

18 June 2021

Submitted via financialconduct@mbie.govt.nz

Financial Markets Policy
Commerce, Consumers and Communications
Ministry of Business, Innovation & Employment
Wellington

Kia ora Financial Markets Policy Team,

RE: Regulations to support the new regime for the conduct of financial institutions discussion document

FinCap (The National Building Financial Capability Charitable Trust) welcomes the opportunity to comment on the Ministry of Business, Innovation & Employment's (**MBIE**) Regulations to support the new regime for the conduct of financial institutions discussion document (**Discussion Document**). FinCap's work often involves approaching financial institutions to raise and address issues around unfair conduct that has been identified by financial mentors and is causing significant harm to individuals or communities. Despite the willingness of many businesses to work with us, we simply cannot achieve all the change needed. This is why we strongly support robust regulation that will lead to fairer outcomes for community members from financial institutions' conduct. Robust regulation will see the change we need on a much greater scale, preventing many issues that can cause serious harm arising in the first place.

It is important that MBIE reassess proposals to not implement regulations in many sections of this reform. Well-crafted regulation will ensure expectations on achieving fairer outcomes are clear and ultimately reduce harm to consumers while helping financial institutions to avoid wasting resources by initially taking an ineffective approach. Financial mentors regularly see where unfair conduct in terms of poor service, exclusion from access or a lack of appropriate assistance from financial institutions causes harm to those who face difficult circumstances in the community. Therefore, it is above all else important that requirements around the consideration of vulnerability are clearly included in the regulations.

FinCap also considers that more must be built into regulations and wider policy settings to ensure action is taken where a financial institution becomes aware of harm caused by unfair conduct in relation to its product or services. Relevant regulators should be reported to immediately where significant harm has occurred. When this happens, these regulators should have adequate resources as well as the power to take action to protect the community in these situations or the ability and willingness to recommend the need for reform if they cannot.

Finally, FinCap supports many other organisations' view that equivalent fair conduct requirements should be promptly extended to organisations offering similar products and services but who are not one of the financial institutions targeted in this reform. We appreciate that this reform is intended to be targeted and swift but financial mentors also regularly see conduct, particularly from other lenders, that is similarly unfair and harmful. The work in this Discussion Document should be the first step

towards wider reform to improve outcomes for the community, especially those who are experiencing vulnerable circumstances. We expand on these comments in our responses to the Discussion Document questions below.

About FinCap

FinCap (the National Building Financial Capability Charitable Trust) is a registered charity and the umbrella organisation supporting the work of Aotearoa New Zealand's 200 local free financial capability and budgeting agencies, which annually support more than 70,000 people in financial hardship. Our input to that involves training Financial Mentors, hosting and analysing data from client interaction, supporting networking, and communicating and advocating around issues affecting those agencies.

Responses to Discussion Document questions

Do you have any comments on the status quo i.e. no further regulations to support the minimum requirements for fair conduct programmes in the Bill? (Q1)

FinCap strongly supports the development of regulations to support fair conduct obligations for financial institutions.

Financial mentors and the people they assist regularly face barriers to fair outcomes from inconsistency from within and across different businesses' responses to someone facing hardship. While we don't expect that regulation will create a uniform response from all financial institutions covered by the fair conduct requirements, regulations should better usher these organisations towards what must be considered when practicing conduct that is fair in the context of a customer or potential customer's circumstances.

Regulations also offer the ability to set clearer expectations as to what unfair conduct should not occur. For instance, we see it as necessary that regulations clearly put expectations in place for appropriate conduct towards a person or whānau who may be experiencing hardship or vulnerability. These expectations should ensure a financial institution is not compounding or causing such experiences and is able to recognise what must be done to mitigate the impact of such conduct.

Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(a)? (Q2)

FinCap strongly supports financial institutions considering other relevant regulatory obligations within the context of a holistic fair conduct programme that is focused on customer or potential customer's experiences.

We recommend that some regulations do point financial institutions to make public and meaningful commitments including in relation to other regulations mentioned in 446M(1)(a) within the relevant requirements in 446HA.

Having these summaries of fair conduct programmes publicly available with clear commitments to relevant regulatory requirements will help financial mentors identify where a financial institution is failing to deliver a regulatory requirement as well as their own fair conduct programme commitments.

This will assist them in efficiently identifying the options of a person they are working with to hold a financial institution accountable, seek a remedy and report misconduct that may reflect a systemic issue.

Do you have any comments on the proposals regarding distribution of relevant services and associated products? We are particularly interested in how these proposals may be implemented. (Q3)

FinCap is concerned about the miss-selling of products or services through inappropriate distribution to people who may end up facing avoidable hardship as a result. We strongly support the proposal that regulations require financial institutions to identify likely consumers and their needs when designing the settings for how a product or service is provided.

To implement this requirement effectively we see it necessary that each financial institution can produce records that show the Financial Markets Authority (**FMA**) the processes followed for identifying likely consumers and their likely needs with minimum standards for what is included. These records should show the FMA how the design of any aspect of the product or service was adjusted or formulated according to those likely needs and any risks of wrong assumptions that lead to unfair conduct were prepared for.

Where it is identified that unfair conduct causing significant harm has occurred despite the above considerations, the financial institutions should be required to immediately report the issue to the FMA. The financial institution should also demonstrate how it is using a wider fair conduct programme to identify the scale of the harm caused, remedy this harm and generally reviewing to avoid the issue repeating with other current or future products or services.

Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(bb) to (bd)? (Q5)

Regulation is needed to prevent or address consumer harm. FinCap recommends that regulations require training on identifying and responding appropriately to people facing vulnerability or hardship for employees, agents, or intermediaries of a financial institution. Financial mentors have often reported that people who may be facing vulnerability or hardship already have barriers to getting a fair outcome and are put at further disadvantage by the disrespectful way they are treated when interacting with financial institutions' employees, agents or intermediaries.

Appropriate training on identifying and appropriately assisting people who may be experiencing vulnerability or hardship is essential to reaching fair outcomes. MBIE should consider the United Kingdom's Financial Conduct Authority Guidance for firms on the fair treatment of vulnerable consumers¹ and the opportunity for regulations that make the way for similar useful guidance on how to achieve fair outcomes.

¹ FCA, 2021. *Finalised guidance; FG21/1 Guidance for firms on the fair treatment of vulnerable customers*. See: <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf>

Do you have any comments on the proposal to specify further minimum requirements regarding remediation of issues? Are there any further specific remediation principles that should be specified in regulations? (Q6)

FinCap strongly supports the proposal for regulated minimum requirements for remediation of issues. We are aware of financial institutions making efforts in trials that look to proactively identify and resolve issues where their customers are likely not to be using a product or service that is in their interests. This work should become embedded across businesses and be standard practice across all financial institutions.

As an example of conduct we see as unfair that we hope fair conduct programmes would remedy, we provide the following. Recently many financial mentors have reported frustration as the people they assist were facing compounding hardship because of an unexpected overdraft facility arising from a direct debit or other payment. The financial mentors report that the fees charged to people for these overdrafts and the overdraft occurring where they thought not possible can be the beginning of a debt spiral. That the people they were working with expected their bank account would not go into debt without their request to do so shows a failure in disclosure and product design.

Financial mentors have commented that the failure of a direct debit payment would be a preferable option that is more manageable as this is what the people being charged expected and this may trigger intervention from relevant suppliers charging through direct debit. For example, an electricity retailer should follow their soon to be published consumer care policy which will include an offer of referral to a financial mentor as opposed to the person ending up struggling to pay off a debt to the bank, including fees, before being able to make other priority payments.² We'd hope the regulation proposed would mean financial institutions recognise issues like this and move proactively with a focus on getting people who may be impacted away from product and service features like this which cause harm and are unexpected. Otherwise, we'd hope that the regulations mean that fees related to this issue are waived and time given for a person to work with a financial mentor to get back on track through a pause in collection processes.

In terms of other principles to include in remediation, FinCap recommends that MBIE propose that any remediation that is owed to consumers but despite every effort cannot be delivered is specifically set aside. These resources should then be invested in preventing similar harmful conduct in the future or mitigating harm that may have arisen because of the conduct. This could be through funding internal initiatives or providing resources to community agencies who support people facing hardship to use as they see fit.

FinCap also supports other consumer organisations' recommendations that regulations seek to prohibit the practice of masking potential systemic issues through financial institutions making remediation conditional on non-disclosure of an issue.

² From December energy retailers are expected to align with the Electricity Authority's Consumer Care Guidelines. See: <https://www.ea.govt.nz/development/work-programme/operational-efficiencies/medically-dependent-consumer-and-vulnerable-consumer-guidelines/>

Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(be)? (Q7)

FinCap recommends that regulations are considered around minimum standards as to records of the considerations made around the design of these incentives and prompt reporting to the FMA where significant harm from unfair conduct arises despite these processes. Please see our response to Discussion Document question 3 as to what the regulated minimum standards could involve. 446M(1)(be) is vital to ensuring that new incentives do not emerge and cause harm in the place of incentives that will become prohibited and regulations should make strong requirements around this section.

Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(bf)? (Q8)

As discussed in our response to Discussion Document question 1, more must be done to overcome issues with inconsistent or confusing communication from within a business that lead to unfair outcomes. A failure to provide clear communication that appropriately responds to a customer or potential customers' needs is often a significant barrier to fair outcomes, particularly where that customer or potential customer is facing hardship or vulnerability.

FinCap recommends regulations should be formed to clearly usher financial institutions into considering this requirement in conjunction with other requirements as is discussed in paragraph 77 of the Discussion Document.

Do you have any comments on MBIE's position that no regulations are needed at this time to support section 446M(1)(d)? (Q9)

FinCap appreciates that this requirement puts the onus on financial institutions to have appropriate methods for regularly reviewing or generally identifying issues with their fair conduct programme. However, if it is not already clearly a requirement, then regulation should be put in place that how this requirement will be achieved should be published by the financial institution for regulators and the public to hold a financial institution to account. The public and regulator will then be able to point out a financial institution who fails to make sufficient commitments or fails to fulfil commitments made. Such potential accountability will incentivise more focus on fair conduct from financial institutions.

Do you have any comments on the proposal to specify further minimum requirements regarding consumer complaints handling? (Q10)

FinCap strongly supports minimum regulatory requirements in relation to complaints handling. FinCap has recently heard frustrations from financial mentors that staff members at financial institutions do not recognise a complaint and do not direct people to correct channels unless someone utters the 'magic words.' This can create barriers to timely access or barriers in general to access of external

dispute resolution where this is the only viable way to address unfair conduct for someone in the community. It reflects the need for more training for staff on both vulnerability and recognising what may be a complaint.

We also believe complaints are of great advantage in terms of insights for financial institutions' understanding on how to move toward fair conduct. Taking up this opportunity and demonstrating how adjustments to the way products and services are delivered in light of complaints should be a regulatory requirement.

FinCap also recommends that these recommendations include requirements for financial institutions to consider and respond to issues proactively pointed out by community representatives with expertise in consumer issues. Organisations like FinCap may be in a position to spot a gap in a financial institution's practice that could reflect unfair conduct. Insights like this should be valued as there is often a lag in complaints from consumers or perceived or real barriers for consumers to make complaints at all.

Workers like financial mentors may also pick up conduct that is concerning but for which their client is uncomfortable making a specific complaint about. This shouldn't mean that a financial institution ignores when this occurring leads to general complaint or concern that arises through a community representative who has been alerted to a potential systemic issue. Regulations should also point financial institutions to considering all community feedback around the risk of unfair conduct.

Do you have any comments on the proposals to specify further minimum requirements regarding claims handling and settlement? (Q11)

FinCap strongly supports regulated minimum requirements in relation to insurance claims handling and settlement. A life event that leads to a change of circumstances is the highest reported reason for seeking assistance from a financial mentor in a records system provided by FinCap and used by hundreds of financial mentors. At times this will involve the potential for an insurance claim which if handled and settled in an unfair way could lead to long term hardship.

Do you have any comments on the discussion regarding customer vulnerability? (Q13)

FinCap strongly recommends that financial institutions are required by regulation to establish and publish consumer care policies which make clear commitments to effectively deliver fair outcomes for people who may be experiencing circumstances that make them vulnerable or see them facing hardship. Such requirements will ensure that the fair conduct programmes specifically consider members of the community who will be most harmed by financial institutions' unfair conduct.

Many financial institutions are making efforts to address their conduct that may cause hardship or reflect not practicing appropriate conduct towards someone experiencing vulnerable circumstances. Some are also moving into considering the needs of people in these circumstances when designing products. However, more must be done and cemented within all financial institution's practice

through regulation as financial mentors still see people significantly harmed by financial institutions every day.

Our example of unexpected overdrafts in our response to Discussion Document question 6 is as far as FinCap is aware somewhat being addressed by encouraging small trials at some financial institutions that assist customers to avoid the issue. However, this has a small impact in what is a significant problem and regulatory requirements to specifically consider vulnerability as a part of fair conduct will see more work done by financial institutions to address issues for those who might be harmed most.

Regulators overseas have reported flow on positive impacts for all consumers from the inclusive design of products with people who may experience vulnerability. As discussed in section 4.3.1 of a report to the Australian Energy Regulator on various regulatory approaches to consumer vulnerability, this sort of design improves all consumer's ease to clearly understand a product or service and confidently contact an organisation about a product or service.³ These findings demonstrate that an approach that does not explicitly require consideration and action to work with people who may experience vulnerability would be a missed opportunity for achieving fairer outcomes for all consumers.

Do you have comments regarding the option of including vulnerable consumers in section 446M(1A)? (Q14)

As in our response to the previous discussion document question, FinCap strongly recommends that financial institutions are required to establish and publish consumer care policies which make clear commitments to effectively assist people who may be experiencing circumstances that make them vulnerable or see them facing hardship.

Do you think any further factors should be added by regulations to the list under section 446M(1A)? (Q15)

For effectively ensuring regulatory oversight in the interest of robust consumer protections FinCap recommends that requirements are in place for financial institutions to report immediately to the relevant regulator or government department any unfair conduct related to its products and services which has caused significant consumer harm.

³ Consumer Policy Research Centre, 2019. *Exploring regulatory approaches to consumer vulnerability; A report for the Australian energy regulator*, pg.44-47. Available at: <https://www.aer.gov.au/publications/corporate-documents/exploring-regulatory-approaches-to-consumer-vulnerability-a-report-for-the-aer>

Do you think any other regulations that could be made under new section 546(1)(oa) are necessary or desirable? Please provide reasons for your comments. (Q16)

FinCap supports the recommendations of other consumer group submissions for a requirement on financial institutions to consider the 'price and value' of their products or services as is the case under requirements from the Financial Conduct Authority in the United Kingdom.

FinCap has heard of people working with financial mentors presenting with issues accessing whole markets of products and services and eventually having no choice but one product or service at provider due to their credit report. This does not mean it is fair for them to have to accept a product or service of unfair value for price as the only option. An example is people who may have access to only one type of bank account after an insolvency procedure which has high fees for branch visits despite no other practical means of access being available.

Do you have any comments on the status quo (no regulations)? (Q17)

FinCap strongly recommends that regulations are developed as opposed to the status quo and supports MBIE's analysis in the Discussion Document as to why regulations are needed.

Do you have any comments on the option to prohibit sales incentives based on volume or value targets? (Q18)

FinCap strongly supports the specific prohibition of sales incentives based on volume or value targets combined with a wider principles-based prohibition discussed as an 'Alternative approach' in the Discussion Document.

It is important that the significant harm that can be caused by incentives meaning people do not act in the interest of a customer or potential customer is addressed. A specific ban of certain incentives is clear in delivering the intended outcome while the broader principles-based approach will avoid new sorts of incentives that can cause harm emerging from 'loopholes' in the regulation. For instance, linear based incentives as described elsewhere in the Discussion Document still appear to risk providing incentives to increase the volume of sales generally regardless of consumers' interests. Adjustments from financial institutions of these incentives could potentially make them vital to employees progressing towards receiving a desirable income at the expense of unfair selling. The broader principle-based requirement would provide an additional safeguard against this occurring.

Waiting to see whether unfair incentives emerge that cause harm after some are prohibited is a risky approach. Many of the financial institutions subject to the fair conduct requirements have significant resources to seek and exploit gaps in regulation if they choose to do so. Conduct that could arise from this would likely have a lag time for regulators to identify issues and react while many in the community are experiencing significant harm in the interim that has the potential to cause long term hardship.

What would the likely impacts be for financial institutions, intermediaries and/or consumers of prohibiting sales incentives based on volume or value based targets? (Q19)

Consumers and especially those who experience vulnerable circumstances will be less likely to face hardship caused by unfair conduct in relation to a person incentivised to not provide them an appropriate product or service. Avoided hardship is of great value to the wider community as the wellbeing of whānau and the people within them means they are better able to thrive with others.

Do you have any feedback on a more principle-based approach to prohibiting some incentives? (Q20)

Please see our response to Discussion Document questions 18 and 19.

How could a more principles-based approach to prohibiting some incentives be made workable? (Q21)

If necessary, exemptions from regulation could be made available which financial institutions could apply for based on appropriate criteria and effective ongoing monitoring of outcomes from exemptions by a regulator.

Also, financial advisors could be supported to promote the benefits of independence through remuneration focused on direct payment from a consumer as opposed to sales incentives.

Do you agree/disagree that within financial institutions and intermediaries sales incentives regulations should apply to all staff? Why/why not? (Q27)

FinCap strongly agrees with 'Option 1' in the Discussion Document that the incentive regulations apply to all employees, agents and intermediaries. It is important that a culture focused on fair conduct towards people in the community comes from the top down in financial institutions. Applying this regulation to all will avoid incentivising real, implied or perceived pressure from those with more authority in a financial institution on people interacting directly with customers to offer inappropriate products or services.

Do you agree/disagree that within financial institutions and intermediaries sales incentives regulations should only apply to frontline staff and their managers? Why/why not? (Q28)

FinCap strongly disagrees, please see our response to the previous Discussion Document question.

Do you think that external incentives should apply to any incentive paid to an agent, contractor or intermediary? Why/why not? (Q29)

FinCap strongly agrees that all internal and external incentives should be covered by the regulation. Every step in the supply chain is a chance for unfair conduct that causes a consumer harm to be

incentivised, so every step should be covered by regulation to prevent this incentive. The impact of harm is no different just because it was offered by an external person supplying a financial institution's product or service.

Do you agree that both individual and collective incentives should be covered? Why/why not? (Q30)

We strongly agree that regulation should be applied to both individual and collective incentives. Both of these forms of incentives pose significant risk of inappropriate provision of a product or service. If anything, peer pressure in a collective incentive arrangement may be more likely to create a culture issue in a financial institution that causes harm to community members.

Is more detail needed to outline what information should be published regarding financial institutions' fair conduct programmes to assist financial institutions to meet this requirement, or to assist consumers in their interactions with financial institutions? (Q32)

We strongly support more detailed requirements around what should be published by financial institutions about their fair conduct programmes. As discussed in our response to Discussion Document question 13, this should include requirements for financial institutions to establish and publish consumer care policies which make clear commitments to effectively assist people who may be experiencing circumstances that make them vulnerable or see them facing hardship.

More detail around what form these publications take will also enable more consistency in general about what financial mentors could expect to see in different financial institutions publications. In their practice, this would allow financial mentors more efficiency in spotting where a financial institution has not met its commitments for fair conduct in the situation of a person they are assisting. It would also allow them more familiarity in general as to where to spot details in a consumer care programme publication on how to complain or the opportunity to feedback where there is a gap in what is published in relation to how to remedy unfair conduct that has occurred.

Do you have any comments on the options outlined above? What do you think the costs and benefits would be to financial institutions and consumers of the two options? (Q33)

FinCap strongly supports 'Option 2' in the Discussion Document. Please see our response to the previous Discussion Document question.

Do you have any comments on the proposal to declare contracts of insurance as financial products under Part 2? (Q35)

We support this proposal as long as it increases consumer protection and clarity of requirements on relevant financial institutions. However, we are unclear whether doing so could create barriers to the ability of the Commerce Commission to take regulatory action that will remedy or deter actions not in

the interests of the community where the Financial Market Authority is otherwise unable or unwilling to do so? We request MBIE consider or clarify whether this is a risk or not.

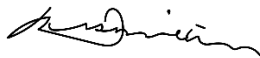
Do you think it would be appropriate to exclude people who are subject to professional regulation from the definition of an intermediary (e.g. lawyers, accountants, engineers)? (Q36)

While some intermediaries may be otherwise professionally regulated this does not necessarily mean a financial institution should assume that those professionals are necessarily practicing fair conduct. It is important that financial institutions consider all who participate in the provision of products or services to ensure fair outcomes.

FinCap generally opposes excluding people subject to professional regulation from the definition of intermediary for these regulations. Please also see FinCap's separate submission in response to the Treatment of intermediaries under the new regime for conduct of financial institutions Discussion document.

To discuss any aspect of this submission please contact Jake Lilley, Policy Advisor at FinCap on 027 278 2672 or at jake@fincap.org.nz.

Ngā mihi,



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