Submission on discussion document: *Fit for purpose financial services conduct regulation*

Your name and organisation

Name	Lloyd Kavanagh/Andrew Walker
Organisation (if applicable)	MinterEllisonRuddWatts
Contact details	Privacy of natural persons

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Responses to discussion document questions

	Introduction
1	*Do you agree the proposed criteria are appropriate, given the objectives? Are there other criteria which should be considered?*
	We support the objective of clarifying and reinforcing the twin peaks regulatory framework in New Zealand. Please see our article *Financial Services – The Case for Reform,* published on 20 December 2023 ***http://www.minterellison.co.nz/insights/financial-services-the-case-for-reform*** In addition, the CoFI regime should be prioritising efficiency and innovation as well as promoting the fair treatment of consumers and good conduct. We therefore support the addition or amendment of the minimum requirements as a means of ensuring that these priorities may be satisfied. MinterEllisonRuddWatts is an associate member of the Financial Services Council and to the extent not inconsistent with our submissions above, we support their submission.
	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?*
	We support removing the minimum requirements of the Fair Conduct Programme (FCP) in s 446J and replacing them with a general requirement to have an FCP that gives effect to the FC principles as appropriate to the nature and scale of business of the relevant institution.
3	*Which requirements should be removed or amended, if any? Please explain what changes you would like to be made.*
	Regarding the FCP requirements under s 446J consistently with our response to question 2 above, we support the removing all the minimum requirements and replacing them with a general requirement to have a FPC that gives effect to the FC principles in relation to the relevant nature and scale of the institution and following consequential changes: • The requirement to include effective policies, processes, systems, and controls for compliance with the FTA, CCCFA, CGA and FSPR to be moved to s 446O. • The requirements for setting up systems by which the FC principle can be met, should be clarified. Currently, the new requirements contain ambiguous language such as requiring an "adequate assessment" and that processes need to be "reasonably assessed" which raises the question of whether through trying to limit these requirements under s 446J, ambiguity is being introduced. • The requirement to regularly review whether methods of compliance are operating as they should, should be removed.

	• The requirement of employee monitoring and training requirements should be removed as there is no longer any reference to employees in this section. • The requirement to manage incentive to mitigate or avoid potential adverse effects should be removed.
4	*What would be the impact of removing or amending particular requirements (for example, on compliance costs for businesses)?*
	The impacts will be the reduction of duplication and the associated compliance burden on financial institutions which will allow for greater flexibility in the ways financial institutions ensure the provision of fair conduct towards consumers.
5	*Do you have any other comments on the minimum requirements for fair conduct programmes?*
	No further comments.
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 oppose adding an express minimum requirement for FCPs relating to fees and charges. The current sections are already sufficiently prescriptive and do not allow providers sufficient ability to tailor the programme to fit the circumstances of its own business, in giving effect to the principle, where the addition of an express minimum requirement would result in additional regulatory and compliance cost burdens to financial institutions. Option A2 would seem at odds with the criteria the options will be assessed against. Guidance from FMA on 'fair' has recognised the difference between good and fair.
7	*What are the advantages and disadvantages of adding an express minimum requirement for fair conduct programmes relating to complaints processes?*
	We also oppose adding an express minimum requirement for FCPs relating to complaints for similar reasons as those outlined at question 6 above.
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?*
	Yes, we see fees and charges as already being covered in the arrangement and complaints processes under the current requirements, in accordance with the obligation of a financial institution to act ethically, transparently, and in good faith and with due regard to consumers.
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?*
	Yes, see more detail in our response to question 2 above, regarding removing the minimum requirements beyond having an FCP that gives effect to the FC principles as appropriate to the nature and scale of business of the relevant institution.

	Unless the specific requirements are removed, it will be very difficult for the FMA to provide leeway, particularly for smaller institutions to design a FCP that truly fits the nature and scale of their business. We are aware that in relation to this answer, our response differs from the Financial Services Council. We do not share the concerns that they raise that removing all minimum requirements for FCPs will create a real risk for misinterpretation between the FMA and the institution. Instead, the FMA, we would expect, will provide clear guidance which the institutions can consider as appropriate. By contrast, if the prescription is in the legislation then even if the FMA wishes to provide greater flexibility for smaller institutions, third parties may still be able to point to non-compliance with the letter of the legislation.
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?*
	No. We do not support this for the reasons set out 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?*
	See our responses to questions 2 and 6 above. Some financial institutions are already taking a risk adverse approach where increased regulation will result in financial institutions becoming more constrained in their attempts not to avoid any breach of the minimum standards. Financial institutions largely recognise that their conduct is important to their reputation, where we see the amendment and removal of the minimum standards (and not further additions) to be a step towards allowing financial institutions to balance excellent conduct with the ability to access products.
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?*
	No, we support Option B2 i.e., making the FC principle definition exhaustive. As explained above, having an open-ended FC principle creates unnecessary ambiguity resulting in cost and constraining innovation. Under the current s 446C requirements, the word “including” implies that there is scope for expansion. We see this as a risk for the minimum standards of the FC principle to be expanded through an increased scope adopted by financial institutions, and for differences in interpretation between institutions. We therefore support the removal of the word “including” in replacement for stating the examples in the list.

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?*
	We agree with the submissions of the Financial Services Council.
14	*Do you have any other suggestions or comments in relation to the fair conduct principle?*
	No further comments.
15	*Do you have any comments in relation to other areas of the CoFI Act that have not been covered in this section?*
	No further comments.

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 the issuing of a single New Zealand Financial Services Conduct licence under Part 6 of the FMC Act, which would be issued to replace all the various product and service licences with a single licence that covers CoFI, FAP, DIMS, and MIS. We support an approach which enables different provisions to be turned on an off within the licence depending on the service or product being offered. Apart from the CoFI regime itself, the changes to enable this to occur do not require amendment of the FMCA itself but could be dealt with via regulations. The changes would include: • Reframing of regulation 182 from the DIMS licensing requirement as an exemption from the DIMS clauses of the general NZFSC licence or an exemption from a licensing requirement for entities where DIMS licensing is an entity's only activity. • Amendment to the Eligibility criteria under regulations 186-187A to state the additional eligibility criteria for having an NZFSC licence that allows the provision of those specific services. • Amendment of regulations 191-197A to state that "a NZFSC Licence that allows the holder to offer the service of … is subject to a condition that …" • Amendment of regulations 199A-202 so that it empowers the FMA to impose additional conditions on NZFSC Licences which allow for those activities. • Reframing of Schedule 28 as a condition on an entity holding an NZFSC Licence which entitles them to be an administrator of a financial benchmark.
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.*

	No. Having said that, to be clear, prudential and conduct licences should remain separate and be regulated by the RBNZ and FMA in accordance with the twin peaks model.
18	*Are there any other matters that should be considered around market services conduct licensing?*
	We agree with the Financial Services Council's submission.
	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 support the submission of the Financial Services Council, however, enabling reliance between the regulators does not imply that we support the blurring of responsibilities between the twin peaks roles of prudential supervisor and conduct supervisor. Instead, the intent is to enable each of the RBNZ and the FMA to discharge their respective roles more efficiently without duplication.
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 that there should be equivalent provisions in accordance with our answer to question 19.
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 view our comments under question 19 as providing adequate ways towards the FMA and RBNZ's reduction of compliance costs and regulatory burden.
	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.*
	In relation to this topic, we support the submissions of the Financial Services Council. We do not agree with the addition of control approval requirements to the FMC Act. The actions of the FMA and RBNZ should be coordinated and coherent. We do not support changing control approval requirements to the FMC Act where this change would result in regulatory compliance burden where the lens applied by each regulator will result in different questions and outcomes.
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?*

	We do not have a submission to this question.
24	*Do you have any other feedback on the change in control requirements option?*
	No further comments.
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.*
	In relation to this topic, we agree with the submissions of the Financial Services Council. We oppose on-site inspections without notice. We are unaware of any reasons why the current approach should change or why it is currently unsatisfactory.
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?*
	We do not have a submission to this question.
27	*What safeguards should be in place for on-site inspections without notice?*
	We do not have a submission to this question.
28	*Do you have any other feedback on the on-site inspection option?*
	No further comments.
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.*
	In relation to this topic, we support the submissions of the Financial Services Council. The FMC Act 2011 already provides appropriate powers and we are unaware of any reasons for change. We also question the cost and regulatory burden that this requirement would place on financial institutions. We support safeguards which ensure that the roles and actions of the FMA ensures against unintended regulatory and compliance burdens and consequences.
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?*
	We do not have a submission to this question.
31	*What safeguards should there be for an expert report power?*
	We do not have a submission to this question.
32	*Is it appropriate that the firm concerned bear the cost of the expert report? Why / why not?*

	We do not have a submission to this question.
33	*Do you have any other comments on the expert report power option?*
	No further comments.
	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?*
	No further comments.
	4*:* Implementation
35	*Do you have any comments on implementation of these reforms?*
	No further comments.

Other comments

Please see out article (as referred to above) Financial Services – the case for reform: http://www.minterellison.co.nz/insights/financial-services-the-case-for-reform

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