

How to have your say

Submissions process

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

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. 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

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

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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?
Enter text here.

Part 2 of the Bill sets out licensing requirements

1. Do you have any feedback on the drafting of Part 2 of the Bill?
It is our view that the legislation should contain a base line for licence conditions that is consistent with legislative policy objectives. The framework should provide a mechanism whereby the legislation, code

and licencing all work in concert together.

Consideration might also be given to the inclusion of statutory provisions requiring the FMA to complete a regulatory impact statement around proposed licensing conditions or, alternatively, complete an impact analysis similar to that proposed to be statutorily imposed on the Code Committee.

At present, the licencing is a complete unknown to all in the industry. The baseline needs to be clear on the fundamental aspects of the licence such as; capital adequacy; insurance; when advisers will be required to be "financial advisers"; size of business and the like. We have concerns that the industry is legislating for an unknown quantity, being the licence. In addition, the consultation document states that "a service that is not a retail service does not need to be licensed" so long as "the service is clearly demarcated from its retail service". We would like clarify (whether in legislation or otherwise) that this mean a firm could have a license to provide financial advice services to retail clients but provide DIMS to wholesale clients without being subject to the same licence conditions, provided that the service is clearly "demarcated".

We understand from page 15 of the consultation that a firm can get one licence for a group of companies even if different services across each however we believe this could be clarified in the legislation.

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

2. 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.

3. 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?

Enter text here.

1. 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?

Generally speaking, we think it is consistent with the aims of the legislation that the client-first duty should apply to everyone who provides financial advice, particularly given that the monetary threshold for being a "wholesale client" as worded will be crossed by many retirees who will not necessarily be financially sophisticated.

We support the Code Committee's submission that the code should apply not just to retail services. In particular, we also support the Code Committee's submission that the proposed new s 431J is changed so that rather than stating the section only applies to a retail service, it states that the Code may impose different standards for a financial advice service that is not a retail service, or impose standards that only apply when dealing with a retail client. This would go a long way in ensuring that the legislation meets the stated objective of an even playing field for all advisers.

We support the ability for a firm with both retail and wholesale clients to offer certain wholesale only financial advice services (that do not need a license) in such circumstances where no retail clients are receiving the same service.

JBWere supports the proposal that the legislation imposes the care, diligence and skill obligation, the client first obligation and the disclosure obligations to wholesale clients, irrespective of whether a wholesale client is receiving a retail service or not. If the legislation maintains provisions such that those businesses providing services only to wholesale clients remain outside of the licensing requirements, it is essential that the obligations of care, diligence and skill and client first are carefully monitored with respect to advisers who do not provide a retail service. This should go some way to avoid situations where advisers pressure clients to complete wholesale certification in order to avoid the licensing requirement. . This should also go some way to avoid situations where a (for example) "retiree" wholesale client who may not be as sophisticated as other wholesale clients (such as a professional investor) receives a service that is not appropriate for them.

The proposed change to the deeming provision at section 562(1)(g) enables the FMA to designate a service as a financial advice service that may not otherwise be. Another useful tool for FMA may be the ability for FMA to declare a financial adviser service to be a regulated financial adviser service if FMA was not satisfied that investors were being correctly classified as wholesale.

2. Do you have any other feedback on the drafting in Part 3 of the Bill?
Enter text here.

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

3. What would be the implications of removing the 'offering' concept from the definition of a broker?
We agree with the proposal
4. 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

5. 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.
6. 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.

7. 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.
8. 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.
9. 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

10. 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.
11. 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.
12. Do you consider that other measures are required to promote access to redress against registered providers?
Enter text here.
13. 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.
14. 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.
15. 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

16. 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.
17. 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

1. 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 believe the definitions should be aligned to the extent possible, both for consistency and to create a clearly demarked boundary for clients. This would simplify this process for consumers. Specifically, we would support removal of the \$1million net asset threshold set out in section 5C(1)(d) of the Financial Advisers Act which is generally accepted as too low.

There is contention in the market as to whether the express "safe harbour" for clients self-certifying as wholesale under FMCA Schedule 1 clause 44 can be relied upon by providers of advice under the Financial Advisers Act. We would recommend that safe harbour mechanism is clarified to be clear it applies to financial adviser services. Care should also be taken that the timeframes to which designations apply are consistent to the extent possible. Currently FMCA wholesale safe harbour certificates are valid for 2 years whereas FAA wholesale is premised on the time the services were received (or immediately before). This should be made consistent for the purposes of the certification

2. 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.

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

Enter text here.

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

Enter text here.

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

Enter text here.

6. 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.

7. 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.

8. 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.

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

We believe that categorising DIMS (in practice, a service) as a “product” it is confusing, as this defines it as equivalent to an equity. Although we recognise that MBIE has done this in order to ensure licensing of this service, we believe this is more appropriately categorised as a type of financial advice service (as would be non-discretionary advice on equities).

About transitional arrangements

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

Enter text here.

Proposed transitional arrangements

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

Enter text here.

12. 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.

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

Enter text here.

14. 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.

15. 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

16. 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.

17. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
Yes provided that the alternative designations under the current code continue to be recognised during the 5 year period (the Consultation Document only refers to the National Certificate).
18. 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.
19. 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.
20. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
Enter text here.
21. 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.
22. 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

23. What would be the costs and benefits of a phased approach to licensing?
Enter text here.
24. 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.
25. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
Enter text here.

Demographics

26. Name:
JBWere (NZ) Pty Ltd
27. Contact details:
Ashley Lane, Head of Legal, Risk and Compliance, JBWere,
REDACTED
28. Are you providing this submission:
 As an individual
 On behalf of an organisation

(Describe the nature and size of the organisation here)

29. 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.](#)