



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

12 April 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600
Email: enforceablecodes@treasury.gov.au

Dear Sir / Madam

RE: Enforceability of financial services industry codes

The Financial Planning Association of Australia welcomes the opportunity to provide feedback on *Enforceability of financial services industry codes*.

As one of only two organisations with an ASIC approved code, the FPA understands the importance and rigour required around the code approval process and ensuring subscribers are able to be held accountable to the rules under a code.

Industry codes play an important role in prescribing norms of behaviour for a covered population and provide professions in particular an ability to establish a set of standards which generally exceed the minimum requirements of the law. To this point, the FPA has expressed significant concern in a number of consultations that in general, proposed financial services codes simply replicate existing legal obligations and fail to properly hold subscribers accountable to breaches, which therefore create unsatisfactory outcomes for consumers.

For this reason, the FPA welcomes and supports the ability to make 'enforceable code provisions' and that where identified, mandatory financial services industry codes will be required to better protect consumers, raise standards above minimum legal requirements and hold financial services providers accountable for misconduct and poor consumer outcomes as defined by their peer group.

Lastly, the FPA wishes to note that care must be taken not to create unnecessary new codified regulations that apply to the financial advice industry without first letting the new FASEA Code of Ethics and other changes recommended by Commissioner Hayne, to be put in place and tested.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

We welcome the opportunity to discuss with Treasury the issues raised in our submission. If you have any questions, please contact me on ben.marshan@fpa.com.au or 02 9220 4500.

Yours sincerely

Ben Marshan

Head of Policy and Professional Standards

Financial Planning Association of Australia ¹

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has

taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Graham McDonald, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Enforceability of financial services industry codes

Taking action on recommendation 1.15 of the Banking,
Superannuation and Financial Services Royal Commission

12 April 2019



FPA RESPONSE TO CONSULTATION PAPER

Q1. What are the benefits of subscribing to an approved industry code?

The FPA is concerned that the Consultation Paper does not appear to acknowledge the difference between an industry code that binds the entities of an industry, and professional codes that apply to individual practitioners. All codes deliver different benefits for consumers, the industry or profession they relate to, regulators and government.

Professional codes

There is a difference between an industry and a profession. A **profession** is a disciplined group of individuals who adhere to ethical standards. This group positions itself as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and is recognised by the public as such. A profession is also prepared to apply this knowledge and exercise these skills in the interest of others². That is, the focus of a professional is to provide a service to their client.

Professional codes and professional membership are more than a set of additional rules and standards that exceed the minimum requirements set in the law. Professional codes deliver significant benefits as they encourage the 'norming' of ethical conduct and professional behaviours of the individual practitioners, building a sense of professional aspiration, pride and commitment to high professional ideals.

Professional standards speak universally to all members of a profession as they are business model agnostic. They encourage individual professionals to strive for client-centred outcomes and to resist adverse commercial interests. This underlying principle of professional codes delivers ongoing fundamental benefits for the consumers the practitioners serve. Professional codes set and enforce professional standards for the individual practitioners on the 'frontline' interacting with and providing the direct service to consumers.

Professional codes can include the following types of code standards:

1. Code of Practice– requiring minimum service standards expected of the practitioner when providing professional services to clients.
2. Code of Conduct – addressing conduct issues and setting minimum standards of behaviour of the practitioner
3. Code of Ethics – is about professional obligations in relation to the client-practitioner relationship. It requires the individual practitioner to use professional judgement to act ethically and make appropriate decisions on ethical dilemmas.

A code of ethics can only apply to the individual practitioner as it specifically relates to the client-practitioner relationship.

² <http://www.professions.com.au/about-us/what-is-a-professional>



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

Industry codes

By contrast, the term '**industry**' typically refers to a grouping of companies focused around particular service or business activities. Industries are also broader in scope than professions. Professionals may work within an industry, but there's more to an industry than just professionals. For example, the financial advice industry includes financial planning practitioner professionals, paraplanners, as well as compliance, human resources, administration, IT and systems, management, finance, marketing and other staff performing auxiliary functions for the business.

The purpose of an industry code is to ensure industry compliance with an agreed upon set of objectives that benefit workers, employers and consumers. As members of industry associations are usually businesses, not individual practitioners, industry codes usually focus on the promotion of best industry practice and enhancing consumer confidence. They do not usually include ethical obligations as these apply to the specific relationship between the client and the individual professional practitioner.

Industry codes are generally limited to Codes of Practice and/or Codes of Conduct and restricted to standards that realistically can be implemented and supervised by a business in regard to the behaviour and service outputs of its representatives.

Generally, the mandate and charter of industry associations is to serve their members' interests, who are usually businesses.

Delivering consumer benefits

Codes of practice, codes of conduct, and codes of ethics all serve a purpose in delivering better consumer outcomes and consumer protections to users of Australia's financial services. The differences between the types of codes must be recognised in order to address the consumer issues that the standards in a code strive to overcome. This includes the regulatory requirements and structures behind the approval of codes.

Codes must serve to improve the quality of services provided to consumers of financial services in Australia. As previously stated, the membership of professional bodies are made up of individual practitioners who sign up to professional standards and rules through their membership contract. As such, there are significant differences between professional codes of ethics and conduct, and industry codes that apply to a corporation or business.

ASIC in its capacity as Regulator of the Corporations Act, governs corporations and licensees. Professional bodies set and enforce professional codes and standards for their members who are individual practitioners on the 'frontline' interacting with and providing the direct service to consumers.

ASIC's *Regulatory Guide RG183 – Approval of financial services sector codes of conduct* reflects the requirements of the Corporations Act, particularly s1101A, and therefore speaks to the licensee or entity as the subscriber to the code. Under the professional code model, some of the functions required by RG183 are not practical or are not possible to require of the professional membership as individuals. This is typical of all professions.

For example:



- Code governance, independent oversight and administration³ - professional bodies typically incorporate governance and independent oversight principles in different ways to captive industry bodies or trade associations. Using the FPA membership and professional code as an example, the FPA Board is made up of elected practitioner members and independent non-executive directors. Membership of the FPA is confined to practitioners. Disciplinary investigations against members for breaches of the FPA Code of Practice are initiated by the FPA upon complaint, and the independently chaired Conduct Review Commission (CRC) authorises breach notices. Disciplinary hearings are conducted with practical independence by Conduct Review Commission disciplinary panels. Quality private tribunal justice is dispensed. Written reasons for decisions are published. The professional accountability regime includes extensive independent investigative powers under FPA Disciplinary Regulations pursuant to the FPA Constitution and contract of membership.

The FPA Professional Standards department is also empowered under the FPA Constitution to conduct compliance reviews of members. Managing these arrangements in-house also provides for the efficient use of member information and market intelligence to identify and address emerging issues, screen new applicants and to maintain an effective member registry.

The FPA's primary role is to act in the public interest at all times. This principle drives the governance and oversight arrangements, and disciplinary processes and systems, for our professional standards.

- Dispute resolution mechanisms⁴ - the legal requirement to have in place internal dispute resolution (IDR) processes and be a member of an ASIC approved external dispute resolution (EDR) scheme is placed on the licensee/entity, not the individual professional. Only licensed entities can join an EDR scheme. While RG183 requires "*the code provisions provide that consumers have access to IDR processes and an appropriate EDR scheme for any code breaches resulting in direct financial loss*"⁵, and reflected in the ASIC ERT's Position 4, this is not a responsibility that can be fully accepted by or bestowed upon an individual professional member under a professional code.

The FPA notes that the Consultation Paper does not refer to the application of the proposals to any professions such as financial planners or accountants, or professional codes. Rather it refers to industry codes, with requirements applying to entities not individuals.

This raises two potential issues that may impact on the consumer benefits of any professional or industry codes that may be in place or developed in the future:

- Consistency and compatibility between potential existing professional codes that practitioners may be bound by, with potential new industry codes placing obligations on the licensee/business, and
- Industry code requirements being extended to professional codes in a manner that does not recognise the difference.

³ ASIC RG183.76 – RG183.85

⁴ ASIC RG 183.63–RG 183.69

⁵ ASIC RG 183.25(c)



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

Financial Advice Standards and Ethics Authority

The Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 set a new education and professional standards framework for the financial planning profession which includes the establishment of the Financial Adviser Standards and Ethics Authority (FASEA), an independent standard setting body responsible for developing a comprehensive Code of Ethics for financial planners.

As summarised in the Consultation Paper, the Corporations Act details the requirements specifically for FASEA and the new Code of Ethics:

From 1 January 2020, advisers must comply with the Code of Ethics made by the Financial Adviser Standards and Ethics Authority and be covered by a compliance scheme which will set out how the Code of Ethics will be monitored and enforced. The compliance scheme will specify which monitoring body is responsible for enforcing compliance. All monitoring bodies will need to be approved by ASIC and may be either a professional association or a third party who is independent of the licensee.

Under s921E a 'relevant provider' must comply with the Code of Ethics. s910A states that a 'relevant provider' is an individual. It is important to remember that as this is a legislated Code enacted through legislative instrument, it does not have or require ASIC approval.

However, ASIC's approach to Codes of Conduct focus on the oversight of entities, not individuals. As explained above, there are significant differences between professional bodies and industry associations which are pertinent to the approval and role of a monitoring body, and are not recognised in RG183.

A different type of engagement is required to manage co-regulation between the Regulator and professions. Should professional bodies seek approval for a professional code, this should be based on separate relevant criteria that can practically apply to codes that bind an individual professional member.

Recommendation

To support a co-regulation approach between the Regulator and professions:

- amend Regulation 8AA of the ASIC Regulations to include other financial services professional bodies, including the Financial Planning Association, and permit collaborative and confidential information sharing between ASIC and professional bodies to enhance consumer protection.
- establish a Memorandum of Understanding between ASIC and professional bodies that facilitates and permits a more collaborative and cooperative two-way working relationship, or co-regulatory partnership.

Industry codes that apply to licensed entities should recognise and complement the professional codes and the standards such codes require of the individuals who provide direct services to clients.

Q2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

The FPA support standards set in an industry code where they fill a gap in consumer protection within the law. Ensuring enforceability of an industry code through 'enforceable code provisions will increase the impact the code has on improving consumer outcomes.

It is important to ensure the industry codes are addressing identified issues that are adversely effecting consumers. Consideration must also be given to other codes and regulations that may already exist to ensure codified regulation is effective and efficient.

Professional codes govern the individual practitioner. In the case of financial advice, the practitioner is a representative of the licensee. The new FASEA Code of Ethics places requirements on the practitioner. The law also requires the licensee to support its representative to adhere to the new Code.

The FPA acknowledges the misconduct evidenced during the Royal Commission including in relation to financial advice. Given the widespread political support for the Recommendations made in the Royal Commission Final Report, it is hopeful that consumers will not be faced with such issues in the future.

Hence, as aforementioned care must be taken not to create unnecessary new codified regulations that apply to the financial advice industry without first letting the new FASEA Code of Ethics and other changes recommended by Commissioner Hayne, to be put in place and tested.

Further, once industries have identified enforceable code provisions it is important that those provisions are appropriately communicated for their subscribers and the public. That is, review of proposals should clearly assess whether the mechanisms to support professions adhering to the provisions are appropriate. These, in turn, articulate that enforceable code provisions are to protect consumers.

While care should be given to ensure intensive and punitive regulation is not driving up the cost of services for consumer, enforceable code provisions can serve a purpose in industries where self-regulation has been ineffective.

Q3. What criteria should ASIC consider when approving voluntary codes?

The FPA supports the criteria in the consultation paper.

However, as highlighted in our response to question 1, the FPA recommends that there needs to be an acknowledgment about the difference between professional codes and industry codes. Criteria outlined previously such as independent administration and dispute resolution mechanisms, are not practical or are not possible to require of the professional membership as individuals, under the professional code model. This is typical of all professions. Hence, ASIC's Regulatory Guide RG183 should acknowledge these differences and set appropriate requirements for industry codes that bind entity (company) subscribers only; and separate appropriate criteria for professional codes which apply to individual professional practitioners.



Q4. Should the Government be able to prescribe a voluntary financial services industry code?

There are different ways in which industry codes can be prescribed:

- Legislated code - where the standards of the code are developed by Government, or a statutory body, forms part of the law governing that industry or profession, and are monitored by an entity independent of industry. For example, the Tax Agent Services Act includes a Code of Conduct for tax practitioners which is monitored by the Regulator; and the new FASEA Code of Ethics is enacted through Legislative Instrument and monitored by independent ASIC approved code monitoring bodies.
- Mandated industry or professional code - where the law requires entities or practitioners to sign up to and adhere to an industry or professional code that is developed and monitored by the industry/profession the parties belong to. A mandated professional code must be supported by an obligation on the business entity to support practitioners to adhere with the requirements.
- Mandating membership of a professional body – this goes further than mandating adherence to a professional code as membership includes adherence to a code plus other professional requirements such as education and CPD.

The FPA does not support legislated codes. The role of an industry or professional code is to set standards that go beyond those required in the law; allow industry or the profession to respond in an appropriate and practical manner to consumer and industry issues; and are more flexible, timely and efficient than enacting changes in the legal or regulatory framework. Legislated codes illuminate the benefits of industry codes as a more efficient and agreed set of standards of behaviour. Legislated codes impose regulatory requirements into or via a code.

Industry and professional codes must be flexible and nimble to be able to respond effectively to issues as they arise to enhance consumer protection. The most effective codes are those that are owned by industry or the profession. Therefore, the FPA supports a co-regulatory approach to the use of codes.

Q5. Should subscribing to certain approved codes be a condition of certain licences?

As previously mentioned, financial planning practitioners must meet the standards set in the new FASEA Code of Ethics from 1 January 2020. The FPA believes that advice licensees should be required to support representatives to adhere to the provisions of the new Code. The FPA recommends requiring licensees to adhere to any additional code conditions in relation to the advice provided under the licence, would be counter-productive at this stage. The requirements of the new FASEA Code should be allowed to be implemented and tested first.

The FPA understands that there may be instances in some industries, where requiring subscription to an approved code as a licensing condition may be necessary and appropriate to address systemic industry issues.

Q6. When should the Government prescribe a mandatory financial services industry code?



The FPA agree with the principle stated in the Consultation paper and Industry Code Policy Framework.

“... mandatory codes should only be prescribed when they are necessary for supporting the efficient operation of markets or the welfare of consumers.”

Q7. What are the appropriate factors to be considered in deciding whether a mandatory code ought to be imposed on a part of the financial sector by Government?

The FPA agree with the framework from the CCA from the consultation paper and from the Competition and Consumer Act:

1. *Is there an identifiable problem in the industry?*
2. *Can the problem be addressed using existing laws or regulations?*
3. *Has industry self-regulation been attempted?*
4. *Is an industry code the most suitable mechanism for resolving the problem?*
5. *Is there likely to be a net public benefit?*

As highlighted above in regards to FASEA, Professions vs Industry and Professional Codes, there needs to be careful consideration on codes that current ‘professions’ or ‘industries’ are already required to comply with. The financial planning profession is required to comply with the Code of Ethics set by the Financial Adviser Standards and Ethics Authority, which is a fully legislated Code of Ethics.

Q10. Should there be regular reviews of codes? How often should these reviews be conducted?

It is not realistic to “continuously” review and update an industry code due to the cost involved and the uncertainty for industry, consumers, EDR bodies, and PI insurers/premiums. This would potentially result in frequently changing standards which would result in significant complexity particularly in relation to code breaches and IDR and EDR processes.

Rather, Codes should be formally reviewed every three years, or if systemic consumer issues arise or significant shortcomings of the code are identified. This is consistent with condition for approval by ASIC.