



26 July 2017

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: ASICenforcementreview@treasury.gov.au

Dear Sir / Madam

Re. Industry codes in the financial sector

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to the ASIC Enforcement Review on the Position and Consultation Paper 4 – Industry codes in the financial sector.

Our submission presents our observations based on the considered impact on consumers and our members' businesses, and our broader goal of improving professional conduct in financial planning.

The FPA would welcome the opportunity to discuss with you the issues raised in our submission.

If you have any questions, please contact me directly on heather.mcevoy@fpa.com.au or 02 9220 4500.

Yours sincerely

Heather McEvoy

Policy Manager

Financial Planning Association of Australia¹

¹ The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 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 super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Graham McDonald, deals 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 required of professional financial planning practices. This is being exported to 24 member countries and 150,000 CFP practitioners of the FPSB.
- We established the Financial Planning Education Council in 2011 as an independent body chartered with raising the standard of financial planning education. The FPEC has built a curriculum with 17 Australian Universities for Bachelor and Master degrees in financial planning. We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, as a minimum, an approved undergraduate degree.
- We are the only professional body in Australia licensed to provide the CFP® certification program. 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 designations, such as the Chartered Accountant designation of the Chartered Accountants Australia and New Zealand (CA).
- We are recognised as a professional body by the Tax Practitioners Board



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

INDUSTRY CODES IN THE FINANCIAL SECTOR Position and Consultation Paper 4

**FPA submission to
ASIC Enforcement Review**

26 July 2017



INDUSTRY CODES IN THE FINANCIAL SECTOR

Profession versus industry

Co-regulatory approach

The FPA is concerned that the Consultation Paper does not appear to acknowledge the difference between industries and professions; and a co-regulatory model that binds the entities of an industry, versus the co-regulation of individual professionals via professional bodies and 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.

Professions also seek to control use of their terms and labels and who can and cannot hold out as a professional. The use of terms financial planner and financial adviser are restricted within the Corporations Act, and to use professional designations such as CERTIFIED PROFESSIONAL PLANNER® an individual must adhere to strict enforceable ethical and professional standards and continued education requirements.

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. Which means it's not a matter of whether financial planners are professionals or part of an industry, but that as professionals they would *still* be part of an industry.

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

The primary emphasis of professional regulation is in the setting and enforcement of professional norms and behaviours, negotiated directly with the community of professionals themselves, for the national public benefit the profession serves. Another feature of professional regulation is an emphasis on providing clarity and depth to the professional community's expectations of good process, identifying the boundaries of good practice, over and above the expectations of the law. Working in concert, these overlapping systems can provide enhanced consumer protection and help build the broader community's trust and confidence in the profession, and the regulatory system.

It is the normative power of professional standards and their appeal to the ethical behaviour of an individual, which offers the best prospects to significantly improve consumer outcomes across the variations in service offerings and business models in the financial services sector. Professional standards speak universally to all members of the profession as they are business model agnostic. They encourage individual professionals to strive for client-centred outcomes and to resist adverse commercial interests. They install pride, a sense of belonging and public purpose in their adherents.

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



By their nature professional bodies seek to bind individual practitioners rather than the licensee, to professional standards and rules, as is the case with financial advice. This is a vital difference and benefit professional bodies bring to the co-regulatory design. Where ASIC in its capacity as Regulator of the Corporations Act, governs corporations and licensees, professional bodies set and enforce professional standards for their members who are individual practitioners on the 'frontline' interacting with and providing the direct service to consumers.

Generally, the mandate and charter of industry associations is to serve their members' interests, who are usually businesses. Professional bodies have express constitutional objectives to serve the public interest. Professional Codes and the encouragement of professionalisation should be maximised as a key co-regulatory tool in the enhancement of consumer protection.

Co-regulation should involve a two-way working collaboration between the profession with individual membership, and the Regulator's oversight of licensed entities.

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.

Professional Codes

Codes of Conduct 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 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 speak to the licensee or entity as the subscriber to the code. Under the professional body 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. In the FPA's 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*", and reflected in the Taskforce'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 Consultation Paper states:

"The Taskforce anticipates that the kind of activity that would ultimately be covered by the approved code requirement would include retail banking, retail life insurance, the provision of insurance and associated services through superannuation or other group arrangements, retail general insurance, insurance brokerage, and the provision of ePayments services...."

The FPA notes that the Consultation Paper does not refer to the application of the Taskforce's 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.

The FPA would support this approach and the application of RG183 to industry codes only – that is, to codes that bind an entity. RG183 should not apply to professional codes that bind an individual at all.

³ RG183.73 – RG183.78

⁴ RG 183.63–RG 183.69



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

The Taskforce acknowledge the difference between professional codes of conduct and industry codes by recommending ASIC's Regulatory Guide RG183 should apply to industry codes that bind entity subscribers only.

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 standards 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.

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.

The FPA suggests that it would be inappropriate for ASIC approval of monitoring bodies for the FASEA Code of Ethics, to be based on RG183. Relevant criteria specifically for the role of code monitoring bodies should be developed.

Given this is a legislated code, it would also be inappropriate for the FASEA Code of Ethics to be subject to the Taskforce's proposed positions.

Recommendation

ASIC and FASEA develop relevant criteria specifically for the approval of code monitoring bodies for the legislated Code of Ethics for financial advisers, with appropriate stakeholder consultation.

The Taskforce specifically exclude /ring-fence the FASEA Code of Ethics for financial advisers from its recommended changes to industry codes in the financial sector.



FPA RESPONSE TO CONSULTATION PAPER

Position 1: The content of and governance arrangements for relevant codes (those that cover activities specified by ASIC as requiring code coverage) should be subject to approval by ASIC.

Position 2: Entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFSL or some similar mechanism).

Consultation questions	FPA response
1. Would a requirement to subscribe to an ASIC approved industry code result in improved outcomes for consumers?	<p>The role of a Code of Conduct is to set standards that go beyond those required in the law, allow industry 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.</p> <p>Placing a mandated legal requirement on an industry to have a code; for that code to meet certain set requirements; and to be approved by ASIC, creates pseudo legal standards that have not undergone appropriate parliamentary due process. It creates a string of legislated codes without due parliamentary process for their development or existence. The proposal does not maximise or use codes as a more efficient and agreed set of standards of behaviour, rather it is trying to impose regulatory requirements into or via a code. There is also a general concern that such codes would impact binding agreements in the law.</p> <p>Industry 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, not forced upon them.</p>
2. In respect of which financial sector activities should the requirement apply?	<p>The requirement should <u>not</u> apply to the financial advice profession. As stated in the Consultation Paper, from 1 January 2020, advisers must comply with the Code of Ethics set by the Financial Adviser Standards and Ethics Authority. This is a fully legislated Code of Conduct that, for the reasons detailed above, must sit outside RG183.</p> <p>Intensive and punitive regulation is driving up the cost of providing advice, creating significant barriers to entry for market competition and making it even more inaccessible for more Australians.</p> <p>These proposals should not apply to the financial advice profession now or in the future.</p>
Should these requirements apply to providers of services covered by the ePayments Code? Or should that code be mandated by other means? If so by what means?	No comment
What costs or other regulatory burden would the requirement imply for industry?	Would impose costs for development of Code including appropriate stakeholder engagement (as per RG183); approval process; business process/systems changes; compliance



	monitoring; reporting; EDR; Code Monitoring Body; PI implications.
Should conduct associated with subscription to approved codes be deemed to be authorised under section 51 of the Competition and Consumer Act?	No

Position 3: Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.

Position 4: An individual customer should be able to seek appropriate redress through the subscriber's internal and external dispute resolution arrangements for non-compliance with an applicable approved code.

Position 5: The code monitoring body, comprising a mix of industry, consumer and expert members, should monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters.

Consultation question	FPA response
Will ensuring enforceability provisions of codes meet a minimum standard improve consumer outcomes?	If the standards set in a Code of Conduct fill a gap in consumer protection within the law, ensuring enforceability of the code will increase the impact the code has on improving consumer outcomes.
Do any problems arise with imposing these requirements in relation to particular financial sector activities?	Yes. See sections on professional codes and FASEA above.
Are contractual arrangements with code monitoring bodies the most effective enforcement mechanism?	Yes
Is it appropriate that, where feasible, code content be incorporated into contracts with customers?	Not in the financial advice profession. However, the requirements of any Code should be promoted to consumers and disclosed in relevant consumer documentation.
Should the composition of individual code monitoring bodies and arrangements for enforcement be subject to ASIC approval?	<u>No.</u> There could be standard guidelines within the updated RG183, however ASIC approval would be too prescriptive. A balance could be for the relevant industry to undertake consultation of the composition of the code monitoring body and arrangements for enforcement. This position should not apply to legislated codes such as the FASEA Code for financial advisers. The requirements for monitoring bodies for legislated Codes should be developed by the appropriate bodies specifically for each legislated Code, and involve stakeholder consultation.
What characteristics should code-monitoring bodies have? (for example, what level of independence should they have?)	Independence does not ensure the effectiveness of the code monitoring body, and should not be used as such a measure.



	<p>There must be a balance between the independence of the code monitoring body, its capabilities and its establishment and ongoing costs.</p> <p>For example, the provision of secretariat support by a professional body to an independent Code Monitoring Committee/Board could achieve the necessary consumer protection outcomes in a cost effective manner for industry and consumers.</p> <p>The Taskforce states that the code body should keep the code content under review on an ongoing basis and adapt it to changing market conditions (para 21.4). 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.</p> <p>Rather, Codes should be formally reviewed every three years, or if systemic consumer issues arise or significant shortcomings of the code are identified.</p>
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