

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.

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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?

Yes, there are circumstances where this may be appropriate. For example where a consumer approaches a FAP for a Mortgage, a Credit Card or Consumer Finance, it is understandable that the conversation could turn to providing protection for the debt. Whilst the original approach was not about Risk insurance, arguably an unsolicited offer could be made as a natural course of the conversation.

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?

If the unsolicited approach was completely “out of the blue”, ie. It was not linked to the sale of any other financial services as described above, then there should be a cooling off period. No sale should be able to be finalised until at least 14 working days had elapsed. This is different to the existing 14 day “free look” that applies to Risk insurance sales, as that is a negative option – ie. If the client does nothing then the contract is put in place. What we are proposing is that unless the client positively confirms the contract, in writing, then it is not allowed to be actioned.

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

4. Do you have any feedback on the drafting of Part 2 of the Bill?

The main issue here is the distinction between Financial Advisers and Financial Advice Representatives.

Arguably, people under both designations will provide Financial Advice -where financial advice is defined as “making a recommendation, or giving an opinion about acquiring, holding or disposing of a financial product”. The key differentiator is who the Adviser is acting on behalf of.

Typically, the Financial Adviser is acting on behalf of the consumer – attempting to provide them with the best product that suits their needs, based on a researched approach. The FAR is acting on behalf of their FAP, and can only provide a product solution from the limited range that they have. It may well be the best that they can offer to suit the client’s needs, but not necessarily the best available in the market.

The key question is whether the designations that are proposed make this distinction clear in the mind of the consumer.

Perhaps the words “Financial Advice Representative” could be replaced with “Specialist”, as in ANZ Insurance Specialist, or ASB Lending Specialist. This denotes the people in the FAP who have the specific skills and competencies to provide advice on Insurance, Lending or Investment products provided by their FAP. They should still have to explain the limitations of their advice, prove that they have the competency to provide advice (through education) and be subject to CPD requirements to ensure that this knowledge is kept current.

As well as this naming convention, we would propose that all people giving Financial Advice should be registered on the FSPR. There have already been instances of individuals having been fired from one organisation for misspelling, and turning up at another organisation to repeat the same behaviours. Without these people being registered there is no tracking mechanism. If all Advisers and Specialists were registered, the FAP should be required to report to the FMA any instances of significant breaches of the Code, and this should be marked on their record for all to see.

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, we are happy that the concept of putting the “clients interest first” – ahead of the adviser or the FAP – is appropriate for all advisers, however this does not really cover the issue of “in the client’s best interests”.

An adviser may perceive that they have no conflicts of interest but, for example recommend to a client that they take out a product that (if a budget was completed) the client would not be able to afford or alternatively recommend a Trauma product to replace an Income Protection product where the clear need to protect income in the event of accident or sickness.

Are these circumstances adequately covered by a definition that seems to be more concerned with guarding against conflicts of interest?

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?

We assume that by “inappropriate” you mean an incentive that is likely to lead or encourage the representative to put their interests ahead of the client – ie by recommending a product or

service that is inappropriate for the client, by overselling the client or by selling a product that the client doesn't need or cannot afford.

This would appear to be a sensible proposal, as incentives that encourage or promote bad behaviours should be banned, however employers must still be able to provide appropriate performance based incentives – whether this be structured as a commission, bonus, promotion or some other form of reward/recognition.

Selling any type of product or service is inherently difficult, and reward structures will usually not only include a strong performance based element, but should also reward sales people for quality as well as quantity. Part of the answer must be transparency and ensuring the client is aware of any conflicts that may influence the advice.

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?

Yes, even though Wholesale clients may have significant assets, that does not mean that they are necessarily sophisticated investors (eg the widow whose husband dies and he was the financially savvy person), so the client first principle should still apply.

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

As noted above, we think that it should be a requirement of FAPs to report breaches to the FMA, and that registration of FARs should also be mandatory.

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 comment

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 comment

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?

No, we believe this may unduly drive advisers out of the industry, or alternatively just encourage them to hide as FARs in a FAP.

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, you can put all of the rules, audits and safeguards in place, but there will still be some people who flout them or operate under the radar.

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 comment

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

No comment

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

No further comment

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?

No comment

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?

It may be useful for the FSPR register to record who provides the audit function to ensure that an Adviser or FAP complies with FAA, FMC and AML/CFT regulations.

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

All FAs and FAPs should have to register with a DRS service, and yes, DRS providers should have the right to terminate (and publish!) anybody who they do not feel is engaging or acting appropriately.

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?

No further comments that those already provided.

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.

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

No.

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 comment

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

No

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 for consistency, but \$1 mill is too low a threshold – it should be at least \$3 mill of net assets – not including residential property
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?
Yes
26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
The only concern we have is the "incidental" nature of advice that is ancillary to the carrying on of a business. For example, if a car dealers principle activity is selling cars, then the provision of insurance may be seen as incidental – but surely those consumers deserve the protection of the law around the provision of financial advice. Similarly a real estate agent who offers Lending advice or an Accountant who offers KiwiSaver advice.
27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
No
28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
Yes
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, although provision should be made to be able to differentiate the complexity of advice – for example domestic versus commercial Fire and General, personal versus business insurance, retail versus commercial lending and a wrap service versus KiwiSaver. An adviser may be competent to provide advice in a simple "mum, dad and the kids" scenario but lack the skill and experience to deal with situations involving significant complexity. This can easily be dealt with by having relevant education advice modules that need to be completed to demonstrate competency.
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, if it provides a cheaper and more effective process – particularly when many FAPs may be sole traders, virtually indistinguishable from the person giving the financial advice.
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?

\$1million – but obviously relevant to how extensive, serious, blatant and regular the breach was.

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

No

About transitional arrangements

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

Yes, there should be specific comment about the need for wide and regular communication as the transition progresses. In addition, the transitional arrangements should not result in a wholesale exodus of existing advisers, or make it more difficult to recruit and train new advisers.

Proposed transitional arrangements

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

Yes, it will give industry participants time to adapt and/or comply.

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?

No, we think that this should be lengthened to 12 months, with a further 18 months to be fully licensed.

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

The only risk we see is that some older advisers may see this as an opportunity to just continue doing what they have always done up until February 2021 when they leave the industry.

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 comment.

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.

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?

No, we believe it is unlikely that the new Code will have competency standards significantly higher than the existing Code which they must abide by. If RFAs and QFE advisers have to step up within two years, surely AFA's should be able to do the same.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?

See above

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?
Yes
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?
See above comments
43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
Yes, book learning only goes so far. If an adviser can show, through regular independent audits, that they are complying with the legislation and the Code through their day to day activities, then a formal qualification may not be necessary
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?
No, we think 5 years is more appropriate.
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?
As part of the Code of Conduct

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
No comment
47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
No
48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
No

Demographics

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REDACTED
51. Are you providing this submission:
 As an individual
 On behalf of an organisation
- SHARE is a cooperative Adviser Network of 78 Financial Advisers, offering advice in the areas of Insurance, Mortgages, Investments and Fire/General. Not all advisers offer advice in all areas, but approximately half are AFA's.

52. 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.