



Enforceability of financial services industry codes

Taking action on recommendation 1.15 of the
Banking, Superannuation and Financial Services
Royal Commission

Consultation Paper

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Consultation Process

Request for feedback and comments

Closing date for submissions: 12 April 2019

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The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Part 1—Enforceability of industry codes

Introduction

In December 2017 the Government established a Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and appointed the Hon Kenneth Hayne AC QC as the Royal Commissioner. Commissioner Hayne provided his Final Report to the Governor-General on 1 February 2019.¹

On 4 February 2019, the Government tabled the Final Report in Parliament and released its comprehensive response to the Royal Commission, *Restoring trust in Australia's financial system*.

In his Final Report, the Commissioner made a number of recommendations concerning existing industry codes of conduct. These recommendations are set out in **Appendix A** and are relevant to codes in the banking, insurance and superannuation sectors.

In its response, the Government agreed to take action on recommendation 1.15 and supported industry and ASIC acting on the other recommendations concerning existing industry codes.

The Commissioner also identified a number of limitations in the current code framework more generally, some of which had previously been identified in the final report of the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce (**ASIC ERT**).² In particular, recommendation 1.15 of the Final Report proposed that the law should be amended to provide:

- that ASIC's power to approve codes of conduct extends to codes relating to all Australian Prudential Regulation Authority (APRA)-regulated institutions and Australian Credit Licence (ACL) holders;
- that industry codes of conduct approved by ASIC may include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law;
- that ASIC may take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code;
- for remedies, modelled on those now set out in Part VI of the CCA, for breach of an 'enforceable code provision'; and
- for the establishment and imposition of mandatory financial services industry codes.

The policy basis for industry codes

A code of conduct is a set of statements setting out an industry's commitments to deliver a certain standard of practice.

Codes of conduct are a vehicle for industries to self-regulate and set standards on how to comply with and exceed what is required by the law. This can involve setting dispute resolution mechanisms, whereby code subscribers are accountable to their consumers. This can promote better consumer outcomes as well as confidence and trust in the industry.

They can also contain dispute resolution mechanisms, which promote better consumer outcomes as well as confidence and trust in the industry.

¹ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, February 2019 (FSRC Final Report).

² FSRC Final Report, p. 106-107.

Codes can raise standards even where they are not universally subscribed to by the industry, because the standard of conduct set out in the code can in effect become the new industry standard expected by, and for, consumers. However, where there is no clear or universally accepted industry practice, codes may be less effective.

Industry codes may develop and evolve over many years, coming to encapsulate industry norms in a way that a code prescribed from outside, even by a closely engaged regulator, would not. This development of norms within industry lends a crucial element of self-regulation to the codes by which the subscribers abide. The Commissioner saw an essential part of creating an industry code was harnessing the views and collective will of relevant industry participants.³

As a general rule, government only steps in to prescribe codes (particularly mandatory codes) when they are necessary for supporting the efficient operation of markets or the welfare of consumers, and it is appropriate for the matter to be dealt with in the form of a code rather than the more general law.

Purpose of consultation

Part 1 of this consultation paper sets out questions, the responses to which will inform the development of legislation to enact the Government's commitment to implement recommendation 1.15.

Part 2 of this paper sets out further information on the current code framework and Government-mandated codes, and deals with the recommendations of the ASIC ERT and the other Royal Commission recommendations.

The public is invited to comment generally on the proposals in this paper, and need not confine themselves to commenting in response to the specific consultation questions.

³ FSRC Final Report, p. 111.

Questions on recommendation 1.15

Questions

1. What are the benefits of subscribing to an approved industry code?
2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?
3. What criteria should ASIC consider when approving voluntary codes?
4. Should the Government be able to prescribe a voluntary financial services industry code?
5. Should subscribing to certain approved codes be a condition of certain licences?
6. When should the Government prescribe a mandatory financial services industry code?
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?
8. What level of supervision and compliance monitoring for codes should there be?
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?
10. Should there be regular reviews of codes? How often should these reviews be conducted?
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?
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?
13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?
14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?
15. In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?
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?
17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?

Reforms proposed by the Royal Commission

Reasons for proposed changes

As the Commissioner set out in his Final Report, industry codes are expressed as promises made by industry participants to those with whom they interact. However, the status of these promises is not always clear, which in turn means that those promises are not always enforced, whether by individuals or the regulator. The reforms proposed by the Commissioner in recommendation 1.15 are around clarifying the status of those promises and making sure that there are appropriate remedies and consequences for breaches.

As the Commissioner noted:

*“If industry codes are to be more than public relations puffs, the promises made must be made seriously. If they are made seriously (and those bound by the codes say that they are), the promises that are set out in the code, and are intended to govern the particular relations between the provider and the acquirer of a financial product or financial service must be kept. This must entail that the promises can be enforced by those to whom the promises are made: the customer who acquires the product or service, and the guarantors of loans to individuals and small businesses”.*⁴

Enforceable code provisions

The Commissioner’s recommended approach allows industry codes approved by ASIC to “include ‘enforceable code provisions’, which are provisions in respect of which a contravention will constitute a breach of the law”.⁵

The Final Report states that this would provide “certainty and enforceability to key code provisions that govern the terms of the contract.”⁶ Making promises in codes enforceable by statute ensures that individuals can rely on these provisions, and allows for judicial decisions to set precedents that can be enforced.

The Commissioner did not say that every provision in an industry code is to be an enforceable promise. Rather, where a provision is identified by the code as an ‘enforceable code provision’, then it follows that those provisions should be enforceable and a breach of that provision should have consequences. Specifically designating these provisions as enforceable code provisions is intended to remove doubt as to which provisions form part of the contract made with consumers, a process which previously required judicial consideration in order to gain clarity.⁷

The Commissioner also notes that a breach of an ‘enforceable code provision’ should constitute a ‘breach of the law’. Similar provisions exist in codes that are prescribed under Part IVB of the *Competition and Consumer Act 2010* (CCA), and which may contain civil penalty provisions. A breach of the code may also allow the ACCC to pursue other regulatory action that would not generally be available to a consumer. More information on this is included in Part 2.

Who will be covered by the new enforceable codes regime?

The Commissioner recommended extending ASIC’s power to approve codes to all APRA-regulated institutions and ACL holders. Currently, ASIC can only approve industry codes of conduct that relate to the activities of:

- Australian financial services (AFS) licensees;
- authorised representatives of AFS licensees; or
- issuers of financial products.

The recommended extension of ASIC’s power to approve codes would also have the effect of bringing a large number of additional industry participants into the ambit of the proposed enforceable code regime framework. In particular, ASIC would be able to approve codes that relate to ACL holders activities, and the activities of all APRA-regulated institutions where those entities do not have an AFSL.

⁴ FSRC Final Report, p. 12.

⁵ FSRC Final Report, p 109.

⁶ FSRC Final Report, p 108.

⁷ FSRC Final Report, p. 106.

The aim of this expansion is to provide these entities with the same opportunity to self-regulate and raise standards in a manner approved by ASIC, while also ensuring that consumers in those industries have the ability to pursue remedies for breaches of promises made in relevant codes. This recommendation should be seen in the context of the other recommendations of the Royal Commission on the roles of APRA and ASIC – in particular, that ASIC should have primary responsibility for conduct regulation.

ASIC criteria for approving a code

Once a code has been submitted to ASIC, it determines whether the code is appropriate for approval on a case-by-case basis. However, ASIC can only approve a code once it has been submitted to it, and historically approval has been rarely sought.

Where necessary, ASIC may consult with other key stakeholders, including industry and consumer representatives, and other government agencies and regulators on the decision to approve a code.⁸

ASIC's discretion to approve codes is broad, and the Commissioner has stated that he does 'not intend to modify or limit ASIC's powers to approve the non-enforceable provisions of industry codes', under section 1101A of the Corporations Act.⁹

In applying its discretion to approve a code under that section, ASIC has produced regulatory guidance around what codes must include.¹⁰ To meet the ASIC threshold, a code must:

- require subscribers to be contractually bound by the code (either by contracting with the enforcement body or with consumers or both);
- have an independent person or body that is empowered to administer and enforce the code, including imposing any appropriate sanctions;
- provide that consumers have access to internal dispute resolution and an appropriate external dispute resolution scheme for any code breaches resulting in direct financial loss; and
- give consumers broad standing to complain about any other code breach to the independent body.

The Final Report's discussion on codes raises the issue of whether ASIC should consider adopting additional criteria when considering whether to approve a code. These include considering whether the code contains:

- a comprehensive body of rules developed in consultation with stakeholders;
- adequate provisions for dispute resolution, remedies and sanctions; and
- effective and independent administration – including compliance monitoring.

This is in addition to the Final Report's recommendation that ASIC may take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code.

The Commissioner also emphasised that it is important to have in place appropriate procedures to support industry to develop voluntary codes, and only have government prescribe mandatory codes where necessary. Equally, in approving a code, the effects on competition should be considered.

In line with the Commissioner's recommendations, the content of voluntary codes should remain a matter for industry to determine (subject to the existing statutory requirements and ASIC's

⁸ ASIC Regulatory Guide 183 *Approval of financial services sector codes of conduct* at [183.18].

⁹ FSRC Final Report, p. 109.

¹⁰ Regulatory Guide 183 *Approval of financial services sector codes of conduct*, [183-25].

approval).¹¹ In particular, the content of codes should continue to be directed to raising industry standards setting out the norms of behaviour which are expected of subscribers.

Approving enforceable code provisions

The Commissioner recommends a four step process for approving enforceable code provisions:

- industry should identify the provisions that it says govern the terms of the contract made or to be made between the financial services entity and the customer or guarantor;
- industry should seek ASIC's approval of those provisions;
- ASIC should review the provisions put forward by industry; and
- once ASIC has approved the enforceable code provisions, they will be enforceable by statute. Customers will be able to elect whether to enforce any breaches of those provisions through existing internal or external dispute resolution mechanisms or through the courts.

Industry should identify enforceable code provisions in voluntary codes

Where an industry has voluntarily created a code, the Commissioner recommends that industry identify the provisions of its code that govern the terms of the contract between a financial services entity and the customer or guarantor. As an example, the Commissioner lists certain provisions of the 2019 Banking Code that he anticipates would become enforceable code provisions, such as the obligation to engage with customers in a fair, reasonable and ethical manner.

Industry seeks ASIC's approval of code

The Commissioner recommends that once the enforceable code provisions have been identified, ASIC's approval of those provisions should be sought (subject to it remaining optional for industry to seek code approval). If a voluntary code has already been approved by ASIC, industry would still need to identify the subset of the code provisions that should be enforceable. As a transitional matter, once the enforceable code provisions are legislated for it may be necessary to submit an already existing code for re-approval within a reasonable timeframe.

ASIC's review of code

The Commissioner recommended that ASIC's role must go beyond passive receipt of industry proposals. ASIC should consider whether all the terms governing the contract made or to be made between the entity and the customer have been identified, and whether those provisions are expressed clearly and unambiguously, so as to be capable of enforcement.

Throughout this process, ASIC should continue to engage with industry until any defects in the code are remedied. In practice, this means that there may need to be a number of iterations of the first three steps. Should this process fail to resolve these defects in a timely manner, the Government would need to consider imposing a mandatory code on industry, as discussed further below.

Statutory effect

Once a code is approved, the enforceable code provisions will be subject to statutory remedies for breach of promise. The Commissioner considered that a customer who wished to pursue these remedies may elect to do so either through internal or external dispute resolution or through the courts.

¹¹ FSRC Final Report, p. 109.

Enforcement and remedies

Because a breach of these provisions will be a 'breach of the law', it also follows that it may be a breach of a licensing condition, where there is a general licensing obligation to comply with applicable laws, which can be enforced by the appropriate regulator.¹² Because this is a breach of the law, it may also be open to ASIC to take a range of other enforcement action for a breach.

In making this recommendation, the Commissioner was careful to emphasise in a number of places that making these breaches of enforceable code provision breaches of the law was intended to 'identify, correct and prevent systemic failures in applying the code'.¹³

Generally, the remedies available to a consumer for a breach of promise in a code should be in addition to any other cause of action they may otherwise have under other general law or legislation. Providing a statutory basis for these remedies makes it clear to consumers that those remedies are available for breach of enforceable code provisions, and that the provisions of codes represent enforceable promises.

The Commissioner suggests that the enforcement provisions and remedies in Part VI of the CCA be used as a model for the enforceable code regime. That regime includes provisions relating to:

- 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.¹⁴

Some of the above remedies, such as damages, may be pursued by a consumer (or the ACCC on behalf of a consumer) and other orders may instead be pursued by the ACCC as part of a broader enforcement action, such as disqualification.

Other enforcement action available to ASIC

In the CCA, there are a range of additional actions which the ACCC is empowered to take in relation to an applicable industry code. These include:

- issuing infringement notices (Part IVB, Division 2A);
- issuing public warning notices (Part IVB, Division 3);
- seeking orders in relation to redress of loss suffered by non-parties to Part VI proceedings (Part IVB, Division 4); and
- investigating matters related to potential breaches of codes (Part IVB, Division 5).

¹² For example, paragraph 912A(1)(c) of the *Corporations Act 2001* requires Australian financial services licensees to comply with the financial services law, and breach of this general obligation has consequences for a licensee.

¹³ FSRC Final Report, pp. 107 and 109.

¹⁴ CCA, ss 76, 80, 82, 86C, 86D, 86E, 87 and 87B respectively.

Under the CCA, a mandatory or voluntary code may contain a civil penalty provision, which is enforceable by the ACCC. The code sets out who is subject to those civil penalties

ASIC currently has powers to take licence action or issue civil penalties for breaches of certain general obligations, including failure to comply with the conditions on the licence. Parliament has recently passed legislation to increase the maximum civil penalty to \$10.5 million or three times the benefit gained/loss avoided or 10 per cent of annual turnover (capped at \$525 million).

Rather than providing for individual enforceable code provisions to be subject to a civil penalty, as is the case in the CCA model, it may instead be preferable that there be a general civil penalty where there are systemic or egregious breaches of a code, and that this penalty would be consistent with the amount currently set out in the Corporations Act.

Election of external dispute resolution or courts

Where an individual chooses to take action for breach of code, the Commissioner recommends that they should be able to enforce a breach of a code through existing internal or external dispute resolution mechanisms, or through the courts.¹⁵

While the Commissioner made no specific recommendation about requiring internal dispute resolution, or the role of a specialist code monitoring body, the discussion assumes that codes are subject to a specialist code monitoring body; in practice this may vary depending on the individual code. For example, under the Banking Code of Practice, the Banking Code Compliance Committee (BCCC) is the relevant monitoring body, and persons are able to report a breach of the Code to the BCCC.

Once a breach has been identified, internal and external dispute resolution processes provide affordable means of redress to consumers while having less formal procedures than courts. In the context of financial service codes, that EDR process is most likely to include resort to AFCA.

Currently, pursuing a matter through AFCA is non-binding on the consumer, so they may elect to pursue the matter through the courts even where they have first gone to AFCA. The Commissioner has recommended that resorting to an EDR mechanism such as AFCA should be treated as an election not to pursue court remedies for breaches of enforceable code provisions unless good cause is shown to the contrary.¹⁶ In such cases, the court would have discretion to determine whether the outcome of the EDR process should preclude further court proceedings.

Making a code mandatory

The Commissioner has recommended the law should be amended to provide for the establishment and imposition of mandatory financial services industry codes, and that the process for implementing a mandatory code should be the same as the process used in respect of industry codes prescribed under the CCA.

Under Part IVB of the CCA, a mandatory industry code is one which it is mandatory for members of that industry, as defined by the code, to subscribe to. By contrast, a voluntary code is only binding on the entities that have subscribed to it. A mandatory code is otherwise the same as a voluntary code, and either may contain enforceable code provisions.

Mandatory codes provide an alternative to other forms of regulatory intervention. While they are imposed on an industry, typically they are developed in close consultation with industry, including peak bodies.

¹⁵ FSRC Final Report, p. 111.

¹⁶ FSRC Final Report, p 111.

Generally, the Commissioner considers that it may be appropriate to impose a mandatory code if an industry does not put forward its proposed enforceable code provisions in a timely manner. In this sense, the possibility of Government prescribing a mandatory code provides an incentive for industry to put forward self-generated codes to ASIC for approval.

The process for mandating a code

The process for imposing a code under the CCA is supported by Treasury's Industry Codes of Conduct Policy Framework. Under the Framework, prescribed codes are only supported where they are absolutely necessary for supporting the efficient operation of markets or the welfare of consumers. For example, a mandatory code might be needed to address problematic behaviour arising from an imbalance of bargaining power or information asymmetry which may lead to poor outcomes for consumers or certain industry participants.

The process set out in the CCA is that the Government prescribes either a voluntary or mandatory code through regulations. Regard is had to the policy framework, and consultation on the draft code is undertaken with the affected industry. Typically, a draft will have been provided by industry to Government beforehand, so while consultation is on the whole of the code, it is usually directed to more technical aspects. In addition, the majority of codes that have been prescribed under the framework are business-to-business codes, whereas financial services codes are typically directed at business-to-consumer standards.

The Framework is designed in the context of the CCA, and is not specific to the financial services industry. It sets out five relevant criteria to be considered when prescribing codes, which are:

1. Is there an identifiable problem in the industry?
2. Can the problem be addressed using existing laws or regulations?
3. Has industry self-regulation been attempted?
4. Is an industry code the most suitable mechanism for resolving the problem?
5. Is there likely to be a net public benefit?

There may be other factors to consider when prescribing a mandatory code in relation to financial services. For example, the Commissioner made a number of recommendations in his Final Report directed at industry bodies on how their codes should be amended or updated. If those changes were not made and submitted for approval within the timeframes set out in the Final Report, the Government may consider prescribing those industry codes, or particular terms of them. Similarly, where an industry has not put forward an existing code for approval in a timely way, and this lack of approval creates doubt about whether the code's provisions are enforceable by consumers, it may be appropriate for Government to consider prescribing the code.

Part 2—Background

Current industry code framework

Voluntary codes under the *Corporations Act 2001* represent a form of self-regulation where businesses decide to establish their own code to encourage industry members to adhere to a higher standard of behaviour or ethics.

These codes may be developed by industry associations or peak bodies to address issues of importance to that industry, with little or no involvement from the Government. Other industry participants may choose to voluntarily sign-up to the code and comply with it.

Enforcement of these codes and dealing with breaches is a matter for industry itself and the regulator does not enforce such codes. Effective self-regulated codes are generally the preferred method of addressing specific problems in an industry.

Codes of conduct have existed in the financial services sector since the late 1980s, and a number of codes of conduct have been developed since. These codes cover a range of subjects such as banking, wealth management, general insurance, insurance in superannuation and electronic payments. Many of the participants in the Australian financial services industry subscribe to an industry code.

There are currently 12 codes in the financial services industry (see **Appendix B**). These codes cover a range of subjects such as banking, wealth management, general insurance, superannuation and electronic payments.¹⁷

ASIC approval of voluntary codes

Currently, ASIC has the power to approve codes in the financial services sector where it has received an application.¹⁸ However, ASIC approval of codes is optional, and historically has been rarely sought and granted. More recently, there have been an increased number of applications for ASIC to approve codes, but this has not yet resulted in any additional approvals. As the Commission noted, new versions of the three insurance codes¹⁹ are currently under development. Of the codes currently in operation in the financial services industry, only the Code of Banking Practice and the Financial Planning Association Professional Ongoing Fees Code have been formally approved by ASIC.

ASIC's guidance on approving codes of conduct is set out in Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183).

ASIC-approved codes may contain provisions which are enforceable by consumers as a contract or guarantee. However, in order to be bound by those terms, the relevant entity must voluntarily subscribe to the code.

¹⁷ While the ePayments code is a voluntary code, it is not developed by industry. ASIC administers the ePayments Code, including compliance and conducting regular reviews.

¹⁸ Section 1101A *Corporations Act 2001* (**Corporations Act**).

¹⁹ The Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice.

Government-mandated codes under the CCA

Currently, Government-mandated codes are a feature of the regulatory regime set out in the CCA. The industry codes framework in the CCA is different in its function to that for the financial sector industry codes, as reflected in the *2017 Industry Codes of Conduct Policy Framework*.

A general principle adopted by that framework is that mandatory codes should only be prescribed when they are necessary for supporting the efficient operation of markets or the welfare of consumers. This high threshold is reflected in the limited number of codes that have been prescribed under the CCA. In particular, 'the Government will generally not consider bringing forward a prescribed industry code unless evidence exists that self-regulation has been attempted within the industry and failed to address the problem adequately.'²⁰

Where a code under the CCA is mandatory, all entities that are part of the industry are bound by the terms of the code. Which industry the code applies to is set out in each prescribed code.

ASIC ERT Recommendations

In December 2017, the ASIC ERT report recommended creating an approved codes regime whereby ASIC would have the power to determine the activities and industry sectors for which ASIC-approved codes would be required. Entities engaging in activities covered by approved codes would also be required to be a subscriber.

Recommendation 22 in the final report of the ASIC ERT recommended establishing 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. Code monitoring bodies are generally responsible for monitoring compliance with an industry code of practice. For example, the Financial Industry Regulatory Authority (FINRA) is an independent, industry-funded body that regulates almost all broker-dealers in the United States. It is authorised by Congress and approved by the Securities and Exchange Commission.

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.²¹

The Commissioner was generally positive about the ASIC ERT recommendations, but, as discussed above, recommended going further by making a breach of a code a breach of the law. As also discussed above, the Commissioner also recommended for the establishment and imposition (where necessary) of mandatory financial services industry codes. A mandatory codes approach would, in effect, subsume the other recommendations of the ASIC ERT.

²⁰ *Industry Codes of Conduct Policy Framework*, p. 2.

²¹ See ASIC ERT, p 33 reference to Part IV of the CCA.

Appendix A Other relevant recommendations

A number of recommendations in the Final Report are affected by the enforceable codes regime proposed by Recommendations 1.15, and the Commissioner also made recommendations which addressed issues arising with certain existing codes.

The Banking Code of Practice

The Banking Code of Practice sets out the standards of practice and service in the Australian banking industry for individual and small business customers, and their guarantors. A new version of the Code is scheduled to take effect from 1 July 2019.

The Commissioner made four recommendations in relation to the Banking Code of Practice:

- Recommendation 1.8 about amending the Banking Code in relation to interactions that banks have with customers;
- Recommendation 1.10 about amending the definition of ‘small business’ in the Banking Code;
- Recommendation 1.13 about amending the Banking Code to provide that banks will not charge default interest on loans secured by agricultural land in certain circumstances; and
- Recommendation 1.16 about certain provisions in the Banking Code being made ‘enforceable code provisions’.

Industry codes in insurance

The Commissioner made two recommendations in relation to codes in insurance:

- Recommendation 4.9 about certain provisions in the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice being made enforceable code provisions; and
- Recommendation 4.10 about amending the Life Insurance Code of Practice and the General Insurance Code of Practice to empower relevant committees to impose sanctions on a subscriber that has breached the relevant code.

In relation to Recommendation 4.9, the Commissioner determined that given the current state of the industry codes in insurance, it would be undesirable to require the insurance industry to seek to identify now (and give to ASIC) the provisions that it sees as being proposed enforceable code provisions.²²

Instead, the Commissioner recommended that in respect of the three insurance codes, the Financial Services Council, the Insurance Council of Australia and ASIC 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’.

In its response to Recommendation 4.9 of the Final Report, the Government noted that the Productivity Commission’s report *Superannuation: Assessing Efficiency and Competitiveness* recommended a binding and enforceable superannuation insurance code of conduct, which would thereafter become a condition of holding an RSE licence.

²² FSRC Final Report, p. 313.

In relation to Recommendation 4.10, the Commissioner also recommended that the sanctions powers be given to the Code Governance Committee in respect of general insurance, and to the Life Code Compliance Committee in respect of life insurance.²³

²³ FSRC Final Report, p. 315.

Appendix B Current codes in financial services industry

Currently, there are 12 codes in the financial services industry, with both the Code of Banking Practice and the Financial Planning Association Professional Ongoing Fees Code being formally approved by ASIC. The codes are:

- Code of Banking Practice, an initiative of the Australian Banking Association;
- Customer Owned Banking Code of Practice (developed by Abacus, now the Customer Owned Banking Association);
- Financial Planning Association of Australia's Code of Professional Practice;
- General Insurance Code of Practice;
- ePayments Code (formerly the Electronic Funds Transfer Code of Conduct);
- National Insurance Brokers Association's Insurance Brokers Code of Practice;
- Mortgage and Finance Association of Australia's Code of Practice;
- Finance Brokers Association of Australia's Code of Conduct;
- Australian Collectors and Debt Buyers Association Code of Practice;
- Insurance in Superannuation Voluntary Code of Practice;
- Financial Services Council's Life Insurance Code of Practice; and
- Financial Planning Association Professional Ongoing Fees Code.

These codes contain industry-specific guidelines and set out rules for dispute resolution and sanctions for breaches. These rules are intended to supplement regulation in areas which require flexibility, as well as the ability to respond to changing expectations and circumstances. Codes can be an effective source of dispute resolution.