

11 April 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES 2600

By email: enforceablecodes@treasury.gov.au

Dear Sir or Madam

Enforceability of Industry Codes

This submission is in response to the consultation document on the above topic. More information about Finitly and our purpose in making the submission is provided at the end of this letter.

General Insurance Code of Practice

Finitly's domain expertise is in general insurance and health insurance. For this reason our submission is directed only at the GI Code.

Reforms to be fit for purpose

The wide-ranging recommendations of the Commissioner are frequently expressed in general terms as applying to 'all financial services' or 'all insurance entities'. While this approach is understandable there are differences and details across the financial services sector and a wide-ranging regulation is very often not fit-for-purpose.

We have a specific request for the Financial Services Reform Taskforce which is to make a commitment to considering industry-specific issues. This can be done while consultation and policy development is occurring. It can be documented in a specific chapter of a regulatory impact statement or similar document.

Overview of our submission

The GI Code has been in existence for 25 years and has been reviewed six times. A pattern of independent reviews of the GI Code is now well established.

In our view:

- (i) Subscription to the GI Code (or another approved code) should be mandatory for a general insurer holding an AFSL
- (ii) Certain provisions of the GI Code should be enforceable

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- (iii) First line monitoring of code compliance and performance should be part of the responsibility of AFCA, overseen by a Code Governance Committee
- (iv) Escalation of issues should be to ASIC, with ASIC responsible for major sanctions and litigation
- (v) AFCA and courts should have the power to enforce, in favour of consumers, compliance with enforceable provisions of the Code
- (vi) AFCA should have the power to issue minor sanctions such as fines for breaches of enforceable provisions of the Code
- (vii) Consistent with the Commissioner’s recommendation 4.10, the Code Governance Committee should also be empowered to impose sanctions on a subscriber that has breached the Code.

Response to Questions

The structure of the 17 questions on page 4 of the consultation paper does not lend itself to an easy response based on our submissions regarding the GI Code. However, for convenience we have made an effort in the table below.

Question responses regarding the GI Code

Question	
1	Consistent expectations of quality, continuous improvement
2	Which provisions, what enforcement powers and what sanctions
3	No comment
4	No, a voluntary code cannot be prescribed by Government
5	Yes, in this case subscribing to the GI Code should be a condition of holding an AFSL to provide general insurance products
6	Only, as at present, if the government determines that it is necessary to achieve desirable consumer outcomes
7	The nature, frequency and degree of unsatisfactory consumer outcomes arising from industry practices, and evidence that a voluntary code has been insufficient
8	A competent body that will receive, consider and decide on complaints. The body may pursue perceived systemic problems on its own motion. FOS was a reasonable body for the previous GI Code and AFCA is the logical body to continue that function. However the stakes will be much higher for the Code Governance Committee (CGC) which is likely to need change.
9	Monitoring through complaints and enquiries during normal times, and a 5-yearly occasional independent review of the Code consulting stakeholders. One part of the oversight role of AFCA and the CGC
10	Yes, every five years, or sooner if emerging issues warrant it
11	No, adequate remedies are enough, otherwise forum shopping occurs
12	tbc
13	If the consumer is dissatisfied they may pursue legal avenues. Statutory remedies, backed by EDR would seem to be a more streamlined and cost effective way of redress.
14	An escalating set of sanctions is appropriate, perhaps starting with fines for repeat offences
15	It is accepted that insurers cannot challenge in court, although it would be preferable

	that there be a 'by leave' challenge for matters of legal principle
16	Monetary (or other) thresholds such as the amount claimed or in dispute as well as matters of legal principle or precedent.
17	No comment

The GI Code can do the heavy lifting of RC responses

The Commission's recommendations touch on the general insurance industry from many angles. There are some groups covering remuneration (2.6, 5.1 to 5.4) and culture and governance (4.12, 5.6, 5.7) that are mainly in APRA's remit and involve the Board.

More specific recommendations affecting operational matters in GI, along with two other Treasury initiatives include:

- 4.1 No hawking of insurance
- 4.3 Deferred sales model for add-on insurance
- 4.4 Cap commissions paid to motor dealers
- TSY Design and Distribution Obligations and PIP
- TSY Disclosure in relation to insurance products
- 4.5 Change to the consumer's duty of disclosure
- 4.7 Unfair contract terms
- 4.8 Claims handling as a 'financial service'
- 4.9 Code of Practice to be mandatory and enforceable
- 4.10 Code Governance Committee able to impose sanction.

For each of these ten recommendations Treasury is the responsible department and ASIC is the primary regulator. The potential is clear for multiple regulatory systems, overlapping and conflicting requirements and an enormous burden for ASIC.

Having considered the recommendations over some months we have come to the view that the GI Code of Practice can be the device by which most of these reforms can be operationalised and monitored. The way this would work is:

- (i) The relevant changes to laws would be made, mostly in the Corporations Act
- (ii) A fit-for-purpose review of GI would be undertaken to determine specific areas where application of the law requires particular actions or clarification
- (iii) Requirements specific to general insurance products, sales and claims would be codified in the GI Code
- (iv) A single system for complaints, monitoring, supervision, industry reporting (e.g. of breaches) and escalation is provided.

Each aspect of the law would remain, with ASIC having the escalation and intervention powers it is seeking and being responsible for major sanctions and for litigation.

Who will be covered?

Page 5 of the consultation paper discusses this issue. In the case of GI, insurers issue financial products if they do any business within the 'retail' definition. To the extent that some insurers may not need an AFSL, they also do not need to subscribe to a Code that operates in the same domain.

Therefore, in the case of GI, the recommended extension of ASIC's power to approve codes is not needed and in fact would be counterproductive because of unclear boundaries and multiple conflicting obligations.

Enforcement and remedies

Treasury notes on page 8 that the Commissioner suggests following the provisions in the CCA. Without knowing all of the nuances, it would be our strong preference to follow the provisions already in the Corporations Act relating to financial services. There is no case for a different regime.

Making the GI Code mandatory

We have no concerns about making subscription to the GI Code mandatory for those insurers with a relevant AFSL. We think the mechanism should be very simple. ASIC can make membership of an approved code a condition of the AFSL, just as it does now in making membership of an approved EDR arrangement a condition of an AFSL.

The process for mandating

While it is informative to look at the CCA model, there is no reason to follow it. The Corporations Law has mechanisms for similar procedures, including the approval of voluntary codes. The only need is for some reserve power to break a deadlock if ASIC and industry cannot reach an accommodation.

About Finity

Finity Consulting is an independent analytics and advisory firm with deep domain expertise in the general insurance industry. We make submissions of this kind in the public interest so that the value and effectiveness of general insurance to the community and economy can be as good as reasonably possible.

Should you wish to discuss any aspects of this submission please contact Geoff Atkins on 02 8252 3337 or geoff.atkins@finity.com.au.

Yours sincerely

Geoff Atkins

A handwritten signature in black ink, appearing to be 'GA', written over a light blue horizontal line.