

Submission

to the

Financial Markets Authority

on the

Consultation: *Proposed fair
outcomes for consumers and
markets*

1 March 2024



About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen 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.
 - KB Kookmin Bank Auckland Branch
 - Kiwibank Limited
 - MUFG Bank Ltd
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

Antony Buick-Constable
Deputy Chief Executive & General Counsel
antony.buick-constable@nzba.org.nz

Sam Schuyt
Associate Director, Policy & Legal Counsel
sam.schuyt@nzba.org.nz



Introduction

4. NZBA welcomes the opportunity to provide feedback to the Financial Markets Authority (**FMA**) on its draft guide on fair outcomes for consumers and markets (**Guide**).
5. NZBA and its members support regulation that seeks to achieve fair outcomes for consumers and markets. We consider that being able to identify and understand the standards of fairness our customers expect, and monitor whether we are meeting those standards, are key elements to achieving fair outcomes for consumers.
6. Our detailed feedback is set out below. In summary, there are four key elements of the Guide that we think would benefit from further clarification or amendment.
 - 6.1. **Inconsistency with existing legislation:** It is not entirely clear what the legislative basis is for some of the FMA's proposed outcomes as set out in the Guide (**Outcomes**). In other cases, there appear to be inconsistencies with existing legislation.
 - 6.2. **Lack of clarity as to function / purpose:** In our view, the intended function of the Outcomes is unclear, and risks creating new rules that will function as legislation in all but name.
 - 6.3. **Risk of hindsight bias:** We submit that the FMA could make it clearer that the Outcomes won't be used as a tool to penalise financial institutions for outcomes that may seem unfair with the benefit of hindsight.
 - 6.4. **Use of examples in relation to Outcomes:** The use of examples risks undermining the purpose of the Guide by creating unintended prescription in relation to each Outcome.

Inconsistencies between the Outcomes and existing regulatory landscape

7. The FMA should be more explicit regarding which legislation specifically underpins the various Outcomes in the Guide. This will enable providers to look to the primary legislation for context and link the Outcomes to their plans for legislative compliance (particularly in relation to the Conduct of Financial Institutions regime (**COFI**)).
8. While the FMA point out that the Guide does not create 'rules', it will form an important part of the FMA's engagement / supervision model and we understand the FMA will take enforcement action if they need to. Where the Outcomes map directly onto a legislative power there is clear scope for the FMA to take enforcement action. However, where this is not the case (or where the Outcomes go beyond, or appear to be a reinterpretation of existing legislative requirements), the Guide risks increasing uncertainty. This may make it difficult to demonstrate how the Outcomes will be achieved in practice, or for the FMA to take action where Outcomes are not being achieved.



9. For example, for providers that are financial institutions (and therefore already subject to COFI), there are, in our view, inconsistencies and gaps between the Outcomes and those providers' existing legal obligations which may undermine COFI's 'principles-based approach' to conduct regulation. Concerns regarding inconsistency may likewise arise in relation to other regulatory frameworks, such as the financial advice regime.
 - 9.1. Outcomes 1, 2, 4 and 5 appear to be extrapolations of COFI's 'fair conduct principle', mapping partially, but not entirely, to some aspects of the fair conduct principle, but using different terminology to describe similar concepts.
 - 9.2. Outcome 1, for example, introduces the concept of "appropriateness" which is not used in COFI. We consider that the addition of 'appropriate' is not necessary and the concept is captured by "products and services that meet their needs", which is closer to the language used in COFI.
 - 9.3. The intent behind Outcome 2 appears to be very similar to the COFI requirement that financial institutions 'assist consumers to make informed decisions' but introduces new concepts. In our view, the COFI language is preferred, and more outcomes driven, as the COFI focus is on ensuring informed decision-making (as opposed to evaluating whether the information may or may not influence decision-making and the nature of the information).
 - 9.4. The COFI language also avoids a number of words used in Outcome 2 that are uncertain and would require further interpretation – such as 'receive', 'useful', 'information' and 'good'. The COFI language ('informed') also better aligns with other existing legislation, such as the Financial Services Legislation Amendment Act 2019.
 - 9.5. If the FMA's intention is to focus on the quality of the information itself, we would recommend adopting the COFI language that requires financial institutions to communicate with customers in a 'timely, concise and effective way'. Again, these COFI terms have a more clearly defined meaning when compared with the language in the Guide, the latter which we believe will create inconsistency, uncertainty and confusion.
10. This disconnect between the Outcomes and COFI (which is, presumably, one example of the 'supporting legislation') may increase uncertainty regarding what COFI requires and undermine the intention to create a principles-based and proportionate framework for conduct regulation, as opposed to assisting financial institutions to work towards delivering outcomes that comply with the fair conduct principle.
11. Principles-based regulation like COFI generally provides more flexibility for innovation compared with prescriptive regulation. However, COFI risks being undermined by further detailed guidance which duplicates requirements and introduces new expectations.



12. A further advantage of principles-focused legislation is its flexibility, which enables directors and management to develop a legislative compliance regime that is appropriate and proportionate for the size and nature of the organisation and its customers. Many financial institutions have already spent considerable time interpreting the meaning of the fair conduct principle in the context of their own organisations and in relation to their customers.
13. We are concerned that many financial institutions have already carried out significant work on their fair conduct programmes, given the COFI regime is coming into force early next year. There is a risk that fair conduct programmes will need to be reviewed and re-worked to ensure they align with the Outcomes as well as meeting COFI requirements, creating cost and inefficiencies. We would appreciate further clarity from the FMA as to whether the Guide, once finalised, will require further changes to fair conduct programmes for those institutions already working towards compliance with the fair conduct principle.

Lack of clarity as to function and purpose

14. We submit that the FMA's expectations regarding the importance of providers meeting the Outcomes are unclear, and risk creating a set of new quasi-regulations (i.e. legislation in all but name).
 - 14.1. On the one hand, the Guide is described as "embedding a regulatory approach". The Guide also states, "These outcomes will inform how we exercise our role as a kaitiaki of financial markets and approach our supervisory and enforcement work".
 - 14.2. On the other hand, the Guide states that "These are not rules. They do not change firms' obligations. They provide a focus for compliance and business efforts, supported by our existing legislative framework."
 - 14.3. The FMA has been clear that the Outcomes will provide the basis for monitoring and enforcement. This creates confusion as to whether the FMA will consider the Outcomes as obligations or as indicators that could lead to further conversations or investigations. It is difficult to reconcile how the Guide can drive enforcement if it does not create an obligation.
15. The FMA's expectations on individual providers for Outcome 7 are unclear to us. As the primary market regulator, we believe that the FMA is best placed to help create a market that sustains innovation and growth – an outcome likely shared among the other Council of Financial Regulators agencies – by influencing the creation of legislation that will enable providers to keep pace with future innovation and influencing the Government to retire or amend outdated legislation that inhibits innovation and growth.



- 15.1. We note and support the Government's stated intention to streamline regulatory requirements operating over financial institutions, and consider that reducing the volume and duplication of regulations will help to promote innovation and growth in financial markets.

Risk of hindsight bias

16. As most of the public commentary on the Guide points out, it creates a real risk of hindsight bias when assessing fair outcomes.
17. For example, a retrospective assessment of whether Outcome 3 (Consumers receive fair value for money) has been achieved in relation to a product may not accurately reflect whether that product was considered fair value for money at the time that it was provided.
18. We submit that the FMA should make it very clear in the "Setting the Context" section of the Guide that the Outcomes won't be used a tool to penalise financial institutions for outcomes that may appear unfair with the benefit of hindsight.

Use of examples in relation to Outcomes

19. We submit that generally, the use of examples in relation to each Outcome risks narrowing what financial institutions will view as compliant behaviour, which may undermine the purpose of the Outcomes being a move away from "compliance as a matter of form and prescription".
20. If retaining the use of examples, we believe the FMA should include examples that provide for situations where less is required due to the simplicity of a product, or no vulnerability is being experienced by a customer. The Guide has examples which focus on where more is required by firms. More balance is needed in terms of the range of examples used to empower providers to take a risk-based approach and do less or more, as appropriate.
21. Examples that reference issues that have already been addressed by legislation or regulatory guidance should in our view be removed from the Guide, as their inclusion is unnecessary and may cause confusion.