CYGNUS LAW'S SUBMISSIONS ON "CONDUCT OF FINANCIAL INSTITUTIONS" OPTIONS PAPER

7 June 2019

Options for overarching duties

Section 3.2 of the Options Paper discusses a number of options for overarching duties.

Question 1
Which overarching duties should and should not be included in the regime? Are there other duties that should be considered?

I support the proposed duties but in more limited circumstances. As I note below I don't support broad duties that give the regulator power to set product specifications (whether directly or indirectly). I don't support a broad duty to have "systems and controls in place that support good conduct and address poor conduct". This essentially creates a de facto licensing regime in the form of a duty.

Overall, I don't consider the "pros" and "cons" set out in the paper fully reflect the substantive costs and benefits of the preferred options, or of the other options. The options paper notes that "Since the FMC Act and FA Act came into force society has increased its expectations of financial institutions with increasing scrutiny of the behaviour of financial institutions." While that may be the case, a social basis for regulation does not usually drive regulation of the financial markets. Rather, the usual justification for intervening in the markets is because market failures have not produced the right outcomes and that regulations, after taking into account relative costs and benefits, produce better outcomes. However, this basic principle is not addressed at all in the options paper. The options paper appears to proceed from a starting presumption that further substantive regulation is necessary without considering the costs and benefits. It does not start from a market basis but assumes a lack of regulation is in itself an issue e.g. "neither regulator has a direct legislative mandate for regulating the general conduct of providers of core retail banking and insurance products and services" and "lack of conduct regulation of retail banking was highlighted by the FMA and RBNZ's recent reports on the conduct and culture of banks and life insurers." I don't consider a lack of conduct regulation is, in and of itself, an issue. The question is whether further regulation is going to produce better outcomes, given the relative costs and benefits. While I fully agree with the concerns about conduct risks, including the risk of misconduct in the future, the paper does not, with respect to a number of the preferred options, provide any analysis to support how regulation will be effective at resolving those concerns in an effective and efficient way. Also, as I note below, ways that market-based solutions could be harnessed to produce better outcomes more effectively and efficiently are barely addressed. Rather, the options paper appears to start from the position that institutions (banks, insurers and regulators), not the market, are the best mechanism to resolve all of the issues identified.

The options paper, and preceding reports, have concluded that current conduct law is ineffective. However, no substantive analysis of that law (including a gap analysis) has been published including an explanation as to why it is ineffective to address conduct concerns. Those documents would leave the reader with the impression that there is little current conduct law when that is not the case. With respect to the fair dealing provisions in Part 2 of *the Financial Markets Conduct Act the paper states "these provisions are relatively narrow in nature, focusing on: misleading or deceptive conduct, false or misleading representations and unsubstantiated representations." This is not correct. The fair dealing rules are a core part of the financial markets regime (and of the Fair Trading Act with respect to market practice in other areas) and apply to a myriad of market conduct. The paper in fact identifies a number of examples of poor conduct that appear to be a breach of the fair dealing rules. The paper refers to this as "Insurers… sometimes use questionable tactics to settle". I don't think this is a correct description of that behaviour – some would appear to constitute a clear breach of fair dealing rules. The paper seems to suggest that the law is powerless to respond or that there are no other available mechanisms to respond (e.g. the existing compulsory dispute resolution schemes). The paper does not address why the fair dealing provisions would be ineffective at addressing those issues. In fact, over the last five years, the Commerce Commission has successfully completed dozens of court and regulatory enforcement actions for breaches of equivalent law under the Fair Trading Act. Targets included large companies such as Spark, Vodafone, Noel Leeming, and Steel & Tube. Over that period the Commerce Commission also concluded actions against ANZ Bank and Tower Insurance in relation to conduct that largely occurred before April 2014, when the FMA took over responsibility for fair dealing in relation to financial products & services. In contrast, over the same 5 year period (since FMA took over responsibility) the FMA has not brought any court proceedings, or taken any other public regulatory action, against a bank or insurer for breach of the fair dealing rules in relation to customers. While there may be valid reasons for that, I don't think new conduct regulation can be validated without considering why that is the case. In particular, if existing conduct laws are not being complied with or enforced in relation to financial products & services, are new, more extensive, conduct laws going to be any more effective at addressing the same issues?*

In addition, the paper does not address, except in passing, the other extensive conduct law current in place including:
- Financial Advisers Act ("FAA") provisions imposing responsibility (and liability) on banks & insurers in some circumstances for the conduct of third party advisers (see section 20F).
- The qualifying financial entity ("QFE") regime in the FAA under which the FMA approves licences for companies to provide direct financial advice through their adviser workforces, and monitors the conduct of the licensed QFEs. Many banks and insurers are QFEs. Licence requirements include that the QFE has processes to ensure reward structures drive appropriate behaviours and that advisers consistently guide customers towards suitable products. QFE conduct in relation to insurance replacement was criticised by the FMA in a July 2018 report- "QFE insurance providers' replacement business practices". Again, a key question that should be considered is why insurer and bank conduct in relation to distribution have arisen despite the existence of a comprehensive licensing regime.
- Service suitability and quality standards in the Consumer Guarantees Act, which apply to contracts of insurance and customer agreements with banks. Standards in the Act are not enforceable by regulators.

While the IMF report recommended greater conduct regulation, it only specifically referred to the financial advice regime. I don't think the IMF report can be used as support for the type of wide-ranging conduct regulation proposed in the paper. I support conduct regulation but in a way that is proportionate. I also consider that market-based solutions should be better considered as a key way to address some of the concerns.

The paper only addresses market-based solutions very briefly, based on a limited analysis of limited examples, and dismisses them as a potential solution. So market solutions that could be supported to provide an effective response to some concerns are not considered, for example:

- The paper does not fully take into account the important function that financial advisers provide in the market including to address the imbalance of knowledge & power highlighted as a key issue. In fact this intermediary function is a clear example of a market response to information asymmetries. Rather than considering ways that the role of advisers could be enhanced to address those asymmetries, the paper proposes imposing obligations on banks & insurers to monitor and control third party financial advisers. That risks eroding the effectiveness of a key market-based solution, by reducing the independence and effectiveness of the market function advisers provide (which are being enhanced in the current adviser conduct reforms that are focused on improving the conduct and effectiveness of financial advisers). It also increases the risk of misconduct because there will be fewer effective checks and balances. The paper seems to reflect a bank and insurer management view of financial advisers as an issue and "bit players" rather than as critical, and equally important, components of effective financial markets. Again, the paper appears to view the solution to conduct issues as being led by institutions rather than the market. The paper could have considered ways of supporting consumers to better access independent advice including via roboadvice.

- The paper notes that comparison websites for general insurance are not available in New Zealand because insurers won't make the required data available. The paper concludes, without any substantive analysis, that comparison websites are not an effective measure. That's despite the fact that comparison websites are a key example of a market-led solution to address information asymmetry. I've used published insurance comparisons before to make decisions on buying contents insurance, and travel insurance (I think offered by Consumer NZ). I found those comparisons helpful as they identified key characteristics of particular products that were relevant. The insurance contract law review paper is more positive about comparison websites. An option that should be considered is regulatory support for comparison websites, including a requirement for insurers to release data to support such websites. Regulations that require KiwiSaver schemes to disclose fees and costs in a consistent way have been very effective- such disclosure helps to identify issues and supports consumers to make better decisions.

A key recommendation in the Australian Royal Commission was a ban on cross-selling during a meeting or call with a person for another purpose. In New Zealand banks have been criticised for cross-selling, including of KiwiSaver schemes. This is an obvious conduct issue. However, cross-selling issues and potential responses are not addressed at all in the paper. While it is unlikely that a similar ban would be implemented in New Zealand, the ARC's concerns about cross-selling, and the issues in New Zealand, mean that cross-selling issues should be considered.

Option 1: A duty to consider and prioritise the customer's interest, to the extent reasonably practicable:

I don't consider that the duty should be included as an overarching duty in this form. I think the duty should be narrowed so it doesn't apply to the product itself (directly or indirectly). A duty of this type is relevant to services. However, as the paper itself notes, insurers and banks provide customers with "products". It is artificial to implement an overarching *"duty" in relation to a product. A duty that extends to product parameters is inevitable if the duty extends to product "design". "Design" is an artificial attempt to create a duty in relation to the product itself and will necessarily require consideration of the product characteristics. The paper doesn't clarify how that would work in practice- the "to the extent reasonably practicable" qualifier highlights that this duty is highly unclear and what is "reasonably practicable" is likely to be very fact specific and often difficult for providers to interpret. This is a real concern in relation to product design, given the proposal for both providers and senior managers to be liable for breaches.*

Since most of the conduct in relation to product development will impact on the final characteristics of the product, e.g. price, extent of cover, exclusions, excess, claims process etc, any consideration of conduct by the regulator will necessarily require the regulator to consider whether the product itself is appropriate. So this duty in effect creates a tool to regulate the product itself. In general, financial markets law does not dictate product parameters, but rather regulates information disclosure and conduct in relation to distribution. That's because it would otherwise require the regulator to make judgment calls about whether a particular product is appropriate for a particular group of customers, or otherwise determine whether the appropriate group of customers has been considered. These are core commercial considerations and, in my view, there is nothing to suggest that the regulator will be better than the market in establishing what products are appropriate. Also, as I note in these submissions, this approach actually increases the risk of poor customer outcomes because it undermines market mechanisms that seek to protect customers from inappropriate products and place overdue reliance on institutions (regulator and financial service providers) to directly regulate the products themselves.

I don't consider that a principles-based duty is a "pro" as stated in the options paper. Rather, it creates new legal obligations with respect to products in a way that is very unclear.

This duty is appropriate in the context of conduct e.g. distribution of products, implementation of contracts. These are in fact services, so applying conduct regulation to them makes sense. In fact, FMA already does that with respect to most large insurers via its QFE licensing regime. Likewise, AFAs and RFAs are subject to conduct regulation via the Financial Advisers Act. Many of the examples provided in relation to this duty in the paper in fact relate to services including:

- *present information about its products in a way that is accessible and comprehensible,*
- *settle claims promptly and in accordance with the policy (all insurers),*
- *handle complaints in a fair, timely and transparent manner,*
- *proactively identify issues that require remediation, and*
- *proactively contact policyholders after a natural disaster (general insurers).*

So I support applying the duty to such services.

Many of the key examples of problems at the product design stage identified in the paper in fact relate to mis-selling of the products, not inherent problems in the products themselves. I consider there are better ways to address those concerns rather than via very wide-ranging, and expensive to implement, conduct regulation. In relation to investments, the key regulatory control across all classes of investment is disclosure, together with conduct regulation prohibiting misleading or deceptive conduct (and unsubstantiated representations). This recognises that individuals are assumed to make rational decisions in their best interests but there is often an information asymmetry, an issue identified in the paper. One way to address the asymmetry, at least initially, would be a requirement for *additional disclosure in relation to products, particularly where there is no advice provided. I don't consider the proposed disclosure duty will be effective in that regard, since it does not provide any clarity regarding disclosure; it is only a very high-level standard. Clear and simple disclosure of key aspects of the product, and potentially warnings for products that have particularly poor outcomes, would enable consumers to make informed decisions. This approach was taken in relation to unsolicited offers of financial products provisions in the Financial Markets Conduct Act (Subpart 10 of Part 5) and in equivalent earlier regulations. It recognised that "low ball" offers were often predatory but that there were individuals who, even with full knowledge of the concerns, were happy to sell at a lower value (e.g. for convenience). Likewise the approach to extended product warranty insurance has been to require better disclosure, not other types of regulation. The risk of regulating products at provider level is that whole ranges of products are removed from the market that are in fact appropriate for some customers, who should be accorded some autonomy to make decisions they think are in their best interests (provided they are properly informed).*

I agree with the option of giving FMA the power to act when a product is clearly unsuitable, rather than an overarching duty to ensure the product is suitable to start with.

The CCCFA does not provide a particularly apt analogy. The products in question, loans, are simple and the duties are applied to individual customers not products themselves. The actual key parameter that needs to be considered, that "the borrower will make the payments under the agreement without suffering substantial hardship", is simple to apply. There is no such simple clear-cut approach that can be applied to more complex and varied products such as insurance.

A concern with this proposed duty is that FMA has been advocating for FSPs to charge customers a "reasonable price". For example, FMA's "View of conduct" document states "Are your customers paying a reasonable price (including ongoing fees and charges) for your products and services, and how do you demonstrate to your customers – through disclosure and discussion – that the price and the way it is calculated is reasonable? If a fee or charge is payable in the future and the amount is not known at the time of the sale (e.g. with derivatives) have you clearly disclosed how that will be calculated?" I'm not against reasonable prices. However, NZ is a market economy where the market is generally left to set prices including in relation to consumers. The law recognises that the market is often the best arbiter of price and only intervenes in limited circumstances. In financial markets law price control regulation is rare- the FMA has a power to regulate KiwiSaver scheme fees via the obligation in law that fees must not be unreasonable. There is limited evidence that this has been effective, with commentators regularly expressing concern about the relatively high level of fees in the market. If this duty is retained then I submit it should expressly state that it cannot be used to consider or set the price of a product (directly or indirectly). A similar carve out applies to unfair contract term provisions in the Fair Trading Act- the price is not something that can be "unfair".

Option 2: A duty to act with due care, skill and diligence:
The paper states that "The objective of this duty is to ensure that the financial institution has the skills and experience to competently provide a suitable service or product." As is the case for the duty to prioritise customer interest, this duty is applied to both services and the product itself. Again, this duty does not fit well when the product is considered. It will work in relation to particular service delivery, as noted above. The examples provided in the

paper in connection with this duty all relate to service delivery. I submit that this duty should be expressly limited to service delivery.

Option 3: A duty to pay due regard to the information needs of customers and to communicate in a way which is clear and timely:

As noted above I consider that information disclosure is likely to be a more proportionate response to concerns in relation to product design than direct regulation of providers and the products themselves. However, I don't consider a principles-based duty is appropriate. While the paper recognises that practical difficulties of specifying disclosure requirements because of the wide range of products and services offered, it assumes that providers are capable to divining what is appropriate from a very broad standard. I don't think that is necessarily correct. It requires a high level of sophistication (and accordingly cost) to implement these types of broad obligations. As with other principles-based law of this type there is likely to be a high level of non-compliance, much of it unintentional. I think it is highly optimistic to assume that dozens of different providers will undertake research into customer needs and produce quality outputs in all cases. The paper states as a "pro" existing industry codes that already reference clear and effective communication. The paper provides no examples to support that and states elsewhere that self-regulation "can result in a tendency to create industry codes that meet the needs of those bound by them, rather than those they are meant to protect." I think the "con" is likely to go much further than uncertainty about what is "clear and timely communication", the "con" is that it won't be clear what the nature and content of disclosure should be. Until the regulator (and ultimately the courts) confirms what is appropriate many providers risk inadvertent non-compliance. It isn't conducive to the rule of law that the law itself doesn't have clear meaning. In my view it is better to rely on industry self-regulation in this regard than to set out principles-based law that relies to industry bodies to develop informal regulations to support compliance. My submission is that disclosure should be a preferred means to address the information asymmetry issues (rather than over-arching duties in relation to product specifications) but with the law, and related regulations, should set out in more detail the nature and extent of disclosure required. This is common in other areas of financial markets regulation so I cannot see any reason not to take that approach in this area.

Option 4: A requirement to have the systems and controls in place that support good conduct and address poor conduct:

This would create a de facto licensing regime. This itself is indicated by the use of word "requirement" rather than "duty" (although the requirement is listed under "overarching duties" in the paper). In that regard the current market service licensing regime does not expressly empower the FMA to create detailed licence requirements. Rather, FMA's power to set very extensive licensing requirements arises from the requirement that "the [licence] applicant is capable of effectively performing that service (having regard to the proposed conditions of licence)". So this "requirement" can easily be used by FMA to develop detailed requirements that mirror licensing requirements and that providers would have to implement to avoid non-compliance. This "requirement" would likely create extensive obligations in relation to conduct that would require very significant resource of implement. Again, it is principles-based so what is required in particular instances won't be clear unless this is further clarified in law. This appears to be intended, in part, to impose obligations on banks and insurers in relation to their core systems, for example to upgrade or replace IT *systems. In my view the law shouldn't dictate this facet of conduct (without clear validation) or at least give the regulator potentially extensive and unclear power to impose high costs on providers. As was the case with product specifications, I don't think the case has been made that the regulator is better positioned than the provider to decide what is, or is not, an adequate system. The FMA already operates a conduct licensing regime that applies to the advice conduct of many banks and insurers (the QFE regime). However, the concerns that have been raised about conduct under the QFE regime appear to have arisen in spite of licensing that addresses systems, processes and controls. So it doesn't follow that, even if implemented, this form of licensing would be effective to achieve its goals or would be cost-effective. While the paper highlights issues with how banks, and particularly insurers, operate, I don't think the paper has made the case for why the very extensive obligations this duty would impose are proportionate or necessary. If this duty is to be retained I think it would be more appropriate to adopt an actual licensing regime rather than the uncertain half-way house this represents.*

In particular:

- Do you agree with the pros and cons of each duty?
- Do you have any estimates of the size of the costs and benefits of these options?
- Are there other impacts that are not identified?

Question 2
Do you think the overarching duty for managing conflicts of interest should be general (as it is currently worded) or focus on conflicts of interest that arise through remuneration?

The paper notes that "This duty would be relevant to many parts of the financial institution's business activities, including corporate strategy, product design, product distribution, complaints handling, insurance claims handling, as well as its overall interactions with their customers." This is a very broad, principles-based duty, that would not only apply to service delivery but also the products themselves. Again, I think it's difficult to apply this in the context of the products. All providers are conflicted- they're a business and exist to make profits from their customers. While I absolutely agree how they conduct themselves is important, for example in relation to implementing an agreement, applying this to every stage of the businesses processes potentially requires the provider to make decisions that impact on the product itself e.g. price. As is the case with "prioritise the customers interest" duty it will require the regulator to ultimately determine what an appropriate product looks like and I don't consider the case has been made that the regulator is better positioned that the market to make those decisions.

I also see limited benefit in "transparency" in all such regimes. If there is a conflict, and its disclosed, then there's often little the customer can do about it as most other providers will often have similar conflicts. In my view conflict disclosure is at times used to avoid responsibility for conflicts rather than providing meaningful information to the customer.

I do agree that managing conflicts of interest that arise through remuneration should be the focus of a duty. However, this should focus on how individuals are remunerated. The law should make it clear that making a profit from creating and distributing a profit or service does not, in itself, create a conflict.

In particular:

- What are some examples of conflicts of interest that arise outside of conflicted remuneration and incentives?

Question 3
Is a code of practice required to provide greater certainty about what each overarching duty means in practice?

I don't consider a code of conduct should be the starting point. As noted in answer to question 1, my view is that many of the duties are too broad. I don't consider this can be remedied in a code of conduct. The recent new financial advice code has ended up itself being a principles-based document that avoided addressing obvious key conduct issues in any detail, so a code is not a panacea for excessive generality in the law. The better resolution in my view is to deal with these matters by regulation that sets out in more detail how the principles are to be effected in practice. If regulations cannot do that effectively I think it calls into question whether a code could be any more effective.

Options to improve product design

Section 3.3 of the Options Paper presents some options to improve product design.

Question 4
Which options for improving product design do you prefer and why?

For the reasons noted in answer to question 1, I don't support option 3. I consider there are better solutions to the issues identified, including relying on better disclosure and support for independent financial advisers and comparison websites to address information asymmetries. As part of that I support option 1. I consider that should apply in place of the duty to prioritise customer interests and the duty of care, skill and diligence duties in relation to product design, and the de facto licensing duty. However, I submit that option 1 should be subject to a condition that a ban or stop on a product only applies where there are no other reasonable options to address the concerns e.g. better disclosure or an obligation that a product can only be provided to customers who receive independent financial advice on the product. While a regulator may assume a product is unequivocally unmeritorious there still may be cases where it suits customers who have particular characteristics. So I don't consider option 2 is appropriate, in particular because of the potential to remove products that may of benefit to some customers, as noted in the paper.

In particular:

- Do you agree with the pros and cons of the options?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 5
If a design and distribution requirement like option 3 were chosen, are there particular products for which this is more necessary than others? If so, please explain what and why.

As noted in answer to question 1 I don't support this approach. Option 3 would work better as a disclosure duty, which doesn't require the provider to pro-actively design a product for a particular "intended audience". Rather, the provider could disclose key aspects of the product including whether it has been designed for a particular audience in mind or whether the provider hasn't done that (with a warning included in that scenario recommending the customer obtains financial advice before purchasing).

Options to improve product distribution

Section 3.4 of the options paper discusses options to improve product distribution.

Question 6
Which options to improve product distribution do you prefer and why?

I consider that option 2 is appropriate as there is significant evidence that target-based remuneration creates greater risk of mis-selling. It is a relatively simple measure whose impact can be assessed before considering whether more extensive regulation of remuneration is required. Option 1 requires the provider to make decisions about how commissions impact on conduct in particular circumstances including in relation to intermediaries. That would require potentially complex analysis. I think it's unlikely all will be able to do that effectively and it will be more effective to set detailed legal requirements in the longer term, if required. I don't support the remaining options. With respect to option 5, I don't support this because of the impact it would have on the independence of financial advisers (I think it should apply with respect to existing "tied" arrangements including when advisers work for an organisation that is owned, directly or indirectly, by the provider or where the advisers or advice firm advise principally with respect to the products of one provider). The paper notes a "con" of increasing tied arrangements including leading to reduced competition. I don't think this is the principal issue. As noted in answer to question 1, financial advisers serve a critical market function to address information asymmetries. The law has just been changed to improve the conduct and skills of financial advisers (RFAs in particular). Increasing provider oversight of intermediaries will likely reduce their independence and ability to provide effective advice. It also suggests a lack of confidence in the recent reforms to improve conduct in the advice sector. I agree with the other "cons" identified with respect to option 5. Taken together I consider that those "cons" considerably outweigh the "pros". In any case I consider there are better ways to address conduct issues as noted elsewhere in these submissions.

In particular:

- Do you agree with the pros and cons of the options?
- Are there other impacts that are not identified – such as unintended consequences or impacts on particular business models?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 7
To assist us in comparing the pros and cons of various options, please provide information about remuneration and commission structures currently in use.

In particular:

- What are common structures, average amounts of remuneration/commissions, qualifying criteria etc.?

Options relating specifically to insurance claims

Section 3.5 of the options paper discusses options relating specifically to insurance claims.

Question 8
What is your feedback on imposing a duty to ensure claims handling is fair, timely and transparent?

I support option 1 as it is fair and reasonable expectation and relates to true conduct (as opposed to the somewhat artificial conduct duties proposed in connection with product design), which is amenable to these types of duties.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of this option?

Question 9
If a duty to ensure claims handling is fair, timely and transparent were to be adopted, should an attempt be made to clarify what fair, timely and transparent mean?

I think that's best addressed through guidance and decided cases, as is the case with the "fair dealing" rules that also broadly formulate the duty.

In particular:

- Why? Why not?
- What are the benefits and costs of doing so?

Question 10
What is your feedback on requiring the settlement of claims within a set time?

That seems costly to implement, and is likely to lead to unfair and unrealistic requirements on insurers.

In particular:

- Are there other impacts that are not identified?
- How do you think that exceptions should be designed?
- Should there be different time requirements for different types of insurance?
- Do you have any estimates of the size of the costs and benefits of this option?

Options for tools to ensure compliance

Section 3.6 of the options paper contains options to contribute to the effectiveness of new conduct obligations.

Question 11
Do you agree with the option to empower and resource the FMA to monitor and enforce compliance?

I agree with giving FMA this power. But please see my response to question 1 regarding the extent to which a regulator should be responsible for regulating core operational matters and the specifications of products.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 12
What is your feedback on the option to require banks and insurers to obtain a conduct licence?

As noted in answer to question 1, I don't think the paper makes an effective case for imposing licensing. I don't consider issues such as outdated systems and poor product design processes justify licensing without evidence that licensing can product better outcomes (and that the positive outcomes outweigh the considerable costs). Licensing doesn't guarantee better conduct particularly when it relates to complex matters such as product design. FMA already operates a conduct licensing regime under its QFE regime, which applies to many NZ banks and insurers. No information has been provided on whether that regime works effectively. QFE conduct in relation to insurance replacement was criticised by the FMA in a July 2018 report. I've noted my concern that "systems and controls" duty creates a de facto licensing regime so I don't support that for the reasons noted.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 13
What is your feedback on the option which discusses a broad range of regulatory tools?

I support that option.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?

- Do you have any estimates of the size of the costs and benefits of the options?

Question 14
Do you think that the maximum pecuniary penalties available for breaches of any conduct duties should be the same as the existing FMC Act penalties?

I don't consider there can be a case for higher pecuniary penalties without compelling reasons.

In particular:

- Is there a case for making the penalties higher?

Question 15
What is your feedback on the option of executive accountability?

I don't consider executive accountability should be any higher than under the current FMC regime.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 16
What is your feedback on the whistleblowing option?

I don't consider this process is an appropriate place to consider whistleblowing reforms. That applies more broadly and there are complex considerations that are best dealt with in a separate and focused process.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 17
What is your feedback on the option of regular reporting on the industry?

I query whether consumers would likely obtain much benefit from regular reporting since many are unlikely to consider it. It also raises a real risk of unfair comparisons being made. I submit that the focus should be on support for direct reporting to consumers of key metrics that are actually directly relevant to their decision making, in the form of comparison websites.

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Question 18
What is your feedback on the role of industry bodies?

In particular:

- Do you agree with the pros and cons?
- Are there other impacts that are not identified?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of the options?

Who should the conduct regulation apply to?

Part 4 of the options paper discusses who the proposed options might apply to.

Question 19
What is your feedback on the options regarding who the conduct regime should apply to?

I do not consider there is any case for applying the conduct regime to financial service providers other than banks and insurers. There is no analysis to support that e.g. identifying if there are issues in connection with other types financial service providers and if the regime would likely provide a net benefit. While those other service providers have similarities to banks and insurers, there are likely to be significant differences that should be assessed.

I think there should be an obligation to avoid overlap so I support option 2. Many financial service providers are already subject to somewhat inconsistent and overlapping regimes. I don't think it can be justified to continue that trend. I don't think the fact that it may make it harder to regulators to take a pan-sector approach is a justification for the extra costs that would be imposed on the market under option 1, which may be significantly higher than the those incurred by the regulators under option 2 because a pan-sector approach requires more resource to implement.

I do think there is a case for product-level regulation. I don't consider the fact that entities can have regard to customer outcomes at all levels is, in itself, a reason for entity-level regulation. As I noted in answer to question 1, I consider this creates the risk of an excessive focus on institution-lead solutions rather than one that seeks to rely on, and to support and enhance, market-based solutions. There are areas where product-level regulation could work e.g. in relation to disclosure.

In particular:

- Do you agree with the pros and cons of the options?
- Are there other impacts that are not identified e.g. do the proposed overarching duties conflict with existing regulation that applies to other financial institutions?
- Are there other options that should be considered?
- Do you have any estimates of the size of the costs and benefits of these options?

- Which options do you prefer and why?