

# How to have your say

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## Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Friday 31 March 2017**.

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 attaching your submission as a Microsoft Word attachment and sending to [faareview@mbie.govt.nz](mailto:faareview@mbie.govt.nz).
- By mailing your submission to:

Financial Markets Policy  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to:  
[faareview@mbie.govt.nz](mailto:faareview@mbie.govt.nz).

## Use of information

The information provided in submissions will be used to inform the development of the Financial Services Legislation Amendment Bill, decisions in relation to the outstanding policy matters, and advice to Ministers.

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 MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). 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 in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons 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

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### Part 1 of the Bill amends the definitions in the FMC Act

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

Enter text here.

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?

Enter text here.

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

There are two issues on which we wish to submit.

1) Whilst we are fully supportive of the need to remove confusion around the three existing types of financial adviser (AFA, RFA and QFE), the proposed new terms of Financial Adviser (FA) and Financial Advice Representative (FAR) do not improve consumers' ability to clearly differentiate between sales and advice. To promote better outcomes for consumers, it is vital that they understand the difference between the two. Whilst they are held to the same conduct, competence and disclosure duties, FAs and FARs are crucially subject to significantly different processes and standards relating to qualifications, licensing, monitoring, training, scope of advice, compliance, civil liability and disciplinary actions. This lack of a more distinct demarcation between the two needs to be addressed (refer additional comments in our

answers to submission questions 6,8,11 & 12). In this regard, we submit that the word 'advice' in the term 'financial advice representative' needs to be replaced.

With respect to the proposed term of 'financial adviser', we see no reason to drop the word 'authorised' from the current designation. Continuation of the (single) AFA designation respects the significant value built up by AFAs over many years of education and continuing professional development, in addition to maintaining continuity with consumers.

2) If a consumer receives an unsolicited offer from an FAR in the course of an unsolicited meeting, it is important that a clear process distinction is made between a 'sale' and 'advice'. E.g a bank customer seeking a mortgage who does not have an existing KiwiSaver account can be 'sold' one of that bank's KiwiSaver products, with 'advice' limited to which one is appropriate to that customer's risk profile. However, if that same customer has an existing KiwiSaver account with a different provider, that customer must be given a fully researched assessment of the comparative differences between the existing KiwiSaver investment and that of the bank – this is no longer simply a 'sale'.

## Part 2 of the Bill sets out licensing requirements

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

There are two issues on which we wish to submit.

1) Whilst the intention of the licensing process and ongoing operational requirements is to differentiate between large and small providers of financial advice services, the legislation as currently drafted does not appear to recognise this, ONCE licensed. Larger entities are by their nature more difficult to regulate and monitor relative to smaller entities. As a result, it will be easier to put smaller financial service providers or sole trader financial advisers out of business. This, combined with the very different consequences of conduct breaches on an FA relative to an FAR is likely to lead to sole traders deciding to operate as FARs rather than FAs in order to mitigate against the disproportionate risks of being put out of business. In turn, this is likely to lead to LESS access to advice, the opposite effect of the desired objective of greater availability of advice to consumers. Legislation therefore needs to clearly differentiate between small and large institutions and make this clear so that consumers don't end up gravitating towards larger advisers.

2) The concept of limited financial advice will not be well understood by consumers. If limitations are on a continuum, we are concerned that they will not actually know if they have been appropriately advised. We are also concerned that many well-intentioned FARs, reliant on the right training from their FAP, will similarly not know whether the limitation of their 'advice' is appropriate. The monitoring and auditing of the activities of FAPs is unlikely to properly highlight this risk, opening the door for unscrupulous FAPs to misrepresent the extent of the basis for their 'advice'.

## Part 3 of the Bill sets out additional regulation of financial advice

### 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?

Enter text here.

### 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?

We recommend that better guidance is needed on what constitutes a conflict of interest and an "inappropriate payment or incentive". This guidance should clearly define upper limits on incentives, bonuses and commission levels beyond which they are no longer considered appropriate AND state those conflict situations and incentives which are definitely NOT

appropriate.

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?

Enter text here.

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

There are two issues on which we wish to submit

1) We strongly believe that FARs and FAs should be subject to the SAME liabilities for contravention of duties. Any person acting as a representative of an FAP who is NOT subject to disciplinary action will act differently to a licensed FA who is subject to both this liability and potential loss of business. Without similar consequences, there is an increased likelihood that outcomes for consumers will be inappropriately different, depending on who they are dealing with.

2) Larger institutions, acting as FAPs, will rightly focus on business risk mitigation and this is not normally consistent with putting clients' interests first. A recent report from the Australian regulator (ASIC) on how large institutions had dealt with poor advice representatives highlighted that "there is further work to be done to assist in rebuilding consumer trust and confidence in the financial advice industry." The ASIC report listed a number of areas due for improvement around inadequacies in dealing with and auditing the activities and advice provided by their representatives. This proposed legislation for New Zealand is highly likely to give rise to the same issues found to have fallen short of acceptable standards in Australia.

#### **Part 4 of the Bill sets out brokers' disclosure and conduct obligations**

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

Enter text here.

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?

Enter text here.

#### **Part 5 of the Bill makes miscellaneous amendments to the FMC Act**

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?

Enter text here.

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?

Enter text here.

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?

Enter text here.

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

Enter text here.

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

Enter text here.

### **Part 6 of the Bill amends the FSP Act**

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

Enter text here.

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?

Enter text here.

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

Enter text here.

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?

Enter text here.

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?

Enter text here.

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

Enter text here.

### **Schedule 1 of the Bill sets out transitional provisions relating to DIMS and the code of conduct**

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?

Enter text here.

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

Enter text here.

### **Schedule 2 of the Bill creates a new schedule to the FMC Act with detail about the regulation of financial advice**

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?

Enter text here.

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?

Enter text here.

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

Enter text here.

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

Enter text here.

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

Enter text here.

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?

Enter text here.

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?

Enter text here.

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?

Enter text here.

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

Enter text here.

### **About transitional arrangements**

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

Enter text here.

### **Proposed transitional arrangements**

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

Enter text here.

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

### **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?  
Enter text here.
40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?  
Enter text here.
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?  
Enter text here.
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?  
Enter text here.
43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?  
Enter text here.
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?  
Enter text here.
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?  
Enter text here.

## Phased approach to licensing

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

Enter text here.

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

Enter text here.

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

We believe there is an unintended consequence of the proposed arrangements, whereby during the transition period from 2019 to 2021, the only people who can become an FAR are those who are in a the equivalent of a QFE before the transition period commences. This therefore precludes an AFA becoming an FAR during the transition period. Given the proposed differences in liabilities between and AFA and an FAR, some AFAs may want to become an FAR as soon as possible from 2019, but they are prevented from doing so unless they join a QFE prior to that.

## Demographics

49. Name:

David Beattie, Joint CEO and CIO, Booster Financial Services Limited

50. Contact details:

**REDACTED**

51. Are you providing this submission:

As an individual

On behalf of an organisation

Booster Financial Services Limited is a NZ -owned and operated financial services provider managing over \$2billion on behalf of mainly retail investors in superannuation (including KiwiSaver) and non-superannuation funds under its MIS licensed subsidiary, Booster Investment Management Limited.

52. 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.