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.

Private information

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. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.

Permission to reproduce

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?
   No comment

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 comment

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   5(7)(ba) The definition of 'dispose of' has been expanded such that a renewal or variation of an existing financial product includes withdrawing from or terminating the product. In the context of consumer credit contracts – certain products have 'features' (particularly around client eligibility), which many would argue are not terms or conditions. For example, a type of loan facility might be designed for, and made available to, university students only. If the borrower is no longer a student, that arrangement can be withdrawn or terminated. We suggest that there is no obvious benefit to having these withdrawals fall within the definition of financial advice services (and therefore the compliance costs would be unnecessary).

   6(a) The examples used may result in 6(a) being interpreted too narrowly. It would be helpful if

the term 'not limited to' (or similar) was included and/or a longer list of examples was included.

7(1) The current legislation (13(1) of the FAA) uses the term 'incidental' rather than 'ancillary'. The FMA has provided a useful example to assist with how 'incidental' should be interpreted. Using the term ancillary appears to significantly widen the possible application of 7(1). For example, arguably, a provider of accounting software to store owner customers would also be able to provide unregulated financial advice services relating to insurance products to those same customers under the proposed exclusion (but not under existing 13(1) of the FAA). We suggest retaining the term incidental and adding further examples to the FMA's website if there are areas where its application is uncertain.

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?
   "Doing anything in relation to the giving of the advice" seems very broad. It would be helpful to understand what MBIE is intending to capture with this language. Practically speaking, it is likely that providers will find it difficult to be able to say with sufficient certainty that this duty has been fulfilled if it not entirely clear what the duty provisions attach to.

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?
   431O(1)(b) has been drafted quite narrowly, and does not appear to cover a number of situations where these types of conflicts of interest matters arise. For example, 431O(1)(b) does not appear to prevent:
   - a provider from making inappropriate commission type payments to a third party in the context of an external distribution model or to a financial adviser employed by the provider, or
   - financial providers from imposing sales targets for their FARs, which are not commission based but have a similar effect to the kinds of commissions MBIE is looking to ban.

   We understand that MBIE's intention is to cover sales targets. However, it would be difficult (though not impossible) to argue that the incentive of retaining one's job if the sales target is met is an 'incentive'. It is also unclear whether the term 'inappropriate' relates to payments only or whether it should also apply to 'other incentive'.

   Query why the legislation does not also prohibit inappropriate payments and other incentives being paid to financial advisers. It could be argued that the quality of the financial advice will be maintained regardless because the financial adviser must comply with the duty provisions. However, this approach appears unrealistic given the persuasive nature of such incentives (particularly in light of the fact that it is also proposed that financial advisers will not be civilly liable for duty provision contraventions).

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?
   Genuine wholesale clients expect to be able to purchase financial advice products with a

minimum of cost, time and fuss. Additional customer facing processes (relating to the satisfaction of the new duties for wholesale clients) will materially change the financial advice conversations with those clients and, likely, increase the cost of execution for those clients without adding any clear benefits.

We understand there are concerns that a significant number of 'mum and dad' clients currently fall within the current definition of wholesale, and that these people require certain basic protections.

However, the application of the duty provisions to some wholesale clients (i.e. those being advised within a retail service and not those wholesale investors being advised within a wholesale only service) appears inconsistent. If the service is not a retail service then it appears that the adviser is exempt from the licensing requirements and consequently the application of the duty provisions. However, if the service is a retail service, and is used by a wholesale investor, the licence holder must satisfy certain duty provisions in respect of that wholesale investor.

We understand that some providers will not design a separate wholesale only service to cover their genuine wholesale clients. This also raises the question – what is a 'service'? Can a provider determine that any service it offers to wholesale will be a wholesale only service?

It not clear that raising the threshold for wholesale clients would adequately address this problem. Perhaps MBIE might consider enabling certain 'qualified' providers (i.e. those with appropriate compliance processes to manage an opt out) to offer an option for certain (i.e. genuine wholesale) clients to opt out of having the wholesale client related duty provisions apply.

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

431C What is meant by the term 'engage' appears unclear. For example, this might be interpreted as including third party distribution arrangements i.e. if one provider (A) is using another provider's distribution network to sell financial advice products (e.g. bancassurance), is A giving financial advice and required to satisfy the duty provisions? Presumably the requirement to comply with the duty provisions in this instance should sit with B and not A.

Application of duty provisions to FARs – If MBIE intends that FARs should be, individually, required to comply with the duty provisions (putting them in the same obligations bucket as financial advisers and providers), we suggest that there are a number of drawbacks to this approach. For example, it would almost certainly result in unnecessary compliance costs, e.g. having to over train / qualify FARs. Additionally, it would appear to add little to the advice outcome (noting that providers are already on the hook vis a vis the customer interactions and FARs are not directly liable in any case).

The alternative (and we believe the better) approach is that, in cases where a FAR is dealing with a client, the person giving the financial advice is the provider (i.e. inference from 431C)? In that case, it would follow that:
(i) a FAR will not be directly required to comply with the duty provisions (431F to 431L). Rather, these obligations fall on the provider.
(ii) consequently, the duty provisions do not need to be satisfied in respect of each individual FAR - i.e. an FAR (individually) is not necessarily required to have the same training / level of competency as a financial adviser. It is the provider's systems and processes (within which the FAR operates) which must (taken as a whole) satisfy the duty provisions.
(iii) consequently, the language in 431E(5) should read 'If a financial advice representative is involved in a contravention…' (given that the FAR would not be directly responsible for satisfying the duty provisions).

431E5(a) One of the outcomes of the existing legislation was that the distinction between class and personalised advice led to some QFEs putting in place reasonably rigid processes to prevent their employees straying into the area of personalised advice. This rigidity sometimes resulted in poorer advice outcomes for customers. To ensure good advice outcomes, it seems likely that some providers will provide FARs will with limited discretions regarding the financial advice recommendations they make to clients. This would mean that some FARs will not be acting in a 'robotic' sense. Additionally, there are bound to be 'bad apples', who ignore the relevant provider's rules and limitations.

If an FAR is responsible for a provider breaching a duty provision because the FAR fails to comply with the rules / limitations set by that provider or the FAR exercises its limited discretion in a manner that breaches the duty provisions:
(i) there appears to be nothing to prevent that FAR from subsequently acting as an FAR for another provider. Presumably, the FAR should also not be able to subsequently obtain a licence. However, without recognition of a breach, it is difficult to see how the FMA would have all relevant information to enable it to determine whether a FAR should pass the fit and proper assessment (in the event that an FAR applies for a provider licence).
(ii) it seems arguable that FARs should indeed be held responsible for breaches of the duty provisions in certain circumstances, because it is possible that FARs might do things that result in the breach of the duty provisions (through no fault of the provider).

It could be argued that FARs might still be held to account if they are 'involved in a contravention' (by the provider). However, query how this could be justified conceptually, given that the Draft Bill states that FARs are not civilly liable for their own contraventions. Additionally, in the examples above (inappropriately exercising their own discretion / bad apples), arguably the provider is not the one at fault. And, if the provider is given a defence (as suggested in question 12 below) no person would be liable.

431E(5)(b) If a FAR contravenes a duty provision it appears that the provider has presumed liability for that offence (assuming there is no legislative defence). MBIE to confirm that 'may' means 'will' in this instance.

431G The language in 431G follows that in the newly adopted Code 8. However, if you look at the interpretive commentary that follows Code Standard 8, it is clear that a client's 'agreement' is not required. The obligation on the financial adviser in respect of personalised advice is limited to clearly and effectively communicating the nature, scope and limitations to the client (where limitations have been agreed with a client). There is an existing presumption of adequate disclosure in respect of class advice.

Without the Code 8 commentary, proposed 431G will change the existing standard in the Code. Query whether MBIE intends for the new Code to include interpretative commentary regarding the duty provisions, that would bring this provision in line with the existing Code 8?
It seems preferable to retain 431G in the Code rather than within the FMC Act. Requirements relating to defining the nature of scope of advice would appear to be more effectively managed by the Code Committee given that the Committee can provide greater flexibility and agility regarding market developments relating to customer engagement over time.

431H The interpretative commentary that follows Code Standard 1 is not included in the proposed Draft Bill. This will effectively broaden the application of the existing standard. Under the existing standard, what is required in order to place a client's interests first is determined according to what is reasonable in the circumstances of that advice.

For example, persons giving regulated financial advice may require the adviser to provide services that are not within the range of the adviser's services (or the agreed scope), as advised to the client in writing, or provide financial adviser services in relation to financial products that are outside of that range.

Additionally, it might be reasonable for a QFE to recommend its own products instead of that of a competitor's, even though the cost is marginally more expensive

Query whether this duty could be retained within the Code instead of being brought within the FMC Act (and a duty to comply could be added to 431J).

To what extent is A expected to determine whether there are 'other persons' whose interests might conflict with B? 'Other persons' is very broad and might include, for example, husbands and wives. Consequently, what steps must A take if A is advising a married couple?

Also, query whether 431(1) is technology neutral – whose knowledge would it be in that case – would a bank system (operating roboadvice) be reasonably expected to be aware of all information stored in that bank's other data bases?

431J(1) It seems possible that the Code might (in the future) include standards relating to categories not expressly mentioned in either 431E and 431J. It might be better to include a broad reference to compliance with the Code, which captures all aspects of the Code.

431K The term 'reasonably ought to know' was used 431H but has not been used in this provision. Query whether it was intended to apply it to 431K as well.

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?
    At this stage, is difficult to see how the interplay between providers, financial advisers and FARs will work. The answer to this question must depend on the degree to which financial advisers are expected to be acting independently of financial providers.

    Also see 431E4. It seems possible that a breach of a duty provision might also be a breach of Part 2 of the FMCA. Presumably MBIE does not intend that financial advisers would not be liable for Part 2 breaches if the related contravention is also a contravention of a duty provision?

    431E5(a) One of the outcomes of the existing legislation was that the distinction between class and personalised advice led to some QFEs putting in place reasonably rigid processes to prevent their employees straying into the area of personalised advice. This rigidity sometimes resulted in poorer advice outcomes for customers. To ensure good advice outcomes, it seems likely that some financial providers will provide FARs will with limited discretions regarding the financial advice recommendations they make to clients. This would mean that some FARs will not be acting in a 'robotic' sense. Additionally, there are bound to be 'bad apples', who ignore the provider's rules and limitations.

If an FAR is responsible for a provider breaching a duty provision because the FAR fails to comply with the rules / limitations set out by that provider or the FAR exercises its limited discretion in a manner that breaches the duty provisions:
(i) there appears to be nothing to prevent that FAR from subsequently acting as an FAR for another provider. Presumably, the FAR should also not be able to subsequently obtain a licence. However, without recognition of a breach, it is difficult to see how the FMA would obtain the relevant information to enable it to conduct a fit and proper assessment of the FAR, if the FAR applies for an FMCA provider licence.
(ii) it seems arguable that FARs should indeed be held responsible for breaches of the duty provisions in certain circumstances, because it is possible that FARs might do things that result in the breach of the duty provisions (through no fault of the provider).

It could be argued that FARs might still be held to account on the basis that they were 'involved in a contravention' (by the provider). However, query how this could be justified conceptually, given that the Draft Bill states that FARs are not civilly liable for their own contraventions. Additionally, in the examples above (inappropriately exercising their own discretion / bad apples), arguably the provider is not the one at fault. And, if the provider is given a defence (as suggested in question 2 below) no person would be liable.

431E(5)(b) If a FAR contravenes a duty provision it appears that the FP has presumed liability for that offence (assuming there is no legislative defence). MBIE to confirm that 'may' means 'will' in this instance.

Application of duty provisions to FARs - It is unclear whether the intention is that FARs are, individually, required to comply with the duty provisions (putting them in the same obligations bucket as financial advisers and providers).
There appears to be a number of drawbacks to this approach. For example, it would almost certainly result in unnecessary compliance costs, e.g. having to over train / qualify FARs. Additionally, it would appear to add little to the advice outcome (noting that providers are already on the hook vis a vis the customer interactions and FARs are not directly liable in any case).

The alternative (and we believe the better) approach is that in cases where a FAR is dealing with a client, the person giving the financial advice is the financial provider (i.e. inference from 431C)? In that case, it would follow that:
(i) a FAR is not directly required to comply with the duty provisions (431F to 431L). Rather, these obligations fall on the financial provider.
(ii) consequently, the duty provisions do not need to be satisfied in respect of each individual FAR - i.e. an FAR (individually) is not necessarily required to have the same training / level of competency as a financial adviser. It is the financial provider's systems and processes (within which the FAR operates) which must (taken as a whole) satisfy the duty provisions.
(iii) consequently, the language in 431E(5) should read 'If a financial advice representative is involved in a contravention…' (given that the FAR would not be directly responsible for satisfying the duty provisions).

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?

This appears to be rather vague. If the elements of the defence too closely resemble the licensing requirements, it could be argued that as long as a provider holds a licence it must consequently have a defence. As an alternative, we suggest that it would be helpful if the FMC Act provides safe harbours for specific duties (e.g. similar to that set out in s961B of the Australian Corporations Act). This would enable providers to design their processes such that they could be relatively certain that key elements of a duty will be met (assuming financial advisers and FARs comply with those processes).

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?
    46(1) We suggest that the proposed drafting also include the ability for the FMA to make a declaration similar to that currently set out in 562(1)(c) i.e. – the FMA can declare that a service that would otherwise be a financial advice service is not financial advice service.

    431A The draft bill does not include a proposed change to s557 or s563 of the FMCA, which restricts the FMA's power to grant exemptions and designate to where it is satisfied that the granting of the exemption or the designation is necessary and desirable to promote the purposes set out in Parts 3 and 4 of the FMC Act. We suggest that these provisions are amended so that the FMA is able to grant exemptions and designate in respect of financial advice services having regard to these additional purposes set out in 431A.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?
    See comments above. It would be helpful to understand what is meant by a service outside the context of DIMS.
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?
    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?
    No comment

18. Do you consider that other measures are required to promote access to redress against registered providers?
    No comment

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 comment

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?
    No comment

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

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?
    No comment

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?
    No comment

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?
    No comment

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
    No comment

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?
    No comment

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    No comment

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 comment

36. Do you perceive any issues or risks with the safe harbour proposal?
    No comment

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?
    No comment

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 comment

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    No comment

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 comment

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?
    No comment

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 comment

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?
No comment

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

49. Name:

Simpson Grierson

1. Contact details:

Attn. Kate Strevens
REDACTED

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

Law Firm

3. 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.