

Exposure Draft Submission

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. However, if you are a provider it is unlikely that an offer would be made at the first 'unsolicited' meeting—as this would be a fact finding type of meeting.

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 there's an unsolicited meeting there should be a 'calling off' period, where the client has sufficient time to arrive at a decision about whether or not to uptake the service. One must ask, why are Financial Advice Representatives (FARs) allowed to have unsolicited meetings but financial advisers are not? The same rules should apply to both set of advice givers.

Offers should be in the client's best interest. Disclosure should be made if the product is merely suitable based on the limited scope of the financial advice provider.

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

There needs to be accountability by financial advice service managers for the quality of their policies and procedures. Legislation is also necessary to allow regulation around financial advice service procedures.

"Financial advice representative" is too ambiguous and too close to the AFA/QFA confusion. A term is needed to indicate the limited nature of QFE advice. For example, 'Restricted Financial Representative' or 'Restricted Financial Adviser'.

Additionally, it is confusing that within the definition attached to a financial adviser, that this person 'does not include a financial advice provider'. The definition of 'finance advice provider' would be made clearer to include: "an entity that contracts the services of financial advice representatives and/or financial advisers to provide a financial advice service."

There are no rules around QFE advisers. For example, can tellers now be FARs?

It must be clear and evident what advice is NOT given; for example, "This may not be in your best interest, as there may be other products/services beyond the scope of our products/services". Commentary seems to imply this, but the Bill does not.

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 use of the term 'licensing' and 'registered' is used interchangeably and should not be. License has to do with higher obligations beyond merely 'registering' (or holding a certification). See research article by Inderst & Ottaviani (2010), "Consumer protection in markets with advice."

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 – putting the client's interest first should be a priority in both cases. However, the "client first" duty should not only include lack of conflict of interest. It would be made clearer if there were a full list of duties and a list of what is NOT offered within the provider's or adviser's scope.

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?

This is in line with decreasing conflicts of interest. But it needs to be clearer as to what an inappropriate incentive is. There should be a note about 'negative' incentives. Someone on the Code Committee needs authority to manage this over time.

Regarding impact, it can result in decreased work efforts by those who worked under such systems in the past, those who relied upon such incentives as part of the workplace benefits and norms. But that is for providers to manage accordingly.

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. Whether retail or wholesale, they are still clients relying upon providers and/or advisers.

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

To make it even clearer and more direct, 'advice' has to include sales recommendations.

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?

It may aid in prosecution, in cases where it's difficult to prove a breach.

We highly suggest that this should also be reflected and changed in the 'financial advice' definition.

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?

Both advice providers and advisers should be held accountable. In some cases, FARs should face personal repercussions in order to prevent/lessen abuse.

At the first instance, an assessment should be made at the firm level and then at the individual level.

FARs need to retain some liability to prevent them quitting and working for another firm. The financial advice service provider should have an obligation to notify the FMA so that a list of 'breachers' is created and made public.

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. That is in line with taking on liability for their advisers. It may also be case specific.

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?

Yes.

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

Yes.

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

NO 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?

Yes. This should take effect immediately once the legislation is in effect.

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?

Yes, but we are not persuaded it would address misuse of the register.

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

What is suggested is reasonable. Providers need the ability to bar those in breach.

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?

The list of services is reasonable, but implications of belonging to a group is not clear. It needs to be set by regulation so that it can be adjusted over time.

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?
Clause 431B (b) of the Bill should read 'designs a financial plan' so it includes an insurance plan.

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 COMMENT

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?

We support the adoption of the FMC Act definition here as it provides greater clarity.

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?

Not evident.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?

Further clarification about the Code Committee can be made, because at present it seems rather open. For example, specify types of members like practitioners, providers, or other stakeholders.

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. However, with robo-advice, the adviser cannot be assessed, so the appropriateness of the algorithms, data analysis procedures, and data mining need to be assessed. Managers still need to be accountable for this.

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, they should “consider” complaints by both – see answer to an earlier question. In some situations disciplinary procedures can be permitted instead of financial consequences. One method may be more effective in any given circumstance.

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?

The Financial Advisers Disciplinary Committee needs to handle the financial advice service provider, and be able to name the FAR who breaches the Code. The maximum fine for the financial advice service provider needs to be \$100,000.

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

In Schedule 2, part 2, 7 (3)(a)(iv) - the definition needs to be expanded to ‘a person employed by an institution’ (as defined in Section 159 of the Education Act 1989). Not all staff employed at educational institutions teach or instruct students, but in the ordinary course of employment may give some kind of advice.

Lawyers and accountants should be placed in a section by themselves; advice needs to be incidental to the primary advice given to the client. Additionally, the inclusion of other professionals who might otherwise be giving advice incidental to their business is necessary.

About transitional arrangements

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

The objectives cited are appropriate.

Proposed transitional arrangements

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

Yes, it gives times for all stakeholders to be on board or move away from the provision of financial advice.

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. Based on the experience around the FAA 2008—registration and so on—it is not practical for licensing authorities to issue licenses within this time frame, as the project time period includes upcoming holidays. There should be some mechanism included to ensure that there is a transition of participants across the transitional period, so that it’s not left to do at the last minute. For example, using FSP number, alphabetical order, etc.

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

It is reasonable, but there is a risk that those advisers may not be competent to provide the services they provide if they do not meet the new Code of Conduct requirements.

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?

This depends on the new competency standards as without that information, it's challenging to figure out the time frame.

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, exemptions should be covered. Transitional arrangement should reflect the appropriate time frame that individuals need to meet the competency requirements.

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

If an exemption were to be in place, the appropriate time frame depends on the specific competency requirements need to be met. Setting an arbitrary date may prove to be unrealistic depending on the new requirements.

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 – this is why we are not in support of this.

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?

NO COMMENT

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?

Yes – all financial advice providers/persons should have a minimum level of competency to serve and put their clients first. Rather than meeting new competency requirements, current client files can be used to assess competency. This should be restricted to AFAs and RFAs who hold the current Level 5 certificate.

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?

Again, we are in support of implementing this process for existing AFAs and RFAs who hold the Level 5 certificate.

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?

We support legislation.

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 COMMENT
48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
NO COMMENT

Demographics

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51. Are you providing this submission:
 As an individual
 On behalf of an organisation
(Describe the nature and size of the organisation here)
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