

# ASIC Enforcement Review – Industry Codes in the Financial Sector

Submission by Legal Aid Queensland



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## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the ASIC Enforcement Review – Industry Codes in the Financial Sector.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ seeks to offer policy input that is constructive and based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation in consumer law matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, house repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ deals with the financial system external dispute resolution (EDR) framework on a daily basis. This submission is informed by that knowledge and experience.

## Positions

**Position 1: The content of and governance arrangements for relevant codes (those that cover activities specified by ASIC as requiring code coverage) should be subject to approval by ASIC.**

LAQ supports the proposal that industry codes in the financial services sector be subject to ASIC approval.

In LAQ’s submission, requiring ASIC approval of industry codes or practice will:

- (a) Provide a minimum standard for the treatment of consumers in the industry;
- (b) Improve the consistency of Industry Codes in financial services;
- (c) Improve the accessibility and effectiveness of industry codes; and

- (d) Provide independent oversight for the administration and enforcement of financial services codes.

However, LAQ recognises that industries engaged in different activities within the financial system:

- (a) Are at different stages of maturity;
- (b) Have different levels of capacity and capability that are required to develop a code and then seek ASIC approval of it.

As a result, LAQ supports the proposals in paragraphs 16 and 17 that ASIC be given some flexibility in specifying what activities should be subject to a Code and the timing and implementation of that requirement for each relevant activity in the financial system.

**Position 2: Entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFSL or some similar mechanism).**

LAQ supports the position that entities engaging in activities covered by an approved code should be required to subscribe to that Code.

In LAQ's submission it is important that all entities engaged in the same or similar activities be subject to the same regulations for reasons of:

- (a) Consistency;
- (b) Fairness;
- (c) Ensuring that all consumers, regardless of the entity they are dealing with, have access to the same remedy;
- (d) Improving the minimum standards of all entities engaged in a particular activity;
- (e) Comprehensive coverage of all entities in an industry doing the same or similar activities.

**Position 3: Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.**

LAQ supports the proposal that approved codes should be binding and enforceable against subscribers through contractual arrangements with the Code Monitoring body. LAQ supports the proposed enforcement provisions set out in paragraph 21.

In LAQ's submission it is only through making the codes enforceable and binding that:

- (a) Consumers will be provided with substantive access to justice for breaches of the code;
- (b) There will be a binding consequence on subscribers in the event that they breach the code.
- (c) Consumers will be protected by an enforceable minimum standard of conduct that has been created by the Code;
- (d) Enables ASIC to monitor and assess industry wide compliance with Codes
- (e) Improves customer service and industry reputation.

**Position 4: An individual customer should be able to seek appropriate redress through the subscriber's internal and external dispute resolution arrangements for non-compliance with an applicable approved code.**

LAQ supports individual customers being able to seek a remedy for code breaches by the industry through a subscriber's internal and external dispute resolution processes.

In LAQ's submission it is important that a consumer is empowered, similar to any other complaint about a subscriber's conduct that is not covered by the code, to try and resolve complaints that they have about a subscriber's compliance with the relevant industry code.

Empowering consumers in this way is:

- (a) Likely to see complaints identified and then resolved in a more timely manner;
- (b) Improve consumer's confidence in interacting with the financial services industry; and
- (c) Improve consumers' access to a remedy when wrongful conduct by the FSP is identified.
- (d) Likely to encourage and enable the subscriber to identify and address through systems redesign and training breaches in their own practices.

**Position 5: The code monitoring body, comprising a mix of industry, consumer and expert members, should monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters.**

LAQ supports the creation of a Code Monitoring body to monitor the adequacy of the code and industry compliance with it.

In LAQ's submission it is important that any monitoring body that is set up to oversee ASIC approved codes:

- (a) Has an equal number of industry and consumers members to ensure that the views of all parties affected by the code are adequately represented.
- (b) Can provide feedback to ASIC on the industry performance in meeting code obligations; and
- (c) Has the power to ensure that systemic problems in the industry's compliance with the Code are identified early and consumers are provided with an appropriate remedy in a quick, efficient and cost effective manner.

## Questions:

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

In LAQ's submission, the requirement to subscribe to an ASIC approved industry code will result in improved outcomes for consumers because:

- (a) The mandatory codes will provide a minimum standard that all entities must meet in dealing with consumers and against which consumers can measure the service they are receiving; and
- (b) It will ensure that a consistent standard of professionalism and service is provided across all activities in financial services; and

- (c) It provides a body that can provide independent oversight of breaches of the Code and for suggesting improvements in the industry; and
- (d) It provides a potential remedy for consumers who suffer loss as a result of inappropriate industry conduct.

**2. In respect of which financial sector activities should the requirement apply?**

In LAQ's submission the following financial sector activities should be subject to an ASIC approved industry code and mandatory membership of the Code for participants in the industry:

- (a) Banking;
- (b) Financial Planning;
- (c) General Insurance;
- (d) Life Insurance;
- (e) Insurance Broking;
- (f) Finance and mortgage broking;
- (g) Debt collection;
- (h) Time share contracts;
- (i) Epayments; and
- (j) Easy pay arrangements similar to those offered by Certegy.

**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?**

LAQ supports the requirements applying to the providers of services covered by the EPayments Code.

In LAQ's submission it is important that regulation of all financial services activities be consistent across all activities.

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

In LAQ's submission, those entities that subscribe to existing codes will be subject to a minor increase in costs and regulatory burden because they already established procedures for complying with the existing codes.

Any costs for the industry will be limited to:

- (a) Costs associated with seeking ASIC approval of existing or upgraded codes;
- (b) Costs for industry participants not currently subscribed to the code to develop and implement systems and procedures that are code compliant; and
- (c) Any systems or technology changes required by the adoption of a mandatory code.

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

LAQ supports the proposal that conduct associated with subscription to approved codes should be deemed to be authorised under section 51 of the Competition and Consumer Act.

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

In LAQ submission, ensuring that enforceability provisions meet a minimum standard will improve consumer outcomes because:

- (a) It will provide an incentive to subscribers to improve the way they treat consumers because there will be a tangible consequence for breaches of the Code.
- (b) It will provide consumers with an accessible, simple and cost effective mechanism for enforcing their rights for a breach of the Code.
- (c) It will ensure Code breaches are responded to and treated consistently across all subscribers to a code.

**7. Do any problems arise with imposing these requirements in relation to particular financial sector activities?**

LAQ does not see any problems arising with imposing these requirements on any particular financial sector activity.

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

LAQ supports contractual arrangements with code monitoring bodies as the most effective enforcement mechanism. In LAQ's experience, contact based enforcement arrangements work effectively for the majority of financial services providers in the current external dispute resolution schemes (Financial Ombudsman Service and the Credit and Investments Ombudsman). LAQ can see no reason that would prevent similar arrangements working equally well between Code Monitoring bodies and subscribers to a Code.

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

In LAQ's submission if industry codes:

- (a) are subject to ASIC approval; and
- (b) are made mandatory for all entities involved in the relevant financial activity; and
- (c) have binding enforceability provisions as set out in paragraph 21; and
- (d) have a code monitoring body with an equal number of industry and consumer representatives; and
- (e) can determine complaints about breaches of the Code where the complainant would not otherwise have access to the EDR scheme.

it is not necessary to directly incorporate the code content into a contract with customers.

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

LAQ supports the composition of individual code monitoring bodies and arrangements for enforcement being subject to ASIC approval because it will ensure consistency and fairness of composition and enforcement across all codes in financial services.

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

LAQ supports the position that the Code monitoring body should:

- compromise a mix of industry, consumer and expert members,
- monitor the adequacy of the Code and compliance with it, and
- report periodically to ASIC.

It is critical for a well-functioning Code Monitoring Body that it is adequately resourced to perform its required functions.

## Characteristics

### 1. Composition and location of Code Monitoring Body

To ensure independence of the Code Monitoring Body it is important that the composition of the governance arrangements of the Body are independent from the industry funding it and that it is located independent of the industry funding it.

To ensure independence, but also industry buy in, the Code Monitoring Body should comprise an equal mix of consumer and industry experts and if necessary other expert members though those expert members should not exceed the numbers of consumer or industry members. When appointing members of the Code Monitoring Body preference should be given to applicants with current relevant consumer and industry experience rather than general consumer and or general industry experience because detailed knowledge of how the industry operates in practice allows the monitoring body to:

- (a) more easily identify where the Code does not adequately protect consumer interests;
- (b) how changes to the Code affect industry participants; and
- (c) the reasons for non-compliance with the Code and potential and actual consumer detriment that results from it.

### 2. Co-Location of Code Monitoring bodies with the Australian Financial Complaints Authority (AFCA)

If AFCA were to be established by government legislation, locating the Code Monitoring Body within AFCA may not be appropriate for the Code Monitoring Body without addressing the issues which are outlined below.

The main reason is that the two bodies perform very different roles. AFCA is primarily responsible for resolving complaints whilst the Code Monitoring Body is primarily concerned with ensuring subscriber compliance with the Code and monitoring the Code's effectiveness.

Whilst co-locating with AFCA is attractive for reasons such as:

- Resource sharing; and
- Ease of referral from AFCA to the Code Monitoring body for possible code breaches.

Co-location could:

- Affect the Code Monitoring Body's ability to maintain its independence from AFCA;
- Blur the roles between the two entities especially in relation to the investigations of systemic issues (currently undertaken by existing external dispute resolution schemes) and the monitoring and compliance functions of the Code Monitoring Body;

- Affect access to resources if there is pressure to redirect resources from the Code Monitoring Body to AFCA to perform its complaint resolution function; and
- Raise governance issues in relation to reporting requirements between the two entities.

### **3. Monitoring functions and Compliance functions**

The Code Monitoring Body should have powers to:

- Conduct its own enquiries into compliance with the Code including undertaking compliance audits and shadow shopping activities if required;
- Compel subscribers to report non-compliance to the Code Monitoring Body;
- Approve rectification plans;
- Promote awareness of the Code to subscribers and consumers;
- Report serious non-compliance to ASIC;
- Periodically report to ASIC on industry compliance;
- Impose sanctions;
- Publicly name non-compliant subscribers in defined circumstances;
- Publicly report on its activities; and
- Review the Code on a regular basis.

### **4. Role in relation to complaints outside the jurisdiction of the Internal and External Dispute Resolution mechanisms of subscribers**

Many third party insurance complaints are outside the jurisdiction of FOS. The most common complaint that is outside jurisdiction is where an uninsured third party is being pursued for damage caused to an insured vehicle. Liability and hardship are the two major issues faced by the uninsured in these circumstances. FOS can hear some uninsured complaints but cannot apportion liability between the parties or where FOS finds the insured liable the claim is limited to an amount of \$5000. FOS also has no jurisdiction in relation to financial hardship where the uninsured is liable for the damage.

In contrast, the Insurance Code of Conduct has financial hardship provisions that are applicable to uninsured third party however; if the insurer does not comply with these provisions a complaint cannot be made to FOS by the uninsured third party.

Similarly, the Code requires insurers to conduct complaint handling in a "fair" manner, however if the party complaining is an uninsured third party, the avenues for redress are once again not available through FOS or presumably to AFCA.

As a consequence of the problem outlined above, it is important that any Code Monitoring Body has the power to resolve complaints that fall outside the jurisdiction of financial services EDR schemes.