

01 March 2024

Financial Markets Authority
Wellington

By email: consultation@fma.govt.nz

Re: Proposed Fair Outcomes for Consumers and Markets

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Financial Markets Authority's (**FMA**) consultation paper *Draft Fair Outcomes for Consumers and Markets Guide* (**consultation paper**). The consultation paper seeks feedback on the seven proposed fair outcomes for consumers and markets and the draft guidance setting out the FMA's approach as an outcomes-focused regulator.
- 1.2 This submission has been prepared with input from the Law Society's Commercial and Business Law Committee.¹
- 1.3 The Law Society has previously commented on the *Guide to the FMA's view of Conduct, July 2016*.²

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

- 2.1 The Consultation Paper outlines a move by the FMA to outcomes-focused regulation through the implementation of seven proposed fair outcomes for consumers and markets. The draft guide (**the Guide**) provides these are not "rules" but rather an introduction to what the FMA considers financial providers should be working towards.
- 2.2 The Law Society considers the move to outcomes-focused regulation, and fair outcomes for markets and consumers, has merit. However, the introduction and implementation of the guidance to providers and consumers will be critical, and should clearly spell out the obligations of financial providers and their legislative basis.
- 2.3 In our view:

¹ More information about this Committee can be found on the Law Society's website, [here](#).

² See the Law Society's submission on the *Guide to the FMA's view of Conduct, November 2016*, copy available [here](#).

- (a) There is a risk that, while useful as an educational tool, the Guide may further complicate an already uncertain regulatory landscape and lead to enforcement of unlegislated matters. The adoption of “fair outcomes” that do not have a legal basis and do not match or link to the definition of “treating consumers fairly” in the Financial Markets (Conduct of Institutions) Amendment Act 2022 (COFI) may obscure the regulatory requirements further instead of clarifying them.
- (b) It is also unclear how the guide will be used in practice. The FMA states that the guide does not equate to rules but also provides that the Guide will be used as a measure for monitoring providers, including consideration of enforcement tools where outcomes are not reached. The FMA’s comment that the proposed outcomes do not “create, replace or supplement existing legal obligations” suggests that the FMA does not intend for there to be any legal consequences for a provider that does not achieve a specified outcome (but is otherwise fully compliant with its obligations under the relevant legislation).³ If this is the case, then it is not clear what this outcome-based regulatory approach adds, other than providing a point of reference for the FMA’s internal priorities. It is appropriate for the market to understand the FMA’s internal priorities but there is a risk that the FMA acts unlawfully if, through the guide, it seeks to regulate unlegislated matters.

2.4 The Law Society recommends that for greater clarity the FMA explicitly tie each proposed fair outcome to the statutory obligations under the Financial Markets Conduct Act 2013 (FMCA) or other related legislation such as COFI. If the outcome cannot be tied to a statutory obligation, it is unclear what lawful basis there is for the proposed outcome.

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

3.1 While the Law Society agrees that the overall approach of the Guide is appropriate, we note that some outcomes are unable to be achieved by individual market participants, and query whether individual market participants should be measured against these outcomes. We discuss this in more detail below in the individual outcome subsections.

3.2 We note also that the FMCA does not provide an express statutory mandate to create wide-ranging conduct obligations that apply to financial service providers. For example, the FMCA provides limited conduct obligations in Part 2 of the FMCA where it imposes requirements relating to “fair dealing”, with the focus being on preventing misleading and deceptive conduct and false, misleading, and unsubstantiated representations. There is no requirement for providers of financial services to retail customers to provide services in a “fair” manner.

³ This issue arises because not all of the outcomes are linked to any legislative or licensing obligations.

4 **Outcome 1: Consumers have access to appropriate products and services that meet their needs**

4.1 This outcome should be encouraged, rather than required. When it comes to mandatory requirements, the Law Society considers that the focus should be on individual businesses complying with the obligations as set out in legislation rather than this outcome.

5 **Outcome 2: Consumers receive useful information that aids good decisions**

5.1 This outcome does not appear to be linked to any legislative or licensing obligations that a regulated entity must comply with.

5.2 The Law Society also considers that the term “useful” is too vague to provide meaningful guidance.

6 **Outcome 3: Consumers receive fair value for money**

6.1 The Law Society considers this outcome unclear.

6.2 The current drafting suggests a significant extension of the FMA’s regulatory remit such that scrutiny of value for money, pricing, and value becomes part of its focus. Pricing and value are not easy concepts to regulate, particularly in the absence of a detailed underlying legal regime.

6.3 As with the United Kingdom’s attempts to define and address “value for money” in the pension industry, any suggestion of extending the FMA’s remit for intervention in such an area requires careful consideration and primary legislation. The United Kingdom’s work in this area illustrates the complexity of the issue, the difficulties in reliably assessing whether consumers are receiving value for money, and the need for primary legislation to facilitate effective regulation.⁴

7 **Outcome 4: Consumers can trust providers to act in their interests**

7.1 The Law Society considers that “acting in the consumer’s interests” does not capture the intended concept of this outcome. Sometimes the interests of consumers and providers do not align.

7.2 Including data protection under this outcome also conflates the idea of protection, with that of “acting in the consumer’s interests”. These are separate obligations and concepts. There are times when a provider is required to disclose a client’s data with permission, for example, to a third-party supplier and the outcome as currently phrased does not adequately capture that.

7.3 This might be better phrased as “Consumers can trust providers to manage conflicts of interest”.

⁴ For further information on the United Kingdom pensions scheme “value for money” issues see [here](#) and [here](#).

8 Outcome 5: Consumers receive quality ongoing care

- 8.1 The Law Society considers that this outcome risks being misinterpreted as imposing an additional obligation on providers to provide this to consumers. The Guide does provide some parameters and the concept is important, but the phrase requires refinement and further clarification. For example, what constitutes “quality” and for how long?

9 Outcome 6: Markets are trusted based on their integrity and transparency

- 9.1 The Law Society considers that this outcome is more properly within the remit of the Commerce Act 1986. The Commerce Act is the legislation that administers the effect of various practices on the market, and this is out of place in a regulatory guide designed for financial services and providers.
- 9.2 Where matters are driven by market processes or good corporate governance, the FMCA is not directly authorised to promote this outside of its prohibitions on various types of misconduct.

10 Outcome 7: Markets enable sustainable innovation and growth

- 10.1 The Law Society considers this outcome is also outside of the FMCA’s remit.

11 Is anything missing that should be included in the fair outcomes?

- 11.1 With the above in mind, the Law Society recommends that the Guide:
- (a) be anchored to legislative standards or rules;
 - (b) distinguish between mandatory and recommended behaviours;
 - (c) clearly set out the purpose of the Guide and any consequences of not complying with the Guide at the *beginning* of the document. It should be made clear that it does not create any new legal obligations and is not enforceable by the FMA or any other party;
 - (d) clarify how the outcomes fit within the wider legislative and regulatory framework applying to providers;
 - (e) set out what action (if any) will be taken against providers that do not meet the outcomes; and
 - (f) provide clear examples of how providers can prove that they have met the outcomes.
- 11.2 We also note that further guidance may be necessary on what these outcomes mean in practice for particular sub-groups of providers to whom not all outcomes will directly apply.

12 Next steps

- 12.1 We hope this feedback is useful. Should you have any questions, or wish to discuss this feedback further, please do not hesitate to get in touch via the Law Society’s Law Reform & Advocacy Advisor, Shelly Musgrave (shelly.musgrave@lawsociety.org.nz).

Nāku noa, nā

A handwritten signature in cursive script that reads "David Campbell". The signature is written in a dark ink and is positioned centrally below the text "Nāku noa, nā".

David Campbell
Vice-President