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ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: ASICenforcementreview@treasury.gov.au

MFAA submission on the Treasury Task Force Consultation Paper: Industry Codes in the Financial Sector

Thank you for the invitation to make a submission on this proposal.

Background

The Mortgage & Finance Association of Australia (**MFAA**) represents over 13,000 members and is the leading industry association for finance brokers in Australia.

Overview

This submission supports three key positions:

- The MFAA strongly supports compulsory codes when they are warranted.
- There are significant consequences to industry and consumers arising from the introduction of compulsory codes and so proposed codes must be developed carefully and cautiously. New codes take time to develop as they are fine-tuned with the benefit of experience. New Codes should not be made compulsory until they are 'road tested'.
- In some cases, compulsory codes have the potential to restrict innovation and competition and so the desirability and content of codes must be approached on a case by case basis.

Compulsory codes are suitable for key processes

The MFAA supports clear binding industry codes covering key aspects of the financial sector. The ePayments code is an example of the type of code that delivers demonstrable benefits

by providing a largely uniform standard for a key payment system. We think it is self-evident that making participation in this code compulsory is desirable to provide enhanced certainty for consumers.

The ePayments code largely deals with how a process should operate and consumer's rights if things go wrong. Areas of financial services which involve widespread systems are appropriate for strong regulation.

In considering the applicability of industry codes for the credit and broking sector, it is important to recognise the extensive and detailed obligations already imposed on these industries by virtue of legislation and other sources, including:

- National Consumer Credit Protection Act;
- National Credit Code;
- Regulations pursuant to that Act and Code;
- the significant number of valuable Regulatory Guides issued by ASIC which deal with a broad range of practical aspects;
- APRA supervision;
- AML/CTF and AUSTRAC supervision;
- VOI (for real estate lending);
- ASIC Act;
- Privacy Act;
- Spam Act; and
- existing industry codes such as Code of Banking Practice, Customer Owned Banking Code of Practice, Epayments Code, and the MFAA Code of Practice.

Given this imposing body of regulation, any further regulation by way of codes on lenders and brokers is only appropriate if there are significant matters not dealt with currently and which need to be addressed. Identifying a need for additional regulation and the content of that additional regulation is clearly the first step. Generally, a reduction in the number of sources of regulation is desirable to assist understanding and compliance.

The consultation paper states that currently codes are generally not enforceable. Where codes are justified, compliance is important and we need to ensure that they can be enforced. It is relevant to note that both the CIO and FOS will apply industry codes in making their decisions and will do so even if the EDR member has not subscribed to the relevant code.

New codes need time to develop

Our experience in developing codes is that there is a need for significant flexibility for a number of years after first publication of a code while fine tuning occurs. We have first-hand experience in the MFAA's establishment of the external dispute resolution scheme which developed into the CIO. The scheme's rules were regularly amended with the benefit of experience. We found the same experience when establishing the procedures for the MFAA's own Code of Practice and Tribunal. The MFAA's Code of Practice (originally established in the year 2000), is now in its 11th iteration. It is binding on MFAA members.

Accordingly, if ASIC approval is required for new schemes then there should be sufficient time allowed for a new scheme to be tested and fine-tuned.

Compulsory codes should enable innovation and competition

Credit and finance broking are two industries particularly affected by the 'fintech revolution' which drives innovation and competition. If there is to be further regulation of the credit and broking sector by way of an industry code (compulsory or other), then it is important to ensure that such a code does not stifle innovation and competition to the detriment of consumers.

Responses to questions posed in the Consultation Paper

1. Will the requirement to subscribe to an ASIC approved industry code result in improved outcomes for consumers?

Yes, in relation to well-developed codes where warranted, and particularly codes that relate to processes and consumer redress. The best example is the ePayments code.

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

With respect to the credit sector, as discussed above, the introduction of any additional code appears unwarranted. However, as mentioned in its MFAA submission to Treasury on ASIC's Broker Remuneration Review, the MFAA and other associations are considering the desirability of a code for lenders and brokers. This would be considered on its merits including whether or not it should be ASIC approved. As noted above, any code emerging from these deliberations should not be rushed and needs to be developed over time.

3. Should these requirements apply to the providers of services covered by the ePayments code? Or should that code be mandated by other means? If so, by what means?

We consider the ePayments code should be mandated for the reasons specified above.

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

We believe the development of an ASIC approved code would be at a considerable cost to industry to implement both in terms of time and financial outlay to develop and finalise and also with regards to training and compliance costs.

There is a risk that compliance with a compulsory code would incur additional costs. For example, a lender seeking to securitise loans would probably be required to provide a legal opinion in relation to compliance with the code. This is a likely requirement because of the risk that non-compliance may impact on the value of the securitised assets. Having to opine on factual circumstances as distinct from documents (which is the current practice) could be extremely time consuming and costly and may be completely impractical.

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

Yes.

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

Where a compulsory code is justified and implemented, the enforceability of the code is obviously important. However, in the credit and broking sectors, the current codes such as the COBP, COBCOP, and our own Code of Practice are generally enforceable through EDR.

Position 3 in the paper contemplates that subscribers to a code should be contractually bound to comply with the code pursuant to a contract with a code monitoring body. The Code of Banking Practice implies the terms of that code into contracts entered by subscribers to that code. EDR and courts have held that provision is effective to give recourse to customers.

The introduction of a code monitoring body solely to ensure enforceability is an unnecessary step which would add significant cost without providing legal or consumer benefit.

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

As stated in our introduction, the credit and broking sectors are already subject to significant and detailed regulation. The need for any further regulation and the nature of that regulation needs to be identified before imposing additional regulation in the form of a compulsory code.

The imposition of an additional compulsory code could stifle innovation and add significant costs.

When and if the content and desirability of an additional code for credit and broking sectors is identified, road testing and fine tuning over a number of years would be appropriate before any move is made to require ASIC approval or compulsory compliance.

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

As noted in our answer to No 6, we see no need for a contract with a code monitoring body. Where codes are justified, compliance is important and we need to ensure that they can be enforced. Courts and EDRs enforce codes incorporated into contracts with customers.

It is relevant to note that both the CIO and FOS will apply industry codes in making their decisions and will do so even if the EDR member has not subscribed to the relevant code.

Where it is decided that code monitoring bodies are needed, their role should be to review the content of a relevant code and general industry compliance with the code. We understand that, for example, this is the role of the Code Compliance Monitoring

Committee, an independent compliance monitoring body established under clause 36 of the 2013 Code of Banking Practice.

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

Yes, see our answer to Nos 6 and 8.

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

As noted in 8, we envisage the role of code monitoring bodies should be limited to reviewing the adequacy and effectiveness of a code and general compliance by industry.

Where the establishment of a code monitoring body is considered appropriate, ASIC's approval should not be required unless the membership of the code is compulsory and the code has been approved by ASIC.

There should be no requirement for ASIC approval to the composition of other code monitoring bodies.

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

The model adopted by the EDRs seems appropriate with members drawn from industry and consumers (or consumer groups). There should be an independent expert chair whose decision is final in the case of deadlock.

The Mortgage & Finance Association of Australia (MFAA) again thanks Treasury for the opportunity to make this submission.

Yours sincerely

Mike Felton
Chief Executive Officer