

Enforceability of Industry Codes

Submission to Treasury

Australian Financial Complaints Authority

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Overview

The Australian Financial Complaints Authority¹ (AFCA) is the independent external dispute resolution (EDR) scheme for the financial sector.

AFCA welcomes the opportunity to provide feedback on the draft legislation and related material released by Treasury on 31 January 2020, which implements recommendations of the Financial Services Royal Commission. We support these reforms and anticipate they will raise standards of consumer protection and strengthen regulation in the financial sector.

This submission² comments on the Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.15 (enforceable code provisions).

AFCA strongly supports initiatives to improve the enforceability of industry codes. This submission suggests modifications to clarify and strengthen the draft legislation.

This submission draws on the experience of AFCA and its predecessors. We have handled financial services complaints for more than 25 years. A separately operated and funded team within AFCA provides services to support independent committees that monitor compliance with several financial services industry codes.

1. Present position

At present, provisions of industry codes may be enforceable contractually. They may also be given effect through AFCA decision-making.

1.1 Industry codes

Industry codes set standards of good or best industry practice for financial firms when dealing with their customers, including individual and small business consumers. These standards relate to service provision, professional conduct and practice as well as ethical behaviour.

Industry codes are designed to supplement the minimum requirements set out in legislation, and act as a self-regulation initiative to provide consumer protection through the standards set and a system of informal complaint resolution.

¹ Appendix 1 provides a brief overview of AFCA. For comprehensive information about AFCA, see our website www.afca.org.au.

² This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

Subscription to a code for an industry sector is voluntary for financial firms operating in that sector. Firms that subscribe to a code agree to be bound by its provisions.

1.2 AFCA decision making

Inherent in AFCA's purpose and values is the provision of a fair and independent EDR service. Fairness is one of the key principles underpinning the AFCA scheme and is a central element of our decision-making approach. Complaints are considered objectively and without bias, by staff and decision makers with appropriate expertise.

AFCA's decisions must fairly reflect the information provided to us and apply the decision-making criteria in the [AFCA Rules](#). While every decision will have unique features, and decision makers must consider the particular facts of a complaint, stakeholders can be confident that decisions made about complaints with similar issues will result in consistent outcomes.

AFCA Rule A.14.2 requires an AFCA decision maker to do what is 'fair in all the circumstances' when determining a complaint. Decisions must have regard to legal principles, applicable industry codes or guidance, good industry practice and previous determinations. AFCA will apply the relevant standards that applied at the time the conduct occurred.

1.3 How code provisions are given effect

Provisions of industry codes are given effect in different ways. For example, the Banking Code of Practice (BCOP) says that the written terms and conditions for banking services and guarantees to which the code applies will include a statement to the effect that the relevant code provisions apply but need not set out those provisions.³ This means that if a bank has adopted the BCOP, all contracts between the bank and consumers include the bank's commitment to comply with the provisions of the code.

AFCA considers that, if a bank adopts the BCOP but does not comply with it, the bank has breached its contract with the consumer. In this case, the consumer may be entitled to compensation for any loss they suffered as a result of the breach.

Alternatively, an industry code may not form part of the contractual relationship between the financial firm and the consumer, but the firm may have subscribed to the code and, by doing so, agreed to be bound by its provisions. In deciding whether the firm's conduct was fair in the circumstances of a complaint, AFCA has regard to the relevant provisions of the industry code. If we consider that the firm did not meet its obligations under the code, the consumer may be entitled to compensation for any loss they suffered as a result of the non-compliance.

³ See [BCOP](#), paragraphs 2 and 3.

There may also be scenarios where AFCA considers a complaint against a financial firm that has not subscribed to the relevant industry code. In these cases, the firm has not made a commitment to the consumer to adopt, or act in accordance with, the provisions of the code.

In considering these complaints, AFCA may compare the standards of good industry practice set in the relevant industry code against the conduct or practice of the financial firm. This may occur if there is no clear reason as to why the industry code should not be applied. If we consider that the firm's conduct or practice fails to meet the standards in the code, the consumer may be entitled to compensation for any loss they suffered as a result of the firm's conduct or practice.

2. Improving code enforceability

AFCA suggests the reforms should include the measures outlined below to improve the enforceability of industry codes.

2.1 Enable consumers to enforce all codes contractually

AFCA considers that the provisions of an industry code should form part of the contracts between the code's subscribers and their customers. This arrangement allows consumers to enforce the code using contractual remedies. The BCOP operates in this way at present and we consider that this model could be followed for other industry codes.

All subscribers to an industry code should be required to comply with **all provisions** of the code. It would be very confusing to consumers to have a code with some mandatory and some voluntary provisions. The approach of requiring compliance with all provisions is simpler, clearer and consistent with the current approach for the BCOP.

Financial firms are encouraged to make commitments, through industry codes, to exceed the standards set in law. If consumers cannot enforce all of the provisions in a code, subscribers may focus only on compliance with the enforceable provisions. This direct adverse impact would be significant. More broadly, the impact could be a reduction in the effectiveness of codes as mechanisms to raise industry standards.

The reforms rely on self reporting by code subscribers. There is a risk that a regime in which some, but not all, code provisions are enforceable may not promote full reporting.

2.2 Provide for independent bodies to monitor code compliance

It is essential to ensure compliance with industry codes is monitored by an independent body. We note that independent monitoring committees exist for the following codes:

- BCOP, monitored by the [Banking Code Compliance Committee](#)
- General Insurance Code of Practice, monitored by the [General Insurance Code Governance Committee](#)
- Customer Owned Banking Code of Practice, monitored by the [Customer Owned Banking Code Compliance Committee](#)
- Insurance Brokers Code of Practice, monitored by the [Insurance Brokers Code Compliance Committee](#)
- Life Insurance Code of Practice, monitored by the [Life Code Compliance Committee](#).

For each of these codes, compliance is monitored by a committee independent of the industry association responsible for the code. We believe the work of the committees not only promotes compliance but also enhances the development of the codes. Their work may, for example, identify gaps in a code or the need for improvements to respond to changes in industry practice, law or community expectations.⁴

2.3 Ensure code compliance monitors have sufficient power

AFCA considers that, for compliance monitoring of an industry code to be effective, the powers of the monitor would need to include:

- conducting own-motion inquiries
- examining records of subscribers including, but not limited to, information required to be submitted to meet self reporting obligations and
- (if the monitor does not itself have enforcement powers) referring non-compliance matters to ASIC for enforcement.

We also consider that an industry code should be enforceable against its subscribers through contractual arrangements with the code compliance monitor.

2.4 Include measures for code enforcement by ASIC and code compliance monitors

AFCA strongly supports the introduction of new measures for code enforcement by ASIC. We believe independent code compliance monitors should also play important roles in enforcement. Given the potential for overlap, we consider that the interface between ASIC and compliance monitors needs to be clearly delineated to ensure transparency and clarity for industry and other stakeholders.

⁴ Further information about the work of the code compliance committees can be accessed through the links above.

3. Code reviews

The draft legislation requires industry codes approved by ASIC to be reviewed at five year intervals. AFCA agrees that regular independent reviews should be required. Our view is that five years should be the longest interval permitted between reviews.

We suggest there should be provisions to allow concerns about a code's operation or impact to be raised at any time with the body that applied for the code's approval, ASIC and the code compliance monitor. The monitor should be made responsible for providing ongoing feedback to identify areas of the code that are working well and those that may require improvement.

Appendix – About AFCA

AFCA is the independent EDR scheme for the financial sector replacing the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

AFCA sees its purpose as providing fair, independent and effective solutions for financial complaints. It does this not only by providing complaint resolution services free to consumers, but also by working with its members to improve their processes and drive up industry standards of service, thereby minimising complaints.

More broadly, AFCA plays a key role in restoring trust in the financial services sector. In addition to providing solutions for financial complaints, AFCA has responsibilities⁵ to identify, resolve and report on systemic issues and to notify ASIC, and other regulators, of serious contraventions of the law.

AFCA's service is offered as an alternative to tribunals and courts to resolve complaints about financial firms made by individual and small business consumers. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation.

AFCA's role is to assist consumers to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent.

If a complaint does not resolve between the parties, we will decide an appropriate outcome, including awarding compensation for losses suffered or substituting the trustee's decision in the case of a superannuation complaint.

⁵ See [ASIC's Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*.