Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 21
380 Latrobe Street
Melbourne VIC 3000

DX 466 Melbourne
T (03) 9605 2700
F (03) 9258 9600

10 April 2019

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

By email: enforceablecodes@treasury.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to Treasury's inquiry into the enforceability of financial services industry codes.

Please do not hesitate to contact me and my colleagues on 07 3014 5051 or at JMennen@mauriceblackburn.com.au if we can further assist with Treasury's important work.

Yours faithfully,

Josh Mennen
Principal Lawyer
Maurice Blackburn

Submission in Response to Treasury's Inquiry into Enforceability of Financial Services Industry Codes.

April 2019

TABLE OF CONTENTS

PAGE

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

Maurice Blackburn believes that the setting of generally applicable and enforceable norms of conduct through industry codes of practice should, theoretically, benefit both the signatory to the code, and the consumers who use its services.

To the consumer, it should provide certainty and predictability in how they're to be treated. The promises made within the code should instil confidence that corporate behaviour will be predictable, ethical and fair.

To the signatory, the code should provide a set of externally agreed and enforced behavioural expectations that they can follow. It should be an expression of industry best practice. It should provide certainty to industry players that by satisfying the promises within the code, they are satisfying the 'generally applicable norms of behaviour'.

Maurice Blackburn supports the finding of The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), that codes should contain enforceable code provisions.

We believe that there should be real pecuniary and other consequences for failing to meet the standards enshrined in an enforceable code.

Failure by a code signatory to comply with an enforceable code provision should amount to a breach of the general obligations spelled out in the *Corporations Act 2001.*

We agree with the view that the adoption of an enforceable code should become a condition of achieving and maintaining registration or a licence in certain industries. We also agree that being a signatory to a relevant financial services industry code of practice should be a condition of membership to the Australian Financial Complaints Authority (AFCA).

Maurice Blackburn believes that *all* enforceable provisions should be open to civil penalty.

We further believe that consumers should not be precluded from pursuing their litigation rights if they are not satisfied with the External Dispute Resolution (EDR) outcome. Rather than looking to restrict consumers' discrete litigation rights, Maurice Blackburn calls for the expansion of the courts' powers of judicial review of AFCA determinations, on points of law, in order to promote confidence and fairness in the AFCA process.

Maurice Blackburn also submits that Treasury should consider extending the scope of those who should be bound by the provisions of enforceable codes to include those who may play

an important role in decision making, such as (in the case of insurance codes) third party agents or representatives of insurers, reinsurers and professional indemnity insurers.

Responses to Questions in the Consultation Paper

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

Maurice Blackburn notes the carefully chosen words of Commissioner Hayne, in his description of the purpose of industry codes[1]:

> *Industry codes of practice occupy an unusual place in the prescription of generally applicable norms of behaviour. They are offered as a form of 'self-regulation' by which industry participants 'set standards on how to comply with, and exceed, various aspects of the law'. They are offered, therefore, as setting generally applicable and enforceable norms of conduct. Industry codes pose some challenge to the understanding that the fixing of generally applicable and enforceable norms of conduct is a public function to be exercised, directly or indirectly, by the legislature.*

This 'setting of generally applicable and enforceable norms of conduct' should, theoretically, benefit both the signatory to the code, and the consumers who use its services.

To the consumer, it should provide certainty and predictability in how they're to be treated. The promises made within the code should instil confidence that corporate behaviour will be predictable, ethical and fair.

To the signatory, the code should provide a set of externally agreed and enforced behavioural expectations that they can follow. It should be an expression of industry best practice. It should provide certainty to the industry players that by satisfying the promises within the code, they are satisfying the 'generally applicable norms of behaviour'.

To both, the code should provide clarity around process. For example, the codes that underpin the insurance industry should offer clarity around expected insurer behaviours in the claims handling processes, processes for setting key provisions for individual insurance policies (for example definitions, exclusions etc.), and dispute resolution processes.

The code should build consumer confidence, and inspire competition.

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

Maurice Blackburn supports the Commissioner's finding that codes should contain enforceable code provisions.

We note the wording of Recommendation 4.9 of the Royal Commission[2]:

> *Recommendation 4.9 – Enforceable code provisions:*
> *As referred to in Recommendation 1.15, the law should be amended to provide for enforceable provisions of industry codes and for the establishment and imposition of mandatory industry codes.*

[1] https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf, p.105
[2] Ibid, p.33

> *In respect of the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice, the Financial Services Council, the Insurance Council of Australia and ASIC should take all necessary steps, by 30 June 2021, to have the provisions of those codes that govern the terms of the contract made or to be made between the insurer and the policyholder designated as 'enforceable code provisions'.*

Maurice Blackburn submits that industry codes of practice should, at a minimum, satisfy the requirements of ASIC RG183[3], and that they should ensure there is an effective code administrator in place.

Maurice Blackburn further submits that a failure by a code signatory to comply with an enforceable code provision should amount to a breach of the general obligations spelled out in s.912A *Corporations Act 2001*, including in respect to insurance claims handling (which Commissioner Hayne recommended should no longer be exempt from the definition of 'financial service'[4]).

The above actions would provide convergence and consistency in the interaction between industry codes and the statutory provisions that mandate civil penalties and recovery of civil damages suffered by consumers, thus making the enforceable code provisions binding and enforceable.

3. What criteria should ASIC consider when approving voluntary codes?

Maurice Blackburn submits that there are a number of factors which ASIC should consider:

- when determining that a voluntary code requires external enforcement, then
- once it has been determined that external enforcement is required.

The factors which ASIC should consider in determining that a voluntary code requires external enforcement might include:

- Whether there has been a history of failure in the industry to address behavioural issues, and the rate of progress in addressing them through pro-active self-regulation,
- The extent to which the industry has consulted with all stakeholders in the development of its voluntary code and the level of transparency throughout that consultation process,
- The proportion of industry that have signed up to the code (see next section for more information on this),
- The potential consequences of non-conformity with the code. For example, if only certain sections of the industry have signed on to the code, the degree of risk of consumers being misled or confused by the lack of conformity,
- The extent that the voluntary code complied with RG209[5] historically (before it became compulsory to do so).

The factors which ASIC should consider once it has been determined that external enforcement is required might include:

[3] https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf
[4] Currently under review by Treasury: https://treasury.gov.au/consultation/c2019-t364638
[5] https://download.asic.gov.au/media/2243019/rg209-published-5-november-2014.pdf

- The nature of regulation required. For example, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry into the Life Insurance Industry recommended the implementation of a co-regulatory approach[6] for the insurance industry codes.

- The degree of ASIC regulation would need to be determined – for example, the number or extent of enforceable code provisions would need to be determined.

- The coverage of the code. For example, the Financial Services Council's (FSC) Life Insurance Code of Practice is only applicable to members of the FSC. The PJC made it clear in its recommendations that that is unsatisfactory, stating that "*the code must apply to all relevant industry participants, without exemptions*".[7]

4. Should the Government be able to prescribe a voluntary financial services industry code?

Maurice Blackburn agrees in principal with the comments of Commissioner Hayne in relation to his preference for self-regulated ASIC approved codes which allow ASIC to harness 'the views and collective will of relevant industry participants'[8].

However, Maurice Blackburn believes that the right to self-regulate is a privilege that must be earned through consistent and reliable compliance with the law, and behaviours consistent with community expectations.

At this point in time, the situation for banks and insurance companies is that they do not hold the social licence needed to enjoy the privilege to self-regulate. That is, those industries have demonstrably failed to meet reasonable standards (including those factors listed under question 3 above) and as a result external enforcement is now warranted.

We note the following examples of misconduct and voluntary code violation:

<u>The ABA Banking Code of Practice</u>

Despite this code's responsible lending provisions, there has been systemic compliance failure by code participants. For example:

- The Royal Commission uncovered internal Westpac board documents in an independent review by PwC in 2017, which found only one of ten lending controls required by APRA were operating effectively. PwC investigated 420 Westpac loans and found that 9% did not meet the serviceability criteria[9].

[6] https://www.aph.gov.au/~/media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en, ref Recommendation 4.1, p.xvi
[7] Ibid, Recommendation 4.3
[8] ASIC, Regulatory Guide 183, March 2013, 4 [183.1]

[9] https://www.afr.com/business/banking-and-finance/westpac-faces-class-action-after-the-banking-royal-commission-20190221-h1biv2

- The ongoing case of *ASIC v Westpac Banking Corporation*[10] wherein Westpac has admitted contravening responsible lending laws by using the HEM[11] benchmark in preference of declared living expenses in some 5041 applications[12].

- The Royal Commission uncovered an admission from the big banks to refunding almost $250 million to about 540,000 home loan customers since July 2010, including for cases of fraudulent documentation and breaches of responsible lending laws[13].

- NAB admitted to the Royal Commission that white envelopes stuffed with money were passed across tellers' counters to bribe bankers into giving out fraudulent home loans in connection with its 'introducer scheme' that generated $24 billion in NAB home loans between 2013 and 2016[14].

- ASIC's review of home loans with an interest-only period[15] found that:
  - In 40% of applications, the affordability calculations assumed the customer had longer to repay the principal on the loan than they actually did;
  - In over 30% of applications, there was no evidence that the lender had considered whether the interest-only home loan met the customer's requirements; and
  - In 20% of applications, lenders had not considered the customer's actual living expenses when approving the loan, but relied instead on expense benchmarks.

  Given interest-only loans worth a combined total of about $360 billion will roll over to interest plus principal in the next three years, the potential impact of this regulatory failure on consumers and the economy is egregious.

The FSC Life Insurance Code of Practice

The recently released Annual Industry Data and Compliance Report 2017−18[16] reported 8,000 isolated breaches affecting individual customers, of which 60% were claims-related breaches. The code administrator, the Life Code Compliance Committee (LCCC) noted:

- That it was not confident that all subscribers (insurance companies who are members of the Financial Services Council and thereby are bound by the code) had robust frameworks in place;

- That the quality of subscribers' processes "*appears to be inconsistent*" and in some instances poor; and

- That subscribers "*may not be accurately capturing all isolated breaches*"[17].

[10] [2018] FCA 1733
[11] Household Expenditure Measure
[12] https://www.smh.com.au/business/banking-and-finance/judge-tears-up-35m-settlement-between-asic-and-westpac-in-home-loan-case-20181113-p50fon.html
[13] https://www.theaustralian.com.au/business/banking-royal-commission-banks-refund-nearly-half-a-billion/news-story/43fd1478ca1234e608e227e08422e733
[14] https://www.theaustralian.com.au/business/banking-royal-commission/envelopes-stuffed-with-cash-to-bribe-tellers-for-home-loans/news-story/c8486901a2616ec678d3d130afb4d362
[15] *ASIC Report 445 – Review of interest-only home loans (August 2015): https://download.asic.gov.au/media/3329474/rep445-published-20-august-2015.pdf*
[16] LCCC Annual Industry Data and Compliance Report; March 2019, available here
[17] https://www.afr.com/business/banking-and-finance/self-regulation-of-life-insurance-is-failing-20190331-p519c8

Prominent journalist Adele Ferguson observed the following:

> *Given the varying state of the systems and the fact that the committee relies on self-reporting by subscribers – and to a smaller extent, customers or their legal representatives – the question is: how much under reporting of complaints and breaches is going on?*[18]

In a 121-page submission lodged in January 2019, the Financial Rights Legal Centre, Financial Counselling Australia and Redfern Legal Centre lambasted the code's poor consultation process, saying it lacked transparency, inclusion or 'any semblance of independence'[19].

AFCA has criticised the FSC's draft version 2.0 of the code:

- As being confusing for consumers as it proposes to have some mandatory and some voluntary provisions;
- For failing to impose an overarching obligation to treat consumers fairly in all circumstances; and
- For a lack of transparency as to the enforceability of the code[20].

Lawyer groups have voiced extensive concerns as to the framework and substance of the code which contains provisions that fall below statutory and general law standards[21].

The ICA General Insurance Code of Practice.

A recent review of this code by the General Insurance Code Governance Committee (GICGC) unearthed significant problems with some subscribers' practices, and how seriously they took the code.

The GICGC, which oversees about 180 insurance companies, said only about 30 companies were generally reporting breaches each year, adding it 'would expect to see higher numbers of breaches'.

Lynelle Briggs, the Chair of the Committee stated:

> *In light of the evidence coming out from the Royal Commission, and the outcome of APRA's prudential review of CBA's accountability, culture and governance frameworks, some subscribers need to question whether they have shown good faith in the past.*

And:

> *While the committee had previously assumed that the industry was acting in good faith, the evidence suggests that some subscribers were not taking the code and their obligations seriously, and that they did not have appropriate code compliance governance and monitoring arrangements in place.*

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[18] Ibid.
[19] Ibid.
[20] https://www.fsc.org.au/web-page-resources/fsc-life-insurance-draft-code-of-practice-2-0-1/1644-afca-fsc-life-insurance-code-of-practice-2-0-submission; https://www.insurancenews.com.au/life-insurance/afca-tells-fsc-to-make-super-code-compulsory
[21] See for example https://www.fsc.org.au/web-page-resources/fsc-life-insurance-draft-code-of-practice-2-0-1/1651-australian-lawyers-alliance-ala-fsc-life-insurance-code-of-practice-2-0-submission

> Another "*common and worrying*" theme that had emerged was that some general insurers attempted to interpret the code's financial hardship standards "*as narrowly as possible*" Ms Briggs wrote[22].

Maurice Blackburn notes that a major contributing factor in this failure of voluntary financial service industry codes is the self-regulation model whereby the 'owners of the codes' are generally member-based organisations who are there to represent the interests of their membership[23]. Quite often their revenue is derived solely from their membership. This means that they would be understandably reticent to take enforceable action against their members.

In summary, whilst self-regulation is always preferable, given the poor history of self-regulation in the banking and insurance sectors, our preferred position is for the Government to prescribe mandatory, enforceable codes, rather than prescribe the continuation of the current voluntary industry code regime.

5. Should subscribing to certain approved codes be a condition of certain licences?

Yes.

For example, Maurice Blackburn notes the Productivity Commission's critical assessment of the Insurance in Superannuation Voluntary Code of Practice, as expressed in recommendation 17 of the report on their inquiry into Superannuation: Assessing the Efficiency and Competitiveness[24]:

> *….adoption of the code should become a condition of holding a Registrable Superannuation Entity Licence for all superannuation funds that offer insurance.*

We agree with this assessment.

We also agree that being a signatory to a relevant financial services industry code of practice should be a condition of membership to AFCA.

6. When should the Government prescribe a mandatory financial services industry code?

Maurice Blackburn believes that, for preference, mandatory codes for the banking and insurance sectors should be developed and implemented as early as possible. This will help to reverse the poor systemic and cultural practices within the banking and insurance sectors, as uncovered by the Royal Commission.

For example, the General Insurance code of practice has been in operation for over 20 years, yet its signatories have been able to perpetuate the misconduct illuminated by the Royal Commission.

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[22] https://www.smh.com.au/business/banking-and-finance/insurers-told-to-step-up-and-take-code-of-practice-seriously-20190405-p51b8i.html; https://www.afr.com/business/banking-and-finance/insurers-self-reported-breaches-more-than-triple-after-hayne-20190405-p51bba

[23] See for example the Australian Banking Association (ABA); the Financial Services Counsel (FSC); Insurance Council of Australia (ICA)

[24] https://www.pc.gov.au/inquiries/completed/superannuation/assessment/report/superannuation-assessment-overview.pdf, ref recommendation 17, p.71

One of the more shocking examples of misconduct presented to the Royal Commission involved the testimony of Sacha Murphy whose young family was left without a proper roof over their heads, exposing three children and the then pregnant Ms Murphy to lead dust after insurer Youi Pty Ltd failed to repair their roof for a year and half after a hailstorm.

Commissioner Hayne notes in his report that:

> *Youi failed to respond to that catastrophe in a way that was efficient, professional, practical and compassionate*[25].

In relation to conflicted financial incentives, Commissioner Hayne noted the following in respect of the Swan Insurance case study concerning sales practices for 'add-on insurance':

> *Selling products through a heavily incentivised dealer network, as an add-on to another sale, creates very significant risk of unfairness for consumers. Doing so in circumstances where the conduct of the authorised representatives is not actively monitored and/or audited heightens the risk that the statutory standard of conduct will not be met. When the products are of low value, the risk of unfairness is compounded. And while industry-wide solutions will often be appropriate, participation through an industry group does not absolve a participating entity of its continuing legal obligations[26].*

All of these behaviours were able to continue whilst the voluntary industry code – in this case the General Insurance Code of Practice - was in place.

As mentioned in our response to Question 3, we believe that the factors which ASIC should consider in determining that a mandatory code is required might include:

- Whether there has been a history of failure in the industry to address behavioural issues, and the rate of progress in addressing them through pro-active self-regulation.
- The extent to which the industry has consulted with all stakeholders in the development of its voluntary code and the level of transparency throughout that consultation process.
- The proportion of industry that have signed up to the code (see next section for more information on this).
- The potential consequences of non-conformity with the code. For example, if only certain sections of the industry have signed on to the code, the degree of risk of consumers being misled or confused by the lack of conformity.
- The extent that the voluntary code complied with RG209 historically (before it became compulsory to do so).

7. What are the appropriate factors to be considered in deciding whether a mandatory code ought to be imposed on a particular part of the financial sector by Government?

Maurice Blackburn submits that the same factors should determine the need for a mandatory code, as for determining that a voluntary code requires external enforcement namely:

- Whether there has been a history of failure in the industry to address behavioural issues, and the rate of progress in addressing them through pro-active self-regulation;

[25] https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-2-final-report.docx, p.428
[26] Ibid at p.411

- The extent to which the industry has consulted with all stakeholders in the development of its voluntary code and the level of transparency throughout that consultation process;
- The proportion of industry that have signed up to existing codes; and
- The consumers' experience of the industry, as evident through:

    - Formal processes such as complaints processes, litigation rates etc, and

    - Informal processes such as media coverage of wide spread consumer discontent, for example the numerous stories of people who believe they have insurance coverage for certain events when they in fact don't.

8. What level of supervision and compliance monitoring for codes should there be?

In our experience, consumers rarely report code breaches to an industry code administrator. That is either because they are not aware of their right to do so, are unaware of how to make a breach report, or are too focused on the overwhelming complexity of the dispute resolution process and their principal claim.

For this reason, code compliance monitoring relies largely on industry self-reporting. That is a problem. The examples of the industry's poor history of self-regulation in the banking and insurance sectors, whereby they have been able to get away with under reporting of code breaches to the administrator, are repeated.

Any industry code should have a well-resourced and independent administrator dedicated to holding the participants to account by proactively investigating through own motion enquiries, random audits and 'shadow shopping'. Whilst these methods are available pursuant to the LCCC Charter[27], there is little evidence of it occurring in practice as yet with the latest LCCC report indicating a heavy reliance self-reporting by FSC members.

Maurice Blackburn submits that any code administrator's mandate should require the abovementioned methods to be practiced and reported upon annually. We further submit that the results of these ought to be published by reference to each code member, identified by name.

Maurice Blackburn believes that, as a bare minimum, the level of supervision and monitoring should reflect that required by RG183.

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?

Yes.

Maurice Blackburn believes that industry codes of practice should be monitored to ensure that they remain relevant, adequate and appropriate. This monitoring function should be multifaceted and comprehensive (please refer to our response to Question 8 above).

[27] See clause 6.1(c)

Maurice Blackburn further submits that administrator determinations should not be de-identified and should be published on ASIC website with commentary/guidance for financial service providers.

Maurice Blackburn believes that industry codes of practice should be monitored for potential examples of perceived bias or lack of independence by the code administrator.

Maurice Blackburn further submits that code provisions should be monitored to identify circumstances where the code standards fall below legal requirements.

For example, clause 14.5 of the FSC code[28] reads as follows:

> *In special circumstances, we may decline to provide access to or disclose information to you, such as:*
> *a) where information is protected from disclosure by law, including the Privacy Act 1988;*
> *b) where we reasonably determine that the information should be provided directly by us to your doctor;*
> *c) where the release of the information may be prejudicial to us in relation to a dispute about your insurance cover or your claim, or in relation to your Complaint; or*
> *d) where we reasonably believe that the information is commercial-in-confidence.*

Clause 14.5 (c) is obviously inappropriate. It is not a consumer protection but purports to give the FSC members rights against consumers that will be inconsistent with the law in some circumstances. Specifically, it is inconsistent with insurers' long-established 'procedural fairness' obligations[29] and their duty of utmost good faith.

We are aware, for example, of circumstances where insurers have withheld documents from their internal medical officers advising of their support for an admission of liability, but where the claims officer has decided not to follow that advice and declines the claim without providing the claimant with the document in issue.[30]

Clearly, information that may be prejudicial to the FSC member is precisely the information that the law requires must be disclosed to the consumer.

Maurice Blackburn submits that regular stakeholder consultation should be a feature of any ongoing code monitoring regime.

10. Should there be regular reviews of codes? How often should these reviews be conducted?

Yes.

Maurice Blackburn believes that reviews should be conducted at least annually to ensure that the code is meeting performance criteria and that relevant industry standards are being maintained.

[28] https://fsc.org.au/policy/life-insurance/code-of-practice/life-code-of-practice_final.pdf, p.27
[29] *Sayseng v Kellogg Superannuation Pty Ltd & Anor* [2003] NSWSC 945 per Bryson J at [82]
[30] Maurice Blackburn is prepared to provide you with the details of a specific ongoing litigation matter on these facts subject to the consent of the super fund and insurer

An annual review would help ensure that the industry are responding to identified concerns, and that consumer confidence is trending positively.

11. Aside from those proposed by the Commissioner, are there other remedies that should be available in relation to breaches of enforceable code provisions in financial service codes?

Maurice Blackburn agrees that the enforcement provisions and remedies in Part VI of the *Competition and Consumer Act 2010* (CCA) should be used as a model for the enforceable code regime, namely:

- pecuniary penalties;
- injunctions;
- damages;
- non-punitive orders, including community service orders, probation orders, disclosure orders and corrective advertising orders;
- punitive orders relating to adverse publicity;
- disqualification from managing a corporation;
- other compensation orders; and
- enforceable undertakings.

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?

Yes.

As stated elsewhere, Maurice Blackburn believes that as a minimum requirement, satisfaction of the requirements of RG183 should be compulsory. That would thereby provide ASIC with equivalent enforcement powers.

13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?

Maurice Blackburn submits that statutory remedies for an enforceable code provision should be a binding term of the contract between the financial services provider and the consumer. We believe that there should be a requirement that contracts contain a term to that effect.

Maurice Blackburn further submits that there should also be a civil penalty under the *Corporations Act 2001* for failing to satisfy this requirement, and that it should be compensable as a 'financial services civil penalty provision' pursuant to s.1317E.

14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?

No.

Maurice Blackburn believes that ALL enforceable provisions should be open to civil penalty.

Further, we believe that the severity of the penalty should be commensurate with:

- the severity of the breach and its impact on the consumer,
- the extent to which the financial service provider has profited – both through collected premiums and earned interest/investment returns; and
- an assessment as to whether the breach was systemic, egregious, intentional or reckless.

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

Never.

These are separate and distinct rights.

Maurice Blackburn reminds Treasury that AFCA is designed to accommodate this, with its scheme rules[31] enshrining the right to pursue further court proceedings in a number of circumstances.

Maurice Blackburn refers Treasury to the following sections of the Rules:

- A.1.4
- A.7.1 c)
- A.11.1
- C.1.2 d)
- C.2.2 a) & e)

Maurice Blackburn notes that where a complainant accepts an AFCA decision they are thereafter contractually bound by it, and cannot take their matter to Court to seek double recovery pursuant to the principles of res judicata[32].

To this end, there is no need for reform on that issue.

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?

Rule A.11.1 of the AFCA Complaint Resolution Scheme Rules[33] reads as follows:

> *AFCA operates on a 'without prejudice' basis. This means that information obtained through AFCA may not be used in any subsequent court proceedings unless required by an appropriate court process.*

[31] https://www.afca.org.au/public/download.jsp?id=6893
[32] Maurice Blackburn observes, parenthetically, our concern that unrepresented consumers may agree to settlements/resolutions in AFCA without fully comprehending its binding nature, a matter that deserves consideration by AFCA as to the adequacy of current resolution processes which are usually conducted by way of written release.
[33] Ibid, p.9

This provision has contributed to an appropriate and successful system (both in AFCA and its predecessors) whereby parties have been able to engage in less adversarial interchange without the threat that something they say in the AFCA process would be used against them in subsequent litigation.

The less combative EDR option is a necessary feature for consumers given the vastly disproportionate resources of the respective parties in financial services disputes. This power asymmetry is more pronounced in court proceedings given the inherent adverse costs risks.

Thus, the non-binary EDR option allows consumers (mainly unrepresented) to seek to resolve their disputes in a less formal and costly process, before having to take the often distressing decision to pursue court proceedings.

Additionally, the non-binary EDR option has supported the integrity of EDR processes, serving to afford parties a valuable early opportunity to resolve their differences, whilst preserving the consumers' rights to litigate if that becomes necessary which may happen for all sorts of reasons that are recognised by the aforementioned AFCA Rules.

Rather than restricting consumers' rights to pursue litigation after the EDR process, Maurice Blackburn has long called for an expansion of the courts' powers of judicial review of AFCA determinations, on points of law, in order to promote confidence and fairness in the AFCA process.

In that regard, it is noted that AFCA specifically provides for the appeal of its determinations to the Federal Court on a question of law in disputes against superannuation fund trustees[34]. However determinations in other matters will not be subject to review unless it is affected by fraud or dishonesty or lack of good faith[35]. That is an excessively onerous threshold for a consumer to have to meet in order to have a legally flawed AFCA determination reviewed and overturned.

The additional scrutiny inherent in a system that enables judicial review can only increase the integrity and accountability of the AFCA process and should be embraced.

17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?

Maurice Blackburn believes that making consumers choose between either AFCA or court may act as a disincentive for participation in AFCA, leading to more litigation and thus undermining the user friendly low cost purpose of EDR schemes.

Where it is appropriate, however, consumers should have access to redress through courts if they wish to pursue it, particularly if they do not agree with the outcome presented to them through using EDR via AFCA.

The right to a fair hearing in court where evidence is tested and witnesses cross examined is an access to justice right and should not be removed.

The Royal Commission uncovered incidences of life insurers providing misleading information to FOS as part of a bellicose approach to dispute resolution, including the following:

[34] s.1057 *Corporations Act 2001*.

[35] https://www.fos.org.au/custom/files/docs/corporate_governance_litigation_overview_legal_cases_involving_fos_and_its_predecessors.pdf

- The CommInsure case study wherein CommInsure accepted that it misled the Financial Ombudsman Service (FOS), made inappropriate challenges to its jurisdiction, and failed to provide information requested by FOS in breach of FOS's Terms of Reference[36],

- The TAL case studies wherein TAL accepted that it failed to engage with FOS in a frank and cooperative way in a number of respects, and that this was conduct that fell below community standards and expectations including TAL making a misleading and incorrect statement to FOS.[37]

Due to the less legalistic nature of EDR processes, including the lack of a formal document exchange, or testing of evidence by cross-examination, the risk to a consumer of an unjust outcome due to misconduct by a respondent or by unintended error is heightened. Hence, there is a heighted need for consumers to have the right to pursue a matter through the courts if they are dissatisfied after EDR.

To further illustrate this point, Maurice Blackburn notes it recently represented a consumer with a general insurance complaint. The FOS system generated a $67,000 result for matter, yet the consumer was dissatisfied with that result and after pursuing her matter through subsequent court proceedings, she was awarded direct compensation of almost $250,000, plus damages in respect of inconvenience of $15,000, plus interest and costs[38].

To deny consumers the ability to pursue matters through a court following a determination from AFCA may be seen as an access to justice issue as demonstrated by this case which is by no means unique.

Notes on other matters in the Consultation Paper

Who will be covered by the new enforceable codes regime?

On page 5 of the Consultation Paper, there is a discussion on which industry codes should be included in ASIC's extended role.

Maurice Blackburn contends that there should also be a focus on who/which organisations or individuals should be bound by the regime.

Maurice Blackburn submits that Treasury should consider extending the scope of those who should be bound by the provisions of those codes to include those who may play an important role in decision making.

We note the following examples:

i. Third party agents or representatives of insurers

[36] https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-2-final-report.docx. p.330.
[37] Ibid at p.349.
[38] *Dickinson v QBE Insurance (Australia) Limited (ACN 003 191 035) & Anor* [2018] VCC 2074 http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2018/2074.html?context=1;query=bingham;mask_path=au/cases/vic/VCC

We believe that certain third party representatives of insurers that provide a claims handling service on behalf of the insurer – such as investigators, loss adjustors, loss assessors, collection agents and claims management services – should be included.

We believe that this should also be extended to include any health care professionals such as medical officers that provide a claims handling service on behalf of the insurer.

This life insurance industry problem featured prominently in the Royal Commission. It was revealed that CBA routinely ignored the medical advice of its own employed doctors (including its chief medical officer Dr Benjamin Koh who blew the whistle on the company's misconduct in 2016, in utilising outdated medical definitions to deny claims), and routinely rejected related claims because it would cost the company more money.[39]

Maurice Blackburn also has concerns regarding instances where insurers have sought to use in-house or retained health care professionals to contact claimants' treating doctors, ostensibly to discuss treatment issues. We have seen this result in treating doctors feeling pressured to give an opinion that suits the insurer's commercial interests but risks the integrity of the treatment relationship, for example by pushing claimants back to work prematurely. We contend that sort of conduct, if proven, should constitute a breach of s.912A[40].

The risk of this type of claims handling strategy has been heightened in recent years through the writing of policies that expressly allow the insurer to decline a disability claim if it decides the claimant has not fully participated in an occupational / rehabilitation program to the insurer's satisfaction[41].

Extending the code's obligations to such health care professionals would encourage greater care and accountability in the claims assessment process resulting in fairer outcomes.

ii. Reinsurers

Maurice Blackburn also suggests that the proposal should extend to reinsurers. Reinsurers also have active and at times decisive involvement in claims assessment and resolution processes, particularly in high quantum insurance claims, and therefore should be subject to the same statutory obligations to consumers.

Maurice Blackburn refers Treasury to the outcomes of *MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme & Anor* [2018][42]. This case is instructive in relation to the central role a reinsurer may play. The court found that the life insurer Metlife was influenced by its reinsurer in exercising its opinion.

In coming to a view on this issue, the Court extensively reviewed both the reinsurance treaty and the reinsurer's 'close involvement' in the management of the claim. The critical provision of the treaty was a claim approval provision which stated:

[39] See for example https://www.theaustralian.com.au/business/banking-royal-commission/banking-royal-commission-cba-rejected-heart-attack-claims-misled-ombudsman/news-story/3fcab50aa16c65d99fb48402f981b705

[40] Such conduct may be a breach of the provisions of the *Life Insurance Act 1995*, *Private Health Insurance Act 2007*, Private Health Insurance (Health Insurance Business) Rules 2013, *Health Insurance Act 1973* and *Superannuation Industry (Supervision) Regulations 1994*.

[41] For example, SunSuper Pty Ltd/AIA Australia Limited TPD Assist policy.

[42] NSWSC 923.

> *For any Sum Insured above the Claim Handling Limit…the Cedant must before accepting liability for a claim under that Reinsured Policy, obtain [the reinsurer's] prior approval…*

In that context, the reinsurer declined the claim, which was in turn declined by the life insurer Metlife.

iii. Professional indemnity insurance providers

With regard to any code of practice covering financial advisers, it is submitted that coverage should extend to the adviser's professional indemnity insurance provider.

Professional indemnity insurers have a financial interest in the conduct of the insured financial adviser. In practice, they generally take control of and pay for the insured's defences where claims are made by consumers, thus becoming the de-facto respondent.

As key stakeholders, Maurice Blackburn believes that professional indemnity insurers ought to be covered in the new enforceable code regime.

That would be consistent with the common law doctrine of 'direct recourse' and the statutory regimes which enable a consumer to look beyond the insured wrongdoer and seek recovery directly from the relevant professional indemnity insurer, as reflected in the comments of the Australian Law Reform Commission (ALRC)[43] that:

> *The fact that an insurer under a third party liability policy usually takes over the conduct of a claim by a third party against the insured might suggest that a third party should be entitled to bring a claim directly against an insurer in all cases.*

Maurice Blackburn submits that such coverage would lead to greater transparency and accountability in the resolution of financial services disputes.

ASIC ERT Recommendations

On page 12 of the Consultation Paper, there is a discussion on Recommendation 22 of the ASIC ERT final report, which refers to the establishment of a code monitoring body, comprising a mix of industry, consumer and expert members, to monitor the adequacy of a code and industry compliance with it over time.

The Consultation Paper notes that:

> *Consistent with the ASIC ERT, it may be appropriate for the adequacy of enforceable code provisions to be monitored to ensure they remain relevant and appropriate. In particular, it is important that industry codes not allow existing industry participants to create barriers to entry for new industry participants, or otherwise hinder competition and efficiency in the market.*

Maurice Blackburn agrees with this assessment.

We submit that the relevant AFCA based monitoring body (for example, the LCCC in the case of the FSC Code) would be appropriate, as long it meets the robust standards detailed

[43] The Law Reform Commission Report No. 20 at 340

above and contains a balance of industry of consumer representatives – as suggested by the ASIC ERT findings.

Where that mix does not currently occur within the existing monitoring body, its membership would need to be adjusted prior to it assuming oversight responsibilities.