



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

11 April 2019

Financial Services Reform Implementation Taskforce
The Treasury
Langton Crescent
Parkes ACT 2600

By email: enforceablecodes@treasury.gov.au

Dear Sir/Madam

Enforceability of financial services industry codes

Thank you for the opportunity to comment on the Enforceability of Financial Services Industry codes. In short, our comments that are expanded more fully below are:

1. The 12 existing codes in the financial services sector should be submitted to the Australian Securities and Investment Commission's (ASIC) as a matter of urgency;
2. The proposed (new) Banking Code of Practice 2019 needs urgent attention to ensure that all defective clauses are corrected;
3. ASIC must be permitted to impose mandatory codes wherever an existing code is deficient;
4. All codes should be reviewed to ensure that they do not contain unfair contract terms (UCT) and a clause should also be inserted in each code stating that all contracts covered by the code must comply with the UCT legislation;
5. All codes must have effective internal and external dispute resolution processes; and
6. Decisions through dispute resolution schemes or code compliance bodies must be able to be enforced.

Of the 12 codes in the financial services industry, only two have been submitted to ASIC for approval. While we support the extension of the Australian Securities and Investment Commission's (ASIC's) power to cover all these codes, this power will remain moot until the owners of these codes seek approval from ASIC. This should be actioned as a matter of urgency.

Of the 144 Authorised Deposit-Taking Institutions (ADIs), only 23 will be covered by an ASIC approved code, namely the (new) Banking Code of Practice 2019 (the Code). However, even in its approved form, the Code remains deficient. For example the Code provides the signatories with numerous "get out of goal" clauses and does not require the signatories to comply with determinations of the code's own compliance body. I attach a marked up version of this code highlighting its various defective clauses.

In respect of question 6 of the paper, to ensure ASIC's relevance, legislation must allow the imposition of mandatory codes where ASIC has identified that an existing code fails to support efficient operation of markets or protect the welfare of consumers and small businesses.

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In respect of Question 3 of the consultation paper, in approving voluntary codes ASIC must consider that:

- that a code itself does not contain UCT's and the code should explicitly prevent contracts covered by it from containing UCT's;
- that signatories have an internal dispute resolution process and are members of an external dispute resolution (EDR) scheme; and
- that the compliance body for a code must be independent, must be able to enforce meaningful penalties and must report all systemic issues identified to ASIC.

In respect of questions 14, 15 and 16 (how EDR schemes interact with the court system), it is acknowledged that small business does not have the resources, time, money and expertise, to pursue dispute resolution through the courts. Even working through an EDR process can leave a small business insolvent. To avoid the need to go to court wherever possible, EDR schemes must ensure that their determinations have been followed in a full and in a timely manner. We must remove the burden from the small business to pursue non-compliance with an EDR determination through the courts.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Jill Lawrence on 02 6121 5312 or at jill.lawrence@asbfeo.gov.au.

Yours sincerely



Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman