SUBMISSION

to

Ministry of Business, Innovation & Employment

Review of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008

Issues Paper

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INTRODUCTION

1 The Trustee Corporations Association of New Zealand Inc (**TCA**) is the industry body representing New Zealand's statutory Trustee Companies. TCA's members are Corporate Trust Limited, Covenant Trustees Limited, Public Trust, the New Zealand Guardian Trust Company Limited and Trustees Executors Limited.

2 For the year ended 30 June 2014 (2015 figures not yet available) TCA members managed in excess of 22,000 personal trusts, 13,000 agencies (including estate management) and prepared over 8,000 new wills.

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3 Statutory Trustee Corporations have the benefit of an exemption at section 14(1)(h) of the Financial Advisers Act 2008 (**FA Act**) in respect of their trustee services in the areas of will-drafting, estate management, family trust management and advice, and related fiduciary services.

4 This exemption was not specifically mentioned in the Ministry's consultation document. However, in the context of the more general question about the scope of the FA Act's exemptions, TCA wishes to make it clear that this exemption should be retained as it is relied on extensively by its members.

Fiduciary services traditionally provided by TCA members

5 The services traditionally provided by TCA's members include assisting clients with the drafting of wills, acting as the executor or administrator of deceased estates and acting as Trustee or co-Trustee of family trusts and other trusts.

6 TCA members also provide related fiduciary services, such as assisting in the drafting of enduring powers of attorney under the Protection of Personal and Property Rights Act 1988 and acting as property attorney in respect of such arrangements or as Court appointed property manager.

Application of the FA Act to fiduciary services

7 In 2010, TCA received legal advice that providing such services would, in the absence of the exemption in section 14(1)(h), likely constitute 'financial adviser services' under the FA Act and therefore be subject to the FA Act's attendant regulatory controls and obligations.

8 For example, assisting with the drafting of a will would usually involve providing a recommendation or opinion as to the acquisition or disposition of financial products. This is likely to be financial advice.

9 Similarly, the administration of a deceased estate, acting as Trustee of a family trust or acting as property manager or property attorney under an enduring power of attorney, may involve deciding which FMCA financial products to acquire or dispose on behalf of beneficiaries or donors. These may be discretionary investment management services.

10 In each case, it is likely the client will be a 'retail client', the service 'personalised' and the financial products will include 'category 1 products'. This means that without an exemption the services would need to be provided through an Authorised Financial Adviser (**AFA**) with an appropriate scope of authorisation and otherwise subject to the regulatory controls and obligations of the FA Act.

Reasons for the exemption are still valid

11 In the process of implementing the FA Act, Parliament enacted the exemption at section 14(1)(h) in recognition of the fact that imposing the FA Act's regulatory controls and obligations in respect of statutory Trustee Corporations' traditional fiduciary services would be inappropriate, for the following reasons:

- Requiring these services to be provided through an AFA and subject to the regulatory controls and obligations of the FA Act would limit the availability of these vital fiduciary services and significantly increase the costs involved.
- These fiduciary services should be provided by a person who has the benefit of the institutional knowledge and experience of the relevant Trustee law – both statute and common. These are not competencies focused on by the FA Act regime.
- The FA Act was never intended to regulate these kinds of fiduciary services. They are not 'true' financial adviser services in the commercial sense. They are traditional fiduciary services that only fall within the scope of the 'financial adviser service' definition due to the broad scope of the FA Act's drafting.

12 **These reasons remain as valid today as they were at the time the exemption was enacted in 2010. Nothing has changed that would warrant a departure from the current position and there has been no evidence of any problems with the exemption.**

13 The risks of removing the exemption include:

- Limiting the availability and increasing the costs of these vital fiduciary services to those who need them the most. Some of the services provided under the exemption are charged at less than or, at best, equal to the actual cost of providing that service. If the exemption is removed the costs will inevitably rise and this will be passed on to the consumer. Less wealthy consumers may not be able to afford the increased cost. This would run counter to one of the stated goals of the current review – to make these kinds of services more available to consumers.
- It would also be contrary to the New Zealand Treasury's best practice regulatory principle of proportionality ie that the burden of the rules should be proportional to the benefits that are expected to result. Fiduciary services is a specialist area with its own regulatory framework and is not a focus of the FA Act's competency framework. Imposing the FA Act's competency framework on the provision of these Trustee services would only increase cost and inefficiency, without any corresponding benefit to consumer outcomes.

No regulatory arbitrage

14 As noted above, the scope of the section 14(1)(h) exemption is limited and only applies to a statutory Trustee Corporation's traditional fiduciary services. However, to complete the picture, TCA notes that, in addition to the traditional fiduciary services mentioned above, some of its members also provide 'true' financial adviser services as part of their 'wealth management' business lines. These 'true' financial adviser services include standalone financial advice, model portfolio offerings[1] and personalised investment management and investment planning.

15 Where 'true' financial adviser services are provided, TCA's members do not (and, in TCA's view, cannot) rely on the section 14(1)(h) exemption. Instead, they must (and do) comply with FA Act. It follows that the section 14(1)(h) poses no risk of regulatory arbitrage and does not confer any competitive advantage on TCA members in the financial advisory

[1] We note model portfolios would be 'class DIMS' requiring a market services licence under the Financial Markets Conduct Act 2013 where they are provided as a retail service. For the sake of simplicity, we have not referred to this distinction in the body of our submission. However, we note here that where class DIMS are provided as a retail service, TCA members will seek a market service licence from the Financial Markets Authority and that it is recognised the exemption at regulation 182 of the Financial Markets Conduct Regulations 2014 would not apply.

market. In this regard, TCA members are on the same regulatory footing as other businesses.

16 This may contrast to the position for lawyers and accountants, the exemption for whom was given special attention in the consultation paper. In some cases, lawyers and accountants may be involved in providing 'true' financial advisory services in the context of their professional activities. This is particularly the case for general practice lawyers and accountants operating in provincial areas where there is less scope of professional specialisation and they may be expected to take on the more holistic role of 'trusted adviser'. In respect of these kinds of services, lawyers and accounts are currently covered by an exemption whereas TCA members are not.

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