

Parliamentary Joint Committee on Corporations and Financial Services

January 2021

ANSWERS TO QUESTIONS ON NOTICE

Division/Agency: Financial Adviser Standards and Ethics Advisory Ltd (FASEA)

Question No: 14/01

Topic: Oversight of ASIC, the Takeovers Panel and the Corporations Legislation

Reference: Written (18 January 2021)

Submitted by: Mr Jason Falinski MP

Question:

QoN 014-01 – ASIC submissions to FASEA

ASIC made a number of submissions to FASEA on the Code of Ethics. It appears that FASEA released the December 2018 consultation round over the weekend of 31 October 2020 / 1 November 2020. However, whilst ASIC is on the list, there is no link to the ASIC submission. FASEA then seem to have released the submissions for the June 2018 Consultation Round on the weekend of 7/8 November 2020. However, ASIC is not even on that list, despite the fact that FASEA have previously advised that they received a submission from ASIC in June 2018.

- a) Does FASEA know why ASIC submissions have not been released? And if so, can you please provide those reasons?
- b) Are there any other submissions not listed that were received?

Answer:

(a)

FASEA has resolved to publish on its website all public submissions received during its various consultations on legislative instruments. Consultation submissions which stakeholders marked as “in confidence”, “not for publication” etc. have not been published.

ASIC submissions on the Code of Ethics were marked as confidential and accordingly have not been published on the website.

FASEA notes that the content of ASIC submissions has previously been disclosed by FASEA in response to SBT44 question on notice from the 23 October 2019 Senate Estimates hearing.

For completeness the response to SBT44 is reproduced below:

ASIC made submissions to both the March 2018 and November 2018 FASEA public consultations on the draft Financial Planners and Advisers Code of Ethics.

Detail of ASIC’s submissions is reproduced below.

The following submission was provided during the March 2018 public consultation on the Draft Financial Planners and Advisers Code of Ethics:

Provision of draft code	ASIC comments
Preamble scope of application of code	<p>We are concerned that there is room for differing interpretations as to what conduct is carried out "in the discharge of professional duties", so we suggest further explaining this concept that is used in the preamble text to the code.</p> <p>For instance, it is not clear whether a relevant provider would have to comply with the code when dealing with persons other than clients (e.g. service providers and colleagues).</p> <p>An alternative would be to specify that the code applies in the context of:</p> <ul style="list-style-type: none"> a) all dealings that the relevant provider has with others in their capacity as an AFS licensee or authorised representative or as an officer or employee of an AFS licensee or authorised representative; and b) all dealings that the relevant provider has with any person with whom they have a client relationship in which they are providing professional services. <p>Further, our reading of the code is that it should apply to relevant providers even when they are dealing with wholesale clients. While, to be a relevant provider, a person must be authorised to give advice to retail clients, relevant providers may also regularly provide advice to wholesale clients. If it is the case that the code is intended to apply to services provided to wholesale clients, we think this would benefit from further clarity in the code.</p> <p>Similarly, we understand that the code is intended to apply to relevant providers even when they are providing services other than personal advice (e.g. general advice). While this is implied in some of the standards to an extent, it would be worth making this clear in the code.</p>
Preamble principles or standards?	<p>The preamble text refers to an expectation that relevant providers comply with "the following principles", but the code uses the term "standards" to describe the obligations.</p> <p>We consider that these terms should be used in a consistent way.</p>
Standard 2 — inappropriate personal advantage	<p>We believe that conflicts of interest can be a key driver of unethical conduct and we therefore support the inclusion of Standard 2 in the code. However, we are concerned that the term "inappropriate personal advantage", may lead to different conclusions about its meaning. For example, it is not clear whether the following would constitute "inappropriate personal advantage":</p>

	<p>a) personal advantage received by a relevant provider where the relevant provider makes the advantage transparent to the client and gives them the opportunity to consider its impact before deciding to proceed with a course of action (e.g. a relevant provider may own a business that provides ancillary services (e.g. SMSF set up and administration) and to which the relevant provider refers their financial advice clients. In this case, would the dividends the relevant provider receives as owner of the business be "inappropriate personal advantage"? Would the answer differ if this association was/was not fully and frankly disclosed?);</p> <p>b) commissions paid in accordance with exemptions from the rules on conflicted remuneration in the Corporations Act 2001 (the Act) and Corporations Regulations 2001 (e.g. life insurance commissions that are paid on a level basis or in accordance with the commission caps and clawback arrangements specifically permitted under the legislation); and/or</p> <p>c) fees charged by a relevant provider that are significantly higher than market rates or that vary significantly depending on the client.</p> <p>We think these questions are key to determining the standards that are to be expected of relevant providers so FASEA should provide an answer to them (either in the code itself or in accompanying guidance).</p>
<p>Standard 3 personal integrity</p>	<p>We agree with the principle expressed in this standard. However, we think some further guidance about its scope (e.g. in the form of examples of the kind of conduct that would fall outside this standard) would best encourage improved behaviour by financial advisers.</p> <p>We query whether "and as an independently minded professional" is a necessary addition to the standard. It appears to mean something different from acting with "personal integrity". Should it be identified in a separate standard?</p>

Standard 5 — all advice and products	<p>While we do not disagree with this standard in principle, we note a couple of points about its implications:</p> <ul style="list-style-type: none"> a) This standard may, in effect, prevent a relevant provider from providing an "execution-only" service to their client. This is because the relevant provider would need to gather information about the client's circumstances and apply that information to be satisfied that the product they are providing is in the best interests of the client and appropriate to their individual circumstances and this would likely involve the provision of personal advice (meaning, that the best interests duty and associated obligations would need to be complied with). We encourage FASEA to consider whether this is the intended result of the standard. b) We query what a relevant provider's obligations are if, for instance, the relevant provider has told their client that they do not recommend a product or strategy, but the client chooses not to take that advice and asks the relevant provider to acquire the product on their behalf/implement the strategy. As the standard is currently drafted, it appears that a relevant provider would be precluded from action on the client's instructions. This may be a scenario that could be further discussed in any guidance (e.g. would the relevant provider be expected to decline to provide the service?).
Standard 6 — Taking into account broad effects of advice	<p>We agree with this principle and note that we often see issues with advisers inappropriately limiting the scope of advice they are giving and the matters they consider when giving it, which can lead to poor consumer outcomes. However, we are concerned that this standard could be construed to mean that a relevant provider must always give clients holistic advice on their entire financial situation and that they may not give scaled advice on a discrete subject. If this is not the intention, we think it would be worth clarifying (perhaps through some examples) when and to what extent a relevant provider can limit the scope of the advice they are providing while acting in accordance with this standard.</p>
Standard 8 — Record keeping	<p>All AFS licensees must ensure that, when relevant providers who act on their behalf provide personal advice to retail clients, records are kept of that advice: see section 912G of the Act. This applies regardless of whether a client has consented to the licensee or its representative maintaining those records.</p> <p>We are concerned that Standard 8 might imply that relevant providers need to seek consent from clients to maintain records, which would conflict with the existing record-keeping obligations.</p> <p>For this reason, we encourage FASEA to remove the reference to seeking consent and agreement to maintaining records.</p>

Our values	<p>We have a couple of questions about the practical effect of the inclusion of the values in the code. In particular:</p> <ul style="list-style-type: none"> a) Would a failure to act in accordance with these values alone be a breach of the code that would need to be dealt with through a compliance scheme? Alternatively, is it intended that these values would be used to inform the interpretation of the more specific standards? We think it would be worth clarifying this. b) We query whether "Trust" is appropriately referred to as a value or something that can be "realised" and "promoted" as required in the code.
Sanctions	<p>We note that the code does not set out any sanctions for breaches of the code. However, we note that the Explanatory Memorandum to the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 contemplates that the code may include sanctions: see paragraph 3.51.</p> <p>We encourage FASEA to consider setting out sanctions, and the code breaches for which FASEA would expect different sanctions to apply, in the final version of the code. The selection and application of sanctions is an area in which consistency between different compliance schemes would be valuable.</p> <p>ASIC has identified a broad list of sanctions that monitoring bodies may wish to impose for code breaches in our Consultation Paper 300 Approval and oversight of compliance schemes for financial advisers: see paragraph 145. However, we do not think it is appropriate for ASIC to provide guidance on which sanctions should apply to particular breaches because we are not responsible for setting the ethical standards and this, in our view, would involve making a judgment about the seriousness of particular breaches of the code.</p>

The following submission was provided during the November 2018 public consultation on the draft Financial Planners and Advisers Code of Ethics:

Provision of draft Legislative Instrument	ASIC comments
Section 1 – Name	<p>We suggest the inclusion of the word “(Code)” after the reference to the <i>Financial Planners and Advisers Code of Ethics 2018</i> to make it clear that any references to ‘Code’ in the Legislative Instrument is to the Code of Ethics.</p> <p>We also query whether the reference to “provisional provider” in Section 1 should, instead, be amended to refer to “provisional relevant provider” given the use of the term “provisional relevant provider” in section 910A of the Act and in the Exposure Draft of the Explanatory Statement.</p>

Section 4 – Interpretation	<p>The definition of “client” in section 4(1) of the Legislative Instrument expressly states that a client “in relation to a relevant provider, includes a retail client of the principal of the relevant provider.” However, it is not clear whether the code is intended to also apply to services provided to a wholesale client of the principal of the relevant provider (or to a wholesale client of the relevant provider). We think this would benefit from further clarity either in the Legislative Instrument or in the Explanatory Statement.</p> <p>Further, the definition of “benefits” appears to be appropriate where the word is used in Standard 7. However, we query whether it is intended for the definition to apply where the word “benefits” is used in Standard 5.</p>
Section 5 – The Values and the Standards	<p>We suggest removing the phrase ‘In a time of increasing volatility’. While this may be true today, it will not necessarily be true going forward. It is a point in time reference that will become outdated. For this reason, it is less appropriate for a long-term instrument. A similar observation applies to the paragraph commencing ‘Collectively, financial planners...’</p>
Paragraph of draft Explanatory Statement	ASIC comments
Paragraph 7 – Monitoring bodies’ role	<p>Paragraph 7 states that “monitoring bodies, also approved by ASIC, administer compliance schemes.” However, Div 8B of Pt 7.6 of the Act only contemplates ASIC approval of compliance schemes. The Act does not contemplate ASIC approval of monitoring bodies.</p>
Paragraph 14 – Compensation and damages	<p>We query whether the reference in paragraph 14 of the draft Explanatory Statement to section 1324(1) of the Act is correct, given that section 1324(1) relates to where an injunction may be granted rather than to damages for a contravention of the Act.</p>
Paragraph 31 – Standard 2	<p>A financial adviser is expected under the law to consider a client’s future circumstances in giving advice that complies with the best interest’s duty in section 961B. Therefore, it is not correct to say that the ethical duty in Standard 2 is wider than the section 961B obligation and is based on a “more professional” relationship between the relevant provider and the client.</p> <p>For example, where giving advice about a client’s life insurance arrangements, a financial adviser would be expected to consider, for instance, the client’s health (including any known health issues and their extended family health history), the implications of the client’s children being financially dependent on them where relevant, and whether the client can reasonably foresee any changes to their employment situation (planned or unexpected changes) in order to comply with the best interests duty.</p>

	<p>We are concerned that the statement in this paragraph that the ethical duty in Standard 2 is wider than the section 961B obligation is incorrect and has the potential to create industry confusion. For this reason, we encourage FASEA to note that the requirement in this Standard for a financial adviser to look more widely at the client's interests and to consider the client's likely future circumstances is an existing requirement under the law or to delete this comment. The part of the standard which goes beyond the law is to 'act with integrity'.</p>
Paragraph 34 – Standard 2	<p>We suggest that the qualifier "adequate" be removed so that relevant providers are required to provide "professional services to all clients" rather than "<i>adequate</i> professional services to all clients."</p>
Paragraph 38 – Standard 3	<p>We note that the example in the first dot point in paragraph 38 constitutes a clear breach of the ban on conflicted remuneration and not merely a breach of the Code. We encourage FASEA to consider including an example of an ethical dilemma involving a breach of the Code that does not involve a clear breach of the law. We think that this would better assist in understanding the meaning of "inappropriate personal advantage" in Standard 3.</p> <p>In addition, we encourage FASEA to provide more context in relation to the situation in the example in the second dot point in paragraph 38. For example, it would be helpful if FASEA could state more specifically how the financial adviser's duty to one client conflicts with their duty to their other client.</p>
Paragraph 43 – Standard 4	<p>We query whether the reference in paragraph 43 to section 3 of the Code should instead be to section 2 of the Code which relates to the commencement of the Code.</p>
Paragraph 46 – Standard 5	<p>We are concerned that some in industry could mistakenly think that the requirement in this paragraph 4, especially when read in conjunction with paragraph 31 of the Explanatory Statement, goes beyond the law.</p> <p>To avoid potential industry confusion, we encourage FASEA to note that the requirement in this Standard for all advice and financial products that a relevant provider presents to a client to be appropriate to the client's individual circumstances and to take into account the client's broader, long-term interests and likely future circumstances, is an existing requirement under the law. Again, we note that the part of the standard which goes beyond the law is the requirement to be satisfied that the client understands the advice.</p>
Paragraph 51 – Standard 6	<p>As noted in our comments above on paragraph 31 of the Explanatory Statement, under the law, a financial adviser is already expected to take into account the broader, long-term interests and likely circumstances of their client. To minimise potential industry confusion, we encourage FASEA to note that this is an existing requirement under the law.</p>

Paragraph 57 – Standard 7	The second sentence in paragraph 57 states that “the code does not remove the need to comply with the requirements (relating to remuneration arrangements in Pt 7.7A of Div 3 and 4 of the Act), and a relevant provider may be able to rely on disclosures given under those Divisions to help establish compliance with this standard.” We encourage FASEA to provide more clarity in the Explanatory Statement on the “disclosures” that this paragraph is referring to. If the reference is to SOAs and FSGs, then we think it is important for the explanatory material to highlight the need to schemes to test whether client consent is ‘free, prior and informed’ rather than simply relying on disclosures.
Paragraph 61 – Standard 9	We are concerned that some in industry could mistakenly think that the requirement in paragraph 61 goes beyond the law. To minimise potential industry confusion, we encourage FASEA to note that the requirement in this Standard for a relevant provider to ensure that financial product advice given, and financial products recommended are not misleading or deceptive is an existing requirement under the law (see Pt 2 of Div 2 of the <i>Australian Securities and Investments Commission Act 2001</i>).
Paragraph 62 – Standard 10	<p>Paragraph 62 states, by way of example, that if a relevant provider specialises in a particular area, the relevant provider should not provide advice outside that area unless they have the necessary skills and competence to do so in a professional way.</p> <p>We suggest that the words “in a professional way” are unnecessary and should be removed. We consider that a financial adviser should not provide financial advice in an area in which they do not have the skills or competencies to do so.</p>
Paragraph 64 – Standard 11	This paragraph refers to the offences in section 921M and section 921P of the Act. We query whether the reference to s921P of the Act is correct, given that section 921P is not an offence provision and instead, imposes an obligation on a monitoring body to ensure that their compliance scheme is publicly available.
Appendix – Case Studies – General comments	<p>We note that Case Studies A, B and C involve clear breaches of the law and do not merely involve breaches of the Code. For example, Case Study A involves a clear breach of section 947D of the Act.</p> <p>We encourage FASEA to consider including as case studies examples of conduct which do not breach the law, but which do breach the ethical standards. This will assist monitoring schemes to better understand how to monitor and enforce compliance with the code.</p> <p>In addition, we presume that like Case Study A, Case Studies B, C and 4 would also involve breaches of the Values in section 5 of the Code. We encourage FASEA to consider setting out if and how the Values would be breached in each case study.</p> <p>We also suggest that, in the case studies and in other examples in the Explanatory Statement where possible, FASEA could use names that are from different ethnic origins to reflect cultural diversity.</p>

Appendix – Case Study 4	We query whether this case study should be referred to as “Case Study D” rather than “Case Study 4” for consistency with the other case studies.
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(b) There were an additional 2 submissions that were listed but have not been publicly available as they were marked confidential. (refer SQ20 000059 Attachment 1 List of submissions received 20 March -1 June 2018 in response to QoN received from the March 2020 Senate Estimates Committee that is attached to this response).

Code of Ethics	
Submissions made during consultation period from 20 March 2018 to 1 June 2018	
1. AFA	Association of Financial Advisers
2. AFMA	Australian Financial Markets Association
3. AIF	Asian Institute of Finance
4. APESB	Accounting Professional & Ethical Standards Board Limited
5. ASDAA	Association of Securities & Derivatives Advisers of Australia
6. ASIC	Australian Securities and Investments Commission
7. ATHOC	Australian Timeshare and Holiday Ownership Council
8. BTFG	BT Financial Group
9. CAANZ	Chartered Accountants Australia and New Zealand
10. CFA	Chartered Financial Analyst Societies Australia
11. CHOICE	CHOICE Community
12. Clear View	Clear View Financial Advice
13. CPA	Certified Practising Accountant (CPA) Australia
14. Consumer Representatives	Authored by Hugh Breakey & Charles Samford
15. FINSIA	Financial Services Institute of Australasia
16. FNS IRC	Financial Services Industry Reference Committee
17. FPA	Financial Planning Association of Australia
18. FSC	Financial Services Council
19. GRCI	Governance Risk Compliance Institute
20. IFAAA	Independent Financial Advisers Association of Australia
21. PSC	Professional Standards Council
22. SAFAA	Stockbrokers and Financial Advisers Association
23. SMSFA	Self Managed Super Fund Association
24. TPB	Tax Practitioners Board
	11 Individual Submissions
	2 Confidential Submissions