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Financial Markets Authority
Emailed to: consultation@fma.govt.nz

ICNZ SUBMISSION ON THE PROPOSED FAIR OUTCOMES FOR CONSUMERS AND MARKETS CONSULTATION

Thank you for the opportunity to submit on the Financial Markets Authority's (FMA) consultation on the proposed fair outcomes for consumers and markets.

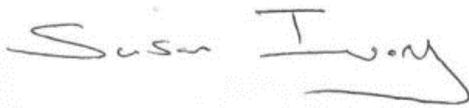
The Insurance Council of New Zealand Te Kāhui Inihua o Aotearoa (ICNZ) represents general insurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including well over a trillion dollars' worth of property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property, and directors and officers insurance).

Our submission that follows has two parts:

- Our overarching comments, and
- Our answers to the questions set out in the consultation paper.

Please contact me (susan@icnz.org.nz) if you have any questions on our submission or require any further information.

Yours sincerely



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OVERARCHING COMMENTS ON THE FAIR OUTCOMES FOR CONSUMERS AND MARKETS

The proposed outcomes set out by the FMA in its draft guidance 'Fair outcomes for consumers and markets' (the Draft Guide) are in themselves desirable objectives in principle. However, it is not clear what role the outcomes are intended to play and what they are intended to mean for the application of the underlying law, especially the recently enacted Conduct of Financial Institutions (CoFI) regime.

We consider there are issues in relation to mandate, ambiguity, and the relationship to legislation that need to be considered and we discuss these below.

Before progressing any further with this sort of approach it will be necessary for the FMA to address these issues. To be clear, our concerns are predominantly with how the outcomes would sit alongside regulatory regimes provided for in legislation and regulation, rather than with the desirability of the outcomes themselves. At present rather than particularly assisting to implement current obligations the Draft Guide just sets out different objectives. If instead the outcomes were presented by the FMA as matters they would consider when administering the regulatory regimes and undertaking its work, as is suggested in some parts of the consultation, we consider this would align better with the wider regulatory scheme.

All members of ICNZ are subject to the CoFI regime to the extent they provide insurance to consumers. There was extensive engagement between the Ministry of Business, Innovation and Employment (MBIE), the FMA and the insurance industry on how the CoFI regime would operate and what regulation and guidance might be required to support financial institutions to comply. Licensing opened in July 2023, and ICNZ members have invested significant time and resource in developing their Fair Conduct Programmes (FCPs) to support compliance with the fair conduct principle and its focus on fair customer outcomes. The FMA now proposes the Draft Guide which makes no reference to the CoFI regime or how it is intended to interact with it. We consider that in its current form the Draft Guide creates uncertainty and confusion and is unlikely to add value for consumers dealing with financial institutions who are subject to the CoFI regime.

If the FMA were to proceed with finalising the Draft Guide, we believe it should not apply to those financial institutions that are subject to the CoFI regime, and the CoFI regime should be given sufficient time to embed before any additional requirements or expectations are introduced.

If the FMA does intend for the Draft Guide to apply to financial institutions that are subject to the CoFI regime, the Draft Guide needs to be reworked to ensure it aligns with CoFI, does not introduce additional requirements and clearly demonstrates how the Draft Guide interacts with existing legislative frameworks.

We support ongoing conversations between the FMA and the financial sector on shared outcomes so long as that is in the context of how existing regulatory obligations are overseen and pursued.

Mandate

It is not clear what the FMA's mandate is to issue the Draft Guide, if it is intended to impose new and additional obligations on providers. Without any clear link to the applicable legislative and regulatory obligations, it is difficult to understand how the legislation within the FMA's remit enables such an outcomes-based approach whereby the FMA unilaterally defines the desired outcomes. It is also not clear how the Draft Guide interacts with CoFI in particular. CoFI introduces a series of principles or outcomes, toward which providers' FCPs should be directed. Some of the outcomes in

the Draft Guide are directed toward *similar* outcomes, but there is certainly not complete alignment. That gives rise to a risk of confusion.

There is a contradiction between key statements in the Draft Guide that the outcomes are not rules and “do not create, replace or even supplement existing legal obligations” (p5) and the FMA’s expectations that those outcomes will be delivered by providers (“*demonstrably embed them in the way they operate*” (p5).

The consultation paper asks, “*how will you demonstrate ownership and delivery of the fair outcomes?*” (q11). The Draft Guide states “*These outcomes will inform how we exercise our role ... and approach to our supervisory and enforcement work*” [emphasis added] (p3).

The recent speech from Samantha Barass to the Financial Services Council¹ also includes this dichotomy when she stated:

“The FMA’s focus on outcomes is in the first instance something for us. It is about our regulatory approach and the judgement we bring to our work as a regulator. It’s about us leaning even further into our engagement-led approach. It is about forward looking supervisory judgement that is risk-based and outcomes-focused.

The consultation is seeking your views on the outcomes that will guide our approach to exercising our regulatory powers and responsibilities. It will be risks to these outcomes that first and foremost guide our decision-making on how we use our resources. For our supervisory approach, we will use these outcomes, not detailed compliance requirements, to frame our discussions with and assessments of providers.” [emphasis added]

How a provider and its Board are expected to reconcile these intentions is not clear.

Are providers expected for example to create a strategy and compliance framework for the outcomes? We note there would be no evident legal basis for this and the nature of the outcomes is not conducive to it (see further comments below). However, it would be difficult for entities to demonstrate “*ownership and delivery of the fair outcomes*” without doing so. Many entities are in the process of implementing the CoFI regime and the fair conduct principle that sits at its heart, which begs the question of how to view these overlapping but different proposed outcomes.

The FMA’s proposals are quite similar in sentiment to the UK’s Consumer Duty. The key difference between the two frameworks though is that the UK’s Consumer Duty was implemented through regulations and supporting guidance set out in the FCA handbook and not non-regulatory material. The FMA’s Draft Guide appears to overlay existing regulations with subjective expectations, which is not effective policymaking.

If the outcomes are instead intended to signal areas that the FMA is interested in or will focus its efforts on (e.g. education) when conducting its supervision, which we consider would be the most appropriate approach, then making this more explicit in the document would be useful for the regulated population by making the status of the outcomes clear.

Ambiguity

Regulatory certainty supports effective and efficient compliance frameworks. Managing to outcomes is most workable when the outcomes are definitive and clear (e.g. avoiding worker harm or death under Health and Safety law) and these are often about avoiding negative outcomes.

¹ Speech by Samantha Barrass to the Financial Services Council Outlook 2024, 31 January 2024

Outcomes are far less certain when they are subjective in nature and more positive/aspirational, which the proposed seven outcomes generally are.

In his speech at the Financial Services Council's Outlook 2024 event earlier this year, the Minister of Commerce and Consumer Affairs Hon Andrew Bayly referred to *"a series of legislative and regulatory changes aimed at enhancing conduct by financial institutions"* and the impact that this *"layering of regulation and legislation"* has had which *"led to a lack of clarity for many market participants"*. Minister Bayly outlined some fundamental changes that the Government will be introducing within the financial services sector which are designed to lessen the burden on market participants, decrease complexity and avoid unnecessary compliance costs. We strongly believe that the Draft Guide will simply add another layer of complexity and result in unnecessary compliance costs contrary to what the current Government is trying to achieve.

The Draft Guide states the FMA wants to be *"clear about what we expect"* (p4), and beyond the issue of the basis for the outcomes discussed above, we do not see the outcomes meeting this objective. For example:

- The outcomes used value-based words (e.g. appropriate, suitable, fair, useful, easily, quality) that are not appropriately defined, and in some cases not used in the underlying legislation. Greater certainty and clarity would be required to make these implementable by entities. The Draft Guide would need to be much more specific in what the FMA is looking for. As currently drafted, it is likely there will be differing interpretations between providers and the regulator, and the outcomes will be interpreted as new requirements on financial institutions.
- The FMA's 'relevant issues and examples' are not very helpful in setting expectations but are more very broad and high-level principles that essentially repeat what the outcome says. E.g. the first example on page 6 refers to cryptocurrency which is not explicitly regulated in New Zealand. Many only refer to a specific regulatory regime or situation. This means examples are only illustrative and do not cover the full range of situations where the outcome would be relevant.
- The consultation paper states that *"everyone will have an intuitive sense of what 'fair' is and whether they have been treated in line with this"* (p13). The problem is that every individual consumer's definition of what is fair in the circumstances is likely different and may not always be a reasonable assessment of fairness in the circumstances.
- Expected outcomes change over time – even within a relatively short space of time – so focusing just on outcomes imposes an obligation on firms to anticipate the FMA's future interpretation of 'fair outcomes' and without clarity on how to assess those outcomes at the beginning.
- The consultation paper states that the FMA *"will require a mindset change to the way we act"* (p13). It would be helpful to see some practical examples of the changes to the FMA's operational practices that are intended here.

These issues would not be a concern if the proposed outcomes are simply intended to signal areas that the FMA is interested in or will focus on when conducting its supervision of current regulatory regimes.

Relationship to legislative frameworks

While we recognise the outcomes are intended to relate to a range of contexts that the FMA is the regulator for, the interrelationship with the fair conduct principle and the CoFI regime is most acute.

For general insurers it is the relationship with this part of the Financial Markets Conduct Act (FMCA) that is of particular interest.

As currently suggested in the Draft Guide, entities would seem for example to be expected to assess whether the outcomes should be explicitly covered in their FCP under the CoFI regime, (when they are well progressed in development and implementation) and would need to pivot making the timing particularly problematic. This would entail replacing adherence to a legislated requirement with adherence to the regulator's direction or expectation, which if it is the intent would appear to be a case of regulatory overreach. It is also unclear whether the FMA's intent is for compliance with CoFI to be sufficient furtherance of the proposed fair outcomes for consumers. We believe this is the only way the approach could be effective without substantial additional compliance costs, but if this is the intent, it should be clarified in the Draft Guide.

As shown in the table on the following page, the first five consumer-related outcomes overlap but also differ from the key elements of the fair conduct principle under CoFI.

In relation to those outcomes that are not related directly to the CoFI fair conduct principle the outcomes again risk over-reaching into new territory that has explicitly not been enacted in conduct legislation (particularly Value for Money). If fair outcomes were to be presented as a form of FMA expectation, they should be limited to align with the CoFI fair conduct principles on the rationale that firms already bound by CoFI can have confidence their FCPs are compatible and do not need revision.

Proposed Fair Outcomes	FMCA (Main Purposes and Additional Purposes in sections 3 and 4)	Fair Conduct Principle under CoFI (section 446C of the FMCA)
		(1) The fair conduct principle is that a financial institution must treat consumers fairly.
1. Consumers have access to appropriate products and services that meet their needs	No direct match	(2) The requirement to treat consumers fairly includes— ... (d) ensuring that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group);
2. Consumers receive useful information that aids good decisions	4(a) to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services:	(2) The requirement to treat consumers fairly includes— ... (c) assisting consumers to make informed decisions
3. Consumers receive fair value for money	3(b) promote and facilitate the development of fair, efficient, and transparent financial markets.	No direct match
4. Consumers can trust providers to act in their interests	No direct match	(2) The requirement to treat consumers fairly includes— ... (a) paying due regard to consumers’ interests; ... and; (e) not subjecting consumers to unfair pressure or tactics or undue influence.
5. Consumers receive quality ongoing care	No direct match	No direct match
6. Markets are trusted based on their integrity and transparency	3(a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and 3(b) promote and facilitate the development of fair, efficient, and transparent financial markets.	(2) The requirement to treat consumers fairly includes— ... (a) acting ethically, transparently, and in good faith
7. Markets enable sustainable innovation and growth	4(d) to promote innovation and flexibility in the financial markets.	No direct match

We also note that CoFI contains a detailed definition of “consumer”. However, the Draft Guide does not define consumer or clarify whether the CoFI definition of consumer applies. Reference to consumer in the Draft Guide would need to be read in the same way to avoid undue confusion.

ANSWERS TO CONSULTATION QUESTIONS

1. Is the way we have described our outcomes-focused approach to regulation clear, and do you understand how a focus on outcomes will be reflected in our work? Please explain.

As outlined in the overarching comments section of this submission, the purpose of the Draft Guide, its relationship to financial conduct legislation and other guidance issued by the FMA, and what it means for the FMA's expectations for providers needs to be further considered and clarified.

The Draft Guide states: *"These fair outcomes are not rules. They do not create, replace or even supplement existing legal obligations. Rather, focusing on the outcomes will assist firms to more easily meet those obligations in a way that achieves the purpose and intent behind them, as well as supporting regulatory compliance and helping to signal whether the regime is working as it should"* (p5). However, there is an expectation that the outcomes will be delivered. The Draft Guide states: *"Providers will need to take ownership of the fair outcomes and demonstrably embed them in the way they operate"* (p5). *"Over time, our regulatory conversations with firms will be built around the efforts they are making to achieve these outcomes. Providers will need to consider how they monitor and review their progress and how they articulate that to us"* (p13) and *"We will be interested in everything that firms are doing to achieve these outcomes. We will work to understand firms' viewpoints, the key risks or constraints, and the journey they are undertaking as they deliver these outcomes"* (p 13). There is a clear disconnect here that needs to be resolved. In our view this is best resolved by the fair outcomes being clearly focused on the FMA's work rather than as an alternative or additional framework for entities to comply with.

The Draft Guide states that by adopting an outcomes-focused approach the FMA wants to avoid a tick-box mentality. However, it is not outlined in the consultation document or evident to us that such a mentality is an issue within the market at the moment. In any event, it is important to allow the principles-based CoFI regime time to embed before assessing whether any additional response to a 'tick-box mentality' is required.

2. What are your views on the proposed fair outcomes for consumers and markets? To what extent do you think the proposed fair outcomes will bring benefits for consumers, providers and markets?

It is not clear how the proposed fair outcomes interact with legislation that the FMA is responsible for and consequently how it will bring any benefits for consumers, providers or markets.

For example, CoFI references a range of outcomes toward which financial institutions must direct their FCPs. The Draft Guide should clarify how the outcomes expressed in it relate to the outcomes expressed in CoFI. Where the outcomes in the Draft Guide go *beyond* the CoFI outcomes, the Draft Guide should be clear about how that is intended to be reflected in the FMA's supervision, monitoring and enforcement activity.

As currently drafted, for reasons outlined elsewhere in the submission, many providers will treat the Draft Guide as imposing additional compliance requirements, further increasing compliance costs which may ultimately be passed onto the consumer.

For providers, the ambiguity around the status of the Draft Guide and application of the outcomes may have the unintended consequence of stifling innovation. The outcomes can be interpreted as applying additional regulatory obligations, meaning providers may not feel that it is sufficient to satisfy themselves that they will be compliant with their legal obligations when developing new

products. A lack of clarity and certainty about their obligations may therefore result in providers taking a more conservative approach to the development of new products.

For consumers, in cases where they are aware of the outcomes, it may be confusing that the outcomes cannot be enforced directly. They may also be disadvantaged if there is a reduction in innovation or an increase in compliance costs for providers that is passed on to consumers in the cost of products and services.

3. What are your views on Outcome 1: Consumers have access to appropriate products and services that meet their needs?

We support the general proposition and aim of Outcome 1, however, CoFI already requires financial institutions to ensure that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group)². It is unclear how the proposed Outcome 1 is intended to interact with this similar obligation and the associated minimum requirements for FCPs in s446J of CoFI.

Accessibility

‘Accessibility’ of financial products that meet diverse customer needs is an outcome that a single provider cannot be responsible for delivering. In the general insurance sector, business imperatives – including reinsurance capacity and prudential regulation – will mean that a single provider cannot meet the needs of the market *per se*. Rather, providers are required under CoFI to ensure that product and service design takes into account the likely requirements and objectives of target customers, not the public at large. There needs to be a recognition of the nuances and that insurers should be free to offer only certain products (for example only travel insurance or motor insurance) and that not all consumers will have access to insurance products and services that meet their needs due to cost and insurer risk appetite. Not recognising this risks undermining the wider market rather than supporting it.

The word ‘appropriate’ is also key in the draft outcome statement. In situations where the risk insured is high (e.g. high natural hazard exposure, high risk industry) or the policy owner is seen as a bad risk (e.g. fraudster, arsonist) insurance may be expensive or unavailable.

From a first principles point of view, it is important to recognise that not all risks are insurable and to be insurable a risk needs to have the following general attributes:

- Risk is pool-able (i.e. sufficient number of homogeneous exposures), meaning niche risks can be difficult to cover.
- Loss must be due to chance (timing and impact must be unexpected).
- Loss is definable, measurable and statistically predictable based on history and/or modelling (and therefore can be priced).
- Premium is affordable for enough customers to make the product viable.

Some types of risks are uninsurable or not fully insurable because the above factors are lacking or for reasons such as:

- The potential losses are too expensive (i.e. catastrophic for insurers) if it did happen – e.g. global pandemic, war.

² S446C(2)(d)

- Where the risk is too difficult to price accurately.
- Where reinsurance is not available (for example in relation to losses from terrorism or war).
- Where providing insurance is prohibited by law.

Also, an insurer may have made a legitimate business decision to target a particular type of product or segment of the market. Such a decision may have benefits for consumers, e.g. a simple product that is easily understood by the target market. This proposed outcome should not be considered to require an insurer to amend their product for consumers outside their target market. Enabling insurers to offer only certain products or to target certain parts of markets supports innovation and diversity in the market.

Finally, it is worth noting that ‘accessibility’ of financial products and services is *not* an outcome that is built into CoFI.

The general insurance sector would appreciate further clarity on the “accessibility” limb of this outcome, including (given the issues outlined above) how the FMA intends to approach this in light of these.

Appropriateness

We agree that the ‘appropriateness’ element of Outcome 1 is sensible. Broadly speaking, this element of Outcome 1 reflects one of the elements of the fair conduct principle described in CoFI (section 446C(2)(d)). The language of this element of the outcome should, however, use the language of CoFI for consistency and clarity.

In addition, Outcome 1’s reference to meeting consumer needs could be read as implying a view of suitability that is more relevant to personalised financial advice services than commoditised general insurance products. Customers’ needs change and customers have their own responsibilities to manage their insurance arrangements to meet those changing needs.

4. What are your views on *Outcome 2: Consumers receive useful information that aids good decisions?*

Under CoFI an insurer must have an FCP that includes effective policies, processes, systems and controls for communicating with consumers about the financial institution’s services and products in a “*timely, clear, concise, and effective manner*”. Outcome 2 refers to information that must be “*useful*”, that is “*easily understood and digestible information that is material, accessible, timely and reliable*”. While these are similar concepts, they are different, and this creates complexity and uncertainty for regulated entities.

It is not apparent what the differences in language might mean for insurers and whether the intention would be to create additional requirements. There is no reference to the CoFI regime despite both the Draft Guide and the regime being designed to support fair outcomes. As noted elsewhere, this poses questions such as whether insurers would be expected (but not legally required) to incorporate this language into their FCPs.

We also note that different insurers use different channels to communicate with their customers and they should maintain the ability to do so.

We also note that unfortunately the availability of good information may not always lead to consumers making good decisions.

5. What are your views on Outcome 3: Consumers receive fair value for money?

An explicit focus by the FMA on fair value for money would be a material new development in the FMA's regulatory agenda and without any explicit legislative underpinning (outside the regulation of KiwiSaver). CoFI for example does not make any reference to fair value for money as an explicit legislative outcome. Again, this is not something that was included by Parliament in the CoFI regime. The wider context is to support competition in the provision of financial services and to regulate competition through the Commerce Act, as is recognised in objective 3(b) of the FMCA.

The value and pricing of financial products and services is a very challenging area to regulate, particularly in the absence of any specific regulatory framework for this.

We agree that "*Value needs to be considered from many dimensions*". Insurance products in particular respond to different types of risk and can be very complex, making it difficult to assess the value for money component, and in some cases this would need to be considered over a longer period of time. This may be particularly so when the policy covers a high severity but low probability event. The value of the product may only become truly evident to the consumer if the event occurs.

For insurance whether the premium represents fair value depends on the risk being insured and the terms provided. For example, broadly equivalent family homes could be subject to materially different premiums in different locations due to the varying natural hazard risk applying. Equally customers could be charged different premiums for similar motor vehicles on the basis of legitimate underwriting factors, such as their age or loss history.

Insurers also have a competitive overlay in their pricing that is on top of the technical risk. Insurers need to ensure an appropriate spread of risk (i.e. not too much in one place) so two identical risks in different locations may be charged differently. The consumer may not see this as fair value, but it is necessary to achieve prudent risk aggregation.

We suggest that a more practical positioning of this outcome would be to state that 'consumers should not be provided with products that firms assess as delivering poor value'.

6. What are your views on Outcome 4: Consumers can trust providers to act in their interests?

We question whether the bundling of "*trust*" with providers "*acting in the consumer's interests*" in one outcome is the best approach. These are two different issues and 'trust' is a largely distinct aspect from acting in the customer's interest.

We note CoFI's fair conduct principle includes "*paying due regard to consumers' interests*". The inconsistency between the language used in CoFI and the language proposed here (i.e. "*act in their interests*") introduces uncertainty about the standards that will apply under the conduct regime. The broader language of Outcome 4 implies that an insurer's duties are being extended.

The more nuanced language used in CoFI recognises that entities such as insurers have their own interests. MBIE's Officials' Report to the Financial and Expenditure Committee on the Financial Markets (Conduct of Institutions) Amendment Bill notes "*Financial institutions also need to be able to reasonably consider their legitimate commercial interests. We do not see this as*

inconsistent with the concept of fairness ...".³ We would agree that financial institutions should put customers at the centre of decision-making, however, an outcome that simply states "*customers can trust providers to act in their interests*" goes beyond this and fails to recognise the nuance in the CoFI language.

We also note the broad subject matter suggested to be covered by this outcome includes data security, disclosure, governance, systems, controls and financial strength. While we are aware that the FMA has sought to include some of these matters in FMCA licence conditions, which we have expressed concerns with in some cases, we still consider that data security issues fall clearly within the remit of the Office of the Privacy Commissioner under the Privacy Act 2020. Disclosure requirements are extremely broad and differ across the various financial institutions, many of which are driven by legislation outside the FMA's remit. An insurer's financial strength for example is a matter for the Reserve Bank of New Zealand to regulate under the Insurance (Prudential Supervision) Act 2010. While issues in these areas could have impacts for consumers, having multiple regulators involved in the oversight of the same matters (even if for slightly different reasons) just adds regulatory complexity and cost and should be avoided wherever possible. We note that Hon Andrew Bayly in his speech at the FSC Outlook 2024 event expressed the desire to remove duplication between regulators.

7. What are your views on Outcome 5: Consumers receive quality ongoing care?

Outcome 5 incorporates elements that would go beyond CoFI and/or do not mirror the language of CoFI, leading to uncertainty.

In 2021, MBIE published a consultation on regulations to support CoFI and treatment of intermediaries. This consultation specifically considered whether regulations were required for additional areas including claims, complaints and customers experiencing vulnerability (CEV) and subsequently MBIE determined regulation covering these areas was not required at this time. It is important to allow financial institutions time for CoFI to embed, and then assess whether there are further areas that should be addressed through regulation, guidance or specific market mechanisms that focus on particular areas of weakness, as opposed to widening the scope of compliance at this point in time through a guide when the industry is focused on preparing for the CoFI regime, particularly as the FMA says it is conscious of unnecessary regulatory burden.

We note the FMA's 'Insurance conduct and culture update: Fire and general insurers update' issued in July 2021 referred to in the examples for Outcome 5 did not consider the huge amount of work that insurers had undertaken in response to the FMA's review in 2019. It was also issued prior to the passing of CoFI which is designed to support fair customer outcomes. If this reference is retained, it is important that the Draft Guide acknowledges the substantial progress that has been made since the 2019 review.

The Draft Guide simply states: "*Consumers should be able to update, alter, switch or exit a product without encountering unreasonable barriers*". It is unclear how this outcome is intended to extend to insurance in the context of renewals and policy amendments.

³ Para 20

8. What are your views on Outcome 6: Markets are trusted based on their integrity and transparency?

The way this outcome is framed in the guide does not appear to be particularly relevant to general insurers that are not listed entities in New Zealand. Nevertheless, we note that it is a market-wide outcome and not one that a single provider can materially influence.

9. What are your views on Outcome 7: Markets enable sustainable innovation and growth?

It is not apparent what the FMA intends under this outcome in relation to general insurance. Again, this is a market-wide outcome that is not within the control of any individual provider.

While we understand the FMA's desire to cover a range of aspects under the proposed outcomes, it is also not particularly evident how sustainable innovation and growth, while important, are particularly linked to fairness.

10. Is anything missing that should be included in the fair outcomes? Please explain.

As outlined above, there is no reference or alignment to the CoFI regime in the Draft Guide or how it is intended to interact with it. We recognise, however, that the FMA envisages the outcomes being applied to a wider set of entities than those regulated by CoFI.

As outlined elsewhere in this submission, we consider that the outcomes are more appropriately suited as matters to guide the FMA's activities.

11. If you are a provider of financial products or services, how will you demonstrate ownership and delivery of the fair outcomes? What will be the implications for your governance, leadership, management and operations, and how they work together?

It is difficult to reconcile this question with the statements in the guide that it does not add to providers' obligations. This question ("*demonstrate ownership*", "*delivery*") however implies that there is a duty to comply with the outcomes.

In short, we consider this would be regulatory overreach but could be resolved by revising any statements implying the outcomes are stand-alone expectations to make it clear that the document should be interpreted more squarely as setting out the FMA's own priorities and for focusing its supervision and enforcement etc. Putting firms on notice of the FMA's proposed approach would usefully give firms pause for thought when prioritising uplift of controls and internal reviews, even if the outcomes are not a form of expectations to be separately complied with by firms.

Also, if it was intended that providers comply with the outcomes (in addition to their existing legal obligations), then as well as identifying the basis for this, the high-level and subjective nature of the outcomes would make it difficult to design policies, procedures, systems and controls to deliver them.

12. If you are a provider of financial products or services, how will outcomes-focused regulation help support your regulatory compliance? Are there areas you will find challenging or where you have concerns?

The intent of the regulator adopting an outcomes-focused approach to its supervision of existing legal obligations ought to be to provide regulated entities with flexibility to manage their regulatory compliance and avoid a tick-box approach. This accepts that there are many different ways to achieve the same result and so encourages innovative approaches and enables the focus

to be on those areas that pose the most risk to consumers. However, there is always the risk that taking such an approach may lead to uncertainty for both regulated entities and regulators as to the appropriate level of compliance. It is for this reason that it is critical that the Draft Guide does support regulatory compliance. Given the uncertainty about the interaction with providers' legal obligations, we do not consider that the Draft Guide will support this.

We consider that the Draft Guide is likely to create confusion and uncertainty amongst providers as to whether it is by providers as imposing additional regulatory requirements and increasing providers' compliance burden.

Insurers are currently preparing to comply with specific CoFI obligations. It is not clear how the outcomes are intended to interact with CoFI or whether insurers' FCPs should be updated to incorporate them.

A number of the outcomes are about matters that are outside the control of any individual firm (i.e. Outcomes 1, 6 and 7). We are concerned how these outcomes would be expected to apply to any individual firm.

13. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence our supervision and monitoring approach?

The regulator adopting an outcomes-focused approach to its oversight of the existing legislative and regulatory framework should reflect the need for a proportionate and risk-based approach to supervision and monitoring. Such an approach should make it easier for the regulator to focus on metrics of good customer outcomes without the need for an undue focus on how the regulated entity is achieving that. An outcomes-focused approach is sensible, provided that it is clear how supervisory, monitoring and enforcement activity will be directed and that the approach is tied to regulated entities' existing legal obligations.

The Draft Guide does not make that clear. It provides the outcomes that are a priority for the FMA, but little detail on how the FMA will supervise and monitor firms, beyond the fact that the FMA will focus on whether it is seeing the outcomes in the market and will respond proportionately where that is not the case. Further detail on how that will be achieved, and the interaction between this Draft Guide and CoFI, would promote certainty.

An outcomes-focused approach could appropriately inform where the FMA chooses to focus its supervisory, monitoring and educational resources. We recognise that a regulator has a discretion here. However, it must be against its legal obligations that a provider's conduct is measured.

14. Do you have any comments in relation to how a move towards a more outcomes-focused approach to regulation should influence how we seek to address and hold individuals and entities accountable for misconduct?

Misconduct can only be defined by reference to a provider's legal obligations. The move to an outcomes-focused approach should not change this and should not apply a higher standard to providers than that set out in the law.

That said regulators do exercise discretion in how they enforce the law as noted above and we can see how an outcomes-focused approach could be used to inform how a regulator prioritises its use of its supervisory and enforcement resources to focus on conduct that creates the greatest

harm. Consistent with this, an outcomes-focused approach should also presumably mean a less stringent approach to technical breaches that do not result in material harm to consumers.

15. If you are a provider of financial products or services, what are your views on the link between outcomes-focused regulation and innovation? Will it provide you with increased flexibility to achieve your business needs?

We do not consider that the Draft Guide will increase flexibility. This is because the purpose and status of the Draft Guide is unclear, in particular its relationship to providers' existing legal obligations, and is likely to be interpreted as imposing additional regulatory requirements on providers. The Draft Guide does not lessen a provider's duty to comply with the law.

There needs to be consistency between the Draft Guide and the legislation to enable certainty for firms to operate within an outcomes-focused regulatory environment.

An outcomes-focused regulator could offer reassurance to providers that technical breaches of regulations (that result in no or little harm) are unlikely to result in regulatory action where the relevant firm engages constructively with the regulator and has acted in accordance with reasonable regulator expectations.

16. If you are a consumer or consumer group, do you understand the fair outcomes and are they relevant to your interactions with the financial sector?

This question is not applicable to ICNZ.

17. What are your views on the examples provided in the guidance? Are they helpful, and are there any other examples we should include?

The Draft Guide includes only a few examples about general insurance. Although we recognise that it would be challenging to provide examples relating to the full range of financial products and services covered by each outcome, the lack of relevant examples limits the helpfulness of the Draft Guide for the general insurance sector. From our point of view, a document such as the Draft Guide would be improved by including more examples relevant to general insurance and how they relate to an insurer's existing legal obligations. We would be happy to engage with the FMA further if the FMA decides to include further examples.

It is also unclear to what extent the examples given can or should be read across from one sector to another. For example, under Outcome 3 'Consumers receive fair value for money' the FMA cites its 2020 research showing a lack of a significant relationship between the level of active management employed by KiwiSaver providers and the fees they charge. KiwiSaver fees are regulated.⁴ Managers of KiwiSaver schemes are subject to a legal obligation not to charge a fee that is unreasonable and the concept of reasonableness potentially encompasses fairness. However, this example does not assist other sectors where pricing is not regulated in this way.

18. Do you need any further guidance or support from the FMA in relation to outcomes-focused regulation or the fair outcomes?

We refer to our comments above regarding the lack of clarity around the purpose of the proposed guidance, its relationship to legislation, and the extent to which it imposes new obligations on providers.

⁴ Clause 2 of Schedule 1 to the KiwiSaver Act 2006.

Whilst the draft guidance refers to 'A Guide to the FMA's view of conduct' (February 2017), it does not specify whether this guidance is intended to replace it or if not, how the two will interact. This should be clarified.