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Financial Markets Policy
Ministry of Business, Innovation & Employment
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Options paper: Review of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008- Part 3

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment 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*. The Law Society's submission responds to the specific questions posed about the misuse of the Financial Service Providers (FSP) Register.

Question 36: Do you agree with our assessment of the pros and cons of the options to overcome misuse of the FSPR?

2. Generally, yes. However, the Law Society cautions against introducing significant change independently from the changes to the Financial Advisers Act 2008 (FAA). For example, the Options Paper proposes three option packages for changes to the FAA and packages 2 and 3 include a requirement that any business engaged in financial adviser services must obtain a licence. Such changes may affect the registration regime. It is therefore premature to consider many of the provisions put forward in dealing with misuse of the FSP register, outside of the context of the wider FAA reforms.

Question 37: What option or combination of options do you prefer and why? What are the costs and benefits?

3. The Law Society understands the substantive issue is that the Financial Markets Authority's (FMA) powers are too restricted.

4. The immediate problem is highlighted in two recent decisions of the High Court: *Vivier & Co v FMA* [2015] NZHC 2337 and *Excelsior Markets Ltd v Financial Markets Authority* [2015] NZHC 3334. Both *Vivier* and *Excelsior* became registered as FSPs but did not carry on business as such in New Zealand. Offshore entities that register in New Zealand but do not carry on business here could give the impression to offshore customers that the businesses are regulated in New Zealand. This could present a risk to New Zealand's reputation as a well-regulated jurisdiction and to the reputation of legitimate New Zealand-based financial service providers.

5. The Court held in *Vivier* that for the FMA to exercise its discretion to deregister, it was not sufficient for the FMA to rely solely on the fact that an FSP does not provide services in or from New Zealand: the FMA must present evidence which goes to whether the registration of the FSP is misleading.

6. However, the Court held in *Excelsior* that if an entity's financial services are being provided almost wholly outside of New Zealand, that can be a sufficient basis for the FMA to conclude that there could be a misrepresentation as to the extent to which those services are regulated in New Zealand.

7. The differences in reasoning between *Vivier* and *Excelsior* are unhelpful and the law is in a state of flux regarding whether the FMA can deregister an FSP for providing most of their services outside New Zealand, where there could be a misrepresentation as to the extent to which those services are regulated in New Zealand. Ideally, Parliament should legislate on this point to give certainty to the industry and the FMA as to the ambit of its deregistration powers.

8. The Law Society considers this problem is best dealt with by adopting Option 2. Further changes to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act) could then be considered in line with the wider FAA review.

9. It is essential that the grounds for deregistration are clear and unequivocal. There is a risk that trying to prescribe detailed prohibitions or 'no-go' areas for advertising of a firm's registered status could lead to more examples of regulatory arbitrage, requiring the FMA to go to extraordinary lengths to justify decisions in the face of judicial review.

10. In addition, the Law Society agrees that clearer messaging and notices to consumers about what it means to be registered are needed, as indicated on page 51 of the Options Paper. In this regard, the consumer information pages about the register on the www.business.govt.nz website could be more detailed and prominent.

Question 38: What are the potential risks and unintended consequences of the options above? How could these be mitigated?

11. Care must be taken to ensure that any amendments to the FSP Act cater for technological advances. Increasingly, financial services are provided offshore and aspects of financial services are outsourced. An example of this is robo-advice. Any changes to the legislation must as far as possible deal with technological advances such as robo-advice and overseas outsourcing.

Question 39: Would limiting public access to parts of the FSPR help reduce misuse?

12. The Law Society acknowledges that making parts of the FSP register private (as provided in Option 5) could reduce the likelihood of creating a false impression that a firm is licensed in New Zealand. However, firms could still represent that they are registered in New Zealand.

13. The purpose behind New Zealand's financial services legislation is to promote and facilitate the development of fair, efficient and transparent financial markets, and increasing financial capability and responsibility are an important part of this. In the Law Society's view, limiting public access to parts of the FSP register would be a retrograde step.

Conclusion

14. This submission was prepared by the Law Society's Commercial and Business Law Committee. The committee convenor, Rebecca Sellers, can be contacted through the committee secretary Karen Yates on 04 463 2962, karen.yates@lawsociety.org.nz.

Yours sincerely

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