

31 May 2018

Financial Adviser Standards and Ethics Authority Limited
c/o The Treasury
Langton Crescent
PARKES ACT 2600
By email: consultation@fasea.gov.au

Dear Sir/Madam

RE: Exposure Draft of Proposed Code of Ethics for Financial Advisers

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission on the Financial Adviser Standards and Ethics Authority's (FASEA) Exposure Draft of *Proposed Code of Ethics for Financial Advisers*.

APESB is governed by an independent board of directors whose primary objective is to develop and issue, in the public interest, high-quality professional and ethical pronouncements. These pronouncements apply to the members of the three major Australian professional accounting bodies (Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants).

In Australia, APESB issues APES 110 *Code of Ethics for Professional Accountants* (APES 110) which specifies the fundamental principles of ethical behaviour for professional accountants, as well as a range of professional and ethical standards that deal with various professional services including APES 230 *Financial Planning Services* (APES 230). APES 230 sets the standards for members of the three professional bodies in the provision of quality and ethical financial planning services.

Introductory comments

APESB commends the FASEA for developing the *Proposed Code of Ethics for Financial Advisers* (FASEA Code) and is supportive of the creation by FASEA of a principles-based Code which aims to establish a robust framework of ethical and professional obligations for financial advisers.

APESB is of the view that the development of this Code is a positive step towards the implementation of reforms in the financial planning industry and will be a key driver in the transformation of the industry into a profession. APESB is pleased to have the opportunity to comment on the proposals in the FASEA Code.

The FASEA Code will need to be complied with in addition to other existing professional and ethical obligations applicable to financial advisers. In this regard, we note that for

professional accountants APES 110 and APES 230 are relevant existing pronouncements to be considered.

Specific Comments

APESB believes that the FASEA should consider the following matters in the development of the FASEA Code:

- clarify how the FASEA Code is intended to interact with other existing professional and ethical standards, and laws and regulations applicable to financial advisers;
- expand the requirements to emphasise financial advisers' responsibility to act in the public interest;
- clarify the need for independence or objectivity of a financial adviser;
- include separate standards and application material addressing remuneration and conflicts of interest;
- define 'free, prior and informed consent' and consider adding full disclosure of pertinent information as a key requirement for obtaining informed consent;
- include further application material and definitions of key terms to assist financial advisers applying the requirements in practice; and
- clarify the requirements in the FASEA Code to ensure consistency in its interpretation and enforceability in practice.

Further information on APESB's suggestions and the responses to specific questions outlined in your exposure draft are included in Appendix A for your consideration.

Concluding comments

If the FASEA wishes, APESB is open to collaborating with FASEA to clarify the interaction between the FASEA Code and relevant APESB pronouncements. APESB has prior experience in collaborating with other professional organisations in developing codes of ethics, and these collaborations have resulted in providing clarity to the respective professional bodies about the interaction between different codes. APESB would welcome the opportunity to work with or provide the FASEA with appropriate assistance.

We trust that you will find these comments useful in your final deliberations. Should you require any additional information, please contact APESB's Chief Executive Officer, Channa Wijesinghe at channa.wijesinghe@apesb.org.au.

Yours sincerely



The Hon. Nicola Roxon

Chairman

Appendix A

APESB's Comments

APESB's responses to the specific questions raised by the FASEA in the Exposure Draft are as follows.

- 1. The Standards Authority is interested in your specific feedback on how the Code addresses the consumer detriments that have arisen in financial advice, particularly Standard 2, which is intended to ensure that the advice (or referral or other service) that a consumer gets from an Adviser does not produce inappropriate personal advantage to the Adviser.**

Standard 2: [Relevant providers] Must neither advise, refer, nor act in any other manner, where inappropriate personal advantage is derived by the relevant provider.

Other issues to consider in relation to this Standard are:

- (a) What types of personal advantage are appropriate vs inappropriate?**
- (b) What might be the unintended consequences of the current draft?**
- (c) How might the Standard be expressed to avoid unintended consequences?**

APESB favourably notes that conflicts of interest (including conflicted remuneration) is included as one of the issues that need to be addressed in the proposed FASEA Code.

The draft FASEA Code sets out requirements for financial advisers not to gain inappropriate personal advantage from their services, and to act only based on free, prior and informed consent. However, APESB is of the view that the proposed requirements in the draft FASEA Code need further clarification as to how financial advisers practically address issues (such as conflicts of interests) arising from the remuneration of financial advisers.

In particular, we believe that there is an opportunity to provide guidance on how '*inappropriate personal advantage*' relates to issues relating to conflicted remuneration. From our perspective, an '*inappropriate personal advantage*' accrues to a financial adviser when there is a conflict between the adviser's and the client's interests, and the adviser places his or her interest above the client's best interest.

We note that the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has highlighted that inappropriate conduct by some financial advisers occurred due to issues relating to conflicted remuneration. In this respect, we suggest that the FASEA consider incorporating separate remuneration-related standards in the FASEA Code to address remuneration-related issues specifically. In addition, we believe that it would be helpful if the FASEA also include application material on these proposed standards to assist practical application by financial advisers.

2. How do the other Standards respond to this type of consideration?

In considering this question, the APESB has focussed on the FASEA Code in its entirety and then each specific Standard. APESB has noted the following matters for the FASEA to consider in developing the final FASEA Code.

The FASEA Code

The FASEA Code provides a good base framework for financial advisers. However, there are two matters that APESB is of the view that FASEA should consider further – the interaction of the FASEA Code with other existing requirements and the need to act in the public interest.

The Interaction of the FASEA Code with other laws, regulations and professional standards

Financial advisers will be legally obliged to comply with the professional and ethical requirements in the FASEA Code. In addition, these advisers invariably need to comply with other existing applicable professional and ethical obligations, as well as laws and regulations.

There is a need for further clarification in the FASEA Code as to how it will interact with other existing codes of ethics, as well as laws and regulations applicable to financial advisers. This could be in the form of application material to the proposed code.

We are of the view that such clarification will address any potential confusion by financial advisers and monitoring bodies about how to comply with different codes, as well as, regulate in accordance with the FASEA Code.

APESB would welcome the opportunity to collaborate with the FASEA to clarify how the FASEA Code interacts with APESB pronouncements, such as APES 110 and APES 230.

Acting in the public interest

APESB notes that the FASEA Code does not explicitly oblige financial advisers to act in the public interest when providing financial planning services to their clients.

We believe that acting in the public interest is a distinguishing mark of a profession. It is our view that in acting in the public interest, a professional's responsibility is not restricted to satisfying the requirements of the professional's clients but includes wider public interest considerations such as serving the public good. For example, a financial adviser should be prohibited from providing services which may lead to illegal activities (e.g., money laundering).

We recommend that the FASEA consider including acting in the public interest as an overarching requirement. For instance, the introductory statement could be revised to read '*A relevant provider must act, at all times and in all cases, in the public interest and in a manner that is demonstrably consistent with the following principles, in the discharge of their professional duties.*'

Standard 3 - Objectivity and independence

APESB favourably notes that Standard 3 requires relevant providers to act with integrity and as 'independently minded professionals' for the 'benefit of each client.'

We recognise that due to vertical integration of the financial services industry and firms, some employment arrangements and affiliations with financial services licensees, many financial advisers may be prevented from being truly 'independent.' However, we believe that this should not prevent them from being *objective* when providing services to their clients.

From our perspective, *objectivity* is a fundamental principle of ethical behaviour, which requires a professional not to permit bias, conflicts of interest or undue influence of other parties to compromise his or her judgements. For your reference, APESB has considered the distinction between objectivity and independence in APES 110.

APESB is of the view that the FASEA should consider whether to shift the focus of Standard 3 to exercising *objectivity* in providing advice (i.e., the advice is given on the basis that is not compromised by bias, conflicts of interest or undue influence from other parties).

We believe that emphasising the importance of objectivity in the provision of financial advice is a timely response to public and regulatory concerns regarding perceived conflicts of interest in the financial services industry.

Standard 7 and 8 - Informed consent

APESB supports the inclusion of standards 7 and 8 that require relevant providers to obtain and act only on the basis of free, prior, and informed consent. We suggest that the FASEA consider the following matters to further strengthen these standards:

- understandability of these standards could be enhanced by providing a clear definition of a *'free, prior, and informed consent'*.
- including a provision that reinforces the importance of full disclosure of relevant information when obtaining informed consent, i.e. consent to be given on the basis of a client being fully informed by the relevant provider of all pertinent information before the client agrees to the service. For your reference, APESB has defined *informed consent* in APES 230 which emphasises the need for the client to be *fully informed* of all relevant information *prior to* the client agreeing to the financial planning service.
- clarify the difference between Standards 7 and 8 as both require obtaining informed consent. If Standard 8 is intended to require documentation of informed consent, we suggest that the FASEA consider combining both standards (as the revised Standard 7) to read as, *'Obtain and document informed consent to receive agreed fees and payments for agreed services'*. Standard 8 could be then revised to read as, *'Maintain records relevant to the advice provided, in accordance with relevant privacy regulatory and confidentiality obligations.'*

3. The practical application of the proposed Code in terms of:

- a) Adviser practice**
- b) Licensee practice**
- c) Education and support**
- d) Compliance requirements**
- e) Consumer experience**

APESB is supportive of the creation of a principles-based FASEA Code as it provides a balance between enforceability and flexibility.

However, we are concerned that the subjectiveness of the proposed Standards will make it difficult for financial advisers to interpret and apply, as well as, monitoring bodies to enforce

the standards. This may create diversity in practice if financial advisers and different monitoring bodies interpret the requirements differently.

APESB are of the view that the FASEA Code should be reviewed to clarify its requirements to ensure consistency in its interpretation and enforceability in practice.

APESB also believes the FASEA Code could be further strengthened if the high-level principles-based standards are supported by definitions of key terms and application material that provides guidance on practical application of the requirements of the Code.

APESB has noted the following instances where additional guidance or definitions may be useful for financial advisers to be able to apply the requirements in practice:

- Standard 1 requires relevant providers to act *'in accordance with the spirit – and not only the letter – of all relevant laws.'* This is a subjective requirement, and financial advisers may need further guidance or assistance in understanding this requirement.
- Standard 8 contains a requirement to consider the broad effects arising from a client acting on the financial advice, but there is no explanation of the context for this requirement.
- Standard 12 contains a requirement for financial advisers to hold each other accountable to protect the public interest. However, it is not clear how this will be applied in practice and what mechanisms will be made available to financial advisers to support compliance with this standard.

APESB believes that adding application material and definitions will assist financial advisers in complying with the requirements and assist monitoring bodies in enforcing compliance with the FASEA Code.