

# Preliminary Response to Submissions

## FG002 Financial Planners and Advisers Code of Ethics 2019 Guidance


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## Preamble

FASEA has completed its broad stakeholder consultation on its initial FG002 Financial Planners and Advisers Code of Ethics 2019 Guidance document (the guidance).

Consultation briefings on the guidance commenced post its release on 18 October 2019 and included a series of stakeholder representative sessions held in November and December 2019.

This response paper sets out FASEA's initial response to the feedback received both at the 2019 consultation briefings and through written submissions.

This response paper and the guidance are available on FASEA's website at: <https://www.fasea.gov.au/code-of-ethics-guidance/>.

## Executive Summary

FASEA has completed the first round of consultation on the guidance document. The aim of the consultation was to:

- Receive feedback on practical elements of the Financial Planners and Advisers Code of Ethics 2019 (the Code);
- Communicate and explain the integrated nature of the Code; and
- Receive feedback on the guidance document.

This paper provides FASEA's initial response to feedback received through consultation. Further detailed response will be provided in 2020 as FASEA works to further engage and consult with stakeholders to facilitate consistent and effective understanding and implementation of the Code.

## Consultation with Stakeholders

Consultation on the guidance commenced in October 2019 post the release of the guidance. A series of stakeholder representative consultation briefing sessions with education providers, licensees, consumer bodies, industry associations and regulators were held throughout November and December 2019. The sessions had active participation and provided valuable feedback.

Over the consultation period, FASEA received 26 written submissions and more than 100 stakeholder representatives attended the consultation briefings.

FASEA issues this document as the first in a series of responses to provide clarification on interpretation and application of the Code and to clarify questions raised by stakeholders during the consultation period.

## Consultation Key Themes

There has been general support for the introduction of a Code of Ethics to help raise standards of behaviour, but also a desire for additional guidance to help advisers:

- interpret and understand the application of the Code; and
- address concerns regarding the ability of advisers to comply with its provisions from 1 January 2020 and possible regulatory implications.

The feedback provided from stakeholders during the consultation period highlighted some consistent themes of concern in complying with the Code from 1 January 2020 on which stakeholders are seeking clarity from FASEA. These are summarised below:

1. Implementation timeframe for full compliance by 1 January 2020 is seen as unreasonable and does not allow sufficient time to amend business models. Clarification is sought regarding FASEA's expectations of licensees and advisers in the period leading up to the formation of the single disciplinary body;
2. Clarifying the operation of Standard 3 and the Code more broadly to assist advisers in assessing actual conflicts of interest;
3. Referral fees – greater clarity requested on what fees are banned (including referral fees directly to/from advisers versus referral fees received/paid by the business);
4. Clarifying the application of the Code to business structures and fee models of businesses under which advisers are employed;
5. Clarifying the application of the Code to forms of advice beyond personal advice on retail products (including wholesale and general advice);
6. Client consent – clarity on what is required specifically regarding existing clients (what is "if required" and "as soon as practicable" – Standard 7);
7. Clarifying the ability to provide scaled/scoped and/or intra fund advice;
8. Clarifying perceived inconsistencies between the Code legislative instrument, explanatory statement and the guidance (specifically related to Standard 3);

9. Clarification or feedback on specific examples contained in the guidance and requests for additional examples providing positive case studies to demonstrate behaviour that would satisfy the Code requirements;
10. Requests for a Glossary of Definitions for specific key terms to be added to the guidance/Code; and
11. Requests to publish submissions on the FASEA website.

The following section provides FASEA's initial responses to key issues 1 – 7 above as prioritised by stakeholders. Additional engagement with key stakeholders will continue in early 2020 to continue to clarify issues 1 – 7, to provide responses for key issues 8 – 11 above and to identify any further matters for clarification in the lead up to the enforcement of the Code following implementation of the single disciplinary body.

# Clarification of Key Themes

## Theme 1: Timeframes for Implementation – FASEA’s Expectations

Many stakeholders raised concerns regarding the requirement for full compliance with the Code by 1 January 2020. Stakeholders highlighted that they were concerned that they may have insufficient time to amend business models ahead of the 1 January 2020 commencement date of the Code.

FASEA understands the concern expressed by stakeholders regarding the ability to amend practices/business models by 1 January 2020.

The implementation of any new standard involves a period of assessing the current level of compliance and taking steps to implement necessary changes over a reasonable timeframe. FASEA, under its legislative remit, is not able to make changes to the timeframe for compliance with the Code, nor is FASEA able to monitor compliance with the Code.

FASEA considers the approach outlined by ASIC ([link](#)) and AFCA ([link](#)) while the single disciplinary body is being brought into operation is appropriate and will allow implementation to occur in a considered and consultative manner.

FASEA suggests that advisers may wish to use this period to step back and assess how they stand against the Code Values and Standards. Where changes are required to be made, the ASIC and AFCA approaches should enable a considered approach to implementation.

### Frequently Asked Questions

1. As a Licensee, what measures do I need to take to ensure my advisers are complying with the Code of Ethics from 1 January 2020?

**Answer:** Refer to ASIC’s communication on the 26 November 2019 ([link](#)), detailing ASIC’s expectations of Licensees in ensuring their advisers are complying with the Code of Ethics from 1 January 2020. This approach will allow time required for any business model changes.

2. As a Financial Adviser, what evidence will I need to provide ASIC to ensure I’m not breaching the Code?

**Answer:** FASEA encourages you to consult with your Licensee regarding record keeping aligned with meeting the requirements of the Code.

## Theme 2: Clarifying the Operation of Standard 3 and Forms of Remuneration

The majority of stakeholders raised concerns with Standard 3 highlighting that the intention of the Code is inconsistent with the existing Corporations Law which contemplates the ability to “manage” and/or “disclose” conflicts rather than not acting where there is a conflict. Some stakeholders believed that Standard 3 is not practical to implement.

Standard 3 of the Code is concerned with an actual conflict between duties advisers owe their client and any personal interest they have or an actual conflict between duties they owe their client and duties they owe another individual or organisation. This requires advisers to make a professional assessment as to whether their personal interests or other duties are incompatible or at variance with the interests of, and duties owed to their client. The Code requires advisers in making an assessment of conflict to ensure that, before giving advice, they have met all the ethical values and standards contained in the Code in order to confirm they have put the client’s interest before any personal interest or other interests. The adviser must remain alert to changes in facts and circumstance that could affect this assessment and continue to assess conflicts during their advice relationship.

The Code does not seek to ban particular forms of remuneration, nor does it determine that particular forms of remuneration would always be an actual conflict.

The guidance addresses the intent of the Standard and notes that advisers will not breach Standard 3 merely by being a duly remunerated employee of an entity that lawfully provides retail financial advice and services, provided the provision of that advice and services are in the best interests of the client and comply with the other provisions of the Code.

In assessing whether an adviser has an actual conflict, advisers need to consider their remuneration in the context of the whole of the Code and satisfy themselves that this remuneration does not impact their ability to provide advice that meets the provisions of the Code including that:

- the advice is in the best interests of the client;
- the fees and charges (regardless of type) are fair and reasonable and represent value for the client and are fully understood by the client;
- the client understands the benefits, costs and risks of the recommendations made; and
- the advice and fee structure are appropriate for the client.

In the case of Standard 3, the ‘standard of judgement’ is one commonly applied in Australian Law and is consistent with that applied in other professions (including by the Australian Professional and Ethics Standards Board which recently adopted the same test).

An adviser needs to consider and assess whether: a disinterested or unbiased and reasonable person, in possession of all the facts, could reasonably conclude that an arrangement or benefit could induce the adviser to act other than in their client’s best interest.

An arrangement that fails that test is in breach of Standard 3. Otherwise, arrangements are permitted - whatever their specific form.

The reliance on the professional judgement of advisers in interpreting the Code is in line with modern best practice in many professions and FASEA considers this approach to conflict to be realistic, practical and in line with community expectations.



## Frequently Asked Questions

1. As an adviser specialising in insurance advice, I receive commissions for the advice I provide my clients. Is this conflicted and will I breach the Code of Ethics?

**Answer:** Insurance commissions are explicitly allowed by law and may be an acceptable form of remuneration for advice. In the context of a specific client situation, an adviser before acting for the client would need to satisfy themselves that they do not have an actual conflict by for example demonstrating the following:

- The advice and product recommendation is in the best interests of the client;
  - The commission received is fair and reasonable and represents value for the client and is fully understood by the client;
  - The client understands benefits, costs and risks of the insurance advice;
  - The advice and fee structure are appropriate for the client; and
  - A disinterested or unbiased person, in possession of all the facts, would reasonably conclude that the remuneration would not lead the adviser to prefer the interests of someone (including their own) over the client's best interest.
2. As an adviser specialising in stockbroking, I receive brokerage fees for the advice I provide my clients. Is this conflicted and will I breach the Code of Ethics?

**Answer:** Brokerage fees are generally an allowable form of remuneration for advice on shares. In the context of a specific client situation, an adviser before acting for the client would need to satisfy themselves that they do not have an actual conflict by for example demonstrating the following:

- The advice and product recommendation is in the best interests of the client;
- The brokerage fee is fair and reasonable and represents value for the client and is fully understood by the client;
- The client understands benefits, costs and risks of the share advice;
- The advice and fee structure are appropriate for the client; and
- A disinterested or unbiased person, in possession of all the facts, would reasonably conclude that the remuneration would not lead the adviser to prefer the interests of someone (including their own) over the client's best interest.

## Theme 3: Clarifying Referral Fees

Many industry stakeholders sought clarity on when referral fees are banned, specifically in relation to adviser and/or Licensee existing third party referral arrangements and where the referral arrangements are for services that are non-financial products as defined in the Corporations Act 2001, e.g. accounting, mortgage broking, health programs.

Standard 7 notes, unless expressly permitted by the Corporations Act, the adviser may not receive any benefits in connection with acting for a client that derive from a third party other than their principal.

FASEA confirms that referrals to specialists or other professionals are acceptable. However, Financial Advisers cannot receive referral fees directly from a third party for advice and services provided to their client, even if these are non-financial products.

Standard 7 and the Code in general apply only to relevant providers (financial advisers), they do not apply to the broader business structures which employ those advisers. Referral arrangements through those broader business structures are not governed by the Code.

## Frequently Asked Questions

1. As an adviser I have a referral arrangement with a Mortgage Broker. I refer my financial advice clients to the Mortgage Broker when my clients need help with their mortgage or any new loans. In return the Mortgage Broker gives me a \$500 payment from the commission he receives for the loan/mortgage. Given this is not a financial product that is affected by the Code can I still receive this fee?

**Answer:** Referral fees received from a third party directly to the adviser will breach the Code of Ethics.

2. As a Licensee or Corporate Authorised Representative (CAR), I have contractual referral arrangements with third parties which will be difficult to change before 1 January 2020. Will my advisers breach the Code until these arrangements have been changed?

**Answer:** Licensee arrangements fall outside the Code and will not be required to change as they are not subject to the Code provisions. However, if the structure of these referral arrangements negatively impacts on the ability of relevant providers to meet their obligations under the Code, FASEA would expect that they be reviewed and amended.

Where the adviser's remuneration is related to the referral fee received via the Licensee structure or CAR and is paid directly to the adviser, the adviser will need to demonstrate compliance with the Code in the same manner as any other form of remuneration received.

## Theme 4: The Application of the Code to Business Structures

Many industry stakeholders raised concern regarding the impact of the Code on their business structure and sought clarification on how the Code would apply to their business structure.

By law, the Code applies to relevant providers only. It does not apply to the broader business entity. The provisions of the Code, therefore, do not apply to the broader business entities within which relevant providers work. However, if the structure of these business entities negatively impacts on the ability of relevant providers to meet their obligations within the Code, FASEA would expect that they be reviewed and amended.

## Theme 5: Clarifying Application of the Code to Forms of Advice Beyond Personal Advice on Retail Financial Products

Some industry stakeholders sought clarification as to whether general advice and advice to wholesale clients is captured by the Code.

The Code is a compulsory Code of Ethics for all Financial Advisers and Provisional Financial Advisers when providing personal financial advice and services to retail clients. It does not apply to other forms of advice.

## Theme 6: Clarifying the Timing and Format of Client Consent

Many industry stakeholders sought additional clarity in relation to receiving client consent, specifically in terms of which clients are classified as existing clients. This included the need for consent and the format and timing of the consent.

Standard 4 and 7 note that *"if required, in the case of an existing client, consent should be obtained as soon as practicable after the Code commences"*.

There are two components to this Standard. The first part is “if required”. If an adviser has already received the clients free, prior and informed consent, Standard 4 and 7 have been met. If they haven’t, they will need to work out a practicable timeframe to do so. This will be influenced by a number of factors including number of clients, next scheduled contact etc.

## Frequently Asked Questions

1. As an adviser, I have, over the course of 2018, contacted my existing clients as the renewal of their Ongoing Service Agreement was required. Do I need to re-contact these clients after 1 January 2020 to seek their consent again?

**Answer:** An adviser who has recently received consent from the existing client for the service and fees they will be paying, does not need to re-contact the client to receive consent post 1 January 2020. The next renewal period is sufficient.

2. As an adviser, I have existing clients who I do not regularly contact where I continue to receive commission. These clients are grandfathered pre the FOFA requirements. Do I need to contact them after 1 January 2020 to seek their consent?

**Answer:** An adviser will need to contact these clients as soon as practicable, to seek their consent post 1 January 2020. Depending on the number of clients that meet this requirement, the adviser is expected to develop a plan that is practicable during 2020.

3. What format is required when obtaining consent from my clients?

**Answer:** An adviser will need to ensure they receive signed consent from their clients. This may be using existing forms e.g. Ongoing Service Agreement, Initial Service Agreement, Authority to Proceed with Advice, etc. FASEA does not expect that a new form is created to meet this standard.

## Theme 7: Clarifying the Ability to Provide Scaled/Scoped and/or Intra Fund Advice;

Some industry stakeholders raised concerns about the ability of financial advisers to scope or scale the advice as currently permitted by law. Stakeholders particularly raised queries regarding limited authorisations, specialisations and intra fund advice e.g. risk specialists, stockbrokers, SMSF specialists (including accountants).

Limited scope engagement and/or scaled advice can be highly effective in meeting the client’s immediate needs. Such limited advice scenarios may include SMSF, insurance, stockbroking, investment and intra-fund advice. The Code is not seeking to prohibit this type of advice.

The adviser must make an assessment whether scoping the advice is in the best interest of the client and it is important the adviser considers the longer-term requirements for the client within the scope of the advice provided e.g. Insurance advice should include confirmation that the client understands the long-term cashflow implications and is expected to have the appropriate funds to pay the premium currently and in the future.

The adviser is not expected to complete a holistic risk assessment for limited scope advice but would be expected to conduct sufficient information gathering to be satisfied the advice is in the client’s best interest as it relates to that scope.

## Next Steps

FASEA is committed to considering feedback received during the consultation period on FG002 Financial Planners and Advisers Code of Ethics 2019 Guidance.

FASEA will continue to consult and engage with stakeholders in the lead up to the implementation of the Single Disciplinary Body to promote a consistent implementation of the Code.



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