IAG SUBMISSION

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

26 February 2016

1. INTRODUCTION

1.1 This submission is a response by IAG New Zealand Group (IAG) to the Ministry of Business, Innovation and Employment (MBIE)'s Options Paper 'Review of the Financial Advisers Act 2008 [the Act] and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 [FSPA]' (the Paper).

1.2 IAG is New Zealand's leading general insurer. We provide more than a million insurance policies a year and protect almost $450 billion of commercial and domestic assets across New Zealand. Our business is focussed on helping make the world a safer place, and we are committed to making sure that New Zealanders have the ability to protect themselves and their assets through easily accessible and affordable insurance.

1.3 We support the government's ambition to promote more confident and informed consumers and investors in financial markets.

1.4 Our submission focuses on the definition of Financial Adviser used within the Financial Advisers Act 2008, how this can be improved, and the high level design of the subsequent regulatory regime. It does not comment specifically on each of the discrete elements or packages presented.

1.5 We welcome the opportunity to discuss our submission further with officials.

1.6 IAG's contacts for this submission are:

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2. OUR THINKING

The core issue is one of definition

2.1 We believe that the core problem with the current Act is the way the term *Financial Adviser* has been defined. If this definitional problem is resolved many of the issues with the current regime are likely to be mitigated and improving it becomes much easier.

2.2 The Act uses three cascading definitions to define a financial adviser: financial adviser; financial adviser service and financial advice. To paraphrase, a financial adviser is *a person who, in the ordinary course of a business, plans or manages investments on behalf of a client or makes a recommendation or gives an opinion to a client in relation to acquiring or disposing (or not) of a financial product*.

2.3 Our primary concern is with the last element of this definition, which in effect defines a financial adviser as someone who gives financial advice. The issues with defining a financial adviser in this way are well documented in our earlier submission, including that:

- The definition catches too many people and as a result, does not align with average consumers' experience of financial advice and expectations of who is or is not a financial adviser;
- The idea that a person who gives financial advice is a financial adviser in practice establishes a regulated occupation on the basis of phraseology and on how a person chooses to communicate with their customer. No other regulated occupation is defined in this way;
- Providing an opinion on a product or recommending to someone that they purchase it should not automatically imply that the individual providing that 'advice' is part of a profession called financial advisers;
- The range of rules and exemptions within the Act illustrate only a subset of those caught by the initial definition were truly meant to be regulated as financial advisers; and
- The Act replicates obligations and protections already in the Fair Trading Act 1986 (FTA), Consumer Guarantees Act 1993 (CGA) and Financial Markets Conduct Act 2013 (FMCA) and imposes additional compliance costs.

2.4 Consequently we believe too much 'low level' advice is caught by this definition and because of this breadth of advice an overly complex and somewhat burdensome regime has been created. Much of this low risk activity can sit outside this regime without any material loss of consumer protections due to other existing consumer and financial services law (see paragraphs 49-57 in our earlier submission).

Focus on the profession

2.5 We believe that a far simpler and less burdensome regime can be established by using a tighter definition of *Financial Adviser*. This regime would establish a regulated profession of Licensed Financial Advisers and not seek to regulate all financial advice.

2.6 A person would become part of that profession by meeting the licensing and ongoing practice requirements set by the Financial Markets Authority (FMA). The FMA would also monitor their conduct and undertake any necessary disciplinary actions. Much as they do now for Authorised Financial Advisers within the current regime.

2.7 It would be mandatory for certain people to be licensed before they can practice. These would be the people that fall within the new definition and include those naturally thought of as financial advisers, such as: investment planners; investment managers; insurance brokers; and mortgage brokers.

2.8 This would mean that some types of advice can only be provided by Licensed Financial Advisers, while all other types of advice can be provided by people without requiring them to be licensed. In this way the regime would be like that which applies to plumbers and gas fitters.

2.9 The regime could also allow people who fall outside the definition to join if they meet the licensing criteria. In this way the regime could also provide a quality mark – much like we see with Chartered Accountants.

A better definition

2.10 Drawing a bright line between those who are expected to be licensed and part of the profession and those who are not is the central challenge. The Paper provides a starting point for this in distinguishing between advice and sales on the basis that advice puts the consumer's interest first and sales does not. While we think this language is unhelpful because of what it implies, it does lead us to a better solution.

2.11 We contend that the difference between someone being an adviser or not lies in the nature of their relationship with their clients and the providers of the products and services they are advising on. A person is an adviser if they are not tied to a single provider and act on behalf of their client. Conversely, if they are tied to and act on the behalf of a single provider then they are not an adviser.

2.12 We believe this distinction represents consumers' general expectation of who is and isn't an adviser. Consumers inherently understand that an employee of a provider will be looking to sell that provider's products and services. Conversely, when those consumers go to an adviser they expect and are seeking help to find the best option(s) from across the market.

2.13 There are examples where people are tied but still give advice on products that are complex and or carry high risk. It may be that the regime would need to name and include these on an exception basis. An example of this are tied investment planners.

Thinking about the future

2.14 In crafting a new regime we must be mindful of what the future market for advice might look like. We know with a changing population and (presumably) growing literacy and non-property assets, the nature of advice will evolve and expand. Similarly, consumer expectations and the ways in which that advice is delivered will also change or at least become more sophisticated, demanding and mature.

2.15 Within this context, we believe the market may naturally resolve many of the issues that this review is considering. For example, rapid developments within the social media world may alter the way in which advice is sought, consumed and ultimately judged. We encourage the government to consider what a profession that provides financial advice may look like in this evolving market.

2.16 To that end, we are pleased to see the government wanting to establish a regulatory regime that encourages and enables innovation in the financial services industry. This innovation will undoubtedly see consumers securing advice through alternative means than the traditional person-to-person interaction. Care must be taken to ensure the law does not introduce an inherent bias towards one channel through the imposition of greater costs or impractical operational demands.

Obligations for Licensed Financial Advisers

2.17 Building off a revised and tighter definition of Financial Adviser, we believe that the right reform option is a variation of Package 3. For Licensed Financial Advisers this would include:

- Individual licensing by the FMA
- FMA to define categories of license and associated licensing criteria
- Licensing criteria to include minimum competency standards for:
  - Giving advice
  - Product specialization (tied to license categories)
- Licensing criteria to include fit and proper standards
- Ongoing licensing to be conditional on:
  - Minimum continued professional development
  - Continued adherence to a minimum code of conduct
  - Continued adherence to fit and proper standards
- Mandatory and standardized disclosure that includes:
  - Licensed category (if applicable)
  - Remuneration
  - Conflicts of interest
  - Dispute resolution

Obligations for non-advisers

2.18 We believe it is right and proper for there to be a minimum standard of conduct and accountability for those who sell financial products and services and for those who provide advice on them but are not required to be a Licensed Financial Adviser.

2.19 Consumers should receive products and services appropriate for their needs and that accord with what they thought they were getting with an easy means of redress should things go wrong. However we are not convinced that obligations are needed within the Act to achieve this.

2.20 All product providers in New Zealand are registered under the FSPA and subject to the FMCA, FTA and CGA. Confidence can be taken that there are already obligations and associated practices in place to provide protection to consumers and which caution against poor conduct. We note that when this does occur, there are provisions and powers for the Commerce Commission and the Financial Markets Authority to take action against those who have acted inappropriately. We listed these in our earlier submission (see 51-54), including:

- A person must not engage in conduct that is misleading or deceptive or likely to mislead or deceive; [s.19 FMCA]
- A person must not engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of financial products; [s.20 FMCA]
- A person must not engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of financial services; [s.21 FMCA]
- A person must not make a false or misleading representation about (amongst other things) the kind, standard, quality, grade, quantity, composition, or value of a financial product or service; [s.22 FMCA]
- A person must not make a representation about a product or service when they don't have reasonable grounds to do so; [s.23 FMCA]
- There is a general guarantee that a service supplied to a consumer will be carried out with reasonable care and skill; and [s.28 CGA]
- There is a general guarantee that a service supplied to a consumer, and any product that results from the service, will be reasonably fit for purpose and can reasonably be expected to achieve a result the consumer makes known. [s.29 CGA]

2.21 Contravening these provisions can lead to direction orders, significant civil liability in the form of pecuniary penalties and compensatory orders, and banning orders. These act as a strong deterrent of poor practice.

2.22 We believe that it is unnecessary, given this range of existing protections, penalties and the means of redress available through the Financial Service Providers Act, to establish additional suitability or other such requirements. Furthermore we note that establishing these requirements is fraught with definitional and operational difficulty, and risks creating increased compliance costs and unintended consequences.

2.23 In addition we do not see a need for the FMA to license, approve or otherwise register individuals and organisations that fall outside the tightened definition of Financial Adviser. Reliance can reasonably be placed on registration under the FSPA and the obligations and penalties that already apply to organisations and their directors and officers.

2.24 Accordingly we do not see a requirement for a material increase in the level of oversight that the FMA would have to exercise over those individuals that are not required to be a Licensed Financial Adviser or the organisations they act for.

Conclusion

2.25 In order to achieve the outcomes listed in the Paper it is essential that the Act becomes more focused. It cannot continue to regulate all financial advice. Attempting to do so has led us to where we are today: a complex and poorly understood regime that has in many circumstances seen a reduction in the level of advice and support consumers receive in making decisions about financial products and services.

2.26 To expand the availability of advice and improve the quality of advice which most impacts consumers it is essential that this review recommend narrowing the focus of the Act.