Submission by

To

Ministry of Business, Innovation & Employment

On

Consultation Paper – New Financial Advice Regime

Draft Financial Services Legislation Amendment Bill and proposed transitional arrangements

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31st March 2017

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?

   Yes it should, not all meetings are pre planned and a consumer should not be put off when they come seeking advice. As long as the correct disclosure requirements are fulfilled there is no reason why the same outcome as a planned meeting should not result. While the concern on prohibiting the offer of financial products through unsolicited meetings may have more application to investment type products under the FMC Act, the same concerns may not be relevant for less complex financial products such as the current Category 2 products.

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?

   Because such a meeting will not have allowed a potential client to contemplate the issues or be potentially pressured into the purchase of a product introduction of a cooling off period maybe appropriate.

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

   "Financial Advice Representative"

   One of the aims of this review is to reduce confusion over terminology; however the current proposal for representatives fails to achieve this.

   The term "Financial Advice Representative" is inappropriate and needs to be changed. Including "Advice" in the title will surely lead to confusion among consumers between the roles of Financial Advice Representative and Financial Adviser. Clients are unlikely to appreciate that there are differing levels of accountability between FAs and FARs. If the intention is to recognise that any person who gives financial advice will be accountable for that advice to the client, then maintaining any distinction between the two types of advisers may not be warranted.

   The role of the representative is more one of sales rather than the giving of advice which is the role of a Financial Advisor. The difference needs to be clear not only in the disclosure requirements but also in the title applied to the representative role. We would support a change to a title along the lines of either "Financial Representative", "Financial Provider Representative" or "Financial Service Representative".

   We also see the need to register representatives to ensure that misbehaving representatives cannot move from one provider to another without being identified. A representative should be publicly registered and searchable on the FSPR.

"Broker", "Broking Service"

A further confusion results from the use of these terms which in financial services have common usage unrelated to the terminology in the legislation. The confusion which resulted during the original registration by financial advisers remains as an unnecessary issue and should be addressed by the Bill.

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?

   Yes, the duty should apply in giving advice and in doing anything in relation to giving advice. However, as currently proposed, the requirement is too broad. We note that the guidance note states that in determining whether to give advice or provide an information-only service, the person must put the client's interest first. We believe that the duty as proposed could lead to situations where advisers are compelled to provide advice where they may not intend to do so.

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?

   The term "inappropriate" requires further clarification. It will be difficult for providers to determine what is or is not appropriate. For example would soft commissions or reward schemes based on sales targets be considered inappropriate.

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?

   Given this legislation is aimed primarily at consumers we do not see the need for obligations that apply to retail clients extended to wholesale clients. Regardless of this legislation there are still common law duties owed by all insurance brokers (advisers) giving wholesale clients avenues to seek redress through the court system. We therefore suggest that it is not necessary to extend the duty to wholesale clients. They don't need the protection and this is consistent with what occurs in Australia.

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

   431H - Duty to put client's interest first – under section 1(b) extends the duty to conflicts with "any other person". This is far too wide, we suggest the duty is restricted to those related to or associated with the adviser.

   Wholesale and retail services could be better defined. The bill provides that if a financial service is provided to any retail client then the entire service is deemed to be a retail service. As a consequence any provider that offers services to a minor amount of retail clients would have to comply with the retail obligations for wholesale clients (competence requirements, agreeing on nature and scope of advice and complying with the Code of Conduct). It would be preferable to make it clear that retail service obligations do not apply to wholesale clients.

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

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

    Wholesale and retail services could be better defined. The bill provides that if a financial service is provided to any retail client then the entire service is deemed to be a retail service. As a consequence any provider that offers services to a minor amount of retail clients would have to comply with the retail obligations for wholesale clients (competence requirements, agreeing on nature and scope of advice and complying with the Code of Conduct).

    E.g. an adviser who only gives advice to wholesale clients would be subject to retail obligations purely because another adviser within the same provider gives the same financial service to a retail client. It would be preferable to make it clear that retail service obligations do not apply to wholesale clients.

Part 6 of the Bill amends the FSP Act

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?

    As mentioned previously we believe "broking service" causes confusion and should be renamed.

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?

    Yes.

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?

    The definition of "wholesale investor" is not relevant in the context of general insurance. We prefer to retain the existing definition of "wholesale client" in the FA Act which recognises that financial products include non-investment products.

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

    No. FAPs will have civil liability for conduct and disclosure obligations of its advisers or representatives plus be held accountable via dispute schemes. The FAP will also come under the direct licencing control of the FMA. So there will be sufficient sanctions without having to make them subject to disciplinary action from the Committee.

Proposed transitional arrangements

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

    Yes, to ensure an orderly transition. Not all the requirements of the new regime can be immediately realised, in particular the competence standards will need time to be met and there will be some significant costs on industry participants to deal with getting existing advisers to meet the required competency standards. However ethical standards, such as client's interests first can be introduced immediately.

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?

    Yes assuming the new Code is not overly onerous compared to the approach of the current Code.

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

    No, this is a pragmatic approach allowing sufficient time to respond to the new requirements while giving certainty on when these need to be achieved.

Possible complementary options

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

    Yes. If the Level 5 is seen to be the entry level test for advisers then it is not an appropriate way to measure competency for experienced advisers. We support a competency assessment process along the lines suggested.

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?

    We do not believe it is appropriate for the competency assessment process to be limited to existing AFAs and RFAs with 10 years' experience. There is no right universal limit; the assessment should instead be available to any adviser who believes they are at the required level of competency. If the adviser fails their assessment then the Level 5 qualification should be required.

Demographics

49. Name:
    Insurance Brokers Association of New Zealand Inc.

50. Contact details:
    Gary Young
    PO Box 7053, Auckland 1141
    Level 5, 280 Queen St, Auckland 1010
    REDACTED

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

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