Knax Consulting Limited
PO Box 105205
Auckland
REDACTED

31 March 2017

Financial Markets Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

By email: faareview@mbie.govt.nz

Submission: Financial Services Legislation Amendment Bill exposure draft

This submission is made by Knax Consulting Limited, which consults on financial services conduct, compliance and regulatory strategy.

We support the draft bill, other than for these two important exceptions —

- **The extent to which financial advice representatives may give advice:** While the policy decision on FARs has already been made and is not being consulted on, it remains fundamental to the workability of the proposed regime.

  It is raised here because in the form proposed, FAR policy would permit the absurdity that **everyone** subject to the proposed advice laws could choose to be FARs — for example to avoid being subject to the disciplinary committee — leaving New Zealand with no (or few) financial advisers. It undermines all the efforts made by the industry to encourage advisers to aspire to professionalism and to build consumer trust and confidence in the benefit of getting help from a person skilled in the complexities of the financial services world.

  Some of the proposed policy on FARs is beneficial. In particular, the introduction of licensing at a business (versus individual) level is supported: it clarifies responsibility and accountability; it facilitates provision of robo advice; and it streamlines licensing.

  However, advice given by a human adviser is more than an organisational process. When viewed from the perspective of the customer, advice depends — often in large part — on qualities inherent in the adviser personally, such as trust, integrity and professionalism.

  Yet the bill has removed any incentive for an adviser to have professional "skin in the game". Under the proposed law, being an individually registered adviser rather than FAR would be entirely optional — and would attract the added risk of disciplinary action — while providing nothing but cosmetic advantage over being an FAR.

The word "professional" describes a personal rather than corporate concept. Processes are not professional in their own right, the behaviour of people using those processes is. The bill retains "professional" in the context of the *Code of Professional Conduct* and *continuing professional training* (itself an awkward title - the industry universally and with justification uses the broader term "development"). Is it really "professional" as the word is commonly understood, when advisers can structure themselves as FARs and opt-out of personal professional responsibility?

The Australian regime has had to grapple with equivalent issues and has announced the transition to an approach that places far greater weight on individual professionalism, at the very moment that (with this bill) New Zealand is heading towards a model that introduces some of the Australian system's current corporate-licence deficiencies.

Is there a solution? Yes, in making a distinction as to the extent to which the employer dictates the outcome of the advice process. The bill skilfully avoids the sales (with opinion/recommendation) versus advice distinction, but there is probably a compelling case to be made that the customer sees professionalism differently when dealing with a person they know is acting on behalf of the provider. It is here that there is scope to adjust the proposed regime to clarify the distinction between FARs and financial advisers — and reduce the widespread anxiety regarding FARs having "financial advice" in their descriptor — with the following recommendation:

> ***Other than advisers giving advice only on their organisation's own products, individual advisers should be required to be financial advisers (not FARs). [They would still be licensed via the FAP.[1]] FARs would therefore be permitted to give advice only on their organisation's own products.***

- **The structure of the legislation:** While the transfer of the regulation of advisers to the FMCA is supported, the proposed distribution of provisions across the Act is likely to reduce the accessibility of the legislation for advisers who do not have legal training.

  At a minimum, it would be helpful to have notes at the top of Subpart 5A that explain the key other provisions it needs to be read with (especially Schedule 5), and restates or cross references the key definitions.

  The objective of this suggestion is that an adviser should be able to read Subpart 5A and obtain a meaningful general understanding of the provisions, without constant searching through other parts of the Act.

Other than those two points above that go to the overall integrity of the bill, the following comments are made on specific aspects of the bill:

[1] Financial Advice Provider

A. We support the submission[2] dated 15 March 2017 made by the Code Committee, in particular their comments about the "**client's interests first**" provision which is currently drafted as a conflict management provision and not in the broader, more aspirational, form suggested in the policy decisions. Here, there is an opportunity to link the overarching concept of good conduct (refer FMA guide[3]) to the Code's "spirit"[4] and the client-first principle[5]. Whether talking about client-first, client best interests or good conduct, advisers should be exhorted to have structural, process and ethical/professional arrangements in place to deliver beneficial customer outcomes.

   We note the Code Committee's concerns about the perimeter of the regime excluding **accountants and lawyers** and agree that this undermines the integrity of the regime.

B. Although there is no register of FARs, the FMA should have the power to **ban a FAR** from being a financial adviser or FAR, either permanently or temporarily, if the FAR has deliberately or negligently acted outside the processes implemented by the FAP. FAPs should have **whistleblower protection** to report an adviser's or FAR's misconduct to the FMA. If the suggestions in this submission were adopted, there would be no need to extend the FADC role to include complaints against FAPs (consultation question 30) because the banning and whistleblowing provisions would provide adequate consumer protection.

There is no confidential information in (and no objection to the release of anything from) this submission.

Yours faithfully

Angus Dale-Jones
Director

[2] Code Committee submission http://www.financialadvisercode.govt.nz/assets/Code-Committee/Code-Committee-Submission-on-Consultation-Paper-March-2017.pdf
[3] FMA Conduct Guide https://fma.govt.nz/assets/Guidance/170202-A-guide-to-the-FMAs-view-of-conduct.pdf
[4] Background section of the Code
[5] Code Standard 1