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Financial Markets Policy
Building Resources and Markets
Ministry of Business, Innovation and Employment
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Submission on the Financial Services Legislation Amendment Bill

Thank you for the opportunity to comment on the draft Financial Services Legislation Amendment Bill (**Bill**).

ANZ Bank New Zealand Limited (**ANZ**) supports improving and simplifying financial advice legislation to help New Zealanders get the financial advice they need and want.

We commend Ministry of Business, Innovation and Employment (**MBIE**) on their continued engagement with the industry on this important topic and the careful approach to reform.

We would like to specifically draw your attention to our key messages set out below. We provide further detail on those key messages in Appendix I. ANZ's responses to the specific questions in the consultation paper are set out in Appendix II.

Key Messages

1. **Financial Advice Providers must be able to themselves set skills, competency, and disclosure duties for Financial Advice Representatives.**

    a. What is suitable for a more complicated investment will not be suitable for mass-market transaction, savings, or lending products.

    b. The ability for a large, well-regulated financial institution to itself set different levels of skill, competency, and disclosure for advice is critical for mass-market transactions.

    c. If the balance of duties is not right, financial institutions will continue to take a 'no advice' approach, which won't achieve the reforms' objectives.

2. **The duty to put clients' interests first must be limited. The duty shouldn't apply to wholesale clients, and should only apply when providing financial advice, not as a continuing duty.**

3. **The scope of the Code of Conduct should be extended to provide guidance on the key duties under the Bill, and evidence of compliance with the Code of Conduct should be evidence of compliance with those duties.**

4. **More clarity is needed on what is <u>not</u> financial advice, particularly around giving basic advice or recommendations about a product.**

5. **Retail client duties should not be applied to wholesale clients and the current 'wholesale' definitions should be retained. The current approach to financial advice for wholesale clients (including the definition of 'wholesale client') works well in practice and is appropriate for ensuring consumer protection.**

6. **The provisions around inappropriate payments and sales incentives must strike the right balance between sales targets and compliance.**

7. **Financial Advice Providers should be able to seek a custom robo-advice licence during the transitional period. The period between approval of the Code of Conduct and the start of the transitional licensing period should be extended to 12 months. The safe harbour should cover new employees of Financial Advice Providers and there should be a notification process for new products.**

About ANZ

ANZ is the largest financial institution in New Zealand. The ANZ group comprises brands such as ANZ, UDC Finance, ANZ Investments, ANZ New Zealand Securities and Bonus Bonds.

ANZ offers a full range of financial products and services including a significant range of financial advisory services, personal banking, institutional banking and wealth management services. ANZ is a Qualifying Financial Entity under the current Financial Advisers Act regime and has over 4,000 QFE Advisers providing advice on 32 different product types. ANZ is also an employer of over 100 Authorised Financial Advisers.

Disclosure of Potential Conflict

ANZ notes that Melanie Biss, an ANZ employee, is a member of the current Code Committee. To avoid any conflict, Melanie was not involved in preparing ANZ's submission.

Contact for submission

REDACTED

Once again, we thank MBIE for the opportunity to comment on the draft Financial Services Legislation Amendment Bill.

Yours sincerely

Bruce Macintyre
Chief Risk Officer

Appendix I – More detail on ANZ's Key Messages

1. Financial Advice Providers must be able to themselves set skills, competency, and disclosure rules for Financial Advice Representatives.

ANZ supports removing the distinction between class and personal financial advice and category 1 and 2 products. These distinctions led to an excessively conservative approach by QFEs.

ANZ also supports improving confidence in the financial advice that consumers get.

But, we are concerned that, in removing those distinctions, the legislation, Code of Conduct, or Regulations may set thresholds that are rigid or inappropriate for how large financial organisations deal with customers.

a. What is suitable for more complicated investments won't be suitable for mass-market transaction, savings, or lending products.

b. The ability for a large, well-regulated financial organisation to itself set different levels of skill, competency, and disclosure for its advice is critical for mass-market transactions.

c. If the balance of duties is not right, large financial organisations will continue to take a 'no advice' approach, which won't achieve the reforms' objectives.

The legislation, Code of Conduct, and Regulations must give large financial organisations providing financial advice through employees the flexibility to set their own competency standards, product scope, processes, and controls. We suggest achieving this flexibility through licensing, with general guidance given in the Code of Conduct.

Training all Financial Advice Representatives to the same standards as Financial Advisers is impractical. The products they sell, the customers they interact with, and the advice they give will vary. Setting the bar for Financial Advice Representatives at a similar level to Financial Advisers is inappropriate.

Licensing should allow large Financial Advice Providers to themselves set clear policies and procedures to ensure their retail clients receive competent financial advice that they want and need. Financial Advice Providers should set clear guidelines on which products their employees can advise on and when they must refer customers to another qualified employee or to a financial adviser. Large Financial Advice Providers must be able to set the competency and employee training needed — and internal training should be suitable.

For example, a Financial Advice Representative providing regulated financial advice about a home loan should meet any competency rules if they completed training and followed any policies and procedures set by the Financial Advice Provider.

The reality is that Financial Advice Representatives employed by Financial Advice Providers won't have discretion to provide any advice they, personally, deem appropriate. Instead, the Financial Advice Representatives must follow guidelines and provide advice the Financial Advice Provider sets for customers seeking that product or asking those questions.

Limiting a Financial Advice Representative's discretion when providing advice and placing liability on the Financial Advice Provider reduces the need for strict competency rules for

Financial Advice Representatives. ANZ considers that this is in line with the intent to regulate through a strict licensing programme and allow greater Financial Advice Provider self-regulation.

We also invite Officials to work closely with the industry on development of disclosure rules. Disclosure must be consumer friendly, timely, and suitable. There must be flexibility to tailor disclosure to the relevant business model of the Financial Advice Provider. We also strongly recommend that a Financial Advice Provider must publish standard information on its website, or on demand, rather than imposing rules that advisers must give written information before advising a customer. This will be critical for mass-market transactions.

As we have previously suggested, we recommend Financial Advice Providers should provide the following information on websites or on demand as standing disclosure:

1. The name and contact details of the organisation
2. Products advisers can advise on
3. Nature and scope of advice, including any limits on it
4. Whether Financial Advice Representatives provide the advice, and whether Financial Advisers are available
5. How it pays its advisers
6. How to raise issues or complaints, internally and through disputes resolution schemes.

Prior to providing the service or advice, we suggest the Financial Advice Representative should disclose:

1. Whether they can advise on the particular product
2. The nature and scope of the service or advice they provide including the extent to which they have considered the customer's personal circumstances in giving that advice.

Financial Advice Representatives should not be required to give disclosure in writing.
We also suggest Financial Advisers should disclose:

1. The name and contact details of the adviser
2. The name and contact details of their employer
3. The products they can advise on
4. The nature and scope of the service or advice they provide including the extent to which they have considered the customer's personal circumstances in giving that advice
5. The fees and charges for the services
6. A description of conflicts
7. How to raise issues or complaints, internally and through disputes resolution schemes

Disclosure changes must not create information overload for consumers. Disclosure must be simple and relevant. Too much information dilutes the importance of information.

2. The duty to put clients' interests first must be limited.

ANZ supports introducing a conflict of interest duty. However ANZ submits that the duty to put clients' interests first in clause 431H of the Bill is too broad and will restrict access to financial advice.

The duty to put clients' interests first should not apply to wholesale clients

ANZ submits the duty in clause 431H should apply to retail clients only. The duty should not extend to wholesale clients.

The objectives of the reform, set out in the consultation paper, are to ensure *consumers* can access advice they need, to improve their financial outcomes and make them better off. The reforms were not intended to give extra protection under law to wholesale clients.

ANZ considers that wholesale clients are sophisticated and do not need protecting in legislation. As stated in the Explanatory note to the Bill, '*Wholesale clients are generally large or sophisticated clients such as banks, investment businesses, or high net worth individuals who do not require or benefit from the same degree of protection as retail clients'*. Extending the duty to put clients' interests first would significantly increase compliance costs without any clear benefit. Extending the duty will also divert attention away from those the regime should protect — consumers.

If Financial Advice Providers correctly classify customers as wholesale clients, then the duty in clause 431H should not apply.

It may be impractical to always give priority to retail clients' interests

If a Financial Adviser or Financial Advice Representative identifies there is a conflict of interest, then they should take reasonable steps to ensure the client understands this. The duty should be to ensure the client understand the nature and scope of the advice, and its limits.

A client should be able to decline advice and still get a product, if the adviser explains the risks. ANZ considers that the Code of Conduct would best address this point.

The duty to put clients' interests first should only apply when providing financial advice to a retail client, not as an ongoing duty

ANZ submits that it is impractical to impose a duty to put clients' interests first when "*doing anything in relation to the giving of advice"*.

We note the consultation paper states that "*doing anything in relation to the giving of advice"* aims to make it clear the duty doesn't only apply in the moment of giving advice. The consultation paper gives an example that, in deciding whether to give advice or provide information only, the financial advice representative or financial adviser must put the client's interests first.

We believe this goes too far. We are concerned this duty:

- will force Financial Advice Representatives or Financial Advisers to give regulated financial advice, whether the customer wants or needs this, and
- is inconsistent with excluding some activities, like giving information, from the scope of financial advice.

We're also concerned that "*doing anything in relation to the giving of advice"* imposes an ongoing duty to provide financial advice. For example, if we give financial advice and sell a customer life insurance policy, it is impractical and inappropriate for us to continue to check whether that life insurance policy remains suitable over time. The customer must be responsible for any ongoing need for financial advice.

Instead, we suggest limiting the duty to put clients' interests first to when providing advice only.

Also, we are concerned that a duty to give priority to a client's interests goes too far.

As we have previously suggested, sales of financial products naturally involve some financial advice. At its most basic, financial advice is a salesperson recommending a product. So, for large financial organisations like banks, the financial advice will be about products they offer, creating an inherent conflict of interest.

We suggest that, where there is a conflict the:

- duty should be to balance the interests, with all reasonable steps taken to put the client's interests ahead

- duty should be to explain the nature and scope of the advice, and the limits on it, including the conflict, and

- client should be free to refuse advice or seek the product advised on.

3. The scope of the Code of Conduct should be extended to provide guidance on the key duties under the Bill, and evidence of compliance with the Code of Conduct should be evidence of compliance with those duties.

We suggest extending the scope of the Code of Conduct. We believe it sensible for the Code of Conduct to guide parties on how to meet the following duties:

- Competence (proposed section 431F)
- Understanding nature and scope and limits on advice (proposed section 431G)
- Putting the client's interests first (proposed section 431H)
- Exercising care, diligence, and skill (proposed section 431I)
- How a Financial Advice Provider should ensure its advisers and representatives comply (proposed section 431N and 431O)

We suggest that the Bill should adopt the same approach as is taken under section 9E of the Credit Contracts and Consumer Finance Act 2003, so that evidence of compliance with the provisions of the Code of Conduct is to be treated as evidence of compliance with the relevant duties.

As a general approach, we support a principled rather than prescriptive Code of Conduct. The Code of Conduct should only be prescriptive where necessary to address clear market failures.

- Differences between organisations, products, and consumers means a one-size fits all prescriptive model is inappropriate.
- A principled approach allows greater flexibility in how Financial Advice Providers organise their business, products, and interactions with customers.
- Too much prescription risks the Code of Conduct becoming out-of-date due to market changes.

This approach has been helpful to industry in enabling compliance with the Credit Contracts and Consumer Finance Act 2003. In our view, it would enable large financial

organisations to confidently structure their financial advice services under the new regime, and so increase the availability of financial advice.

4. More clarity is needed on what is <u>not</u> financial advice, particularly around giving basic advice or recommendations about a product

We believe the distinction between clause 431B and clause 6(c) in Part 2 of Schedule 5 is unclear, increasing confusion about what is financial advice.

- Clause 431B of the Bill states that a person gives financial advice if the person '*makes a recommendation or gives an opinion about acquiring or disposing of*' a financial advice product.

- Clause 6(c) in Part 2 of Schedule 5, states that a person doesn't give financial advice when '*making a recommendation or giving an opinion about a kind of financial advice product in general rather than a particular financial advice product*.'

We would appreciate clarity on whether the following examples would <u>not</u> be financial advice:

- At an in-branch review of a customer's finances, a personal banker explains that a Term Deposit could be a good option for the client because people can earn a better rate of interest if they don't need funds immediately.

- In a discussion with a customer who runs a small export business, a Markets dealer explains that a foreign exchange forward would be a good option for the client if they wanted to have greater certainty as to the amount of New Zealand dollars they will receive in connection with the goods they have exported.

- A retail client wishes to cancel their insurance cover for affordability reasons. A salesperson suggests lower trauma cover to make the product more affordable, while ensuring some cover remains in place.

ANZ recommends providing greater clarity on what is and is not financial advice. Defining a 'recommendation' using clear terms, and providing greater certainty about the meaning of '*a kind of financial advice product in general*' will ensure better compliance. We would be happy to discuss this point further with Officials as the distinction between financial advice and what is not financial advice must be clear.

To provide greater clarity about what is not financial advice, we also suggest that any requirements in existing legislation to ask questions of a retail client in order to meet obligations under such legislation (e.g. lender responsibility principles under the Credit Contracts and Consumer Finance Act 2003 or suitability assessment requirements under the Financial Markets Conduct Act 2013 (**FMCA**)) should not be financial advice. These conversations should be excluded from the financial advice regime, and dealt with under these other frameworks.

We also recommend extending the scope of the exclusion for carrying out instructions to include carrying out a client's instructions to amend, vary, or replace a financial advice product.

5. Retail client duties should not be applied to wholesale clients and the current 'wholesale' definitions should be retained. The current approach to financial advice for wholesale clients (including the definition of 'wholesale client') works well in practice and is appropriate for ensuring consumer protection.

The concept of a retail service is unnecessary – obligations should apply at a client level and not a service level

The Bill states that if a financial advice or broking service is provided to any retail clients, the entire service is deemed to be a retail service. This would mean that Financial Advice Providers who offer services to even one retail client would have to comply with retail obligations in relation to their wholesale clients.

In ANZ's view, wholesale customers should not be the focus of the protection provided under the regime. ANZ considers that this would direct resources away from providing retail services, to ensuring that wholesale services are compliant with retail obligations. The current wholesale distinction appropriately lowers compliance costs and creates efficiencies in dealings between financial markets participants and wholesale clients - who by definition are sufficiently sophisticated and do not require or benefit from the same degree of protection as retail clients.

Further, in practice, ANZ's business is not clearly aligned to providing services to either wholesale or retail clients. The example used on page 26 of the consultation paper does not work in application as while ANZ's institutional division predominantly deals with wholesale clients, it also has retail client interactions. As such, it is impossible to clearly delineate retail and wholesale services in the way the Bill presupposes.

The current approach to financial advice for wholesale clients should be retained

We do not consider there to be any reason to change the definition of a 'wholesale' client to match the definition in the FMCA. In our view:

there is no evidence that setting the definition of 'wholesale' at its current level has led to consumer harm

the threshold for the net assets / turnover test in the 'wholesale' definition is set at the right level as it appropriately reflects the consumer protection purpose of the legislation, and

by limiting the net assets / turnover test to 'entities', the wholesale definition already excludes individuals, and so any concerns as to whether 'mum and dad investors' are not receiving adequate protection are misplaced.

Wholesale Disclosure

ANZ also submits that if disclosure is required for wholesale clients that this should be limited to informing the client that they have been categorised as a wholesale client, what this means for them in terms of not having access to a dispute resolution service and also what the process is to "opt-in". ANZ considers that this should be reflected in the Disclosure Regulations.

6. The provisions around inappropriate payments and sales incentives must strike the right balance between sales targets and compliance.

ANZ is concerned that clauses 431O(1)(b) and (2) in the Bill are too broad and may effectively forbid the use of any sales or volume-based incentives. Volume-based incentives are important in managing a large distribution network.

ANZ agrees that 'inappropriate' incentives drive the wrong sales behaviours, causing harm to consumers. But, the Bill should take a balanced approach to sales or volume-based incentives. The Bill must reflect that Financial Advice Providers are in the business of making quality sales that help customers achieve their financial goals.

We believe sales incentives, including volume-based incentives, are only inappropriate if used by a Financial Advice Provider alone. Payments, sales or volume-based incentives that apply when a product is sold, but consider how that product was sold are balanced and appropriate. Payments and sales incentives should focus on training, expertise, and compliance with processes and policies. We believe it would be best if the Code of Conduct provides guidance on what is or isn't appropriate.

7. Financial Advice Providers should be able to seek a custom robo-advice licence during the transition period. The period between approval of the Code of Conduct and transitional licensing should be extended to 12 months. The safe harbour should cover new employees of Financial Advice Providers and there should be a notification process for new products.

ANZ considers the time to transition to a full licence is too long to wait to introduce automated personalised advice tools to the market. The intent of the new regime is to provide better access to quality advice and robo-advice is an effective way to deliver that advice to a higher volume of clients.

ANZ has many class-advice tools available online which are accessible to clients either directly, through anz.co.nz, or through a QFE Adviser. For example, we offer tools to help in choosing the best KiwiSaver fund to invest in. ANZ would like the flexibility to expand these tools to increase client access to personalised advice before receiving a full licence. ANZ considers that it would be proper to allow a custom licence for this purpose. Financial Advice Providers could then provide advice directly to customers, without needing to upskill Financial Advice Representatives or Financial Advisers under the new regime.

ANZ submits that once Financial Advice Providers have received a transitional license that they should be eligible to apply for a robo-advice licence.

We understand applying for a transitional licence will be largely administrative. However, before getting a transitional licence, Financial Advice Providers will need to respond to the new Code of Conduct standards and disclosure rules. ANZ is concerned that 6 months will be too short for large organisations to achieve compliance.

ANZ suggests a minimum 12-month period to meet transitional licence requirements to give time to:

- decide and make changes to distribution models
- develop and set up new disclosures for customers in many channels, including face to face and online
- update policies and procedures, and

- deliver training to all impacted staff.

We suggest extending the time to 12 months need not delay the regime's implementation. We suggest adjusting the full licensing timeframe to offset, for example by requiring a full license to be obtained within 18 months of a transitional licence.

ANZ is also concerned that new employees hired during the transitional licence period must meet the new competency requirements, even though ANZ itself will be in transition to a full licence. We believe this will be impractical. We recommend that any new employees of a Financial Advice Provider should be covered by the safe harbour, in the same way as existing employees.

Also, we recommend that new products developed by Financial Advice Providers should be able to be added to transitional licences. Financial Advisers and Financial Advice Representatives employed by the Financial Advice Provider who will sell those products will be in transition to the new regime, and it would be impractical to separate products in sales models.

Appendix II – ANZ response to specific questions in the consultation paper

Part 1

1. If an offer is through a financial advice provider, should it be allowed to be made during, or because of, an unsolicited meeting with a potential client? Why or why not?

ANZ supports keeping an exemption allowing unsolicited offers of financial products. Removing the current exemption could have the unintended result of reducing access to financial advice and financial products. Financial Advice Providers, Financial Advisers, and Financial Adviser Representatives must be able to offer their services to prospective clients.

Removing the exemption is also inconsistent with how customers want to access products and services. Customers increasingly expect large financial organisations to offer products and services proactively based on their understanding of the customer's needs. Removing the exemption may prevent organisations from meeting customer demand.

However, the exemption must include Financial Advice Representatives and Financial Advisers as well as Financial Advice Providers. We suggest amending clause 10 of the Bill so an exemption applies to unsolicited offers made through a *financial advice provider, financial advice representative, or financial adviser*, acting in the ordinary course of business as set out below:

> *'(b) the offer is through a financial advice provider, financial advice representative, of financial adviser that is acting in the ordinary course of business as a financial advice provider; or'*

Usually a natural person will make the offer, being the financial adviser or financial advice representative, for the financial advice provider. This approach is also consistent with the current effect of sections 34(2)(b) and (c) of the FMCA.

Financial Advice Providers will only make offers directly by an automated offer, for example by an offer online or by email. We question whether this behaviour will fall within the definition of 'meeting' in clause 34(4) of the FMCA.

We also suggest the idea of an 'unsolicited meeting' is no longer relevant given technology changes.

2. If the exception allowing Financial Advice Providers to use unsolicited meetings to make offers is retained, should there be further restrictions placed upon it? If so, what should they be?

We believe there is no need for further limits on the exemption applying to unsolicited offers.

Financial Advice Providers, Financial Advisers, and Financial Advice Representatives must be able to offer suitable products that meet the customer's needs, even if the customer didn't first contact them about those products.

Financial Advice Providers, Financial Advisers, and Financial Advice Representatives will need to comply with the duties applicable to financial advice when making an unsolicited offer, which ensures that consumers are adequately protected in these circumstances.

ANZ does suggest revisiting the exemption in section 34 of the FMCA and the uninvited direct sales rules in the Fair Trading Act 1986 (**FTA**) and Fair Trading (Uninvited Direct Sales — Financial Products) Regulations (**FTA Regulations**). The relationship between these rules is complex.

We suggest excluding *all* financial advice products offered through a Financial Advice Provider, Financial Adviser, or Financial Advice Representative, from the uninvited direct sales rules in the FTA. The incomplete coverage of the exemption for financial advice products provided under clause 4(b) of the FTA Regulations imposes unnecessary compliance costs with little added benefit. As we have said, consumers remain protected through advice duties.

Also, if the exception from the uninvited direct sales requirements for offers of complex financial products needing prescribed disclosure under the FMCA is kept, ANZ suggests extending the exception to simple products which are not currently within its scope.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?

Definition of financial advice representative (clause 5)

We support replacing the term 'Financial Advice Representative' with 'Financial Provider Representative' or 'Provider Representative'.

The term 'Financial Advice Representative' will create customer confusion. It must be clear for consumers they're dealing with an organisation's employee, bound by the organisation's policies on what advice they can give.

We suggest changing the term so it is more clearly distinguished from Financial Advisers. Financial Advisers will have a significantly greater training and expertise to provide specialist and individualised financial advice on often more complex products and services.

We also suggest amending 'Financial Advice Representative' so it reflects the current definition of 'QFE Adviser', meaning:

(a) an employee of a Financial Advice Provider, or

(b) a nominated representative of a Financial Advice Provider.

Paragraph (a) of the current definition of Financial Advice Representative is too broad as it captures individuals engaged (as an employee or otherwise) by a Financial Advice Provider to give financial advice on its behalf.

ANZ is concerned this could capture wider relationships that Financial Advice Providers have. For example, ANZ considers the current definition could be interpreted as including mortgage brokers. Mortgage brokers are, contractually, agents of their customers. However, mortgage brokers may be caught under the proposed definition as they enter contracts with a bank, setting out terms on which the broker may access the bank's products and deal with the bank. This could mean a mortgage broker's advice is for the bank's benefit or on its behalf.

We believe it is intended that mortgage brokers are Financial Advisers or Financial Advice Representatives employed by the mortgage broking firm, who would hold a Financial Advice Provider licence. We suggest amending the current definition of 'Financial Advice Representative' to reflect this intent.

Part 2

4. Do you have any feedback on the drafting of Part 2 of the Bill?

Exemptions from need for market services licence (clause 15)

ANZ suggests removing the new subsection 389(4).

ANZ does not support the approach adopted for wholesale and retail clients in the Bill. We have explained our concerns in more detail in our Key Messages 2 and 5.

When FMA may impose permitted conditions (clause 20)

ANZ suggests removing the new subsection 403(4).

ANZ does not support the approach adopted for wholesale and retail clients in the Bill. We have explained our concerns in more detail in our Key Messages 2 and 5.

We recommend revisiting the general mechanism for distinguishing between wholesale and retail services. We have included further comments about this in our submission on Part 5 of the Bill.

Part 3

5. Do you agree that the duty to put the client's interest first should apply both in giving the advice and doing anything in relation to the giving of advice? Does this make it clear that the duty does not only apply in the moment of giving advice?

Please see our Key Message 2.

The duty to put clients' interests first must be limited. Proposed section 431H is too broad. Extending the duty to apply "*in doing anything in relation to the giving of advice"* is also unworkable.

Given the example provided in the consultation paper, ANZ is concerned the duty will compel a Financial Advice Provider, Financial Adviser, or Financial Advice Representative to give advice.

Where there is a conflict, it must be open to a Financial Advice Provider, Financial Adviser, or Financial Advice Representative to refuse to provide financial advice, and instead provide information only. Even where there is no conflict, it should be open to a Financial Advice Provider, Financial Adviser, or Financial Advice Representative to provide information only for that product.

Also, a customer must be able to choose whether they receive financial advice — they must not be forced to receive financial advice.

ANZ also submits that the duty to act in the client's best interests must be limited to and by the nature and scope of the advice and any limits disclosed under proposed section 431G. The Financial Advice Provider, Financial Adviser, and Financial Advice Representative should be required to go no further than the scope set under that section.

The interaction between proposed sections 431G and 431H also needs to be considered. We believe proposed section 431G already helps address conflicts of interest. The Financial Advice Provider, Financial Adviser, or Financial Advice Representative must take reasonable steps to ensure the customer understands any limits on the scope of the advice. These limits would include explaining the extent to which there is a conflict

between the customer's interests and the interests of the Financial Advice Provider, Financial Adviser, or Financial Advice Representative.

The opening words of proposed section 431H(2), however, create unneeded confusion. ANZ suggests amending proposed section 432H(2) as follows to avoid confusion, while ensuring conflicts of interest don't improperly influence advice:

> '(1) This section applies if a person who gives regulated financial advice (A) knows, or ought reasonably to know, that there is a conflict between:
>
> (a) the interests of the person to whom the advice is given (B); and
>
> (b) A's own interests or the interests of any other person.
>
> (2) ~~In~~ When giving regulated financial advice ~~the advice or doing anything in relation to the giving of the advice~~, A must ~~give priority to B's interests, included by~~ takeing all reasonable steps to ensure that A's own interests or the interests of any other person do not materially influence the advice.

6. Do you have any comments on the proposed wording of the duty that a provider must not give a representative any kind of inappropriate payment or incentive? What impacts (both positive and negative) could this duty have?

Please see our Key Message 6.

ANZ considers the legislation should clarify that this duty does not forbid volume-based sales incentives. However, organisations must effectively balance those incentives with incentives to ensure compliance with the law and Code of Conduct.

The Bill must provide certainty for financial organisations on how they can arrange their business. The Code of Conduct should provide guidance on payment or sales incentive programmes that are suitable.

ANZ submits that the proposed requirement not to give, or offer to give 'whether conditionally or unconditionally' an inappropriate payment or other incentive in proposed section 431O(1)(b) is unclear.

ANZ is concerned that balanced volume-based sales incentives could be held to break the proposed duty, if viewed in isolation. A suitable incentive arrangement could well include volume-based incentives, if balanced by requirements that the Financial Adviser or Financial Advice Representative has not breached any duties under the legislation or Code of Conduct, etc.

We welcome the opportunity to work with Officials further on this point.

7. Do you support extending the client-first duty to providers who do not provide a retail service (i.e. those who only advise wholesale clients)? Why or why not?

Please see our Key Message 5.

ANZ doesn't support extending the client first duty when a Financial Advice Provider, Financial Adviser, or Financial Advice Representative is dealing with a wholesale client. We do not believe the duty should be extended to wholesale clients simply because the same products or services are provided to retail clients.

The purpose of classifying clients as wholesale clients is to recognise they have enough sophistication and knowledge to understand the products and services they are getting. Imposing client first duties for wholesale clients will create unnecessary compliance costs and complexity.

The legislation must recognise that it is inappropriate to impose consumer protection on relationships between sophisticated financial markets participants.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?

Additional purpose of subpart 5A

We suggest including a requirement that the subpart is intended to improve the efficiency and effectiveness of financial advice services. The legislation must balance the goal of protecting consumers and their interests against the need for effective and efficient markets for financial advice.

Duty to agree on nature and scope of advice (proposed section 431G(1)(a))

We strongly suggest removing paragraph (a) from proposed section 431G(1). We believe it will be impractical for Financial Advice Providers and Financial Advice Representatives to agree '*the nature and scope of the advice to be provided*' to a customer in advance. We believe this will simply perpetuate issues that currently arise, leading organisations to provide class rather than personal advice.

Customer dealings are often informal, not giving opportunity to agree the advice's nature and scope in advance. For example, a customer asks for a copy of a brochure about a particular product from a Financial Advice Representative. The customer may then begin asking questions which require the Financial Advice Representative to provide regulated financial advice. It's impractical to stop a conversation to 'agree' the nature and scope of the advice. We believe this will create a barrier to customers receiving the financial advice they want and need, contrary to the purpose of the regime. We also believe the perception of 'formal' advice may inhibit some customers from asking questions they need to.

We believe customers want to trust the information and advice they receive is suitable, not misleading, and correct. We think this is best achieved through amending the duty in proposed section 431G(1). The Financial Advice Provider, Financial Advice Representative, or Financial Adviser should take reasonable steps to ensure the customer understands the scope and nature of the advice and any limits on that advice.

We suggest:

> '(1) A person (A) must not give regulated financial advice to another person (B), unless A takes reasonable steps to tell B of the nature and scope of the advice and any limits on it.'

Code of Conduct

We suggest extending the scope of the Code of Conduct to provide guidance on the key duties under the Bill, and that evidence of compliance with the Code of Conduct should be evidence of compliance with those duties. Please see our Key Message 3.

If the Code of Conduct's scope is widened, we suggest amending proposed clause 28 in Part 4 of Schedule Two and related provisions.

We also believe it sensible if the Code of Conduct provides guidance on disclosure, allowing the Regulations to be less prescriptive.

False or misleading statements and omissions (proposed section 431M)

We suggest amending proposed section 431M(1)(b) to state that the statement or omission is materially adverse to a *reasonable person* in the same circumstances as the client.

We believe the wording that the statement or omission is materially adverse from the client's point of view is too subjective. The current wording will create confusion for Financial Advice Providers, Financial Advice Representatives, or Financial Advisers.

What's materially adverse to a particular client is difficult to decide. Individual clients may have different sensitivities. And, if a breach happens for many clients, it's nearly

impossible to decide whether the statement or omission, for each client, was materially adverse. Where non-compliance has happened for only a few clients, or a single client, the client and the adviser may take differing views, leading to unnecessary confusion or conflict. An objective standard would provide greater certainty.

We also suggest ensuring the scope of proposed section 431M(2) is consistent with equivalent rules around unsubstantiated representations in the FTA.

False or misleading statements and omissions (proposed sections 431M and 431T and proposed amendments to section 534)

We disagree that directors should be liable under section 534, where disclosure under sections 431M or 431T is defective.

Although the Regulations will prescribe disclosure content, large organisations, like ANZ, will produce many different disclosure documents for regulated financial advice by Financial Advisers and Financial Advice Representatives.

The due diligence for a document like a Product Disclosure Statement would be impractical for the interactions, documents, and advice section 431M will apply to.

Part 4

9. What would be the implications of removing the 'offering' concept from the definition of a broker?

We support this simplification and see no impact from removing the 'offering' concept from the definition of a broker.

10. Do you have any other feedback on the drafting of Part 4 of the Bill, for example any suggestions on how the drafting of broker provisions could be simplified or clarified?

We have no comment on this question.

Part 5

11. Should Financial Advisers have direct civil liability for breaches of their obligations, if the financial advice provider has met its obligations to support its advisers? Why or why not?

We have no comment on this question.

12. Should the regime allow Financial Advice Providers to run a defence that they met their obligations to have in place processes, and provide resources to enable their advisers to comply with their duties?

Yes. While Financial Advice Providers will take all reasonable steps to ensure Financial Advice Representatives and Financial Advisers comply with requirements, they will still find it difficult to prevent certain breaches.

We suggest providing a defence similar to that in section 499 of the FMCA (with the modification that the carve-out in section 499(2) of the FMCA, removing the defence in cases where the contravention is due to the act of an employee, does not apply). A Financial Advice Provider should not be liable where they took all reasonable precautions and exercised due diligence to avoid the breach.

Financial Advice Providers should also have a defence for matters outside their control or due to reasonable mistake. A compliance programme's existence should be relevant. Such a defence would be consistent with sections 106 and 107 of the Credit Contracts and Consumer Finance Act 2003.

We support a licensing regime that requires Financial Advice Providers to set controls, processes, and systems to ensure they meet the relevant duties and the Code of Conduct. Financial Advice Providers who comply should have a defence for breaches by Financial Advice Representatives.

13. Is the designation power for what constitutes financial advice appropriate? Are there any additional/different procedural requirements you would suggest for the exercise of this power?

We recommend providing a designation power that would allow the FMA to declare a service that '*would otherwise be a financial advice service* to *not be a financial advice service'*. We think this provides clarity where it's not right that a particular service is caught.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?

Please see our Key Message 5.

Classification must be at the client level, not product or service level.

If a retail client obtains a service that is otherwise provided only to wholesale customers, then the Financial Advice Provider should hold a licence for that service. But, the client care duties must only apply to the retail clients who obtain that service, not the wholesale clients.

15. Do you have any other feedback on the drafting of Part 5 of the Bill?

Please see our Key Message 5.

ANZ considers that the concept of a retail service is unnecessary. Duties should apply at client level and not at service level.

Despite this general position, ANZ considers that the Bill as drafted does not include any clear mechanism for distinguishing between different financial advice services provided by a Financial Advice Provider. The effect is that it is unclear how it would be possible for a Financial Advice Provider to offer separate retail and wholesale financial advice services.

ANZ considers this to be the case because of the interaction of the new definition of a *financial advice service*, new section 431C, and new clause 35(3) of Schedule 1:

- A financial advice service is defined as 'the service of giving regulated financial advice as referred to in section 431C'
- Section 431C provides that a person (A) provides a financial advice service if A engages 1 or more individuals to give regulated financial advice on A's behalf, and
- Clause 35(3) of Schedule 1 provides that a financial advice service is a retail service if at least 1 client who is supplied the service is a retail client.

The effect is large organisations will be treated as having only one financial advice service, which is a retail service. These provisions must be amended to permit demarcation of different services provided by the same entity.

Part 6

16. Does the proposed territorial application of the Act set out above help address misuse of the Financial Service Providers Register (FSPR)? Are there any unintended consequences? How soon after the passing of the Bill should the new territorial application take effect?

We consider the territorial application is an improvement on the current requirements. We also support the new territorial requirements taking effect when the Bill is passed.

17. Do you support requiring further information (such as a provider's AML/CFT supervisor) to be contained on the FSPR to help address misuse?

We support strengthening requirements for information to be included in the FSPR. We believe this will help the public make informed decisions.

18. Do you consider that other measures are required to promote access to redress against registered providers?

We have no comments on this question.

19. Do you have any comments on the proposed categories of financial services? If you're a financial service provider, is it clear to you which categories you should register in under the proposed list?

The proposed categories will make it clearer when registering services on the FSPR.

20. Do you support clarifying that schemes must provide information to the FMA if they believe that a provider may be involved in conduct that constitutes breach of relevant financial markets legislation?

Disputes Resolution Schemes should only refer a series of material complaints, and only if notice is given to the Financial Service Provider.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?

We have no comments on this question.

Schedule 1

22. When should an FMC Act DIMS licence granted to AFAs who provide personalised DIMS expire? For example, should it expire on the date on which the AFA's current authorisation to provide DIMS expires?

We do not offer personalised DIMS to retail customers, so this does not apply to ANZ. However, we support expiry of the FMCA DIMS Licence when the AFA authorisation, or Financial Adviser authorisation, expires.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?

We consider that proposed clause 64 of Schedule 4 of the FMCA is too broad. Providing that 'any action' taken by the Code Working Group will be deemed to be validly taken could avoid the important protections provided under the new Schedule 5.

Schedule 2

24. Should the FMC Act definition of 'wholesale' be adopted as the definition of wholesale client for the purposes of financial advice? Why or why not?

We suggest that no changes are needed to the current definitions of 'wholesale' clients — the current definitions work as designed. Please refer to our Key Message 5.

In our view:

- there is no evidence that setting the definition of 'wholesale' at its current level has led to consumer harm
- the threshold for the net assets / turnover test in the 'wholesale' definition is at the right level to exclude businesses, and so appropriately reflects the consumer protection purpose of the legislation, and
- by limiting the net assets / turnover test to 'entities', the wholesale definition already excludes individuals, and so any concerns as to whether 'mum and dad investors' are not receiving adequate protection are misplaced.

25. We understand that some lenders consider that they may be subject to the financial adviser regime because their interactions with customers during execution-only transactions could be seen to include financial advice. Does the proposed clarification in relation to execution-only services help to address this issue?

We agree that the proposed clarification in relation to execution-only services helps to address this issue. However, we suggest that further clarity would be provided by extending the exclusion for carrying out instructions to where a consumer asks to amend, vary, or replace a particular financial advice product.

To provide greater clarity about what is not financial advice, we also suggest that any requirements in existing legislation to ask questions of a retail client in order to meet obligations under such legislation (e.g. lender responsibility principles under the Credit Contracts and Consumer Finance Act 2003 or suitability assessment requirements under the FMCA) should not be financial advice.

As a general comment, to avoid confusion it will be important the Bill is consistent with complementary legislation that imposes duties on financial organisations when dealing with consumers.

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?

Please see our Key Message 4.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?

We believe this is clear.

28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?

We believe the guidance to the Code Committee is clear.

As suggested in our Key Message 3, we suggest widening the scope of the Code of Conduct to provide guidance on a wider range of the duties proposed.

29. Does the wording of the required minimum standards of competence knowledge and skill which 'apply in respect of different types of advice,

financial advice products or other circumstances' adequately capture the circumstances in which additional and different standards may be required?

ANZ believes the Bill must make it clear that Financial Advice Providers can develop their own frameworks to suit their business and customer needs. For example, a Financial Advice Provider may allow a Financial Advice Representative to give regulated financial advice on consumer credit contracts, but may require Financial Advisers to give regulated financial advice on life insurance contracts.

The regime must provide enough flexibility for large, well-regulated financial institutions to set the skills and standards their employees must meet. Refer to Key Message 1 for more information.

30. Should the Financial Advisers Disciplinary Committee consider complaints against Financial Advice Providers as well as complaints against Financial Advisers? Why or why not?

ANZ considers the FMA should deal with complaints against Financial Advice Providers, given these will be about their licences.

31. If the jurisdiction of the Financial Advisers Disciplinary Committee is extended to cover Financial Advice Providers, what should be the maximum fine it can impose on Financial Advice Providers?

We have no comments on this question.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?

Workplace financial products (proposed clause 11)

We suggest the exemption should include advice given by a related body corporate of an employer.

Content of Code (proposed clause 28)

As set out in our Key Message 2, we consider that the legislation, Code of Conduct, and Regulations must give large financial organisations providing financial advice through employees the flexibility to set their own competency standards, product scope, processes, and controls. We suggest achieving this flexibility through licensing, with general guidance given in the Code of Conduct.

As suggested in our answer to question 8 and Key Message 3, we suggest widening the scope of the Code of Conduct to provide guidance on a wider range of the duties proposed, and to provide that evidence of compliance with the Code of Conduct will be considered to be evidence of compliance with those duties.

Consistent with these Key Messages, we suggest that clause 28 should be amended to delete references to 'setting minimum standards' of competence, knowledge and skills. Instead, we suggest that clause 28 should require the Code of Conduct to elaborate on the relevant advice duties, and offer guidance on how those duties may be met.

We also suggest removing references to 'professional training' in paragraph (4)(a) of proposed clause 28 — the reference should be only to 'training'. The nature and extent of training needed for people giving financial advice must be flexible. For example, the training needed for providing advice on a mass-market transaction, saving, or lending product will be different to the training needed for other products, like insurance or investments. The term 'professional' implies external training, where internal training set by the Financial Advice Provider as part of their wider compliance programme may be most suitable.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?

Please see our Key Message 7.

The transitional arrangements essentially 'freeze' an organisation at a moment in time. We believe the transitional arrangements must allow flexibility for Financial Advice Providers to react to market changes or changes within their own businesses.

For example, if ANZ identifies a need for an AFA to work in an area of its business, providing personalised advice to retail clients on a new type of product, it will be impractical if this is treated as a new service to which the new duties and disclosure rules apply.

A Financial Advice Provider with a transitional licence must be able to add new employees or new products and services under the scope of that transitional licence. Financial Advice Providers should not have to treat those new employees or new products and services as caught under the new regime, requiring a new licence. Assuming a Financial Advice Provider's business and structure must stay static during transition is simply impractical and will introduce significant compliance costs that the transition arrangements are intended to avoid.

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?

Yes – this was effective in terms of compliance with the FMCA.

35. Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?

No – please refer to our submission in Key Message 7.

36. Do you perceive any issues or risks with the safe harbour proposal?

We have no comments on this question.

37. Do you think there are any elements of the new regime that should or shouldn't take effect with transitional licences? What are these and why?

We have no comments on this question.

38. Is two and a half years from approval of the Code of Conduct sufficient time to enable industry participants to become fully licensed and to meet any new competency standards?

Two years to get a full licence is enough time for Financial Advice Providers to comply with the new regime. However, the scale of the changes required in connection with the new legislation mustn't be underestimated.

We suggest it would help the industry if Financial Advice Providers can get a custom robo-advice licence during transition. This will help with faster delivery of personalised advice services to retail clients under the new regime. See our Key Message 7.

Possible complementary options

39. Do you support the option of AFAs being exempt from complying with the competence, knowledge and skill standards for a limited period of time? Why or why not?

It is difficult to give an answer before seeing the new Code of Conduct.

Unless there are significant changes to the Code of Conduct's competency requirements, we don't support an exemption. An exemption appears inconsistent with the regime's objectives. We also believe it could introduce inconsistent levels of skill in Financial Advisers, which could create confusion for consumers and challenges for Financial Advice Providers' governance of Financial Advisers.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?

See our response to question 39. If an exemption is in place, five years is too generous, increasing confusion for customers. Unless the new competency standards are significantly higher, two years would seem more suitable.

41. Is there a risk that this exemption could create confusion amongst industry and for consumers about what standards of competence, knowledge and skill are required?

Yes. An exemption would likely cause both industry and consumer confusion.

42. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?

We do not support this option.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?

Our answer to question depends on the new Code of Conduct competency and qualification standards.

AFAs have already met existing competency standards through completing the current qualification criteria. We believe the competency assessment process for them to be a Financial Adviser should be limited.

RFAs should complete the qualification requirements and not just complete a competency assessment. We believe this is important to lift standards in the industry.

44. Is it appropriate for the competency assessment process to be limited to existing AFAs and RFAs with 10 or more years' experience? If not, what do you suggest?

The competency assessment shouldn't be time-bound. Instead, the competency assessment should focus on current qualification levels and address any 'gaps'.

45. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?

We do not support this option, but believe this is best addressed through the Code of Conduct.

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?

We do not support a phased approach to licensing. Unknowns will influence how long it takes to get a full licence.

If licensing were phased, Financial Advice Providers may have to make significant changes within an inadequate amount of time, or be forced to be last to market within the new regime.

Please see our Key Message 6. We consider an alternative should be to allow Financial Advice Providers to get a custom robo-advice licence to help speed up access to quality advice for retail consumers.

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?

See our answer to question 46.

48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?

See our answer to question 46.