How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by 5pm on 22 July 2015.

Your submission may respond to any or all of these issues. We also encourage your input on any other relevant issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please also include your name, or the name of your organisation, and contact details.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on the operation of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

We may contact submitters directly if we require clarification of any matters in submissions.

Except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to the **FAA page on MBIE's website**. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

Release of information

Submissions are also subject to the Official Information Act 1982. Please set out clearly with your submission if you have any objection to the release of any information in the submission, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

If your submission contains any confidential information, please indicate this on the front of the submission. Any confidential information should be clearly marked within the text. If you wish to provide a submission containing confidential information, please provide a separate version excluding the relevant information for publication on our website.

Private information

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that MBIE may publish.

Permission to reproduce

Role and regulation of financial advice

When providing your comments, we would particularly appreciate information about the relative benefits, costs (financial or otherwise) and any other impacts of these proposals on businesses, consumers or other stakeholders. This information will help us more fully understand the effects of the current regulation.

1. Do you agree that financial adviser regulation should seek to achieve the identified goals? If not, why not?

2. What goals do you consider should be more or less important in deciding how to regulate financial advisers?

3. Does this definition adequately capture what financial advice is? If not, what changes should be considered?

4. Is the distinction in the Financial Advisers Act (FA Act) between wholesale and retail clients appropriate and effective? If not, what changes should be considered?

5. Is the distinction in the Act between a personalised financial service and a class service appropriate and effective? If not, what changes should be considered?

6. Is it appropriate to have different requirements on advisers depending on the risk and complexity of the products they advise upon?

In theory we agree it is appropriate to have different requirements depending on the risk and complexity of the product.

We are aware, however, that differentiating on the risk and complexity of the product may result in financial advisers attempting to avoid the rules by structuring their service to avoid giving advice when it is not appropriate. We have, for example, heard anecdotal evidence of RFAs arranging KiwiSaver products for clients, on the basis they are not giving advice. Our view is that RFAs, or those who sell risk products, should be more accountable to clients (see 7).

7. Does the current categorisation system accurately reflect the level of complexity and risk associated with financial products? If not, how could it be improved?

The way "complexity and risk" is assessed is crucial. For example, giving investment advice is treated as carrying more complexity and risk than life insurance, because poor advice can lead to substantial financial loss. As a result, financial advisers giving investment advice must meet higher standards. However, the risk of getting insurance advice wrong can have similar consequences; e.g. if a policy is avoided for non-disclosure, or financial advice results in a consumer having a policy that is either not appropriate to their circumstances or that does not respond to the claim.

8. Do you think that the term Registered Financial Adviser (RFA) gives consumers an accurate understanding of what these advisers are permitted to provide advice on and the requirements that apply to them? If not, should an alternative term be considered?

We do not believe that consumers understand that there is a distinction between different types of financial advisers, or that they understand what an RFA is able to provide advice on. The term simply indicates that the person is registered. In the absence of knowledge that there are different types of financial advisers, it does not, in itself, indicate there may be some things an RFA is not able to provide advice on.

The category of RFA covers a wide range of financial advisers, from people who provide quite extensive advice, to people who advise on credit contracts or a single type of insurance product;

9. Are the general conduct requirements applying to all financial advisers, including RFAs, appropriate and adequate? If not, what changes should be considered?

Generally, we find the conduct requirements adequate. When we have considered complaints about RFAs, the generic conduct requirements in s 33 of the FA Act have provided an appropriate framework to determine whether an acceptable standard has been met.

10. Do you think that disclosing this information is adequate for consumers? Should RFAs be required to disclose any additional information?

We do not believe there should be a distinction between the information AFAs are required to disclose about their remuneration and the information RFAs should disclose. Commission structures associated with Category 2 products are such that they can encourage replacement business which is not entirely in the consumer's best interests. For the same reason that AFAs must disclose remuneration, so that any conflict is identified, RFAs should be obliged to disclose fees and commission to consumers.

We see cases that raise questions about why an existing insurance policy (usually life, income,

11. Are there any particular issues with the regulation of RFA entities that we should consider?

12. Are the costs of maintaining an adviser business statement justified by its benefits? If not, what changes should be considered?

13. Is the distinction between an investment planning service and financial advice well understood by advisers and their clients? Are any changes needed to the way that an investment planning service is regulated?

14. To what extent do advisers need to exercise some degree of discretion in relation to their clients' investments as part of their normal role?

15. Should any changes be considered to reduce the costs on advisers who exercise some discretion, but are not offering a funds management-type service?

16. Are the current disclosure requirements for Authorised Financial Advisers (AFAs) adequate and useful for consumers?

The current disclosure requirements appear to be adequate for AFAs, but the 2-tiered disclosure obligations also appear to be somewhat confusing to consumers.

Most consumers who complain to the ISO Scheme refer to disclosure documents when an issue arises, rather than relying on them as a means of deciding whether or not to use a financial adviser's services.

17. Should any changes be considered to improve the relevance of these documents to consumers and to reduce the costs of producing them?

18. Do you think that the process for the development and approval of the Code of Professional Conduct works well?

19. Should any changes to the role or composition of the Code Committee be considered?

20. Is the Financial Advisers Disciplinary Committee an effective mechanism to discipline misconduct against AFAs?

21. Should the jurisdiction of this Committee be expanded?

22. Does the limited public transparency around the obligations of Qualifying Financial Entities (QFEs) undermine public confidence and understanding of this part of the regulatory regime?

We believe most consumers are unaware of the existence of the category of QFE and what that means. Where advisers are employed by a QFE, it is usually obvious that the QFE, as a business, is responsible for the QFE adviser. This is not always the case for Nominated Representatives, who may use a different business name and have no obvious connection with the QFE. Their status as a Nominated Representative is not recorded on the FSPR, which causes issues.

Our experience is that it takes a considerable effort to keep the ISO Scheme's records of QFE advisers up-to-date, in order to know which individuals are covered by a particular QFE. This could

23. Should any changes be considered to promote transparency of QFE obligations?

We suggest further consideration be given to the practicality of all financial advisers, regardless of type, being required to be recorded on the FSPR so that they are visible to (and able to be searched by) consumers and DRSs ("Dispute Resolution Scheme") alike.

24. Are the current disclosure requirements for QFE advisers adequate and useful for consumers?

25. Should any changes be considered to improve the relevance of these documents to consumers or to reduce the costs of producing them?

26. How well understood are the broker requirements in the FA Act? How could understanding be improved?

The broker requirements in the FA Act are confusing. The term "broker" has always been widely used in the industry to refer to a person who sells fire and general insurance (an insurance broker), or arranges mortgages (a mortgage broker). As a result, the different and specialised use of the term in the FA Act is confusing for both advisers and consumers; the use of the term "broker" in the FA Act should be changed.

27. Are these requirements necessary and/or adequate to protect client assets? If not, why not?

28. Should consideration be given to introducing disclosure requirements for brokers? If so, what would need to be disclosed and why?

29. What would be the costs and benefits of applying the broker requirements in the FA Act to insurance intermediaries?

30. Are the requirements on custodians effective in reducing the risk of client losses due to misappropriation or mismanagement?

31. Should any changes to these requirements be considered?

32. Is the scope of the FA Act exemptions appropriate? What changes should be considered and why?

The discrepancy between the obligations to be registered on the FSPR and the obligations to be a member of an DRS resulting from various exemptions, mean DRSs' public membership lists and the FSPR are not consistent. For example, for the exemption of a sole adviser practice in regulations 6 and 7 of the Financial Service Providers (Exemptions) Regulations 2010 to apply, the financial adviser must be registered on the FSPR and the sole adviser practice must be the member of the DRS.

FSPs are also confused about whether s 20E of the FA Act exempts them and whether, and in what

33. Does the FA Act provide the Financial Markets Authority (FMA) with appropriate enforcement powers? If not, what changes should be considered?

34. How accessible and useful is the guidance issued by the FMA? Are there any improvements you would like to see?

We find the guidance issued by the FMA very useful.

Key FA Act questions for the review

35. What changes should be considered to make the current regulatory regime simpler and easier for consumers to understand? For example, removing or clarifying the distinction between AFAs and RFAs.

Unless all financial advisers are required to meet the same standards, there is a need to distinguish between types of financial advisers. However, we believe the distinction should be replaced by terms that are meaningful to consumers and that reflect the service the particular financial adviser actually provides. It also needs to use current market terminology. For example, AFAs could be allowed to describe themselves as financial advisers and RFAs could choose from a selection that included: insurance adviser/broker, mortgage broker, or credit contract adviser.

36. To what extent do consumers understand that some financial advisers' primary roles may be selling financial products, rather than solely acting as an unbiased adviser to their clients?

We believe that consumers do not necessarily turn their minds to the role or motivation of their financial adviser, or even seem to understand that different financial advisers might operate differently. They often make an assumption that financial advisers are sufficiently expert to be able to advise them about all products. This could include those products the consumer already has in place, but that the financial adviser does not sell, and with which the financial adviser might be unfamiliar.

We see cases where consumers have replaced insurance policies, such as income protection or

37. Should there be a clearer distinction between sales, information provision, and advice? How should such a distinction be drawn? What should or should not be included in the definition of financial advice?

While a clearer distinction between sales, information, and advice has some immediate appeal, we are not convinced it is achievable, as the boundaries are fluid and depend on the specific facts of the situation. There is a risk that attempting to prescribe clear boundaries will result in financial advisers fitting what they do into a particular category, to reduce their obligations, or structuring their advice/sales process to limit or avoid providing advice. We understand that this is how some RFAs believe they are able to sell KiwiSaver products.

However, by changing the names to more accurately reflect what the advisers actually do would be

38. Do you think that current AFA disclosure requirements are effective in overcoming problems associated with commissions and other conflicts of interest?

Providing consumers with information about remuneration which allows them to identify advice bias, based on commission, is certainly useful. However, our experience is that consumers rarely read written material, so we are not convinced the AFA disclosure requirements are currently as effective as they could be.

39. How do you think that AFA information disclosure requirements could be improved to better assist consumer decision making?

40. Do you support commission and conflict of interest disclosure requirements being applied to all financial advisers? If so, what requirements are appropriate for different adviser types?

Disclosure of commission and conflict of interest should be applied to all financial advisers. The risk of commission causing bias in the financial advice provided is an issue for many RFAs, as well as AFAs - this also includes soft commission. For that reason, we believe the same requirements should apply to all advisers.

Our experience is that financial advisers find it difficult to identify conflicts of interest relating to themselves. For example, the ISO Scheme has an increasing issue of financial advisers acting as representatives of their customers in complaints against insurers, when the financial adviser has

41. Do you think that commissions should be restricted or banned in relation to financial advice, and if so, in what way? What would be the costs and benefits of such an approach?

We do not have a specific view on whether commissions should be restricted or banned.

An emerging issue we are seeing is advisers passing on commissions to consumers (as a fee) when they do not continue with the product, resulting in the financial adviser's commission being clawed back by the product provider. For example, a fee charged if the adviser does not get commission from the company.

42. Has the right balance been struck between ensuring advisers meet minimum quality standards and ensuring there is competition from a wide range of providers (and potential providers)?

43. What changes could be made to increase the levels of competition between advisers?

44. Do you think that the Code of Professional Conduct for AFAs strikes the right balance between requiring them to understand their clients and ensuring that consumers can get advice on discrete issues?

45. To what extent do you think that the categorisation of types of advice and advisers is distorting the types of advice and information that is provided?

46. Are there specific compliance requirements from the FA Act regulation that have affected the cost and availability of independent financial advice?

47. How can regulatory requirements be made less onerous without reducing the quality and availability of financial advice?

48. What impact has the Anti-Money Laundering and Countering Finance of Terrorism Act had on compliance costs for advisers? How could these costs be minimised?

49. What impact do you expect that KiwiSaver decumulation will have on the market for financial advice in New Zealand? Are any specific changes to regulation needed to specifically promote the availability of KiwiSaver advice?

50. What impact do you expect that the introduction of the Financial Markets Conduct Act (FMC Act) will have on the market for financial advice in New Zealand? Should any changes to the regulation of advice be considered in response to these changes?

51. Do you think that international financial advice is likely to increase? Is the FA Act set up appropriately to facilitate and regulate this?

52. How beneficial are the current arrangements for trans-Tasman mutual recognition of qualifications? Should further arrangements be considered?

53. In what ways do you expect new technologies will change the market for financial advice?

We expect that new technologies will allow easier direct access to financial services. This could raise issues in terms of whether the FSP needs to be both registered on the FSPR and belong to a New Zealand DRS.

We continue to have problems with foreign exchange on line trading platforms which are registered on the FSPR and are Participants of the ISO Scheme but which, in effect, provide no substantive services in New Zealand and do not have New Zealand based customers. Our experience is that it is not possible for us to provide an effective dispute resolution service to consumers of these

54. How can government keep pace with technological developments to ensure that quality standards for advice are maintained, without inhibiting innovation?

55. Are the minimum ethical standards for AFAs appropriate and have they succeeded in fostering the ethical behaviour of AFAs?

Generally, we believe the minimum ethical standards for AFAs are appropriate. Most AFAs we deal with are very aware of the minimum ethical standards and have gone to some lengths to try to comply with them.

56. Should the same or similar ethical standards apply to all types of financial advisers?

We believe the same or similar minimum ethical standards should apply to all financial advisers, on the basis that the ethical standards can be considered in light of the particular circumstances, rather than as absolute requirements.

57. What is an appropriate minimum qualification level for AFAs?

58. Do you think that RFAs (for example insurance or mortgage brokers) should be required to meet a minimum qualification relevant to the area of advice they specialise in? If so, what would be an appropriate minimum qualification?

RFAs should be required to meet a minimum qualification standard and maintain compliance with continuing education requirements (similar to the requirements of the NZ Law Society), and membership of an approved industry group. The question of monitoring might then become an issue, but there should be a practical way of increasing the level of ability of RFAs without being too onerous.

59. How much consideration should be given to aligning adviser qualifications with those applying in other countries, particularly Australia?

60. How effective have professional bodies been at fostering professionalism among advisers?

Professional bodies have a variable impact on fostering professionalism among advisers, depending on the particular body. Some impose their ethical and/or other requirements, but they do not always have the resources to monitor or enforce them.

61. Do you think that professional bodies should play a formal role in the regulation of financial advisers and if so, how?

Most professional bodies' objective is to raise their members' operating standards. Some financial services professional bodies do this very effectively, but others do not. We believe there is too much inconsistency in professional bodies' roles, requirements and ability to enforce their standards, for them to play a "formal" role in the regulation of financial advisers.

62. Should any changes be considered to the relative obligations of individual advisers and the businesses they represent? If so, what changes should be considered?

It would be useful to further clarify the respective roles of individual advisers and the business they represent, particularly for AFAs. For example, it would be useful for complaints to lie against them jointly and severally, to ensure consumers are able to get adequate redress if, for example, a company goes out of business.

63. Is the QFE system achieving its goals in terms of consumer protection and reducing compliance costs for large entities? If not, what changes should be considered?

Role of financial service provider registration and dispute resolution

64. Do you agree that the Register should seek to achieve the identified goals? If not, why not?

A key role of the FSPR is to ensure consumers can access redress by searching for their FSP and finding which DRS they belong to. Allowing consumers to search the FSPR using a financial adviser's employer's name, as well as the financial adviser's trading name, would make it significantly easier to find financial advisers. Currently, the employer's name is captured and is included in the DRS section, but cannot be used to search. It could be included in the section at the top of the FSPR record with the other searchable information.

(Please see our comments on question 32 in respect of recording when an exemption is relied on.)

65. What goals do you consider should be more or less important in reviewing the operation of the Register?

See question 64 above

FAA Review Submissions

66. Do you agree that the dispute resolution regime should seek to achieve the identified goals? If not, why not?

67. What goals do you consider should be more or less important in reviewing the dispute resolution regime?

How the FSP Act works

68. Does the FMA need any other tools to encourage compliance with financial service provider (FSP) registration? If so, what tools would be appropriate?

See question 64 above

69. What changes, if any, to the minimum registration requirements should be considered?

See question 64 above

70. Does the requirement to belong to a dispute resolution scheme apply to the right types of financial service providers?

Effectively, all FSPs which deal directly with consumers must belong to an approved DRS.

Unfortunately, however, we understand that there are still some businesses and, in particular, third tier lenders which remain unregistered and do not belong to an approved scheme. Consumers have no rights of redress against them except through the courts. The FMA needs to actively monitor and prosecute these businesses.

71. Is the current framework for the approval of dispute resolution schemes appropriate? What changes, if any, should be considered?

The framework set out in the FSP Act is appropriate. However, if important aspects required of a DRS are not set out in the statute, variations can emerge that create distinctions between the approved schemes e.g. monetary jurisdiction. It is important the approved schemes are all seen to be substantially the same in terms of structure and compliance.

72. Is the current framework for monitoring dispute resolution schemes adequate? What changes, if any, should be considered?

The framework set out in the FSP Act, of providing an annual report to the Minister and 5 yearly independent reviews, is appropriate.

73. Is the existence of multiple schemes and the incentive to retain and attract members sufficient to ensure that the schemes remain efficient and membership fees are controlled?

The existence of multiple schemes is not necessarily a driving factor in making sure the DRSs remain efficient and membership fees are controlled. It is an easy means of justifying the existence of multiple schemes and competition.

The underlying principle of "efficiency", as required of an approved scheme by the FSP Act, is that the DRS keeps track of complaints, ensuring they are dealt with by the appropriate process, with regular reviews of the DRS's performance.

74. Should the $200,000 jurisdictional limit on the size of claims that dispute resolution schemes can hear be raised in respect of other types of financial services, and if so, what would be an appropriate limit?

The jurisdictional limit should be raised to $350,000, which is reasonable in light of the increase in the District Court's monetary threshold. We agree that the rationale behind the requirement that all FSPs need to be members of a DRS means the monetary threshold should keep pace with the District Court to ensure there is no gap in consumers' access to justice.

While we understand the drivers behind considering an increase in the DRSs' monetary thresholds in relation to earthquake claims of up to $350,000, we do not agree that the proposal should be limited to insurance claims relating to real property. That would still result in a "gap" between DRSs'

75. Should additional requirements to ensure that financial service providers are able to pay compensation to consumers be considered in New Zealand?

We agree that additional requirements should be considered to ensure all FSPs are able to pay compensation to consumers. Where an FSP remains solvent, there are remedies available to the consumer through the courts. However, where an FSP is insolvent, a DRS has no ability to make a decision in respect of compensation and to have any confidence it can, or will be paid. PI insurance would be a good start, but does not always cover an FSP's negligence, and that might well be the reason for the decision in respect of compensation.

Key FSP Act questions for the review

76. What features or information would make the Register more useful for consumers?

See question 64 above

77. Would it be appropriate for the Register to include information on a financial adviser's qualifications or their disciplinary record?

See question 64 above

78. Do you consider misuse of the Register by offshore financial service providers is a significant risk to New Zealand's reputation as a well-regulated jurisdiction and/or to New Zealand businesses?

Misuse of the FSPR by offshore FSPs is a significant risk to New Zealand's reputation. We have already had complaints about offshore entities which have no bona fide complaints processes and we have had to terminate their membership of the ISO Scheme. A better means of assessment of the entities is required, prior to allowing them to register. Those which do not meet the required standard should not be allowed to register on the FSPR.

79. Are there any changes to the scope of the registration requirements or the powers of regulators that should be considered in response to this issue?

See question 64 above

80. What are the effects of (positive and negative) competition between dispute resolution schemes on effective dispute resolution?

In the Report to the Minister of Consumer Affairs prepared by MBIE in 2013 ("MBIE report"), it was recommended that the effectiveness of the dispute resolution process could be improved with an "increased focus ... put on improving consumer awareness and understanding the role of the [Dispute Resolution Schemes ('DRSs')]" (para. 45, MBIE report).

There was also an observation that "having four schemes adds complexity to the dispute resolution process. This may be an additional hurdle, particularly for vulnerable consumers. DRSs and consumer organisations' views were that four sets of administration in a relatively small market is not

81. Are there ways to mitigate the issues identified without losing the benefits of a multiple scheme structure?

See question 80 above

82. Are the current regulatory settings adequate in raising awareness of available dispute resolution options? How could awareness be improved?

See question 80 above

Demographics

***83. Please provide your name and/or the name of the group of people, business, or organisation you are providing this submission on behalf of:**

Karen Stevens, Insurance & Savings Ombudsman Scheme

***84. Please provide your contact details:**

18(d)

85. Are you providing this submission:

- [ ] As an individual
- [x] On behalf of an organisation

Please describe the nature and size of the organisation:

Insurance & Savings Ombudsman Scheme - approved DRS, providing dispute resolution services to approximately 4,300 Participants.

86. If submitting on behalf of an organisation:
How many people are in the organisation, or work in the organisation, that you are providing this submission on behalf of?

- [ ] 1-5
- [x] 6-19
- [ ] 20-49
- [ ] 50-99
- [ ] 100-250
- [ ] 251-500
- [ ] >500

FAA Review Submissions

87. I would like my submission (or specified parts of my submission) to be kept confidential, and explain my reasons for this, for consideration by MBIE:

☐ Yes ☑ No

Explanation:

Thank you for your time. Please send your submission.