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Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
Parkes ACT 2600

By email: enforceablecodes@treasury.gov.au

Dear Treasury,

AFA Submission: Enforceability of Financial Services Industry Codes

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Introduction

The AFA is supportive of the role that codes of conduct, codes of practice or codes of ethics play in different parts of the financial services industry. In some cases, they may apply across the entire sector and set down detailed commitments and standards that apply in terms of the agreement with the client. In other situations, they may play a very different purpose.

Our high-level view, is that a one-size fits all approach should not apply to codes and that it should be considered on a case by case basis. At a high level, the enforceability of a code or certain provisions within the code should only apply in the following circumstances:

- Where the code applies universally across an entire sector. In our view, it is highly problematic to have an enforceable code apply to some participants in a sector, but not all participants. This creates an unlevel playing field that will have a range of negative consequences.

- It might be suitable to apply where it is used as a vehicle to define standards that consumers should be able to rely upon.
- It is unnecessary where the law already defines specific standards that adequately protect the interests of consumers.
- It should not contribute to duplication or confusion with respect to the standards that apply.
- Enforceable provisions should only apply where it is expected that it could be complied with 100% of the time. Things like service standards, that are subject to a range of complexity factors, should not be the subject of enforceable codes.

In the financial advice sector, financial advisers are already bound by the TPB Code of Professional Practice as well as individual professional associations' codes. From 1 January 2020, financial advisers will also be bound by the Financial Advisers Standards and Ethics Authority (FASEA) Code of Ethics. The TPB code is a legislated code and the FASEA code is a code where sanctions that arise as a result of breaches are reportable to ASIC. We cannot see any point in professional association codes, that do not apply to the full market, being enforceable.

We note that Appendix B - the list of current codes in the financial services industry is incomplete. Amongst others, it does not include the Association of Financial Advisers.

Consultation Questions

We do not propose to answer each of the consultation questions, and some of our key points are addressed above, however we have set out some additional key points below:

- Industry codes are designed to set standards for an industry or sector that are typically at a level above the law.
- ASIC have already set out in Regulatory Guide 183 the criteria for the approval of industry codes.
- We do not see any need, on a universal basis, for the Government to get involved in prescribing a voluntary code for an industry. There may be certain situations where this is desirable and where it will deliver materially improved consumer outcomes.
- The extent of supervision and monitoring of codes will depend upon the objectiveness of the provisions within the code and the industry commitment to monitoring. Once again, the most appropriate model will be contingent upon the specific sector characteristics. An independent governance structure is one vehicle to achieve this oversight.
- All codes should be subject to regular review, however the frequency and nature of this review will depend upon the specifics of the industry/sector/association that it applies to.
- In our view, breaches of a code should only incur civil penalties where they are systemic breaches.
- At present, EDR determinations are not binding on the client (although they are on the financial firm) and the client can choose to pursue the matter in Court. In our view, where a client chooses to pursue the EDR scheme pathway, then the determination should be binding on them, although a right of appeal should apply to both the client and the financial firm.
- In the context of what we have proposed above, we do not see an argument for courts being able to consider a matter that has already been finalised by AFCA. Under the existing AFCA model, if a client has accepted an AFCA determination, then they would not also have the ability to go to court. We certainly believe that this is appropriate.

Concluding Remarks

We note the Royal Commission's consideration of enforceable codes provisions, however it is our view that the pursuit of that approach should not be universal, but rather on the basis of a case by case consideration and only where there are clear grounds for doing so.

AFA Submission – Enforceability of Financial Services Industry Codes

The AFA welcomes further consultation with Treasury, should it require clarification of anything in this submission. If required, please contact us on (02) 9267 4003.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'P. Kewin'.

Philip Kewin
Chief Executive Officer
Association of Financial Advisers Ltd