

Submission

to the

Ministry of Business,
Innovation and Employment

on

Part 3 of the Options Paper:
Review of the Financial
Advisers Act 2008 and the
Financial Services
Providers (Registration and
Dispute Resolution) Act
2008

29 January 2016

Submission by the New Zealand Bankers' Association to the Ministry of Business, Innovation and Employment on Part 3 of the Options Paper: Review of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("Options Paper")

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following fifteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited.

Background

3. NZBA is grateful for the opportunity to submit on the Options Paper.
4. NZBA commends the Ministry of Business, Innovation and Employment's (**MBIE**) commitment to meaningful consultation and engagement, and appreciates the invitation to participate in this consultation.
5. The following submission makes some comments on the Part 3 of the Options Paper – Misuse of the Financial Service Providers Register (**FSPR**).
6. If you would like to discuss any aspect of the submission further, please contact:

Antony Buick-Constable
Policy Director & Legal Counsel

Executive summary

7. NZBA's members are registered on the FSPR as Financial Service Providers (**FSPs**).
8. NZBA sets out below certain issues that its members consider could be addressed to further enhance FSPs' experience when using the FSPR.
9. NZBA appreciates the concerns raised by MBIE in the Options Paper about the misuse of the FSPR by, in particular, offshore-controlled providers. NZBA has some suggestions about MBIE's problem definition, and proposes an alternative solution. NZBA and its members have also considered the Options presented by MBIE and other steps that MBIE could take to address these challenges.

Administrative challenges posed by the FSPR

10. As a general comment, NZBA notes that there are now multiple registers (Companies, FSPR, Disclose etc.) that FSPs are required to use and maintain for the various activities that they undertake. NZBA considers the transparency enabled by these registers about entities and individuals operating in New Zealand provides an important public service and notes New Zealand's approach is world leading in this regard. While each of these registers has a specific purpose (and different enabling legislation), NZBA considers that MBIE should continue to consider how to best enable FSPs to utilise these registers without a significant administrative burden to complete entries, especially where information is replicable. The work being undertaken by MBIE on the New Zealand Business Number will go some way to assisting providers to seamlessly update information across registers and NZBA and its members support this initiative.
11. NZBA notes that FSPs (typically being licenced Qualifying Financial Entities (**QFEs**) that employ Authorised Financial Advisers (**AFAs**) can face issues in relation to updating the registration details of AFAs. The responsibility (and ability) to update the FSP entry is the responsibility of the AFA, not their FSP employer. This can cause challenges when an AFA leaves an FSP's employ, but fails to update the FSPR entry to reflect the changes. The FSP itself is unable to request the AFA's FSPR entry be updated where an AFA fails, or ignores requests of the FSP, to do so themselves. NZBA and its members submit that a mechanism for an FSP to request the Registrar update the AFA's FSPR entry should exist, provided the FSP can evidence the need for the update to occur.
12. NZBA also notes that there is a lack of consistency in entries made in the 'Trading Name' and 'Employer Name' field by AFAs who are employed by FSPs. An AFA's FSP entries in these fields could turn up several different derivations. NZBA submits that it would be helpful if the 'Trading Name' and 'Employer Name' fields self-populated with the Name nominated by the FSP to the Registrar, or linked through to the FSP's own FSPR entry to ensure that the fields are completed consistently, or

were selected from a “drop-down” menu. This would assist greatly with search functionality for users of the FSPR and instil confidence that the AFA is actually an employee of the relevant FSP. Taking this approach would also assist in easily identifying and being able to validate any AFAs who have mis-registered or failed to update an FSP entry where their employer has changed. Furthermore, the current lack of consistency results in a limited search ability for a list of AFAs employed by each FSP. QFEs must report AFA numbers to the Financial Markets Authority (**FMA**) annually, and a standardised approach/greater consistency would allow the FMA to more easily monitor the numbers of AFAs at each QFE, and also provide additional functionality for FSPs to search for staff details.

Options to prevent misuse of the FSPR by offshore-controlled entities

Problem definition and proposed alternative solution

13. NZBA and its members would support changes designed to protect the reputation of New Zealand as a soundly regulated jurisdiction and the reputation of legitimate New Zealand FSPs.
14. NZBA acknowledges the Options in Part 3 of the Options Paper identified by MBIE to assist in preventing misuse of the FSPR by offshore-controlled entities. However, some NZBA members have expressed a concern that MBIE's problem definition has not been fully developed, and therefore none of Options proposed will address the problem sufficiently.
15. NZBA notes that one of the original aims of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**the Act**) was to provide a register of FSPs to meet Financial Action Task Force (**FATF**) requirements prior to the Anti-Money Laundering and Countering of Terrorism Act 2009 (**AML/CFT Act**) (i.e. the FSPR was to provide a register of entities captured by the AML/CFT Act). For this reason, the Act created an informational register that does not in itself require any supervision of the provision of the financial services that require registration. However, in practice, the FSPR is not used to define whether a business is a reporting entity under the AML/CFT Act as was anticipated, because the Act was not actually in force when the AML/CFT Act was passed.
16. NZBA and its members submit that it is the creation of a status as an FSP without statutory supervision and ongoing obligations (which does not exist in otherwise similar jurisdictions such as the United Kingdom and Australia) that enables the misuse of the legislation.
17. NZBA and its members submit that the best way to address the misuse of the FSPR by offshore-controlled entities is to ensure that FSP registration is only available for entities that are subject to statutory supervision and ongoing obligations (through prudential supervision, licensing or other statutory regimes). NZBA and its members submit that the original FATF compliance aim can be met by a specific form of registration for those types of entities that require AML supervision. This is the

approach taken in Australia, where the scope of the Australian Transaction Reports and Analysis Centre's (**AUSTRAC**) anti-money laundering supervision under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 Cth (Aus) is not reliant on whether or not an entity is captured by the financial services and financial markets provisions of Chapter 7 of the Corporations Act 2001 Cth (Aus). Instead AUSTRAC operates its own mandatory roll and register of reporting entities subject to the 2006 legislation.

18. This approach would require the alignment and revision of provisions in legislation beyond the Act. This could, however, have additional benefits in removing the current additive approach to entity licensing that has led to banks having to make separate and full applications to be registered as FSPs, approved as QFEs, licensed as DIMS providers and licensed as derivatives issuers etc. in circumstances that would all be covered by an Australian Financial Services License under Part 7.6 of the Corporations Act in Australia.
19. In addition to this proposed alternative solution, NZBA and its members have also considered the Options presented by MBIE and other steps that MBIE could take to address these challenges.

Use of the word “register”

20. NZBA agrees that the status of the FSPR may often be misunderstood. FSPR registration is merely an administrative measure; it does not offer licensing or confer regulatory approval, but there is a risk that this can be implied.
21. NZBA considers that the misuse largely appears to arise from the use of the word “register” and associated terms (e.g. ‘FSP Status: “Registered”’). The definition of or status implied by these terms appears to have, in some circumstances, indicated a higher threshold or standard has been achieved by the FSP than in reality and causes confusion when compared with other industries or jurisdictions that use these same terms to indicate this. For example, in the context of banking, teaching and nursing the term “Registered” equates to a status that an entity or individual has had to achieve and be granted/validated by an independent body. NZBA and its members submit that misuse of the FSPR takes advantage of this ambiguity/lack of public awareness.
22. NZBA and its members therefore consider that one option MBIE could consider is renaming the FSPR a single word (equivalent to the approach taken for Disclose – the online offer register under the Financial Markets Conduct Act 2013) or using a different phrase such as “FSP Portal” together with using different associated terms. For example, ‘FSP Status’ could state “Pending / Complete” (whichever is relevant).

Public awareness/education

23. Given the potential benefits that might result from improved awareness and knowledge about the FSPR, NZBA and its members submit there would be

advantages in increasing public education about the FSPR, including education that it is not a licensing or regulatory prudential oversight regime.

24. NZBA and its members also submit that it should be a requirement for a registered FSP to state on its website that it is registered on the FSPR, and provide a link to the FSPR, so that it is easy for members of the public to view the FSP's registration details.

Preferred options

25. NZBA and its members would support more stringent requirements imposed prior to registration, particularly the requirement that applicants confirm and provide proof that they are licensed and/or supervised in their home jurisdiction and in any jurisdiction that they are proposing to provide services to. Therefore, NZBA supports Option 1. With respect to the other change proposed under Option 1, NZBA and its members submit that while requiring a level of indemnity cover or bonding would disincentivise fraudulent providers, it would also add a cost for legitimate providers.
26. NZBA and its members support Option 2 to the extent that it proposes an amendment to the Act that would give the FMA greater powers to direct the Registrar to decline a registration or de-register on the grounds that the FSP does not provide a substantive amount of services from a place of business in New Zealand.
27. NZBA and its members support Option 3, namely amending the territorial scope of the legislation to require a legitimate connection to New Zealand. However, NZBA and its members agree with the drawbacks/loopholes which potentially come with this Option identified by MBIE. In addition, NZBA and its members consider there could be potential drafting risks and interpretive issues with determining what a "legitimate connection to New Zealand" is, which could bring with them potentially absurd outcomes (for example, a requirement on an entity to register even if they only have one client/investor in New Zealand, creating a costly compliance burden for that entity with little benefit to either them or their New Zealand based client/investor). NZBA and its members submit that a "bright line" test as to when the Act applies should be introduced. MBIE should consider aligning the application of the Act with the test for carrying on an insurance business in New Zealand, as set out in section 8(1) of the Insurance (Prudential Supervision) Act 2010. NZBA and its members submit that the focus should be on where the service is provided rather than where it is received, and the FSP should also be required to have a place of business in New Zealand.
28. NZBA and its members also support Option 4, namely requiring trust and company service providers who are subject to Anti-Money Laundering legislation to register on the FSPR. Such a requirement would be consistent with the purpose of the Act as set out in section 9(c) (conform with New Zealand's obligations under the FATF Recommendations).
29. NZBA and its members therefore favour Options 1, 2, 4 and 3 (while recognising the limitations of the latter option).

30. NZBA and its members do not favour the restriction of public access to the FSPR as proposed in Options 5 and 6, but rather favour the retention of a transparent FSPR that can be searched by members of the public, because:
 - a. Options 5 and 6 would reduce the transparency and utility of the FSPR for consumers, which are its main benefits; and
 - b. NZBA and its members are not convinced that limiting public access to the FSPR would reduce misuse. In particular, as the Options Paper acknowledges, it also leaves it open for entities to truthfully claim that they are registered.
31. NZBA and its members submit that consideration should be given to whether there are other types of information (in addition to those set out in section 27(1) of the Act) that it might be useful to keep on the FSPR, for example, details of qualifications of directors and senior employees, a link to the information maintained by the Companies Office (both of which would benefit from a streamlined approach with the Companies Office, discussed at paragraph 10 above) and/or more detailed information on the financial services provided.