How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Friday 31 March 2017**.

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

  Financial Markets Policy
  Building, Resources and Markets
  Ministry of Business, Innovation & Employment
  PO Box 1473
  Wellington 6140
  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 the development of the Financial Services Legislation Amendment Bill, decisions in relation to the outstanding policy matters, and advice to Ministers.

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

Except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

Release of information

Submissions are also subject to the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

If your submission contains any confidential information, please indicate this on the front of the submission. Any confidential information should be clearly marked within the text. If you wish to provide a submission containing confidential information, please provide a separate version excluding the relevant information for publication on our website.

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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. A financial advice provider will be appropriately licensed and regulated with relevant standards (the duties in sections 431F-M) and oversight (by the FMA and with consumer recourse available via the independent external dispute resolution schemes) ensure that if any problems arise, they are addressed.

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?
   No. The Bill proposes legislative requirements to agree upon the nature and scope of service be and the duty of advisers to comply with the Code. These protections should be adequate to guard against undesirable adviser behaviours. We do however support a limitation of unsolicited meetings to existing clients.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   No.

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   No comment.

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 interests first throughout all stages of the process, not just in the giving of advice, is consistent with the expectation of conduct that is aligned with good consumer outcomes.

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?
   "Incentive" could be more specifically defined to ensure that it is clearly recognised that it is intended to capture non-financial benefits, or indirect pressures on advisers (i.e. sales targets) that could influence adviser behaviours.

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?
   Not extending the client-first duty tacitly creates a situation where advisers may place their own interests, or that of their provider ahead of the client on the basis that client's wholesale status means they are appropriately skilled (or have access to the resources) to carry out their own due-diligence on advice services. This approach is inconsistent with the FMA's published conduct expectations for financial service providers.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?
   No comment.

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?
   No comment.

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?
    Licensed entities (financial advice providers) should face civil pecuniary penalties and individuals (both financial advisers and financial advice representatives) should face disciplinary processes. The direct civil liability of financial advisers should be limited where they can provide

a defence that the performance enabling resources (e.g. systems, processes, tool, rules) provided by their employer contributed to their non-compliance. Any such defence would need to be supported by the provision of evidence of notification to their employer of their concerns that the resources provided were not fit for purpose.
Where poor or negligent conduct has caused financial loss to a customer, then compensating the customer for that loss should take priority with consumer recourse available through the independent disputes resolution schemes.

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?
Providers should have to demonstrate that the processes and resources are fit for purpose. Providing resources does not necessarily mean that advisers will comply. There is a difference between being enabled to do something and for whatever reason, doing something different.

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?
We are supportive of there being designation powers available to the FMA as a tool to address intentional circumvention of the regulatory boundaries of what constitutes a financial advice service.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?
It seems logical that the provision of financial advice services to any number of retail clients triggers the licensing requirements.

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
In the absence of a client-first duty applying to providers of advice services to wholesale clients, the Bill does not contain adequate provisions to prevent the coercion of clients (who may not understand the risks) into certifying as wholesale clients. This creates a risk that there is potential means of circumventing the licensing requirements.

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?
No comment.

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?
We fail to see any correlation between disclosing who a provider's AML/CFT supervisor is and improvement in decision making by the public. Likewise, small print disclosure in advertising as to the limitations of being registered is of little value in improving public confidence. Misuse of the register should be addressed by increasing the controls for becoming registered (i.e. checks that legitimate services are being offered) and monitoring by regulators. This should be accompanied by an educational campaign to increase public awareness of the register and its purpose, in conjunction with a revamp of the register which is arguably unfit for purpose in its present form.

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

No.

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?
No.

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?
We would be reluctant to support a power for dispute schemes to provide information to FMA if they believe relevant financial markets legislation has been breached. The introduction of such a requirement would be in conflict with schemes' primary purpose to resolve individual complaints of financial loss in confidence.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?
No.

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?
Terms used within any legislative tool should be defined and applied consistently for related terms to avoid potential confusion and misapplication.

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?
The exclusions to what is financial advice should be clear enough to prevent the potential for confusion raised in this example.

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
No comment.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
No comment.

28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
    No comment.

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?
    The Code could be more specific and guidance documents could be prescriptive The current Code lacks clarity in this area and clearly is interpreted with variation. Case studies help and it would be useful if there was a resource on the Code Committee to whom providers could refer for guidance in specific situations.

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
    The jurisdictional scope of the disciplinary committee should be broadened to encompass financial advice providers. The rationale of it being a faster and cheaper mechanism for addressing breaches is valid. It also allows for more appropriate consideration of breaches by a financial adviser where the adviser is an employee of a provider and there may be shared culpability for any alleged breach.

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?
    No comment.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    No comment.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    It is important that transitional arrangements give recognition to the appetite of consumers to be able to access advice via digital platforms. It is therefore desirable that streamlined processes be considered to enable providers to develop and implement roboadvice platforms at the outset or in the early stages of the new regime. This would also minimise the competitive advantages / disadvantages that may arise over the lengthy timeframe to assess and approve full licences.

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    A staged transition seems to be the most logical approach to minimise disruption to the industry.

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?
    If sufficient resourcing is available and it is made a priority for the business. It would help if an organisation could apply for an extension if needed. Until the draft Code is available and an impact assessment is conducted this is hard to say. Therefore it is desirable to have a draft available for review well ahead of its proposed approval date. There is potential risk that 6-months may be insufficient without contracting in expert resource in the necessary areas (e.g. process mapping and documentation, additional learning & development resource). The business would have to rate this work top priority to guarantee the necessary access to subject matter experts and the cost to do so is potentially significant.

36. Do you perceive any issues or risks with the safe harbour proposal?
    There is risk of public confusion as to the competency standards that apply to advisers throughout the transitional period that safe harboru

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?
    We anticipate that this be a sufficient time period to become fully licensed. The additional timeframe allowed for through the exemption proposed for existing AFAs provide additional assurance that competency standards can be met within prescribed time frames.

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?
    Without seeing the Code, this is hard to assess however, in principle yes otherwise AFAs who need to undertake additional study will need time to meet these requirements. MAS would also need to determine its policy on who is responsible for meeting the costs of this, if it is to be done on work time and if so, if additional staffing is required to back fill.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    Five years seems reasonable and consistent with NZQA's revision and review timeframes which result in transitional arrangements.

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?
    No. It is unlikely that the exemption would create any material level of confusion.

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?
    Should be considered for incorporation into the Code. The Bill already proposes the legislative duty for advisers to comply with the Code.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    Yes, otherwise the compliance costs go up and people end up training for the sake of training

when they could already demonstrate competency. Training should only need to be undertaken when the person demonstrates that they lack the ability to apply the necessary skills and knowledge.

Both Recognition of Prior Learning (RPL) and Recognition of Current Competency (RCC) should be available and this should be able to achieved through the process known as professional conversation whereby the candidate gathers the evidence to demonstrate that they meet the performance criteria.

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?
No. The process of competency assessment is just that – if you are judged to be competent it should not matter how many years' experience you have. I estimate that in most RPL/RCC processes, especially professional conversation, experience will be what positions the candidate for competency. Two candidates may both have 10 years but one may have experienced more opportunities and been exposed to a greater variety of situations. For this reason I favour RCC by professional conversation and demonstration of how they have applied their skills over a candidate sitting an exam and being deemed competent.

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?
The Code, as per answer to question 42.

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
A phased approach is not preferable as it may give those entities who are licensed early a competitive advantage particularly in the implementation of digital advice platforms.

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
No.

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

Demographics

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

Medical Assurance Society is a QFE offering life and disability insurances, general insurances and superannuation investment funds. Approximately 200 staff including 18 AFAs and 75 QFE

advisers.

52. 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.