



**Submission by the
Financial Rights Legal Centre**

Treasury

ASIC Enforcement Review

Position and Consultation Paper 4: Industry Codes
in the Financial Sector, 28 June 2017

July 2017

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2015/2016 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

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Introduction

Thank you for the opportunity to comment on *Position and Consultation Paper 4 – Industry Codes in the Financial Sector*.

The Financial Rights Legal Centre (**Financial Rights**) has long argued the need for a stronger Industry Code regime and we welcome consideration of a co-regulatory scheme.

Would a requirement to subscribe to an ASIC approved industry code result in improved outcomes for consumers?

Yes.

In June 2016, Financial Rights with seven other consumer representatives¹ wrote to six financial services sector associations administering codes which we deal with on a regular basis to request that they they seek ASIC approval in accordance with the Australian Securities and Investments Commission's (**ASIC's**) *Regulatory Guidance 183*.² The six we wrote to:

- the Australian Bankers' Association (**ABA**) with its Code of Banking Practice
- the Customer Owned Banking Association (**COBA**) with its Customer Owned Banking Code of Practice;
- the Financial Planning Association of Australia (**FPA**) with its FPA Code of Professional Practice
- the Financial Services Council (**FSC**) with its recently launched Life Insurance Code of Practice;
- the Insurance Council of Australia (**ICA**) with its General Insurance Code of Practice;
- the Mortgage & Finance Association of Australia (**MFAA**) with its MFAA Code of Practice;
- the National Insurance Brokers Association (**NIBA**) with its Insurance Brokers Code of Practice.

In this letter we stated that ASIC approval of all codes in the financial services sector:

"is a significant aspiration of the consumer movement and will be our position moving forward in future code reviews and other relevant fora."

We argued and continue to believe that ASIC approval would increase public confidence in the financial services sector, ensure that code meets minimum practice standards that they

1 including Consumer Action Law Centre, Consumer Federation Australia, CHOICE, Financial Counselling Australia, Redfern Legal Centre, CARE Inc and the CCLC SA

2 <http://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

currently do not meet and send a strong signal to consumers that they can have confidence in the codes.

Approval would also demonstrate that the financial services industry proactively responds to identified and emerging consumer issues and that the codes work to deliver substantial benefits to consumers.

Code approval would also mean that:

- that minimum benchmarks for an effective Code would need to be met by all industry codes
- investigative or enforcement action can be undertaken if misrepresentations are made about a code;
- ASIC can monitor a code based on issues raised by consumers, External Dispute Resolution (**EDR**) schemes or industry consultations;
- there is greater certainty that consumer concerns and independent review recommendations will be taken seriously and more likely implemented – rather than what can occur now which is that some recommendations for change are watered down significantly or rejected outright;
- consumers can have confidence that there is specific government/ASIC oversight of the Code and its ongoing development;
- members will no longer be able to walk away from their code.

We have argued for some time now that industry organisations should show leadership and send a strong message to consumers, subscribers and the financial services sector by seeking ASIC approval. To date no industry organisation has taken this step.

Most recently two industry bodies have sent signals that they are considering seeking approval of their Codes.

The ABA in response to the recent Khoury Review into the Code of Banking Practice has stated that:

The industry will be working with ASIC on getting the new Code approved under section 1101A of the Corporations Act and RG 183.

In announcing the launch of the Life Insurance Code of Practice the FSC stated it will

“consider making an application for ASIC approval of the second iteration of the Code. (our emphasis)”³

³ FSC, *Media Release: Life Insurance Code of Practice*, http://www.fsc.org.au/downloads/file/MediaReleaseFile/2016_1110_MediaRelease_LifeInsuranceCodeofPractice_final.pdf

We note however that the Minister for Revenue and Financial Services, the Hon. Kelly O'Dwyer MP stated in response to the launch of the Life Insurance Code of Practice in October that:

...she expects the FSC and life insurance industry will take the necessary steps to ensure that the Code is enforceable across the whole industry, by gaining ASIC approval of the Code.

ASIC should work collaboratively with the FSC and the industry to approve the Code. Once the Code is approved, the Government will give ASIC the necessary powers to enforce the Code, so as to ensure financial services licensees' compliance with the Code.⁴

Despite these two recent assertions, Financial Rights remains concerned that the FSC will not seek ASIC approval for their Code.

Financial Rights notes that in the 2011 Independent Review of the Code of Practice, the Final Report stated that the Independent Reviewer believed that the recommendations made met ASIC RG 183 criteria.⁵ Financial Rights further notes that in meetings with the ICA and Ian Enright at the time, the ICA told consumer advocates that they would seek ASIC approval of the General Insurance Code. However after much delay, the recommendations of the Independent Reviewer's report were not fully implemented by the ICA and approval was never sought.

RG 183 outlines the following list of approval criteria:

- Freestanding and written in plain language: RG 183.55 & RG 183.129
- Body of rules: RG 183.19 & RG 183.24
- Consultative process for code development: RG 183.49–RG 183.54
- Meets general statutory criteria for code approval: RG 183.28–RG 183.41
- Code content addresses stakeholder issues: RG 183.55–RG 183.62
- Effective and independent code administration: RG 183.76–RG 183.81
- Enforceable against subscribers: RG 183.25–RG 183.27
- Compliance is monitored and enforced: RG 183.79–RG 183.81
- Appropriate remedies and sanctions: RG 183.68–RG 183.73
- Code is adequately promoted: RG 183.78–RG 183.80
- Mandatory three-year review of the code: RG 183.82–RG 183.84

No industry code currently meets these minimum benchmarks fully – most are a long way off.

Just as one example, the General Insurance Code of Practice falls down on:

⁴ Minister for Revenue and Financial Services, *Media Release: Key life insurance reforms to assist consumers*, 12 October 2016 <http://kmo.ministers.treasury.gov.au/media-release/091-2016/>

⁵ General Insurance Code of Practice 2012–2013 Independent Review Final Report, para 4.7, page 24.

- *Enforceability*: The General Insurance Code states that it does not create legal or other rights between us and any person or entity other than the ICA (subsection 1.5);
- *Reviews*: There is no minimum three year review process other than when the ICA feels like it (subsections 12.7 and 12.8)
- *Code content*: The General Insurance Code's content does not address stakeholder issues that have been raised with the ICA with respect to a range of issues from claims handling and fraud investigation to sales practices. The ICA's disappointing response to the last Independent Code Review failed to address a number of the issues raised in the Final Report of that review.
- *Code sanctions*: The current General Insurance Code only includes one sanction listed in RG 183.

Using the example of the General Insurance Code of Practice, ensuring that it meets the minimum standards set by RG 183 would improve outcomes for consumers immensely by:

- Clarifying that the General Insurance Code is enforceable and forms a part of the contract with a customer;
- Ensuring that the General Insurance Code is up-to-date and regularly independently reviewed
- Addressing specific consumer concerns and systemic issues;
- Ensuring that there are actual consequences for General Insurance Code breaches and that appropriate sanctions and remedies are available without resorting to court action;
- Improving consumer confidence in the sector with the knowledge that all members of the general insurance sector are adherents to the General Insurance Code.

Recommendations

1. Financial Rights supports the introduction of a requirement that industry Codes must be approved by ASIC as this will result in significantly improved outcomes for consumers.
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2. In respect of which financial sector activities should the requirement apply?

Financial Rights believes that all activities regulated by ASIC should be subject to Code requirements.

The financial services sector is made up of a number of varying segments. In terms of stepping up as an industry segment and meeting basic minimum standards as foreseen by RG183 there are generally:

- mature industry segments: ie banking, general insurance
- maturing industry segments: ie financial planning, debt collection, insurance brokering, mortgage brokering, life insurance, superannuation
- immature and emerging industry segments: ie consumer leasing, pay day lending, fintech, debt management firms including credit repairers, debt agreement brokers, credit -like/non-interest payments services like Afterpay, Certegy etc.

Ensuring all industry segments meet basic minimum standards is important to ensure that mature industries are meeting those standards and extending themselves, maturing segments are encouraged to step up quicker and immature and emerging industries are not left to exploit the cracks in regulation.

With respect to mature industry segments such as banking and general insurance we believe that these are close to meeting the minimum standards required under RG 183 and could seek approval of their codes with a few amendments and improvements to address current consumer concerns. This is particularly the case for the Code of Banking Practice whose administrator – the ABA – recently announced it will seek ASIC approval for the next iteration of its code. The general insurance code of practice while in our view is at least 20 years behind the banking sector in terms of addressing basic consumer issues (be it in claims handling, mis-selling, unfair contract terms, disclosure problems and the creation of problem products and business models), is at least relatively far along the path towards meeting minimum standards and came close to taking action to do so in 2011.

With respect to maturing industry segments these involve codes that need more work to ensure they meet minimum code standards and need a fair amount of work to improve their codes to address consumer concerns. The new Life Insurance Code of Practice for example, while a modest first step, failed to meet minimum standards set by RG 183 and fails to address key concerns with respect to problematic products and sales practices, for example, funeral insurance and ‘add-on’ sales practices.

We would also note that while the superannuation sector has established the Insurance in Superannuation Working Group to fill the gaps left by the Life Insurance Code of Practice – this will only capture the insurance related aspects of their business and not other superannuation activities and interactions with consumers. There is space for further code development, particularly when the Australian Financial Complaints Authority (**AFCA**) takes over from the Superannuation Claims Tribunal (**SCT**).

The nature of the immature and emerging industries is that they are varied. These industries may be fragmented, made up of a number of small companies (or a mix of large and small companies), with new and older companies, that have yet to or are unwilling to come together to discuss minimum standard practices.

Some of these industry segments do in fact have codes that are not listed in the Consultation Paper.

For example, in the consumer lease area there is the Consumer Household Equipment Rental Providers Association (**CHERPA**) Industry Code of Conduct, January 2016. It is not publicly available on their website but can be found on the treasury website attached to CHERPA's submission to the Small Amounts Credit Contract Review.⁶ CHERPA represents 40 consumer lease providers in Australia and claim that their members write approximately 20 per cent of all consumer leases written in the market.⁷ However CHERPA does not include Radio Rentals Australia's largest consumer leasing company.

The National Credit Providers Association, the peak body for the small loans industry, has a Code of Conduct⁸ which like most other industry codes fails to meet minimum standards set out by ASIC RG 183.

The Australian Collectors & Debt Buyers Association also has a Code of Practice⁹

Other emerging or immature financial services segments like debt management firms have fallen through the gaps and are yet to be actually regulated as financial services. The recent Ramsay Review stated:

There is no uniform regulatory framework applying to the activities of debt management firms in Australia. Most of the services provided by debt management firms do not meet the definition of 'financial services' or 'credit activity' and, therefore, most debt management firms are not required to hold a licence under the financial services or credit regime and are not required to be a member of one of the ASIC approved EDR schemes. Instead, general consumer law prohibitions against misleading and deceptive conduct and unconscionable conduct apply.¹⁰

The Ramsay Review ultimately settled on recommending that Debt Management Firms should be required to be members of the single EDR body and that further work should be undertaken to determine the most appropriate mechanism by which to impose this requirement. This could mean licensing.

In the meantime Financial Rights simply notes that there are no peak bodies in the Debt Management Firm space to even develop an industry-wide code of practice. Having said that Credit Repair Australia, one of the larger credit repair companies have – in the absence of

⁶ <https://consumercredit.treasury.gov.au/content/downloads/SACC-submissions/Interim-Report/CHERPA.pdf>

⁷ <https://consumercredit.treasury.gov.au/content/downloads/SACC-submissions/Interim-Report/CHERPA.pdf>

⁸ <http://www.ncpa.net.au/about-us/code-of-conduct.html>

⁹ <http://www.acdba.com/images/acdba/ACDBA-Code-of-Practice-Mar16.pdf>

¹⁰ p.198, Review of the financial system external dispute resolution and complaints framework, April 2017

<http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Reviews%20and%20Inquiries/2016/Review%20into%20EDR/Key%20Documents/PDF/EDR%20Review%20Final%20report.ashx>

broader industry agreement - attempted to implement basic minimum standards on their own with the Credit Repair Australia Code of Conduct for Credit Restoration Services.¹¹

Ensuring that all financial service providers undertaking regulated activities across the spectrum become subject to a code will mean that all consumers using any financial service will be able to expect some minimum standards with respect to their interactions with these companies, particularly when things go wrong. It will ensure industries professionalise, take ownership over their industry segments, raise standards and improve quality of service across the board and ultimately improve business outcomes and bottom lines.

If exceptions were allowed consumers will be placed back in the situation they are in at the moment - having to investigate whether the financial services provider that they have engaged or plan to engage is a code participant. This would require ASIC to undertake an expensive and extensive consumer education exercise that would be bound to fail.

More importantly, it is in the interests of all financial services providers to meet minimum standards of practice for competitive neutrality purposes and to protect the reputation of their industry as a whole. Loopholes and gaps in the framework will lead to regulatory gaming and avoidance which will continue to fail to serve consumer interests and will continue to undermine consumer confidence in the financial services sector.

Finally where a code does not exist and the nature of the particular sector is such that it cannot or will not reach agreement to develop an effective code, ASIC should be empowered to intervene to assist the sector to establish a Code or recommend comprehensive legislative intervention. It would be a poor outcome for consumers if the result is that the mature industries are co-regulated and the less mature industries effectively get off scot free. It would also create a disincentive for some industry sectors to develop the requisite maturity to participate in the model.

Financial Rights also notes that the activities of credit reporting are regulated in part by a Credit Reporting Code. The Credit Reporting Code applies across a range of sectors, some covered by codes, others not. The Credit Reporting Code is created subject to the *Privacy Act* to further define Credit Reporting Bodies, Credit Providers, and affected information recipients' obligations. The Credit Reporting code obligations are binding – a breach of the Credit Reporting Code is a breach of the *Privacy Act*. The Credit Reporting Code is registered and enforced by the Information Commissioner. On the regulatory spectrum, the Credit Reporting Code is a regulatory regime, rather than co-regulatory or self-regulatory. We believe that this should remain the case and not be included in the mooted changes under the proposals contemplated in this Consultation Paper.

Recommendations

2. All activities regulated by ASIC should be subject to Code requirements.

¹¹ <https://www.creditrepair.com.au/images/pdf/Credit-Restoration-Code-of-Conduct.pdf>

3. Where a code does not exist and the nature of the particular sector is such that it cannot or will not reach agreement to develop a code, ASIC should be empowered to intervene to assist the sector to establish a Code or recommend comprehensive legislative intervention.
 4. The Credit Reporting code should remain regulated by the OAIC under the Privacy Act.
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3. Should these requirements apply to providers of services covered by the ePayments Code? Or should that code be mandated by other means? If so by what means?

Our view is that the ePayments Code should be mandatory and not voluntary. The protections in the ePayments Code are key consumer protections and should now be legislated. Electronic transactions now form the vast majority of transactions. When the ePayments Code began in 1986 there were far fewer electronic transactions. Financial Rights' regularly receives complaints about mistaken payments and liability from fraud. We contend that "tap and go" use has increased exponentially, and other payment system/device innovations have commenced or are in the pipeline, and accordingly consumer's will need technologically neutral and enforceable protections in the case of unauthorised transactions.

In the event that the Government chooses not to legislate protections, then yes these requirements should apply to providers of services covered by the ePayments Code, because Codes meeting RG 183 have a lot more protections and commitments than the ePayments Code. We do not see a problem with industry codes of practice and the ePayments Code overlapping in some instances as long as it is clear which code will take precedence when there is a conflicting commitment.

4. What costs or other regulatory burden would the requirement imply for industry?

Financial Rights acknowledges that there will be additional costs for financial services providers in meeting improved Code standards. It is our strong belief that any costs to meet these standards are the cost of business in a modern, compliance oriented, consumer protection-focussed, financial services sector. We note that the cost burden would be greater if legislation was enacted to replace the Codes. The costs of Code development and compliance should be offset for the business, however, by greater consumer confidence, fewer complaints and more effective resolution of complaints. There is also a significant public benefit in a trusted and trustworthy financial sector.

5. Should conduct associated with subscription to approved codes be deemed to be authorised under section 51 of the Competition and Consumer Act?

In Financial Rights experience in negotiating the drafting of codes, the threat of breaching competition rules was regularly used as an excuse not to tackle some important issues, even when recommended by the independent reviewer, with the associations claiming their ability to act is restricted by this issue.

Competition issues arose in the development of the Life Insurance Code with respect to Funeral Insurance, Consumer Credit Insurance and medical definitions. Legal advice obtained by insurance companies was regularly brought up in negotiations to kybosh any meaningful commitments to restrict harmful practices. It led to very limited commitments under the Life Insurance Code of Practice (if there are any commitments at all) with respect to many of the industry's most concerning activities. Subsequently the FSC publicly stated that it will submit any commitments developed for inclusion in the next iteration of their Code for approval with the Australian Competition and Consumer Commission (ACCC).¹²

In the Superannuation Code's we have had to argue that any competition issues that may arise in the development of an eventual Superannuation Code of Practice should not be considered a barrier to making significant commitments under the Code. Similar competition issues arise in all the financial services Codes of Practice and there is a simple process largely administered by the ACCC and ASIC that is available to ensure that all relevant competition issues are appropriately considered and approved by Government in finalising a Code. Financial Rights recommended that the Insurance in Superannuation Working Group make early contact with the ACCC and ASIC on this point to ensure that no hurdles are in the way of the sector to make significant commitments under the Code of Practice that will benefit consumers.

In order to do away with (a) the potential legal ramifications of collective commitments and (b) any excuse to act and make genuine commitments under a Code, Financial Rights recommends that all conduct associated with subscription to an approved Code be deemed to be authorised under section 52 of the *Competition and Consumer Act* provided the changes are supported by stakeholders to address an identified issue affecting consumers.

Recommendations

5. All conduct associated with subscription to an approved Code be deemed to be authorised under section 52 of the *Competition and Consumer Act*.
6. Any industries currently working on a code of practice should make early contact with the ACCC and ASIC to ensure no competition problems arise.

¹² <https://www.fsc.org.au/entity/annotation/fe078546-30a7-e611-80c9-00155d252c17> n

6. Will ensuring enforceability provisions of codes meet a minimum standard improve consumer outcomes?

Financial Rights notes the Consultation Paper outlines the three ways codes are complied with and made enforceable.

The first is the enforceability of rights through contractual arrangements between the code subscriber and the relevant body administering the code. This, of course does not extend to non-subscribers to codes and therefore is necessarily incomplete in its coverage.

The second is the enforceability of rights through contractual arrangements between the code subscriber and the relevant body administering the code. The code that comes closest to stating explicitly that the code is a part of the terms of the contract with consumers is the Code of Banking Practice. The current Code of Banking Practice states:

“Any written terms and conditions will include a statement to the effect that the relevant provisions of this Code apply to the banking service but need not set out those provisions.”¹³

Financial Rights is unaware of any other code that explicitly makes their code a part of their contract with consumers. However it is our understanding that even in the case of the Code of Banking Practice, some banks continue to challenge this reading in courts. This has led to continued uncertainty with respect to enforceability.

The third way is via EDR schemes having reference to industry codes in their decision-making. Both the FOS and CIO include industry codes of practice in their Terms of Reference..

Finally, Codes may be enforceable via court actions based on the argument that codes form a part of the contract between the subscriber and the consumer, either explicitly or implicitly. The ASIC Act provides this power too. However as noted in the Consultation Paper the status is “not entirely clear.”

Financial Rights notes that many codes go out of their way to explicitly attempt to limit any application of their code. For example the NIBA Code states:

*The Code does not create legal or other rights between us and any person other than NIBA, with which we contract in relation to the Code.*¹⁴

The General Insurance Code states:

¹³ Subsection 12.3

¹⁴ NICACOP p.6 https://www.niba.com.au/codeofpractice/NIBA_Code_2014.pdf

By agreeing to this Code, we enter into a contract with the ICA to abide by this Code. This Code does not create legal or other rights between us and any person or entity other than the ICA.¹⁵

The Life Insurance Code of Practice states:

The Code is not intended to create legal or other rights between us and any person or entity other than the FSC.¹⁶

Indeed the Life Insurance Code of Practice goes on to state:

The Code does not apply once you commence proceedings in any court, tribunal or external alternative dispute resolution process (with the exception of FOS and the SCT).¹⁷

RG 183 states that an effective code should deliver stronger consumer protection outcomes because they are enforceable. It goes on to state that:

In most cases, subscribers will incorporate their agreement to abide by a code by contracting directly with the independent person or body that has the power to administer and enforce that code. In some cases, subscribers will also incorporate their agreement in individual contracts with consumers (e.g. written directly into the terms and conditions of a particular product). We strongly encourage code owners to consider this approach.

The Consultation Paper's proposal with respect to the incorporation of Codes into customer contracts is that:

Subscribers should be contractually bound to comply with the code, by an agreement with the code body. Where ASIC considers it appropriate, there could also be a requirement that the provisions of the code be incorporated into agreements with customers.

Financial Rights is of the view that for the sake of clarity and certainty it is appropriate in all cases and for all codes that there be a requirement that the provisions of the code be incorporated into agreements with customers. We cannot see a case where it would be inappropriate. By failing to include such a requirement, the Taskforce would be stating that a code should not be a term of a customer contract and therefore not enforceable under contractual law and the courts. We cannot support this argument and see no circumstance where this would be a good outcome.

Financial Rights strongly supports the other proposals made under the Consultation Paper that:

Codes should expressly provide that a subscriber's failure to comply with the code is to be taken into account in resolving disputes with individual customers through the subscriber's

¹⁵ GICOP subsection 1.5

¹⁶ LICOP subsection 2.16

¹⁷ LICOP subsection 2.21

IDR and by AFCA, on the basis that compliance with the code by subscribers is expected (rather than optional or aspirational)

Each subscriber would be required to monitor its ongoing compliance with the code and report periodically to the code body. If, based on that report or following notification (for example by ASIC, AFCA or a relevant consumer or industry body) of concerns about a subscriber's code compliance record, the code body considers that there is systemic non-compliance, the code body could require the subscriber to take steps to improve its compliance practices. The code body could also escalate concerns to ASIC for further investigation.

The code body should keep the code content under review on an ongoing basis and adapt it to changing market conditions

These proposals will improve consumer outcomes through the creation of greater certainty and increased confidence in seeking justice.

Recommendations

7. All codes should bind the subscriber to the code by an agreement with the code body and must also bind the code subscriber with their customers via incorporation of the code as a term of their customer contracts.
 8. Financial Rights supports the proposals that
 - a) the codes should expressly provide that a subscriber's failure to comply with the code is to be taken into account in resolving disputes with individual customers through the subscriber's IDR and by AFCA, on the basis that compliance with the code by subscribers is expected (rather than optional or aspirational)
 - b) each subscriber would be required to monitor its ongoing compliance with the code and report periodically to the code body. If, based on that report or following notification (for example by ASIC, AFCA or a relevant consumer or industry body) of concerns about a subscriber's code compliance record, the code body considers that there is systemic non-compliance, the code body could require the subscriber to take steps to improve its compliance practices. The code body could also escalate concerns to ASIC for further investigation.
 - c) the code body should keep the code content under review on an ongoing basis and adapt it to changing market conditions
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7. Do any problems arise with imposing these requirements in relation to particular financial sector activities?

No.

As outlined above, Financial Rights is of the view that for the sake of clarity and certainty it is appropriate in all cases and for all codes that there should be a requirement that the provisions of the code are incorporated into agreements with customers. We cannot see a case where it would be inappropriate.

With respect to financial sector activities that are currently not subject to a code, such as the activities of Debt Management Firms, currently unregulated credit products such as pawn broking and non-interest payments services such Certegy Ezi Pay and AfterPay, Financial Rights strongly believes that they should not be able to avoid being subject to codes of practice due to the immaturity of their sector or unwillingness to develop a code of practice.

8. Are contractual arrangements with code monitoring bodies the most effective enforcement mechanism?

Contractual arrangements with code monitoring bodies are effective enforcement mechanisms but must be supported by arrangements that require incorporation of Codes into contracts with consumers as well as the other proposals listed at paragraphs 21.2-21.4.

Recommendations

9. Contractual arrangements with code monitoring bodies must be supported by arrangements that require incorporation of Codes into contracts with consumers as well as the other proposals listed at paragraphs 21.2-21.4.

9. Is it appropriate that, where feasible, code content be incorporated into contracts with customers?

Yes, as outlined above Financial Rights strongly supports the incorporation of code terms into contracts with customers.

Recommendations

10. Codes of Practice should be incorporated into all contracts with customers without exception

10. Should the composition of individual code monitoring bodies and arrangements for enforcement be subject to ASIC approval?

Financial Rights believes it is appropriate that the composition of individual code monitoring bodies and arrangements for enforcement be subject to ASIC approval. While the picking and choosing of individuals to fulfil the role should not be subject to ASIC approval, the only caveat on this would be where there is a clear breach of the composition – for example, there is no consumer representative where one is required.

The proposal put forward in the Consultation Paper is that a code monitoring body should consist of a “mix of industry, consumer and expert members.”

Financial Rights believe that each Code Committee should include an Independent Chair.

The current code committees have worked relatively well. Generally they are made up of

- a consumer representative
- an industry representative; and
- an independent chair

This is the case with the Life Code Compliance Committee,¹⁸ the Insurance Brokers Code Compliance Committee¹⁹ the COBA Code and the General Insurance Code²⁰ among others. The Code of Banking Practice is more expansive in their description of each member stating that their code would be made up of:

1 person with relevant experience at a senior level in retail banking in Australia as our representative, to be appointed by the ABA on our behalf;

1 person with relevant experience and knowledge as your representative, to be appointed by the consumer representatives on the Board of Directors of the FOS; and

1 person with experience in industry, commerce, public administration or government service as the Independent Chairperson of the CCMC, to be appointed jointly by the Chief Ombudsman of the FOS and the ABA on our behalf;

¹⁸ For the sake of full disclosure, we note that Financial Rights' co-principal solicitor Alexandra Kelly has recently been appointed to the Life CCC.

¹⁹ For the sake of full disclosure, we note that Financial Rights' policy and communications officer solicitor Julia Davis is a member of the Insurance Brokers CCC.

²⁰ For the sake of full disclosure, we note that Financial Rights' senior solicitor Alice Lin is a member of the General Insurance Code Governance Committee's Management Committee.

In terms of arrangements for enforcement generally, Financial Rights believes that yes, ASIC should approve these arrangements to ensure that that mean the minimum standards expected, otherwise the whole exercise would be pointless.

Recommendations

11. The composition of individual code monitoring bodies and arrangements for enforcement should be subject to ASIC approval.

12. Each Code Committee should include an Independent Chair.

11. What characteristics should code-monitoring bodies have? (for example, what level of independence should they have?)

A code monitoring body should include the following basic characteristics:

- independence
- adequate resources
- monitoring compliance with the code
- able to receive, investigate and determine complaints about code breaches
- empowered to impose appropriate sanctions and remedial action
- data collection, analysis and reporting
- public reporting of annual code compliance
- conduct inquiries into, and report to ASIC on, serious breaches of the code and systemic issues
- recommend amendments to the code in response to industry or consumer issues or other issues identified in the monitoring process
- promote the code
- ensuring that staff are appropriately trained in the code and that subscribers make provision for this training
- ensuring that there is a regular, independent review of the content and effectiveness of the code and its procedures
- external or independent auditing or monitoring of subscribers.

Independence

It almost goes without saying that code monitoring bodies need to be independent of the industry whose code they are monitoring. Without independence consumer confidence in the

decisions made by the body will be fundamentally undermined. Under RG 183.76 this independence is describes independence thusly:

is independent of the industry or the industries that subscribe to the code and provide the funding (e.g. with a balance of industry representative and consumer representatives and an independent chair);

Financial Rights accepts that this is appropriate to ensure all views and perspectives are represented.

Adequate resources

In order to appropriately fulfil the functions of the code monitoring and compliance work the code monitoring body needs to be adequately resourced including secretariat staff, funding for compliance work, research and analysis, promotion, marketing, and other administration costs.

It is Financial Rights experience that many code monitoring bodies have been underfunded and unable to carry out the full remit of their functions including data gathering and analysis and own motion inquiries. This is symptomatic of a lack of commitment to self-regulation and identifying, analysing and addressing individual and systemic consumer issues.

Able to receive, investigate and determine complaints about code breaches

One of the main roles of any code monitoring body must be to receive, investigate and determine complaints about code breaches. This goes to a code's ability to directly protect consumers, ensure code compliance and raise industry standards. Without this, identified code breaches will go undetermined or unsanctioned and there will be no incentive for industry members to comply.

Consumers, small businesses and consumer advocates should all be able to make complaints to the code body about code breaches. Individual subscribers should be required to self-report breaches of the code. There should also be memoranda of understanding to ensure that the new Australian Financial Complaints Authority can report code breaches to the appropriate code body or bodies.

Empowered to impose appropriate sanctions and remedial action

Code monitoring bodies should have the ability to impose appropriate sanctions. The current RG 183.70 states with respect to sanctions power that:

[i]t is important that subscribers are also subject to a range of sanctions for code breaches that go beyond providing compensation or rectification to individual consumers. These sanctions might include:

- (a) formal warnings;*
- (b) public naming of the non-complying organisations;*
- (c) corrective advertising orders;*
- (d) fines;*
- (e) suspension or expulsion from the industry association; and/or*
- (f) suspension or termination of subscription to the code.*

Financial Rights notes that this is a non-exhaustive list and no code that we are aware of has include all of these sanctions – most choosing the most benign sanction powers for inclusion in their code.

For example, there are only four sanctions available to the General Insurance Code of Practice Code Governance Committee (CGC) under the General Insurance Code at subsection 13.15:

- (a) *a requirement that particular rectification steps be taken by us within a specified timeframe;*
- (b) *a requirement that a compliance audit be undertaken;*
- (c) *corrective advertising; and/or*
- (d) *publication of our non-compliance.*

When comparing this list to RG 183.70, the current General Insurance Code only includes one sanction listed, i.e. corrective advertising. The “publication of our non-compliance” sanction is not “publicly naming as foreseen under 183.70. Financial Rights notes that the 2011 Enright Review into the General Insurance Code of Practice recommended that

The CGB Sanctions Committee should have a discretion to name the culprit in a serious, systemic or significant breach if the Code Participant did not self-report, was unco-operative in the Corrective Action phase or otherwise the breach merited the naming of the Code Participant.

This was not taken up by the ICA at the time.

In the case of the current Code of Banking Practice the powers of the Code Compliance Monitoring Committee (CCMC) are limited solely to publicly naming a code subscriber. Clause 36(j) of the Code of Banking Practice states that the subscribers

“empower the CCMC to name us on the CCMC’s website, in the next CCMC annual report, or both, in connection with a breach of this Code, where it can be shown that we have:

- i. been guilty of serious or systemic non-compliance;*
- ii. ignored the CCMC’s request to remedy a breach or failed to do so within a reasonable time;*
- iii. breached an undertaking given to the CCMC; or*
- iv. not taken steps to prevent a breach reoccurring after having been warned that we might be named”*

Financial Rights notes that the public naming of a subscriber in breach of the Code has been used sparingly. The first (and seemingly only) time a subscriber was named was when Westpac was found to be in serious breach of Clause 28.4(d) and 28.5 of the 2003 Code in 2008. All other breaches listed in the CCMC’s Annual Reports (serious or otherwise) leave banks unnamed.

The 2008 Review of the Code of Banking Practice Issues paper also noted that

“neither the constitution nor the Code consider what action the CCMC may take if a bank, having been named, refuses to remediate the breach and continues to conduct its business in

serious non compliance with the Code. The Committee suggested that the potential outcome of these is that banks can pick and choose which parts of the Code they wish to accept while choosing to be non compliant in respect of some others.”²¹

The Issues Paper went on to recommend that

“consideration be given to broadening the range of sanctions available to the CCMC such as a warning, requirement to rectify of an issue within a specified time and conduct of a compliance audit, so that any sanctions that are imposed are commensurate with the extent and severity of the breach.”²²

This recommendation was not taken up by the ABA.

The recent Khoury review has recommended a boosting of sanction powers to include:

- a) require rectification or implementation of CCMC recommendations from own motion inquiries within a reasonable period of time (to be specified by the CCMC after consultation with the signatory bank);*
- b) require corrective advertising and/or publication of information;*
- c) require an independent compliance audit of the signatory bank’s remediation actions; and*
- d) suspend or terminate status as a signatory to the Code.*

In response the ABA has stated it supports:

strengthening the powers of the CCMC, however, the powers will need to be considered in light of the requirements for ASIC approval of the new Code.

Financial Rights strongly believes that code committees should have available to them all the sanction powers in the tool kit. This is not to say that they should use them regularly, but simply to say the power should be available to them in situations that they feel are appropriate.

Data collection, analysis and reporting

Data collected directly from the industry on code compliance, systemic issues and other industry statistics is critical to improving code compliance and raising industry standards. Financial Rights points to the CGC General Insurance Industry Data Reports as a clear example of the use and analysis of particular datasets can lead to recommendations to improve industry practice.

Public reporting of annual code compliance

Basic annual statistics of code compliance are important signals to consumers, industry and regulators how an industry is travelling with respect to code compliance.

²¹ Review of the Code of Banking Practice: Issues Paper, May 2008, <http://www.reviewbankcode2.com.au/IssuesPaperReviewofCodeofBankingPracticeMay2008.html>

²² Ibid

Conduct inquiries into, and report to ASIC on, serious breaches of the code and systemic issues

One of the key roles of the code body is to identify systemic breaches of the code in order to raise industry, consumer and regulator awareness of issues that have been heretofore hidden.

This requires the ability to instigate own motion inquiries.

Recommend amendments to the code in response to industry or consumer issues or other issues identified in the monitoring process

This is important to ensure that the code continuously keeps up to date addressing consumer concerns.

Promote the code

Awareness of codes, their role and the role of code monitoring committees is low amongst consumers and even among many consumer representatives and advocates. While many current codes include clauses to assist in the promotion of their codes and the role of the code monitoring committee, some codes fall short. Promoting awareness amongst consumers is critical if codes of practice are going to encourage best practice in the industry.

Other characteristics required for a code monitoring body

- Ensuring that staff are appropriately trained in the code and that subscribers make provision for this training
- Ensuring that there is a regular, independent review of the content and effectiveness of the code and its procedures
- External or independent auditing or monitoring of subscribers.

Recommendations

13. A code monitoring body should include the following basic characteristics:

- independence
- adequate resources
- monitoring compliance with the code
- able to receive, investigate and determine complaints about code breaches
- empowered to impose appropriate sanctions and remedial action
- data collection, analysis and reporting
- public reporting of annual code compliance
- conduct inquiries into, and report to ASIC on, serious breaches of the code and systemic issues
- recommend amendments to the code in response to industry or consumer issues or other issues identified in the monitoring process

- promote the code
 - ensuring that staff are appropriately trained in the code and that subscribers make provision for this training
 - ensuring that there is a regular, independent review of the content and effectiveness of the code and its procedures
 - external or independent auditing or monitoring of subscribers.
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Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



Karen Cox
Coordinator
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: Karen.Cox@financialrights.org.au