



Manager  
Financial Services Reform Taskforce The Treasury  
Langton Crescent  
PARKES ACT 2600

12 April 2019

Dear Manager,

Please find below a submission in response to the request for feedback and comments on the enforceability of financial services industry codes.

Yours sincerely,

Cris Parker  
Director The Banking and Finance Oath  
Head of The Ethics Alliance | The Ethics Centre

In his Final Report, Commissioner Hayne made a number of recommendations concerning existing industry codes of conduct. Commissioner Hayne also emphasised the need for institutions *and* staff in the financial services industry to have a clear understanding “of what is ethical, of what is efficient, honest and fair, of what is the 'right' thing to do”. Although The Banking and Finance Oath does not partake in broader industry issues beyond the role of the individual, we feel the role of the individual needs to be considered if provisions within the Code of Banking Practice are to become enforceable. Particularly the provision – Part C, 3.2.

‘We will act fairly and reasonably towards you in a consistent and **ethical manner**. In doing so we will consider your conduct, **our conduct** and the contract between us.’

The legal view of a corporation today is not that different from the comments made in the late 17<sup>th</sup> century from Lord Edward Baron Thurlow “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” A corporation can’t be shamed as an individual can.

So how do we design rules to make a corporation do what we want or do what society expects of them? The options are limited; public law, private law, industry self-regulation (codes) and organisational self-regulation (compliance) and true individual self-regulation (The Banking and Finance Oath).

Choosing the best action or regulation to address a particular problem is not straight forward.

If we draw on the general guidelines provided to officials developing or amending Commonwealth regulation, it would seem in the current environment and in answer to this consultation paper, *Quasi-regulation* would be most appropriate.

*Quasi-regulation* should be considered where:

- there is a public interest in some government involvement in regulatory arrangements and the issue is unlikely to be addressed by self-regulation;
- government is not convinced of the need to develop or mandate a code for the whole industry;
- there are cost advantages from flexible, tailor-made solutions and less formal mechanisms, such as access to speedy, low cost complaints handling and redress mechanisms; and
- there are advantages in the government engaging in a collaborative approach with industry and industry having substantial ownership of the scheme.

Addressing Questions 1 and 2 of the discussion-paper.

### **1. What are the benefits of subscribing to an approved code?**

No regulation will be effective unless it is enforceable, and ideally regulation will have wide spread support by those who are required to abide by it, and it will be largely self-enforced.

As has been evidenced in the Royal Commission self-enforcement has not proven to be effective. An approved industry code which bares Government pressure will come with suitable penalties or other consequences.

This structure will signal to consumers that this is a code they can have confidence in.

It is worth noting, while the community expects wrongdoing to be detected, remediated and punished, there’s no question they would much prefer that misconduct not take place in the first place. Will sanctioning the organisation change behavior?

As the community demands for individual accountability increases, personal accountability systems such as the BEAR will help to support the right behaviour and initiatives such as The Banking and Finance Oath will help to drive ethical considerations.

## 2. What issues need to be considered for financial services industry codes to contain enforceable code provisions?

The Commissioner recommends a four-step process for approving enforceable code provisions:

- industry should identify the provisions that it says govern the terms of the contract made or to be made between the financial services entity and the customer or guarantor;
- industry should seek ASIC's approval of those provisions;
- ASIC should review the provisions put forward by industry; and
- once ASIC has approved the enforceable code provisions, they will be enforceable by statute. Customers will be able to elect whether to enforce any breaches of those provisions through existing internal or external dispute resolution mechanisms or through the courts.

Provision 3.2. - 'We will act fairly and reasonably towards you in a consistent and **ethical manner**. In doing so we will consider your conduct, **our conduct** and the contract between us.'

'Ethical manner' is an aspirational norm and therefore easily 'violated' through subjectivity. It is a norm of which the responsibility will fall on the individual.

Points for consideration would be:

- Is the outcome of an ethical culture diluted as focus would be on disciplinary sanctions?
- the element of personal discipline does not seem to be compatible with the serious ethical issues that banks face. A bank renders the service of providing credit, deposits, payment services etc, not the banker. This is different from professional services. There it is individual lawyers or doctors who render services. When things go wrong with banks, however, it is often a systemic issue. For example, if a product turns out to be detrimental to consumers, who is to blame? The one who engineered the product? The board who approved it? The call centre who sold it to a client? The monitoring committee who failed to notify consumers?

The nature of financial services puts the primary ethical responsibility with the bank, not with the banker. But a bank has 'no soul to be damned, and no body to be kicked'.

### **Our recommendation**

Individuals should be equipped with all means possible to enable, encourage and enhance ethical behaviour. The Banking and Finance Oath recommends the Oath be included in the preamble of all financial services industry codes and promoted throughout the organisations.

## **Background of The Banking and Finance Oath**

The Vision of The BFO is “A banking and finance industry that meets the community’s needs and has its full confidence, thereby fulfilling its integral role in society.”

The BFO is an industry-led initiative whose founders shared a belief in the inherent “good” of the financial services industry in Australia. Given the global scope and range of institutions within the industry, these key industry figures felt that a credible initiative that transcended membership of any particular institution or sector of the industry was required. Thus, The BFO, a set of simple but powerful tenets to underpin ethical behaviour, was born.

The BFO was launched as an online initiative in August 2012. Since then, over 2,600 signatories have taken the Oath, including Chairs and CEOs of a number of leading financial institutions. An indication of the range of signatories is provided in Appendix B. The BFO is a voluntary individual Oath and does not have any legal standing. In our view, this is its major strength. Both ASIC and APRA have identified The BFO as an effective self-regulating tool because of its voluntary nature.

The BFO is governed by a Board and supported by its Policy Council, both bodies comprised of leaders from the financial services industry (Appendix A). The Policy Board is also responsible for disciplinary mechanisms introduced to preserve the public standing of The BFO. The BFO’s sole institutional member is The Ethics Centre. Funding comes from a small and renewable contribution from signatories, and from the generosity of a few institutions and some of the directors themselves.

## **Purpose of The Banking and Finance Oath**

The Banking and Finance Oath seeks to re-assert the ethical foundations of the financial services industry in a way that goes beyond regulation and compliance, by highlighting the importance of ethics, integrity, honesty and trust in the behaviour of individual industry participants. Similar to the Hippocratic Oath, The BFO is a set of professional commitments freely entered into by individuals who choose to be accountable to each other for upholding the tenets of the Oath, and to call out behaviour that falls short.

Thus, the Oath, which is public, provides individuals committed to high ethical standards with a way to “stand up and be counted”.

The BFO has two clear aims:

- to encourage a strong ethical framework for individuals in our financial services industry. The values of integrity, honesty and trust must underpin the industry’s dealings with the Australian community, and these values clearly need to be strengthened. The BFO is uniquely targeted at the behaviour of the individual and, building on that behaviour, can help to shape a positive culture within institutions themselves; and
- to provide a public platform on which signatories have the opportunity to demonstrate their integrity and in turn their commitment to the industry. An oath needs to be public, ideally taken publicly but also visible beyond the act. This transparency encourages peer-to-peer accountability and allows the signatory to be held to account by all stakeholders. Two mechanisms are in place to ensure this:
  - (i) The BFO website lists all signatories and allows individuals to include their organisation; and
  - (ii) The BFO provides an insignia that individuals are encouraged to include on their email sign-off (Appendix B).

## **The Oath**

Trust is the foundation of my profession.

I will serve all interests in good faith.

I will compete with honour.

I will pursue my ends with ethical restraint.

I will help create a sustainable future.

I will help create a more just society.

I will speak out against wrongdoing and support others who do the same.

I will accept responsibility for my actions.

In these and all other matters;

My word is my bond.

For more information on The Banking and Finance Oath:

Website – <http://www.thebfo.org>

## Appendix A

### Banking and Finance Oath Board

Philip Chronican

Lyn Cobley

Emilio Gonzalez

Steve Harker

John Laker (Chair)

Cris Parker

Rob Priestley

Steve Tucker

Pauline Vamos

### Banking and Finance Oath Policy Council

Jillian Broadbent

Bill Gurry

Ian Hammond

Greg Hutchinson

Peter Marriot

Simon McKeon (Chair)

Andrew Mohl

Michelle Tredenick

Paul Vercshuer

### Ethics Adviser

Dr Simon Longstaff

## Appendix B

