



ASIC

Australian Securities & Investments Commission

**ASIC Enforcement Review
Position and Consultation
Paper 4—Industry codes in
the financial sector**

**Submission by the Australian
Securities and Investments
Commission**

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Executive summary

- 1 ASIC welcomes the opportunity to make a submission to the ASIC Enforcement Review Taskforce (Taskforce) in response to its Position and Consultation Paper 4 *Industry codes in the financial sector* issued 28 June 2017 (Consultation Paper 4).
- 2 ASIC is Australia’s corporate, markets, financial services and consumer credit regulator. Our fundamental objectives include promoting confident and informed investors and consumers and maintaining, facilitating and improving the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy.
- 3 We share the Taskforce’s view that, with effective monitoring and enforcement arrangements, industry codes can support the dispute resolution process and provide certainty for consumers about the conditions under which financial products and services are provided. However, whether industry codes can deliver enhanced consumer outcomes ultimately depends on the underlying conduct standards that each code sets.
- 4 With some exceptions such as the ePayments Code, ASIC shares the view that the technical content or standards set out in industry codes should not be universally incorporated into legislation or regulation. This changes the basis on which codes are established in the first instance. We think an industry code, generally speaking, should provide supplementary standards of good practice determined by industry.
- 5 At present, ASIC does not have a direct regulatory role for existing industry codes in the financial services sector. With the exception of the ePayments Code and soon to be introduced Code of Ethics from the Financial Advisers Ethics and Standards Authority (FASEA Code of Ethics), each financial services industry code has its own governing or compliance body responsible for carrying out the roles of monitoring, enforcement and sanctions. The industry is also responsible for drafting and updating its code.

Note: From 1 January 2020, individuals who provide personal advice to retail clients on relevant financial products will be required to comply with the FASEA Code of Ethics: see s921E of the *Corporations Act 2001* (Corporations Act).
- 6 The ePayments Code is drafted by ASIC (following appropriate stakeholder consultation) and administered by ASIC. While the FASEA Code of Ethics will be drafted by FASEA (again in consultation with industry), it will be potentially monitored and enforced by a number of monitoring bodies operating compliance schemes that must be approved by ASIC. ASIC is currently considering how it will administer its power to approve these compliance schemes with a view to providing its final guidance once FASEA has published the Code of Ethics.

- 7 Under the current law, ASIC may on application approve a code of conduct that relates to any aspect of the activities of Australian financial services (AFS) licensees, authorised representatives of licensees or issuers of financial products: see s1101A of the Corporations Act.
- 8 We have issued [Regulatory Guide 183](#) *Approval of financial services sector codes of conduct* (RG 183), which contains our guidance on how to obtain ASIC's approval of a code. To date, we have only approved one industry code under s1101A. This was a code for the Financial Planning Association of Australia (FPA) for a limited purpose: see the *FPA Professional Ongoing Fees Code*, issued 28 September 2016.

A ASIC’s comments on Position 1: Approval of codes by ASIC

Key points

ASIC generally supports the Taskforce’s proposals in Position 1 for approval of codes by ASIC.

However, we note that there may be existing co-regulatory arrangements in place to which the Taskforce’s proposals in Position 1 (and Positions 2–5) may not apply, in particular:

- the FASEA Code of Ethics; and
- the ePayments Code, which we think, given its different circumstances, would work more effectively under a different framework such as a legislative ASIC rule making power.

ASIC’s approach to code approval

Taskforce Position 1

The content of and governance arrangements for relevant codes (those that cover activities specified by ASIC as requiring code coverage) should be subject to approval by ASIC.

- 9 ASIC acknowledges the Taskforce’s position that the content of and governance arrangements for relevant codes (i.e. those codes that cover activities specified by ASIC as requiring a code) should be subject to approval by ASIC. We broadly support this general position.
- 10 We agree that ASIC should have flexibility in specifying which code (or codes) should be subject to this new requirement and when. In our experience, code review and approval processes are typically time and resource intensive, in large part due to the need to consult broadly about the nature and effect of any changes. For this reason, we would want to carefully prioritise decisions about which codes should be subject to approval.
- 11 We generally agree that the content of self-regulatory or co-regulatory codes should not be prescribed by law. We also support a co-regulatory model under which industry participants would be required to subscribe to an ASIC-approved code.
- 12 We envisage that the framework for approving the content of a code would involve a two-step process where ASIC would:
- (a) reach a view that an existing or enhanced industry code broadly meets the requirements for approval; and
 - (b) determine that it is appropriate to mandate that all relevant licensees subscribe to the code to ensure comprehensive coverage.

- 13 We would seek to exercise code approval powers for industry sectors or subsectors where:
- (a) we are satisfied that it is necessary to enhance consumer outcomes; and
 - (b) the industry sector, or a sufficient proportion of it, has the necessary capacity and commitment to implement and manage a code that meets the approval standards.
- 14 We would also take into account:
- (a) the likely consumer benefits of approving a code and mandating membership;
 - (b) the costs to industry and ASIC; and
 - (c) any other regulatory or law reform initiatives that might be taking place or should be prioritised in that sector.
- 15 As part of our response to Position 1, we have included comments on:
- (a) the effectiveness of the industry code model (see paragraphs 16–22);
 - (b) specific issues for code approval, including:
 - (i) the appropriate nature and form of code obligations (see paragraphs 23–28);
 - (ii) code administration (see paragraph 29); and
 - (iii) technical issues such as the need for any new framework to address existing complexities and ASIC’s powers to revoke codes (see paragraphs 30–32); and
 - (c) our view that the ASIC-administered ePayments Code is an important exception (see paragraphs 33–42).

Effectiveness of the industry code model

Characteristics of effective industry codes

- 16 In ASIC’s view, industry capacity and commitment is essential for a co-regulatory code model to be effective.
- 17 In particular, we consider that an industry code of practice can lead to improved consumer outcomes in sectors where:
- (a) there is not too much fragmentation (e.g. a code of practice or conduct may be less effective in a sector where there are multiple competing industry bodies, lots of industry players that are not members of an industry body and large numbers of industry players of different sizes with very different business models and different interests);
 - (b) there is enough recognition across the sector of the issues that need to be addressed and a willingness to address them (including committing

time and resources to negotiating a code’s content and meeting the costs of implementation and monitoring); and

- (c) the sector has the structures and leadership to undertake the task.

18 In industry sectors where these characteristics are absent, we consider it is unlikely that an effective code can be developed. A mandatory requirement on individual licensees to subscribe to an ASIC-approved code will not overcome a sector’s lack of capacity to develop and administer a code.

Previous work on self-regulatory measures

19 ASIC’s views on industry codes are informed by the final report of the Taskforce on Self-Regulation in Australia (Self-Regulation Taskforce), to which ASIC referred in its initial submission in April 2014 to the Financial System Inquiry (FSI).

Note: See Self-Regulation Taskforce, [Industry self-regulation in consumer markets](#), Commonwealth of Australia, August 2000.

20 This review identified a number of factors that make self-regulation more effective, including:

- (a) clearly defined problems but no high risk of serious or widespread harm to consumers;
- (b) a mature industry environment with an active industry association and/or industry cohesiveness;
- (c) a competitive market that makes industry participants committed to participating, either to differentiate their products, or fear of losing market share; and
- (d) incentives for industry participants to initiate and comply with self-regulation (e.g. consumer recognition and preference for members of the scheme).

21 The Self-Regulation Taskforce’s final report stresses that a self-regulatory system is likely to be more effective if an industry has sufficient resources to:

- (a) implement the system;
- (b) monitor and enforce compliance with standards on an ongoing basis; and
- (c) apply sanctions to members, including removal from industry where necessary.

22 The report states that governance and enforcement are only likely to be effective if an industry is sufficiently cohesive and has a uniform set of standards. If there are multiple sets of standards and governing bodies within a self-regulating industry, this can risk fragmentation and arbitrage, as industry members may be able to move from one governing body to another with lower standards.

Specific issues for code approval

Standards for code obligations

- 23 ASIC notes the Taskforce’s suggestion that ‘[e]ach code would set out base level (rather than ‘best practice’) service standards...’. We suggest that ‘base level’ should not be adopted as the standard for codes.
- 24 In RG 183, we explain that an approved code must do more than restate the law. ‘Base level’ could be interpreted as merely meeting minimum statutory requirements. For this reason, a descriptor that is above base level and short of best practice is preferable to ensure that an approved code actually delivers enhanced outcomes.
- 25 We also suggest that the use of the term ‘service standards’ is problematic. It may accurately describe some aspects of codes (e.g. how quickly members will provide a letter acknowledging receipt of a client communication) and in such cases, ‘best practice’ may be the standard strived for.
- 26 However, codes may also include important consumer rights, such as those in the Code of Banking Practice dealing with when and how a guarantee will be taken and enforced, including details about what types of documents must be provided. These matters are arguably closer in nature to legal standards, where the code is setting acceptable practice and where departure from that standard has significant consequences. The same applies to the ePayments Code provisions dealing with liability for unauthorised transactions.
- 27 We do not support a requirement that a code ‘be brief’. A code needs to be the appropriate length to contain all of the provisions to improve industry behaviour and consumer outcomes. A code should be drafted in plain language and be accessible.
- 28 There is recent case law that despite the Banking Code of Practice having been incorporated by reference into consumer contracts with their bank, the generality of some provisions mean that contractually they are too vague to have any legal effect. We consider that it is important that code obligations are sufficiently specific and clear to provide some legal certainty as to what is required in any particular case.

Note: See *Marsden v DCL Developments Pty Limited (No.3)* [2016] NSWSC 179.

Code administration

- 29 The Taskforce’s suggested that ‘[c]odes should be formulated by an incorporated code body, the board of which includes an appropriate mix of industry representatives, consumer representatives and independent experts’. However, we suggest that codes to which this framework would apply would be ‘formulated and administered’ by a code body.

Technical issues

- 30 Under s1101A of the Corporations Act, ASIC currently has the power to revoke the approval of a code. We believe this power should be retained because it is an important way for ASIC to control the quality and efficacy of codes on an ongoing basis.
- 31 However, when considering changes to the framework for codes it may also be appropriate to consider:
- (a) what the legal effects of a revocation of a code’s approval will be (e.g. whether and how a consumer can still seek redress for failures to comply with it); and
 - (b) whether ASIC has the power to revoke approval for a particular incorporated code monitoring body (e.g. due to governance concerns), while allowing the code to otherwise continue.
- 32 The Taskforce’s Consultation Paper 4 acknowledges the complexities of imposing requirements for ASIC code approval on industry subsectors that have other arrangements in place—for example, the arrangements under the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*, which require financial advisers to comply with the FASEA Code of Ethics. Any new regulatory framework for industry codes should identify and address these complexities.

Mandating the ePayments Code

- 33 It is ASIC’s strong view that the ePayments Code is different from other industry-administered codes and that the general approval framework in Position 1 is not appropriate for ASIC-administered arrangements such as the ePayments Code.
- 34 When electronic banking was first introduced, industry sought to address consumer and regulatory concerns by introducing a self-regulatory code of practice. However, under this code, there was no agreed position for effectively resolving key issues such as liability for unauthorised transactions and no effective monitoring and compliance. This was the case even though the industry was made up of a much smaller number of more homogenous participants at that time than it is today.
- 35 The code (known as the Electronic Funds Transfer Code of Conduct and more recently the ePayments Code) became active after significant Government intervention about its content (effectively pushing industry to a position on the liability issues) and monitoring (with a government agency given a significant monitoring role). Due to difficulties achieving industry consensus on key issues, Government took on subsequent reviews of the code, which were then done by ASIC after ASIC was established.

- 36 The ePayments Code is not an add-on to existing reasonably comprehensive legal provisions. The ePayments Code contains essential consumer protections, in particular the regime for allocation of liability for unauthorised electronic payment transactions, which is not dealt with elsewhere in the law. Effective enforcement and coverage of the Code is therefore essential in promoting consumer trust and participation in electronic payments, and is one of the key reasons ASIC supports its differential treatment.
- 37 While most of the current ePayments Code subscribers are authorised deposit-taking institutions, eligibility for subscription is not limited and is intended to cover the diverse nature of current and emerging players in the electronic payments industry. The heterogeneity of industry membership means it is unrealistic to expect that industry can resolve the complex issues involved and achieve code terms by consensus. This is a key reason for treating the ePayments Code differently.
- 38 We note that it is unclear at present how widely framed the regulated population of a mandated ePayments Code is likely to be in response to Recommendation 16 in the FSI's final report (FSI report).
- Note: See [FSI report](#), Commonwealth of Australia, 7 December 2014.
- 39 We also note that, while an industry code is being formulated, additional new payments entities are likely to enter the market and not be subscribers to the ePayments Code. Therefore, even if industry could generate and agree on an effective ePayments Code in a reasonable timeframe, we are likely to need a legislative rule-making power as a fall-back.
- 40 For this reason, we strongly support the use of a legislative rule making power as an appropriate method of addressing Recommendation 16 in the FSI report to mandate the consumer protections in the ePayments Code. This power would allow ASIC to determine the content of the ePayments Code and monitor compliance and enforce obligations.
- 41 Useful analogies for ASIC rule making powers include the Market Integrity Rules under Pt 7.2A and Derivative Transaction Rules under Pt 7.5A of the Corporations Act. If ASIC does not have a legislative rule-making power, we will not have a mechanism for putting appropriate rules in place.
- 42 ASIC can assist Treasury with the design of a legislative framework as required.

B ASIC's comments on the other Taskforce positions

Key points

ASIC generally supports the proposals in Positions 2–5 in the Taskforce's Consultation Paper 4.

We have provided feedback on each of these positions.

Position 2: Requirement to subscribe to code

Taskforce Position 2

Entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFS licence or some similar mechanism).

- 43 ASIC acknowledges the Taskforce's position that entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFS licence or some similar mechanism).
- 44 However, we consider that Position 2 should be revised to state that ASIC be expressly empowered to impose a requirement to subscribe to an industry code approved by ASIC. This is because ASIC does not currently have a general power to impose licence conditions under s914A of the Corporations Act and s45 of the *National Consumer Credit Protection Act 2009* (National Credit Act), which we might conceivably use to impose such a requirement.
- 45 Adding the word 'expressly' to the Taskforce's position indicates that there would be a separate legislative provision for ASIC to impose this kind of condition on a class of licensees. If ASIC has the power to impose a requirement, the power to modify its operation should also be built into ASIC's discretion or otherwise expressed in the legislation.
- 46 It should be made clear that the requirement can apply to new and existing licensees, without the procedural requirements (e.g. the right to a hearing and review by the Administrative Appeals Tribunal) that apply to the exercise of the general power to impose licence conditions. We accept that there should also be some allowance for consultation.

Position 3: Enforcement of code

Taskforce Position 3

Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.

- 47 ASIC supports the Taskforce’s Position 3: see also our comments in paragraph 28.

Position 4: Dispute resolution

Taskforce Position 4

An individual customer should be able to seek appropriate redress through the subscriber’s internal and external dispute resolution arrangements for non-compliance with an applicable approved code

- 48 ASIC supports the Taskforce’s Position 4.
- 49 We note that the content of the industry codes listed in the Taskforce’s Consultation Paper 4 would match the proposed jurisdictional reach of the Australian Financial Complaints Authority.

Position 5: Monitoring and compliance

Taskforce Position 5

The code monitoring body, comprising a mix of industry, consumer and expert members, should monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters.

- 50 ASIC supports the Taskforce’s Position 5.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
Consultation Paper 4	Position and Consultation Paper 4, <i>Industry codes in the financial sector</i> , issued 28 June 2017 by the Taskforce
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
ePayments Code	The ePayments Code regulates consumer electronic payment transactions, including ATM, EFTPOS and credit card transactions, online payments, internet and mobile banking, and BPAY
FASEA	Financial Advisers Ethics and Standards Authority
FASEA Code of Ethics	Code of Ethics drafted by FASEA that will apply from 1 January 2020 to individuals who provide personal advice to retail clients on relevant financial products
FPA	Financial Planning Association of Australia
FSI	Financial System Inquiry
FSI report	The final report of the FSI, issued 7 December 2014
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
RG 183 (for example)	An ASIC regulatory guide (in this example numbered 183)
s1101A (for example)	A section of the Corporations Act (in this example numbered 1101A), unless otherwise specified
Self-Regulation Taskforce	Taskforce on Self-Regulation in Australia
Taskforce	ASIC Enforcement Review Taskforce