2 November 2020

Financial Adviser Standards and Ethics Authority

Email: consultation@fasea.gov.au

Dear Mr Glenfield,

SMSF ASSOCIATION SUBMISSION ON FASEA CODE OF ETHICS GUIDANCE

The SMSF Association (SMSFA) welcomes the opportunity to provide a submission on the Financial Adviser Standards and Ethics Authority's (FASEA) Code of Ethics Guidance.

The SMSF Association understands and supports FASEA's intention to raise ethical standards above the existing law. The updated Guidance reflects the industry and SMSF Association's call for more principle based and overarching guidance. This approach will help advisers understand and apply the Code with regards to their very specific examples.

We are also supportive of the greater importance given to the intent of the Standards which was less clear in preceding FASEA documentation and Guidance. The updated Guidance now reflects the fact that not all advisers, licensees, associations and regulators had the benefit of being a part of FASEA's roundtable consultation to hear their verbal intentions behind the Code and to raise the standards of behaviour in a reasonable manner. Ultimately, it is only the written Code and Guidance that is determinative, particularly years into the future.

Apart from our specific feedback detailed later in this submission on 'scaled advice', the SMSFA supports the broader intent of each Standard in the Code.

However, we note that some concerns remain with the practicality of the Code when compared with the Corporations Act, ASIC regulatory guides and other comparable codes of ethics. There will continue to be confusion between FASEA's stated intention for the Code and what the Code actually states. The key issue is that the Guide states, "*This guide is illustrative rather than conclusive regarding application of the Code.*"

Guidance which describes the Code is to apply as whole, rather than standard by standard, has not eased this confusion, especially due to the Code's wording not to read down any provisions.

As a result, we continue to believe the strict wording of the Standards and the more nuanced wording of the intent and Guidance are not compatible. This is highlighted in the extract below:

> **Standard 3**
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> **You must not advise, refer or act in any other manner where you have a conflict of interest or duty.**
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> **Intent**
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> **The intent of Standard 3 is that advisers must not advise, refer or act in any other manner where they have a conflict of interest or duty that is contrary to the client's best interests.**

In our opinion, the Code would be improved if many of the Standards were amended to reflect the 'Intent', for example, in Standard 3, referencing the 'client's best interests'. The SMSF Association has previously submitted Standard 3 should be revised to reflect that intent.

Until such a process is complete, industry will continue to refer to the written Code as determinative.

We outline our specific feedback with the Code and Guidance below:

Scaled advice

We believe that a key challenge for the advice sector is how to service clients' advice needs that may be limited to a single issue or for scaled advice needs, for example superannuation. This is particularly pertinent for SMSF advisers and SMSF trustees.

The SMSF Association and other professional bodies are committed to addressing scaled advice and its impact on the 'advice gap' and would welcome the opportunity to work collaboratively with FASEA to help develop and implement changes which would improve the provision of single issue and scaled advice.

Feedback we continue to receive from AFS licensees and advisers is that current regulatory guidance potentially impedes such scaled advice from readily being provided.

Therefore, we support the aspect of the Guidance released by FASEA in its comment that the Code is not seeking to prohibit this type of advice – but to ensure that scaled advice is provided where appropriate.

However, our continued concern is that the Guidance does not provide advisers with clarity on 'how' this type of advice can be provided. The way Standards 2,5 and 6 apply practically for advisers acting under a scoped authorisation or a limited AFS licence remains unclear.

We believe that FASEA, in conjunction with ASICs 'unmet advice' project, should issue a further specific guidance document on how a financial adviser can provide single issue or scaled advice that complies with the Code of Ethics.

A typical example of single issue advice in ASIC RG 244

An illustration of single issue advice the SMSF Association supports is example 3 in RG 244 involving a retirement savings health check for a couple. The couple seek advice about whether they are on track with their finances in the lead-up to their retirement. They are not interested in product advice.

In this example, ASIC details that the adviser must undertake a standard investigation of circumstances and objectives.

ASIC's guidance details "Tim (the advice provider) decides the scope of the advice by using his judgement to establish that the scope of the advice is consistent with Bruno and Rosa's (the couple) relevant circumstances and the subject matter of advice that they are seeking. In this example, Tim provides strategic advice, but not product advice, and complies with the law, including the best interests duty and related obligations."

The example highlights the advice and subsequent recommendations the adviser provides to the couple and how it should be conveyed in a short statement of advice document (akin to a Record of Advice).

One of these advice recommendations is to implement a transition to retirement pension.

However, as noted in this submission below, and in previous submissions, the ability to readily provide advice and recommendations such as a transition to retirement pension in the example above is stifled due to legislative requirements, AFLSs, ASIC guidance and current FASEA standards.

Potential contradictory guidance in FASEA Guidance

The SMSF Association has concerns that the FASEA Guidance has potential contradictory guidance which would restrict offering limited advice or scaled pieces of advice such as the example in RG 244.

Specifically, members have raised concerns when they are engaged for SMSF advice but the Code requires consideration of broader requirements and therefore they cannot act in a limited advice scope.

We understand the intention of the Code is to ensure that actual limited scoped advice is in the best interests of the client. This is the correct intention. However, the practical application of the Code will restrict advisers from providing best interest limited scope advice because it requires consideration of the best interests relating to the clients broader, long-term interests. This requirement inevitably conflicts with advice limited to one aspect. Additionally, the Guidance is silent on what these considerations should practically be.

These considerations are amplified when the Code requires a sufficient broad long-term interest based fact find that is more comprehensive than the consumer requests. This deceases the affordability and efficiency of the advice and documentation.

Under Standard 2 the Guidance asks*, 'Is my advice in the best interests of the client rather than merely what the client wants*?'. Practically, current guidance in the advice industry lends itself to the argument that advice is ultimately in the best interests of the client when it is comprehensive. Unfortunately, to the detriment of consumers who seek scaled advice, this is the position many AFS licensees are obliged to take.

Furthermore, the Guidance states, *"To comply with the ethical duty, it will not be enough for you to limit your inquiries to the information provided by the client. You will need to make reasonable steps to inquire more widely into the client's circumstances. You are not relieved of the ethical duty merely because the client does not provide enough information, even when asked. You should take into account your client's express wishes, but these do not override your duty to give advice that is in the client's best interests."*

Under Standard 6 the Guidance states, *'You must make an independent, professional assessment as to whether scoping the advice is in the best interests of the client (and not just in accordance with their preference or instruction) and it is important that you consider the longer-term requirements and/or any broader considerations for the client within the scope of the advice provided.'*

These statements imply that an adviser requires a comprehensive understanding of the client's full current personal circumstances and broader circumstances, not just those relevant to the requested scope. Once this is conducted, an adviser must make a determination on the scoped advice request. If this is not in the client's best interest to give that scaled advice then the adviser must not act in this regard.

However, an adviser can very rarely provide advice to individuals purely seeking limited advice once they consider broader long-term impacts, complete a broader fact find and then provide advice through the best interests lens with this information. Despite the fact that consumers want piece by piece advice, an adviser ethically will continue to struggle to demonstrate that a consumer's request for single issue advice is in their broad best interests under the Code without providing more advice than requested.

A consumer that wants specific advice on 'whether to make pre or post tax contributions only' will rarely be in a scenario where an adviser is comfortable to only provide this advice similarly to the examples in RG244. An adviser will almost always need to consider things such as estate planning, debt, insurance, the Age Pension, cash-flow, asset allocations, appropriate superannuation products and all their long-term impacts rather than focussing their skills on what should be reasonably considered for advice that is limited to the issues the consumer seeks advice on because of the Standards in the Code.

Unfortunately, advisers do not currently have the opportunity to provide scaled advice and 'scale up and down' aspects of their advice when they must be more comprehensive than the client desires. There is a real risk that a limited scope engagement is never able to fully meet a client's advice needs when broader considerations are taken into account. Where advisers are unable to determine broader needs or provide advice on broader needs, how are advisers able to provide limited advice?

We note that these issues are not the purely the fault of the Guidance, but they have the ability to impact on the provision of limited licence advice, scaled advice, intra-fund advice and single-issue advice which we understand is not the intention of FASEA and will exacerbate the 'advice gap'.

We therefore encourage FASEA, in conjunction with ASIC and industry, to issue a specific guidance paper to provide further certainty around the practical obligations and behaviours that are necessary to satisfy these standards. This should include how an adviser is able to provide ethical and compliant best interest advice in the context of a scenario where the client does not want their broader advice needs investigated or met, for example, a consumer seeking specific superannuation contribution advice.

In our opinion, the examples in the initial Guidance were not realistic or insightful enough to make the facilitation of scoped advice achievable. This is because they were clearly inappropriate advice and considered factors beyond what was necessary for the scoped advice. The SMSF Association would be happy to consult on appropriate examples as the ASIC guidance on scaled advice is formulated.

In addition, the Standard may need to be redrafted, particularly in relation to the use of the word 'broad' and 'broader'. These references should be amended to reflect the 'reasonable' requirements and considerations relating to a client's demand for piece by piece advice.

We believe if advisers are unable to manage these concerns, FASEA is placing another restriction on the legislated limited licence advice framework.

High level of relevant knowledge and skills

We support FASEA addressing our concerns on the ambiguity relating to Standard 10. The preceding explanatory statement details that if an individual specialises in a particular area, they should not provide advice outside that area unless they have the necessary skills and competencies to do so in a professional way. We believed the previous Guidance did not provide enough practical information to demonstrate to advisers how they can satisfy a high level of relevant knowledge and skills.

The ambiguity determining what this level may be is now resolved by referencing that additional specialist study is required for specialisations.

If you have any questions about our submission, please do not hesitate in contacting us.

Yours sincerely,

John L Maroney

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the SMSF sector which is comprised of over 1.1 million SMSF members who have $700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.