

## Doubts raised about validity of FASEA code and exam



24 February 2020

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**Future boards of the Financial Adviser Standards and Ethics Authority (FASEA) will have no choice but to come to grips with the legal uncertainty inherent in the FASEA code of ethics, according to academic, Dr David Millhouse.**

Millhouse, an honorary adjunct senior research fellow at Bond University, has provided commentary around the FASEA code and the notion of best interests and concluded that an Australian financial adviser can comply with the existing best interest provisions of the *Corporations Act* but be found wanting under the FASEA Code of Ethics.

What is more he argues that despite FASEA having published cameos describing various client circumstances, these are not cases, do not establish precedent and are not law.

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He goes further by suggesting that the FASEA adviser exam may also be flawed with respect to its reference to the code.

Millhouse said that, despite this, financial advisers would find themselves carrying unlimited personal liability.

"Future boards of FASEA will have no choice but to come to grips with the legal uncertainty its Code of Ethics has created," he said. "...The reading list for the compulsory examination contains no direct authoritative references to the central questions of best interest and, because of the way the Code is drafted, other law (for instance, what constitutes 'informed consent') which support the best interest duties. This raises doubts about the veracity of the examination for the adviser in their quest for legal certainty".

Millhouse said the objectives of the Code of Ethics were doubtless pure but it did not have the jurisprudence and statutory support of pure liability civil law countries or the necessary supervisory architecture for effective implementation.

"These will take some years. In the meantime, the Code should operate on a comply-or-explain basis. Advisers, for their own defence, may themselves want to become status-based fiduciaries by virtue of contract and apply absolutist fiduciary principles," he wrote.

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