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Submission to the Consultation Paper: Enforceability of financial services industry codes

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financialcounsellingaustralia.org.au | www.financialcounsellingaustralia.org.au

Level 6, 179 Queen Street
Melbourne
VIC 3000

Contact person for this submission
Fiona Guthrie
phone: 03 8554 6979
mobile: 0402 426 835

About Financial Counselling Australia and Financial Counselling

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are the State and Territory financial counselling associations.

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1 Introduction

Financial Counselling Australia (FCA) welcomes this consultation on the enforceability of financial services industry codes. Financial counsellors have used industry codes for many years to assist their clients. Financial counsellors have also been steadfastly involved in advocating for improvements in industry codes particularly to improve standards relating to financial difficulty.

FCA supports industry developing voluntary codes that commit to standards that not only exceed what is required by law but also work toward best practice standards in an industry. Effective industry codes are one way that industry can build trust and confidence with the public. We therefore support improving the enforceability of financial services industry codes.

This submission is divided into two parts:

a) general comments; and
b) answers to the specific questions in the consultation paper.

2 Summary

There have been two sets of Recommendations issued recently on Codes. There are the recommendations from the Final Report of the Financial Services Royal Commission and the recommendations from the *ASIC Enforcement Review Taskforce Report*[1] (ASIC ERT). Both sets of recommendations are excellent and we consider that the best outcome would be to implement all of them. We acknowledge that there are some slight inconsistencies between the different sets of recommendations but these are minor and can be resolved.

We support changes to regulation of industry codes as follows:

a) ASIC is given the power to approve codes across the entire financial services industry;
b) Any financial services industry code must have ASIC approval;
c) ASIC is given the power to make a financial services provider subscribe to a code relevant to its activities (if there is one);
d) ASIC revises Regulatory Guide 183 (RG183) to set comprehensive minimum standards for Code approval;
e) There is a comprehensive approach to enforceability which includes enforceable code provisions, the code being a term of the contract, the code is enforceable in the Australian Financial Complaints Authority (AFCA) and there is effective code monitoring;
f) The remedies in Part IV of the Competition and Consumer Act are replicated in legislation allowing ASIC to deal with breaches of enforceable code provision;
g) Civil penalties are imposed for serious, systemic and ongoing breaches of enforceable code provisions; and

[1] ASIC Enforcement Review Taskforce Report, December 2017, page 33 https://treasury.gov.au/sites/default/files/2019-03/ASIC-Enforcement-Review-Report.pdf.

h) The power to impose mandatory financial services industry codes (or legislation) when required (across the entire financial services industry regardless of whether the financial services provider is required to be licenced or not).

3 General comments

This section makes a number of overarching comments about the enforceability of financial services industry codes.

3.1 Lifting standards in the financial services industry

Industry codes have an important role in improving standards in the financial services industry. The aim should be to lift standards to a "best practice" level or at least a standard that exceeds the law in a number of meaningful ways. People need to be able to see that not only does industry keep its promises under a Code, but it has an ongoing impact on standards through a regular review process.

Recommendation

Industry codes must have a clear objective of lifting standards.

3.2 Minimum standards

Codes need to meet minimum standards. It is completely unacceptable to have a Code that has some or all of the following problems:

- exceeds the law in only a minimal way;
- is not adequately resourced;
- staff are not trained or are poorly trained in how the code actually works;
- the code monitoring committee is under-resourced and not committed to monitoring and lifting standards (for example through investigations); and
- is not contractually binding.

Codes must deliver a benefit to people. Codes cannot be window dressing to fool people into believing the industry is improving standards when in fact the impact is minimal or negative.

it is critical that there are minimum standards for a Code. ASIC RG183 already sets the standards for a Code approval and those standards must be mandated as the minimum standards. An industry that wants to develop a Code must be required to have the Code approved by ASIC. This must be a legislative requirement.

The benefits of introducing this change would be transformative. The public would have trust and confidence that a Code meets minimum standards set by the regulator, ASIC. ASIC would then be able to consult and improve minimum standards over time. Setting minimum standards does not of course prevent some industries exceeding those minimum standards.

Finally, industry codes that do not meet minimum standards would need to improve to have a Code. People would not be misled into believing that a Code means something when it provides no real benefit.

We strongly support Recommendation 18 of the ASIC ERT that ASIC approval must be required for all financial services industry codes. This recommendation is consistent with the intent of Recommendation 1.15 (bullet point 5) of the Final Report of the Financial Services Royal Commission.

Recommendation

ASIC approval must be legislatively mandated for all codes in the financial services industry.

3.3 The fragmentation of the financial services industry

The financial services industry in Australia - for the purposes of Codes and Industry Associations - is fragmented. An ordinary person would be incredibly confused by the range of industry associations all covering the same area. That same ordinary person would need advice from a financial counsellor or community lawyer to work out what Code could apply to their financial services industry member and how that Code could assist.

Industry sector	Codes
Banking/Credit	1. Code of Banking Practice 2. Customer owned Banking Code of Practice 3. MFAA Code of Practice
Finance brokers/mortgage brokers	1. MFAA Code of Practice 2. FBAA Code of Conduct
Insurance	1. General Insurance Code of Practice 2. Insurance in Superannuation Voluntary Code of Practice 3. FSC Life Insurance Code of Practice
Insurance brokers	NIBA Insurance Code of Practice
Financial Planning	1. FPAA Code of Professional Practice 2. FPA Professional Ongoing Fees Code
Debt collection	ACDBA Code of Practice

There is considerable overlap in the above associations and codes. Some financial service providers have a choice on which industry association to join and which Code they to comply with.

For example, a mortgage broker could join the Mortgage & Finance Association of Australia or the Finance Brokers Association of Australia. This leads to forum shopping and a competitive race to lower standards not higher standards.

The myriad of Industry associations and codes are confusing. Code promotion cannot be effective in these circumstances. It is hard to see how people can ever be aware of, and use codes until there are clear sectors and codes.

Recommendation 1.15 (bullet point 5) of the Final Report of the Financial Services Royal Commission anticipates mandatory codes when an industry fails to put forward enforceable code provisions in a timely manner. An extension to this concept is to ensure ASIC has the power to mandate a Code when the industry sector is fragmented.

Recommendations

ASIC must be able to mandate the development of a Code for a particular industry sector if necessary.

3.4 Industry Association shopping and non-members

There are financial services providers who simply choose to not be a member of an industry association. There are also financial service providers who switch industry associations. It is not compulsory to be a member of an industry association or subscribe to a Code. We acknowledge that the vast majority financial service providers do choose to be a member of an industry association.

For example, Pioneer Credit is a publicly listed debt collection company. Pioneer Credit is not a member of the Australian Collectors and Debt Buyer's Association (ACDBA) and it does not subscribe to the ACDBA Code of Practice.

People need to be confident that when dealing with a financial service provider they are subscribing to a Code if their peers in the industry are subscribed to a Code. No one should be left to look up a Code only to find that they chose a financial service provider who is just not in it.

We acknowledge that a mandatory code may resolve the problem identified above. However, we assume that there would be a delay in making a code mandatory. It makes sense to give the power to ASIC to ensure that financial services providers cannot simply avoid a code by ceasing membership of an association. We strongly recommend that Recommendation 19 of the ASIC ERT is legislated to give certainty to people dealing with financial services providers.

Recommendation

Financial services providers must be required to subscribe to the approved codes relevant to the activities in which they are engaged.

3.5 Enforceability

ASIC RG 183 sets out three requirements for a code to be adequately enforceable:

1. Subscribers to the code are contractually bound by it;

2. There is an independent body to administer and enforce the code. The body has powers to receive and investigate complaints; and

3. The code provides that consumers have access to internal dispute resolution (IDR) and external dispute resolution (EDR). The EDR scheme can investigate and award compensation for a code breach that causes financial and/or non-financial loss.

ASIC does not make point 1 above mandatory but it appears to be strongly preferred. We strongly believe that this point, that subscribers to the code are contractually bound by it, should be mandatory.

The Banking Code of Practice (previously Code of Banking Practice) is now an ASIC approved code and it makes the Code a term in its contracts with its customers. This means the Code is enforceable at law. The Code can be enforced in both the AFCA and in Court. AFCA regularly considers the provisions of the Code in its processes and the Code has also been enforced through Court[2].

Recommendation 1.15 (Bullet point 2) of the Final Report of the Financial Services Royal Commission recommends including "enforceable code provisions" which are provisions in respect of which a contravention will constitute a breach of the law. We support this extra layer of enforceability. A breach of the law is a stronger provision, allowing ASIC to take action on the breach. We support the reasoning given in the Final Report.

It is important to clarify that the existing enforceability provisions outlined in RG183 should remain, with the exception of strengthening the requirement that the provisions of the code must be incorporated into agreements with customers. The enforceable provisions would be an addition to the current list.

As observed in the Final Report, the promises made should be enforceable. Our reasoning is that the different types of enforceability need to be available which include:

- As a term of the contract for the whole Code;
- Certain provisions being enforceable at law;
- Enforceable by making a complaint to a code monitoring committee (to sanction the member); and
- Enforceable in AFCA and in court either at law and in contract (and "good industry practice" for AFCA).

Recommendations

It must be mandatory for Code approval that the Code is a term of the contract with the customer.

Certain code provisions should be enforceable at law.

[2] For example, Commonwealth Bank of Australia v Wood 2016 VSC 264; National Australia Bank v Rice (2015) VSC 10

RG183 should clearly set out the requirements for enforceability which includes:

- the code is a term of the contract
- certain provisions are enforceable at law
- codes are enforceable against subscribers through contractual arrangements and there is a code monitoring body
- that individual customers can seek redress in internal dispute resolution and AFCA for breaches of the applicable code.

3.6 Codes that do not meet minimum standards and may never meet those standards

We are concerned that a number of financial services codes do not meet minimum standards, as set out in RG183, and are very unlikely to meet those standards. The Consultation Paper mentions the Industry Codes of Conduct Policy Framework. We support the process set out in the framework. Our concern is that there are a number of voluntary codes that have come into being in an attempt to avoid much needed comprehensive or enhanced legislation or a mandatory code.

Debt collection (specialist debt collectors) industry

As outlined above, the ACDBA Code of Practice has numerous problems:

- A number of debt collectors (including one large debt collector) are not subscribers;
- Members of the debt collection industry have been the subject of enforcement action from ASIC[3];
- Financial counsellors and consumer advocates continue to report systemic unethical and unfair behaviour by debt collectors and this behaviour seems to be getting worse for some debt collectors; and
- The ACDBA Code is light on detail and the standards set are low.

Overseas jurisdictions, such as in the USA[4], have enacted specific legislation to cover debt collectors. Debt collectors do not just collect loan debts but any type of debt. At the moment, the only conduct guidance for the debt collection industry is an ASIC/ACCC guide. It would make more sense if there was specific law so that the industry was clear about what is acceptable and what is not. Even if ASIC approved a Code, it would not cover all of the activities of debt collectors. A further problem is that many of the larger debt collectors also provide finance which sets up a potential (if not actual) conflict of interest.

Recommendation

[3] For example: Action against Axess by ASIC in 2010 https://asic.gov.au/about-asic/news-centre/find-a-media-release/2010-releases/10-141ad-asic-acts-against-queensland-debt-collector/; ASIC v ACM Group 2012 https://asic.gov.au/about-asic/news-centre/find-a-media-release/2012-releases/12-261mr-federal-court-finds-debt-collection-group-misled-and-harassed-debtors/.

[4] For example, Fair Debt Collection Practices Act https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-debt-collection-practices-act-text.

Specific legislation needs to be enacted to regulate the debt collection industry to protect consumers. The starting point for this legislation could be the ASIC/ACCC Debt Collection Guideline.

Finance brokers

There is regulation – the National Consumer Credit Protection Act - covering mortgage brokers that arrange home loans and investment property loans but very little protection for any other type of loan brokerage. The Financial Services Royal Commission also identified significant problems with conflicted remuneration of mortgage brokers and a failure to comply with responsible lending laws. Mortgage brokers are split across two industry associations and two industry codes. This situation has not led to high standards in the provisions of the Codes or in the conduct of finance brokers.

Recommendation

A mandatory, single code is required for the finance/mortgage broking industry.

4 Questions

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

As detailed above, we believe it is critical that ASIC have the power to make financial services providers subscribe to a relevant code. Approval of a Code must be mandatory otherwise the code should not exist.

Many financial services providers will see the benefit of a code in building trust and confidence with the public. They are also making a commitment to higher standards. However, as already stated code approval and subscription should not be left to a marketing exercise.

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

This will be a matter of negotiation depending on the Code. The main issue will be to ensure that the enforceable code provisions are those provisions with the greatest impact. In relation to codes covering financial services for example, these would include provisions setting out financial hardship responses and responsible lending.

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

RG183 sets out a set of criteria that are considered for Code approval. RG183 was written well before the Financial Services Royal Commission, and it would now be appropriate for it to be reviewed again to set out more comprehensive criteria for approval. The financial services industry continues to change. RG 183 should therefore go through a consultation process and be updated.

Recommendation

ASIC RG183 needs to be updated to reflect the higher standards for codes required following the Financial Services Royal Commission.

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

Yes. We support this subject to the Code being tailored to a particular industry sector.

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

Yes. However, as outlined above we believe that it needs to be mandated to avoid the loopholes created by the requirement to be licensed or not. For example, providers of business loans do not require a licence but there should still be standards set out in a code.

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

The prescription of a mandatory financial services code should be automatically considered if any of the following apply:

- The Code does not and is unable to meet minimum standards and approval by ASIC;
- The Code coverage is poor (for example, a number of financial services providers are not subscribers);
- The industry remains poor at enforcing and improving their code; and
- The industry continues to have systemic problems.

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 the Government?**

See point 6 above.

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

We support the recommendations and comments on code compliance in the ASIC ERT Report.

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, and ASIC should be responsible for this.

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

Codes need to be subject to a three yearly review process, overseen by ASIC. RG183 should provide further detail on how the review process will work to ensure that standards continue to improve and that they meet community expectations.

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

No. We support the proposed remedies.

12. **Should ASIC have similar enforcement powers to the ACCC in Part IVB of the Competition and Consumer Act in relation to financial service industry codes?**

Yes. ASIC should have the same remedies.

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

This is a matter for the decision maker, either AFCA or a court.

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

We support this approach.

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

In no circumstances. A fundamental principle for EDR is that the complainant always has the option of not accepting the determination and pursuing the matter in Court. The other principle is that the financial service provider is bound by the AFCA decision if the consumer accepts it. Both of these principles are essential to maintain confidence in what is an "alternative dispute resolution process" provided for the benefit of the consumer.

16. **To what matters should courts give consideration in determining whether they can hear a dispute following an AFCA EDR process?**

A fundamental principle for EDR is that the entire process is completed on a "without prejudice" basis (AFCA Rule A 11.1). This is to encourage the parties to settle the dispute. As it is "without prejudice" the court does not see the negotiations in AFCA. As detailed in the previous point, the complainant should always have the option to go to court if they do not accept the AFCA decision.

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

As detailed above, consumers must always have the right to pursue the matter in court if they choose not to accept a determination. Of course, if they do accept a determination, the matter is settled and a court would only reopen it if there was an injustice (for example, duress).