

12 April 2019



The Manager
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Dear Sir/Madam

**Enforceability of financial services industry codes – Consultation Paper
Submission by Australian Finance Group Ltd ACN 066 385 822**

Australian Finance Group Ltd (**AFG**) was founded in 1994, was listed on the Australian Securities Exchange in 2015, and has grown to become one of Australia's largest mortgage broking groups. Approximately 2,950 brokers (of which 1320 are credit representatives of AFG) arrange residential mortgages, commercial finance and other loan products through AFG.

Enforceability of financial services industry codes

AFG welcomes the opportunity to respond to the *Enforceability of financial services industry codes* consultation paper issued by the Australian Government on 18 March 2019 (the **Consultation Paper**). For the purposes of this submission, AFG's response is limited to the following questions.¹

Question 2 - What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?

In the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Final Report**), Commissioner Hayne recommended that (Recommendation 1.2):

"The law should be amended to provide that, when acting in connection with home lending, mortgage brokers must act in the best interest of the intending borrower. The obligation should be a civil penalty provision."

The details of the amendments to the law to introduce this duty on mortgage brokers to act in the best interests of the intended borrower (**Best Interests Duty**), have not yet been set out by the Government.

¹ Consultation Paper, page 4.

However, given the nature of the protections for borrowers that the Best Interests Duty is likely to involve, it is reasonable to assume that aspects of these protections will also be covered in any relevant industry code which applies to mortgage brokers, such as the Mortgage and Finance Association of Australia's (**MFAA**) Code of Practice and the Finance Brokers Association of Australia's (**FBAA**) Code of Conduct. Both the MFAA code and the FBAA code are noted in Appendix B of the Consultation Paper as codes in the financial services industry.

To the maximum extent possible, any enforceable provisions in relevant industry codes should be consistent with the Best Interests Duty so as to avoid confusion and potential breaches by mortgage brokers of these provisions. To ensure that there are no inconsistent enforceable provisions in such industry codes, the relevant industry bodies should be provided with a sufficient transitional period after the Best Interests Duty is introduced to draft the enforceable provisions of their codes (if applicable). Therefore, we suggest that any Australian Securities and Investments Commission (**ASIC**) approval of industry codes of conduct that may be impacted by the Best Interests Duty should be deferred until a reasonable transition period has expired (including if ASIC requires the industry code to be a 'mandatory' code).

Another area of potential conflict arises in relation to where two or more industry codes may cover the same industry participants. For mortgage brokers this could arise in relation to the MFAA code and the FBAA code or any separate industry code that may also apply. In these circumstances, as far as practicable, ASIC should ensure that any approved enforceable provisions in these codes are consistent and do not lead to a position where a broker's conduct which is required under one code conflicts with required conduct under another code.

Question 15 - In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?

AFG agrees with Commissioner Hayne's proposal that if a consumer resorts to an EDR mechanism such as the Australian Financial Complaints Authority (**AFCA**), it should be treated as an election not to pursue court remedies for breaches of enforceable industry code provisions, unless good cause is shown to the contrary. In our view, this will assist to reduce frivolous and vexatious claims by consumers to AFCA (which are currently funded by the credit licensee) because if the AFCA determination is not binding and a consumer can pursue the same claim through the courts later, consumers are more likely to lodge any claim through AFCA first (even if that claim has no merit or a low likelihood of success) as it doesn't cost them anything.

AFG further notes that, in these circumstances where AFCA will become the tribunal of last resort (in most cases), the AFCA process should be fair and balanced and ensure that a due process is followed. AFG suggests that a regular audit of AFCA's decisions should be carried out by ASIC to ensure that they are consistent in applying whichever is more appropriate of either:



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- the current law; or
- the law and relevant regulatory guidance which applied at the time of the activity being considered.

For the avoidance of doubt; AFG's view is that legislation or regulatory guidance which came into being after a specific activity, should not be applied retrospectively, where it is unfair or unreasonable to do so. For example a lending decision should not retrospectively be subject to obligations or restrictions that did not exist at the time the lending decision was made.

Please do not hesitate to contact AFG if you require any further detail about the matters raised in this submission or if AFG can provide any further assistance in the development of alternative proposals.



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