How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the questions raised in this document.

- Submissions on the questions in Part 3 of this paper (relating to the Financial Service Providers Register) are due by **5pm on Friday 29 January 2016**.
- Submissions on the questions in Part 1 and Part 2 of this paper are due by **5pm on Friday 26 February 2016**.

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

Please include your name, or the name of your organisation, and contact details. You can make your submission:

- By filling out the submission template online.
- By attaching your submission as a Microsoft Word attachment and sending to ***faareview@mbie.govt.nz***.
- By mailing your submission to:

  Financial Markets Policy
  Ministry of Business, Innovation & Employment
  PO Box 3705
  Wellington
  New Zealand

Please direct any questions that you have in relation to the submissions process to: ***faareview@mbie.govt.nz***.

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.

Submissions are subject to the Official Information Act 1982. MBIE intends to upload PDF copies of submissions received to MBIE's website at ***www.mbie.govt.nz*** and will do so in accordance with that Act.

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 under that Act.

If your submission contains any confidential information, please indicate this on the front of the submission, mark it clearly in the text, and provide a separate version excluding the relevant information for publication on our website.

MBIE reserves the right to withhold information that may be considered offensive or defamatory.

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.

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Chapter 3 – Barriers to achieving the outcomes

1. Do you agree with the barriers outlined in the Options Paper? If not, why not?
   Enter text here.

2. Is there evidence of other major barriers not captured in the Options Paper? If so, please explain.
   Enter text here.

Chapter 4 – Discrete elements

3. Which options will be most effective in achieving the desired outcomes and why?
   Enter text here.

4. What would the costs and benefits be of the various options for different participants (consumers, financial advisers, businesses)?
   Enter text here.

5. Are there any other viable options? If so, please provide details.
   Enter text here.

4.1 Restrictions on who can provide certain advice

6. What implications would removing the distinction between class and personalised advice have on access to advice?
   This may create a risk of further confusion for the consumer. I suggest that the concept of personalised advice is retained and is either full or limited personalised advice. Another category could then be used in place of “class advice” e.g. “product advice”.

7. Should high-risk services be restricted to certain advisers? Why or why not?

Enter text here.

8. Would requiring a client to 'opt-in' to being a wholesale investor have negative implications on advisers? If so, how could this be mitigated?
   The current issue isn't the opt-out regime but rather the definition of retail client. The opt-in could impose higher duties on an adviser in relation to a genuine wholesale client that does not require that protection. In practice many wholesale clients may be happy to retain retail status as any benefits of lower transaction costs may not be significant in practice. I suggest that, rather than changing the opt-out provisions in the FAA, that the "retail clients" definition be widened to include the class of wholesale clients who have the benefit of the custodian obligations under the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 (see regulation 11). This is a class of persons who are treated as wholesale but who in practice do not always have the attributes expected of someone in that class.

4.2 Advice through technological channels

9. What ethical and other entry requirements should apply to advice platforms?
   I note that "robo-advice" in commentaries I've seen refers to a DIMS-type service (i.e. investment management) not financial advice. I also note that personalised advice can be and is provided by companies- contracts for financial advice services are typically in the name of the companies that advisers are engaged by (and sometimes additionally in the name of the advisers). However, under s20F(1)(a) of the FAA the AFA has financial adviser obligations under the Act (together with the company), including an obligation to make personal disclosure. So it is possible at the moment to provide "robo-advice", as companies can and do provide financial adviser services and these could (at least in theory) be conducted on-line, although disclosure statements would need to be provided where the services are those that can currently only be provided by AFAs.

10. How, if at all, should requirements differ between traditional and online financial advice?
    Enter text here.

11. Are the options suggested in this chapter sufficient to enable innovation in the adviser industry? What other changes might need to be made?
    The proposal for licensing will be expensive for advisers in some cases, in comparison to the benefits. I suggest a model based on incorporated law firms provisions under the Lawyers and Conveyancers Act 2006. This requires that incorporated firms must be owned and managed by lawyers only (with some limited exceptions) and individual lawyers are still subject to personal liability in some circumstances. Disclosure works in that context and could be achieved for advisers with some relatively minor changes to the current disclosure requirements. So I suggest a similar option for advisers, with the benefit of incorporation, advisers retaining their own regulated status and advisers retaining personal responsibility (and liability) for compliance with the FAA.

4.3 Ethical and client-care obligations

12. If the ethical obligation to put the consumers' interests first was extended, what would the right obligation be? How could this be monitored and enforced?
    It should be extended to all financial advisers. I suggest it is the same obligation that applies currently to AFAs. It can be monitored and enforced in the same way it is currently with respect to AFAs. In many cases the DRS will consider whether an adviser has met its obligations and is well placed to do so. Enforcement is always difficult in all areas but I don't consider that should in itself be a reason to not set an appropriate standard of conduct. Equally all advisers are banned from engaging in "misleading or deceptive conduct". This brings with it difficulties

with regard to monitoring and enforcement but it is still an appropriate standard.

13. What would be some practical ways of distinguishing 'sales' and 'advice'? What obligations should salespeople have?
    As suggested in answer to question 6, one way would be to use the terms "personalised advice' and "product advice". In addition, I suggest that the term "advice" should not be used where the adviser works for the product provider except where the adviser has separate AFA (or equivalent) status. This reflects my view that the term "advice" will for most people suggest that the "adviser" is acting in an agent capacity for the person being advised and so is required to act in their best interests (a view expressed previously by MBIE).

14. If there was a ban or restriction on conflicted remuneration who and what should it cover?
    Enter text here.

4.4 Competency obligations

15. How can competency requirements be designed to lift capability, without becoming an undue barrier to entry and continuation in the profession?
    I suggest that appropriate competency standards be introduced and that they are developed in consultation with the industry. For existing advisers there could be a transition period e.g. 5 years so that they are not unduly inconvenienced. If competency standards are developed with industry input (so reflect skills and knowledge that are required to provide adequate services) it should not be unduly difficult for existing competent advisers to obtain the required qualification.

16. Should all advisers be subject to minimum entry requirements (Option 1)? What should those requirements include? If not, how should requirements differ for different types of advisers?
    Enter text here.

4.5 Tools for ensuring compliance with the ethical and competency requirements

17. What are the benefits and costs of shifting to an entity licensing model whereby the business is accountable for meeting obligations (Option 1)? If some individual advisers are also licensed (Option 2), what specific obligations should these advisers be accountable for?

    In my view the benefits of entity licensing would be minor and the costs significant. The background materials have not identified an existing problem that suggests entity licensing is a necessary solution. The issues identified appear to largely relate to the failure of the regulatory regime to deliver services required by clients (and the difficulty clients face in understanding the terms used) and to concerns about conflicted conduct, not to the quality of delivery of services within the current regime.
    If an adviser is already an AFA (a form of licensing) I don't see how much more confidence consumers would obtain from operating through a licensed business. The regulator already has the ability to impose specific conditions on AFAs so licensing would not change that. Many financial adviser businesses are relatively small but licensing would require them to operate as "mini corporations". While FMA has attempted to reduce the rigour of the minimum standards for other licensed sectors my view is that FMA's expectations are still unduly high in some areas for small businesses, particularly with regard to governance. In most cases for small adviser businesses the ability of the business to comply will depend on the competence and experience

of the individual advisers. I suggest that the option to operate a licensed adviser business be provided for using the existing QFE model. I also suggest that an option to operate an incorporated adviser business is provided for, similar to the incorporated law firm model (see more about this in my answer to question 11). I support greater involvement by industry bodies but only where there was significant consolidation and capability building within the industry bodies.

18. What suggestions do you have for the roles of different industry and regulatory bodies?
    If industry bodies wish to play a more substantive role then I suggest that significant consolidation is required or one body is given a regulatory role. While I'm not suggesting this is the appropriate model, I note that that my experience as a lawyer is with the New Zealand Law Society, which has regulatory powers (including to fine and strike off lawyers) and a significant level of independence (but certainly not complete). I also belong to the Auckland District Law Society even though it doesn't have any regulatory powers. So that model doesn't mean that multiple industry bodies can't exist. The industry body with regulatory powers could then take over the role (at least in part) of the Code Committee.

4.6 Disclosure

19. What do you think is the most effective way to disclose information to consumers (e.g. written, verbal, online) to help them make more effective decisions?
    Enter text here.

20. Would a common disclosure document for all advisers work in practice?
    Enter text here.

21. How could remuneration details be disclosed in a way that would be meaningful to consumers yet relatively simple for advisers to produce?
    Enter text here.

4.7 Dispute resolution

22. Is there any evidence that the existence of multiple schemes is leading to poor outcomes for consumers?
    Enter text here.

23. Assuming that the multiple scheme model is retained, should there be greater consistency between dispute resolution scheme rules and processes? If so, what particular elements should be consistent?
    Enter text here.

24. Should professional indemnity insurance apply to all financial service providers?
    I suggest that PI insurance be optional but with an obligation to disclose where it isn't required (as currently applies to lawyers). PI insurance is not a complete answer to a claim because in some cases it may not respond and because if a business is insolvent any insurance proceeds may not be available to meet a claim. Insolvency will be more likely where there has been a significant failure, so the more clients affected the less likely PI insurance will respond adequately.

4.8 Finding an adviser

25. What is the best way to get information to consumers? Who is best placed to provide this information (e.g. Government, industry, consumer groups)?
    I suggest that the role be left of the private sector and industry bodies

26. What terminology do you think would be more meaningful to consumers?

    I support removing the term "registered" financial adviser. I suggest that the concept of personalised advice is retained and is either full or limited personalised advice (and that this is made very clear at the time the advice is given). A person who provides such advice would be a financial adviser. Where an adviser only gives "class advice" I suggest they be called a "product adviser". In all cases where advice is not personalised I suggest calling it "product advice". I don't consider that a person working for a QFE who isn't an AFA (or new equivalent) should be able to use the term "adviser" at all. This implies the adviser is an agent for the customer when they're in a sales role. I suggest as alternatives such as "financial product consultant", "sales consultant", "QFE representative".

    I consider that the term "broker" should be removed. The term "broker" is much better known as a person who acts in an agent capacity not as a person who receives money or property from or on behalf of a client. And many different types of financial services businesses provide what are currently defined as "broking services"- they are often not known as "brokers" otherwise and their core functions are not "broking". One simple option is that a replacement term isn't adopted but that existing obligations are retained. I suggest that the term "custodian" is retained as this has a well-established and clear meaning and in many cases most of the role of the broker will be compromised of providing custodian services.

4.9 Other elements where no changes are proposed

The definitions of 'financial adviser' and 'financial adviser service'

27. Do you have any comments on the proposal to retain the current definitions of 'financial adviser' and 'financial adviser service'?
    Please see my answer to question 26. Enter text here.

Exemptions from the application of the FA Act

28. Are those currently exempt from the regime posing undue risk to consumers through the provision of financial advice in the normal course of their business? If possible, please provide evidence.
    Enter text here.

Territorial scope

29. How can the FA Act better facilitate the provision of international financial advice to New Zealanders, without compromising consumer protection? Are there other changes that may be needed to aid this, beyond the technological options outlined in Chapter 4.2?
    Click here to enter text.

30. How can we better facilitate the export of New Zealand financial advice?
    Enter text here.

The regulation of brokers and custodians

31. Do you have any comments on the proposal to retain the current approach to regulating broking and custodial services?
    It seems anomalous that brokers (including custodians) are now one of the few financial service providers who service retail clients in New Zealand that are not required to be licensed, despite the inherent risks where someone holds client money or property. While the Custodian Regulations introduce some oversight through the requirement to get an "assurance engagement and report", there are no restrictions on providing broking and custodian services (with an assurance engagement and report required up to a year after commencing business) and there is no process to address changes or issues that arise between audits.
    I suggest that consideration be given to addressing the following "technical" matters:
    • In my view the meaning of "client" in s5A(1) is unclear with respect to broking services. I've seen different interpretations of this section from different people. Broking services are often "outsourced" either within a group or to third parties- so there may be a series of brokers/custodians in a chain. The question is who is a "broker" for the purposes of registration on the FSPR in those cases (as it's clear from s77U that only the person with an unmediated relationship with the client will have broker obligations under the FAA). Key interpretation difficulties arise from the from difference between the definitions in section 5A(1)(a) and 5A(1)(b) and the meaning of "person on whose behalf the client money or client property is received, held, paid, or transferred under the service". My view is that all brokers and custodians in a chain will be "brokers" (with some exceptions) though under s77U not all will have broker obligations. I suggest that the intended meaning be confirmed and then clarified in an updated definition.
    • The definition of "client" with respect to a "broking service" in s77B of the FAA is circular. A broking service is "the receipt of client money or client property by a person…" and part of the "client money" definition is money "received from, or on account of, a client by a person (A) (and not on A's own account)". However, a "client" under s5A(1)(b) "means the person on whose behalf the client money or client property is received, held, paid, or transferred". So, for example, a broking service arises where a person receives client money, and client money is money received from a person on whose behalf client money is received.
    • I suggest that consideration be given to creating a statutory trust in Part 3A. Currently s77P does not appear to create a trust, rather it requires that the broker hold money on trust for the client and pay it into a bank account. This money is given additional protection through s77T, which protects the money "received or held by a broker on trust" from creditor claims. The risk is that, if a broker does not take steps to create a trust when receiving and/or holding client money (and property), there may be no money held on trust that is protected by s77T. By contrast, the separate rules that apply to derivatives investor money and property in the Financial Markets Conduct Regulations 2014 create a statutory trust. Regulation 245 creates a similar protection to that in s77T. However, regulation 246 goes further and on an insolvency event creates a trust over the investor money and property, with the FMA designated as trustee. The FCA's CASS Rules in the UK go further and create a statutory trust at the outset (see CASS 7.17).

    The effect of s77U means that custodians (other than those who hold money and property directly for clients) are not bound by the broker obligations or the requirements of custodians in Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014- see regulations 4(3) and 4(4). I suggest that amendments are made that impose a direct obligation at law on a custodian to comply with the regulations.

Chapter 5 – Potential packages of options

32. What are the costs and benefits of the packages of options described in this chapter?
    Enter text here.

33. How effective is each package in addressing the barriers described in Chapter 3?
    Enter text here.

34. What changes could be made to any of the packages to improve how its elements work together?
    Enter text here.

35. Can you suggest any alternative packages of options that might work more effectively?
    Enter text here.

Chapter 6 – Misuse of the Financial Service Providers Register

36. Do you agree with our assessment of the pros and cons of the options to overcome misuse of the FSPR?
    Enter text here.

37. What option or combination of options do you prefer and why? What are the costs and benefits?
    Enter text here.

38. What are the potential risks and unintended consequences of the options above? How could these be mitigated?
    Enter text here.

39. Would limiting public access to parts of the FSPR help reduce misuse?
    Enter text here.

Demographics

1. Name:
   Cygnus Law Limited

2. Contact details:
   Redacted

3. Are you providing this submission:
   ☐As an individual
   ☐On behalf of an organisation

   (Describe the nature and size of the organisation here)

4. Please select if your submission contains confidential information:

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

Reason: Enter text here.