FINANCIAL
SERVICES
COUNCIL

Enforceability of financial services industry codes

FSC response to the Treasury Consultation

12 April 2019

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing almost $3 trillion on behalf of more than 14.8 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

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2. FSC Policy Principles

Our responses to the questions in section 4 below are based on the following principles:

Civil Penalties

Civil penalties are a form of state (that is, public law) sanction for breaches of legislation passed by Parliaments. Civil penalties fall within a spectrum of purely civil remedies on the one hand (for example, civil liability for loss or damage) and clearly criminal sanction (for example, criminal offence provisions with fines or imprisonment). Civil penalties are state authorised sanctions imposed by a court for breaches of legislation passed by the Parliament and they have a punitive character (as opposed to compensatory) – they are not compensation for loss.

While breaches of certain legislation may appropriately be subject to civil penalties authorised by the state and imposed by a court, industry codes which contain principles-based provisions agreed between industry to enhance industry standards (beyond the laws set by Parliament – see ASIC RG 183) should not be subject to civil penalties (as opposed to civil liability for loss). Conduct subject to civil penalties should be set out in legislation, and Parliament should decide whether a provision of the legislation should come with the potential sanction of civil penalties.

The voluntary codes that exist were not developed with civil penalties in mind. They may need to be refined if non-compliance with an enforceable code provision results in the sanction of civil penalties (in addition to civil liability for loss). The FSC Life Code has many principles-based provisions and others designed to lift service standards across the industry.

FSC does not therefore believe that civil penalties are appropriate for code breaches, and remedies should be limited to the statutory right to compensation for loss. However, if civil penalties were to apply, then the process for applying them should remain solely in the jurisdiction of the court.

AFCA

FSC believes that the focus of AFCA should primarily remain on providing a fast, free-to-consumer, independent dispute resolution service. The new requirements on organisations to co-operate with AFCA should help this process.

It is entirely appropriate the AFCA can take alleged code breaches into account in its dispute resolution process. FSC is not of the view that AFCA's powers should be extended to adjudicate on penalties for code breaches.

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3. Definitions:

In our submission we have based our response on the understanding that the terms have the following meaning:

- **Approved Code** – a mandatory or voluntary code that has ASIC Approval.
- **Mandatory Code** – a code applicable to all industry participants, perhaps as a condition of obtaining/maintaining an appropriate licence to trade.
- **Voluntary Code** – a code that does not necessarily apply to all industry participants (but might happen to). It requires some mechanism for participants to subscribe (for example, through membership of an industry association).
- **Enforceable provision** – a provision in a mandatory or voluntary code where ASIC has agreed that the provision be designated as enforceable.
- **Code Owner** – the entity responsible for developing and maintaining the code.

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4. Consultation Responses

Treasury Question	FSC Response
1. What are the benefits of subscribing to an approved industry code?	• We consider the main benefits of subscribing to an approved industry code to be raising standards across the industry, increasing consistency across the industry, improving consumer outcomes, enhancing the reputation of the industry and subscribers, and increasing consumer confidence and trust in the industry.
2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?	• The consequences for consumers of a breach – in particular, potential compensation for financial loss. • Whether the provision should be expected to be met 100% of the time. Provisions which amount to service standards are unlikely to be met 100% of the time unless the standard is set so low as to have little or no benefit to consumers. Only provisions which are expected to be met 100% of the time should be enforceable – others should not. From the current Life Code for example: (i) The minimum standard trauma medical definitions have the right characteristics of an enforceable provision. Failure to apply these to a customer's claim where applicable would be a serious breach and could have significant financial consequences for the customer. (ii) Conversely, a service standard such as providing an update about a claim every 20 days should not be enforceable. • Having appropriate and proportionate sanctions/penalties/remedies. Civil penalties should not apply to codes (as opposed to legislation). • If a provision in a voluntary code is designated as an 'enforceable code provision', there would need to be some mechanism for it to be binding on all industry participants to avoid distorting the market. • Enforcement action and remedies under the code need to take into account action through other forums (such as AFCA, the Privacy Commissioner, regulators, courts etc) that may have been already commenced or taken by the consumer that will consider the same issues or underlying concerns about the code subscriber's conduct in relation to an application, claim or service. Not doing so risks double jeopardy and/or double penalties for the subscriber and possibly inconsistent findings. • Enforceable code provisions need to be clear, certain and not ambiguous to provide certainty to all industry participants as to the precise point at which a breach would occur. • The relevant industry body should identify specific clear, certain and unambiguous obligations in its code, so that codes do not have to be substantially re-written and to preserve the aspirational and principles-based nature of code obligations. This should be in consultation with and approved by ASIC.
3. What criteria should ASIC consider when	• The beneficial nature of the code to consumers. • The proportion of industry participants that become code subscribers.

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approving voluntary codes?	• The appropriateness of the code's obligations. • The breadth of the code's provisions. • The extent of consultation. • The code's monitoring arrangements – independence/structure/frequency/sanctions • Consistency with existing approved voluntary codes.
4. Should the Government be able to prescribe a voluntary financial services industry code?	• No. As a voluntary code might not apply to all industry participants, this might distort the market by creating an uneven industry playing field where some participants decide not to subscribe. • Any mandated provisions or codes should have a mechanism such that they apply to all appropriate industry participants (and no others).
5. Should subscribing to certain approved codes be a condition of certain licences?	• As a general principle we believe this may be appropriate. • The Government would need to consider carefully the precise nature of the activities and entities that any particular code should cover. • In particular, there would need to be careful consideration of whether the entirety of the code or only more significant parts of it should be subject of licence conditions. One factor determining what is significant might be by reference to whether the breach of the provision would cause material detriment to the consumer. • FSC notes that not all financial services activities require a licence. • Only if the requirements of the licence and the extent of required participation are precisely aligned, then this could be an effective way to ensure industry-wide participation.
6. When should the Government prescribe a mandatory financial services industry code?	• If Government were to prescribe a mandatory code, this should only be to resolve an identified industry issue that creates, or is expected to create, known consumer detriment which the prescribed code or provisions would resolve. • This should always be accompanied by consultation with industry, a regulatory impact statement with a cost/benefit analysis to ensure that the cost and other implications for industry participants are not disproportionate to the consumer benefits. • Mandating a code, or mandating particular new provisions within an existing code, rather than legislation provides an appropriate means to meet community expectations and improve consumer outcomes. • We believe there could be benefits to this if the process for doing so is highly collaborative, thereby ensuring that the issues can be addressed in a way that does not have unintended consequences for industry and consumers. The collaboration should result in a stronger, more sustainable outcomes for all parties.
7. What are the appropriate factors to be	• The extent to which an identified matter or issue might be addressed in other ways.

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considered in deciding whether a mandatory code ought to be imposed on a particular part of the financial sector by Government?	• The nature and number of complaints and whether these are largely being addressed through current or proposed legislation and regulation and/or if the complaint can be pursued through existing forums. • Possible over-prescription of requirements on a particular sector. • The need to build confidence in the particular sector. • Where a highly collaborative approach to developing solutions would be of value. • Where the specific part of the sector can be tightly defined, so that the provisions do not become applicable to organisations where they are not appropriate, and could become a burden – for example, by adding costs with no meaningful consumer benefit. • The number/proportion of industry participants who are subscribed to a voluntary code for a given industry, if any. FSC notes that in prescribing a mandatory code, Government should ensure that participants have sufficient time to implement, test and embed the code. As set out in section 2 above, it is not appropriate for state (public law) sanctions (civil penalties) to be applied to industry codes (as opposed to legislation).
8. What level of supervision and compliance monitoring for codes should there be?	• codes should have independent oversight through the appointment of an independent committee which has responsibility for oversight, compliance and sanctions. • Significant breaches of an enforceable code provision would be reported to the independent committee as they occur. (reporting to ASIC would be assessed under section 912D). • The committee would prepare a yearly report which would go to ASIC.
9. Should code provisions be monitored to ensure they remain relevant, adequate and appropriate? If so, how should this be done and what entity should be responsible?	• The code owner should have responsibility for ensuring the code remains relevant, adequate and appropriate. • The primary means to doing so would be by commissioning regular (say 3-yearly) independent reviews. • Any changes code owner identifies would normally be fed into the next 3 yearly independent review. • Changes outside the independent review process would be as required on a case-by-case basis when driven by significant regulatory/legislative change or other significant change in market or trading conditions.
10. Should there be regular reviews of codes? How often should these reviews be conducted?	• Independent reviews every 3 years, overseen by the code Owner.
11. Aside from those proposed by the Commissioner, are there other remedies that	• No. We do not consider that other remedies are either needed or appropriate.

should be available in relation to breaches of enforceable code provisions in financial service codes?	• Please note our position set out in section 2 above regarding the drafting of codes, appropriate sanctions and the means of enforcement.
12. Should ASIC have similar enforcement powers to the Australian Competition and Consumer Commission (ACCC) in Part IVB of the Competition and Consumer Act in relation to financial services industry codes?	• Given the significant other avenues for review of conduct and enforcement action (such as by ASIC in relation to breaches of financial services law or action by other regulators), there needs to be careful consideration of: (i) the need for such additional avenue of enforcement; or (ii) limiting enforcement under equivalent Part IV powers where other enforcement action has already been taken. • Remedies should be limited to statutory right to compensation for breach, reflecting the principle-based nature of code commitments. ASIC should have the power to investigate breaches and bring proceedings on behalf of affected consumers, as well as in its own right. • Sanctions/remedies need to be proportionate to the financial detriment, if any, for consumers when a code breach of an enforceable provision occurs.
13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?	• These should not affect a consumers' contractual rights, provided that remediation from different processes in aggregate are proportionate to the detriment suffered by the consumer.
14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?	• For the reasons set out on in section 2 above, civil penalties may apply to legislation but state (public law) imposed sanctions (such as civil penalties) should not apply to industry codes which set standards above the law (legislation). If civil penalties do apply, given that civil penalties have serious implications and are penal in nature, Government needs to ensure that due process can take place, including the right of appeal. Such remedies are not appropriate for AFCA to order. They are judicial in nature, have a penal character (are not compensatory) and should be awarded only by a Court. • This due process should take into account the significance of the breach, the number of people affected, the intention of the action, any remedial action taken and the nature of the impact on the affected consumers. • Remedies should be limited to statutory right to compensation for breach, reflecting the principle-based nature of code commitments. ASIC should have the power to investigate breaches and bring proceedings on behalf of affected consumers, as well as in its own right.

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	• If a breach of the code is also subject to an existing Corporations Act civil penalty, as well as a breach of an enforceable code provision, then civil penalties may apply.
15. In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?	• AFCA decisions are currently binding on organisations but not on consumers. The EDR process should preclude consumers taking further action if they accept the EDR ruling, and subsequently the settlement and/or otherwise resolved the dispute by agreement.
16. To what matters should courts give consideration in determining whether they can hear a dispute following an Australian Financial Complaint Authority (AFCA) EDR process?	• If the matter is not resolved through the EDR process, then courts should also give consideration to other matters, including: (i) Time limits in commencing Court proceedings following final determination by AFCA (that is, equivalent to a Statute of Limitations); (ii) Monetary thresholds (exclude low value claims); (iii) The nature of the issue to be determined (eg allow Court proceedings on legal interpretation of legislation, if financial loss is claimed. (iv) Pricing issues should be excluded as these should be for ASIC/APRA to investigate. (v) Right of the insurer to commence proceedings on question of law. (vi) Abuse of process and unfairness to the financial service provider.
17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?	• It would be inappropriate if consumers are not able to pursue matters through Court – this would be a denial of rights to use the Courts as an avenue of redress. Access to Courts must remain embedded as protective of consumers rights, subject to our comments in Q16 above. • Consumers are currently able to pursue matters if they do not accept a determination by AFCA. • Assuming that AFCA will be granted primary jurisdiction for violations of enforceable code provisions, courts should not hear such disputes before AFCA has made a proper determination in accordance with its rules (or the claimant opts out of/waives their right to the AFCA process). Courts should only hear these disputes on appeal. A hierarchy of remedies should be observed to avoid conflicting rulings and double penalties.