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FINANCIAL SERVICES LEGISLATION AMENDMENT BILL EXPOSURE DRAFT AND NEW FINANCIAL ADVICE REGIME CONSULTATION PAPER

ASB Bank Limited (**ASB**) welcomes the opportunity to provide feedback on the Ministry of Business, Innovation and Employment's *Consultation Paper – New Financial Advice Regime* (**the Consultation Paper**) and Financial Services Legislation Amendment Bill Exposure Draft (**the Exposure Draft**).

ASB is a subsidiary of Commonwealth Bank of Australia and a related company of Sovereign Assurance Company Limited.

This submission makes both general comments on the proposed regime and answers specific questions from the Consultation Paper. General comments have been marked as such, while specific questions have been referenced. We have contributed to the submission on this matter being made by the New Zealand Bankers' Association and we support the points made in that submission.

We acknowledge that ASB's submission may be made publically available by way of publication on the MBIE website, and may be released in response to a request under the Official Information Act. Some aspects of this submission are commercially sensitive and we request that these are not included in any version of the submission made publicly available. We have indicated where this is the case.

If you require any further information in relation to this submission, please do not hesitate to contact me.

REDACTED

FINANCIAL ADVISER / FINANCIAL ADVICE REPRESENTATIVE DISTINCTION

Comment

We note that MBIE's *FAQs about the draft Bill for the New Financial Advice Regime – March 2017* stated that MBIE had heard some concerns about the change of title from the previously-announced 'agent' to Financial Advice Representative (**FAR**). We understand that the Authorised Financial Adviser (**AFA**) industry in particular is concerned that the titles Financial Adviser (**FA**) and FAR are not sufficiently differentiated.

The FA and FAR titles are appropriate because:

1. It is consistent with the policy underpinning the amendments that both titles reference financial advice:
   - The regime does not contemplate differences in the Code of Conduct (**Code**) standards for FAs and FARs.
   - The Code must not restrict types of financial advice to FAs only.
   - Equally competent FAs and FARs can give the same advice on the same products.
2. FAs and FARs both are agents of their Financial Advice Provider (**FAP**). However, unlike FAs, FARs are not personally accountable for complying with the conduct and disclosure duties. The word 'representative' highlights that the FAR is solely a representative of the FAP whereas its absence in the FA title is consistent with the additional individual accountability. That is the only difference between otherwise equivalent agents.

We understand that some AFAs have suggested that there should be a further differentiation in the FA title (e.g. the addition of a word such as 'registered' or 'chartered' financial adviser). Such a change would imply a higher level of competency by that group of agents relative to FARs. That would be completely contrary to the policy of the reforms and would undermine the integrity of the new regime, which is designed to be agnostic to whether advice is given by an FA or FAR so long as the adviser is competent to give it. Furthermore, there is no consumer protection purpose served by registration of FAs on the Financial Service Providers Register (**FSPR**), which is all the more reason why registration should not be used in a manner that implies differentiated competency (see our comments below on Question 21).

It is always open for individual advisers to develop their own organisations and nomenclature to identify individuals who have extra-regulatory qualifications or experience.

DUTY TO PUT CLIENTS' INTERESTS FIRST

Comment

ASB strongly supports the duty to give priority to clients' interests. We have submitted in favour of this approach previously, and think it correctly reflects the increased focus on appropriate customer outcomes, and the conduct work undertaken by the FMA.

The heading of section 431H should be amended to 'Duty in relation to conflicts of interest' to better reflect the conflict management nature of the section and avoid an implication of a broader best interests duty.

AGREEING THE NATURE AND SCOPE OF ADVICE

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

In relation to section 431G, we are concerned that the word 'agree' could be interpreted broadly to require an active bilateral agreement between adviser and client in every instance.

This could be problematic in a situation where an adviser is providing advice to multiple consumers. For example, a FAP providing advice intended for more than one person through an online process.

Section 431G should be amended to provide for both one-to-one and one-to-many situations. Where a FAP is providing advice intended only for one person (tailored advice), active bilateral agreement as to the nature and scope of the advice is appropriate. Where advice is intended for more than one person (general advice), the FAP should disclose any limitations on the nature and scope of the advice. The standards for disclosure could be managed through regulations.

Section 431G could be amended as follows:

431G Duty to agree on nature and scope of advice

(1) A person (**A**) must not give regulated financial advice intended for—

(a) only one person (**B**), unless A has agreed with B on the nature and scope of the advice to be provided; or

(b) more than one person, unless A has disclosed to those persons any limitations on the nature and scope of the advice in a clear, concise and effective manner.

(2) This section applies only to a retail service.

LIABILITY FOR DUTIES

Comment

It is important to appropriately incentivise FAPs to ensure that their processes and controls are adequate. FAPs that have taken all reasonable steps to ensure that their FAs and FARs comply with sections 431F to 431M should not be exposed to possible civil penalties, and their liability should be limited to compensatory orders only. This approach incentivises FAPs to take all reasonable steps to ensure their FAs and FARs comply with their duties, because only by doing so can they avoid possible civil penalties. However, it is still appropriate that the FAP compensates clients for their losses even if the FAP has taken all reasonable steps to ensure compliance.

Question 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?

The duty in section 431O (FAPs to not offer inappropriate incentives) should apply to all FAPs, irrespective of whether they engage FAs or FARs. There is no valid basis to exclude FAPs that engage FAs from this duty , irrespective of any parallel personal duty that the FA might have, particularly noting that the personal duty is limited to disciplinary action only.

UNSOLICITED MEETINGS

Question 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?

FAPs should continue to be able to make offers during an unsolicited meeting if the meeting takes place in the ordinary course of their business. Therefore, we support clause 10 of Part 1

of the Exposure Draft which retains the current exceptions in section 34 of the Financial Markets Conduct Act 2013. If section 34 is breached, the recipients of the financial product can withdraw, and the offeror (and directors of the offeror) are liable for any failure to repay money owed following a withdrawal.

We do not support any narrowing of the exception. That would lead to confusion as to which rules apply in what circumstances. For example, if the exception only applied to existing clients, when a new client visited a bank branch to talk about opening a new bank account, the adviser would be unable to also have a conversation on KiwiSaver (if appropriate) and give them advice around this.

Furthermore, we consider that the duty to put a client's interest first and the disclosure requirements of the new regime combine to provide adequate protection against pressure selling (we note that there are comparable uninvited direct sales provisions in Part 4A of the Fair Trading Act).

In our view, adequate consumer protection is provided by the tightly controlled circumstances around the current exception and the overarching adviser duties.

TRANSITIONAL PERIOD

Comment

It is important that the Exposure Draft clearly sets out which aspects of the existing regime will continue to be in effect after the new regime commences until FAPs become fully licensed. This includes detail around whether advisers can take on new staff during this period, what qualifications new staff will need, whether FAPs can advise on new products, and whether the terminology of the existing FAA will continue during transition. For example, it should be clear how an adviser should explain the concepts of class and personalised advice during the transitional period (where these concepts would otherwise no longer exist under the new regime).

Question 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?

The proposed effective date of February 2019 for transitional licences sets a very tight schedule for both the legislative process and compliance by FAPs with the provisions that will come into effect at that time. For this reason, it is important that the industry has the finalised Code, disclosure regulations, and licensing information from the FMA as soon as possible. Any delay in the development of those supporting instruments should be reflected in a delay in the implementation date for transitional licences.

Question 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?

During the transition period, FAPs should be able to obtain a limited license that allows them to provide robo-advice as long as they can meet the robo-advice requirements contemplated by the new regime. This limited licence should be available as soon as the new regime takes effect. A limited license of this type would mean large FAPs would not be disadvantaged in their ability to provide robo-advice relative to a new-entrant in the market during the transition period. We understand the FMA is looking at providing relief under the current regime, but rather than stretching the FAA beyond the scope of what Parliament might have intended, it would be

better to proactively licence robo-advice under the new regime in a manner that would ultimately be rolled into a full FAP licence.

Question 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?
We do not agree with the proposal at page 49 of the Consultation Paper that AFAs need an additional five years to comply with the changes. Given that AFAs should only need minimal changes to meet the competency, knowledge and skill requirements of the new regime, we believe that the standard two year transition period is suitable.

Question 43: Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
We support the flexibility in the approach of the current AFA Code of Conduct, which allows basic minimum standards to be met by recognising alternate qualifications as equivalent for the purpose of demonstrating competency. We would also support other assessment approaches if they effectively measure the competence, knowledge and skill to the same minimum standard as those required in the new Code, noting that experience in the market alone would not be an effective measure.

FINANCIAL SERVICE PROVIDERS REGISTER CHANGES

Question 21: Do you have any other feedback on the drafting of Part 6 of the Bill?
The FSPR should be a register of financial advice licensees only (i.e. only FAPs should be required to register) as only licensees are both accountable and liable for the advice they provide (directly or through their agents) to consumers. FAs are not licensed and are subject only to disciplinary proceedings in limited circumstances. FAs are not personally liable for the advice that they provide. Requiring FAs (or indeed FARs) to be registered on the FSPR separately from their FAP delivers no incremental consumer benefit and will impose significant cost on advisers through registration fees and on the Crown in the maintenance of the register. The recourse to disciplinary proceedings for an FA can be effectively communicated to consumers through disclosure, which would state:

- the name of the relevant licenced FAP;
- that the adviser, as an FA, is subject to disciplinary oversight; and
- how and where to complain.

MISCELLANEOUS

- Clause 431L – 'Duty to make available prescribed information'. We submit that further information (e.g. timeframe, method of delivery) should be provided on what 'make available' means in this context in order to give certainty and promote consistency across the market.

- Schedule 2, Clause 28(1)(b) – we submit that the words 'or other circumstances' should be removed, as they are in our view too broad. It is not clear what other circumstances would be anticipated that are not already covered by (a) to (d) of this clause.

- Schedule 2, Clause 28(4)(b) – we submit that the word 'the' should be replaced with 'a, to read: 'a way in which a financial advice provider or financial adviser may demonstrate the provider's or adviser's competence, knowledge and skill' because the word 'the' does not allow the intended provider flexibility in meeting the Code standard.