

# Duty of care: the FCA's last stand?



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5 July, 2021

# What *is* a duty of care?

(NB: layperson's version!)

A requirement on **party A**

to avoid causing reasonably foreseeable harm to **party B**

which, if breached, results in a right for

party B to sue party A

for losses caused

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# Who are A and B?

A requirement on **authorised persons**

to avoid causing reasonably  
foreseeable harm to **consumers**

which, if breached, results in a right  
for

consumers to sue authorised persons

for losses caused

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# What's the back story?

- FSA disappplied FSMA s138D(2)
  - 8-14 consultations - still no rules
  - Financial Services Act 2021 amended to oblige FCA to
    - Consult on a duty of care\* and publish responses by 1 January 2022
    - Make rules by 1 August 2022
  - FCA published 'new Consumer Duty' [consultation](#) 14 May 2021
  - Proposes bold-sounding 'new Consumer Duty' (changes to its Principles for Business\*)
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# Is the 'new consumer duty' a duty of care?

	<b>Duty of care</b>	<b>'New consumer duty'</b>
<b>Who would owe the duty?</b>	Authorised persons (firms and individuals)	Probably just firms
<b>To whom?</b>	Consumers	Probably just customers/clients
<b>What duty?</b>	Avoid causing reasonably foreseeable harm	Act in best interests* or achieve good outcomes
<b>Who'd have the power to enforce the right?</b>	Consumers OR the FCA [presence of former right supercharges latter]	The FCA [unless a Private Right of Action is agreed]

# Is the 'new consumer duty' paper misleading?

What constitutes a 'duty of care' may have different meanings, and our existing rules already create different duties of care for firms. The generally accepted legal meaning of a duty of care is an obligation to exercise reasonable care and skill when providing a product or service and this is, for example, reflected in Principle 2's requirement that a firm must conduct its business with due skill, care and diligence. In addition, section 49 of the Consumer Rights Act 2015 (CRA) implies into every contract for a trader supplying a service to a consumer a term saying that the trader must perform the service with reasonable care and skill.

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# Why is the FCA opposed to a duty of care?

- Duty of care would empower consumers to bypass regulator
  - Feels like FCA protecting industry - not a good look!
  - FCA consultation is a classic bait-and-switch:
    - Hard sell push for regulatory, not legal, solution
    - Organisation stuffed with expensive lawyers misdirecting respondents about the meaning of key legal term
    - Statutory body charged with protecting consumers, trying to deprive consumers of rights
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- Parliament intends them to have

# Is this the FCA's last stand? Context...

- [Complaints Scheme](#) consultation
  - Trying to avoid compensating victims of regulatory failure:
    - [Hiding behind defective Complaints Scheme](#) to evade LCF redress\*
    - Falsely claiming Connaught victims are [not out of pocket](#)
  - ‘Crony hires\*’ (Butler, Delfas, Parker)
  - Creates case for radical change:
    - Industry: duty of care
    - FCA: civil liability (inc. legacy cases), genuine complaints scheme
    - Consumer oversight, accountability
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# What is TTF doing about this?

- Dialogue with Charles Randell
  - Reissue consultation
  - Genuine duty of care
  - Remove all misdirection
- Responding to the consultation
- Urging others to use our [draft response](#) as the basis of theirs:
  - ‘Authorised persons’
  - ‘Consumers’
  - Private right of action + regulatory
  - Prioritise consumer responses
- Briefing Parliamentarians
- Paving way for judicial review  
\_\_\_\_\_and/or Parliamentary challenge

# Questions

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