



Australian Government

ASIC Enforcement Review

Position and Consultation Paper 4
Industry Codes in the Financial Sector
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CONTENTS

Executive summary	1
1. Background.....	4
2. Current issues	7
Subscription to codes	7
ASIC approval of codes	8
3. Possible solutions	10
Annexure A — industry codes in other contexts / jurisdictions	15
Industry codes under the Competition and Consumer Act 2010	15
Prescribed codes of conduct in the United Kingdom	17
Prescribed codes of conduct in Hong Kong.....	17
Voluntary codes of conduct in Canada	18
Annexure B – ASIC enforcement review taskforce terms of reference.....	20

EXECUTIVE SUMMARY

Self-regulatory initiatives are a means by which participants in an industry can demonstrate their commitment to good practices by themselves and their peers. Industry codes – often described as ‘codes of practice’ or ‘codes of conduct’ – have been said to be “at the apex of industry self-regulatory initiatives.”¹ Ideally, the existence of codes should serve to improve consumer confidence in the relevant industries. The Australian financial sector has a system of codes to which most participants in key industries subscribe.

As noted in the recent *Review of the financial system external dispute resolution and complaints framework* (Ramsay Review), “the number of disputes [in the sector] remains small compared to the overall size of the system and the number of interactions individuals have with it.”² However, as the Ramsay Review further notes: “the impact of financial disputes on the lives of individuals and their families can be devastating.”³

The impact on the lives of those affected by poor practices, as brought to light in media reports and in Parliamentary and other inquiries, has resulted in the Australian financial sector coming under intense public and regulatory scrutiny in recent times and in the impairment of consumer confidence in the sector. In this context it is apt to consider whether self-regulatory initiatives such as industry codes are achieving their potential, and whether that potential could better be achieved by the introduction of a co-regulatory model – at least for codes in relation to key services provided to retail and small business customers.

Under a co-regulatory model, industry participants would be required to subscribe to an ASIC approved code, and in the event of non-compliance with the code an individual customer would be entitled to seek appropriate redress through the participant’s internal and external dispute resolution arrangements. A code monitoring body would monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters. However, the content of the code would remain a matter for industry to determine consistent with the broad criteria set by ASIC. To propose a co-regulatory model does not connote a call for the *content* of codes to be incorporated into statute or regulation. Though calls have been made for such a measure,⁴ the Taskforce believes that there is room to substantially strengthen the code regime while preserving the participatory role for industry – a role that legislating code content would remove.

The introduction of a co-regulatory model in appropriate parts of the financial sector could serve to improve significantly the content, consistency and enforceability of codes, and so have a profound effect on consumer confidence. For these reasons (and those set out in more detail below), the Taskforce adopts a preliminary position consistent with the co-regulatory model. The key components of such a model would be:

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- 1 Australian Securities and Investments Commission Regulatory Guide 183 Approval of financial services sector codes of conduct, par. 183.2.
 - 2 Review of the financial system external dispute resolution and complaints framework, Final Report, April 2017, p. 7
 - 3 Ibid.
 - 4 See for example Andrew Wilkie MP’s private member’s Bill – Banking Amendment (Establishing an Effective Code of Conduct) Bill 2017.

- 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.
- Position 2:** Entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFSL or some similar mechanism).
- Position 3:** Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.
- 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.
- 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.

The Taskforce recognises that this co-regulatory model may not be appropriate for all activities conducted in the financial sector. The specification of activities that should be covered by approved codes would best be left to ASIC to determine by instrument where it considers this appropriate and necessary. That said, the Taskforce considers that these activities should ideally align with the proposed jurisdiction of the new Australian Financial Complaints Authority (AFCA). To this end, each code should be expressed to apply to dealings between a subscriber and anyone who is entitled to access the dispute resolution system operated by the AFCA in respect of those dealings.

The Taskforce anticipates that the kind of activity that would ultimately be covered by the approved code requirement would include retail banking, retail life insurance, the provision of insurance and associated services through superannuation or other group arrangements, retail general insurance, insurance brokerage, and the provision of ePayments services (noting that special considerations may apply to the ePayments code, as it is administered by ASIC (see below for details)). This list is not intended to be exhaustive, and is subject to the Taskforce's view outlined above, that ASIC should be the final arbiter of activities that should be subject to the requirement.

There should ideally be a single approved code covering an activity, rather than a proliferation of alternative codes.

The Taskforce notes that ASIC's power to approve codes (currently contained in section 1101A of the Corporations Act), is likely to require amendment to facilitate the new model and to give ASIC flexibility to apply the requirement in respect of a broad range of activities.

Certain conduct associated with forming and subscribing to codes may also enliven provisions of Part IV of the *Competition and Consumer Act 2010*. Consideration will need to be

given to whether these matters should be expressly taken to be authorised as an exception to Part IV.⁵

The proposed model does not preclude the adoption of other, voluntary codes in other parts of the financial sector (for example, in relation to dealings with wholesale customers or in relation to activities not specified by ASIC).

Many of the necessary requirements for content of the codes would already be spelt out in ASIC's Regulatory Guide 183. However, it may be necessary for ASIC to review and update that document, to capture the full spectrum of requirements of this co-regulatory model. Specifically, ASIC approval should be subject to the following requirements:

1. Each code would set out base level (rather than 'best practice') service standards that a consumer or small business customer can expect in dealings with the subscriber. It should not repeat or paraphrase existing legal obligations. It should be drafted in plain language, and be brief.
2. Codes should be formulated by an incorporated code body, the board of which includes an appropriate mix of industry representatives, consumer representatives and independent experts.
3. Codes should contain robust enforcement provisions including:
 - 3.1. Subscribers should be contractually bound to comply with the code, by an agreement with the code body. Where ASIC considers it appropriate, there could also be a requirement that the provisions of the code be incorporated into agreements with customers.
 - 3.2. Codes should expressly provide that a subscriber's failure to comply with the code is to be taken into account in resolving disputes with individual customers through the subscriber's IDR and by AFCA, on the basis that compliance with the code by subscribers is *expected* (rather than optional or aspirational).
 - 3.3. Each subscriber would be required to monitor its ongoing compliance with the code and report periodically to the code body. If, based on that report or following notification (for example by ASIC, AFCA or a relevant consumer or industry body) of concerns about a subscriber's code compliance record, the code body considers that there is systemic non-compliance, the code body could require the subscriber to take steps to improve its compliance practices. The code body could also escalate concerns to ASIC for further investigation (for example, of whether the non-compliance is evidence of a failure by the subscriber to meet the requirements of CA s 912A).
 - 3.4. The code body should keep the code content under review on an ongoing basis and adapt it to changing market conditions.

Finally, the Taskforce acknowledges that ASIC's enhanced role under the new model may require additional resourcing and the Government should consider making this available.

⁵ See section 51 of the *Competition and Consumer Act 2010*.

1. BACKGROUND

1. Codes of Conduct have existed in the financial services sector since the late 1980s with the introduction of the Electronic Funds Transfer Code of Practice. These industry-based systems of code and dispute-resolution scheme were developed on a sectoral basis prior to the reform of the sector through the Corporations Act. The Code of Banking Practice, introduced in November 1993 had its genesis in a parliamentary inquiry (Martin Committee) into the banking system that supported legislative codification of banking law. At the time of its establishment, the Banking Code substantively filled regulatory gaps and preceded the current licensing and conduct regime in the Corporations Act.
2. Since then, the Government's approach to codes has been to provide flexibility to industry participants and foster an environment whereby industry works cooperatively with the regulator and consumer associations to establish best practice. In this context, self-regulation is primarily about providing protection for consumers of financial products and services through the setting of standards of conduct and providing a system of informal dispute resolution.⁶
3. The Electronic Funds Transfer Code of Practice (now known as the ePayments code) provides the only example of a co-regulatory code currently operating in the retail financial services system. It is a voluntary industry code regulating consumer electronic payments – including automatic teller machines, electronic funds transfers at point of sale, internet banking and BPAY. In setting out a regime for the allocation of liability for unauthorised transactions the ePayments code provides important consumer protections. Many banks, credit unions and building societies currently subscribe to the ePayments code along with a number of non-banking subscribers such as PayPal. The code is co-regulatory because ASIC is responsible for the administration of the code as there is no single industry body that has been able to accept responsibility for administering or monitoring compliance. The Financial System Inquiry, in a recommendation the Government subsequently agreed with, said that the ePayments Code should be mandated.⁷
4. The most recent code to be developed in the financial services sector is the Life Insurance Code of Practice. The inception of this code occurred as a result of calls for reform to the life insurance and financial advice sectors in Australia.
5. In 2015, the Trowbridge Report recommended that a Life Insurance Code be developed and modelled on the General Insurance Code of Practice and aimed at setting standards of best practice for life insurers, licensees and advisers for the delivery of effective life insurance outcomes for consumers (Policy Recommendation 6).⁸ The Code came into effect from 11 October 2016 and all Financial Services Council life insurer members (which does not include all industry participants) will be bound by the Code by 30 June 2017.

6 Gail Pearson, 'Business Self-regulation' (2012) 20 *Australian Journal of Administrative Law* 34.

7 Inquiry Recommendation 16, Government's response to the Financial System Inquiry, 20 October 2015.

8 John Trowbridge, Review of Retail Life Insurance Advice, 26 March 2015.

6. ASIC has the power under the Corporations Act to approve codes, though it is not required to do so and can only do so upon an application. To gain ASIC approval, industry must have regard to the guidelines contained in Regulatory Guide 183 *Approval of financial service sector codes of conduct (RG 183)*. This guide sets out the key criteria that must be met for a code to be considered for approval by ASIC. These include requirements for the code to be written in plain language, to address stakeholder issues, to provide for consistent monitoring and compliance, and for mandatory three-year code reviews. According to RG 183, while approval is optional, where approval by ASIC is sought and obtained, it is a signal to consumers that this is a code they can have confidence in.⁹
7. Currently there are 11 codes in the financial services industry with one having received ASIC approval under the Act.¹⁰ The codes are the:
 - 7.1. Code of Banking Practice, an initiative of the Australian Bankers' Association;
 - 7.2. Customer Owned Banking Code of Practice (developed by Abacus, now the Customer Owned Banking Association);
 - 7.3. Financial Planning Association of Australia's Code of Professional Practice;
 - 7.4. General Insurance Code of Practice;
 - 7.5. ePayments Code;
 - 7.6. National Insurance Brokers Association's Insurance Brokers Code of Practice;
 - 7.7. Mortgage & Finance Association of Australia's Code of Practice;
 - 7.8. Finance Brokers Association of Australia's Code of Conduct;
 - 7.9. Australian Collectors and Debt Buyers Association Code of Practice;
 - 7.10. Financial Services Council's Life Insurance Code of Practice; and
 - 7.11. Financial Planning Association Professional Ongoing Fees Code (ASIC approved).¹¹
8. By their nature, codes in the financial services industry contain industry specific rules. For example, the Code of Banking Practice contains rules governing customer accounts, direct debits, chargebacks, guarantees and debt collection. The insurance codes govern areas such as sales practice and claims handling. Collectively, these codes also prescribe rules for dispute resolution and sanctions for breaches. The content of codes typically has a consumer focus, establishing best practice rules for how signatories interact with their customers. These rules fill a regulatory gap in areas which require flexibility and the ability to respond to changing expectations and circumstances. Codes are able to provide efficient and effective dispute resolution, as well as having potential to improve industry practices.

⁹ RG 183.2.

¹⁰ Section 1101A(1).

¹¹ ASIC media release, '16-404MR ASIC approves the FPA Professional Ongoing Fees Code', 23 November 2016.

9. A key component of any effective industry code is its ability to monitor compliance and enforce sanctions and remedies for breaches. The enforcement of industry codes generally lies with an internal compliance body set up under each individual code. For example, under the General Insurance Code of Practice, the Code Governance Committee is the body responsible for monitoring and enforcing the Code.
10. In order for a code to be enforceable, subscribers must first agree to be bound by the terms of the code. There are two main types of arrangements for contractual enforceability. In the first and most common, there is a contractual agreement to abide by the code between subscribers and the relevant body with the power to administer and enforce the code (for example, General Insurance Code of Practice administered by the Code Governance Committee). The second is where code subscribers incorporate their agreement in individual contracts with consumers (for example, written directly into the terms and conditions of a particular product).
11. Another key mechanism for code compliance is, effectively, through external dispute resolution mechanism like the Financial Ombudsman Service (FOS) (or the planned Australian Financial Complaints Authority). Consumers can bring complaints to the FOS where they are not satisfied after complaining to the relevant provider. Code compliance committees may also refer disputes to the FOS in certain circumstances. Codes are relevant in the FOS context because its terms of reference provide that, in deciding what is fair in all the circumstances, it can have regard to “applicable industry codes or guidance as to practice”.
12. Codes may also give rise to enforceable rights in court actions – for example based on arguments that codes form, either expressly or impliedly, part of the contract between the parties. In addition, the *Australian Securities and Investments Commission Act 2001* (ASIC Act) provides that a court may have regard to an industry code in determining whether the conduct of a financial services supplier is unconscionable (provided the service recipient acted on the reasonable belief that the supplier would comply with that code).¹² However, the status of the various codes in terms of enforceability in the courts is not entirely clear.¹³

¹² Subsections 12CC(1)(g) and (h) of the ASIC Act.

¹³ Compare *Commonwealth Bank of Australia v Starrs* [2012] SASC 222 and *ING Bank (Australia) Ltd v Leagrove Pty Ltd* [2012] 1 Qd R 140, with *Brighton v Australia and New Zealand Banking Group Ltd* [2011] NSWCA 152 and *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335; *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351; and *National Australia Bank Ltd v Rose* [2016] VSCA 169.

2. CURRENT ISSUES

1. There are two key issues that the positions put in this paper seek to address:
 - The benefits of industry codes are not available to significant numbers of consumers because not all players in relevant industry subsectors are code subscribers.
 - Codes are not currently required to be approved by ASIC and therefore are not subject to a requirement to contain a minimum set of consumer protections or minimum standards on enforceability.

SUBSCRIPTION TO CODES

2. Even in some of the key financial subsectors, not all players subscribe to codes. For example, of the 33 Australian owned banks, 10 of those are signatories to the Banking Code of Practice and 14 are signatories to the Customer Owned Banking Code of Practice. Although the signatory banks represent a significant portion of banking services in Australia, consumer confidence is lessened when some industry participants are not signatories to their relevant code.
3. Similarly, the new Life Insurance Code of Practice, while being a welcome development, covers only life insurers who are members of the FSC and does not apply to superannuation trustees. As trustees can play a significant role in relation to handling of claims made under group life policies, it is desirable that they be also be subject to an approved code.
4. Several submissions on the draft life insurance code raised concerns arising from the fact that the new code did not extend to superannuation trustees.¹⁴ In response to these concerns, the Insurance in Superannuation Working Group (ISWG) was established to develop a code of conduct for superannuation trustees and insurers. The Group consists of Australia's superannuation industry bodies, the Australian Institute of Superannuation Trustees (AIST), the Association of Superannuation Funds of Australia (ASFA), the Financial Services Council (FSC), the Industry Funds Forum (IFF) and Industry Super Australia (ISA). The Group has been releasing a series of discussion papers to shape the contents of the code and it is intended it will be published in late 2017.
5. As noted above, the Financial System Inquiry recommended that the ePayments Code be mandated. This recommendation seems motivated largely by the lack of universal industry subscription:

*"The ePayments Code provides some consumer protections; however, it is not mandatory and as such does not cover all consumers."*¹⁵

¹⁴ Submissions by Choice and Consumer Action Law Centre.

¹⁵ Financial System Inquiry Final Report, p. 165

Examples given by the FSI of non-subscribers to the code were ‘a three-party system provider as well as some banks, credit unions, building societies and finance companies.’¹⁶

6. As the ePayments code sets out the liability regime for unauthorised transactions (that is not dealt with in the law) effective enforceability and industry coverage of the code are important to promote consumer trust and participation in electronic payments. ASIC’s submission to the FSI noted, in respect of the ePayments Code:

“The voluntary nature of the ePayments Code enables some entities that offer electronic payment facilities not to subscribe to the Code. It has been argued that this has contributed to an uneven playing field, due to industry players who subscribe to the Code having to carry more compliance burden than those that do not – a cost to the industry of maintaining a self- or co-regulatory model. Similarly, the advancement and accessibility of technology in recent years has meant some new, smaller players can enter the market quickly, but may fail. This exposes consumers to higher risks and raises questions about the extent to which a self- or co-regulatory model can continue to deliver effective market supervision and regulation.”

ASIC APPROVAL OF CODES

7. ASIC has power to approve codes under the Corporations Act.¹⁷ It should be noted that this power currently extends only to codes that ‘relate to any aspect of the activities of’ AFS licensees and their authorised representatives, and ‘issuers of financial products’, being ‘activities in relation to which ASIC has a regulatory responsibility’.
8. ASIC approval of codes is a means to ensure that certain minimum conditions around enforceability are met. To meet the ASIC threshold, a code must:
 - 8.1. require subscribers to be contractually bound by the code (either by contracting with the enforcement body or with consumer or both);
 - 8.2. have an independent person or body that is empowered to administer and enforce the code, including imposing any appropriate sanctions;
 - 8.3. 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
 - 8.4. give consumers broad standing to complain about any other code breach to the independent body.¹⁸

¹⁶ Ibid., footnote 44.

¹⁷ Section 1101A.

¹⁸ RG 183.25.

9. As noted above, ASIC approval of codes is not a legislative requirement and none of the major codes have been approved by ASIC. While codes can generally be taken into account by internal and external dispute resolution forums (such as the FOS) in resolving disputes, there are still no minimum standards which the provisions of codes must meet. The result is that the content of codes may be of limited assistance both in internal and external dispute resolution forums, and their usefulness in other forums such as courts may be limited. Hence where disputes fall outside the jurisdiction of bodies like the FOS¹⁹ enforcement may be more difficult. As noted above, the status afforded codes by the courts has not been made entirely clear.
10. An example that highlights consumer concerns about the effectiveness and enforceability of financial services codes is the evidence of non-compliance with the Code of Banking Practice particularly with respect to direct debit provisions. The Banking code sets out the banking industry's key commitments and obligations to customers on certain standards, with the last version taking effect from 1 February 2014.
11. The body responsible for enforcing the code is the Code Compliance Monitoring Committee (CCMC) – a body established under the provisions of the Code. While the CCMC can make a finding about a code breach, it investigates a relatively small number of cases (that is, 67 in 2015-16 with 18 confirmed breaches), has only one sanction available to it in the event of identifying a breach,²⁰ and the scope of its jurisdiction was curtailed in the *2013 Code* and accompanying *CCMC Mandate*.²¹ A recent independent review into the CCMC, conducted by Mr Phil Khoury, found that there was significant dissatisfaction amongst non-industry stakeholders with the effectiveness of CCMC and its enforcement of the code.²²
12. To some extent at least, Khoury saw this as a matter that could be addressed in the content of the code, recommending that:

“The Code and the CCMC Mandate should be redrafted to make it clear that the primary focus of the CCMC should be its monitoring and public assurance.”²³

This is one example of a matter that might be addressed by setting minimum standards as a requirement for ASIC approval.

19 The Government announced on 9 May 2017, in its response to the Ramsay Review, that it will set up a new single EDR body called the Australian Financial Complaints Authority to replace the FOS, Credit and Investments Ombudsman and the Superannuation Complaints Tribunal. The Body will be established by 1 July 2018 and will hear disputes with a monetary limit of \$1 million and a compensation cap of no less than \$500,000 for non-superannuation related financial disputes.

20 The CCMC can publicly name a bank where it has (i) been guilty of serious or systematic non-compliance; (ii) ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time; (iii) breached an undertaking given to the CCMC; or (iv) not taken steps to prevent a breach reoccurring after having been warned that the bank might be named: *2013 Code* cl 36(j).

21 The CCMC's compliance monitoring, investigation and reporting powers no longer extend to alleged contraventions of cl 3 and 4, unless there is also an alleged contravention of another clause of the Code: *2013 Code* cl 36(b)(iii); and the CCMC cannot investigate matters that are referred to the CCMC more than 12 months after the complainant became aware of the relevant events, or should have become aware of the relevant events: *CCMC Mandate* cl 6.2(a)(vi).

22 Phil Khoury, Independent review into the Code Compliance Monitoring Committee, 20 February 2017.

23 Recommendation 79.

3. POSSIBLE SOLUTIONS

1. In the United Kingdom, the Financial Conduct Authority is able to take disciplinary action against those that have failed to comply with codes of practice; however, enforceability does not extend to private actions for breaches of the code. In Australia, codes can assist financial services consumers in a number of ways including by reference in matters brought to the FOS (or the planned Australian Financial Complaints Authority); through code enforcement bodies; or, in some cases, by court proceedings (where it can be shown that code provisions form part of the contract between the provider and the consumer). The Taskforce considers that this framework offers flexibility for consumers and has benefits in terms of retaining a role for industry in enforcement of codes. Moving to a model such as that adopted in the UK would likely place a heavy burden on ASIC's resources and potentially reduce flexibility for consumers. For these reasons, and those outlined below, the Taskforce believes the existing regime, if bolstered by mandated participation and compulsory ASIC approval, is the preferred option.
2. Other jurisdictions have not sought to mandate the content of codes. For example, in Canada, codes of conduct in the financial services industry are voluntary with the corporate regulator having limited administrative tools to promote compliance. Hong Kong has a regime of code prescription but this appears to be more in the nature of guidance and stops short of giving the effect of law to the content of codes (see Annexure A for further information).
3. Calls have been made to give statutory effect to the content of financial sector codes in Australia.²⁴
4. There is already a regime for mandatory codes in Australia under the Competition and Consumer Act. This Act provides for a regime of mandatory and voluntary industry codes that can be given the effect of law.²⁵ However, the codes that have been prescribed under these provisions generally deal with specific issues between firms operating within an industry, which cannot be addressed through self-regulation, rather than with supplier interaction with consumers (an exception is the Unit Pricing Code). Government Guidelines on the use of this regime, issued in 2011, indicate that it is reserved only for cases where insurmountable problems had been demonstrated:

*'... codes of conduct which can be effectively developed, implemented and enforced by the participants in an industry are generally to be preferred over the prescription of industry codes in law. An industry will generally only be subject to government intervention where there is a demonstrable problem affecting other participants or consumers which the market cannot or will not overcome.'*²⁶

24 See for example Andrew Wilkie MP's private member's Bill – Banking Amendment (Establishing an Effective Code of Conduct) Bill 2017.

25 See Annexure A.

26 The Treasury, 'Policy Guidelines on prescribing industry codes under Part IVB of the *Competition and Consumer Act 2010*', May 2011, p. 2.

5. Ideally, the existence of industry codes and self-regulation should serve to improve consumer confidence in the relevant industries. In the Australian financial sector it may be inferred that their existence has had positive benefits for consumers in providing a tool to aid the resolution of disputes. As noted in the recent Review of the financial system external dispute resolution and complaints framework (Ramsay Review), “the number of disputes [in the sector] remains small compared to the overall size of the system and the number of interactions individuals have with it.”²⁷ However, as the Ramsay Review further notes: “the impact of financial disputes on the lives of individuals and their families can be devastating.”²⁸
6. The impact on the lives of those affected by poor practices, as brought to light in media reports and in Parliamentary and other inquiries, has resulted in the Australian financial sector coming under intense public and regulatory scrutiny in recent times and in the impairment of consumer confidence in the sector. In this context it is apt to consider whether self-regulatory initiatives such as industry codes are achieving their potential. A conclusion that codes have failed might have the result that they should be abandoned in favour of more formal regulation. The Taskforce does not, however, adopt that view. The fact that codes play a positive role in the resolution of disputes in internal and external dispute resolution schemes – a role that should in effect be expanded with greater coverage and access promised by the Government’s new Australian Financial Complaints Authority (AFCA) – is a foundation on which to conclude that strengthening the existing code regime may have the potential to enhance consumer trust and confidence in the sector.
7. For these reasons the Taskforce does not support a model under which the content of codes would be prescribed as law. Instead, the Taskforce supports a move to a co-regulatory model, under which industry participants would be required to subscribe to an ASIC approved code that would be binding and enforceable through contractual arrangements with an independent code monitoring body. A possible exception to this general position exists in relation to the ePayments Code, as this code has certain idiosyncratic features such as the facts that it is currently administered by ASIC (as there is no single representative industry body), and the scope of its regulatory population is broad, including small and large firms as well as new entrants with the advent of new technologies. In addition, as currently drafted the ePayments code does not contain enforcement mechanisms.
8. In the event of non-compliance with an approved code an individual customer would be entitled to seek appropriate redress through the participant’s internal and external dispute resolution arrangements. A code monitoring body would monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters. However, the content of the code would remain a matter for industry to determine consistent with the broad criteria set by ASIC.
9. Against that background the Taskforce adopts the following preliminary positions for consultation.

²⁷ Review of the financial system external dispute resolution and complaints framework, Final Report, April 2017, p. 7

²⁸ Ibid.

- 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.
- Position 2:** Entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFSL or some similar mechanism).
10. Calls for industry codes to be approved by ASIC have been made by the recent Khoury review²⁹ and the ASBFEO inquiry into Small Business loans inquiry which recommended that a revised Banking Code should be submitted to ASIC for approval.³⁰ The Australian Bankers Association indicated in its response to the Khoury review that it will be working with ASIC to have the new Code of Banking Practice approved under section 1101A of the Act.³¹
 11. The Taskforce recognises that if an industry is required by ASIC to have its code approved, this may involve costs, and will take time for negotiations with ASIC and other matters. For example, in some cases conduct associated with the formation of and subscription to codes may potentially enliven the provisions of Part IV of the Competition and Consumer Act 2010. Consideration will need to be given to whether these matters should be expressly taken to be authorised as an exception to Part IV.
 12. Imposing requirements such as these may give rise to complexities. For example, there may be subsectors where other arrangements may be in place. An example is for financial advisers (as opposed to financial services licensees) who will soon be subject to a requirement to comply with a code. From 1 January 2020, advisers must comply with the Code of Ethics made by the Financial Adviser Standards and Ethics Authority and be covered by a compliance scheme which will set out how the Code of Ethics will be monitored and enforced. The compliance scheme will specify which monitoring body is responsible for enforcing compliance. All monitoring bodies will need to be approved by ASIC and may be either a professional association or a third party who is independent of the licensee.
 13. In addition, the requirements may only be appropriate for sufficiently mature industries where 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. The Taskforce recognises, that imposing a mandatory requirement on individual licensees to subscribe to an ASIC approved code will not overcome the lack of capacity in an industry sector to develop one. In practice, it is likely that ASIC will first need to be satisfied that an existing or enhanced industry code meets the requirements for approval and second, determine that it is appropriate to mandate that all relevant licensees subscribe to the code to ensure comprehensive coverage.
 14. These considerations may affect the question of whether particular subsectors should be subject to the requirement to subscribe to an ASIC approved code.

29 Khoury, Phil *Report of the Independent Review of the Code of Banking Practice 2017*.

30 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans* 12 December 2016, recommendation 2.

31 Australian Bankers' Association, Response to Review Final Recommendations 28 March 2017, response to recommendation 99.

15. At the same time, it may be necessary, in some circumstances, to impose the requirement to subscribe to more than one code. For example it may be appropriate to require authorised deposit-taking institutions to subscribe to both the Banking Code of Practice and the ePayments Code.
16. For these reasons the Taskforce's view is that ASIC should have some flexibility in specifying activities that should be subject to the requirement to subscribe to an approved code and the timing for implementation of any such requirement. This position enables the regulator to ensure that firms are signatories to their appropriate codes of conduct, without an unnecessary increase in compliance costs.
17. There are key subsectors where gaps in coverage and or problems or ambiguities around enforcement of codes have been identified. The Taskforce considers that these subsectors should be prioritised in the application of the proposed requirement. However, the time at which any such requirements should take effect will be a matter best considered by ASIC on an assessment of all the relevant circumstances.

QUESTIONS

1. Would a requirement to subscribe to an ASIC approved industry code result in improved outcomes for consumers?
2. In respect of which financial sector activities should the requirement apply?
3. Should these requirements apply to providers of services covered by the ePayments Code? Or should that code be mandated by other means? If so by what means?
4. What costs or other regulatory burden would the requirement imply for industry?
5. Should conduct associated with subscription to approved codes be deemed to be authorised under section 51 of the Competition and Consumer Act?

Position 3: Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.

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.

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.

18. Many of the necessary requirements for content of the codes would already be spelt out in ASIC's Regulatory Guide 183. However, it may be necessary for ASIC to review and update that document, to capture the full spectrum of requirements of this co-regulatory model. Specifically, ASIC approval should be subject to the following requirements:
19. Each code would set out base level (rather than 'best practice') service standards that a consumer or small business customer can expect in dealings with the subscriber. It should not repeat or paraphrase existing legal obligations. It should be drafted in plain language, be accessible and clearly outline expectations and obligations.

20. Codes should be administered by an incorporated code body, the board of which includes an appropriate mix of industry representatives, consumer representatives and independent experts.
21. Codes should contain robust enforcement provisions including:
 - 21.1. Subscribers should be contractually bound to comply with the code, by an agreement with the code body. Where ASIC considers it appropriate, there could also be a requirement that the provisions of the code be incorporated into agreements with customers.
 - 21.2. Codes should expressly provide that a subscriber's failure to comply with the code is to be taken into account in resolving disputes with individual customers through the subscriber's IDR and by AFCA, on the basis that compliance with the code by subscribers is *expected* (rather than optional or aspirational).
 - 21.3. Each subscriber would be required to monitor its ongoing compliance with the code and report periodically to the code body. If, based on that report or following notification (for example by ASIC, AFCA or a relevant consumer or industry body) of concerns about a subscriber's code compliance record, the code body considers that there is systemic non-compliance, the code body could require the subscriber to take steps to improve its compliance practices. The code body could also escalate concerns to ASIC for further investigation (for example, of whether the non-compliance is evidence of a failure by the subscriber to meet the requirements of CA s 912A).
 - 21.4. The code body should keep the code content under review on an ongoing basis and adapt it to changing market conditions.

QUESTIONS

6. Will ensuring enforceability provisions of codes meet a minimum standard improve consumer outcomes?
7. Do any problems arise with imposing these requirements in relation to particular financial sector activities?
8. Are contractual arrangements with code monitoring bodies is the most effective enforcement mechanism?
9. Is it appropriate that, where feasible, code content be incorporated into contracts with customers?
10. Should the composition of individual code monitoring bodies and arrangements for enforcement be subject to ASIC approval?
11. What characteristics should code-monitoring bodies have? (for example, what level of independence should they have?)

ANNEXURE A — INDUSTRY CODES IN OTHER CONTEXTS

JURISDICTIONS

INDUSTRY CODES UNDER THE COMPETITION AND CONSUMER ACT 2010

1. Part IVB of the *Competition and Consumer Act 2010 (CCA)* provides for the prescription of mandatory or voluntary industry codes. The purpose of Part IVB and the codes made under it is to regulate conduct in the relevant industry in order to improve business practices, to provide some protection to participants or consumers and to decrease litigation.
2. An ‘industry code’ is defined in section 51ACA of the CCA as a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. Section 51ACB states that a person must not contravene, in trade or commerce, an applicable industry code. An ‘applicable industry code’ is defined as, in relation to a corporation that is a participant in an industry, the prescribed provisions of any mandatory industry code relating to the industry and the prescribed provisions of any voluntary industry code that binds the corporation. Mandatory codes are binding on all industry participants. Voluntary codes are binding on only those members of an industry or profession that have agreed to be bound by the code.
3. Section 51AE of the CCA allows industry codes to be prescribed in regulations proposed by the responsible Australian Government Minister. Regulations made under section 51AE:
 - 3.1. prescribe specific industry codes or specified provisions of an industry code;
 - 3.2. declare those industry codes to be either a mandatory industry code or a voluntary industry code; and
 - 3.3. in relation to voluntary industry codes, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be so bound. These methods may be by reference to provisions of the code.
4. In 2014, section 51AE was amended to add a specific power to include in industry codes provision of pecuniary penalties of up to 300 penalty units. The first and only Code to date in which penalties were inserted is the Franchising Code of Conduct.
5. Most industry codes under the CCA are mandatory codes. The Australian Competition and Consumer Commission (ACCC) keeps a public register of companies bound by voluntary codes. As of May 2017, four mandatory industry codes and one voluntary industry codes have been prescribed. These are:

Mandatory

- Franchising Code of Conduct – introduced in 1998;
- Horticulture Code of Conduct – introduced in 2006;
- Wholesale oil supply – introduced in 2006;
- Unit Pricing Code – introduced in 2009; and
- Horticulture Code – from 1 April 2017.

Voluntary

- Food and Grocery Code of Conduct – introduced in 2015.
6. Prescribed industry codes are enforceable by the ACCC or by private action under the CCA. The enforcement provisions and remedies are found in Part IVB and Part VI of the CCA, namely:
 - 6.1. public warning notices (s 51ADA);
 - 6.2. orders to redress loss or damage (other than awards of damages) (s 51ADB);
 - 6.3. infringement notices (ss 51ACC – 51ACJ);
 - 6.4. injunctions (s 80);
 - 6.5. damages (s 82);
 - 6.6. non-punitive orders, including community service orders, probation orders, disclosure orders and corrective advertising orders (s 86C);
 - 6.7. other compensation orders (s 87);
 - 6.8. enforceable undertakings (s87B).
 7. As identified above, the ACCC may issue an infringement notice imposing a pecuniary penalty where it believes on reasonable grounds that a person has contravened a civil penalty provision of an industry code. The penalty amount is 50 penalty units if the person is a body corporate, otherwise, it is 10 penalty units. The ACCC also has special investigative powers in relation to industry codes under Division 5 of the CCA.
 8. The Taskforce is of the view that there are significant differences between the industry codes under the CCA and the financial services codes. The majority of mandatory codes under the CCA are aimed at addressing particular issues between parties within the industry. For example, the franchising code addresses the information asymmetry and power imbalance that exist between franchisees and franchisors.
 9. Where self-regulation is non-existent or has proved ineffective, and a legislative solution is not appropriate, an enforceable industry code of conduct allows the participants to define the rules regulating their behaviour within the industry. The enforceable codes under the CCA seek to address issues which are internal to the industry, rather than regulating activities between the industry and consumers. The only voluntary code under the CCA: *the Food and Grocery Code of Conduct* also governs the conduct of grocery retailers and wholesalers in their dealings with suppliers.
 10. An exception is the unit pricing code, which requires retailers to display a unit price for all grocery items for consumers. Unit pricing enables consumers to quickly compare products of different sizes and brands in order to work out which one offers the best value. As such, the code does not address any specific industry issues, but regulates an aspect of how consumers interact with businesses in the grocery market. The code seeks to empower consumers in their purchasing decisions and to increase the level of competition in the grocery market.

PREScribed CODES OF CONDUCT IN THE UNITED KINGDOM

11. The Financial Conduct Authority (**FCA**) is the conduct regulator for financial services firms and financial markets in the United Kingdom, and is the prudential regulator for a portion of those firms. Pursuant to section 64 of the *Financial Services and Markets Act 2000 (FSMA)*, the FCA has the power to issue statements of principle and code of practice with respect to the conduct expected of approved persons.³² A code issued under this provision may specify descriptions of conduct which comply or do not comply with a statement of principle, and relevant factors to be considered. The ‘Statements of Principle and Codes of Practice for Approved Persons’, found in the FCA Handbook, were promulgated under section 64 of the FSMA.
12. A person who has failed to comply with a Statement of Principle issued under section 64 of the FSMA is guilty of misconduct.³³ The FCA may take disciplinary action against those approved persons it suspects of misconduct and the FCA is satisfied that this is an appropriate course to take.³⁴ The FCA may consider a public censure or impose a financial penalty or may suspend an authorisation of any function or impose such limitations or restrictions as it considers appropriate.³⁵ There is, however, no right for private action under section 13D of the FSMA (action for damages) for breach of the code.

PREScribed CODES OF CONDUCT IN HONG KONG

13. The Securities and Futures Commission (**SFC**) is the independent statutory body charged with regulating the securities and markets in Hong Kong. The SFC issues codes and guidelines to help industry participants comply with the laws.
14. Under section 169 of the *Securities and Futures Ordinance (SFO)*, the SFC has a specific power to prescribe codes of conduct for the purpose of giving guidance relating to the practices and standards with which intermediaries and their representatives are expected to comply. In addition, the SFC has a general power under section 399 of the SFO to issue codes and guidelines:
 - 14.1. to provide guidance for the furtherance of its regulatory objectives;
 - 14.2. in relation to any matters pertaining to any of its functions; and
 - 14.3. in relation to the operation of any provision of the SFO.

32 ‘Approved person’ means a person in relation to whom the FCA has given its approval under section 59 of the *Financial Services and Markets Act 2000*.

33 *Financial Services and Markets Act 2000*, section 66(2)(a).

34 *Financial Services and Markets Act 2000*, section 66(1).

35 *Financial Services and Markets Act 2000*, section 66(3).

15. As of May 2017, the SFC has published 11 codes of conduct.³⁶ Such codes are not subsidiary legislation³⁷ and failure to comply with them does not by itself render a person liable to any judicial or other proceedings, but may be admissible as evidence.³⁸ Further, for codes published under section 169 of the SFO (that is, the 'Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission'), a breach may be taken into account by the SFC when considering whether a licensee is a fit and proper person to remain licensed or registered.³⁹
16. If the SFC finds a person not fit and proper, it is empowered to impose one or more of the following sanctions:
 - 16.1. revocation or partial revocation of licence or registration;
 - 16.2. suspension or partial suspension of licence or registration;
 - 16.3. revocation of approval to be a responsible officer;
 - 16.4. suspension of approval to be a responsible officer;
 - 16.5. prohibition of application for licence or registration;
 - 16.6. prohibition of application to become a responsible officer, executive officer or relevant individual;
 - 16.7. fine up to the maximum of HK\$10 million or three times of the profit gained or loss avoided, whichever is the higher; and
 - 16.8. private or public reprimand.
17. Accordingly, breach of a conduct of conduct provision could ultimately lead to disciplinary action through a finding of non-fitness and propriety.

VOLUNTARY CODES OF CONDUCT IN CANADA

18. The Financial Consumer Agency of Canada (FCAC) was established by the federal government in 2001 to regulate the market conduct of federally regulated financial entities, strengthen oversight of consumer issues and expand consumer education in the financial sector. Its responsibilities include:⁴⁰
 - 18.1. promoting the adoption of voluntary codes of conduct and public commitments by financial institutions that are designed to protect the interests of their customers; and
 - 18.2. monitoring the compliance of these instruments by financial institutions.

³⁶ A list of codes is available at <http://www.sfc.hk/web/EN/rule-book/codes-and-guidelines/codes/>.

³⁷ Securities and Futures Commission, sections 169(6) and 399(8).

³⁸ Securities and Futures Commission, sections 169(4) and 399(6).

³⁹ Securities and Futures Commission, section 169(4).

⁴⁰ *Financial Consumer Agency of Canada Act*, section 3(2). This mandate does not seem to require the FCAC to implement or enforce compliance.

19. If a financial institution has adopted a voluntary code of conduct or made a commitment identified above, the FCAC may make or cause to be made any review that it considers necessary to monitor compliance with the code or commitment.⁴¹
20. Where the FCAC identifies possible non-adherence to a voluntary code of conduct or a public commitment, it can resort to the following administrative tools to promote compliance:
 - 20.1. ***Non-substantive letter***: a letter sent to a financial entity as a notification that the FCAC is aware of possible contravention, but will not pursue the issue further for the time being. The FCAC continues to monitor the issue to identify any trends that may develop. It expects that the financial entity will review the issue noted and assess the practice concerned to ensure compliance.
 - 20.2. ***Letter of concern***: a letter to inform a financial entity of the FCAC's concerns regarding its investigative findings and to advise the entity that it possibility will take stronger regulatory actions in the event of another contravention. In addition, the FCAC continues to monitor the issue to identify any trends that may develop. There is an expectation that the financial entity will also review the issue noted, assess the practice to ensure compliance and report to the FCAC when changes are made.
 - 20.3. ***Letter of concern with an action plan***: a letter of concern similar to the one identified above, but with recommended measures (that is, action plan). An action plan requires the financial entity to provide information on the cause non-compliance, as well as measures it plans to undertake to prevent recurrence.
 - 20.4. ***Non-compliance letter***: a letter notifying the financial entity that the FCAC is aware of possible non-adhere to a code or commitment and that it will close the case as non-compliant. In some cases, the FCAC will request a financial entity to take appropriate measures in order to work toward full adherence with the code or commitment. The financial entity has the right to make representations to the Commissioner to contest the non-compliance letter if it deems necessary.
21. Incidents of non-compliance do not form part of the financial entity's compliance history and are not subject to an administrative monetary penalty. However, they will be considered in the Risk Assessment Model when establishing the risk level of a financial entity.⁴²

41 Financial Consumer Agency of Canada Act, section 5(3).

42 The Risk Assessment Model (RAM) is an internal compliance tool that helps the FCAC establish relative levels of risk of individual financial entities based on items such as market presence, corporate structure, relevant market conduct data and controls. The RAM helps identify entities that have a higher probability of non-compliance related to legislative provisions, voluntary codes of conduct and/or public commitments, and render a respective outcome into a single net residual risk score. In turn, the risk scores associated with each entity allows the FCAC to better focus on high-impact industry issues and aids in determining which compliance activities will be conducted by FCAC.

ANNEXURE B – ASIC ENFORCEMENT REVIEW TASKFORCE

TERMS OF REFERENCE

The Taskforce will review the enforcement regime of the Australian Securities and Investments Commission (ASIC), to assess the suitability of the existing regulatory tools available to it to perform its functions adequately.

The review will include an examination of legislation dealing with corporations, financial services, credit and insurance as to:

- The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
- The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally;
- The adequacy of existing penalties for serious contraventions, including disgorgement of profits;
- The adequacy of enforcement related financial services and credit licensing powers;
- The adequacy of ASIC's power to ban offenders from occupying company offices following the commission of, or involvement in, serious contraventions where appropriate;
- The adequacy of ASIC's information gathering powers and whether there is a need to amend legislation to enable ASIC to utilise the fruits of telephone interception warrants or to grant the equivalent of Federal Crimes Act search warrant powers under ASIC's enabling legislation for market misconduct or other serious offences;
- The adequacy of ASIC's powers in respect of licensing of financial services and credit providers, including the threshold for granting or refusing to grant a licence, the circumstances in which ASIC may vary, suspend, or cancel licenses; and its coercive powers (including whether there is a need for ASIC to have a power to direct licensees to take, or refrain from taking, particular action);
- The adequacy of the frameworks for notifying ASIC of breaches of law, including the triggers for the obligation to notify; the time in which notification is required to be made; and whether the obligation to notify breaches should be expanded to a general obligation (currently confined under the Corporations Act to auditors, liquidators, and licensees, and noting that obligations to report offences exist under other Federal or State statutes); and
- Any other matters, which arise during the course of the Taskforce's review of the above, which appear necessary to address any deficiencies in ASIC's regulatory toolset.

Upon completion of the Review, the Taskforce will identify any gaps in ASIC's powers and make recommendations to the Government which it considers necessary to strengthen any of ASIC's regulatory tools and as to the policy options available that:

- address gaps or deficiencies identified in a way that allows more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- do not impose undue regulatory burden on business, and promote engagement and cooperation between ASIC and its regulated population;
- promote a competitive and stable financial system that contributes to Australia's productivity growth; and
- relate to other matters that fall within this Terms of Reference.

Further information on the ASIC Enforcement Review taskforce is available at our website: <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>.