considerations are a material factor in, for example, a MIS Manager’s investment decision making, then this should be included in the PDS or register entry (in the OMI and/or SIPO) as material information. Failure to do so (or weaknesses in the information disclosure) may be a breach of the FMC Act. We also note that Part 2 applies to disclosure documentation.</p> <p>Ongoing disclosure</p> <p>In terms of ongoing disclosure that may aid good decisions for investors, we note that the FMC Act, FMC Regulations and NZX Rules (for listed issuers) also already contain an extensive ongoing disclosure regime. This disclosure regime includes Financial Reporting as well as detailed timing, form and content requirements for periodic and annual reporting for the different financial products (for example fund updates for</p>

	<p>managed investment products that are units in a managed fund and annual meetings for equity securities). The intention is to ensure that investors are adequately informed of any material changes in the risk of a security over time. The existing regime therefore already provides for useful information to be provided to investors in order to aid good decisions and in a way that balances the benefits of implementing a disclosure regime with the costs involved.</p> <p>In terms of more general ‘useful’ information outside of what is already prescribed by the current legislative regime, it is not clear to us who will be expected to provide this information to investors or what that ‘useful’ information might be. This will obviously change depending on the nature of the information and who has the relationship with the customer. The current regime makes these expectations clear. The Draft Guide does not.</p> <p>One of the illustrative examples relates to a concern that consumers may no longer be in a KiwiSaver fund that is aligned with their investing preferences and stage of life. This is a discrete issue that KiwiSaver managers may address at least annually with investors. However, as a general rule, issuers should not be expected to second guess what additional disclosure (outside of what is prescribed) might be useful for investors to know <i>vis a vis</i> their investment and whether it remains suitable for them. If anything this is a matter for a financial adviser (if the investor has elected to use a financial adviser) and is already covered off by the duty provisions in the FMC Act and the Code of Conduct for Advisers.</p>
<p>5. What are your views on Outcome 3: Consumers receive fair value for money?</p>	<p>We agree with the concept of providing value for money, but disagree that this is a matter for regulatory intervention. This is a matter determined by the market, which we note is not only competitive but is also subject to media and analyst scrutiny.</p>
<p>6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?</p>	<p>This outcome conflates operational resilience with conflicts of interest – both of which raise distinct regulatory issues. If this outcome is to remain the two matters should be separated – trusting a provider to act in their interests has nothing to do with operational resilience.</p> <p>The illustrative example refers to an FMA information sheet that emphasises the importance of having effective resilience and operational systems risk management in place to safeguard consumers’ data and avoid disruptions. Historically operational resilience has been addressed by the FMA through its licensing regime (in terms of an assessment of whether the licensee is effectively capable of performing the service) and the imposition of licence conditions that ensure these requirements continue to be satisfied. In our view, addressing a Provider’s ability to perform the service through the licensing regime (including its business continuity planning) is the appropriate forum for addressing operational resilience.</p> <p>It’s not clear what this particular outcome adds to what is already in place at the moment other than confusion from the introduction of the notion of “trust” <i>vis a vis</i> operational resilience.</p>
<p>7. What are your views on Outcome 5: Consumers receive quality ongoing care?</p>	<p>This is a confusing and unhelpful outcome to include in a guidance note that is expressed to apply broadly to Providers as a whole. As currently drafted this outcome would apply to equity and debt issuers, MIS Managers, DIMS Providers, FAPS etc. Not all of these entities will have (nor should they) have a direct and ongoing relationship with the investor which requires “quality ongoing care”.</p>
<p>8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</p>	<p>There is already adequate provision through the FMC Act and NZX Participant and Listing Rules to address issues regarding market conduct. Including an additional layer of markets being “trusted” based on integrity and transparency adds nothing other than confusion as to what</p>

	the legal test is and who is responsible for enforcement as between NZX and the FMA.
9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?	This outcome is vague and confusing. It's not clear what outcome the FMA is seeking to achieve here let alone how it could apply to Providers. The illustrative examples are equally as unhelpful in terms of linking the outcome back to Providers. One refers to the creation of the Catalist Public Market and the others refer to reports and forums seeking to promote innovation in financial markets.
10. Is anything missing that should be included in the fair outcomes? Please explain.	As noted already we consider that the Draft Guide ought to be re-drafted to make clear where there are legal obligations (and where there are not) and who those obligations apply to.
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?	Customer outcomes are already at the centre of our business model. We are continuously thinking of new ways to innovate and provide value to our customers and the wider NZ public (seen for example, through our recent introduction of Tempo – New Zealand's first guided investment app). However, it's important to note that this decision was a business decision and was not driven by regulatory intervention of a requirement to consider outcomes. In fact most of the outcomes that lack a corresponding legal obligation (e.g. access to appropriate products) are, in our view, appropriately business decisions, not matters requiring regulatory involvement. In particular, there should not be an additional burden of needing to engage with the FMA on how vague outcomes with no basis in law may or may not have been incorporated into processes, products or services.
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 noted already, in circumstances where the outcomes are not linked to existing legal obligations then outcomes focused regulation will not help support regulatory compliance. In short, this is because there is nothing to comply with. We are concerned that what is proposed creates an additional layer of de facto accountability to the FMA.
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>An outcomes focused approach to supervision might be useful for the FMA in terms of deciding where to allocate its supervision and monitoring resources. However, any supervision or monitoring activities must be as against a Provider's existing legal obligations not against the stated outcomes. This is because, absent a legal obligation, Providers are not required to comply with or embed the outcomes into their business.</p> <p>The FMA should not lose sight of the fact that every engagement it has with a Provider comes at a cost. This is because each request is taken seriously. Time is spent reviewing the request, identifying the appropriate staff to respond, drafting the response and, if necessary, gathering evidence in support. Because of this, we consider that it is incumbent on the FMA (or any regulator or supervisor) to only ask questions and monitor matters that relate back to an actual legal obligation. Expecting Providers to embed outcomes (where they are not linked to legal obligations), and then monitor against those outcomes, will impose unnecessary costs and becomes an unjustified compliance burden on businesses.</p>
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?	As previously noted, Providers should only be held accountable for breaches of a legal obligation. Having said that, an outcomes focused approach to supervision and enforcement might usefully form part of the FMA's Regulatory Response Guidelines (which are publicly available on the FMA's website). Much like the FMA's strategic risk outlook (which changes over time), the outcomes might assist the FMA to determine what areas of focus it will look at, whether an issue or problem requires the FMA's attention and what an appropriate and proportionate response might be. By reframing the outcomes as FMA focus areas (and the 'lens' through which it will view compliance with legal obligations) they could then change and adapt over time as the FMA identifies other areas where it can usefully influence market behaviour. However the

	starting point must always be whether a legal obligation has been breached. Quite aside from the chilling effect on the market, without a clear focus on enforceability, public money will be wasted on seeking to impose or enforce outcomes which are ultimately not enforceable.
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>We cannot see a link between outcomes focused regulation and innovation. If implemented the outcomes in the Draft Guide will add a layer of de facto regulation and level of legal uncertainty and this will stifle innovation.</p> <p>We see this as being in stark contrast with the statutory function of the FMA to “promote the confident and informed participation of businesses in the financial markets” (as per section 9(1)(a) of the Financial Markets Authority Act 2011).</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?	Not applicable.
17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?	Overall the examples appear to be tailored towards the banking and insurance sector or derived from FMA sector surveys, reports and thematics. None of which provides helpful guidance to the broad spectrum of Providers as to how the proposed outcomes might apply to them. As noted elsewhere in our response we consider that the Draft Guide ought to make clear where there are legal obligations and who those obligations apply to. The examples might then usefully suggest ways in which the outcomes link back to those obligations and how they might be applied by the FMA.
18. Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?	See our earlier comments.
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.	

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 with 'Fair outcomes for consumers and markets: [your organisation's name]' in the subject line. Thank you. **Submissions close on 1 March 2024. Extended to 1 April 2024 for BIG member submissions.**

Date: 1 April 2024

Number of pages: 14

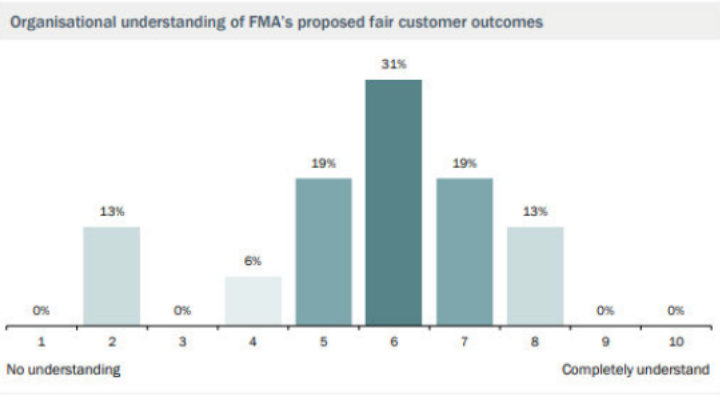
Name of submitter: BIG

Company or entity: Unincorporated Group


Organisation type: Industry body

Contact name (if different): [REDACTED]

Contact email and phone: [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.	<p>1) BIG engaged Korda Mentha to conduct a survey of its members on their readiness to implement regulatory changes. One of the questions within the survey was about how well our member organisations understand the FMA's proposed fair customer outcomes. The distribution of answers is set out below:</p> <p>Organisational understanding of FMA's proposed fair customer outcomes</p>  <table border="1"><caption>Organisational understanding of FMA's proposed fair customer outcomes</caption><thead><tr><th>Understanding Level</th><th>Percentage</th></tr></thead><tbody><tr><td>1 (No understanding)</td><td>0%</td></tr><tr><td>2</td><td>13%</td></tr><tr><td>3</td><td>0%</td></tr><tr><td>4</td><td>6%</td></tr><tr><td>5</td><td>19%</td></tr><tr><td>6</td><td>31%</td></tr><tr><td>7</td><td>19%</td></tr><tr><td>8</td><td>13%</td></tr><tr><td>9</td><td>0%</td></tr><tr><td>10 (Completely understand)</td><td>0%</td></tr></tbody></table>	Understanding Level	Percentage	1 (No understanding)	0%	2	13%	3	0%	4	6%	5	19%	6	31%	7	19%	8	13%	9	0%	10 (Completely understand)	0%
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6	31%																						
7	19%																						
8	13%																						
9	0%																						
10 (Completely understand)	0%																						

- 2) With 68% of members, expressing a 6 out of 10 or less understanding of what is being proposed, and a few indicating almost no understanding of what the focus on outcomes will mean, there is clearly more work to be done in terms of either conveying expectations or recasting the outcomes. We set out below reasons why we think there is a high level of uncertainty.
- 3) The document contains numerous vague statements (examples listed below) that are highly subjective and are therefore difficult for market participants to apply / respond to.
- ✚ *'We all know what is fair when we see it.'*
 - ✚ *'If we can observe fair outcomes in the market, this is a strong indication of good conduct.'*
 - ✚ *'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.'*
 - ✚ *'We want firms to adopt a demonstrable focus on results.'*
- 4) The statements provided below imply that, in the initial stages of implementation, the FMA intends to experiment with and test the approach in the live environment, which creates significant uncertainty for market participants. We are not sure how the FMA plans to apply a consumer lens to outcomes, including measurement of outcomes.
- ✚ *'Success will come from building the FMA's understanding of consumers' perspectives and experiences across different demographics.'*
 - ✚ *'These outcomes will inform how we exercise our role as a kaitiaki of financial markets and approach our supervisory and enforcement work.'*
 - ✚ *'This will be an important part of our engagement model and the results we see in the market will alert us to where we need to have robust conversations about appropriate practices.'*
 - ✚ *'Instead of prescribing the processes or actions that firms must take, the FMA is setting out the outcomes that regulation seeks to achieve. We will then step back and let firms find the most efficient way to achieve these outcomes.'*

- 5) The Guide is not clear on how or why market participants are expected to “take ownership” and “make efforts to achieve”, the outcomes and “monitor and review progress...and articulate that to [the FMA]”. These expectations do not appear to be either clear or grounded in providers’ legal or regulatory obligations and in some cases the outcomes are things that we cannot control at all. For example, how can a small firm that supplies a single type of product be expected to control whether or not the market as a whole sees certain types of customer fall through the cracks?
- 6) The Guide mentions that *'if we can observe fair outcomes in the market, this is a strong indication of good conduct.'* This statement is confusing for providers and appears to contradict the earlier expectations on 'efforts.' Fair consumer outcomes are subjective, intangible, and not easily standardized or systematically measured. There are times when these outcomes can even be 'invisible,' especially if a consumer doesn't share their experience with a provider (positive or negative), making it challenging for us to verify if they were treated fairly. In addition, we seek insights into the FMA's approach to market observation. What specific data or information does the FMA intend to analyze during this monitoring process?
- 7) As BIG members, we seek clarity on the role of supervisors in this new approach as well. Are they expected to create their own monitoring framework, and if so, what does that involve?
- 8) We are also interested in understanding how the FMA reconciles the proposed outcomes-focused approach with its existing [Compliance Approach, which includes this statement:](#)
 *'We recognize that the burden of complying with financial regulation imposes cost, which is borne by those who participate in our market. However, a lack of strong regulation can harm investor confidence and informed participation. It is all about finding a balance so that businesses can comply with the law and focus on their day-to-day business activities.'*
- 9) Maybe the root of the problem is that the guidelines attempt to be all things to all participants, when this may not be possible:

	<ul style="list-style-type: none"> ✚ There is a very broad diversity of participants in the financial universe and maybe different participants should be focused on different outcomes. The most important outcomes for a bank to be contributing to are probably not the same as the most important outcomes that we are looking for from a fintech start up to be focusing on and these are different again from the NZX, a MIS manager or a financial adviser. ✚ Therefore to try and force all those different kinds of participant into one list of outcomes and one narrative, the inevitable output will be that it either goes off point from each individual participant type's most important considerations or will have to be described in such high level terms as to not add much value when viewed against an entity's actual obligations. For example, discussing whether all people in NZ can access services is an important topic to discuss in the context of basic banking services. In contrast, national access to services is not a topic that is helpful to discuss in the context of small start-up fintech businesses... so is this outcome one that should be in or out of a list of outcomes for everyone? If yes, the FMA is inserting an outcome that is actually not applicable to most of the participants in the sector, which injects uncertainty as to which parts of the commentary are applicable to different entities. If no the FMA is leaving out an outcome that is critical for the most important part of the sector. Either way, one list does not really work. ✚ Our preference would be to have different outcomes for different participants that take into account their specific frameworks and scale.
<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>	<ol style="list-style-type: none"> 1) When viewed in isolation, we agree that many of the changes were well-intentioned. Most would agree that emphasising the prevention of consumer harm, rather than a mere checkbox approach to compliance, is a positive development for the industry. 2) However, as alluded above, there is a fundamental question to ask here about whether we actually want the same outcomes from all participants?

- 3) In this regard it is worth reflecting on the fact that the Government is currently in the process of unwinding provisions of the CCCFA because trying to apply a one set of lending principles to all types of lending led to unintended consequences. Forcing mortgage lending and truck shop lending into the same regulatory box when clearly the policy considerations of those two activities are very different has caused significant harm which needs to be reversed. Here the FMA seems to be going much further than what the CCCFA tried to do by trying to squeeze the entire financial universe into one tiny ball of outcomes.
- 4) We believe that the consequence of forcing everyone into a one size model that is not quite right for any one part of the sector is to create confusion, increase operational complexity, and create inefficiency. In our case it cuts across our current frameworks such as FMC Act conduct obligations and FMC licence obligations and minimum standards. Parts overlap but not perfectly with existing obligations, parts import concepts that at least in regulatory terms apply to different participants so they appear to be de facto new regulations and parts discuss things that seem entirely off point to our context, which then means we are unsure whether we are supposed to apply them all or not.
- 5) What colours our answer is the knowledge that if the FMA sets an expectation that MIS must contribute to quite a high level and subjective concept like “Consumers can trust providers to act in their interests” say, the FMA would then require us to have a tangible way of defining what that phrase means and then collect objective evidence in support. This amounts to a significant amount of extra work, that may not yield much.
- 6) As set out above, our preference is to have outcomes specific to MIS so that what we are then working with is relevant to our context and obligations. A particularly helpful way forward would be to have conversations with the FMA along the lines of which parts of our current suite of obligations it sees as being most important, what it sees the rules we have as meaning to achieve and whether there are problems or gaps caused by what

	<p>we have. A very focused outcomes-based discussion along those lines would be mutually beneficial.</p> <p>7) If there is to be one set of outcomes for everyone (which is probably sub optimal for the reasons given above), the way to do this in a way that reflects Parliament’s will and which is coherent is to base them in the purpose statements of the FMC Act. Unlike the FMA’s proposed outcomes, the FMC Act purpose statements:</p> <ul style="list-style-type: none"> ✚ Apply to all participants. ✚ Balance the interests of businesses, consumers, and investors, rather than focusing so heavily on the consumers. This is important because some of the biggest risks in the financial sector relate not to consumer issues but to industry outcomes that are not healthy (for example the shallow nature of NZX, or lack of competition among administrators). ✚ Also consider the broader welfare of New Zealand with the focus on efficiency. For example, the financial sector is not only there to serve consumers, but also to allocate capital in the most efficient way, which makes society as a whole wealthier. Again, this is a key part of what the financial sector is there to deliver, which the excessive consumer focus ignores. ✚ Also consider the statutory instruction to avoid “unnecessary compliance costs”. In a small economy compliance burden is an important factor to consider.
<p>3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?</p>	<p>1) The conversation around customer groups without sufficient or appropriate product access appears tailored for larger national entities that are intended to provide ubiquitous coverage and access essential facilities like banks. It does not resonate with smaller and/or specialized businesses that may have a strategic focus on particular sectors or a particular target market. This is an excellent example of why it is not the right approach to attempt to define one set of outcomes that are intended to be all things to all participants.</p> <p>2) In terms of “are products appropriate”, the risk of MIS products is primarily addressed by extensive rules concerning disclosure and governance, which includes oversight by a Supervisor charged with engaging with us from a member/investor lens. Conversely, we have no specific rules concerning product design and it is not clear that there is a product design problem within</p>

	<p>our sector. In short, this outcome appears to present a focus on a concept that certainly does not overtly sit within our current framework, to address a harm that may be addressed in a different way. Whereas the mechanisms that govern us are not emphasized.</p> <p>3) If FMA believes that there should be product design rules, instead of such emphasis on governance it should seek policy change and a legislated regulatory mandate.</p>
<p>4. What are your views on Outcome 2: Consumers receive useful information that aids good decisions?</p>	<p>1) Useful information is one concept that probably does apply to every participant. This can be sourced in the FMC Act purpose statement, also in other parts of the regime, such as:</p> <p>2) Part 2 FMC Act which is about false and misleading statements and unsubstantiated representations, and applies to all participants.</p> <p>3) Section 446J(1)(j) of CoFI shares a largely similar intent where entities are expected to communicate with their consumers about the relevant services and products in a timely, clear, concise, and effective manner.</p> <p>4) The concept of providing useful information for decision making also duplicates the Code, Standard 4, in giving financial advice we must take reasonable steps to ensure client understanding.</p>
<p>5. What are your views on Outcome 3: Consumers receive fair value for money?</p>	<p>1) The law does not have any price/value related provisions, with the specific exception of reasonableness of fees rules for KiwiSaver (and there is a heavily prescribed mechanism for how reasonableness is to be assessed). This is for good reason. Attempting to define “value” is context specific and immensely difficult to do. The probability of unintended consequences from intervening on issues of price is high. In a small market like New Zealand once a market consolidates down to a small number of similar players, it is very difficult to reverse that outcome. Therefore interventions that could result in such an outcome are to be avoided.</p>

	<p>2) Further, a high level of competition analysis skills and micro economics expertise are required to contemplate intervening; expertise which has traditionally sat within the Commerce Commission and we are not convinced the FMA possesses.</p> <p>3) In our view if we can achieve, fair efficient and transparent markets, then we have to trust that value will follow as a consequence.</p> <p>4) The outcomes we should be pursuing therefore are fair efficient and transparent markets as per s 3 of the FMC Act and s 8 of the FMA Act.</p>
<p>6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?</p>	<p>1) A significant aspect of this would appear to be the appropriate management of conflicts. We support the idea of managing conflicts, and this can be readily addressed within the existing legal framework.</p> <p>2) More broadly concept of 'trust' is personal to each consumer, and as the current regulatory framework generally requires providers to act in investors' interests and to disclose conflicts, arguably the question is whether investors trust the regulatory framework, not individual providers.</p>
<p>7. What are your views on Outcome 5: Consumers receive quality ongoing care?</p>	<p>1) We are not against Financial Services Providers having policies and procedures in place to ensure ongoing competency, to manage complaints and support vulnerable clients.</p> <p>2) However, "ongoing care" suggests more in the way of checking in or communicating with customers than the FMA commentary suggests. This perhaps emphasises that many of the outcomes presented are subjective and will be understood by different people in different ways.</p>
<p>8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?</p>	<p>1) Agree and would add that markets also need to work in terms of efficiency (Goes to fair efficient and transparent markets).</p>

	<p>2) It is interesting to note that FMA seems to be picking the transparent part of the core purpose of the FMC Act but ignoring the concept of efficiency that is in the same part. It is a focus on efficiency that leads to overall net public benefit. As a smaller economy we need to place more emphasis on efficiency, which means doing things like removing barriers to entry and unhelpful regulatory burdens as our markets have scale disadvantages relative to other markets.</p> <p>3) We agree with creating a fair and level playing field by managing trading misconduct, scanning for frauds and scams, ensuring cyber security, and making sufficient and accurate disclosure.</p> <p>4) We agree with respecting privacy obligations but the rationale for having these is somewhat different to the rationale for the other items listed.</p> <p>5) AML/CFT compliance is concerned with meeting international obligations and identifying crime. It tends to create market transaction costs, rather than support fair, efficient and transparent markets.</p>
<p>9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?</p>	<p>(1) We agree that promoting growth and innovation are critical for a healthy industry and the welfare of consumers. As we are at a technological inflection point with the development of AI this has never been more important. Also as noted above some of the key risks in the market, such as the shallow nature of NZX stem from weak growth.</p> <p>(2) The word “sustainable” is interesting. Is the FMA requiring an ESG lens?</p> <p>(3) We note that the exemption power, which the FMA refers to is helpful, but only marginally so. It tends to be a lengthy and intense process to address a very specific issue and cannot depart from the general policy of the law. Proper law reform is required to significantly cut red tape and address most regulatory problems.</p> <p>(4) In general regulatory change also does not keep pace with market needs. For example, dropping the requirement for</p>

addresses as part of AML legislation has taken years to progress, basic administrative processes like statutory declarations have not kept pace with Zoom.

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

- 1) Overall we would suggest a reworking of the outcomes, rather than additional outcomes, assuming that the idea remains having one set of outcomes to be all things for all participants.
- 2) Our preference would be for sector specific outcomes, failing that outcomes based on the FMC Act purpose statements.
- 3) More of an industry focus, which would flow naturally from greater attention to the FMC Act's direction to consider issues from the balanced perspective of businesses, investors and consumers.
- 4) More focus on avoiding unnecessary compliance burdens as per s 4 FMC Act.
- 5) More focus on the concept of efficiency as per s 3 of the FMC Act. This captures ideas of promoting creation of broader public welfare and lighter regulation, given the scale of New Zealand markets.
- 6) There should be a piece on consumer capability. FMA surveys have shown a clear link between customer confidence and customer financial literacy. Also ultimately consumers will be the ones to live with the consequences of their financial decisions therefore a piece of the puzzle must be to arm customers to make better choices for themselves.
- 7) There should be a piece about creating a hostile environment for bad actors e.g. scammers and other persons setting out to commit crimes and harm customers and markets. This would involve the business community being united against persons of that nature and also the FMA being seen to take timely and effective enforcement against such persons.
- 8) Businesses should not face penalties for an 'unfair' consumer outcome if they can clearly demonstrate that it has taken reasonable steps to avoid unfair outcomes and provided diligent

	<p>customer care for customers. Ideally, the FMA should provide guidance around what it considers acceptable efforts.</p> <p>9) For example, in the case of KiwiSaver hardship, when processing a sensitive case of withdrawal, with careful handling and proper processes in place, the result can still 'go wrong' for the member and that it may not always meet the members' needs. What will be the verdict of that?</p> <p>10) In a different scenario, ongoing care and services are offered to consumers through multiple channels and reminders, yet no actions are taken by the consumer. While this might not produce an ideal outcome for consumers, is it unfair?</p> <p>11) Consideration ought to be given to acknowledge that the regulatory environment needs to promote confident and informed participation of businesses, and that a 'fair' outcome needs to be sustainable and fair for providers and consumers. Providers can put in place processes and procedures to try and achieve fair outcomes, monitor, and react to poor outcomes, but they cannot underwrite or guarantee what an outcome will be.</p>
<p>11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?</p>	<p>1) BIG represents multiple MIS managers. A survey of our members indicated that greater than 40% believed the costs of responding to the guidance would be in the order of at least \$100,000.00.</p> <p>2) If the FMA offered additional guidance on the implementation method and monitoring framework, we would need to conduct a gap analysis against existing processes</p> <p>3) As proposed, the approach is vague, generic, and does not coherently align with the existing legislative frameworks and obligations, therefore we generally do not believe that the approach could be practically implemented.</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>1) The approach, as proposed, would not support our members' regulatory compliance. Indeed, we believe that the uncertainty and ambiguity would introduce significant regulatory burden that would hamper our business without producing benefits for our customers.</p>

	<p>2) If we had a much more focused discussion about which parts of MIS framework are most important from the FMA perspective , with a view to efficient allocation of resources then that would be helpful.</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>1) The proposed approach may be useful as an internal tool to assist the FMA with prioritising key areas of focus for monitoring and supervision, but this should not alter regulatory objectives or conduct expectations of market participants.</p> <p>2) Beyond this, we would welcome discussion about:</p> <ul style="list-style-type: none"> • How much compliance resource should we have at our disposal bearing in mind the scale of New Zealand; and • Given the limitations of resource, what are the things that matter most. <p>3) We need further clarification on how the FMA intends to monitor 'measurable improvements' and what that might entail in practice.</p> <p>4) We also want to know how the FMA collects data related to consumer outcomes. How does the FMA ensure the accuracy, timeliness, and independence of this data? Furthermore, how do MIS supervisors monitor for 'measurable improvements' and, importantly, how these 'improvements' are quantified by the supervisors.</p> <p>5) Finally, If businesses are allowed the freedom to be creative and organize their own approach to implementation, what happens when the FMA disagrees with the business's approach? Will FMA impose its views as to what is reasonable over the views of management of the relevant entity? In obvious cases that might be relatively simple. The difficulty will come when matters are finely balanced, and there is a risk that the FMA will have the benefit of hindsight that is not available to the governors and managers of the business.</p>
<p>14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to</p>	<p>If a participant breaches an outcome but not the law, there is nothing that the FMA can do about this. Part of our nervousness with</p>

<p>regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?</p>	<p>the FMA attempting to influence conduct outside of the law is that willing compliers stand to lose out to participants that choose to gain an advantage by leaning into choosing to breach the outcomes, but not the law.</p> <p>Conversely, if we act in what we believe to be the spirit of the outcomes but in doing so we breach black letter obligations, we would have no defense if we were held for breaching the black letter obligation. Further, the nature of the outcomes are such that there may also be disagreement as to whether we have acted in the spirit of the outcomes. The invitation to potentially step away from actual obligations in favor of outcomes also makes us nervous for this reason.</p>
<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>In general we do not believe that a new regulatory approach that imposes regulatory uncertainty and burden will create conditions for more innovation in the market. In our view more onerous regulation favours entrenched large scale market participants that have extensive compliance resources and little incentive to innovate. Smaller players are likely to be discouraged from innovation due to prohibitive compliance overheads.</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 style="text-align: center;">Not applicable.</p>
<p>17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?</p>	<p>1) The examples are historical and only relevant to specific types of entity. If the FMA decides to progress with the guidance more current and relevant examples (covering all types of market participants) will be essential.</p>
<p>18. Do you need any further guidance or support from the FMA in relation to outcomes focused regulation or the fair outcomes?</p>	<p>We would rather have a more specific set of outcomes for MIS, so that they are more relevant to our context.</p> <p>We would also like to better understand what outcomes focus looks and feels like , given that we have not seen a substantial change in how conversations with FMA staff have gone since FMA has been speaking about outcomes.</p>

We would appreciate additional guidance on:

- 1) Managing overlapping and duplicating laws, obligations, and expectations.
- 2) The implications of the existing legislative framework.
- 3) Implications of the existing compliance approach and supervision framework.
- 4) The data required to demonstrate efforts.
- 5) The Supervisor's role.
- 6) The FMA's plan to upskill its understanding of the current state of consumer sentiment.

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.