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9 November 2018

Code Working Group
c/o Code Secretariat
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140
New Zealand

Emailed to: code.secretariat@mbie.govt.nz

Dear Working Group,

ICNZ submission on draft Code of Professional Conduct for Financial Advice Services

Thank you for the opportunity to submit on draft *Code of Professional Conduct for Financial Advice Services* ("Code"), which was released for consultation by the Code Working Group on 11 October 2018. ICNZ represents general insurers that insure about 95 percent of the New Zealand general insurance market, including over half a trillion dollars' worth of New Zealand property and liabilities.

Please contact Andrew Saunders (andrew@icnz.org.nz or 04 914 2224) if you have any questions on our submission or require further information.

Overarching comments

Overall, ICNZ is supportive of the draft Code. It provides a good platform to improve the way financial advice is delivered via generalised standards. We support taking a high level/principles-based approach and using straightforward language. Commentary is welcomed and further commentary in some areas would be beneficial in terms of clarifying intent and application. We support the cross-referencing of legislative and regulatory requirements and the use of appropriate examples is generally helpful.

We have identified issues with aspects of Standards 1, 6 and 8 and their associated commentary. We outline these and make recommendations to resolve them below in our responses to the questions asked in the consultation document.

Whilst we are generally supportive of the draft Code we do note it is not particularly orientated to financial advice associated with the provision of insurance by general insurers.

Responses to specific questions asked in the consultation document

In this section we respond to the questions posed in the consultation document, following the same numbering.

[Standard 1] Treat clients fairly and act in their interests

1. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

2. Please provide any comments on this standard and the proposed commentary.

ICNZ supports the intent of Standard 1. We do however wish to raise the potential uncertainty associated with how the language used, in particular “act in their interests”, relates to the language used in provisions in the primary legislation and to other Standards in the Code. We also have comments on the proposed commentary.

Similar language is used in Standard 1 to the new section 431J of the *Financial Markets Conduct Act 2013*.¹ Section 431J will provide “...must give priority to C's interests by taking all reasonable steps to ensure that the advice is not materially influenced by...” whereas Standard 1 in the draft Code provides “treat clients fairly and act in their interests”. Standard 3 in the draft Code also explicitly addresses conflicts of interest. How these various legislative/Code provisions are intended to interact together needs to be carefully provided for to ensure that the obligations and expectations on entities are clear.

We understand the Code Working Group's intent behind Standard 1 is putting the client at the centre of the Code and this is intended to go beyond managing conflicts of interest. Given the overlapped nature of the language used we suggest that the language used here is revised or what is meant by it in this context is expanded on in the commentary to make the intent and relationship to other provisions clearer. We note the proposed commentary currently lacks specific explanation of what the phrase “act in their interests” is intended to mean.

We also have some drafting comments on the proposed commentary to Standard 1:

- The purpose of including the words “fairness is not-one sided” in the first bullet point is not apparent as there is no suggestion that it would be “one-sided”. Suggest this phrase is reworded or perhaps simply removed as fairness is expanded on in the subsequent bullet points in any case.
- The words “and intent” should be removed from the last bullet point of the proposed commentary. It is not reasonable to expect all financial advisers to know what the intent of the legal obligations are. This could also be subject to debate in future.

[Standard 2] Act with integrity

3. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

¹ Once it is amended by the Financial Services Legislation Amendment Bill.

4. Please provide any comments on this standard and the proposed commentary.

No comments.

[Standard 3] Manage conflicts of interests

5. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

6. Please provide any comments on this standard and the proposed commentary.

The order of the first and second bullet points could be reversed to align with conventional usage.

[Standard 4] Take reasonable steps to ensure that the client understands the financial advice

7. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

8. Please provide any comments on this standard and the proposed commentary.

We suggest the proposed commentary might flow better if the paragraph beginning "Section 431I of the FMC Act..." came first and before the paragraph/sentence and bullets commencing "Clients should be able to...".

With regard to the example in Standard 4. ICNZ questions the inclusion of an example that is focussed on financial advice associated with replacement of a life insurance policy given the concerns that have been raised by the FMA and others in this area. Furthermore, we note that a name is used for the financial adviser in this example ("Beth") but no names are used for any other person in this example, or the other examples. We suggest the use of a specific name is avoided here to align with approaches elsewhere in the Code and in legislation.

[Standard 5] Give financial advice that is suitable for the client

9. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

10. Please provide any comments on this standard and the proposed commentary.

No comments.

[Standard 6] Protect client information

11. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Disagree. Whilst we support the general principles contained in proposed Standard 6 we consider it is unnecessary as it is duplicative of privacy law and we disagree with a number of the prescriptive restrictions contained in the proposed commentary.

12. Please provide any comments on this standard and the proposed commentary.

Data protection is an increasingly topical and important area and ICNZ supports robust regulation in this area. We however question the need for Standard 6 to be covered in the Code at all and have significant concerns with the content of the proposed commentary in relation to the use and retention of information and anonymised information.

This rationale for including Standard 6 is not apparent given protection of personal information is covered by the *Privacy Act 1993* and this will cover all individual clients subject to the Code. If a Standard in this area was to be included in the Code it should not duplicate what is already provided in privacy legislation and so a gap analysis would be fundamental to any inclusion along these lines. Also, if Government or the Code Working Group considers there are gaps in the existing *Privacy Act 1993* in relation to the provision of financial advice then it would be better for these to be addressed through the new Privacy Bill currently before Parliament rather than introducing separate and differing requirements in the Code.

Beyond our overarching concern with the inclusion of this Standard we also have a number of concerns with the proposed commentary, which purports to apply some significant and prescriptive constraints on entities. We also note there is no guidance on how an entity which deals with a customer in various ways, some of which involve regulated financial advice (subject to the Code) and some which do not, would be meant to practically apply the expectations outlined in the proposed commentary.

Before turning to specific issues, we note that what is considered client information in this context is not clear. The first sentence of the commentary envisages a very broad scope (“all information about clients...”), whereas the second sentence suggests a narrower scope focussed on financial advice. It would be more appropriate and workable if the definition applied to information related to financial advice rather than to all information about clients.

The language used in the proposed commentary for Standard 6 is different to that in the *Privacy Act 1993*, for example in information Privacy Principle 9. This would mean that a financial adviser or financial advice provider would need to simultaneously apply two different standards in relation to the retention/disposal etc. of what will in many cases be the same information. This could cause confusion and uncertainty and perhaps additional compliance costs.

With regard to anonymised data and the following statement in the second paragraph of the proposed commentary: “This applies even where the client information would be used for another purpose in an anonymised form”. This is an unexplained and material change from the proposal in paragraph 99 of the Code Working Group’s March 2018 consultation paper that stated:

“Provided such data is anonymised, we propose that the Code should not impose any standards on its use. Any Code standard that addresses confidentiality would apply only where it relates to information that can be linked to an identifiable person.”²

Insurers utilise a lot of what may have originally been “client information”, depending on how it is defined, for analysis and modelling and reporting to regulators on an anonymized basis – and this is generally not relevant to the giving of financial advice to a particular client. If client information is in a truly anonymized form we also question how it can even be considered “client information”?

² Code of Professional Conduct for Financial Advice Services, Consultation Paper, Monday 12 March 2018.

We have concerns with the content of the proposed commentary in relation to the statement that “client information should only be held for as long as it is required for the purposes of the engagement, or to comply with a regulatory requirement.” First, this is a very different requirement to current Code Standard 13 of the current *Code of Professional Conduct for Authorised Financial Advisers*, which provides an Authorised Financial Adviser (AFA) must ensure that records of all information and documents required under that Code are kept for a minimum of 7 years. We also note there is generally no regulatory requirement to hold onto client data after the end of an insurance policy and exactly when an engagement ends is not always clear (e.g. a claim might be able to be made after a policy has expired).

The proposed commentary suggests that an insurer should at the point an engagement ends generally delete or return client information. How this is envisaged to be applied when the client has given permission to use information is uncertain. Further issues with this include: that customers can return and expect to be able to smoothly resume engagements, which often relies on information being retained; information needs to be retained for the purposes of audit and statistical reporting; entities might be deemed or simply expected to know something in future, for example because the client told them when they were client previously, and this could become problematic if information is deleted pursuant to this Code expectation.

Given these various issues the most practical and workable solution would be to remove Standard 6 and rely on privacy law, which is being updated, to address issues of client information. If there is a compelling reason to retain Standard 6 in the Code, and we don’t consider there is, then the commentary needs to be completely reworked to address the following issues:

- how it relates to privacy law, only imposing additional obligations where necessary to address identified gaps or limitations;
- reworking the definition of “client information” and focussing it clearly on information related to financial advice; and
- removing or revising the position in relation to the retention of information and anonymised data.

[Standard 7] Resolve complaints

13. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

14. Please provide any comments on this standard and the proposed commentary.

No comments.

[Standard 8] Not bring the financial advice industry into disrepute

15. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

16. Please provide any comments on this standard and the proposed commentary.

ICNZ strongly supports the imposition of robust conduct standards. We consider however that the drafting of Standard 8, which we note is similar to Standard 2 in the current *Code of Professional*

Conduct for Authorised Financial Advisers, would benefit from being reworked to make it more focussed.

As currently drafted the inclusion of “not do anything that would, or would be likely to, bring the financial advice industry into disrepute” is provided as a distinct element and not in relation to wider performance/behaviour related to financial advice. Given this, the scope of Standard 8 is on its face potentially broad enough to cover all actions of an entity or individual whether or not the actions are related to the provision of financial advice.

Provisions against bringing an industry into disrepute are usually linked to behaviour that is illegal or falls short of standards in relation to the activity. As an example, clause 1.4 of *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, which links bringing the legal profession into disrepute to particular types of poor conduct relevant to the profession:

- “(c) negligence or incompetence in a lawyer’s professional capacity of such a degree or so frequent as to reflect on the lawyer’s fitness to practise, or as to bring the legal profession into disrepute:
- (d) conviction of an offence punishable by imprisonment where the conviction reflects on the lawyer’s fitness to practise, or tends to bring the legal profession into disrepute.”

Industry associations and professional bodies often impose a “not do anything that would, or would be likely to, bring the industry into disrepute” standard on their members and many entities will already be subject to these (for example ICNZ members). Such membership organisations might bring action against a member for bringing their industry into disrepute even if no laws were broken or those laws that were broken were not directly relevant to the sector. However, in a regulatory context, as the Code operates in, regulators tend to limit their enforcement action to their sphere of responsibility.

Redrafting Standard 8 could easily address the issues identified. For example, changing the first sentence to “A person when giving financial advice must...” or similar and/or linking the disrepute to the breaching of relevant laws/rules/standards.

[Standard 9] Have general competence, knowledge, and skill

17. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don’t know)

Agree.

18. Please provide any comments on this standard and the proposed commentary.

We question whether the phrase “alternative qualification” at the top of page 8 should be reworked as competence, knowledge and skill won’t just be demonstrated through a “qualification” or designation. It may be logical to refer to “general competence, knowledge, and skill” here.

We also suggest consideration is given to whether this same paragraph at the top of page 8 starting “a person seeking to demonstrate” should be included in the commentary below Standards 11 and 12.

[Standard 10] Keep competence, knowledge, and skill up-to-date

19. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

20. Please provide any comments on this standard and the proposed commentary.

No comments.

[Standard 11] Have particular competence, knowledge, and skill for designing an investment plan

21. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

22. Please provide any comments on this standard and the proposed commentary.

Note our comments in relation to Standard 9 above and the paragraph at the top of page 8.

[Standard 12] Have particular competence, knowledge, and skill for other types of financial advice

23. Overall, do you agree or disagree with this standard and proposed commentary? (Agree/Neither agree nor disagree/Disagree/Don't know)

Agree.

24. Please provide any comments on this standard and the proposed commentary.

Note our comments in relation to Standard 9 above and the paragraph at the top of page 8.

General questions

25. Is there anything missing from the draft Code?

No comments.

26. If you answered yes, what is missing?

No comments.

27. Do you have any feedback on the examples, or suggestions on other examples that should be included in the draft Code?

Please note our comments above in regard to the example in Standard 4.

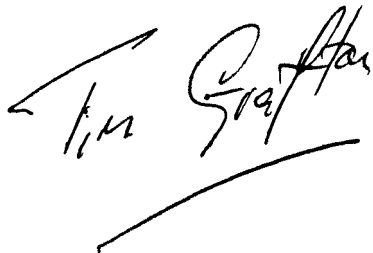
28. Is there anything else you want to say?

No further comments.

Conclusion

Thank you again for the opportunity to submit on the draft Code. If you have any questions, please contact our Regulatory Affairs Manager on (04) 914 2224 or by emailing andrew@icnz.org.nz.

Yours sincerely,

Handwritten signature of Tim Grafton in black ink, featuring a large, sweeping flourish that extends downwards and to the left.

Tim Grafton
Chief Executive

Handwritten signature of Andrew Saunders in black ink, consisting of the initials 'AB' followed by the name 'Saunders' in a cursive script.

Andrew Saunders
Regulatory Affairs Manager