21 December 2021

Insurance Brokers Code of Practice Review
Further Consultation on NIBA Draft Code of Practice
Submission from Consumers' Federation of Australia

About Consumers' Federation of Australia

Consumers' Federation of Australia (CFA) is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations.

CFA advocates in the interests of Australian consumers with and through its members, supports consumer representatives to industry and government processes, develops policy on important consumer issues and facilitates consumer participation in the development of Australian and international standards for goods and services.

CFA is a full member of Consumers International, the international peak body for the world's consumer organisations.

We acknowledge the funding that NIBA has provided CFA to allow us to make this submission and contribute to ongoing discussions about the new Code.

This submission has been endorsed by the Financial Rights Legal Centre.

Introduction

We commend NIBA for its willingness to amend significantly its draft Code following input from CFA and the Code Compliance Committee. While we still have some important concerns, which we set out below, the new draft of the Code is very much better than the previous version and is far closer to meeting NIBA's ambition to have a Code which is a benchmark for industry self-regulation.

We welcome many aspects of the draft Code, such as the commitment that all NIBA members must subscribe to it, the application of the Code to prospective clients, clarity about the limitations of advice, clear communication more generally, the application of the Code to agents, and that where an issue is covered by the provisions of two codes, the higher standards will apply.

There are still a few places where the tone of the previous draft appears to have been retained, with highly hedged statements. Examples include 'We will work towards ensuring that we provide clear information' in 5.2(c), 'We will take steps to help you understand the advice we have provided' in

6.1(b), and 'We take steps to ensure that our services are accessible' in 6.2(c). It will be important to strip out all such examples and replace them with more straightforward commitments.

Our most substantial remaining comments relate to:

- Application of standards set out in the FASEA code of ethics
- Conflicts of interest and remuneration
- Vulnerability.

We also have some comments about timing, detailed drafting and consistency of style.

Application of standards in FASEA code of ethics

The previous consultation asked whether the Code should adopt some or all of the FASEA Code of Ethics[1]. We said that the default should be that all FASEA standards are imported into the NIBA Code. Clause 4.1 of the draft Code in particular includes some aspects of the FASEA Code standards, but this is done in a limited way. We compare the two Codes in table 1 below.

Table 1: A comparison of the FASEA And draft NIBA Codes

FASEA Code standard	Is this in the draft NIBA Code?	Proposed change
1: You must act in accordance with all applicable laws, including this Code, and not try to avoid or circumvent their intent.	Partially – the first half is in 4.1(b)(ii). The second half is arguably covered in 4.1(b)(iii), but the FASEA wording is stronger because it refers to intent while the NIBA draft refers to obligations.	Add a reference to not avoiding or circumventing intent.
2: You must act with integrity and in the best interests of each of your clients.	Yes – the first half is in 4.1(b)(i), the second half is in 6.3(a)	None
3: You must not advise, refer or act in any other manner where you have a conflict of interest or duty.	No. 6.3(b) says that the broker will not act for an insurer or other party where doing so would be contrary to the client's best interests. But 6.3(d) then allows conflicts of interests with the express written consent of clients. This is not fit for purpose.	Amend the draft to reflect the FASEA Code. The provisions of 6.3(b) and 6.3(d) are at odds with one another; and the imbalance of knowledge, experience and power between clients and brokers will mean that many clients will in reality not be able to provide informed consent. The requirement of 6.3(c), to have policies and procedures in place to identify and avoid acting against the client's best interests, are unlikely to be adequate in practice. We do not consider that additional

[1] https://www.fasea.gov.au/code-of-ethics/

		Code Guidance and training on effective disclosure and consent will be sufficient to address the fundamental issues here.
4: You may act for a client only with the client's free, prior and informed consent. If required in the case of an existing client, the consent should be obtained as soon as practicable after this Code commences.	Yes – in 5.2.	None
5: All advice and financial product recommendations that you give to a client must be in the best interests of the client and appropriate to the client's individual circumstances. You must be satisfied that the client understands your advice, and the benefits, costs and risks of the financial products that you recommend, and you must have reasonable grounds to be satisfied.	Partially. The first sentence is covered in 6.3(a). Aspects of the second sentence are covered in 6.1(b), but it says 'we will take steps to help you understand…' The FASEA wording is more outcomes-focused and less hedged, and we think it is significantly better than the NIBA draft.	Amend 6.1(b) so that it uses the FASEA wording.
6: You must take into account the broad effects arising from the client acting on your advice and actively consider the client's broader, long-term interests and likely circumstances.	No. However this may be most relevant to other types of advisers.	We suggest NIBA should consider whether there are any circumstances in which this might be relevant, for example in relation to short-term discounts that may affect a longer-term decision. If there are such examples it should be added to the draft Code.
7: The client must give free, prior and informed consent to all benefits you and your principal will receive in connection with acting for the client, including any fees for services that may be charged. If required in the case of an existing client, the consent should be obtained as soon as practicable after this code commences. Except where expressly permitted by the Corporations Act 2001, you may not receive	Partially. The language in the final paragraph is not included in the NIBA draft and could usefully be added.	Add the text from the final paragraph.

any benefits, in connection with acting for a client, that derive from a third party other than your principal. You must satisfy yourself that any fees and charges that the client must pay to you or your principal, and any benefits that you or your principal receive, in connection with acting for the client are fair and reasonable, and represent value for money for the client.		
8: You must ensure that your records of clients, including former clients, are kept in a form that is complete and accurate.	No – but we assume that this is already required elsewhere. If not then it should be added here.	None, provided this is covered elsewhere.
9: All advice you give, and all products you recommend, to a client must be offered in good faith and with competence and be neither misleading nor deceptive.	No. This language is not used in the draft, other than a reference to professional competence in the introduction then in 9.2 in the context of training.	This language could usefully be added to the draft Code.
10: You must develop, maintain and apply a high level of relevant knowledge and skills.	Partially – the FASEA wording focuses on knowledge and skills which should relate directly to client outcomes, whereas 4.1(a)(i) and 9.2(a)(ii) are framed around activities (qualifications, education and training).	Adopt the FASEA approach in 4.1.
11: You must cooperate with ASIC and monitoring bodies in any investigation of a breach or potential breach of this Code.	Yes. This is covered in 4.1(c)(ii) and 12.4(b).	None
12: Individually and in cooperation with peers, you must uphold and promote the ethical standards of the profession and hold each other accountable for the protection of the public interest.	Partially. This is covered in 4.1(a)(i) and 4.1(c)(ii). But this is framed around professional standards, with no mention of the public interest.	Add a reference in 4.1. to the wider public or consumer interest.

As noted in the Table, we consider that there is a particularly strong case for adding standards 3 and 5 to the Code, though some other standards have important elements that should be incorporated too.

Conflicts of interest and remuneration

The provisions on conflicts and remuneration are largely contained within clauses 6.3 and 8 (with the latter covering the financial relationship between the broker and other parties, not just disclosure of earnings, as the clause heading suggests).

We see value in the clarity of Standard 3 in the FASEA Code, which prohibits conflicts, and we would like to see NIBA going further in adopting this principle too. The important duty to act in the client's best interests is undermined by the potential for allowable conflicts.

As noted in Table 1 above, we think the provisions of 6.3(b) and 6.3(d) are at odds with one another. 6.3(a) and 6.3(b) both set out the duty to act in the client's best interests, with 6.3(b) explicitly noting that this will apply to instances when acting for an insurer or another party would be contrary to the client's best interest. But this is then fatally undermined by 6(d), which suggests that the client can consent to a conflict. This implies that there may be instances where a conflict would not be against the client's interests. We are not convinced that such circumstances exist and we continue to support a prohibition on conflicts.

Additionally we do not consider that it is reasonable just to inform a client about a conflict and expect them to assess the validity of the broker's view that this conflict is not against their interests. This goes against the nature of the broker-client relationship, which as the draft Code notes is intended to be one of consumer confidence in the broker's advice. The imbalance of knowledge, experience and power between clients and brokers will mean that many clients will in reality not be able to provide such informed consent. Even if the disclosure is noticed by consumers, it may have the effect of increasing trust in advisers rather than making consumers more wary.[2] The requirement of 6.3(c), to have policies and procedures in place to identify and avoid acting against the client's best interests, is unlikely to be adequate in practice given the nature of the relationship, nor would additional Guidance or training.

We would welcome further explanation of the case for excluding binder agreements in 8.2.

Non-financial remuneration

Clause 8.3 permits non-financial remuneration, unless this could reasonably be expected to influence the advice provided. The examples cited in 8.3(a) are all instances where another business is providing the broker with a free service or support. These do not relate to any one client in particular and might not clearly and directly influence advice in an individual case. But many of the arrangements listed create a relationship between the business and the broker, which is presumably intended to benefit the business across the totality of the broker's work. So such remuneration might influence the broker's decisions across all their clients, even if this cannot be identified in relation to any individual client. We would therefore suggest that non-monetary remuneration is not permitted.

Clause 8.1 requires that any non-financial remuneration be disclosed, but as we noted in our initial submission there is a strong body of evidence to suggest that such information remedies tend not to be effective and so this will not act as a meaningful constraint on brokers. We are also not clear how this would apply where the non-financial remuneration does not relate directly to the client in

[2] James Lacko and Janis Pappalardo, The effect of mortgage broker compensation disclosures on consumers and competition: A controlled experiment, Federal Trade Commission Bureau of Economics Staff Report, 2008 referenced in Financial Services Authority, Financial Capability: A Behavioural Economics Perspective, 2008.

question – is the suggestion here really that a broker would disclose to every client the details of all their event sponsorships etc? This feels unworkable.

Vulnerability

The text on vulnerability is generally consistent with other Codes, such as the 20202 GICOP. The independent reviewer on the Banking Code makes some useful observations about this area in his final report[3], which would be worth considering here. For example it proposes to define vulnerability as ‘‘Someone who, due to their personal circumstances, is especially susceptible to harm – particularly when a firm is not acting with appropriate levels of care.’ This latter part is important, because vulnerability is not just about an individual’s characteristics, along the lines listed in 11.1(b), but how these interact with the market. The behaviour of businesses and the design of products and services can reduce or increase vulnerability.

There should be an onus on the broker to work to identify vulnerability, rather than just relying on the client, whose vulnerability may be a barrier to this. Often consumers who are in vulnerable circumstances may so or do something that indicates their vulnerability, without explicitly talking about it, and the best businesses are able to hear and act on this. The tone of Clause 93 of the GICOP is arguably better than clause 11.1(c) here, though neither gets across the importance of active listening to identify consumers in vulnerable circumstances. It would be better to start with a more positive commitment, along the lines of ‘We work to identify where clients are in vulnerable circumstances, but this may not always be possible, and we encourage clients to tell us so that we can provide extra help.’

Clarity of drafting

The new draft is significantly better written than the first version, and it will be easier for consumers to understand. There is still some scope for greater clarity of style, such as:

- consistent meaning of ‘we’ – mostly this refers to the Subscriber, but for example the ‘we’ at the start of clause 12 means NIBA not the subscriber (though the ‘our’ means the subscriber) , and ‘we will hold each other accountable’ in clause 4.1(c) presumably means all Code subscribers
- consistency in whether businesses are referred to in first or third person (for example 4.2(b) uses both ‘we’ and ‘a Subscriber’ – and both are used throughout the Code)
- consistency in whether the consumer is referred to in second or third person (for example in clauses 5.2 and 6.1 the text veers between ‘you’ or ‘a prospective client’/’them’)
- reduced use (or if really necessary greater explanation) of technical terms, such as ‘the broader intermediated insurance industry’ (clause 2), ‘alternative risk transfer solutions’ (3.3), ‘ contingent remuneration including volume-based commissions or profit-sharing arrangements or preferential remuneration such as (override commissions)’ in 8.2(a), ‘a binder arrangement’ (8.2(b)) and ‘a personal advice or general advice model’ (footnote 3 on p8).

[3] https://bankingcodereview.com.au/wp-content/uploads/2021/12/Final-Report-Banking-Code-of-Practice-Review-2021.pdf

Start date

Clauses 2 and 3 are potentially inconsistent in describing when the Code takes effect. Clause2 says that it takes effect 'on 1 September 2022', having been launched on 1 January 2022; while clause 3 says both that existing subscribers must 'formally adopt the Code by 1 September 2022' and that it applies to activities after 1 September 2022. We would suggest that this sets out more clearly which of two options applies:

- the Code must be applied by subscribers no later than 1 September, with the option for each subscriber of going earlier in 2022, and it will cover activities from the date of application by each subscriber; or
- the Code must be applied by all subscribers from 1 September, and it will cover activities from that date onwards.

Our general view is that the new Code should be implemented sooner rather than later, while allowing sufficient time for brokers to prepare properly. While we appreciate that starting part-way through a reporting year creates some complexities, we are not in favour of delaying implementation until 2023.

Other detailed drafting suggestions

The purpose in clause 1 ('Building professional competence and consumer confidence') could connect the two elements mentioned and also point to how consumer confidence is increased. We like the general approach behind the Code Committee suggestion of 'Building better consumer outcomes through professional competence.'

Clause 2, para 2 should refer to prospective clients as well as clients, to be consistent with the rest of the Code. The first two sentences of this paragraph appear repetitive, unless it is trying to make the point that safeguards may be both higher and/or wider than the law, in which case this could probably be drafted more clearly.

Clause 8.4 relates to services that are not connected to the relationship between the broker and the client / prospective client, so we are not sure it is worth including this here.

Clause 10.1(a) is oddly phrased and can probably be deleted. 10.1(c) refers to 'our' EDR processes, which does not accurately communicate the independent status of AFCA.

Clause 12.2(b) implies that the Code Committee makes a formal finding in relation to every alleged breach, whereas it is in practice likely to need more flexibility, for example to decide not to investigate or to refer a case to another body.

For further queries about this submission, please contact Gerard Brody, CFA chair, at chair@consumersfederation.org.au