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Dear Karl

FINANCIAL MARKETS CONDUCT REGULATIONS - DISCUSSION PAPER

The Insurance Council of New Zealand ("the Insurance Council") appreciates the opportunity to comment on MBIE's Discussion Paper on Financial Markets Conduct Regulations. The matters discussed in the Paper are of significant interest to our members.

1. Insurance Council of New Zealand

The Insurance Council is the industry representation body for fire and general insurance in New Zealand. The Council aims to assist members in key areas affecting their business through effective advocacy and communication.

The Council currently has 26 members who collectively write more than 95 percent of all fire and general insurance in New Zealand. Insurance Council members, both insurers and reinsurers, are a significant part of the New Zealand financial services system. Our members currently protect more than $0.5 trillion of New Zealanders' assets.

The Insurance Council plays an active role in representing the insurance industry. Our members are licensed under the Insurance (Prudential Supervision) Act 2010 and signatories to the Fair Insurance Code that requires insurers to act ethically. We also perform an important role in informing and educating consumers about key insurance issues and risks.

2. Questions from the Discussion Paper

We would like to focus on the following specific questions within Chapter 3 of the Discussion Paper, which directly affect insurers:

1 *What are the possible benefits or problems with covering insurance contracts under the fair dealing provisions of Part 2 of the FMC Bill rather than under the equivalent provisions of the Fair Trading Act?*

As far as we are aware, the practical effect of bringing insurance contracts within the realm of the FMC is to allow the FMA to bring an alternative civil claim under the proposed FMC Act. There could be some benefit in giving the FMA the power to bring a claim for breach of fair dealing under the FMC Bill, as it would be an inefficient use of parties' resources to be

dealing with parallel proceedings under both regimes over the same transaction. It may also prove unjust if, for example, the court found unfair dealing under the Fair Trading Act ("FTA") in one proceeding, but regulatory action under the FMC was not made out in another.

Nevertheless, there is concern that the FMC Bill effectively covers the same territory as the Financial Advisers Act 2008 ("FAA") provisions, in terms of misleading/deceptive conduct relating to financial advice provided by the insurer/agent.

Financial advice

Insurers and their agents are already subject to the misleading and deceptive conduct provisions under the FAA (ss34-35) with respect to any financial adviser service (e.g. in advertisements or making general recommendations about a product). There seems no clear reason to have the same legislative requirements under both the FTA/FMC Bill and the FAA for financial adviser services.

Financial product

Further, there seems no compelling need to specifically include insurance products in the FMC Bill or the FTA as there is no investment, they are easy to understand and insurers already have a working dispute resolution channel with internal and external dispute resolution channels under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

We would recommend that insurance advice and products be exempted from the FMC Bill (and the FTA), by amending the wording at clause 15A of the Bill. It seems unnecessary to include financial advice and simple insurance products into this regime, as insurers are already subject to misleading and deceptive conduct requirements under the FAA and we already have working dispute resolution channels. We would appreciate clarification as to the need for duplicate measures in this respect.

Lastly, the proposed penalties under the FMC Bill are much greater than under the Fair Trading Act:

a. Penalties for a breach of the fair dealing provisions in the FTA comprise up to $60,000 for individuals and $200,000 for corporations.
b. Penalties for a breach of Part 2 of the FMC Bill comprise a maximum of the greater of:
    i. Consideration of the relevant transaction;
    ii. 3 times the amount of the gain made or loss avoided; or
    iii. $1 million for an individual and $5 million for a corporation.

We would seek clarification as to the need for such significantly increased costs associated with a breach under the FMC Bill. The penalties seem out of line with those currently under the FTA.

2 *What are the risks and benefits of excluding registered financial advisers from the scope of the prohibition on offers in the course of, or because of, unsolicited meetings?*

If insurance contracts are covered under the FMC Bill, despite our above recommendations, then a specific carve out should be provided for insurers from the scope of the prohibition on offers in the course of, or because of, unsolicited meetings. It would make sense to have an

exemption for insurance contracts so that all insurers and their agents are exempt, regardless of whether they are QFEs. Otherwise, there would be an unnecessary and confusing distinction between QFE advisers and Registered Financial Advisers ("RFAs").

Alternatively, the regime could exempt from its scope any insurers who sell insurance policies but who do not give "financial advice" in the course of the customer's acquisition of that policy. This would provide an effective exemption for insurers that only provide class advice or elect to not engage in conduct which is intended to be regulated.

This should not cause significant concern as RFAs will still be subject to the provisions of the Financial Advisers Act, and in any event, are already restricted in the type of advice they may give. They will only be able to advise on straightforward category 2 insurance products.

However, insurers would also appreciate some guidance on specific terms utilised under the FMC Bill if there is no exemption for insurance contracts under 26B. Firstly, the definition of an *'unsolicited meeting'* needs clarifying. For example, car dealers would, during the course of selling a car, offer to sell car insurance. Alternatively, after the car is sold, the dealer may call the client to offer to sell insurance. Is this considered unsolicited? We would appreciate some clarification in this respect.

Secondly, the definition of *'offer'* needs clarifying. People talk about business all the time, but that does not mean there has been a formal offer that has been made that should attract regulatory compliance. If someone decides to investigate their own insurance (e.g. online), when does the chain of causation break if that investigation was prompted by an unsolicited conversation? For example, an adviser may suggest to someone following an unsolicited meeting to go online to look at policies and then contact them afterwards to discuss. The person may then search online and make a decision to purchase a policy, which turns out to be a bad one, without consulting the adviser further. This should not be deemed an '*offer*' for the purpose of an unsolicited meeting, as the person is not buying the product as a direct result of advice received.

If the mischief to be avoided is a bad decision made in the course of a pressure sales process via telephone, then perhaps more consideration should be given to offers made and accepted in the course of unsolicited conversations, with such offers being subject to a cooling-off period.

Clause 26B

We are also concerned with proposed clause 26B. Assuming there is no exemption for insurance contracts under 26B, if a claim is lodged and paid during the 1 month in which the right to withdraw applies, and the insured exercises the right to withdraw under 26B, insurers would not be able to charge anything as they would be obliged under 26B to refund the whole premium.

Insurers should be able to charge for time on risk if they are expected to cover claims during that period.

3. Reference to Product Disclosure Statement

It is our understanding that PDS provisions will not apply to our members because general insurance products would not be considered '*financial products*' under clause 7 of the Bill.

However, we would strongly suggest that the language of Part 3 be changed so that it does not refer to a "*product disclosure statement*" or "*PDS*".

These terms have a long-established and very clearly defined meaning in Australia. If New Zealand adopts the same terminology to refer to a different document that has some common elements of a PDS and other different elements, there will be ongoing confusion for:

1. customers, who will search on the internet for documents and will be bombarded with entirely unrelated Australian documents that are partly the same and partly different;

2. businesses operating in both Australia and New Zealand, who will need to clarify each time key words are referred to whether they are referring to the Australian document or the New Zealand document, manage training requirements and need to ensure that staff and customers understand that a PDS and a PDS are two different things. They will also need to review naming conventions for files and documents;

3. regulators, who will from time to time request or see documents that will refer to key words in a different context and need to clarify matters with businesses;

4. researchers and paper authors, who will be unable to use key terms to search for or tag information quickly;

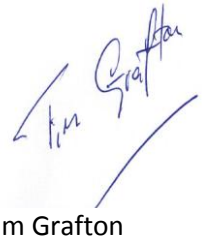
5. lawmakers and policy makers, who will no doubt make reference to overseas financial services regulation and be mislead into thinking that a (NZ) PDS should be the same as a PDS, without digging further to understand the rationale for differences.

We would strongly encourage that unique terminology be used to refer to the disclosure statement.

4. Conclusion

Thank you again for the opportunity to provide input on the Discussion Paper. We would appreciate consideration of our above comments and queries and will look forward to your response. Please contact Simon Wilson on (04) 472 5230, or at simon@icnz.org.nz, to discuss.

Yours sincerely



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