

# 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.

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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?

We are not convinced of the need to restrict offers being made during an unsolicited meeting with a potential client for two reasons: 1. the offer in question may be related to a time-bound financial product (investment or other offer) and failure to take advantage of the offer could result in the client/prospect missing out and 2. Consumer protection can be supported through provision of 'free-look' or cancellation entitlements.

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?

Our view is that consumer protection can be supported through 'free-look' / cancellation provisions. We would also support expanding mandatory disclosure obligations where such offers are being made as well as evidence that the client has been made aware of their entitlements.

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

We are extremely concerned about the introduction of a new term: Financial Advice Representative. Our view is that, contrary to the stated intent of providing clarity for the consumer, this term will create confusion in much the same way as the current RFA/AFA has

done. We strongly argue that the term advice or adviser is removed from this category and replaced with e.g. Financial Product Representative or Financial Service Representative. Our view is that there needs to be a clearly understood (from a consumers perspective) demarcation between advice and product 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?

Broadly speaking we are comfortable with most of the proposed licensing provisions. However, we have some concern about 2 elements: 1. FMA license conditions. Our concern relates to how consumers/clients of 'restricted' licensees will be notified of such restriction and whether they would necessarily understand the nature of those restrictions. 2. Licensing of a single body to cover multiple entities. Our view is that the 'parent' or license-holder should be required to register all entities which operate under their license and this should be publicly available on the FSPR (or any replacement register). This would include details of Financial Advice Representatives employed by the license-holder.

## 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?

We generally agree with the concept of client's interest first and that this should also apply to doing anything in relation to the giving of advice as well as the giving of advice itself. However, we are concerned that this has been shifted from the Code to legislation and limited to conflicts of interest. In this context, what is deemed a conflict of interest needs some boundaries. It could be argued, for example, that the receipt of commission from the provider of a product is a conflict of interest when the receipt of such commission has the effect of increasing the cost of the product to the client.

### 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?

Generally speaking we concur with the concept that a provider must not give a representative any kind of inappropriate payment or incentive.

### 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?

If the client-first obligation applies to retail clients, it should also apply to advice to wholesale clients.

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

We are concerned that proposed wording could lead consumers to believe they are receiving financial advice from a transaction which is essentially a product sale in nature. Once again this derives from the proposed Financial Advice Representative title given to what are essentially product sales agents.

## 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?

We don't have an opinion on this.

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?  
No opinion.

### **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?

We are not convinced of the need for direct civil liability for advisers who breach their obligations. However, we have some concern that, with the lack of a register of any kind for financial advice representatives (or replacement term) that an FAR who breaches their obligations could just move to another financial advice provider. We are of the opinion that the register should contain some mechanism for flagrant breaches of obligations by a Financial Advice Representative to be noted against the FAR record for future employers to reference.

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. However, we believe that financial advice providers should still be held liable for any losses incurred by a client where one of their representatives breached their obligations.

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?

In principle we agree with the concept of designation power being granted to the FMA. We are, however concerned that the consultation requirement may be too limited in scope. We believe that a broader consultation obligation should be required to ensure that ALL affected parties have an opportunity to comment on any proposed designation as well as provisions for appeal against a designation ruling.

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

No feedback.

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

No other feedback.

### **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?

We believe that the proposed territorial application of the Act will address some of the current misuse of the FSPR. The territorial application should take effect as soon as practicable after the passing of the bill – with some time provision (6 months?) for affected participants to address any territorial breach.

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?

Yes. As it currently stands, the FSPR provides some utility but further information would be

beneficial for consumers and other market participants who may be looking to engage the provider.

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

As noted earlier in our response, we are of the opinion that a financial advice provider should be required to 'register' all Financial Advice Representatives operating under their license. This should be accessible to consumers.

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 only comment we would have relates to the broker category which has traditionally caused confusion. We would like to see some clarity of the broker category to incorporate something along the following lines: A broking service which handles client funds....

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?

No. We are not comfortable with a requirement for schemes to report what could be a single incidences of breach as currently proposed. Whilst we accept the need to report material breaches, care must be taken to ensure that the reporting requirement is only for multiple material breaches.

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

No other feedback.

### **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?

We do not have an opinion on this.

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

None

### **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?

We do not have an opinion on this provision.

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 have no opinion on this.

26. Are there any unintended consequences resulting from the minor amendments to the

exclusions from regulated financial advice, as detailed above?

Our primary concern relates to exclusions for accountants and lawyers who may not have requisite knowledge or experience about the financial service on which they are expressing an opinion. However, the client to whom they are communicating 'incidental' advice may assume a level of expertise. Our view is that the care, diligence and skill and client-first obligations should be extended to such interactions.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?  
Our reading of the proposed membership criteria and proceedings are appropriate and clear.
28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?  
Our view is that any impact analysis should also have regard to practical implications for the financial advice industry in New Zealand.
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?  
We are of the opinion that the proposed wording is adequate.
30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?  
Yes. Our view is that all financial advice should be subject to consistent disciplinary provisions.
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?  
Our view is that maximum fines should be commensurate with the relative size of the market participant using a scaled approach based on the number of advisers and/balance sheet of the financial advice provider. We would suggest 10-50 times the maximum fine which can be imposed on an individual financial adviser.
32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?  
None at this stage.

### About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?  
We believe that the objectives for transitional arrangements should include measures designed to ensure that there is a distinction between advisers who are currently authorised those who are registered as advisers under the transitional model. This distinction could be achieved by retaining the RFA and AFA titles during the transitional period.

### Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?  
Yes. A staged transition enables participants to progressively transition to the new arrangements.

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. We believe so.
36. Do you perceive any issues or risks with the safe harbour proposal?  
None at this stage.
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?  
As noted above, we believe that the distinction between AFAs and RFAs should be retained throughout the transitional period.
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?  
Yes. We believe so subject to the following: 1. experience-based provisions for experienced practitioners being made available and 2. Educational standards set at a level consistent with the current level 5 certificate.

### 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?  
Yes to the extent that the AFA has completed level 5 certificate for the advice type for which they are being licensed. AFAs have already met level 5 certificate and ongoing professional development obligations.
40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?  
Not sure which this is required as long as ongoing professional development obligations are being met by the AFA. If this relates to AFA's returning after a period of absence, our view is that 2 years should be considered.
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?  
We don't believe so.
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?  
For purposes of clarity, we believe that this should be legislated for.
43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?  
Absolutely. There are a significant number of experience practitioners in the industry, many of whom do not have a formal qualification. They do not need to relearn about product or financial services markets and they should be allowed to demonstrate via a competency assessment.
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?  
Our view is that continuous experience of 5 years or more should be considered for competency assessment purposes.

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?  
Again, for the purposes of clarity, we believe this should be legislated.

### Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?  
The proposed transitional licensing model does not appear to have any obvious additional costs  
The key benefits allow for the introduction of key provisions contained in the legislation (e.g. the code and licensing arrangements) earlier than would otherwise be the case.
47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?  
The most effective incentivisation would be to incorporate tiered pricing on licensing over the course of the transitional period (e.g. 50% discount for transition during 1st 12 Months and 25% in next 6 months, etc.
48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?  
None

### Demographics

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New Zealand Financial Advisers' Association Inc

50. Contact details: David Yates, General Manager  
**REDACTED**

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 As an individual  
 On behalf of an organisation  
Professional Body for Financial Advisers

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