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.

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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?
   I feel that no self-respecting, professional adviser would make an offer during an unsolicited meeting.

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?
   The FAP should also provide advice in writing with provisions for a cooling off period before the purchase is finalised.

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

   The term Financial Advice Representative needs to be amended to “Product Representative”. The Bill needs some consistency in how it treats a sales situation and one where advice is involved (whether this involves a product or not). I note that the definition of financial advice at cl431B does not appear to contemplate that insurance or lending products be bought or sold as part of a planning process. This suggests that insurance and lending products are viewed as being subject to a sales process only. This requires the word advice to be removed where there is no planning process, otherwise it denigrates the greater value to the consumer derived from

advice provided within a planning context.

The distinction between sales and advice is an important one in that the consumer needs to be clear about the nature of the interaction they might have when seeking to address issues/problems they need help with. In my view the term financial adviser should be defined as to include only where a planning process (as contemplated by s431B (1)(b)(i)) is applied to the resolution of client needs. Where no planning is carried out Product Representative more accurately describes the service being provided.

While it is important to get the terminology in the Bill clear and correct I also offer the view that the legal terminology relating to roles is unlikely to find its way into the retail, client-facing domain. For example I would expect to see a bank teller continue to be called a bank teller and an insurance agent/sales person/broker continue to be called such by the public. What will be important is that the disclosure regime causes the consumer to understand clearly what services and products the person they are before can provide to them, whether any planning service will be involved, along with any limitations on what they can offer/recommend, how they might be remunerated etc, etc. Clearly defining this function at the point of consumption will also determine what duty the salesperson/adviser has to the consumer.

If it is the intent of the Government that no financial product should be purchased without there being an advice process then I feel the definition of financial advice in s431B needs to include the design of a lending or insurance plan. Subsection (b) refers only to design of an investment plan.

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   Comment on the Exposure Draft is problematic in that it only sets out some of the framework for the advice industry. (I would like to be able to apply the term "profession" but aspects of the Exposure Draft that do not place full responsibility upon individuals for their actions mean that it will sadly remain an industry – unless a different approach is taken).

   We do not have details of the licensing requirements and hence we cannot be confident about whether they will further the intended aims of the Bill. For example if licensing imposes further costs on an advice business the costs of advice and/or products will rise further and fewer consumers will avail themselves. Evidence of this is there to be seen in the US, UK and Australia, however NZ seems intent on following the same paths used overseas that have seen greater costs, fewer advisers and reducing access to the more affluent – all without providing demonstrably better outcomes for the consumer. In the foregoing 'costs' extends to the input of time as well as direct expenditure.

   Advice businesses have already experienced significant rises in costs through a range of regulatory requirements. Care must be taken not to impose further unnecessary cost burdens. These will also act as a disincentive to the setting up of new businesses.

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 and Yes. However, I hope that the proposed wording of cl431H does not survive in its

current form. At the least the words “or the interests of any other person” need to be removed. “Any other person” could be construed far too widely and give rise to uninvolved parties making complaints, or worse, perhaps mischievously.

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?
I support the provisions in the Bill in this respect

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?
The client-first duty should extend to those who advise wholesale clients. This requirement is consistent with the overall FMCA purposes and fair dealings provisions, not to mention a part of professional ethical behaviour. To omit its application to wholesale advice is to leave a gap in financial sector regulation.

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

The purpose statement of the Bill in cl431A is deficient in that it does not bring into it the aspect of encouraging professionalism and integrity as is provided for by the definition in the Financial Advisers Act: “The purpose of this Act is to promote the sound and efficient delivery of financial adviser and broking services, and to encourage public confidence in the professionalism and integrity of financial advisers and brokers.” The inclusion of concepts of professionalism and integrity must be key concepts to retain as they provide a reference for the spirit of the Bill and the contentof not only the Bill but of the Code.

Once again it is difficult to comment fully on Part 3 as the Code is yet to be drafted along with the Disclosure regulations. These are significant aspects of the regulation of advice and sales and without drafts of these at hand it is hard to formulate a full appreciation of how the regime will function (or not).

I note there is a tension between having the law well defined and the more principles-based approach of the Code. I have heard comments to the effect that we need certainty in the law that applies (implying prescriptive definition) and that ‘slogans should not be put into law’ (such as Code Standard 1 is seen by some to be). It is important that the Bill provides a good framework and that Regulation continues to allow for advice to be delivered in diverse ways to a very diverse market place. Prescription tends to close down options and increase costs. I have direct experience with the implementation of DIMS regulations and feel that the heavily prescriptive nature of these regulations has caused higher costs and a number of adverse outcomes for clients that could have been avoided.

The principles based approach of the Code produces more uncertainty for the advice provider as to how they arrange and deliver their business and it provides more risk for the FMA, however it is a far better way to approach the regulation of advice.

Section 431H defines putting client interests only in terms of conflicts of interests. I my view acting in a client’s best interests can manifest itself in a number of differing ways, some of which are stated in various Code Standards. For example of not acting in the client’s best interests can include: not acting in a timely manner where this is important to client outcomes; not taking time to understand the client’s situation fully; omitting to provide advice or point out other issues important to a client situation; advice not correctly matching the client’s needs; not researching an issue fully enough.

Acting in a client’s best interests can encompass a wide range of professional conduct, not just conflicts of interest. I agree with the submissions of the Code Committee in their paragraphs 24

to 29. I note also that conflicts of interest are addressed by Code Standard 5 already and would hope these provisions are retained which would adequately address the issue.

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?
   No submission

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 submission

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?
    In principle any client-facing individual should be responsible for their conduct and face consequences for poor conduct. As such an FAR should be able to be subject to disciplinary action by the regulator. There needs to be in place sufficient checks and balances for both employers and employees. We see in Australia many instances of where employees have "gone rogue" within what is regarded as a well regulated regime. There need to be constraints against an employer imposing unfair or illegal requirements on employees also, and there seems to be adequate provision for this in the Bill.

    I agree that Financial Advisers should have direct civil liability for breaches.

    I support the inclusion of a "whistle blower" clause in cl431P. I feel, however, it would take an employee with a lot of courage and a reasonably good knowledge of the FMCA Act (as amended) to take action under this clause.

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?
    I think a successful defence would need to rely on the demonstrated outcomes of the processes, ie a process needs to be more than just a manual on a shelf - it needs to be effective in practice.

    Perhaps it would be useful to impose a strict liability approach on the management of FAPs – in other words if they have offences committed by their employees they are implicitly guilty to start with and must subsequently prove their innocence.

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?
    No submission

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

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?
    I support the provisions of the Bill with respect to the FSP Act.

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?
    I do not think this would be helpful. I doubt the FSPR gets much use by the public.

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?
    No submission

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
    I support the comments of the Code Committee in their submission in this respect, paragraphs 34-40.

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?
    Yes. The definition of wholesale in the FMCA has a higher threshold for an entity. A higher threshold would bring more consumers under the retail protections of the Act. The lower threshold in the Financial Advisers Act allows too many people to be deemed wholesale given the extreme increases in the value of housing and rural properties. Few of these folk would have the sophistication and knowledge implied by the wholesale category.

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?
    No submission

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?
    I support the comments of the Code Committee in their submission in this respect, paragraphs 34-40.

28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
    No submission

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?
    Yes

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. It would be a good outcome if Court proceedings were not needed for all breaches although the FADC would need higher penalties available to it. This would act as a deterrent to larger FAPs arbitraging the system toward lower cost outcomes.

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?
    Unsure about what the maximum size of fine should be but the FAP is gaining significant benefits through being able to self-regulate their advisers and I feel with this comes significantly greater responsibilities. Therefore greater potential penalties for breaches for larger organisations are needed.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    I support the proposal by the Code Committee in their submission paragraph 32 that lawyers and accountants be subject at least to the proposed s431i as a condition of their relief.

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?
    Staging makes sense given the likely numbers captured by the proposed regime.

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?
    I think some flexibility in timeframes will be needed. I think the proposed timeframe for Code development looks ambitious as does the expectation for the Bill to be passed before the General Elections. I would expect dates in the Consultation Paper will need to be reviewed and reset well in advance as soon as some lag looks evident.

36. Do you perceive any issues or risks with the safe harbour proposal?
    Some form of safe harbour is essential given the magnitude of the changes proposed and the need to continue to ensure services are available to the public. I think there needs to be some additional thought given to the issue where new staff can be taken on under the safe harbour provisions, especially where firms are not QFEs. There can be quite a lead time to qualify staff through to (what are presently unknown) minimum competence standards.

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?
    No submission

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?
    I think this timeframe could be too short. Once again we are asked to comment when the detail is unknown. In this instance it is the competency standards and recognition of existing qualifications/prior learning that we do not know. For some, working and gaining an additional qualification could take a couple of years, even at a Level 5 academic requirement.

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, but not for a limited time only. All AFAs have met certain requirements for qualifications, competency and have on-going CPD requirements. This should be sufficient to allow them to transit without barriers into the new regime. If they maintain their authorisation and CPD requirements there should be no sunset clause on their automatic inclusion into the new regime. This assumes standards under the present Code remain substantially the same.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    No. The exemption should not expire, given it is likely that there will be on-going CPD requirements through and beyond any transition period. I find it inconsistent to be thinking

that old knowledge and qualifications should no longer be acceptable. Are lawyers, doctors, dentists, engineers, accountants etc etc required to get a new degree every 5-10 years?

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?
    No

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?
    The Code Working Group should be left to do this work. It is going to get complicated and is best addressed in Regulation rather than Legislation.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    For AFA's no, as they have been subject to the Code requirements already. I feel RFA's should go through a similar process as did AFA's when they were first authorised and/or are currently authorised. Once again there is difficulty in answering this. If Code requirements for existing AFAs substantially remain the same no competency assessment should be needed.

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?
    see answer to Q43

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?
    see answer to Q42

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    No submission

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
    I do not think that the ability to remain in business will be sufficient incentive to get licenced in good time! Good communication by FMA to the industry should encourage folk to take action. Clarity about what is required will be important.

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

Demographics

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    REDACTED

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

    (Describe the nature and size of the organisation here)

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