NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Options paper: Conduct of Financial Institutions

7 June 2019

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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank
- Citibank, N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- MUFG Bank, Ltd
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the options paper: *Conduct of Financial Institutions* (**Options Paper**). NZBA commends the work that has gone into developing the Options Paper.

4. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

5. NZBA strongly supports the policy goal underpinning the Options Paper – to ensure that conduct and culture in the financial sector is delivering good outcomes for all customers.

6. In particular, we support the concept of introducing overarching duties on entities as a way to ensure that good outcomes are achieved for all customers.

7. NZBA also broadly supports the other proposed changes in MBIE's initial preferred package of options, subject to the comments that are set out in this submission, including that:

   (a) Care needs to be taken to appropriately address (or remove) the significant regulatory and legislative overlap relating to the proposed duties. This is an issue which requires further consideration in order to avoid unnecessary regulatory complexity and cost.

   (b) Some of the wordings of the proposed new duties in MBIE's initial proposed package of options require further consideration, including whether the proposals are duplicative.

   (c) The proposed timeframes for the design and implementation of the new conduct regime are very tight. In circumstances where the banking and insurance industries are complying with requests for information, action and focus from the Financial Markets Authority (**FMA**) and the Reserve Bank of New Zealand (**RBNZ**), we query whether legislation is required in the time currently targeted. To avoid unintended consequences, any new conduct regime should be designed and implemented with care and should not be rushed.

8. Given the above, NZBA suggests a phased introduction of conduct regulation in New Zealand (which may be similar to the way in which conduct regulation has evolved in other jurisdictions). In this regard, NZBA supports progressing with the introduction of basic entity-level obligations in the first instance to be enforceable by the FMA.

9. Consideration of executive level accountability for conduct obligations and other proposed options (eg providing the FMA with product ban powers) should then be considered by way of a second phase of consultation.

Conduct regulation should apply to all financial services providers

10. NZBA considers that the objective of delivering good customer outcomes can only be achieved if the proposed conduct regime applies to all entities providing financial products and services. That includes, but is not limited to, non-bank deposit takers, managed investment schemes (including Kiwisaver) and discretionary investment management services, laybuy providers, and other consumer lending providers.

11. To avoid regulatory arbitrage and consumer confusion, we consider that the new regime should apply to any financial services provider who is involved over the lifecycle of lending, deposit taking, or the provision of contracts of insurance (which is not currently regulated by the FMA under the Financial Markets Conduct Act 2013 (**FMCA**)). Additionally, we consider that intermediaries should be within scope of

the regime as they are captured by many of the proposals, particularly those relating to product distribution.

Regulatory and legislative overlap

12. NZBA is largely supportive of the proposed overarching duties, provided they are appropriately integrated with other legislative and regulatory regimes.

13. To the extent there is overlap, or a lack of integration, this will create uncertainty and confusion both for financial institutions that are trying to implement and/or meet their various compliance obligations, and for customers seeking to understand their rights. Clarifying these areas of overlap is particularly important where different regulators are monitoring and enforcing different pieces of legislation which contain very similar duties.

14. To that end, we think MBIE should consider potential overlaps and the need for integration with existing legislation and regulation. To assist with this, we have attached a table which compares the overarching duties in the Options Paper with existing duties (and penalties for breaching those duties). That is **Appendix One**.

15. In particular, the following legislation and regulation has substantial overlap with the proposed overarching duties:

    (a) Credit Contracts and Consumer Finance Act 2003 (**CCCFA**);

    (b) Financial Services Legislation Amendment Act (**FSLAA**) and the accompanying disclosure regulations;

    (c) Code of Professional Conduct for Financial Advice Services (**Financial Advice Code**);

    (d) Consumer Guarantees Act 1993 (**CGA**);

    (e) Fair Trading Act 1986 (**FTA**); and

    (f) FMCA.

16. Additionally, there may be overlap with the following reviews and consultations:

    (a) Credit Contracts Legislation Amendment Bill (**CCLAB**);

    (b) MBIE's insurance contract law review;

    (c) Treasury's Phase 2 review of the Reserve Bank of New Zealand Act 1989 (**RBNZ Act**);

    (d) the State Services Commission's review of protections available to whistleblowers under the Protected Disclosures Act 2000;

    (e) MBIE's review of unfair commercial practices; and

    (f) Farm Debt Mediation Bill.

17. Given the level of law reform underway, and in light of the short time provided for the consultation on the Options Paper, NZBA cannot comment comprehensively on

MBIE's proposals for addressing overlap (at paragraph 233-237 of the Options Paper). However, our initial preference is that any new legislation is integrated where possible into existing regimes.

Implementation of conduct regime

18. Banks are already currently undertaking a large amount of work with a focus on good conduct and good customer outcomes, noting that our members welcomed the recent conduct and culture reviews by FMA and RBNZ. Activities underway include:

    (a) implementation of the conduct and culture work plans (developed in consultation with Boards, FMA, and RBNZ in response to the Conduct and Culture Review);

    (b) responding to the FMA and RBNZ review of the conduct and culture of life insurers;

    (c) implementation of FSLAA; and

    (d) engaging closely with MBIE and Government on CCLAB.

19. The above work (both individually and collectively) represents significant regulatory developments and is, or will be, accompanied by large-scale projects and intensive compliance work plans, which absorb a great deal of bank resource.

20. Additionally, there have been significant international developments in the conduct regulation space in recent years. While it is important that we take a New Zealand-centric approach to a new conduct regime, we think it could be helpful to leverage international comparisons to the extent these are relevant.

21. We consider that it is more important to take the time to get the design of the new conduct regime right rather than implementing new legislation with haste.

22. On that basis, and as noted above, NZBA supports progressing with the introduction of entity level obligations in the first instance. Consideration of executive level accountability for conduct obligations should be undertaken as a second phase within a broader consideration of appropriate director and executive accountability in respect of both prudential and conduct matters. This is important given the uncertainty around what individual responsibility in a principles-based regime may bring, and the possible deterrent effect that uncertainty may have on good people wanting to remain in, or join, the industry.

23. NZBA would welcome the opportunity to be involved in further consultation relating to the detail (including drafting) of the options that will be implemented.

NZBA broadly supports the options for overarching duties

24. NZBA supports principles-based duties as they encourage financial institutions to carefully consider the intent of the duty and how that duty can be met in the context of their business. We broadly support MBIE's initial preferred package of options, subject to the comments that follow.

25. We agree also that the overarching duties should be underpinned by commentary to aid interpretation – that is, commentary that focuses on appropriate additional

information as to each standard's overall intent rather than outlining how a duty should be complied with.

Options for overarching duties	
Option	**NZBA comments**
Option 1: A duty to consider and prioritise the customer's interest, to the extent reasonably practicable	NZBA broadly supports Option 1. However, more clarity is needed as to whether its intention is to deal with conflicts of interest or to create a wider duty of fairness. We note that s 431K of FSLAA introduces a duty to give priority to a client's interests. That focuses on conflicts of interest. It provides that a person giving regulated financial advice must take reasonable steps to ensure they are not materially influenced by their own interests where they know, or ought to know, there is a conflict. However, the examples of ways a financial institution might go about meeting the proposed duty (set out at paragraph 129 of the Options Paper) are more akin to ways a financial institution might seek to comply with a duty to 'treat customers fairly'. In that regard, the Financial Advice Code will introduce such a duty in relation to financial advice providers. Further consideration must also be given to how this will overlap with other legislative regimes. Without this, there is a risk that this duty will cause considerable confusion among financial institutions that must comply with these different regimes.
Option 2: A duty to act with due care, skill and diligence	NZBA supports Option 2. However, if this option is introduced it will be important to consider the extent to which it may overlap or conflict with other similar duties. For example, both the FMCA and FSLAA set out the professional duty of care that various parties must comply with when they provide certain products or services. It would be desirable if the framing of this option was consistent with those existing duties as that would facilitate efficient implementation and would allow financial services providers to rely on existing precedent as an aid to interpretation. We note that in paragraph 130 of the Options Paper, the 'diligence' aspect of this obligation is described as including having 'checks and balances in place to carry out [that] action properly'. This appears to overlap with Option 4, which would create a requirement to have systems and controls in place that support good conduct/address poor conduct. To avoid confusion, we consider that Option 2 should not include a requirement for 'checks and balances'.
Option 3: A duty to pay due regard to the information needs	NZBA considers that Option 3 requires further clarification. We would support this option to the extent that it is intended to: • ensure that communication is appropriate for the customer, particularly in the case of customer vulnerability; and

of customers and to communicate in a way which is clear and timely	• address information asymmetries. However, as currently drafted, this option seems to create disclosure requirements similar to those contained in CCCFA, FMCA and FSLAA. If that is the intention, NZBA would be unlikely to support this option as we consider that it is captured through existing legislative regimes, and an additional duty would create unnecessary legislative overlap. Additionally, we consider the suggestion that financial institutions take into account the circumstances of particular (individual) customers when providing them with information (or determining what information to provide them) has the potential to be impractical and unworkable. It may be difficult to identify those circumstances which might affect the information and communication needs of individual customers in every case.
Option 4: A requirement to have the systems and controls in place that support good conduct and address poor conduct	NZBA generally supports Option 4. However, we consider that the wording 'systems and controls' should be clarified, for example, with the words 'appropriate conduct risk management' (ie 'a requirement to have appropriate conduct risk management in place that supports good conduct and address poor conduct'). That is because we understand the intent of this to be that the entity has an appropriate control environment, as opposed to 'systems' (which may be interpreted to mean IT systems). Additionally, it is a standard condition that QFEs maintain procedures and monitoring to ensure that retail clients receive adequate consumer protection. Again, clarity regarding that overlap of duties would be beneficial.
Option 5: A duty to manage conflicts of interest fairly and transparently	NZBA considers that the relationship between Option 5 and Option 1 should be clarified. If Option 1 is intended to capture conflicts of interest (similar to s 431K of FSLAA) then there is no need for a separate duty. See our response to Option 1 above. NZBA considers that this duty could instead focus on conflicts of interest that arise through remuneration. Additionally, disclosure should operate as a form of safe harbour if any such duty is introduced. We also note that many existing legislative regimes already address disclosure of conflicts of interest.
Option 6: A duty to ensure complaints handling is fair, timely and transparent	NZBA supports the intent of Option 6, but we consider that it should instead be incorporated into an overarching duty to 'treat customers fairly'. See our response to Option 1 above.

Options to improve product design

26. NZBA's preference is for product design Option 3 – a requirement for manufacturers to identify the intended audience for products and a requirement for distributors to have regard to the intended audience when placing the product.

27. We have some overarching comments regarding the product design options:

Options to improve product design	
Option	**NZBA comments**
Option 1: Give regulator power to ban/stop the distribution of specific products	NZBA broadly supports Option 1. A power to ban or stop the distribution of specific products, if adopted, would need to be the subject of clear controls to ensure certainty for market participants, and only exercised in extreme cases. In particular, it would be necessary to specify objective criteria that the regulator must consider when determining whether to exercise the power. That may include evidence of harm to the vast majority of customers, evidence that the regulator has exhausted all other avenues, assessment of any potential negative impacts from banning, and the market context more broadly. We also consider that any such power should be on a temporary basis only (for example, no more than 12 months). As an alternative, we would support the regulator having various powers to audit products and make recommendations/orders where it considers that a product is not resulting in good customer outcomes.
Option 2: Ban certain products	NZBA does not support Option 2. We agree that most products are not unequivocally bad; they may be beneficial to some customers. A ban would mean that some customers would not be able to obtain the benefit of these products. We also agree that it would be difficult to define banned products, and this may lead to products being adjusted slightly to work around the ban.
Option 3: Requirements that manufacturers identify intended audience for products and requirement that distributors have regard to intended audience when	NZBA supports Option 3. We consider that such a requirement would be effective in ensuring that good customer outcomes are at the forefront of product design and distribution. We query whether this need be a standalone duty. Rather, this could be captured by the overarching duty to 'treat customers fairly'. Additionally, we think that it should include commentary regarding how the intended audience is identified (and, in particular, how narrow/specific the intended audience must be) to ensure that financial institutions apply this requirement consistently.

placing the product	The extent to which 'distributors' include financial advisers will also need to be carefully considered as a substantially similar duty will apply under the Financial Advice Code. Consideration should also be given to whether some classes of relatively simple products should be excluded (for example transactional accounts).

Options to improve product distribution

28. We consider that product distribution Options 1, 2 and 5 as a package would be most likely to demonstrate commitment to, and promote the delivery of, good customer outcomes in a manner that is also commercially sensible.

29. These options would also permit the use of sales-measures in incentive structures, so long as these support good customer outcomes, and the business is confident that any conflicts of interest are addressed. This would be more likely to support an appropriate balance between customer and business outcomes.

30. We are also supportive of an industry-wide approach (including intermediaries), as we believe this will best support good customer outcomes, while also ensuring an even playing field.

31. We have the following additional comments regarding the product design options:

Options to improve product distribution	
Option	**NZBA comments**
Option1: A duty to design remuneration and incentives in a manner that is likely to promote good customer outcomes	NZBA supports Option1. We agree that this option will support good customer outcomes through the effective design of incentive practices. However, in isolation, Option 1 may not sufficiently address concerns around conflicts of interest in the context of significant power and information asymmetries. This duty should clarify that the achievement of long-term customer outcomes extends beyond short-term customer satisfaction.
Option 2: Ban target-based remuneration and incentives, including soft commissions, for in-house and intermediaries	NZBA agrees that incentive structures linked to sales targets should be reviewed with the aim of supporting good customer outcomes and addressing potential conflicts of interest. To that end, we reiterate and endorse the FMA and RBNZ's recommendation (in the Conduct and Culture review) that: "Banks' incentive structures need to be designed and controlled in ways that sustain good customer outcomes. Removing incentives linked to sales measures is a significant step toward this goal. We expect banks to revise their sales incentive structures for frontline salespeople and through all layers of management ...

	Any bank that does not … commit to removing sales incentives for salespeople and their managers will be required to explain how they will strengthen their control systems to sufficiently address the risks of poor conduct that arise with such incentives." Additionally, we believe that there needs to be consistency in the approach for internal advice and sales roles and advice and sales given by intermediaries. Without this consistency, there is a risk that adverse customer outcomes may arise dependent on the sales channel – leading to customer confusion. We consider that any review of incentives structures linked to sales targets should be undertaken in consultation with the industry.
Option 3: Prohibit all in-house remuneration and incentive structures linked to sales measures	NZBA does not support Option 3. This option is a more stringent approach than that taken in Australia or recommended in the Sedgwick Review – or by other regulators of which we are aware. Removing sales from consideration in performance for all roles (including senior management) would likely have a long-term detrimental impact on the commercial performance and viability of banks and insurers. It could also have unintended consequences for customers and society as a whole. Additionally, as this option excludes intermediaries, it would have the potential to result in unintended consequences, including the adoption of different approaches for customers dependent on sales channel. Finally, the impact of this option would be heavily dependent on the definition of 'sales' – for example, would top-line revenue or profit be captured by this option?
Option 4: Impose parameters around the structure of commissions (ie commissions paid to intermediaries)	NZBA does not support Option 4. Similar to our comments in respect of Option 3, we think Option 4 could lead to unintended consequences for customers and have a long-term detrimental impact on the commercial performance and viability of financial institutions. We consider this option may unintentionally lead to worse customer outcomes for the reasons at paragraph 172 of the Options Paper. For example, it may limit customers' access to financial advice in circumstances where advisers can, and do, support customers' understanding of complex financial products and protect against power asymmetries.
Option 5: A duty on manufacturers to take reasonable steps to ensure the sales of its products are likely to lead to good	NZBA supports Option 5. We agree that a manufacturer should be responsible for taking reasonable steps to satisfy itself that the sale of its products are leading to good customer outcomes, and take reasonable action if it sees poor conduct, or considers that poor customer outcomes are likely to result from those sales. We generally consider that the examples of 'reasonable steps' included in the Options Paper at paragraphs 176 and 177 are sensible.

customer outcomes	However, without guidance and/or commentary, the 'reasonableness' obligation would be subject to a range of different interpretations including, at the extreme, the creation of a principal-agent duty between manufacturer and intermediary – that is not desirable. A balance must be struck to ensure that the oversight expectations of a manufacturer are not so onerous or intrusive that there is a dilution of the intermediary's own financial advice and conduct obligations. Also to ensure that compliance obligations are manageable. We agree that reasonableness should be scalable, for example, in respect of advisers who are also subject to FSLAA. This option, if adopted, would benefit from commentary and/or guidance.

Options for tools to ensure compliance

36. NZBA has the following comments in respect of the proposed tools to ensure compliance:

Options for tools to ensure compliance	
Option	**NZBA comments**
Option 1: Empower and resource the FMA to monitor and enforce compliance	NZBA supports Option 1. We think it is appropriate that the FMA monitor and enforce any new conduct obligations. The Options Paper states that a regime like this requires a proactive regulator that engages with the industry, sets clears expectations and holds institutions to account. We agree, and support the FMA in taking this role. In doing so, we are mindful of the increased resourcing that will be required to support any new functions. Given that many of the options set out in the Options Paper would extend to products regulated under the CCCFA, we consider that the FMA should also be responsible for the oversight and enforcement of the CCCFA. That would ensure that there is consistency in the application of similar duties, give financial institutions greater certainty as to the entity that regulates conduct in relation to these products, and would be more efficient.
Option 2: Entity licensing	NZBA generally supports Option 2 on the basis that any such licensing regime would apply to all entities providing financial products and services (ie our submission at paragraphs 10-11 above is accepted). Additionally, to the extent that the FMA regulates this area, there is an opportunity to review the operation of the various licensing regimes under its legislative purview to ensure they are efficient and do not create an unnecessary compliance burden or regulatory uncertainty. Without simplification there would almost certainly be

	some duplication of effort and the introduction of inefficiencies for both financial institutions and regulators on an ongoing basis.
Option 3: Broad range of regulatory tools	NZBA supports Option 3. We consider that it is appropriate to give the regulator a broad range of regulatory tools. We consider that this option would support graduated and proportionate enforcement responses.
Option 4: Strong penalties for non-compliance	NZBA supports Option 4. We consider that penalties will be likely to promote compliance. However, it will be important to set clear parameters around the use of penalties so that they are applied proportionately. The maximum pecuniary penalties should be consistent with the penalties regime under the FMCA. We do not consider there is a case for making the penalties under this option higher than those in the FMCA.
Option 5: Executive accountability	NZBA supports Option 5 on the basis it is considered in a standalone consultation. We agree that director and senior manager responsibility and accountability is crucial to a conduct framework. We also acknowledge that tone from the top is vital, and that this was a key theme of the Conduct and Culture Review. We consider that any accountability regime should apply to all entities providing financial products and services (ie our submission at paragraphs 10-11 above is accepted). We would like to engage more closely with MBIE on this option, and explore how an executive accountability regime could best be implemented in New Zealand. Our current view is that it is particularly important given that any executive accountability regime may interact with the FMCA and the proposals under CCLAB, and would likely sit between the FMA and RBNZ and is therefore relevant to Phase 2 of the RBNZ Act review. Additionally, we do not agree that directors or senior managers should be personally liable under the proposals. Obligations imposed by law with respect to principles based rule making should not be imputed to individuals, rather the aim should be to make directors and senior managers aware of their duties to ensure that their entity complies with its obligations. If a liability imposing framework was to be introduced it should only be applied in cases of the most serious breaches (intentional or reckless) of specific obligations, and with appropriate defences being available.
Option 6: Require whistleblowing	NZBA supports Option 6 on the basis that it is considered in conjunction with the State Services Commission's current review of the Protected Disclosure Act 2000 (various reform options were consulted on in December 2018). To manage risks around overlapping legislative regimes, the outcomes of that review should

procedures to be in place	be considered before any obligations are introduced through a new conduct regime. In this context, we also note that NZBA's members have whistleblowing policies and procedures in place.
Option 7: Require regular reporting about the industry	NZBA supports Option 7 on the basis that it is subject to further consultation. We consider this to be an area that would benefit from further consideration before any decisions are made. That should include a wider review of the information/data that is already provided to regulators, as well as work already in train, such as the Banking Ombudsman's proposal to create a complaints dashboard.
Option 8: Greater role for industry	NZBA does not support Option 8. We consider that the role industry bodies play at present is appropriate and that it is not appropriate for industry bodies to take a greater role at present, given the inherent conflict of interest that exists. Additionally, we do not necessarily agree with the 'pros' identified at paragraph 210. We consider that the industry, including NZBA, is already required to take ownership of its conduct. Not only are banks (formally), and NZBA (informally), accountable to a number of regulators, we are also accountable to the Government and the public. We do, however, agree with the 'cons' identified, in particular, the conclusion that expanding and formalising the role of industry bodies will not solve the issues raised.

Appendix One:

Comparison of existing duties and penalties for existing duties

Entity level duties

Proposed duties	Existing duties	Penalties for existing duties
A duty to consider and prioritise the customer's interest, to the extent reasonably practicable.	Under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**), every lender must comply with the lender responsibility principles in section 9C. For example, a lender must make reasonable inquiries, before entering into an agreement, so as to be satisfied that it is likely that:[1] (a) the credit or finance provided under the lending agreement will meet a borrower's requirements and objectives; and (b) the borrower will make payments under the agreement without suffering substantial hardship. These principles are supplemented by the Responsible Lending Code (**RLC**) issued by the Minister of Commerce and Consumer Affairs under section 9G of the CCCFA. The RLC states that a lender should: (a) be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to be satisfied that it is likely that the credit agreement will meet the borrower's requirements and objectives (section 4 of the RLC); and (b) make reasonable inquiries into the borrower's income, expenses and likelihood of repayment and be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to be satisfied that it is likely that the borrower will make payments under the agreement without suffering substantial hardship (section 5 of the RLC).	Section 94 of the CCCFA provides that a court may make all or any of the following orders against a person in breach of section 9C, if the court finds that the borrower has suffered loss or damage as a result of the breach: (a) an order to refund or credit a payment in accordance with section 48 of the CCCFA; (b) an order to pay an amount not exceeding the amount of the loss or damage; (c) an order to pay exemplary damages; and (d) an order to refund any fee imposed or debited that is contrary to another court order. The court may also make an order for any consequential relief that the court thinks fit. The Commerce Commission enforces the CCCFA.
	Section 39 of the Financial Advisers Act 2008 (**FA Act**) requires an authorised financial adviser (**AFA**), when providing a personalised	The Financial Markets Authority (**FMA**) enforces the FA Act and under section 49, the FMA has

[1] The Credit Contracts Legislation Amendment Bill, which passed its first reading on 30 April 2019, proposes to extend the requirement to make reasonable inquiries by including a requirement to comply with regulations made under the proposed section 138(1)(abe). These regulations specify the inquiries that must be made and the way in which the results of inquiries must be taken into account.

Proposed duties	Existing duties	Penalties for existing duties
	discretionary investment management service (**DIMS**) to a retail client, to: (a) act honestly in providing that service (b) in exercising any powers under or performing any duties under the client agreement or investment authority for the service, act in the best interests of the client; and (c) not make use of information acquired through providing that service in order to – (i) gain an improper advantage for the adviser or any other person; or (ii) cause detriment to the client. The Code of Professional Conduct for AFAs, issued by the FMA under Part 4 of the FA Act requires an AFA to place the interests of the client first, and act with integrity. These obligations are paramount (Code Standard 1). This Code Standard applies to any activity of an AFA that relates to the AFA's financial adviser services.	the power to give a direction to any AFA who is in breach of section 39. A person who fails to comply with a direction of the FMA commits an offence and is liable on conviction to a fine not exceeding $5,000 (section 135). Any person may complain to the FMA about the conduct of another person in that second person's capacity as a financial adviser (section 96). The FMA may also initiate a complaint. The FMA may investigate a complaint (section 97), and must refer the complaint to the disciplinary committee if, in the FMA's opinion, the conduct complained of amounts to a breach of the Code (section 98). Under section 101, the disciplinary committee may: (a) recommend that the FMA cancels the AFA's authorisation: (b) recommend that the FMA— (i) cancels the AFA's authorisation; and (ii) debars the AFA for a specified period from applying to be re-authorised: (c) recommend that the FMA suspends the AFA's authorisation for a period of no more than 12 months or until A meets specified conditions relating to the

Proposed duties	Existing duties	Penalties for existing duties
		authorisation (but, in any case, not for a period of more than 12 months): (d) censure the AFA: (e) order that the AFA may, for a period not exceeding 3 years, perform a financial adviser service only subject to any conditions as to employment, supervision, or otherwise that the disciplinary committee may specify in the order: (f) order that the AFA undertake training specified in the order: (g) order that the AFA must pay a fine not exceeding $10,000: (h) take no action.
	Section 143 of the Financial Markets Conduct Act 2013 (**FMCA**) requires a manager of a registered scheme which offers managed investment products to: (a) act honestly in acting as a manager; and (b) in exercising any powers or performing any duties as a manager,— (i) act in the best interests of the scheme participants; and (ii) treat the scheme participants equitably. If the registered scheme is established under a trust deed, the manager has the same duties and liability in the performance of its functions as manager as it would if it performed those functions as a trustee. Section 433 requires entities licensed to provide DIMS (**DIMS licensees**), to (a) act honestly in providing the service; and (b) in exercising any powers or performing any duties as a DIMS licensee under the client	A contravention of either section 143 (governance provision) or section 433 (services provision) may give rise to civil liability (under subpart 3 of Part 8), including a pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and $1 million in the case of an individual or $5 million in any other case (sections 228 and 449).

Proposed duties	Existing duties	Penalties for existing duties
	agreement or investment authority for the service,— (i) act in the best interests of the investors using the service and treat those investors equitably (if the service is provided to a class of investors); and (ii) act in the best interests of the particular investor using the service (if the service is provided to only that investor).	
	The Financial Services Legislation Amendment Act 2019 (**FSLAA**), which comes into full force on 1 May 2021, repeals the FA Act and inserts Subpart 5A into the FMCA. Subpart 5A covers the additional regulation of financial advice and financial advice services. The new section 431K in Subpart 5A of the FMCA introduces a duty to give priority to the client's interests, but there is no direct equivalent to section 39 of the FA Act in Subpart 5A. The FSLAA provides for a Code of Professional Conduct for Financial Advice Services which is expected to come into effect in Q2 2020. Code Standards 1 and 2 requires a person who gives financial advice to always treat clients fairly and always act with integrity. Standard 3 requires a person who gives financial advice to ensure that the financial advice is suitable for the client, having regard to the nature and scope of the financial advice. The new section 431M in Subpart 5A of the FMCA requires a person who gives regulated financial advice to a retail client to comply with the standards of ethical behaviour, conduct, and client care required by the code of conduct.	New section 431H of the FMCA provides that a provider who contravenes a duty provision (such as section 431K and section 431M): (a) may be civilly liable for the contravention; (b) is not liable to disciplinary action or a deregistration or suspension order; and (c) may face consequences under subpart 3 of Part 6 of the FMCA (which relates to enforcement of licences). Individual financial advisers can be subject to disciplinary action and deregistration under section 431H(4)(a).
A duty to act with due care, skill and diligence.	The CCCFA section 9C lender responsibility principles require lenders to exercise the care, diligence, and skill of a responsible lender: (a) in any advertisement for providing credit or finance under an agreement; (b) before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and (c) in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee. This involves developing and monitoring compliance with policies, having procedures in	CCCFA section 94: refund of payments and fees, and damages.

Proposed duties	Existing duties	Penalties for existing duties
	place to ensure compliance, providing adequate training, being generally available for contact, and notifying the borrower of any relevant changes (paragraphs 2.1-2.2 and 11.2-11.5 of the RLC).[2]	
	The FA Act conduct obligations on financial advisers under Subpart 2 of Part 2, and on brokers under Part 3A, require financial advisers and brokers to exercise the care, diligence, and skill of a reasonable financial adviser or broker (sections 33 and 77K) and not engage in misleading or deceptive conduct (sections 34 and 77L).	Under sections 49 and 77V, the FMA has the power to give a direction to any AFA who is in breach of section 33 or section 77K. A person who fails to comply with a direction of the FMA commits an offence and is liable on conviction to a fine not exceeding $5,000 (sections 134G and 135) or $25,000 for an entity under section 134G. A person who knowingly or recklessly contravenes section 34 or section 77L commits an offence and is liable on conviction to a fine not exceeding $100,000, in the case of an individual, or not exceeding $300,000 in the case of an entity (section 118).
	Part 2 of the FMCA contains fair dealing provisions that apply in relation to financial products and financial services. Section 19 provides that a person must not, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to: (a) any dealing in financial products; or (b) the supply or possible supply of a financial service or the promotion by any means of the supply or use of financial services. Section 19 also states that a person must not engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to any dealing in quoted financial products, regardless of whether or not the dealing is in trade. Sections 20 and 21 prohibit conduct that is liable to mislead the public as to the nature, characteristics,	Subpart 3 of Part 8 of the FMCA imposes civil liability for contraventions of the fair dealing provisions. Section 490 provides that the maximum amount of a pecuniary penalty for a contravention, or involvement in a contravention, of the fair dealing provisions is the greatest of: (a) the consideration for the transaction that constituted the contravention (if any); (b) if it can be readily ascertained, 3 times the amount of the

[2] This provision will be extended to credit-related insurance contracts.

Proposed duties	Existing duties	Penalties for existing duties
	suitability for a purpose, or quantity of financial products and services respectively. Section 435 imposes a duty on DIMS licensees to, in exercising any power of investment or performing any duties in that capacity in relation to the service, exercise the care, diligence, and skill that a prudent person engaged in that profession would exercise in the same circumstances.	gain made, or the loss avoided, by the person who contravened the civil liability provision; and (c) $1 million in the case of a contravention, or involvement in a contravention, by an individual or $5 million in any other case.
	When the FA Act is repealed by FSLAA, the equivalent obligations that impose duties are: (a) section 431L (Duty on person who gives regulated financial advice to exercise care, diligence, and skill); (b) section 431P (False or misleading statements and omissions in relation to prescribed disclosure by financial advisers); (c) section 431Y (False or misleading statements and omissions in relation to prescribed disclosure by client money or property services providers); and (d) section 431ZA (Duty on client money or property services provider to exercise care, diligence, and skill). These sections will be inserted into the FMCA.	In relation to sections 431L and 431P, see reference to section 431H at proposed duty 1. A contravention of section 431Y or 431P may give rise to civil liability (under subpart 3 of Part 8), including a pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and $1 million in the case of an individual or $5 million in any other case. A contravention of section 431L or 431ZA may give rise to civil liability (under subpart 3 of Part 8), including a pecuniary penalty not exceeding $200,000 in the case of an individual or $600,000 in any other case (section 449).
	The Fair Trading Act 1986 (**FTA**) prohibits any person who is in trade from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive (section 9). Section 11 also prohibits any person in trade from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services. Services, is defined in section 2 of the FTA, as including any rights (including	Every person who contravenes section 11 of the FTA commits an offence and is liable on conviction to a fine not exceeding $600,000 for a body corporate or

Proposed duties	Existing duties	Penalties for existing duties
	rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred under either of the following (among other classes of contract): (a) a contract of insurance, including life assurance, and life reassurance: (b) a contract between a bank and a customer of the bank; or (c) any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits; - but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service.	$200,000 for an individual (section 40). If the Commerce Commission is considering commencing proceedings in relation to conduct that constitutes, or may constitute a contravention of section 9, section 48P of the FTA provides that the Commerce Commission must obtain the consent of the FMA before commencing those proceedings.
	Under the Consumer Guarantees Act 1993 (**CGA**) where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill (section 28). Section 2 provides that services: (a) includes any rights (including rights in relation to, and interests in, personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred by a supplier; and (b) includes (without limitation) the rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier under any of the following classes of contract: (i) a contract of insurance, including life assurance and life reassurance (ii) a contract between a bank and a customer of the bank: (iii) a contract between a bank and a customer of the bank: However, section 2 notes that services does not include any rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier by simply paying or crediting any money to the consumer without the performance of any other task (other than one that is merely incidental to the making of the payment or credit).	Section 32 provides consumers with the following options where a service supplied to the consumer fails to comply with section 28: (a) where the failure can be remedied, require the supplier to remedy it within a reasonable time or recover all reasonable costs incurred in having the failure remedied; or (b) where the failure cannot be remedied, or is of a substantial character within the meaning of section 36, cancel the contract (subject to section 35) or obtain from the supplier damages in compensation for any reduction in value of the product of a service below the charge paid or payable by the

Proposed duties	Existing duties	Penalties for existing duties
	The section 28 guarantee only applies where services are supplied to a consumer, which is defined in section 2 as a person who: (a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and (b) does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of supplying them in trade, consuming them in the course of a process of production or manufacture or, in the case of goods, repairing or treating in trade other goods or fixtures on land.	consumer for the service. In addition, section 32 also allows the consumer to obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the product of the service) which was reasonably foreseeable as liable to result from the failure.
	The members of NZBA have committed, under the Code of Banking Practice (**Code**), to treat retail clients fairly and reasonably and act responsibly when offering or providing credit.	The Banking Ombudsman, an approved Dispute Resolution (**DR**) scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP Act**), oversees compliance with the Code.
	The Financial Services Council (**FSC**) Code of Conduct has as its principle ethical standard that members must carry out business professionally, with due care, competence and skill, and act with integrity. The standard requires members to behave in a way that promotes public confidence in the financial services industry. The Code of Conduct came into effect on 1 January 2019, and is only binding as between FSC and its 35 members. Consumers have no rights of redress for Code breaches.	Where a potential material breach of a Code Standard is identified, the FSC will work to help the member minimise the risk of harm to customers and the risk of damage to the reputation of the financial services industry. The FSC process to review and assess potential breaches includes an independent disciplinary committee. If a member has materially breached a Code Standard, details of the breach may be disclosed to the public and/or the regulator. Where a material breach is found, sanctions may include: • a reprimand;

Proposed duties	Existing duties	Penalties for existing duties
		• a reparation order; • a fine of up to NZ$100,000; • a payment towards the FSC's costs of investigating and bringing the disciplinary action; • suspension from membership of the FSC (which may be subject to conditions); or • termination of membership of the FSC.
A duty to pay due regard to the information needs of customers and to communicate in a way which is clear and timely.	The CCCFA section 9C responsible lending principles (discussed above in reference to duty 1) require lenders to assist the borrower to reach an informed decision. The RLC specifies that, to comply with this principle, a lender should inform the borrower of the key features of the agreement and clearly highlight those features in a way that draws the borrower's attention to the information (paragraph 7.2). Where the lender has explained the key features of the agreement in detail but the lender is aware that the borrower has not understood the key features of the agreement as explained by the lender, a lender should take further steps to assist the borrower's understanding (paragraph 7.16).	See reference to CCCFA section 94 above.
	The CCCFA Subpart 2 Part 2 sets out the prescribed disclosure for consumer credit contracts and consumer leases including initial disclosure before the contract is entered into (section 17) and continuing disclosure statements which must be made periodically (section 18). Section 32 requires persons making disclosure to express the required information clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person.	CCCFA Subpart 4 Part 4: breach of disclosure obligations is an offence, liable for a fine up to $200,000 for an individual or $600,000 for a body corporate.
	Parts 2 and 3A of the FA Act require financial advisers and brokers who provide personalised services to retail clients to disclose prescribed information to the client, before providing the service. The matters that must be disclosed are set out in prescribed form in the Financial Advisers (Disclosure) Regulations 2010 and relate to the	A person who knowingly or recklessly contravenes a disclosure obligation commits an offence and is liable on conviction to a fine up to $100,000 for individuals or $300,000 for entities (section 117).

Proposed duties	Existing duties	Penalties for existing duties
	financial adviser services provided, the fees for the services and the adviser's remuneration. Under the Code of Professional Conduct for AFAs an AFA must behave professionally in all dealings with a client, and communicate clearly, concisely and effectively (Code Standard 6). Communicating 'effectively' for the purposes of the Code requires an AFA to take reasonable steps to ensure the client understands the communication. An AFA must also ensure each retail client has sufficient information to enable the client to make an informed decision about whether to use the AFA's financial adviser services (Code Standard 7). The information an AFA may be required to provide to a retail client under this Code Standard includes (but is not limited to) written information about the range of the AFA's financial adviser services, any limits on the AFA's authorisation, the AFA's qualifications to provide those services, the basis on which those services are provided, the fees the client must pay, and any interests the AFA is required to communicate under Code Standard 5, in relation to the AFA's financial adviser services provided to the client. The requirements of this Code Standard may be satisfied in whole or in part by complying with the AFA's disclosure obligations under the FA Act. In some circumstances, additional information may need to be provided to a retail client to ensure the client has sufficient information to be able to make an informed decision.	An AFA who breaches the code may be the subject of a complaint under the FA Act and can be disciplined by the FMA on the recommendation of the disciplinary committee.
	The FMCA Part 2 fair dealing provisions, mentioned above in relation to duty 2, prohibit misleading or deceptive conduct, false or misleading representations, and unsubstantiated representations. Section 22 provides that a person must not, in trade, in connection with any dealing in financial products, the supply or possible supply of financial services, or the promotion by any means of the supply or use of financial services, make any of the false or misleading representations detailed in that section. Section 23 provides that a person must not, in trade, make an unsubstantiated representation. A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.	Breach of the fair dealing provisions is an offence carrying pecuniary penalties under Subpart 3 Part 8. Failure to make disclosure under section 50 is a separate offence (section 53). A person who contravenes section 50 is liable on conviction, in the case of an individual, to imprisonment for a term not exceeding 5 years, a fine not exceeding $500,000, or both (for an individual) or a fine not exceeding $2.5 million (for a body corporate).

Proposed duties	Existing duties	Penalties for existing duties
	Part 3 of the FMCA contains the prescribed disclosure that must be made to an investor by any person making an offer of financial products for issue or for sale (sections 39 and 40). A Product Disclosure Statement (**PDS**) must be given to a person to whom disclosure under Part 3 is required before that person can apply for, or be issued or transferred the financial products (section 50). The PDS must be worded and presented in a clear, concise, and effective manner (section 61). Regulation 30 of the Financial Markets Conduct Regulations 2014 requires that the format, font, and font size of the PDS must be easily readable.	The FMA can make a stop order if a PDS does not comply with section 61.
	The new section 431O of the FMCA (inserted under the FSLAA) imposes a duty on a person who gives financial advice to make prescribed information available in the prescribed manner when required to do so by regulations. The regulations have not been promulgated at this stage. The FSLAA provides for a Code of Professional Conduct for Financial Advice Services which is expected to come into effect in Q2 2020. Standard 1 requires treating clients fairly and specifically "communicating with clients in a timely, clear and effective manner". Standard 4 imposes a duty to take reasonable steps to ensure that the client understands the financial advice. The new section 431X imposes a duty on a person who provides a regulated client money or property service to a retail client to, in the prescribed manner, disclose prescribed information to the retail client.	In relation to section 431O and the Code of Professional Conduct for Financial Advice Services see reference to section 431H at proposed duty 1. In relation to a contravention of section 431X may give rise to civil liability (under subpart 3 of Part 8), including a pecuniary penalty not exceeding $200,000 in the case of an individual or $600,000 in any other case (section 449).
	Part 1 of the FTA prohibits any person, in trade, from making an unsubstantiated representation (section 12A), or a false or misleading representation (section 13), in respect of goods, services, or an interest in land or in connection with the supply or possible supply of goods or services.	See reference to FTA section 40 above.
	NZBA members have committed under the Code to communicate with retail customers clearly and effectively. This involves making information about the bank and their accounts, products, and services readily available in plain language and responding to customer questions and requests quickly.	See reference to the Banking Ombudsman above.

Proposed duties	Existing duties	Penalties for existing duties
	The FSC Code of Conduct requires FSC members to communicate with customers clearly and effectively and make reasonable efforts to ensure that customers are provided with sufficient information to enable them to make informed decisions about product and services (Code Standards 2 and 3).	See reference to the FSC review process and sanctions above.
A duty to manage conflicts of interest fairly and transparently.	The prescribed form for disclosure under the Financial Advisers (Disclosure) Regulations 2010 requires statements about commissions, extra payments, and non-financial benefits that an adviser or broker receives. Code Standard 5 of the Code of Professional Conduct for AFAs states that an AFA must effectively manage any conflicts of interest that may arise when providing a financial adviser service. Effective management for the purposes of this Code Standard includes a requirement for the AFA to identify, and clearly and effectively communicate to the client, all interests of the AFA or a related person that might influence the services the AFA provides to the client. Where a conflict of interest that arises when providing a financial adviser service is such that an AFA is unable to manage the conflict so as to place the interests of the client ahead of the interests of the AFA or a related person, the AFA must decline to act.	See reference to the FA Act section 117 disclosure offences and penalties above. An AFA who breaches the code may be the subject of a complaint under the FA Act and can be disciplined by the FMA on the recommendation of the disciplinary committee.
	The new section 431K of the FMCA (inserted under FSLAA) imposes a duty on financial advisers to give priority to the client's interests where the adviser knows, or ought reasonably to know, that there is a conflict with the adviser's own interests or the interests of a person connected with the giving of the advice. This requires the adviser to take all reasonable steps to ensure that their advice is not materially influenced by any of the conflicting interests. The Code of Professional Conduct for Financial Advice Services Standard 2 requires a person who gives financial advice to always act with integrity. This includes avoiding or appropriately managing any conflicts of interest.	See reference to FMCA Subpart 3 Part 8: civil liability and pecuniary penalties above. See reference to section 431H at proposed duty 1.

Proposed duties	Existing duties	Penalties for existing duties
	Under Code Standard 8 of the FSC Code of Conduct, FSC members must manage conflicts of interest fairly and in a way that promotes good customer outcomes.	See reference to the FSC review process and sanctions above.
	Under the Secret Commissions Act 1910, it is an offence for a person to advise anyone to contract with a third party where they are receiving a secret reward (section 8), or for an agent to accept gifts or fail to disclose a pecuniary interest (sections 3-5).	A person who commits an offence against the Secret Commissions Act is liable to imprisonment for a term not exceeding seven years (section 13).
A duty to ensure complaints handling is fair, timely and transparent.	The Code of Professional Conduct for AFAs requires an AFA to ensure there is an appropriate internal process in place for resolving client complaints in relation to the AFA's financial adviser services. The complaint resolution process must ensure that: (a) the client is, as soon as reasonably practicable after making a complaint, provided with acknowledgement of the complaint, information about the AFA's internal complaints handling process, and how to complain to the Financial Markets Authority and to any applicable external dispute resolution scheme; and (b) a register is kept recording all complaints, and action taken towards resolving those complaints.	See reference to the FSC review process and sanctions above.
	Financial service providers, including banks, are required to belong to an approved DR scheme and comply with the scheme's rules (Part 3 of the FSP Act). These rules require members to have internal complaints processes. The members of the NZBA have committed, under the Code, to deal effectively with concerns and complaints from retail clients. This requires banks to provide a free internal complaints service for retail customers to acknowledge receipt of complaints within five working days, to provide a response within a reasonable time, and to refer customers to the Banking Ombudsman.	Where a customer makes a successful complaint to a dispute resolution scheme, including the Banking Ombudsman, the scheme can require the insurer to pay compensation to the claimant, under the rules of that scheme.
A duty to design remuneration and incentives in a manner that is likely to promote good	No relevant existing duties.	

Proposed duties	Existing duties	Penalties for existing duties
customer outcomes.		
A duty to ensure insurance claims handling is fair, timely and transparent.	Insurers are also subject to the FSP Act DR requirements, discussed above, and must comply with the relevant scheme's rules regarding complaints handling.	The DR scheme can require the insurer to pay compensation to the claimant.
A duty on manufacturers to take reasonable steps to ensure that the sales of its products are likely to lead to good customer outcomes.	Under Part 1 of the CGA where goods are supplied to a consumer, there is a guarantee that the goods are of acceptable quality (section 6) and that the goods correspond with the description (section 9). Where the goods fail to comply with the guarantees in this sections 6 and 9 Part 3 may give the consumer a right of redress against the manufacturer	The consumer, or any person who acquires the goods from or through the consumer, may obtain damages from the manufacturer for any reduction in the value of the goods resulting from the failure and for any loss or damage to the consumer or that other person resulting from the failure which was reasonably foreseeable as liable to result from the failure (section 27).
	Code Standard 5 of the FSC Code of Conduct requires FSC members to design and distribute products responsibly.	See reference to the FSC review process and sanctions above.
A requirement to have the systems and controls in place that support good conduct and address poor conduct.	The Reserve Bank of New Zealand Act 1989 requires registered banks and applicants for registration to carry on business in a prudent manner as a condition of registration. Carrying on business in a prudent manner includes having internal controls and accounting systems in place (section 78(1)).	The Reserve Bank may decline an application for registration, cancel registration or give other orders if it considers that a bank does not meet the conditions of registration (sections 73, 77 and 133).
	The Insurance Prudential Supervision Act 2010 also imposes a requirement on licensed insurers and license applicants to carry on business in a prudent matter. Carrying on business in a prudent manner includes having internal controls in place (section 20).	The Reserve Bank may decline an application for licensing, cancel a license or impose conditions on a license insurer does not meet the requirements for licensing (sections 19 and 21).
A ban on target-based remuneration and incentives, including soft	No relevant existing duties.	

Proposed duties	Existing duties	Penalties for existing duties
commissions (this would apply to both in-house staff and to intermediaries).		
A requirement for manufacturers to identify the intended audience for a product and a requirement for distributors to have regard to the intended audience when placing the product.	Sections 8 and 29 of the CGA imply guarantees that goods and services supplied to consumers will be reasonably fit for any particular purpose that the consumer makes known to the supplier as the purpose for which the goods are being acquired and that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.	Consumers have a right of redress against suppliers under section 16 (for supplies of goods) and section 32 (for supplies of services). A supplier can be required to remedy a failure or provide a refund.
Requirement to settle claims within a set time, with exceptions for certain circumstances.	See reference to DR scheme rules above.	See reference to DR scheme penalties above.

Penalties

The Options Paper proposes "strong civil pecuniary penalties" for breaches of the conduct duties. It identifies that existing penalties under self-regulation and through industry bodies are inadequate (at paragraphs 30 and 50).

Option 4 suggests setting the penalties at the same level as existing FMCA penalties, specifically the greater of:

- the consideration for the contravening transaction,
- three times the amount of the gain made or the loss avoided, or
- $1 million for individual contraveners or $5 million in any other case.

Option 5 proposes achieving executive accountability for bank and insurers by either:

- following the existing executive liability provisions in sections 533 to 536 of the FMCA, including section 534 inferred liability for directors where an entity has failed to comply with a duty, or

- developing a liability regime specifically for banks and insurers along the lines of the Australian regime.

The intention is to hold directors and senior managers personally liable if their entity did not meet the proposed duties.