



Submission to the MBIE on the FAA Review

This submission is made from Trade Me Limited (“Trade Me”). Trade Me provides New Zealand’s largest online marketplace, where our approximately 4 million members can buy and sell items. Trade Me provides the venue, but transactions are made directly between buyers and sellers based in New Zealand and internationally. Every day over 700,000 New Zealanders use the Trade Me marketplace.

Trade Me is not a financial adviser, but we do:

- operate Trade Me Insurance where clients can purchase general insurance products underwritten by Tower; and Life Direct, a life, health and other insurance aggregator which provides clients with insurance information and allows online comparisons. Trade Me Insurance and Life Direct do not provide personalised advice on insurance products, and do not act as brokers. Rather we provide information and services which assist consumers to identify and obtain suitable insurance products direct from the insurer. We would be willing to provide commercially sensitive information on the scale of our operations if that would assist.
- offer payment products (especially Ping and Pay Now), such that some of the regulation relevant to financial services applies to us (e.g. disputes about our payment products can be referred to the Finance Dispute Resolution Service scheme). These products are available on our online marketplace, not our insurance websites.

When providing these products and services, Trade Me aims to provide greater transparency and choice to consumers about insurance products which empowers consumers to make sensible financial decisions. MBIE now have the opportunity to ensure consumers continue to benefit from these types of comparison services, by ensuring they fall outside the definition of ‘financial advice.’

Over the past 18 years of operating online we’ve found that laws work best when they are:

- straightforward and easy for consumers to understand and apply;
- practical for businesses to operationalise and enforce with clear definitions;
- implemented in a pragmatic way;
- consistent online and offline; and
- sufficiently technology neutral to withstand the test of time.

We’ve focused on these principles when considering the draft regime.

We do not provide financial advice, so we don’t have extensive comments on the exposure draft. However, we have provided below some responses to your submission questions 3, 5 and 32.

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

Given the nature of the comparison websites we provide we seek clarity on:

- how the replacement regime will apply to websites which provide information and comparison tools, but do not offer financial advice or brokerage services;
- whether the revised legislation is clear regarding what activities constitute the provision of information and what activities are the giving of advice;
- whether the legislation will specifically clarify that entities that merely give information are not financial advisers.

We are pleased to see the continued focus in the Exposure Draft on advice and advisers.

We support the inclusion of technology neutral definitions, which will pave the way for robo-advice platforms to be introduced. To be considered robo-advice it is important that there is a personalised financial advice element. For example, Life Direct offers generic comparison tools that rate policies offered by different insurers against different criteria. These don't provide any advice to individuals on which criteria are important for each individual's personal circumstances, and don't recommend any particular products. We think these comparison tools are an important consumer product, and should not be considered robo-advice platforms. They are merely platforms, where consumers can receive insurance estimates based on the supply of some high-level personal information.

We support the inclusion in the definition of Financial Advice Representatives (FAR) of the phrase "to give financial advice on A's behalf". It is important that entities and platforms that merely provide information and comparison tools are not considered FARs. This is important for businesses like LifeDirect but also for websites such as sorted.org.nz. This distinction is also important for entities that assist individuals to prepare information required to submit insurance applications (such as the services offered by community entities such as Citizen's Advice Bureau or translators) and other entities that provide information on insurance options.

We have seen some commentary on the Exposure Draft that has suggested the term FAR should be changed to "salesperson". If this term does change, it is important that any new replacement term makes clear to consumers that there is an advice component. In particular, we do not think any new term or definition of FAR should cover customer support representatives. LifeDirect has employees who assist consumers with applications to insurers and provide customer support, but they do not provide advice. Also, it would be unnecessarily onerous if every insurer's customer support representatives fell within the definition of a FAR. We think the inclusion in the definition of the word 'advice' is important and should be retained.

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?

Trade Me believes that the duty as currently drafted will be difficult to implement. We are concerned that the expansive drafting of this duty may fuel uncertainty around when it is acceptable to give

generic information about different financial and insurance products. In particular, the inclusion within the draft section of the phrase “doing anything in relation to the giving of advice” means that the duty could be interpreted in a very broad manner. Further, the duty could be breached by deciding to only provide generic information, where it would have been in the client’s interest to provide personal advice. Consistent with this, we note that MBIE’s consultation paper suggests that this duty would require the adviser to put the client’s interests first in determining whether to give information only or financial advice.

We believe the impact of this uncertainty would lead to a material reduction in the provision of general information by advisers and other entities (as advisers would be concerned that, without asking personal questions to confirm that the provision of generic information is appropriate, the provision of generic information may inadvertently give rise to a breach of this duty).

Also, if a company regularly provides only generic information to consumers, but was viewed by a regulator as having given some advice in a particular instance, would this duty then apply to all other instances where only information had been provided?

To ensure consumers get the benefit of generic information about particular financial and insurance products (for example, information on the type of consumers the products are typically suitable for), we think it is important that businesses are not unduly concerned about the risk of inadvertently breaching this duty when providing generic information about products and options.

Accordingly, we consider there should be a carve out from this duty for the provision of generic information, such that the duty will not apply to the provision of non-targeted, generic information to a wide audience. If there are concerns about generic information being given by advisers, then a better approach would be that where personalised advice is being provided the financial adviser or FAR should have a duty to consider and communicate whether any generic information that they have provided is relevant for the individual. Alternatively, safe harbours could be developed to provide clarity so that businesses and individuals understand where it is acceptable to give only generic information. Where an entity is in good faith operating within these safe harbours, it should not be concerned with breaching this duty.

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

We have some observations on Schedule 2 of the Bill, in particular on the draft wording for clause 6 of Schedule 5.

We support the exclusions from the definition of financial advice outlined in draft clause 6 of draft Schedule 5 as a great starting point. However, we recommend this clause be expanded to allow for regulations to be able to be promulgated to provide safe harbours which clarify activities that are not financial advice. Safe harbours would provide clarity to entities such as Life Direct and Trade Me Insurance, where operations are structured in a manner that ensures that no advice is provided. Such safe harbours would also be of benefit to other information organisations and services, such as budgeting advisers, Citizens Advice Bureau, sorted.org.nz, Consumer NZ comparisons and the like.

We further believe that safe harbour regulations would benefit consumers. In this vein, we note that the FMA has recently released some guidance on class and personalised KiwiSaver advice (see <http://fma.govt.nz/assets/Consultations/161108-Consultation-KiwiSaver-advice-guidance.pdf>). The need for this guidance demonstrates that consumers will be disadvantaged if there is uncertainty. On page 4 of this guidance, the FMA states “We recognise that if our view of what can be delivered as class advice is too restrictive, the likely result is that firms will not feel comfortable enabling their staff to give class advice – in effect, any advice – and New Zealanders are less likely to get the help they need.”

While the class advice construct is being changed in the proposed replacement FAA regime, the potential for grey in the interpretation of what is information and what is financial advice will remain. It is important that the parent legislation includes appropriate mechanisms for clarification, and in our view the ability for the Minister to issue safe harbours in regulations would be a significant improvement to the current definition of financial advice.

Thanks for opportunity to comment on the Exposure Draft. Please do not hesitate to contact Lucy Elwood should you wish to discuss any of the points we have raised.

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