

**Treasury Consultation Paper –  
Enforceability of financial  
services industry codes –  
Recommendation 1.15 of the  
Banking, Superannuation &  
Financial Services Royal  
Commission**



# Treasury Consultation Paper – Enforceability of financial services industry codes

## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission in response to the Treasury Consultation Paper – Enforceability of financial services industry codes.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers provide advice and representation in credit and debt law and consumer law matters. The unit provides advice to clients, lawyers and financial counsellors in relation to mortgage stress, housing repossession, contracts, insurance, loans and other debts, telecommunications and unsolicited consumer agreements.

LAQ supports the view of the Financial Services Royal Commission (FSRC) in Recommendation 1.15 of its Final Report that recognises the importance of financial services industry codes. LAQ also supports those parts of the Recommendation that are designed to improve the enforceability of financial services industry codes strengthen the role that they play in regulating the financial services industry.

Overall, LAQ supports the proposed changes as they will:

- provide consumers with a practical mechanism for enforcing breaches of the promises made by industry under financial services industry codes;
- provide regulators with another enforcement mechanism if the industry engages in inappropriate conduct; and
- provide greater consequences for industry if they breach the terms of the relevant code.

## Consultation Questions

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

From a consumer perspective, the benefits of having all, or the majority, of an industry subscribe to an approved industry code include:

- consistency in the way consumers are treated across an industry;
- an improved standard of service across the industry;
- the ability for regulators to more easily identify which industry members are not compliant and to identify industry conduct issues; and
- a standard for consumers to use to identify which industry members have higher levels of professionalism and customer service.

From an industry perspective, the benefits of subscribing to an approved industry code include:

- it demonstrates a commitment to higher standards of professionalism and customer service; and
- can demonstrate a point of differentiation between providers within the industry and identifies those who do and who do not subscribe to the relevant codes.

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

LAQ supports the Commissioner's recommended approach to include enforceable code provisions in ASIC approved industry codes which are then treated as breaches of the law if contravened.

It is appropriate that these provisions should form part of the contract between the consumer and the financial services firm.

We submit that the issues which need to be considered are:

- how does the consumer identify which provisions should be enforceable code provisions;
- the nature and scope of any remedies that should be available to the consumer as a result of an enforceable code provision being breached;
- the nature and scope of any remedies and sanctions that can be imposed by ASIC, in addition to consumer remedies, as a result of an enforceable code provision being breached; and
- what mechanism will consumers have for exercising their rights when enforceable code provisions are breached.

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

LAQ supports all of the criteria listed on page 6 of the Consultation Paper.

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

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

LAQ does not support the Government prescribing an industry Code. Rather, it should be a licence condition that the financial service firm has subscribed to an approved industry code.

In our view, making membership of an approved code a condition of a licence is likely to:

- improve the overall practices of an industry. Industry members who are unable to meet the basic standard of conduct set out in the relevant code are likely to lose their licence;
- give more incentive to industry to develop and then have approved by ASIC industry codes that reflect community expectations of behavior by industry members;
- improve the consistency of industry conduct towards consumers; and
- provide certainty to consumers and industry about the standard of conduct expected in the industry.

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

LAQ supports the framework set out for mandating a code in the context of the Competition and Consumer Act which is reproduced on page 10 of the Consultation Paper.

Additional questions that should be asked include:

- whether any recommendations for improving an existing code have been considered in a timely manner;
- whether industry has sought ASIC approval of changes and amendments to an existing code in a timely manner; and
- where industry does not have an existing code, whether an appropriate mechanism for development of a new code and approval by ASIC, has been identified and implemented in a timely way?

#### **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?**

We refer to our answer to Question 6.

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

In LAQ's view, there should be a number of levels of supervision and compliance monitoring for financial services industry codes. These include:

- approval of all financial services industry codes by ASIC;
- a Code Compliance Monitoring Committee (CCMC) that has the power to determine remedies and issue sanctions against financial services firms for breaches of the relevant code;
- supervision and monitoring to enable ASIC to take action against systemic non-compliance with the industry codes. This power should include bringing actions to obtain statutory remedies and sanctions for enforceable code provisions; and

- a mechanism for the identification, development and approval by ASIC of new codes and changes and amendments to existing codes.

**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?**

In LAQ's view, code provisions should be monitored to ensure that they remain relevant, adequate and appropriate. We are aware of existing Code Compliance Monitoring Committees (CCMCs) that currently oversee existing financial services industry codes in Banking, Customer Owned banking, Insurance and Life Insurance. We submit that these CCMCs are best placed to undertake the required monitoring. We support a monitoring role for CCMCs.

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

LAQ supports the regular review of financial services industry codes. It is important that Codes are able to:

- respond to developments and changes in industry products and technology;
- respond to emerging issues relating to the consumer experience of the financial services industry; and
- identify and respond to gaps in Industry Codes.

We support financial services industry codes being reviewed either every 4 years of the date when the last review was commenced or every 3 years from when a new version of the Code commences, whichever time period is earlier.

**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?**

LAQ supports the remedies proposed by the Commissioner. It is appropriate to use the Competition and Consumer Act 2010 (Cth) remedies as a guide for the appropriate remedies 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?**

LAQ supports ASIC having similar enforcement powers to the ACCC in Part IVB of the Competition and Consumer Act in relation to financial services industry codes. The enforcement powers currently held by the ACCC have allowed it to be effective in addressing issues with industry codes that fall within its enforcement remit.

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

LAQ submits that the available statutory remedies for enforceable code provisions are complementary to consumers' contractual rights. Consumers should have the ability to enforce both their contractual rights and access any statutory remedies that are available under the relevant code. Regulators should have the ability to enforce the statutory remedies and sanctions as is warranted.

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

LAQ supports the proposal that only on-going or systemic breaches of the enforceable provisions of an industry code should attract a civil penalty.

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

We refer to AFCA Rules and Operational Guidelines concerning the effect of determinations. These Guidelines provide that in any EDR dispute, between a consumer and a financial firm, where an EDR process looks at the issues and makes a determination about those issues and that determination is accepted by a consumer. Further court action by the consumer is precluded.

The same rules apply where a negotiated or conciliated outcome is agreed between the parties or both parties accept a recommendation of an EDR scheme.

Each of these resolutions involves the consumer agreeing to forego the opportunity to go to Court on the issues that are relevant to their dispute. Where the matter has been resolved it is appropriate that the consumer be held to that agreement except in exceptional circumstances.

Determinations of dispute involving breaches of provisions of financial services industry codes and the imposition of available statutory remedies are no different to the processes covered by AFCA Rules and Operational Guidelines. Consumers should be held to the election they make.

However, a resolved EDR complaint about a financial services industry code does not prevent ASIC from taking court action and seeking to access the statutory remedies available.

**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?**

We refer to our answer to Question 15.

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

AFCA considers and examines all issues that are relevant to a dispute before issuing a determination. Consumers have their dispute properly considered and determined by AFCA. While consumers do not always like the result they receive from an AFCA determination, they retain the right to decide not to accept the determination and proceed with Court action if they do not wish to accept it.

Where a consumer agrees to accept the determination it is appropriate that they are held to this agreement.

LAQ submits that it is also important to highlight that for most vulnerable consumers assisted by LAQ, going to Court about financial related matters is not an option because court litigation is expensive and the consumer runs the risk of legal costs being awarded against them if they are not successful with their claim. AFCA provides a free, efficient and fair alternate means of resolving financial services disputes for consumers.