16th June 2021

Financial Markets Policy
Commerce, Consumers and Communications
Ministry of Business, Innovation & Employment
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By email: financialconduct@mbie.govt.nz.

Treatment of intermediaries under the new regime for the conduct of financial institutions: Insurance Brokers Association of New Zealand Inc submissions

1. Please find attached the submissions of the Insurance Brokers Association of New Zealand Inc (IBANZ) on the Ministry of Business, Innovation and Employment's Discussion document, *Treatment of intermediaries under the new regime for the conduct of financial institutions* (April 2021).

2. IBANZ has over 100 member firms operating in the general (non-life) insurance market. IBANZ members employ approximately 5,000 staff of which approximately 2,500 staff are currently financial advisers.

3. IBANZ members place general insurance cover equating to approximately 50% of all general insurance premiums ($3.5 billion) for approximately 1 million New Zealand customers and for approximately 14 of the 30 general insurers operating in New Zealand. The total New Zealand gross written general insurance premiums in the 12 months to 30 September 2020 were more than $6.9 billion.[1]

4. Our members commonly consider a number of different insurance contracts underwritten by a range of insurers and have frequent cover placements on a daily basis.

5. In the general insurance broking sector, up to 20% of clients may change insurers (i.e. replace their financial product) each year. This is a standard general insurance practice, and is undertaken to ensure the client receives the benefit of improved policy terms, coverage, conditions or pricing.

6. Please let us know if there are any issues with or you would like us to expand on any of the submissions made by IBANZ.

[1] Insurance Council of New Zealand Market Data. An additional approximately $400 million of cover was placed through Lloyds.

Treatment of intermediaries under the new regime for the conduct of financial institutions

Your name and organisation

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[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

☐ The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at ***www.mbie.govt.nz***. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

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☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because… [Insert text]

	Do you have any comments on Option 1: 'Amend definition of intermediary to focus on sales and distribution'?
1	IBANZ supports narrowing of the definition to focus on sales and distribution. The amended definition should ensure that professions that do more than provide professional or ancillary services will be within the definition if they conduct sales and distribution activities. For example, accountants and other professionals may sell insurance to their clients, so should be captured.
	Do you think the scope of the proposed definition of an intermediary is comprehensive enough to capture the variety of sales and distribution methods and to avoid gaps and risks of arbitrage?
2	The proposed definition's scope is sufficiently comprehensive. In fact, "directly involved" should replace "involved", as those who are indirectly involved should not captured.
Option 2: Refine scope of who is covered as an agent	
	Do you have any comments on Option 2?
3	FSLAA regulated employees and agents should not be covered by the employee and agent definitions for the same reasons specified in the response to question 6. They are sufficiently regulated by comprehensive conduct obligations under the FMCA. Under the Insurance Intermediaries Act 1994 (IIA), insurance brokers may be considered agents of the insurer and, in particular, section 2(2) provides that an insurance broker who is appointed, under a signed agreement, as an agent of the insurer "shall be deemed, unless the agreement states otherwise, as an agent of the insurer for the purposes of receiving money due to the insurer from the insured and due to the insured from the insurer." An insurance broker should not be an agent for the purposes of the Bill only because it is deemed to be an agent of the insurer for the purposes specified in section 2(2).
	Do you think Option 2 would adequately exclude advisory services (e.g. lawyers, accountants) and other service providers to the financial institution who are not involved, directly or indirectly, in providing any part of the financial institution's relevant service or associated products to consumers?
4	No. FSLAA regulated employees and agents should not be covered by the employee and agent definitions for the same reasons specified in the response to question 6. They are sufficiently regulated by comprehensive conduct obligations under the FMCA. Also an insurance broker should not be an agent for the purposes of the Bill only because it is deemed to be an agent of the insurer for the purposes specified in in the IIA.
	Do you think any explicit exclusions are needed for particular occupations or activities? If so, which ones, and why?
5	FSLAA regulated employees and agents should not be covered by the employee and agent

definitions for the same reasons specified in the response to question 6. They are sufficiently regulated by comprehensive fairness obligations under the FMCA.

Also an insurance broker should not be an agent for the purposes of the Bill only because it is deemed to be an agent of the insurer for the purposes specified in the IIA.

Objectives

Do you have any comments on the objectives regarding the treatment of intermediaries?

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IBANZ welcomes the Government's recognition of the compliance burden that would arise from overlapping obligations on intermediaries under the Financial Markets Conduct Act 2013 (as amended on 15 March 2021) (**FMCA**) and through financial institutions' fair conduct programmes required by the proposed Financial Markets (Conduct of Institutions) Amendment Bill (**Bill**), and the willingness to explore moderating the Bill's indirect application to intermediaries.

However, the proposed options do not go far enough. IBANZ submits that the Bill should not impose any obligations on financial institutions in respect of intermediaries who are licensed financial advice providers (**FAPs**) or persons engaged by them to give financial advice (together **FSLAA intermediaries**), on the basis that FSLAA intermediaries are already governed by a comprehensive conduct regime under the FMCA. That regime already includes a statutory duty to comply with Code Standard 1 which imposes a duty to "treat clients fairly" that purports to apply to all aspects of the client relationship, not just giving financial advice (as it requires FSLAA intermediaries "always treat clients fairly"). Even reading Code Standard 1 more narrowly would still justify removal of all additional obligations on FSLAA intermediaries in the Bill when they are acting as a financial adviser.

As IBANZ has previously submitted to the Select Committee on the Bill, with the coming into force of the new financial advice regime, there is no conduct regulation gap for FSLAA intermediaries in respect of their FMCA regulated activities. When asked in industry forums, MBIE has not been able to identify any gaps. In paragraphs 52 and 67 of the Discussion document, MBIE acknowledges the overlap of the proposals for intermediaries in the Bill with the FSLAA regime. IBANZ's strongly believes the overlap of the proposals for intermediaries in the Bill with the FSLAA regime should more accurately be described as "wholly" overlapping rather than "partly" in the Discussion document, as "fair conduct" is imposed on FSLAA intermediaries in both cases, and IBANZ does not believe that the FSLAA reforms are inadequate to achieve this purpose in respect of FSLAA intermediaries.

IBANZ's member firms (together with all other FSLAA intermediaries):

(a) are highly regulated as licensed providers of a financial advice service, supervised by the Financial Markets Authority;

(b) must ensure that they, and the persons who provide regulated financial advice on their behalf, comply with the duties and obligations under Subpart 5A, Part 6 of the FMCA, which relate to their conduct and are targeted at ensuring good customer outcomes, including (amongst other things):

- the duty to ensure that the client understands the nature and scope of advice when giving regulated financial advice to retail clients;

- the duty to give priority to client's interests; and
- the duty to comply with the Code when giving regulated financial advice to retail clients, which requires (amongst other things) that a person who gives financial advice must always treat clients fairly (as mentioned), must always act with integrity, must ensure they have competence, knowledge and skill and undertake continuing professional development;

(c) are required to have policies, procedures and controls designed to support the giving of regulated financial advice, the provision of client money or property services (if applicable), and to ensure compliance the duties and obligations under the new financial advice regime;

(d) have comprehensive complaint processes under standard licence conditions which provide for complaints to be dealt with in a "fair, timely and transparent manner"; and

(e) are subject to the enforcement and liability regime under Part 8 of the FMCA (which includes civil liability for contraventions of duty provisions).

Given these comprehensive and extensive existing fairness requirements, subjecting FSLAA intermediaries to another layer of obligations unnecessarily duplicates the regulatory burden imposed on them. Financial institutions should be able to assume that FSLAA intermediaries are treating their clients fairly.

Further, the FMCA financial advice conduct obligations (together with the Code of Professional Conduct for Financial Advice Services) were designed to comprehensively cover the obligations of FSLAA intermediaries. The FMCA conduct duties have a had long period of gestation, being informed by the particularities of the financial advice industry, the experience of the Financial Advisers Act 2008, and extensive public and industry consultation.

To add another layer of requirements on FSLAA intermediaries through financial institutions would defeat this legislative purpose and disrupt the balance achieved over a long period of legislative development.

The new financial advice regime has only recently come into effect, so it is too early to make the case that another layer of requirements is needed. If it is considered that the new financial advice regime is failing to sufficiently ensure fair treatment of customers – and this view should only be reached after the new financial advice regime has operated for a sufficient period of time – it would be more appropriate for the financial advice regime to be reformed further, rather than introducing another separate layer of regulation.

Regulating FSLAA intermediaries' conduct through financial institutions exacerbates the regulatory burden by causing additional and extensive duplication because FSLAA intermediaries may provide financial advice on products from a wide range of financial institutions. There will inevitably be differences between the Fair Conduct Programmes of each financial institution, which would require FSLAA intermediaries to satisfy the expectations from many sources. For example, one IBANZ member has arrangements with 57 insurers or underwriting agencies, of which 16 provide policies to consumers. It would be

	impractical to maintain compliance with the expectations under these many different arrangements if the FSLAA intermediaries are required to comply with the Fair Conduct Programmes of each of the financial institutions. If FSLAA intermediaries are required to comply with multiple Fair Conduct Programmes, there would be inevitable operational difficulties and increased compliance costs. For example, IBANZ's members have high volume transactional businesses, with multiple advice conversations taking place on a daily basis, commonly consider a number of different insurance contracts underwritten by a range of different insurers and have frequent cover placements. A member can often advise on a combination of policies of a number of general insurers when providing financial advice to a client. If the Bill applies to them, each IBANZ member would typically have to comply with the fair conduct programmes of multiple insurers (which will likely be highly subjective and different for each insurer, and the requirements under which may not be able to be easily reconciled with each other, or the member's own policies, procedures and controls). To reduce these difficulties and costs to an acceptable commercial level, FSLAA intermediaries would very likely need to provide financial advice on the products of fewer financial institutions, cease all or part of their business, set minimum earnings thresholds or restrict their offerings, as has occurred in some cases as a result of the introduction of FSLAA. We are aware of insurance brokers who are actively considering curtailing their services to consumers because of the costs of implementing processes to comply with the FSLAA requirements. Adding another layer of compliance costs would significantly affect the likely commercial response to an additional new compliance regime. IBANZ believes that compliance costs have been one of the significant factors in QBE, Allianz and AIG deciding to withdraw from offering consumer products in the last 3 years. Compliance costs continue to be a significant factor in decisions of insurers not entering the consumer market. Loss of independent advice is detrimental to customers through reducing their product choice and decreasing competition.
Option 3: Minimal changes to intermediaries obligations (remove 446M(1)(b) only)	
	Do you have any comments on Option 3: 'Minimal changes to intermediaries obligations'?
7	Section 446M(1)(b) should be removed entirely, as it is too unclear and too broad. However, this change does not go far enough. FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6. They are sufficiently regulated by comprehensive conduct obligations under the FMCA, and the proposed further requirements would impose a significant and unnecessary compliance burden on FSLAA intermediaries which would be impractical and cause unnecessary costs, reducing/impacting the availability of independent advice for consumers.
	If Option 3 were pursued, do you think any other obligations in section 446M(1)(bb), (bc), (bd) or (bf) would need clarifying or amending? Why/why not?
8	FSLAA intermediaries should be excluded entirely from sections 446M(1)(bb), (bc), (bd) or (bf) for the reasons specified in the response to question 6. They are sufficiently regulated by comprehensive corresponding obligations under the FMCA, and the proposed requirements would impose a significant and unnecessary compliance burden on FSLAA intermediaries which would be impractical and cause unnecessary costs. In particular:

	• Sections 446M(1)(bb) and (bc) require financial institutions to impose training obligations which duplicate Part 2 of the Code of Professional Conduct for Financial Advice Services: Competence, Knowledge and Skill; • Sections 446M(1)(bd) require financial institutions to impose supervision and monitoring obligations which duplicate the FAP's and FMA's supervision and monitoring obligations under Subpart 5A of Part 6 of the FMCA, competence obligations which duplicate Part 2 of the Code of Professional Conduct for Financial Advice Services: Competence, Knowledge and Skill and enforcement regimes which overlap with the FMCA penalty provisions; • Sections 446M(1)(bf) require financial institutions to impose clear, concise and effective communication obligations which duplicate the Code Standard 1 duty to communicate with clients in a "timely, clear and effective manner".
Option 4: More significant changes to intermediaries obligations	
	Do you have any comments on Option 4: 'More significant changes to intermediaries obligations'?
9	The more significant changes to intermediaries' obligations do not go far enough. FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6. They are sufficiently regulated by comprehensive conduct obligations under the FMCA.
10	What do you think the level of responsibility should be for financial institutions' oversight of intermediaries? For example, "*managing or supervising* the intermediary to ensure they support the financial institutions compliance with the fair conduct principle", or "*monitoring* whether the intermediary is supporting the financial institution's compliance with the fair conduct principle", or something else?
	Neither is sufficient. FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6. They are sufficiently regulated by comprehensive conduct obligations under the FMCA.
	What standard do you think financial institutions should have to oversee their intermediaries to?
11	For the reasons given in response to question 6, financial institutions should be able to assume intermediaries are meeting suitable standards imposed on them under the FMCA because FAPs are licensed and their financial adviser intermediaries are monitored by the FAP, with suitable penalties for non-compliances, including the potential of the FAP losing its licence. FSLAA intermediaries should therefore be excluded entirely for the reasons specified in the response to question 6.
Option 5: Distinguish between FSLAA and non-FSLAA intermediaries	
12	Do you have any comments on Option 5: 'Distinguish between FSLAA and non-FSLAA intermediaries'?

Of the reform options identified in the Discussion document, IBANZ considers an enhanced Option 5 is the only sensible and practical alternative. However, Option 5 does not go far enough. FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6.

The matters identified in paragraph 70 for FSLAA intermediaries duplicate matters covered by the FMCA and accordingly there is a risk that financial institutions will develop different "effective processes" which impose varying requirements for the same purpose as the FMCA reforms, which would give rise to unnecessary compliance costs, duplication, further boundary issues and potentially inconsistencies. In particular the requirement for:

- financial institutions to impose training obligations duplicates the intent of Part 2 of the Code of Professional Conduct for Financial Advice Services: Competence, Knowledge and Skill;
- financial institutions to set conduct expectations duplicates the intent of the entire comprehensive range of Subpart 5A of Part 6 of the FMCA requirements, including the Code of Professional Conduct for Financial Advice Services: Competence, Knowledge and Skill, Code Standards, Disclosure Regulations and statutory duties;
- financial institutions to monitor compliance with the financial institution's fair conduct programme duplicates the FAP's and FMA's supervision and monitoring obligations under Subpart 5A of Part 6 of the FMCA; and
- financial institutions to impose enforcement regimes duplicate the FMCA penalty provisions.

If there are substantial gaps in the requirements imposed on FSLAA intermediaries and those imposed under the Bill, it would indicate that the FSLAA reforms failed in their objectives, which are in common with the Bill – regulating for fair conduct. There is no current suggestion that the FSLAA reforms are inadequate or have failed. There has been insufficient time to determine their effect, but generally expectations are that they will have a very positive effect on consumer outcomes.

How far do you think financial institutions' oversight of FSLAA intermediaries under Option 5 should extend? For example, should it cover the general conduct of the intermediaries, or more narrowly on product performance and related consumer outcomes (or something else)?

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For the reasons identified in the response to question 6 above, FSLAA intermediaries should not be subject to financial institutions' oversight with respect to their FMCA regulated activities.

Consistent with the response to question 12 above, financial institutions should be able to assume that FSLAA intermediaries will treat customers fairly when carrying on their FMCA regulated activities, as this is legally required of them and their compliance should be adequately monitored by the financial advice provider and the FMA.

Obligations in relation to employees and agents

	Do you have any comments on the proposals regarding obligations in relation to employees and agents?
14	Employees or agents that are FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6. They are sufficiently regulated by comprehensive conduct obligations under the FMCA. Under the Insurance Intermediaries Act 1994, insurance brokers may be considered agents of the insurer and, in particular, section 2(2) provides that an insurance broker who is appointed, under a signed agreement, as an agent of the insurer "shall be deemed, unless the agreement states otherwise, as an agent of the insurer for the purposes of receiving money due to the insurer from the insured and due to the insured from the insurer." An insurance broker should not be an agent for the purposes of the Bill only because it is deemed to be an agent of the insurer for the purposes specified in section 2(2).
	Do you think there should be a distinction drawn between employees and agents? Why/why not?
15	Employees or agents who are FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6.
	Do you think any amendments should be made to the obligations in 446M(1) that would apply to employees and agents?
16	Employees or agents who are FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6.
	Do you have any other comments or viable proposals?
17	Employees or agents who are FSLAA intermediaries should be excluded entirely for the reasons specified in the response to question 6.

Other comments

At paragraph 15, the Discussion document identifies that the "consumer" has different definitions depending on the relevant financial institution's services involved. In the insurance context, the definition in section 446S(1) rightly links to "personal, domestic or household purposes" through the definition of a "consumer insurance contract". Whereas in the financial advice and client money handling context, the definition adopts a far broader "retail client" definition. The two approaches cause confusion.

The Bill should apply only to customers who ordinarily are regarded as "consumers" (ie, persons who acquire a financial institution's products and associated services of a kind ordinarily acquired for personal, domestic, or household use or consumption), and not "retail clients" as that term is defined in the FMCA.

The term "retail client" is defined broadly as a person who is not a wholesale client and can include sophisticated investors (whether individuals or entities). Such persons can be expected to have the resources and knowledge to ensure they are treated fairly and, accordingly, there is no policy justification for extending the Bill's to cover them.

The approach is inconsistent and confusing, particularly if a financial institution is both an insurer

and a FAP. We assume that if an intermediary is acting where a financial institution is an insurer in respect of a consumer insurance contract, that "consumer" (i.e. the insurer's consumer) is the offeree of the consumer insurance contract and therefore should be the intermediary's "consumer". Section 446M which imposes obligations on intermediaries only works sensibly if the financial institution and the intermediary apply the fair conduct programme to the same persons. However, the drafting is not clear on this point, and should be clarified.

It would make little sense to require a financial institution to have a fair conduct programme in respect of consumers, and require that financial institution to establish processes, train, seek assurances, set conduct expectations, establish misconduct penalties and monitor intermediaries in respect of a different, broader class of customers.

IBANZ submits that the definition in section 446S(1)(d) of "consumer" in respect of intermediaries be amended so intermediaries adopt the same definition as the financial institution in respect of whom they are providing the services. Section 446S(1)(d) needs to be:

"an intermediary shall have the same meaning as applies to the financial institution's relevant service **under paragraph (a), (b), or (c)** in respect of which the intermediary's services are being provided".

Currently, the drafting, wrongly, appears to suggest that if an intermediary is providing financial advice or client money handling services, the insurer's obligations relate to policyholders with wholly or predominantly personal, domestic, or household purposes, whereas the intermediaries' obligations relate to the substantially broader class of "retail clients". That simply makes no sense in this context, when the intermediary is governed by the financial institution's fair conduct programme (which applies when an intermediary is involved in the provision of the financial institution's services to the financial institution's "consumers" – see section 446C(2)). This needs to be fixed.

Yours faithfully

Melanie Gorham

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