



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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Code Working Group

Terms of reference

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Introduction

Function

The function of the Code Working Group (the **Working Group**) is to prepare a draft code of professional conduct for persons who give regulated financial advice to retail clients (the **code**) for recommendation to the Minister of Commerce and Consumer Affairs (the **Minister**).

The Working Group must ensure that the draft code meets the requirements set out in these terms of reference (which may be amended from time to time to ensure they reflect the developing position in the draft Financial Services Legislation Amendment Bill and, once the Bill is passed into law, the amended Financial Markets Conduct Act 2013).

Context

The Code Working Group

In July 2016, Cabinet made decisions on a number of changes to the Financial Advisers Act 2008. This included that there would be a universal Code of Conduct for all providing financial advice. The code is to be developed by a Code Committee, and will set minimum standards of conduct, competence and client care for persons who give regulated financial advice to retail clients. The Government's decisions will be reflected in a Financial Services Legislation Amendment Bill, which is expected to be introduced to Parliament later this year (following consultation on a draft version of the Bill). The Bill will amend the Financial Markets Conduct Act 2013 once it is passed into law.

Feedback from industry participants following the July 2016 decisions was that many will not know what is required of them under the new regime until the details are revealed via the code.

To expedite development of the code, Cabinet has agreed that a Code Working Group be appointed to develop the code in parallel with the legislative process (i.e. rather than needing to wait for the Bill to be passed into law). The Working Group will be appointed for a three year term, whereby its members will become the Code Committee under the new regime once the Bill is passed into law (should they wish).

The Working Group will be a new group, rather than a continuation of the current Code Committee that was appointed under the Financial Advisers Act (and who are responsible for the Code of Professional Conduct for Authorised Financial Advisers). This recognises the wider scope of the new Code of Conduct. For example, rather than setting the conduct for a subset of the financial advice industry, the new code will provide standards for the entire industry in respect of retail services.

The code

In developing the code, the Working Group will be guided by the main and additional purposes of the Financial Markets Conduct Act and the new purposes that are specific to the regulation of financial advice. These purposes include:

- promoting confident and informed participation of consumers in financial markets,
- avoiding unnecessary compliance costs,
- improving the availability of financial advice for persons seeking the advice, and
- improving the quality of financial advice.

The code standards should be developed with a view to improving the availability of advice that consumers are seeking (bearing in mind that different consumers may seek advice of varying nature and scope). To promote confident and informed participation of consumers, the code standards should be set with a view to promoting good conduct and competence of those giving financial advice.

Scope

What will the Working Group be required to produce?

The Working Group will be expected to provide a draft code to the Minister. The Code Working Group should aim to provide this to the Minister within ten months of appointment.

The draft code must include the following content:

- a) Minimum standards of professional conduct that must be demonstrated when financial advice is given, including minimum standards—
 - i. of general competence, knowledge, and skills that apply to all persons that give financial advice
 - ii. of particular competence, knowledge, and skills that apply in respect of different types of financial advice, financial advice products, or other circumstances
 - iii. of ethical behaviour
 - iv. of conduct and client care.
- b) The code—
 - i. must identify different types of financial advice, financial advice products, or other circumstances for the purposes of (a.)(ii.) above
 - ii. may specify different standards in respect of those types.
- c) The code must also provide for—
 - i. continuing professional training for persons that give financial advice, including specification of minimum requirements that a person must meet for the purpose of continuing professional training, and

- ii. the way in which a financial advice provider or financial adviser may demonstrate the provider's or adviser's competence, knowledge, and skill.

Further detail about content of the Code

Structure and application

The structure of the code is at the discretion of the Working Group. However, the code should recognise that there are many types of and means of providing financial advice. A one size fits all approach may not be appropriate for a code which applies across the whole financial advice industry, and to a range of persons (including a legal person such as a firm).

The code must also recognise that the new financial advice legislation is technologically neutral. Recommended standards should therefore be applicable for different advice delivery methods.

For example, given that financial advice may be given by the licensed 'provider' (e.g. via an online robo-advice platform), it is important that the code standards are relevant to a provider in this situation (rather than assuming the person giving advice will be a natural person).

What is the relationship between the code and primary legislation?

The standards set in the code will need to be consistent with the amended Financial Markets Conduct Act (and, while the Bill is being progressed, the code will need to be consistent with the draft Bill). The standards may complement the duties in the legislation or may be additional to the duties in the legislation. The Working Group should also give consideration to other applicable legislation and statutory codes.

Transitional provisions

To ease transition to the new regime, MBIE has proposed alternative options for existing authorised financial advisers and registered financial advisers to demonstrate that they meet the competency requirements as set out in the code. MBIE is consulting on whether these types of transitional arrangements should be something set in primary legislation, or should be the remit of the Working Group in developing the first code. Therefore, depending on the final decisions made around transitional arrangements, the Working Group may need to give consideration to how transitional options to assist existing advisers to meet any new competency standards will work in practice.

Outside of scope

Standards set by the Working Group will not:

- Set mandatory methods for demonstrating how a particular competency standard is met. This is because a provider may use alternative methods to ensure their advisers and representatives meet the competency standards (as set out in the code), and this will be assessed by the FMA via the licensing process.

- Set limits on the types of advice that may be given by a financial advice representative. This will be addressed by the processes, controls, and limitations that a provider has in place relating to the financial advice that may be given by its representatives, and will be assessed by the FMA via the licensing process.
- Provide guidance on how the code standards will be enforced, as this is the role of the FMA.
- Set out deemed to comply actions or standards for the legislative obligations (apart from in the case of competency).
- Override any standards or obligations set in legislation. Code standards should complement legislative obligations.

How will the Working Group be required to develop the draft code?

In preparing their recommendations for the draft code, the Working Group must—

- a) develop code standards with regard to:
 - i. improving the availability of financial advice for persons seeking that advice
 - ii. improving the quality of financial advice and financial advice services
 - iii. the purposes of the Financial Markets Conduct Act 2013 (as set out in sections 3 and 4 of the Act)
 - iv. New Zealand’s international obligations that are relevant to financial markets or financial advice services
- b) prepare an impact analysis document that describes how the proposed standards may contribute to, or detract from, the matters referred to in paragraph a) (including a description of any trade-offs between these impacts)
- c) consult with:
 - i. the FMA
 - ii. any persons that it reasonably considers to be representative of the financial advice industry
 - iii. any persons that it reasonably considers to be representative of consumers of financial advice
- d) allow an opportunity for any person affected by the code to make submissions to the Working Group
- e) publish, on an Internet site maintained by or on behalf of the Working Group¹,—
 - i. the impact analysis document prepared under paragraph b)
 - ii. a summary of the submissions made to the Working Group, and
 - iii. a brief response to those submissions.

¹ MBIE may publish the required information on behalf of the Working Group if no internet site is established for the Working Group.

Further detail around undertaking an impact analysis

The Working Group is required to produce an analysis of the impacts of the proposed code standards and how they contribute to, or detract from, the purposes of the Financial Markets Conduct Act 2013 and the new purposes that are specific to the regulation of financial advice. It should also consider the impact on different parties within the regime. There is no prescribed format for the impact analysis, but the Secretariat (described on page 9) can provide guidance around preparing and presenting the analysis.

What will happen after the Working Group has provided a draft code to the Minister?

After receiving the draft code prepared by the Working Group, the Minister must approve or decline to approve it, following consultation with the FMA.

The Minister must approve the draft code if he or she is satisfied that a majority of the Working Group has approved the draft code, the Working Group has complied with its statutory obligations relating to preparation of the draft code (including consultation) and the draft code is consistent with amended the Financial Markets Conduct Act.

Should the Minister not be satisfied of this, he or she may direct the Working Group to revise the draft code or undertake further consultation as necessary.

Membership

Members of the Working Group will be appointed by the Minister.

The Working Group will consist of at least seven members (and no more than eleven members), including one appointed as chairperson.

Two members will be appointed based on their knowledge of, and skills and experience in relation to, consumer affairs or dispute resolution.

Other members will be appointed based on:

- their individual knowledge of, and skills and experience in relation to, the provision of financial services, or
- any other appropriate knowledge, skills and experience that will assist the Working Group to perform its functions.

The Minister will appoint one member of the Working Group as chairperson.

Working Group members will be appointed by virtue of their individual expertise, and not as representatives or nominees of particular interest groups.

Term of appointment

The term of appointment for Working Group members will be three years, from approximately 30 June 2017 to 30 June 2020.

On the date on which the empowering legislation for the new Code Committee comes into force, the members of the Working Group will become the Code Committee under the new regime (should they wish).

Remuneration

Payments to members of the Working Group are set in accordance with the Cabinet fees framework [Cabinet Office Circular (12)6] – which is set by the government for the classification and remuneration of members of entities such as the Working Group – and are advised to members in their appointment letters. Any questions about fees should be directed to the Working Group Secretariat (refer to page 9 for a description of the Secretariat role).

Members will be reimbursed for actual and reasonable travel, meal and accommodation costs.

Conflicts of Interest

Members of the Working Group must be aware of the importance of personal integrity and the need to declare conflicts of interest, either potential or actual. A conflict of interest arises where a prospective or existing member (or a person in a close relationship with that member) has an interest which conflicts (or might conflict, or might be perceived to conflict) with the interests of the Working Group itself. A conflict of interest will not necessarily bar an appointment, although a serious conflict may mean a candidate is not suitable for appointment, or should resign if a significant and unmanageable conflict arises during the term of appointment.

Before a person is appointed to the Working Group, the person will be required to disclose to the Minister the nature and extent (including monetary value if quantifiable) of all interests that the person has at that time, or is likely to have in matters relevant to the operation and functions of the Working Group.

It is also a good practice to identify and determine appropriate management of conflicts collectively rather than this being left to individuals. Therefore, members will bring their interests to the chairperson's attention as soon as they are aware of any new interest as early as possible. The Secretariat will ensure any new conflicts of interest (and how they will be managed) are noted in the meeting minutes.

Arrangements

Secretariat

Secretariat support for the Working Group will be provided by the Ministry of Business, Innovation and Employment (MBIE). The Secretariat will work with the chairperson of the Working Group to prepare meeting agendas and accompanying material, and will be responsible for minute-taking and follow-up of action points.

The Secretariat will keep the chairperson and the Working Group apprised of the policy intent of, and any developments to, the new financial advice legislation, given that the code will be developed in parallel with the legislative process (whereby the Bill will be subject to change as it passes through Parliament).

The Secretariat has a budget to operate the Working Group, including travel costs. The Working Group and its members will not have an independent budget.

Logistics

Meetings of the Working Group are held at the times and places as the chairperson and the Secretariat from time to time decide.

The following procedural requirements will apply to the meetings of the Working Group:

- a) The quorum for a meeting of the Working Group is five members.
- b) Every question before the Working Group must be determined by a majority of the votes of the members present or otherwise.
- c) The chairperson of the Working Group has a deliberative vote and, in the case of an equality of votes, a casting vote.
- d) The Working Group may otherwise regulate its own procedure.

Accountability and reporting

The Working Group will be accountable to the Minister. The chairperson will report to MBIE (as the representative of the Minister) every two months throughout the approximate ten month code development period, to note progress of work and any key action points or decisions that have been made.

If the Working Group fails to meet the expectations or procedural requirements set out in these terms of reference, its members may be removed from office by the Minister.

The Official Information Act 1982 will apply to the activities of the Working Group. The chairperson will be responsible for ensuring that members are aware of the provisions of the Act, and will liaise with the Secretariat in responding to any requests for information that may be received.

Confidentiality and conduct

Working Group members may, from time to time, be provided with sensitive information for consideration and discussion. Working Group members will treat all information provided as confidential, unless informed otherwise.

Members must also conduct themselves in accordance with the State Services Commission standards of integrity and conduct.

Media

Media statements on behalf of the Working Group may be made by the chairperson following consultation with the Minister.

Review

These terms of reference will be periodically reviewed and may be altered by the Minister to ensure that the process and mandate reflect the drafting in the Financial Services Legislation Amendment Bill, which is subject to change throughout the legislative development process.

These terms of reference apply only to the Working Group and to the development of the draft code. Once the Working Group has transitioned to become the new Code Committee, these terms of reference will no longer have effect. The new Code Committee will then be governed by the relevant provisions in the Financial Markets Conduct Act only.