Financial Services Council NZ

Grow the financial confidence and wellbeing of New Zealanders

Wednesday 19 June 2024

Financial Markets
Small Business, Commerce and Consumer Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

By email: FinancialMarkets@mbie.govt.nz

Fit for purpose financial services conduct regulation

This submission on the fit for purpose financial services conduct regulation discussion document (the Discussion Document) is from the Financial Services Council of New Zealand Incorporated (FSC).

As the voice of the sector, the FSC is a non-profit member organisation with a vision to grow the financial confidence and wellbeing of New Zealanders. FSC members commit to delivering strong consumer outcomes from a professional and sustainable financial services sector. Our 119 members manage funds of more than $100 billion and pay out claims of $2.8 billion per year (life and health insurance). Members include the major insurers in life, health, disability and income insurance, fund managers, KiwiSaver, and workplace savings schemes (including restricted schemes), professional service providers, and technology providers to the financial services sector.

Our submission has been developed through consultation with FSC members and represents the views of our members and our industry. We acknowledge the time and input of our members in contributing to this submission.

We welcome the opportunity to provide feedback on the options to streamline and improve provisions of the Financial Markets Conduct Act 2013 (FMC Act), as amended by the Financial Markets (Conduct of Institutions) Amendment Act 2022 (the CoFI Act) and options to amend the regulatory framework and powers of the Financial Markets Authority (FMA) in the FMC Act and the Financial Markets Authority Act 2011 (FMA Act). However, given the importance of these proposed changes to our industry and consumers, and the fact that the Consumer Credit Review, the Effective Financial Dispute Resolution Review and other important reviews are all at the same time, we express our disappointment on the short time frame in which to respond.

Our members are also concerned about adding the FMC Act review to the CoFI review. The proposed changes to the FMC Act are far reaching, have not been consulted on prior and arguably require a longer timeframe for our members to consider and provide meaningful responses. Ideally the regulatory reform of the CoFI regime should be completed and embedded first and, if required, then followed by a review whether the FMA's powers should be expanded.

With all FSC members well underway with compliance with the CoFI regime in preparation for licensing, change at this time, and particularly when any change would not occur until quarter 3, 2025, appears to be tokenistic and of nominal impact. We encourage expediating changes to meet the commencement date and support a focus more on ongoing requirements than set up, noting new players to the industry may still benefit from streamlining the process in a way that does not impact existing organisations.

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As previously provided to The Ministry of Business, Innovation and Employment (MBIE) the following are the FSC member's key areas of concern in relation to the CoFI regime and conduct regulation:

a) Duplication of licenses
   Our membership is strongly supportive of streamlining of the licensing, at least across the multiple FMCA licences.
b) Duplication with the Financial Advice Provider (FAP) regime
   There is an overlap with the FAP regime, namely standard conditions. Better alignment with the FAP approach is sought.
c) Broad scope of obligations
   Our members have concerns about s446J which is broad, vague and difficult to ensure compliance. We encourage a more tailored focus on the objectives of the regime avoiding unnecessary duplication (such as s446(1)(a)) which adds no value.
d) Communications obligation
   More clarity on the scope, expectations and modes of communications. As this is a particularly broad requirement, further clarity would result in a more consistent implementation across the industry.
e) Incentives
   The legislation is unhelpful, and we would prefer that guidance and legislation are aligned.

We welcome continued discussions and engagement. Please contact Privacy of natural persons Privacy of natural persons to discuss any element of our submission. In addition, please reach out to Privacy of natural if you would like to attend our CoFI Focus Group once again.

Yours sincerely

Privacy of natural persons

Financial Services Council of New Zealand Incorporated

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Fit for purpose financial services conduct regulation

Name	Privacy of natural persons
Organisation (if applicable)	Financial Services Council of New Zealand Incorporated
Contact details	Privacy of natural persons

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

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Please check if your submission contains confidential information:

☐ 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.

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Introduction

1 *Do you agree the proposed criteria are appropriate, given the objectives? Are there other criteria which should be considered?*

We agree that the proposed criteria are generally appropriate, however, paragraph 8.c. on page 8 of the Discussion Document, "whether they promote fair treatment of consumers and good conduct" should be moved to 8.a.

The criteria should also include whether the changes are timely, particularly due to the inefficiency of requiring Financial Institutions comply with legislation and prepare a Fair Conduct Programme (FCP) based on law that is recognised as requiring improvements, before any improvements are made.

1: Options for CoFI Act reform

A. Options for amending minimum requirements for fair conduct programmes

Option A1: Remove/amend some minimum requirements for fair conduct programmes

2 *Do you support removing or amending some of the minimum requirements for fair conduct programmes? What are the advantages and disadvantages of this option?*

Our members consider removing duplication and promoting efficiency, whilst still supporting the Fair Conduct (FC) Principle, to be the key considerations of the review of the requirements for a FCP. We support amendments in line with the principle based nature of the CoFI regime and providing clarity on the legislature's intent and certainty in what is expected of Financial Institutions.

Under the CoFI licensing regime, the FMC Act should be prioritising efficiency and innovation. We therefore support Option A1 and the removal and amendment of some of the minimum requirements to avoid duplication, unnecessary prescription and potential confusion prior to the commencement of the CoFI regime to gain their full benefit. For example, life and health insurers are already required to have risk management programmes in place which are approved by the RBNZ.

Whilst FSC members have undertaken extensive work on preparation for the CoFI regime, it is still considered necessary to ensure there is a tailored focus on the objectives and remove requirements which are unnecessary and add no value. For example, providing a FCP summary, in addition to all other documentation that consumers are required to read about their financial institution services and products, is unlikely to add value and may detract from other important information such as insurance policy terms and conditions.

We note paragraph 30.b. on page 11 of the Discussion Document in relation to an effective risk management program, appears to endorse removing all minimum requirements in relation to identifying, monitoring and managing conduct risks. We do not support this approach if it would result in more guidance to the same effect. At this time change in legislation is considered to be preferable to more guidance which would require further review and adjustments adding to the compliance burden within our member organisations.

Any amendment to the CoFI Act is likely to come into effect in 2026. This means that those processes, policies, systems and controls designed to comply with the current minimum requirements will likely already be embedded in Financial Institutions' businesses if amendments come into effect. Whilst we support changes that allow flexibility and lessen the compliance burden over time we would prefer that, if changes are to be made, they be made in a timely fashion to allow the regime to commence in a final and suitable form.

Removing or amending some of the minimum requirements to make the CoFI regime less prescriptive will align with the principle based nature of the CoFI regime and would allow financial institutions flexibility in how they achieve fair treatment of consumers. A less prescriptive legislative approach will also afford Financial Institutions more agility to pivot, adapt and iterate their FCPs where opportunities for improvement are identified or in response to changes in and around their businesses.

A possible disadvantage of removing or amending some of the minimum requirements might be that the legislature's intent or expectations around compliance with the FC Principle become less clear. However, principles based legislation allows Financial Institutions to determine the manner of compliance with the FC Principle in a way unique to their businesses.

Separately, we encourage consideration of whether consistent reference to 'consumers' would be desirable rather than referring to the broader category of 'retail clients' in the context of some financial services. The definition of 'consumer' in the context of insurance is also problematic, as it is unclear in some insurance contexts whether insurance has predominantly a personal, domestic or household purpose (for example travel insurance). This problem also arises in the context of the Contracts of Insurance Bill.

3	*Which requirements should be removed or amended, if any? Please explain what changes you would like to be made.*

Our members support removing section 446 J(1)(a), enabling the institution to meet its legal obligations to consumers, as this paragraph creates unnecessary duplication and as a result increases compliance costs. We do not see any risk to customers from removing this paragraph given financial institutions are already required to comply with applicable consumer legislation.

As noted in response to Question 2, our members prefer changes via legislation rather than guidance and also prefer not to take out or make changes to the legislation if it results in more guidance.

We can see that there could be some benefit in removing section 446 J(1)(c)(i) to (iii) (identifying, monitoring, and managing conduct risks) by providing more flexibility for Financial Institutions subject to more than one regulatory regime. However, the Discussion Document notes an expectation that FCPs should cover these requirements. Therefore, the removal of the stated sections is unlikely to reduce the compliance burden on Financial Institutions.

The provisions relating to setting requirements relating to employees and agents section 446 J(1)(e) to (h) are too detailed and prescriptive. All organisations will be training their staff, and we prefer to have a single requirement for procedures and processes for appropriately training employees.

We consider there would be benefit in adjusting paragraphs (e) to (h) to reduce the level of prescription. In particular, paragraphs (f) and (g) contain very prescriptive requirements for training employees which do not allow for a proportionate risk based approach to the employees' role, experience and tenure. Training can take many forms and this prescriptive approach is like to result in a tick box compliance approach rather than a needs based approach. We suggest paragraphs (f) and (g) are deleted and replaced with the requirement to "provide appropriate training for each of those employees to support the financial institutions compliance with the fair conduct principle". This would allow a flexible risk based approach to training.

Paragraph (h) (i) to (iv) also contains prescriptive requirements for managing or supervising employees. Similarly, we consider a less prescriptive approach allowing a financial institution to tailor its response based on a range of risk based factors with the overall objective of supporting compliance with the FC Principle is more appropriate. To achieve this, we suggest sub-paragraphs (i) to (iv) are unnecessary and paragraph (h) on its own is sufficient.

We agree that section 446 J(1)(k) is unnecessary because section 446G(1) adequately provides for reviewing the effectiveness of the FCP.

4	*What would be the impact of removing or amending particular requirements (for example, on compliance costs for businesses)?*
	As mentioned in response to Question 3 above, removing sections is unlikely to reduce the compliance burden on Financial Institutions as the Discussion Document notes "we expect that in most circumstances equivalent requirements will still be needed in fair conduct programmes." The changes will also have nominal effect for dual regulated entities as the programmes and mechanisms in place to manage these risks exist regardless of whether they are required in a FCP or not and the simplification is not considered to translate to reduced costs.
5	*Do you have any other comments on the minimum requirements for fair conduct programmes?*
	We encourage more clarity on the scope, expectations and effective modes of communication for the communications obligation as this is a particularly broad principle. Further clarity would result in more consistent implementation across the industry.
Option A2: Potential additions to minimum requirements for fair conduct programmes	
6	*What are the advantages and disadvantages of adding an express minimum requirement for fair conduct programmes relating to fees and charges?*
	We strongly oppose adding an express minimum requirement for FCPs relating to fees and charges on its own or in conjunction with any other option. The Minister of Commerce and Consumers expectations for transparent fee structures referred to on page 13 of the

Discussion Document focus on intermediaries. FAPs already have obligations for clear fee disclosure under the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2020, and intermediaries are not directly subject to CoFI (other than the CoFI prohibited incentives regulations), so we do not consider this the appropriate place to address this.

Option A2 would seem at odds with the criteria the options will be assessed against, namely removing duplication and reducing compliance costs. It is appropriate to give the CoFI regime time to embed to see if there is a problem to respond to before adding to the minimum requirements. We agree that adding specific references to these matters will reduce flexibility, require review and amendment to FCPs, and increase compliance costs without necessarily advancing the key objectives of the CoFI regime.

7	*What are the advantages and disadvantages of adding an express minimum requirement for fair conduct programmes relating to complaints processes?*

We strongly oppose adding an express minimum requirement for FCPs relating to complaints. We note all organisations have, and are required to have, internal complaints handling processes and be members of a dispute resolution scheme under the Financial Service Providers (Registration and Disputes Resolution) Act. If this is included as a minimum requirement then the risk is a clash or duplication of these requirements, for example for FAPs this is already included in the FAP licence.

The CoFI Act already addresses complaints as mentioned in paragraph 39.b. of the Discussion Document and Financial Institutions already have existing obligations relating to complaints.

Whether further regulation was required for complaints was addressed in MBIE's previous consultation paper "Regulations to support the new regime for the conduct of financial institutions", April 2021. We reiterate our feedback provided in our submission, namely we do not consider that adding minimum requirements for FCPs relating to complaints processes would meet the objective for the financial services conduct regulation review to avoid duplication of other requirements in financial markets legislation.

8	*Do you consider that financial institutions already need to cover fees and charging arrangements and/or complaints processes in their fair conduct programmes under the current requirements?*

The FCP is designed to ensure that a Financial Institution treat customers fairly and we consider complaints handling and processes to be sufficiently covered as noted in response to Question 7 above.

Furthermore, complaints are expressly addressed in section 446D (which gives responding to a complaint as an example of when the fair conduct principle applies) and the duty in section 446H to ensure that information is available to assist consumers to understand how to make complaints. We do not consider anything further is required to ensure complaints handling forms part of a FCPs.

Fees and charging arrangements are not specifically mentioned in the FCP minimum requirements or the CoFI Act. Therefore, we do not consider they 'need' to be covered in FCPs (other than, depending on the circumstances, under the associated product's design obligations in paragraph (b)) but there may be aspects of fees and charges covered in an FCP depending on the nature of the Financial Institution and their business. For example, there is limited application to insurers who generally do not charge customers 'fees or expenses'. Irrespective of whether fees and charges are expressly mentioned in an FCP, the FC Principle applies when Financial Institutions offer to provide relevant services or associated products to consumers and when it has any dealings or interactions with consumers. Therefore, in addition to existing FAP disclosure requirements, issues arising from fees and charging arrangements that impact consumers are likely to be identified through FCP policies, process, systems and controls.

Option A3: Remove all minimum requirements for fair conduct programmes

9	*Do you support removing all of the minimum requirements for fair conduct programmes from the legislation? What are the advantages and disadvantages of this option?*

We do not support removing all of the minimum requirements as they provide assistance as to the required content for a FCP. Without them, there would be no context, on which to base Financial Institutions' FCPs.

Some members consider the FCP has a role as an overview document which, when supplied to FMA and boards, give both boards and our regulators oversight of how an entity has operationalised the FC Principle. The FCP can also be used as a yardstick to measure meaningful compliance via clear reporting, and a baseline for continuous improvement initiatives. Other members also consider that it forces a more in depth update on policies and their FCP purpose.

Removing all minimum requirements for FCPs could open Financial Institutions to a regime of unsettled rules, potential for misinterpretation between the FMA and a Financial Institution, as well as 'interpretation by hindsight' through regulator guidance notes. This could have the unintended consequence of reinstating minimum requirements through setting a regulator's expectation or adding requirements through regulator guidance. Unlike regulatory change that requires public consultation, this is not a prerequisite where a regulator issue guidance notes and Financial Institutions may not get an opportunity to provide input during the guidance's developmental process.

In addition, this option does not align with the stated Governmental objectives for this review, and we do not consider leaving FCP content to that regulator guidance would achieve the objectives in paragraphs 9.a. and 9.b. of the Discussion Document relating to certainty, flexibility and avoidance of unnecessary compliance costs.

Option A4: Retain minimum requirements for fair conduct programmes without change

10	*Do you support retaining the existing list of minimum requirements for fair conduct programmes without any changes? What are the advantages and disadvantages of this option?*

	FSC members prefer Option A1, as stated above. The advantages of Option A1 are articulated in the responses to Questions 2 and 6 above.
Proposal: proceed with Option A1 (remove/amend some minimum requirements)	
11	*Do you support the proposal to remove and amend some of the minimum requirements for fair conduct programmes and not to proceed with the other options? Why/why not?*
	This is the preferred option for members and we refer to our response to Questions 2 and 6 above. A less prescriptive legislative approach will also afford Financial Institutions more agility to pivot, adapt and iterate their FCP where opportunities for improvement are identified or in response to changes in and around their businesses.
B. Options for amending fair conduct principle	
Option B1: Keep the fair conduct principle open-ended	
Option B2: Make the fair conduct principle definition exhaustive	
Proposal: retain status quo (Option B1)	
12	*Do you support the proposal to maintain the status quo in the definition of the fair conduct principle? What are the advantages and disadvantages of this option?*
	Our members prefer a complete definition of the FC Principle for the sake of clarity and certainty, it is good for customers and therefore good for business. The establishment of a FCP has been a positive development and has meant that providers are critically reviewing, challenging, monitoring, and uplifting their frameworks that lead to fair outcomes. The FC principle wraps up existing consumer law and not having a licence does not restrict the FMA from supervising. The current list of matters in section 446C appropriately and sufficiently defines the FC principle. If any changes are required to the definition, it can be consulted upon. This will avoid 'interpretation by hindsight' for example through guidance notes. We do not favour an open ended definition of the FC principle. An open ended definition could lead to scope creep and a difference in interpretation between a Financial Institution and the FMA on what it means to treat customers fairly. For example, a Financial Institution may unwittingly be in breach of the FC principle where the Financial Institution's interpretation differs from the FMA's.
13	*Are there any additional clarifications that could be made to the definition of the fair conduct principle, or matters that you consider should be included or removed? Why or why not?*

14	*Do you have any other suggestions or comments in relation to the fair conduct principle?*
	We support a complete (exhaustive) list rather than the inclusive list as drafted in the Discussion Document.
15	*Do you have any comments in relation to other areas of the CoFI Act that have not been covered in this section?*
	We note that section 449 of the FMC Act makes certain sections within the CoFI Act subject to 'civil liability' provisions. New Zealand has gone further than other jurisdictions in this respect and we submit that the conduct review should assess whether these provisions are appropriate.

2. Options for regulatory framework and powers

C. Consolidating financial market conduct licences

Option C1: Amend the FMC Act to require the FMA to issue a single licence covering different classes of market service

16	*Do you support the FMA being required by legislation to issue a single conduct licence covering one or more market services? What are the advantages and disadvantages of this approach?*
	We support streamlining of the licencing, at least across the multiple FMCA licences or its removal. Most of the CoFI licence questions relate to the establishment and content of the FCP (which is in itself a regulatory requirement) and the remainder of the questions are, for the most part, covered by licensing requirements of other applicable regulatory regimes. The CoFI licence conditions overlap and introduce differences (and in some cases conflicts), to be managed by providers, when a provider has other licences. Examples of common conditions across licences include outsourcing (a prudential requirement, FAP standard condition, and CoFI standard condition), regulatory returns, and business continuity and technology systems. We note the notification requirement for a material critical system issue under CoFI is different to the FAP standard condition. It is not anticipated that this would lessen the work required to bring the CoFI regime under licensing, but on an ongoing basis it would be preferable to manage one licence. Ensuring that differing licence conditions are aligned once consolidated and the collection of information and data, for example via regulatory returns or information requests, is simplified and not duplicated will benefit both financial institutions and consumers. A single licence could be issued under Part 6, where the common provisions would be consolidated under a single regime with common expectations. The purpose of this

	streamlining is to promote efficiency and encourage innovation, and streamlining the licencing requirements will satisfy these purposes.
17	*Could consolidating existing licences into a single conduct licence give rise to any unintended consequences or costs for existing licensed firms? If so, please explain with examples where relevant.*
	We support consolidating all existing licences into a single conduct licence, for the purpose of ensuring that common provisions would be consolidated under a single regime with common expectations. However, a single licence may not in practice lessen the compliance burden in respect of regulatory returns. In order to reduce the compliance burden of multiple regulatory returns for each market participant section of a single licence, we recommend appropriate wording in the regulation to reduce the regulatory burden of duplicated questions in the market services sections of regulatory returns and a single regulatory return containing only material and streamlined questions.
18	*Are there any other matters that should be considered around market services conduct licensing?*
	We recommend removing the record keeping, business continuity, cyber reporting and operational resilience standard conditions from CoFI licensing. These standard conditions are not relevant for conduct but more relevant to, or already regulated under, prudential requirements and they would create a record keeping burden.
	D. Enabling reliance on another regulator's assessment
	Option D1: Amend legislation to enable the FMA and RBNZ to rely on an assessment by the other regulator where appropriate
19	*Should the FMC Act be amended to enable the FMA to rely on the RBNZ's assessment for appropriate matters? Please provide examples of any specific areas where you think this could be useful.*
	We agree that the FMC Act should be amended to enable the FMA to rely on the RBNZ's (or another relevant regulator) assessment for appropriate matters where it results in streamlined processes and reduction of duplication of compliance requirements that add to compliance burden. We note the duplication of CoFI and other obligations. This creates a situation of multiple regulators, and our members may be required to report a single incident multiple times and be assessed inconsistently, with different requests for information or actions to be actioned where regulators take a different view on the severity of the same incident. To achieve the objectives of this review we propose language that obliges the FMA to rely on the RBNZ's assessment for appropriate matters and under appropriate circumstances (such as fit and proper assessments) as we consider 'enablement' does not place a sufficient

obligation to lessen the compliance burden and does not avoid potential for duplication and inconsistent outcomes for dual regulated Financial Institutions.

For example, recent constructive collaboration between FMA and RBNZ resulted in a single cyber resilience reporting template to report incidents to both entities. It does assist in certainty and clarity by completing one template for both regulators, however, without regulation to allow reliance on one another's assessment, it would not eliminate double handling and the compliance burden associated with it. For example, Financial Institutions will separately send the same cyber resilience template to both FMA and RBNZ. Financial Institutions are likely to receive from each regulator correspondence and questions with requests for more information (and they are likely to be different) which would require separate responses to each of FMA and RBNZ. It does not alleviate the compliance burden of double handling, yet it relates to the same cyber incident.

Another example relates to fit and proper assessments for which CoFI sets out detailed licensing requirements. All Financial Institutions applying for a CoFI licence are also licensed by the RBNZ. This means they have already been subjected to fit and proper assessments by the RBNZ. Duplicating this fit and proper assessment under the CoFI regime is an unnecessary additional burden on the Financial Institution without due consideration of existing similar processes set by other regulation. There is also a concern where regulators could take differing views on what might be appropriate to meet a regulatory fit and proper requirement.

To address the unintended consequences in both these scenarios where there is reporting to both regulators of similar nature and content, we propose that the regulation requires the dual regulators to determine at the first instance who would act as the lead regulator. The lead regulator would then be the sole contact with the Financial Institution for purposes of the said reporting and would be responsible for engaging with the other regulator.

20	*Should there be equivalent provisions enabling the RBNZ to rely on the FMA's assessment for appropriate matters? Please provide examples of any specific areas where you think this could be useful.*
	We agree there should be equivalent provisions such as the fit and proper provisions, material cyber incidents or outsource provider disruption and change in control (if introduced which we do not support).
21	*Are there any other improvements that could be made to the way the FMA and the RBNZ work together to reduce compliance costs and regulatory burden?*
	We consider there are improvements that could be made and refer to our response to Question 19 above.

E. Ensuring the FMA has effective tools

Option E1. Introduce change in control approval requirements

22	*Should change in control approval requirements be introduced into the FMC Act? Please explain your answer, including why the current approach does or does not work.*

If a financial institution is prudentially regulated, the FMA should accept the RBNZ's assessment, as noted under Question 19 above.

We do not agree with introducing change in control approval requirements into the FMC Act. It would add to regulatory compliance burden to apply to two regulators who, due to their separate and independent interest in a change in control (prudential versus conduct), would likely approach it through a different lens asking different questions and potentially lead to differing outcomes, restrictions or requirements.

This requirement could also have the unintended consequence of lessening competition as it may be harder for overseas entities to enter the New Zealand market.

We refer to the FSC submission of 6 August 2021 in response to the MBIE policy document, assess financial institutions upon change in control of 13 July 2021. The FSC submission provided feedback on the proposed requirement for a licensed Financial Institution covered by the Financial Markets (Conduct of Institutions) Amendment Bill (at that time) to obtain regulatory approval from the FMA prior to a change in control or other similar transactions. As noted in that submission, our members did not support the proposed requirement and continue to remain of that view. This submission can be provided on request.

23	*Should change in control approval requirements apply only to firms licensed to act as financial institutions, or to all firms licensed under Part 6 of the FMC Act? Why?*

If the change in control approval requirements are introduced (which our members strongly consider it should not be) it should be applied to all licenced firms.

24	*Do you have any other feedback on the change in control requirements option?*

Option E2: Introduce on-site inspection powers for the FMA

25	*Should the FMA have the ability to conduct on-site inspections without notice? Please explain your answer, including why the current approach does or does not work.*

We support onsite inspections on reasonable grounds, with reasonable notice provided there are adequate controls in place, such as when previous methods for obtaining information have failed, and it is consistent with the powers of other New Zealand financial markets regulators. This is consistent with the previous FSC submission on the RBNZ consultation on the Review of the Insurance (Prudential Supervision) Act 2010 Options Paper 3: Enforcement and Distress Management, 10 March 2022, and likewise, we cannot

see an equivalent need for FMA in the supervision of conduct. We note that such a power is out of touch with modern technological and business environments.

The following is an extract from our 2022 submission (which can be provided on request):
Successful regulator and participant relationships are based on openness and trust, and we consider the FMA, and industry have been working hard to establish this. Positive engagement with industry and onsite engagement with FMA already occurs with examples being regular supervision meetings. If this changed, and the FMA moved to a model of commencing onsite visits unannounced and asking for substantial information, this could seriously erode the benefits of the existing relationships. It may give industry and the New Zealand public the impression that it is needed because there not open dialogue between the FMA and industry which in the experience of our members is not the case.

We consider sufficient notice of onsite inspections would help ensure meaningful and efficient engagement with the FMA. In the absence of notice, we consider the following issues will arise which will not assist the FMA in its supervisory function:

- Flexible working practices and employees in different cities make it unlikely that the appropriate people will be present without notice. Without suitable executive support, staff may be inadvertently fearful and unsure how to engage directly with the regulator.
- Whilst we support comparability with other regulators, we note that the provision of a list of roles the FMA would like to speak to are often not the most appropriate to provide the information sought. Without sufficient prior notice there is not time to advise of more appropriate personnel.
- The purpose of the FMA visit is likely to be frustrated as it could mean that documents nor the appropriate people are available to access what is required on the spot.
- There may be an access and security issue with the FMA turning up unannounced at an office and without a person who has previously authorised their attendance.
- The visit may take longer and not be as effective if the entity does not have the time to prepare any wider contextual information and explanation of operational practices in advance to help ensure the focus is on the pertinent areas.
- An on-site inspection without notice power may also not reflect the evolution of the workplace where the majority of information is now stored electronically and accessed remotely. Without any advance notice of such inspection, there is the potential for this to cause significant disruption to the operations of an organisation as there would not have been an opportunity to put in place additional resource to accommodate such requests. This could be particularly problematic if it requires time and resource from customer facing staff so could potentially impact on servicing customers. There is the potential for this to cause distress to staff and possibly customers.

We also note the FSC responded directly to MBIE in a letter dated 4 May 2021 on this topic, MBIE's Proposal for consultation, FMA on-site inspection power draft. This submission was provided prior to a meeting on Thursday 6 May 2021 where the FSC Regulation Committee Co-Chairs and MBIE officials discussed the proposals further. The key points of this letter are consistent with above, querying why such a power is required, the importance of a risk based approach, impact on existing relationships, and why notice is required in all except exceptional cases. This letter can also be supplied if required on request.

We note the FMA already has additional powers to inspect without notice by utilising the provisions under section 29 of the FMA Act (power to enter and search place, vehicle or

	other thing). Section 29 seems to adequately provide for those instances where an onsite inspection without notice may be warranted in the context of conduct regulation. Adding a provision similar to s112 of the Deposit Takers Act would serve little additional benefit to the FMA's suite of regulatory tools while making considerable inroads into the rights and interests of market participants.
26	*Should an on-site inspection power apply only certain firms or in certain circumstances, e.g. to firms licensed under Part 6 of the FMC Act, or to all firms regulated as financial markets participants? Why?*
	Whilst we do not support the introduction of such a power, if it were to be introduced then it should apply to all financial market participants. We expect that the power would be more relevant to those firms that are not licensed under Part 6 of the FMC Act as they will not already have the same level of FMA oversight. Firms with a licence would have already undergone assessment by FMA in obtaining the licence and have ongoing compliance obligations such as annual returns and reporting to the FMA. We would expect that it would be extremely rare for the use of such powers to be justified in respect of firm that is licensed.
27	*What safeguards should be in place for on-site inspections without notice?*
	Despite our preference not to provide the FMA with the power of onsite inspection without notice, should MBIE nevertheless proceed with this proposal, we strongly suggest that without notice inspections should be a rare exception to the rule and should only occur where the FMA is concerned about a serious and imminent high risk of consumer harm and they have taken reasonable steps to obtain information with notice which has failed. It is critical that there is transparency on the use of any such powers and whether the grounds existed justifying the use of the power.
28	*Do you have any other feedback on the on-site inspection option?*
Option E3: Introduce an expert report power for the FMA	
29	*Should the FMA have the ability to commission expert reports? Please explain your answer, including why the current approach does or does not work.*
	We do not consider that this power aligns with the Government's objectives for this review. Providing this power would unjustifiably add to the compliance costs of Financial Institutions and be overly burdensome without just cause.

We are concerned that the FMA did not take into account the potentially significant cost and additional compliance burden that this proposed power holds for Financial Institutions.

The FMA have information gathering powers through, amongst other things, regulatory returns in addition to their extensive information gathering powers under section 25 of the FMA Act. We consider there to be little justification for giving the FMA this power where an existing regulatory obligation serves the same purpose. For example, paragraph 127 of the Discussion Document states expert reports "… would help the FMA gather intelligence to support a proportionate, risk-based and outcomes-focused approach to regulation, providing information to help the FMA better target the appropriate use of its powers and regulatory resources." The regulatory returns and section 25 powers provide the FMA with the opportunity to ask the right questions on all supervisory matters, obtain appropriate responses and ask further clarification if required. This process enables them to draw appropriate and informed conclusions and take appropriate action where required.

The FMA's requisite for expert reports is fundamentally different from that of the RBNZ. The RBNZ reports from technical experts in respect of technical financial or actuarial matters. Considering the FMA's stated position that Financial Institutions are best placed to assess what is fair for their organisations, we do not think the FMA similarly requires technical expert support for conduct matters.

30 *Should an expert report power apply only to firms licensed under Part 6 of the FMC Act, or to all firms regulated as financial markets participants? Why?*

31 *What safeguards should there be for an expert report power?*

We consider there to have been insufficient thought given to the controls associated with this proposed power to require an expert report. We ask for more detail on the practical application of this proposed power to enable us to provide considered feedback.

32 *Is it appropriate that the firm concerned bear the cost of the expert report? Why / why not?*

Our members do not consider the cost should be met by the industry. If introduced, the cost should be met by the FMA.

The Discussion Document proposes in paragraph 125(e) that "the firm may be required to obtain an audit or review of the report, which must be carried out by an auditor or other person approved by the FMA". The practical implication is that the FMA would have the right to ask for an audit or review of an audit or review report. We do not understand the purpose of double auditing. In addition, the Financial Institution would be expected to cover the costs of the review report itself, as well as the costs of reviewing the review report. This is not considered to be fair or reasonable, especially where the report finds no basis for the alleged concerns raised by the FMA.

33	*Do you have any other comments on the expert report power option?*
	3: Limitations and constraints on analysis
34	*Are there any other areas and options for change that we should consider that have not been addressed in this discussion document?*

4: Implementation

35. Do you have any comments on implementation of these reforms?

We note that this question was not included in the submission template and other submitters may not have picked this up.

Given MBIE has stated that Financial Institutions will need to comply with current legislation (without amendments) until the amendments commence in around 2026, this significantly reduces the benefit to existing Financial Institutions who will have already invested in compliance. Ideally, the changes should be fast tracked to meet the current commencement date of 31 March 2025. However, irrespective of this, we support the amendments to reduce ongoing compliance costs and provide more flexibility for Financial Institutions moving forward.

The proposed changes to the FMC Act and FMA Act would significantly impact the financial services industry. We propose first completing and embedding the regulatory reform of the CoFI Act and, if a need is identified, it then could be followed by an assessment of whether the FMA's powers should be expanded.

Other comments

We note in relation to the overlap or duplication with other obligations and suggest it would be helpful to have clearer lines or some guidance on how overlap will be treated, perhaps from the Council of Financial Regulators where different regulators have different expectations. We are keen to work with MBIE or other officials if this would assist.

We also refer to the duplication with the FAP regime and seek better alignment. FAP is very narrow (only related to financial advice services) so if a financial institution complied with the CoFI regime, it would potentially also meet many of the FAP requirements. This could mean one set of requirements could cover most, if not all FAP and CoFI obligations, namely one regulatory return.