# 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.

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## Release of information

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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. The offer is being made through a financial advice provider appropriately qualified and regulated to make the offer. The financial advice provider will need to comply with the duties that apply to giving financial advice and the Code of Conduct, including the duty to put the client's interests first.

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, for the reasons set out under number 1 above.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   We submit the term "financial advice representative" (FAR) should be changed as it is too close to the term "financial adviser" and therefore potentially confusing for customers. Also a person may be a FAR but they may only very occasionally provide financial advice - it is possible that in many cases they could sell one provider's products without any advice. Therefore, it is not appropriate for the word "advice" to be in their title. We suggest the following alternatives to the term FAR:
   (a) Financial Provider Representative;

(b) "Name of provider" Representative – that would make it clear the person is only representing one product provider which will be the most common situation. We do not think the term is too broad and would be taken as a reference to any employee of the provider because of the context the term is used in, ie, in a customer interaction regarding a financial product;
(c) Do not have any prescribed term that must be used. While for the purposes of the legislation there may need to be a term to refer to FARs, we submit that providers should be allowed to choose the term they use with customers to suit their brand and marketing. Current consumer protection laws would prevent this term from being misleading. We consider that this is a common practice in other professions, for example, titles of lawyers and accountants in different organisations have different titles.

Similarly, we submit that "Financial Advice Provider" should not have the word "advice" in the title because not every interaction or transaction with a customer will involve the provision of financial advice.

## Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   We do not have any specific feedback on the drafting of Part 2. We are supportive of a licencing regime as it helps enable improving the quality of financial advice and financial advice services.

## 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?
   We submit that the words "or doing anything in relation to the giving of advice" in section 431H are not necessary. The words are vague and potentially too broad. It is inherent in the words "giving the advice" that it is the advice itself that must put the client's interests first, it is not limited to the moment of giving advice.

   We submit that the drafting of section 431H is broad and lacks clarity, for example, the use of the words "or in the interest of any other person". We also have concerns of how this duty would apply in practice, for example, for a financial advice representative or an online sales tool that only sells products from one provider.

   Given the importance of this duty, we submit that the core duty should be in the legislation with the details of it set out in the Code of Conduct. This would give the opportunity for further consultation on, and consideration of, the practical application of the duty.

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?
   We submit that the words "or is likely to have the effect of" should be removed in section 431O as this is too subjective.

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?
   No. We submit that this is not necessary for wholesale clients as they will be sophisticated enough to put their own interests first. It is inconsistent to have this duty apply to wholesale clients when the duties to meet the competency standard and comply with the code of conduct

do not apply.  Further, it is not appropriate or practical to apply this duty the types of wholesale clients set out in schedule 2 clauses 3(1)(a) and (b).

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

## 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 comments.

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 comments.

## 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?
    Yes.  We consider that this level of accountability is in keeping with the purposes of the legislation.

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.  We consider that this is appropriate as even with the most robust processes in place by a financial advice provider an individual financial adviser could breach their duties.

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?
    No.  We consider this designation power is not necessary given the definition of "financial advice" is so broad and gives scope for FMA in how they interpret and apply this.  Under the current FMCA there is a finite list of financial products so there is a need to have a designation power where a product falls outside this list.  However, we do not consider this need exists for financial advice which is a service (as opposed to a product) with a broad definition already.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services?  Is it workable in practice?
    We submit that wholesale clients should not have to be treated as retail clients just by virtue of the fact that the provider of the financial advice service has one or more retail clients.  The other types of clients the provider has should not affect the classification of any one client.  This potentially undermines the concept of having the wholesale client category.

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
    No comments.

## 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 comments.

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 comments.

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

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?
    We support the proposed approach to changes to the categories of financial services as this is clearer than the current categories. We also agree that it would be appropriate for the change in categories to be carried out for each financial service provider at the time the annual confirmation is due.

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. The purpose of the schemes is to resolve disputes – extending their function to having to identify any potential breaches of financial services legislation is not within their terms of reference. The current section 67 of the FSP Act has a materiality threshold requirement which ensures there is substance to any reporting. Lowering this threshold could potentially result in "over-reporting" by schemes who want to ensure they meet their obligations.

    We further note that it is appropriate that section 67 requires reporting to the relevant licensing authority as this may not be the FMA (eg, it may be the Reserve Bank). We submit that it would be appropriate for the scheme to notify the licensed provider that they are communicating information to the licensing authority before they do so.

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

## 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 comments.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
    No comments.

## 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. We consider it is appropriate in the context of financial advice for there to be a slightly broader definition of wholesale client. This will also ensure consistency with, and continuity of, the current Financial Advisers Act definition.

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?
    We consider the addition of execution-only services is useful. However, the term execution only and the description in schedule 2 clause 6(b) is generally associated with investment and lending products.

    We submit there should be an additional exclusion in schedule 2 clause 6 which covers sales of financial products where only information is given and there is no financial advice. We consider this is another form of execution only and it would be helpful if this was specified in the legislation. It would also be helpful in addressing issues raised in the ongoing debate of sales versus advice. An example of where this exclusion would be applicable is in the sale of general insurance products. Such products can often be purchased without a recommendation or opinion being given. Customer are asked a series of factual questions to determine a premium. Employees are trained to not answer any questions regarding whether the customer should acquire or dispose of the product or which policy options they should select but instead to refer the customer to a financial adviser in such instances.

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

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

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

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. The words "or other circumstances" means the provision is sufficiently broad for all matters to be considered.

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. Financial advice providers that are sole traders will in effect be subject to the Financial Advisers Disciplinary Committee. For entities that are financial advice providers, we consider that many would already be licenced and regulated by the Reserve Bank or the Financial Markets Authority. Further, such entities would be subject to industry codes of practice and be members of a dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act. In addition to this, we submit that financial advice providers have a high level of self regulation in order to manage reputational risk.

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?
    Subject to our comments in number 30 above, we consider the maximum fine should be consistent with the maximum fine for financial advisers (being $10,000).

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    We submit that three additions should be made to clause 6 as exclusions from the definition of financial advice. There should be specific exclusions for:
    (a) Annual offers of renewal for general insurance products;
    (b) Advertisements for financial products that are not specifically addressed to any person, eg, websites, television or print advertisements. These advertisements potentially come within the broad definition of "financial advice". Under the current Financial Advisers Act they would be considered class advice and therefore require the entity making the advertisement to be registered on the FSPR. However, under the new regime the entity would be required to be licenced. If this is the only type of financial advice the entity gives (because they do not directly engage financial advisers or make direct sales), then it does not seem necessary for the entity to be licenced given all advertising would be subject to current consumer protection and trade practices laws including the fair dealing provisions under FMCA.
    (c) Sales made without any financial advice (please see our response to question 25 above).

## About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    No comments.

## Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    Yes. Given the significant impact of the changes, particularly for current registered financial advisers, we consider a staged transition is appropriate. This will minimise disruption for both industry participants and customers.

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?
    This depends on when there will be reasonable certainty as to what will be included in the Code of Conduct before it is approved. Entities need sufficient time to decide whether they want to be a financial advice provider (and assume liability for financial advisers and financial advice representatives). Likewise, individual financial advisers need time to decide if they wish to be a licenced as a sole trader or instead be engaged by a financial advice provider. Such decisions will be heavily dependent on what the Code of Conduct requirements are. If the content of the Code of Conduct will not be sufficiently certain until it is approved, then we submit that 12 months from approval should be given for industry participants to shift to a transitional licence.

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

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 comments.

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?
    In principle this sounds sufficient, however, it would be dependent on what the full licence requirements are and the processing time for granting the licence.

## 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?
    Yes, provided the standards under the new Code of Conduct are not significantly higher than the current requirements.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    This depends on how different the standards in the Code of Conduct are from the current Level 5 certificate. If it is not significantly different then we question whether there should be a shorter time frame than five years.

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. We expect that the disclosure requirements will clarify the position for customers.

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 comments.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    Yes. We consider that there are a large number of existing financial advisers who have extensive relevant experience and this should be recognised. We note however that there could potentially be an insufficient number of assessors available to undertake this work. We suggest that MBIE and FMA consider this as part of the planning for the transition to the new regime.

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?
    Given it is a competency based assessment, it should be available to all financial advisers and not limited to those with 10 or more years' experience. We do not assume that number of years of experience is necessarily indicative of level of competency.

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 think the option should be set in legislation with the details set out in the Code of Conduct.

## Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    We would like to better understand how it would be determined as to who has to apply for a full licence and by when, ie, who will have less than two years to get their full licence, how much time they would have and how long the licensing process will take. Given the potential costs and resources required to become licensed, it is important that this is clarified.

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

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

## Demographics

49. Name:
    Suncorp New Zealand

50. Contact details:
    Chris Taylor, Executive Manager Regulatory Affairs and Compliance.
    **REDACTED**

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

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Reason: