

How the Code Working Group will operate

9 August 2017

A new approach

The Financial Services Legislation Amendment Bill significantly alters New Zealand's direction on regulating conduct for financial advice.

At the heart of the new approach is the draft code to be prepared by the Code Working Group (CWG).¹ It reaches not only traditional advisers but now also a vast range of financial service activities where people or technology give customers recommendations or opinions about buying or selling financial advice products².

The development of the code is an opportunity for a step-change in advice conduct, that benefits customers and advice businesses alike. It builds on the extensive work already done by the current Code Committee. Through the consultation process, it presents all parties with an opportunity to be aspirational about how customers experience financial services and how appropriate advice can help.

Purpose of this paper

This paper has been prepared by the chair as a preliminary “scene setter” for the inaugural meeting of the CWG on 9 August 2017 to inform a discussion about how the CWG should operate. The concepts in the paper will evolve over time as the legislative and consultation processes progress.

Functions of the CWG

The CWG has been established³ to produce a draft *code of professional conduct for financial advice services*, periodically review it, and recommend changes to it as the CWG thinks fit.⁴ The CWG is also required to liaise with the Minister, the FMA and persons the CWG reasonably considers to be representative of the financial advice industry and of consumers of financial advice, regarding the development, review and implementation of the Code. These are—other than the new liaison requirement—equivalent functions to those of the current Code Committee established under the FAA, but with several important differences:

- In preparing the draft code, the CWG has the benefit of the considerable work already done over eight years in the production of the **current code**.

¹ A list of acronyms is available at the end of this paper.

² Financial advice products include financial products (debt securities, equity securities, managed investment products and derivatives), DIMS facilities, contracts of insurance and consumer credit contracts.

³ Pursuant to Ministerial appointment, as contemplated by the Financial Services Legislation Amendment Bill

⁴ Proposed FMCA Schedule 5 clause 25

- The code’s **scope** has widened:
 - from an **occupational code** for AFAs to a **service code** capturing advice given by all individual advisers,⁵ corporates and digital services, and
 - is now able to **differentiate** types of advice, product or other circumstances.⁶
- The code’s **context** has gained new facets:
 - it must satisfy new purposive requirements⁷ to improve **availability** and **quality** of advice (potentially contrary objectives), and
 - as adviser regulation moves into the FMCA, conduct considerations—and the FMA focus on “**customer outcomes**”⁸—become directly relevant to the code.

The CWG must undertake a series of tasks in fulfilling its functions, the most significant of which is consultation.⁹

Consultation

The CWG makes its decisions informed by appropriate consultation. In this regard the CWG is a catalyst, endeavouring to ensure that relevant interest groups (the “who” described below) are involved in a manner (the “how” and “when”) that is likely to produce effective outcomes (the “what”).

CWG members are not representatives of particular sectors, but sit on the CWG for their individual knowledge, skills and experience. All members are involved in monitoring the adequacy of all aspects of consultation.

WHO?

The draft legislation specifically requires consultation with:

- the FMA
- any persons the CWG reasonably considers to be representative of the financial advice industry
- any persons the CWG reasonably considers to be representative of consumers of financial advice.

The CWG must also allow any person affected by the code to make submissions.¹⁰

⁵ Using the terminology of the current regime, it captures AFAs and registered-only (non-AFA) advisers

⁶ Proposed FMCA Schedule 5 clause 32

⁷ Proposed FMCA section 431B

⁸ A guide to the FMA’s view of conduct, Feb 2017

⁹ Proposed FMCA Schedule 5 clause 33

¹⁰ Proposed FMCA Schedule 5 clause 33(2)(c)-(f)

The **financial advice industry** in the context of the code is a broad term, covering not only financial advisers and financial adviser associations, but much of the financial services industry. Given the increasing interest in digital advice and digitally assisted advice, particular attention will be paid in ensuring that consultation reaches fintech expertise.

The relationship with the **FMA** is different from that of the current Code Committee. The CWG is accountable directly to the Minister, has a secretariat provided by MBIE, and operates independently of the regulator. However, the CWG is required to consult with FMA, not least because the code is pivotal to the FMA's licensing and supervision processes. The Minister is also required to consult with the FMA in the process of deciding whether to approve the code drafted by the CWG.

The CWG will also liaise with:

- The current **Code Committee**, to ensure full understanding of the thinking behind the current code standards and a smooth transition between codes. The committees share one member and the chair of the current Code Committee has been appointed by the Minister as adviser to the CWG.
- The **Financial Advisers Disciplinary Committee**, which is responsible for enforcing the standards specified in the code.
- **The Skills Organisation**, given their role in financial services training and educational standards.
- Relevant **overseas bodies** (eg FASEA and ASIC in Australia) given the requirement for the CWG to have regard to international obligations.

HOW?

There are several avenues of consultation available to the CWG. These are likely to include:

- Formal consultation documents requesting submissions.
- "Roadshow" presentations across New Zealand, that support the formal consultation periods. These may be combined as back-to-back sessions with other (eg MBIE, FMA) consultation on the new regime.
- Focus groups where some members of the CWG join industry, consumers or other external experts to workshop particular concepts.
- Technological solutions allowing people to submit views electronically.

WHEN?

In the preparation of the first draft code, two formal consultation periods are likely: consultation on concepts in Oct/Nov 2017 and consultation on a preliminary draft code in Mar/Apr 2018.

WHAT?

The current Code Committee has generally consulted on competence, ethics and client care, reflecting the elements of the code listed in the legislation.

Those remain relevant topics for the CWG. However, consultation is now also required on the widened scope of the code, specifically how minimum standards should apply to:

- the vastly increased range of individual advisers and also corporates and digital services, and
- different types of advice, product or other circumstances.

In formulating the structure of consultation, the CWG will therefore need to consider issues such as:

- The extent to which **current code standards** remain relevant (eg Level 5—achieved in the relevant strand¹¹—used as the core “particular”¹² competence level).
- The need for **additional standards** (eg client care standards for ongoing advice relationships / renewals).
- A methodology for determining when **advice/product types or other circumstances** justify modifications of minimum standards. This is complex and involves a number of possible approaches, which could include:
 - Focusing on the advice provider’s overall customer outcome “plan” (in the context of the balance between availability and quality of advice).
 - Selecting one or more options for distinguishing between advice situations, eg: **(a)** replicating a product divide as in the FAA, **(b)** replicating a personalised / class divide as in the FAA, **(c)** revisiting limited advice, **(d)** applying different standards to in-house product advice or **(e)** simplifying advice requirements in situations where the customer already receives transparent product comparison information.
 - Specifically making “advice process” a less absolute concept, with additional principles as to how it may be adjusted to circumstances.
 - Finding balances between adviser competence and organisational capability.
- For competence, re-assess how **Level 5** is applied.
 - Is any baseline universal general competence required? (eg Unit 26360 covering knowledge of the code and consumer protection laws)

¹¹ Eg investment, insurance, lending

¹² Proposed FMCA Schedule 5 clause 32 distinguishes between general and particular competence

- For “particular” competence (ie Level 5) is there any situation where another qualification should apply? (eg Level 4 in some in-house process situations)
- What transitional arrangements are appropriate? In particular, should the code limit or modify standards, or provide separate standards, for 1 or more periods of transition?¹³
- How can (measurable) continuing training be used to broaden skills as adviser roles evolve over time?
- A **survey** of the range of advisers and advice types to which the code will apply.
- How to **write the code**, given that it will not be a code for AFAs but rather a code for financial advice (eg structuring it partly/fully as a code to be read by customers).

Principles

The CWG’s principles are to encourage:

- **Customer outcome focus.** In consulting on and developing the code, the CWG will seek to understand what good conduct means in an advice context. The code should encourage behaviours that deliver customer outcomes which provide an appropriate balance between advice availability and quality.
- **Transparency.** The CWG will operate transparently. That does not mean publishing everything, but it does mean being open, in a timely fashion, about policy deliberations (including in the statutorily required impact analysis document) and progress. Similarly, the CWG encourages those involved in consultation to be publicly transparent too, especially on policy thinking.
- **Professionalism.** The code is required to set minimum standards (in the context of achieving good customer outcomes, with a balance between advice availability and quality). The CWG encourages the industry and professional associations to take the lead in setting aspirational standards that go beyond minimum standards (eg in adviser credentials, in advice process and in terms of culture, structure etc).
- **Creativity.** The CWG regards the development of the code as an opportunity for a step-change in advice conduct, in readiness for a significant, technologically-driven reshaping of how financial services and advice are likely to be delivered. During consultation—especially in the focus groups—a challenge for the CWG will be to reach those people who have a range of views and are able to think imaginatively about the future.
- **Pragmatism.** The code will have an impact on all advice providers. The CWG is mindful that advisers need a practical and achievable pathway to migrate to the new environment.

¹³ Proposed FMCA Schedule 5 clause 32(5)

Meetings

9 Aug 2017 Inaugural meeting

Subsequent meetings to be held approximately monthly until the development of the draft code is complete.

Acronyms

AFA Authorised Financial Adviser as defined in the Financial Advisers Act

ASIC Australian Securities and Investments Commission

CWG Code Working Group

FAA Financial Advisers Act

FASEA (Australian) Financial Adviser Standards and Ethics Authority

FMA Financial Markets Authority

FMCA Financial Markets Conduct Act

Level 4 and

Level 5 New Zealand Certificates in Financial Services

MBIE Ministry of Business Innovation and Employment