# How to have your say

## Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the questions raised in this document.

- Submissions on the questions in Part 3 of this paper (relating to the Financial Service Providers Register) are due by **5pm on Friday 29 January 2016**.
- Submissions on the questions in Part 1 and Part 2 of this paper are due by **5pm on Friday 26 February 2016**.

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 filling out the submission template online.
- By attaching your submission as a Microsoft Word attachment and sending to ***faareview@mbie.govt.nz***.
- By mailing your submission to:

  Financial Markets Policy
  Ministry of Business, Innovation & Employment
  PO Box 3705
  Wellington
  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 MBIE's policy development process, and will inform advice to Ministers on the operation of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

We may contact submitters directly if we require clarification of any matters in submissions.

Submissions are subject to the Official Information Act 1982. MBIE intends to upload PDF copies of submissions received to MBIE's website at ***www.mbie.govt.nz*** and will do so in accordance with that Act.

Please set out clearly with your submission if you have any objection to the release of any information in the submission, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information under that Act.

If your submission contains any confidential information, please indicate this on the front of the submission, mark it clearly in the text, and provide a separate version excluding the relevant information for publication on our website.

MBIE reserves the right to withhold information that may be considered offensive or defamatory.

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review.

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## Chapter 3 – Barriers to achieving the outcomes

1. Do you agree with the barriers outlined in the Options Paper? If not, why not?
   Yes, however noting that (i) advice provision currently works well in many situations and (ii) advice and adviser standards are stronger and more consistent since FAA implementation.

2. Is there evidence of other major barriers not captured in the Options Paper? If so, please explain.
   While your explanations go some way to considering the adviser's perspective, the headline barriers are written predominantly from a consumer perspective. An additional barrier from an adviser perspective would be helpful, along the lines of it being "hard for advisers to provide common-sense, straightforward advice because of regulatory process restrictions". The central issue here – without detracting from the validity of the other barriers you identify – is that the focus on process-based regulatory solutions (licensing, disclosure, conduct requirements, reporting) rather than on structural and/or incentive-based regulatory approaches, adds significant complication to all advice business and to the experience of the client.

## Chapter 4 – Discrete elements

3. Which options will be most effective in achieving the desired outcomes and why?
   Please read this in conjunction with our comprehensive package set out at question 35. [4.1] Options 1 (removal of class/personalised distinction) and 2 (removal of category 1 and 2 product distinction) would be effective. We do not oppose Option 4 (wholesale/retail opt in) but are unconvinced of its effectiveness in achieving the outcomes. [4.2] Option 1 (licensed entity delivering advice through technology) would be effective, particularly if the Code is used as recommended at question 9 below. [4.3] Options 1 (ethics for all) and 2 (permit sales) would be effective. [4.4] We believe all the competency options would benefit if they were structured around Code Committee discretions, as we explain at question 15. [4.5] We support option 2B (individual licensing supported by Code and Disciplinary Committees).

4. What would the costs and benefits be of the various options for different participants (consumers, financial advisers, businesses)?

Please read this in conjunction with our comprehensive package set out at question 35. [4.1] Options 1 (removal of class/personalised distinction) and 2 (removal of category 1 and 2 product distinction) primarily benefit consumer access. They also simplify the advice process. [4.2] There are potentially enormous societal benefits to allowing technologically-based advice. There are also benefits from technological delivery of advice for the adviser profession, including promoting the use of advice generally, supplementing a human adviser's expertise, and helping to highlight where a traditional adviser-client relationship is beneficial. [4.3] We consider that the articulation of ethical standards for RFA would, if anything, be helpful, noting that they are currently subject to the very broad test of "care, diligence and skill". The distinction between sales and advice is likely to boost the value that customers place on true advice. [4.4] From an adviser's perspective, formal competency requirements are one of the most costly (financial and time) aspects of the regime. From a consumer's perspective, the adviser's academic achievements are often less significant than their relationship skills and product knowledge. We support progressively lifting adviser standards, but recommend – given these substantial potential qualitative and quantitative costs – that transitional arrangements are put in place for RFAs – see question 15 below. [4.5] Option 2B is the most cost neutral option compared with the current position. In terms of qualitative costs, we disagree with your comment that this approach may lead to the standard setting process being captured by some advisers.

5. Are there any other viable options? If so, please provide details.
   Please read this in conjunction with our comprehensive package set out at question 35. [4.1] If Options 1 (removal of class/personalised distinction) and 2 (removal of category 1 and 2 product distinction) are adopted, we recommend giving the Code Committee an explicit ability to designate advice complexity tiers, with the applicability of particular Code (client care and competence) Standards switching on or off depending on the tier relevant to a particular advice situation. We suggest that the FAA should permit the Committee to designate those tiers based on any indicator of advice complexity (perhaps citing in the legislation some non-limiting examples, for instance: the nature of the client or client service, the type of product, the technology used for advice delivery and whether the advice provision was a continuing service). We recommend that the tier distinction apply only to the Code itself, and not to how advisers are badged (ie no Option 3 "expert adviser") or how they are authorised (ie only one class of licence). [4.2] We recommend at question 9 below that your Option 1 be expanded by giving the Code a role in respect of technologically-based advice. [4.3] We recommend at question 12 a practical approach to monitoring advisers' conduct and ethics, and at question 13 how to approach sales. [4.4] We recommend a greater role for the Code Committee – see question 15 below.

## 4.1 Restrictions on who can provide certain advice

6. What implications would removing the distinction between class and personalised advice have on access to advice?
   Consumer access to advice would improve because there would be no incentive for advisers to restrict their service to a class service. Also, the advice process would be simplified because determining whether the service was class or personalised would not be required.

7. Should high-risk services be restricted to certain advisers? Why or why not?
   We suggest that the regime would work best if the Code Committee had an explicit ability to apply particular Code Standards to particular advice situations, depending on advice complexity. We explain this at question 5 above. However, we oppose any differentiation between advisers being extended beyond that, for example to how advisers are badged (ie no Option 3 "expert adviser") or how they are authorised by the FMA (ie only one class of licence). The logic behind opposing "expert adviser" badging is that it perpetuates, in a alternate guise, the difference between AFA/RFA that currently confuses for consumers. The logic for opposing classes of FMA adviser authorisation is that there is little that can be done at initial licensing to

assess an adviser's capability in respect of difference types of advice, other than a review of qualifications and experience which – especially in marginal cases – tends to be subjective. In short, if the adviser operates in a particular advice situation, relevant Code Standard come into play – but no other restrictions.

8. Would requiring a client to 'opt-in' to being a wholesale investor have negative implications on advisers? If so, how could this be mitigated?
   No, although it would be a compliance irritation for major corporates seeking high-level advice.

## 4.2 Advice through technological channels

9. What ethical and other entry requirements should apply to advice platforms?
   While we favour a continuation of a licensing regime that is primarily based on the authorisation of individuals, we also support a framework that is technologically neutral. Where advice is given by a person who is not a natural person, that person should be licensed on condition that they can demonstrate (and continue to demonstrate) that clients would receive protection of a similar standard to that provided by advisers who are subject to the code (compare FAA s66). In practical terms, this is likely to mean that their Adviser Business Statement would need to address how the ethical and other provisions of the Code are applied in their business and technology systems. In addition to our "similar standard" provision above, we recommend that the Code Committee be enabled to specify standards that apply specifically to technologically-based advice delivery. In summary, to clarify: the Code continues to be written for human advisers, their standards would apply automatically to non-natural advisers using the "similar standard" approach, and in addition the Committee could specifically add standards to apply to technological delivery.

10. How, if at all, should requirements differ between traditional and online financial advice?
    So long as "similar standard" protection can be demonstrated (see question 9 above), there should be no difference. Conceptually, however, technological delivery could alter (up or down) the complexity of an advice situation, or raise issues that do not arise in the case of face-to-face advice. It is for those situations that we recommend (see question 9 above) that that the Code Committee be enabled to specify standards that apply specifically to technologically-based advice delivery.

11. Are the options suggested in this chapter sufficient to enable innovation in the adviser industry? What other changes might need to be made?
    Yes. We support option 1 (provision of online advice by licensed entity) and believe that the disadvantage you cite will be overcome if the Code is involved as suggested at question 9 above.

## 4.3 Ethical and client-care obligations

12. If the ethical obligation to put the consumers' interests first was extended, what would the right obligation be? How could this be monitored and enforced?
    Extend the Code ethical provisions (standards 1 to 5) to all advisers. In terms of enforcement, extend the scope of the Disciplinary Committee to all advisers. For monitoring, we recommend that the Act should explicitly envisage External Compliance Assurance Providers, permitting the Regulations and/or the FMA to prescribe the characteristics that a business must have for it to qualify as an ECAP. Typically this role could be taken on by a professional association (or an entity associated with a professional association), an accounting firm or other person/entity independent of the adviser's business. [Compare AML/CFT Act s59(3)-(5). Also compare Australian and Singaporean tax legislation re External/Assisted (respectively) Compliance Assurance. Also compare NZ regulation of audit firms.] The objective of the ECAP would be to

periodically (every 2-3 years or on request by the FMA) review or peer review an adviser's Adviser Business Statement, spot check some files to validate the approaches described in the ABS and report to the adviser.

13. What would be some practical ways of distinguishing 'sales' and 'advice'? What obligations should salespeople have?
    We recommend that the Act should permit advice to be treated as a sale in this situation: "A person does not give financial advice if they make a recommendation or give an opinion in relation to acquiring or disposing of their own product (ie they, their employer or a related company is the product provider), provided (i) no choice of other provider products is offered, (ii) the client is given a sales warning making clear that they are dealing with a salesperson and not a financial adviser, (iii) negative assurance suitability is performed (explained below), and (iv) the provider entity takes responsibility for the sales person and is licenced under the Act." "Negative assurance suitability" is that the product and/or the process is structured so as to make clear to the client the characteristics of the typical person/entity for whom the product is designed. The onus is on the provider entity to demonstrate that a reasonable client would be able to determine from the product/process that it was suitable for them. [By comparison, we have (this week) submitted to the Code Committee giving partial support to their proposal for a "limited advice" provision, noting that this presents similar challenges regarding suitability: 'sales' deal with 'own product', while 'limited advice' concerns 'specific product'. We have suggested as an alternative to its proposed limited advice approach that the Code should permit the concept of "specific product advice" which we define as being "financial advice that clearly identifies: > the financial product(s) subject to the advice, > the purpose of the advice, and > that the adviser has made enquiry only into aspects of the client's financial situation that are relevant to those products and purpose, PROVIDED THAT > such enquiry would be sufficient to satisfy a reasonable financial adviser that the advice is suitable for the client given the scope, nature and circumstances of the advice, and > the advice does not include advice on a DIMS facility, provision of an investment planning service, or advice that a reasonable financial adviser would consider is likely to have a materially negative impact on the client's overall financial situation."]

14. If there was a ban or restriction on conflicted remuneration who and what should it cover?
    Enter text here.

## 4.4 Competency obligations

15. How can competency requirements be designed to lift capability, without becoming an undue barrier to entry and continuation in the profession?
    Our overriding principle is that competency standards should be left to the Code Committee. We support the work they continue to do to ensure those standards are appropriate. In particular, we endorse their ongoing use of national standards because this allows education providers to compete with different delivery and course structure options. We would encourage you to give the Committee specific powers in two respects: (i) to provide a transitional period for RFAs to attain specified qualification levels and (ii) to introduce measurable CPD requirements, so that over time CPD can be used to lift the qualification level. In both cases, the objective is to lessen the emphasis on minimum entry standards of competence and focus chiefly on the qualification journey. Neither case is dependent on the adviser working under supervision.

16. Should all advisers be subject to minimum entry requirements (Option 1)? What should those requirements include? If not, how should requirements differ for different types of advisers?

See question 15.

## 4.5 Tools for ensuring compliance with the ethical and competency requirements

17. What are the benefits and costs of shifting to an entity licensing model whereby the business is accountable for meeting obligations (Option 1)? If some individual advisers are also licensed (Option 2), what specific obligations should these advisers be accountable for?
    A primary purpose of the FAA is to "encourage public confidence in the professionalism and integrity of financial advisers". A central advantage of New Zealand's regulatory framework is that the regime pivots around the individual professional, reflecting the Act's purpose. To allow the oversight of those professionals to slip down a rung, to be supervised by licensed businesses rather than accountable to the regulator, undermines the very behaviour that the Act seeks to promote. We agree that entity licensing must be introduced to enable advice delivery by technology, but this should be possible only where a human adviser is not involved. We also understand the resourcing burden this places on the regulator – there are lots more individual advisers than businesses employing them. For the reasons above we strongly prefer FMA retaining the licensing function (which will now likely extend to all RFA). However, we propose – in terms of ongoing monitoring post licensing – use of External Compliance Assurance Providers, as explained at question 12 above.

18. What suggestions do you have for the roles of different industry and regulatory bodies?
    Please see the proposal at question 12 regarding External Compliance Assurance Providers, which is a role that could be performed by professional associations. We also would support more direct consultation with professional associations in the appointment of members of the Code Committee.

## 4.6 Disclosure

19. What do you think is the most effective way to disclose information to consumers (e.g. written, verbal, online) to help them make more effective decisions?
    We recommend that disclosure regulations should be channel neutral. However, a clearer regulatory distinction between disclosure about the adviser and disclosure about the advice would enhance the regime. In the case of the former, the objective is comparable information for the consumer choosing the adviser. Ideally this should be provided centrally, for example on the FSPR.

20. Would a common disclosure document for all advisers work in practice?
    Yes, provided it was kept simple.

21. How could remuneration details be disclosed in a way that would be meaningful to consumers yet relatively simple for advisers to produce?
    The disclosure regime should encourage and reward the clarity and transparency of remuneration structures. Additional information should only be provided if the adviser cannot answer yes to certain key statements about remuneration.

## 4.7 Dispute resolution

22. Is there any evidence that the existence of multiple schemes is leading to poor outcomes for consumers?

Enter text here.

23. Assuming that the multiple scheme model is retained, should there be greater consistency between dispute resolution scheme rules and processes? If so, what particular elements should be consistent?
    Enter text here.

24. Should professional indemnity insurance apply to all financial service providers?
    Enter text here.

## 4.8 Finding an adviser

25. What is the best way to get information to consumers? Who is best placed to provide this information (e.g. Government, industry, consumer groups)?
    Enter text here.

26. What terminology do you think would be more meaningful to consumers?
    Enter text here.

## 4.9 Other elements where no changes are proposed

**The definitions of 'financial adviser' and 'financial adviser service'**

27. Do you have any comments on the proposal to retain the current definitions of 'financial adviser' and 'financial adviser service'?
    Enter text here.

***Exemptions from the application of the FA Act***

28. Are those currently exempt from the regime posing undue risk to consumers through the provision of financial advice in the normal course of their business? If possible, please provide evidence.
    Enter text here.

***Territorial scope***

29. How can the FA Act better facilitate the provision of international financial advice to New Zealanders, without compromising consumer protection? Are there other changes that may be needed to aid this, beyond the technological options outlined in Chapter 4.2?
    Click here to enter text.

30. How can we better facilitate the export of New Zealand financial advice?
    Enter text here.

***The regulation of brokers and custodians***

31. Do you have any comments on the proposal to retain the current approach to regulating broking and custodial services?

Enter text here.

## Chapter 5 – Potential packages of options

32. What are the costs and benefits of the packages of options described in this chapter?
    Enter text here.

33. How effective is each package in addressing the barriers described in Chapter 3?
    Enter text here.

34. What changes could be made to any of the packages to improve how its elements work together?
    Enter text here.

35. Can you suggest any alternative packages of options that might work more effectively?
    The PAA outlines below the composite package of changes that it recommends to the FAA. (a) All advisers would be authorised as Financial Advisers. Instead of AFAs, RFAs and QFEAs, there would simply be Financial Advisers. (However, it would be helpful if terms like "insurance adviser" and "mortgage broker/adviser" could also be used by financial advisers carrying out those functions.) The provisions that currently apply to AFAs, including the Code, the Disciplinary Committee and the FMA authorisation process would apply to all Financial Advisers. (b) There would be no distinction in the FAA between personalised and class advice, or between category 1 and 2 products. Importantly, however, the Code Committee would be explicitly permitted to specify Code Standards that apply only in certain advice situations, so that conduct and competence requirements alter depending on advice complexity. (c) There would be no licensing difference between advisers and no distinction in what they were called, based on the type of advice they provided. A compliance assurance package, explained below, would help ensure that advisers performed only those advice services that they were qualified and resourced to take on. (d) A two-step transition period would apply to existing non-AFA advisers. Transition step 1: From commencement of the revised legislation, those advisers would have six months to apply to the FMA for authorisation, with the FMA having a three month time limit to approve or reject each adviser's application. Transition step 2: From the same date, advisers would have a three year competence transition, enabling them to use their CPD in those three years to progressively meet the new competence standards that apply to (formerly) category 2 product advice. The exception would be a core knowledge standard (that could be examined by multiple choice) which would have to be accomplished before initial authorisation. The compliance assurance package explained below would also apply to conduct during transition. (e) All advisers would be authorised individually. However, the legislation would also permit the authorisation of an entity as a "financial adviser entity" in three situations. First, entity licensing would be permitted in respect of advice activities not performed by an individual, allowing an entity to take corporate responsibility for robo advice and advice published in any other manner that did not involve individual advisers. Those entities would be required to demonstrate (in an Adviser Business Statement that accompanies their authorisation application) how clients would receive protection of a similar standard to that provided by advisers who are subject to the Code. In addition, the Code Committee would be given powers to specify standards specifically relevant to technologically-based advice situations. Second, entity licensing would also be permitted for entities that employ two or more financial advisers. In this latter case, the entity would not provide advice, but would take on in aggregate the ongoing compliance obligations of its advisers, for example regulatory filings and maintenance of a corporate ABS covering all its advisers. Those advisers would still be individually responsible under the Code, but would be permitted to rely on the entity's (single) corporate filings / ABS in place of their own. (f) The third situation for entity licensing concerns sales. The existing concept of sales (currently unregulated by the FAA) would be broadened to include a recommendation or opinion given by a financial adviser entity (not an individual) through its salesperson employees, but only in respect of its own products, subject

to certain conditions and warnings. “Own products” that qualify the entity for such regulation would be restricted to appropriately regulated products, for example under the FMCA or banking legislation. The entity, or person acting on behalf of the entity, would have to make clear that it was a sale and that any person involved in providing it was a salesperson (and not a financial adviser). (g) QFEs would be abolished once the six month initial transition (described above) concluded. In effect, sales transactions by a financial adviser entity would have many regulatory similarities to a QFE, but - for consumer clarity - the entity would not be described as a QFE and there would be no QFE advisers, simply salespeople (although some employees might be individual financial advisers in their own right). The Code would not apply to sales activities, but the Adviser Business Statement would describe how the sales conditions and warnings would be internally policed. Former QFE activities that do not fall within this expanded concept of sales would be regulated consistent with all other advice: that is, the adviser employees would be individually authorised. (h) Disclosure statements would be abolished and replaced with an “About Your Adviser” statement available on the FSPR and the adviser’s website. It would be a static document in a set format aimed at informing consumers about the adviser (as opposed to the advice). The Act and the Code could continue to specify matters that need to be disclosed to clients as part of the advice, but not as a templated disclosure statement. (i) The PAA considers that the central feature required to make these new arrangements work effectively is an External Compliance Assurance (ECA) Package. In recommending this, we are deliberately distinguishing between the supervisory activity at authorisation (which we believe is best handled by the regulator) and the ongoing supervision of the advisers activities (which we believe is best handled by the industry, but subject to regulatory oversight). In summary, we recommend that industry - probably through one or more professional associations - develop a process of reviewing, on which the regulator could place reliance. We see this as a more sophisticated but flexible version of the two yearly audit in AML/CFT legislation. Importantly, we believe while in part it could take the form of an agreed-upon procedures review, it should also include a peer review element. In the case of peer review, we consider professional associations are best placed to coordinate such activity. We envisage the requirements for the ECA process being set by the regulator, subject to a consultation process and regulatory impact analysis. (j) CONCLUSION: Professional associations thus contribute to this new regulatory landscape in three key respects: competence, compliance and consumer awareness. For competence, we coordinate the provision of high-quality training and CPD. For compliance, we coordinate the provision of External Compliance Assurance, delivering at least the peer review component and delivering or partnering with other providers on the more routine checking. For consumer awareness, we raise public awareness of the uses and benefits of advisers and advice.

## Chapter 6 – Misuse of the Financial Service Providers Register

36. Do you agree with our assessment of the pros and cons of the options to overcome misuse of the FSPR?
    Enter text here.

37. What option or combination of options do you prefer and why? What are the costs and benefits?
    Enter text here.

38. What are the potential risks and unintended consequences of the options above? How could these be mitigated?
    Enter text here.

39. Would limiting public access to parts of the FSPR help reduce misuse?
    Enter text here.

## Demographics

1. Name:
   Professional Advisers Association

2. Contact details:
   Redacted

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

   1,100 members

4. 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.