Financial Rights
LEGAL CENTRE

**Submission by the**

**Financial Rights Legal Centre**

The Treasury

# 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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## About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

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## Introduction

Thank you for the opportunity to comment on the Treasury's Consultation Paper on Enforceability of financial services industry codes.

Financial Rights supports making financial services industry codes of practice enforceable.

The easiest and most effective way to ensure that industry codes of practice are enforceable by a consumer is to mandate that codes of practice be incorporated into individual contracts between the consumer and the financial service provider.

ASIC approved codes *in their entirety* should also be made enforceable by the regulator in respect of which a contravention will constitute a breach of the law.

ASIC's power to approve codes of practice should be extended to codes relating to all APRA-regulated institutions and ACL holders.

The criteria that ASIC should consider when approving a code should be the full complement of 11 criteria as outlined under RG 183.12 but with strengthened wording to ensure industry cannot weaken a code by picking and choosing elements that suit.

Remedies should be introduced for the breach of an 'enforceable code provision' modelled on Part VI of the Competition and Consumer Act.

ASIC should be provided with the full regulatory toolbox and apply civil penalties for individual enforceable code breaches as well as ongoing or systemic breaches of the enforceable provisions of an industry code.

The power to establish and impose a mandatory industry code with a hard timeframe in place should be provided to ASIC.

Subscribing to an approved code should be a condition of all businesses operating in an industry sector including all licensed and unlicensed entities.

Determinations by external dispute resolution should continue to be binding on the industry member as long as the consumer accepts the Determination. If the consumer doesn't accept the Determination, the consumer should continue to be able to take the matter to a Court or Tribunal. We do not support treating any resort to AFCA as an election not to pursue court remedies.

## Questions on recommendation 1.15

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

Subscribing to an approved industry code:

- increase public confidence in the individual company, the industry and the financial services sector more broadly;
- sends a strong signal to consumers that they can have confidence in the Code;
- demonstrates that the financial services industry proactively responds to identified and emerging consumer issues and that the codes work to deliver substantial benefits to consumers
- ensures that investigative or enforcement action can be undertaken if misrepresentations are made about a code;
- sets minimum benchmarks that will be met by industry
- enables ASIC to monitor a code based on issues raised by consumers, External Dispute Resolution (**EDR**) schemes or industry consultations;
- provides greater certainty that consumer concerns and independent review recommendations will be taken seriously and more likely implemented – rather than some recommendations for change being watered down significantly or rejected outright as sometimes occurs now;
- gives consumers the confidence that there is specific government/ASIC oversight of the Code and its ongoing development;
- guarantees that companies will no longer be able to walk away from their code.

We have argued for some time now that industry organisations should show leadership and send a strong message to consumers, subscribers and the financial services sector by seeking ASIC approval. To date only one industry organisation – the ABA with its Banking Code of Practice - has taken this step.

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

We are aware that the some parts of the financial services sector – particularly in the general insurance, life insurance and life insurance in superannuation industries – continue to be wary of committing to enforceable codes of practice or enforceable code provisions.

As we understand it, these issues are as following:

***The costs of compliance will increase and these costs will be passed on to the consumer***

If there is in fact an increase in costs complying with current codes of practice this is an explicit admission that the codes of practice have not been adhered to and the promises made have been seen as aspirations rather than commitments. This would be a clear demonstration as to why the codes need to become mandatory and enforceable. Commissioner Hayne made the same observation with respect to claims handling.[1] Consumers do not need insurance products that do not deliver as promised.

Further we do not accept that the cost of compliance should fall on consumers. Financial services providers' and their shareholders' profits have been propped up by a system that has provided significant advantage to them against the interests of their customers. The cost burden should therefore be placed upon shareholders and executives who have profited from business models and a regulatory system that have acted against the consumer interest.

There is currently a problem with competition in the market place because it is virtually impossible for consumers to make meaningful comparisons between products or to ensure they are getting value. There are a number of measures currently under consideration, or in the process of implementation, that could help address this issue, including: component pricing; disclosing the previous year's premium; improvements to disclosure and standard cover; and improved reporting of vital statistics such as claims ratios, refusal and withdrawal rates and complaints. If fully implemented these reforms could assist in both facilitating consumer's shopping around for value as a competitive pressure to keep prices contained, at the same time as ensuring insurers are appropriately motivated to invest in claims handling and customer service.

***Mandating enforceable provisions will result in two codes – one enforceable, one unenforceable.***

Financial Rights understands that industry is arguing that having parts of a code of practice be enforceable will mean there will be two codes – one with enforceable clauses and another without. This bifurcation, the argument goes, will lead to companies prioritising and focusing on complying with the enforceable code and ignoring or at least proving les attention to the other.

The fact that this argument has been put forward by industry again demonstrates that the industry sees commitments without enforceability as optional and aspirational and has been to date.

If it is the case that the industry will set different levels of commitment to voluntarily made promises, we believe that the Government must act to avoid such arbitrage.

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[1] "*…there can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly and fairly is to impose on the individual insurer, or the industry more generally, a burden it should not bear. If it were to be said that it would place an extra burden of cost on one or more insurers or on the industry generally, the argument would itself be the most powerful demonstration of the need to impose the obligation.*" Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Vol 1, page 309, https://financialservices.royalcommission.gov.au/Pages/reports.aspx

We believe that the entire code should be made a mandatory part of the contract with the consumer. This is a straightforward solution to the issue of having two codes and two levels of commitment for the sector.

If the Codes are not made enforceable in their entirety, then it is absolutely imperative that the code compliance bodies are properly resourced and able to apply meaningful sanctions to mitigate this potential dual code effect.

***Philosophical adherence to self-regulation being voluntary***

The insurance sector has long been reticent to make their codes of practice enforceable. The FSC did not choose to make the Life Insurance Code enforceable and had not made a statement that it would seek to have the second iteration Life Insurance Code be made enforceable. The Life Insurance in Superannuation Code is not even binding on its members.

The ICA too has not supported the concept of enforceability as one that makes the Code a part of the contract with the consumer. They have argued:

> *providing enforceability through CGC oversight and sanction powers and through EDR should be sufficient to meet the requirements of RG 183 and that requiring subscribers to also incorporate their agreement to abide by the Code into individual contracts with consumers is unnecessary and not supported by the ICA and the industry.*[2]

This view does not align with the recommendations of the Royal Commission. We have yet to hear anything from the ICA as to whether their view has changed.

The Royal Commission has demonstrated in no uncertain terms the problems that have arisen from codes of practice being voluntary and unenforceable. Self-regulation without enforceability and without the threat of becoming mandatory has fundamentally failed and any continued arguments to the contrary must be dismissed out of hand.

Two recent reports from the Life Insurance Code Compliance Committee (LCCC) and the General Insurance Code Governance Committee (CGC) demonstrate the failing state of self-regulation in this regard.

With respect to the Life Insurance Code, the LCCC were highly critical of life insurer's commitment to compliance with the code stating that:

> *While subscribers generally reported that they were satisfied with their Code risk and compliance frameworks, the Committee is not confident that all subscribers have robust frameworks in place. The quality of subscribers' processes appears to be inconsistent and in some instances, poor. As a result, the Committee believes that subscribers may not be accurately capturing all isolated breaches. There is room for improvement and the Committee*

[2] Pages 73-4, ICA, Final Report, Review of the General Insurance Code of Practice Insurance Council of Australia June 2018

*has made several suggestions to improve the robustness of individual subscribers' compliance frameworks.*[3]

They also noted a significant underreporting of complaints recommending that:

*good practice is for Code subscribers to monitor and record all complaints, including monitoring the complaints received by third party distributors of their products. With the Australian Securities and Investments Commission (ASIC) signalling its intention to review internal complaints handling as part of its corporate plan, the Committee hopes that for next year's Report, more subscribers will be recording and reporting on all the complaints they receive. This will enable a more detailed analysis of consumer concerns and complaint handling.* [4]

The longer standing General Insurance CGC were even more damning of general insurers approach to self-regulation:

*Appropriate compliance monitoring and governance arrangements do not exist in all subscriber organisations. In light of the evidence coming out from the Royal Commission, and the outcome of APRA's prudential review of CBA's accountability, culture and governance frameworks, some subscribers need to question whether they have shown good faith in the past.*

*Industry now needs to step up, improve its game and take the Code more seriously. Compliance failures need to be addressed; not just given lip service.*[5]

Both the Life and General Insurance Code Compliance reports found high levels of Code breaches. In its first year of existence the LCCC found there to be 164 breach events, 7,926 isolated breaches event with 1,766,803 consumers potentially impacted. The General Insurers notes 11,774 code breaches in 2017/18, up 32 per cent from the previous year. Other code compliance committees too have reported high levels of non-compliance: COBA's Code Compliance Committee for example found disappointing levels of compliance with section 20.1 of the COBA Code with respect to promptly cancelling direct debit facilities.[6]

We would expect that if codes of practice were to be approved, enforceable and mandatory compliance would increase with subsequent increases in positive consumer outcomes.

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[3] Page 6, Life Code Compliance Committee Life Insurance Code of Practice, Annual Industry Data and Compliance Report 2017−18, March 2019 https://www.afca.org.au/public/download/?id=9730

[4] Page 5, Life Code Compliance Committee Life Insurance Code of Practice, Annual Industry Data and Compliance Report 2017−18, March 2019 https://www.afca.org.au/public/download/?id=9730

[5] General Insurance CGC, Deliver strong and fair culture or risk business, insurers told, 8 April 2019 https://www.afca.org.au/public/download.jsp?id=9939

[6] Customer Owned Banking Code Compliance Committee, Compliance with direct debit cancellation obligations disappointing A follow-up own motion inquiry by the Customer Owned Banking Code Compliance Committee March 2019 http://www.cobccc.org.au/uploads/2019/03/COB-OMI-Direct-Debit-21March2019.pdf

In addition to these we wish to raise a number of further issues that we believe need to be considered.

***Codes are enforceable when incorporated into the contract***

We note that the Banking Code of Practice and the Customer Owned Banking Code of Practice are both included in the contract or terms and conditions with the consumer.

The new Banking Code states:

> ***The Code forms part of our banking services and guarantees***
>
> *2. Our written terms and conditions for all banking services and guarantees to which the Code applies will include a statement to the effect that the relevant provisions of the Code apply to the banking service or guarantee.*
>
> *3. The terms and conditions need not set out those provisions.*

The COBA Code states at Part B:

> ***Commitment to comply with Code***
>
> *We undertake to comply with this Code in our dealings with you. We will incorporate this Code by reference in our written Terms and Conditions for products and facilities to which the Code applies. We will ensure we do this within six months of the commencement date of this Code; or, if we subscribe to this Code after its commencement, within six months of the date on which we first subscribe.*

The enforceability of the Banking Code clauses has been tested a number of times by the courts and have been found to have the force of contractual obligation.

The most recent case is *Westpac Banking Corporation v Haynes* [2017] SASC 23, BC201701191. Nicholson J found that:

> *it is well accepted that clause 25.1, when incorporated contractually into a banker and customer relationship, will provide for, at least, a contractual warranty by the bank in accordance with its terms.*[7]

Nicholson J favourably cites Hargrave J in *Commonwealth Bank of Australia v Doggett:*

> *Clause 25.1 of the Code is in my opinion a contractual obligation extending beyond the previously recognised duties or obligations of banks. It is expressed in promissory language ("we will") and the promise is expressly one to "exercise the care and skill of a diligent and prudent banker" for a specific purpose.*[8]
>
> *… As appears above, cl 25.1 of the Code imposes a specific contractual obligation on the Bank. It contains a promise by the Bank to exercise, or warranty that it has exercised, the*

[7] Para 56

[8] *Commonwealth Bank of Australia v Doggett* [2014] VSC 423 at [118].

> *stipulated standard of care in forming the requisite opinion before offering the relevant credit facility.*[9]

At footnote 35 Nicholson J refers to further common law considerations the application of the Code

> *To date, most authorities dealing with clause 25.1 and other provisions of the Code have involved claims by guarantors for breach of Code provisions incorporated into bank guarantee documents, see for example,* NAB Ltd v Rose *[2015] VSC 10 and, on appeal, [2016] VSCA 169;* CBA v Wood *[2016] VSC 264 and* Commonwealth Bank of Australia v Doggett *[2014] VSC 423 and, on appeal,* Doggett v Commonwealth Bank of Australia [*2015] VSCA 351. However,* ANZ Banking Group Ltd v Fink *[2015] NSWSC 506 did involve the incorporation of clause 25.1 into a customer's loan agreement.*

Given this it is clear that the Banking Codes of Practice is enforceable at law since it is incorporated as part of the contract with the consumer. We believe that requiring all codes of practice to be incorporated into the contract with the consumer - would be the most straightforward way to ensure codes of practice are enforceable.

This could be implemented via a license condition or beefing up the language of RG 183.27 to make mandatory the incorporation of the code in individual contracts with the consumer. This is discussed further below under Question 3.

The fact that the Banking Code and the COBA codes are currently enforceable as a part of the contract with the consumer raises another issue: in the case that a model of "enforceable code provisions" is introduced then this has the potential to decrease consumer rights with respect to those codes.

***Introducing a regime of "enforceable code provisions" is likely to be a step backwards for the banking and COBA codes of practice***

Introducing a regime where only some of the code of practice commitments will be enforceable would mean that there may be fewer enforceable clauses under the ABA and COBA Codes of Practice. As there currently are – a derogation of current consumer rights.

While the ABA and COBA could decide to maintain the commitment to make their respective codes a part of the contract with the consumer, there is nothing ensuring that this will be the case, and unless required, it is more likely than not that the two sectors will simply align with the new enforceability regime.

The simplest way to proceed on enforceability is therefore again, to ensure that codes of practice are made a part of the contract between the consumer and the financial services provider/subscriber.

[9] At [132]

***Codes of practice should be able to be enforced by the regulator***

In addition to the above, Financial Rights believes that the entire code of practice should also be enforceable by the regulator as a breach of the law. This is to ensure that those code provisions that do not go directly to the relationship between the customer and the financial service provider are able to be overseen and enforced on behalf of all consumers. It is unlikely that an individual customer would seek to enforce provisions that do not go directly to the relationship between the customer and the financial service provider. The regulator must be empowered to do so on their behalf.

***Excluding some code provisions from being enforceable undermines the systemic value of those provisions for all consumers***

Introducing a regime where the regulator is unable to enforce a code provision that does not go directly to the relationship between the consumer and the financial services provider essentially would undermine the systemic value of those provisions for consumers as a whole.

A commitment to training staff, such as that found at Clause 36 of the Banking Code of Practice:

> *We will provide cultural awareness training to staff who regularly assist customers in remote Indigenous communities*

ensures that all Aboriginal and Torres Strait islander customer will be treated in a culturally appropriate manner. Similarly if subscribers commit to taking

> *reasonable steps to make information about our banking services accessible to customers in remote communities*

as per Clause 35 Banking Code of Practice, all remote community consumers will benefit from banks meetings this clause and will be let down if this is not met.

Some clauses too provide the subscriber with some leeway on whether they act on a commitment in the Code. For example, Clause 149 of the Banking Code states:

> *We may waive or refund fees for providing you with a copy of a document or statement 149. We may charge you a reasonable fee for providing you with a copy of a document under this Code. However, in certain circumstances we may waive or refund that fee*

The use of the modal verb "may" suggests that in an individual case the subscriber may waive or refund a fee or may not. An individual therefore may not be able to enforce it in their own case because there is no certainty that the subscriber will act. However if a Code Committee or ASIC were to examine the implementation of this clause and found that out of 5000 times the circumstance has been raised and nobody has had their fees waived or refunded then there should be some ability for the regulator to step in and enforce the code to ensure genuine consideration is provided to a waiver.

The same applies to the above examples. ASIC should be able to take enforcement action if subscribers have not fulfilled these commitments.

These commitments and clauses go directly to addressing systemic issues raised with financial services providers. It is very unlikely that individual consumers will ever seek a remedy for a breach of these terms but as a whole, consumers would want to ensure that these clauses are being met. Giving ASIC the power to enforce these clauses is therefore critical to ensure that they meet these clauses. Otherwise there is the possibility that they will not meet these clauses/commitments, given the issues the industry have raised between splitting the Codes and focussing on those that are enforceable at law.

There is also the risk that making some clauses enforceable and others not will simply lead to increased complexity and confusion for consumers and bank employees.

***Some industry bodies may see the introduction of mandatory enforceable codes as an opportunity to lower standards***

Financial Rights is deeply concerned that those sectors who are currently in the process of re-drafting their codes of practice (ie. General Insurance, Life Insurance, Customer Owned Banking and the National Insurance Brokers) or who have a purely voluntary code (superannuation trustees with their insurance in superannuation code of practice) will seize the opportunity and time given to finalise these codes to lower standards and commitments or delay for as long as possible. We expect that that industry will do so in order to lower compliance costs.

We would hope that ASIC would take this into account in approving codes and that this issue be explicitly referenced in Treasury rules (see below under Question 3).

***There are currently examples of competing industry codes with different consumer protection standards***

There are currently two codes of practice in the banking sector – one administered by the Australian Bankers Association and the other by the Customer Owned banking Association. Most consumers do not understand the difference between the two types of deposit taking institution. Those that do would not expect lower standards of consumer protection from customer owned banks (arguably they would expect the contrary).

We understand there may be a case to be made that the ABA and COBA can compete on raising standards, to the benefit of consumers. We do not agree. Competition is not a reliable driver of improved standards. Nor are differing standards for similar services appropriate. It is inefficient to have two different Codes and a waste of time and resources. A range of other factors are stronger drivers for change and innovation in Codes:

- consumer movement advocacy, policy development and campaigning;
- periodic *independent* reviews; and
- individual actors within Code compliance monitoring and peak bodies who (for a variety of reasons) drive proactive change within their organisations

Consumers should be afforded the same consumer protections no matter what banking service they use. To allow for different levels of consumer protections would be to maintain

loopholes gaps and exceptions that Commissioner Hayne sort to remove under Recommendation 7.3.

We recommend that there be one Code of Practice for Banking services for all lenders with the highest standards from both the Banking and COBA Codes being applied. This would largely mean that the Banking Code will be the standard[10] however we would note that there are a small number of commitments made by COBA members with respect to reverse mortgages and privacy and security of personal and financial information that are not included in the Banking Code and should be.

As to the argument that smaller customer owned banks may not be able to afford the compliance costs of higher standards that larger banks may be able to, we cannot accept that the outcome of competition should be lower consumer protections for those who choose to be with one bank than another. If any difference in regulatory standards is appropriate at all, it should not be in standards of consumer protection.

Financial Rights also points to the duplication of the current Life Insurance in Superannuation Code of Practice and the Life Insurance Code. We note that the Financial Services Council is planning to incorporate the voluntary Life Insurance in Superannuation Code into the second iteration of the Life Insurance Code as a Chapter 2. The FSC has stated that it intends to make this Chapter binding upon FSC members, with a view for the remaining industry participants to sign up and mandate compliance. While we support this, there does remain the possibility that the two Codes may diverge over time.

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

The Treasury Consultation Paper states that "ASIC has produced regulatory guidance around what codes must include" and refers to RG 183.25 the section of the regulatory guide that details what is expected with respect to enforceability.

While it is true that a code must meet the criteria listed under 183.25, enforcement is only one of eleven criteria that a code must meet for ASIC to approve a Code. These eleven criteria are listed at RG 183.12:

- Freestanding and written in plain language (RG 183.55 & RG 183.129)
- Body of rules (not single issue, unless Section E of this guide applies) RG 183.19 & RG 183.24
- Consultative process for code development RG 183.49–RG 183.54
- Meets general statutory criteria for code approval RG 183.28–RG 183.41
- Code content addresses stakeholder issues RG 183.55–RG 183.62
- Effective and independent code administration RG 183.76–RG 183.81

[10] The differences between the two codes is outlined in the recent Joint Consumer Submission to the Independent Review of the Customer Owned Banking Code of Practice – March 2019 https://financialrights.org.au/wp-content/uploads/2019/04/190329-COBACode_Submission_FINAL.pdf

- Enforceable against subscribers RG 183.25–RG 183.27
- Compliance is monitored and enforced RG 183.79–RG 183.81
- Appropriate remedies and sanctions RG 183.68–RG 183.73
- Code is adequately promoted RG 183.78–RG 183.80
- Mandatory three-year review of code RG 183.82–RG 183.84

ASIC provides clear guidance on each of these elements in a similar fashion to that outlined by the treasury paper for enforcement.

Financial Rights would however wish to highlight a key component of the approval process and that is that the Code content addresses stakeholder issues.[11] It is worth providing the statements by ASIC in full as it is primary focus of the approval process:

> *RG 183.60 Our approval process focuses primarily on the adequacy of a code's core rules. Core rules are the substance of any code, and the main vehicle for improving industry practices. It is essential that core rules address existing and/or emerging problems in the marketplace, rather than merely restating the law.*
>
> *RG 183.61 Generally, we will be satisfied that all key problems and solutions are identified if an applicant has followed the processes for developing a code in RG 183.50. Applicants should then explain how these issues are addressed in the code.*
>
> *RG 183.62 If identified consumer concerns or undesirable practices are not addressed in the code, we will need a detailed explanation for why this is so. Possible explanations may include that: (a) an issue is best dealt with in another specified way (e.g. law reform); (b) industry reasonably needs further time to develop or comply with a code obligation dealing with the issue; (c) there is evidence that the issue is not a real problem; or (d) a cost–benefit analysis of the issue does not warrant it being covered in the code.*

In summary the above requires that:

- the code *addresses* existing and/or emerging problems in the marketplace;
- the Code is more than a mere restatement of the law
- code administrators need to explain how all key problems are address in the Code
- If they are not, address an explanation is required as to why not.

Financial Rights believes that this needs to continue to be a core part of the Code approval process.

Our experience in contributing to Code Reviews over the past 15 years has been that recommendations contained in independent code review reports, that have been developed after consultations with key stakeholders and reviewing the evidence, are sometimes not included in the final draft or re-draft of the relevant code with little to no explanation as to why not.

[11] RG 183.55–RG 183.62

We therefore suggest that "ASIC's role must go beyond being the passive recipient of industry proposals," as posited by Commissioner Hayne. While referring specifically to the identification of enforceable code provisions, we believe that this also reasonably applies to the entire process of code approval. This should therefore involve back and forth discussions until all identified defects in the Code are remedied. Where recommendations by independent reviewers have not been implemented, ASIC should be required to report publicly as part of the approval process on the reasons why it considers this response acceptable similar to the requirement imposed on industry under RG 183.62 quoted above.

Further while ASIC did consult some consumer advocates during the approval process for the Banking Code, the process was somewhat ad hoc. While it should not be a complete re-run of the independent code review process, the ASIC approval process should involve some formal requirement for consultation with consumer groups and transparency. Financial Rights has also had the opportunity to read Consumer Action's submission to this review and supports its call for consumer representative involvement in the code approval process. Greater consumer representative involvement will only serve to enhance the quality of commitments in a code.

In addition to the above there is room to tighten up the language in RG 183 to ensure that industry acts to implement effective Codes. Much of the language gives wriggle room to industry to choose not to act in a particular ways.

For example, with respect to enforceability RG 183 currently states:

> *RG 183.27* ***In most cases****, subscribers will incorporate their agreement to abide by a code by contracting directly with the independent person or body that has the power to administer and enforce that code.* ***In some cases****, subscribers will also incorporate their agreement in individual contracts with consumers (e.g. written directly into the terms and conditions of a particular product).* ***We strongly encourage*** *code owners to consider this approach.*

"In most cases" and "In some cases" says to an industry considering a code of practice that there is an ability to choose not to make the code a part of the contract with the consumer. No wonder most sectors have chosen not to take this action. "We strongly encourage" again implies a choice.

With respect to sanctions, RG 183 states:

> *RG 183.70 It is important that subscribers are also subject to a range of sanctions for code breaches that go beyond providing compensation or rectification to individual consumers.* ***These sanctions might include****: (a) formal warnings; (b) public naming of the non-complying organisations;…*

Providing a list of sanctions that an industry may include provides yet another choice. Again, there is little surprise that no industry has chosen to include fines as a sanction. They have been given the choice not to.

Financial Rights submits that ASIC have (and have always had) the power to strengthen this guide to state what they expect in an approved Code. There are many uses of the word "must" throughout RG 183 so there should be no reticence to have minimum standards that the Code *must* meet. For example:

> *RG 183.20 As such, a code should satisfy the following criteria: (a) the rules contained in the code must be binding on (and enforceable against) subscribers through contractual arrangements; (b) the code must be developed and reviewed in a transparent manner, which involves consulting with relevant stakeholders including consumer representatives; and (c) the code must have effective administration and compliance mechanisms.*

We believe that given the state of play and a failure for industry to meet the higher standards that the community expects of them, ASIC must strengthen RG 183 to remove wishy washy language that provides industry a choice not to act to include particular, much needed, elements to their codes.

Further we note Consumer Action's recommendation that consideration be given to whether ASIC approval should remove the risk of legal action under competition law as occurs with ACCC authorisation. We support this and strongly support consultation between ASIC and the ACCC early and often to deal with any potential competition issues. In our experience in code development and reviews is that the spectre of competition law breaches (and legal advice sort to support it) is used as a common reason to not act to introduce code clauses that genuinely address consumer concerns.

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

Yes. Financial Rights supports the Government being able to prescribe a voluntary financial services industry code to ensure consistent consumer protection and competitive neutrality.

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

Yes.

The current state of codes of practice is that members of industry peak bodies subscribe to codes of practice. The key issue is that if a company is not a member of an industry peak body they may not be a subscriber to the code of practice.

This can produce an uneven playing field for industry and inconsistent consumer protections for consumers.

Ensuring all members of an industry segment meet basic minimum standards is important to ensure that the entire industry is meeting those standards and extending themselves. There should be no gaps or loopholes to allow rogue companies within an industry exploit the fact that they do no subscribe to code as per Recommendation 7.3 of the Banking Royal Commission.

Mandating that all licensees subscribe to an approved code would be one simple way to close this gap. We would make a number of further points in implementing this.

Firstly we would note that there are a number of sectors in the financial services industry that currently do not have a code of practice. The financial services sector is made up of a number of segments that vary in this respect:

- highly mature industry segments: ie banking

- mature industry segments: ie general insurance, customer owned banking sector
- maturing industry segments: ie financial planning, debt collection, insurance brokering, mortgage brokering, life insurance, superannuation
- immature and emerging industry segments: ie consumer leasing, pay day lending, fintech, debt management firms including credit repairers, debt agreement brokers, credit –like/non-interest payments services like Afterpay, Certegy etc.

Making sure all industry segments meet basic minimum standards is important to ensure that mature industries are meeting those standards and extending themselves, maturing segments are encouraged to step up quicker and immature and emerging industries are not left to exploit the cracks in regulation.

The ABA Banking Code is the first an only code to be approved by ASIC and as such require little if any consideration.

With respect to mature industry segments such as general insurance or the customer owned banking sector we believe that these are have either met or are close to meeting the minimum standards required under RG 183 and could seek approval of their codes with a few amendments and improvements to address current consumer concerns. The general insurance code of practice, while needing a lot of work, is at least relatively far along the path towards meeting minimum standards of ASIC RG 183.

With respect to maturing industry segments these involve codes that need more work to ensure they meet minimum code standards and need a fair amount of work to improve their codes to address consumer concerns. The new Life Insurance Code of Practice for example, while a modest first step, failed to meet minimum standards set by RG 183 and fails to address key concerns with respect to problematic products and sales practices, for example, funeral insurance and 'add-on' sales practices.

We would also note that while the superannuation sector has established the Insurance in Superannuation Working Group to fill the gaps left by the Life Insurance Code of Practice – this will only capture the insurance related aspects of their business and not other superannuation activities and interactions with consumers. There is space for further code development, particularly when the Australian Financial Complaints Authority (**AFCA**) takes over from the Superannuation Claims Tribunal (**SCT**).

The nature of the immature and emerging industries is that they are varied. These industries may be fragmented, made up of a number of small companies (or a mix of large and small companies), with new and older companies, that have yet to or are unwilling to come together to discuss minimum standard practices.

Some of these industry segments do in fact have codes that are not listed in the Consultation Paper.

For example, in the consumer lease area there is the Consumer Household Equipment Rental Providers Association (**CHERPA**) Industry Code of Conduct, January 2016. It is not publicly available on their website but can be found on the treasury website attached to CHERPA's

submission to the Small Amounts Credit Contract Review.[12] CHERPA represents 40 consumer lease providers in Australia and claim that their members write approximately 20 per cent of all consumer leases written in the market.[13] However CHERPA does not include Radio Rentals Australia's largest consumer leasing company.

The National Credit Providers Association, the peak body for the small loans industry, has a Code of Conduct[14] which like most other industry codes fails to meet minimum standards set out by ASIC RG 183.

The Australian Collectors & Debt Buyers Association also has a Code of Practice[15]

Other emerging or immature financial services segments like debt management firms have fallen through the gaps and are yet to be actually regulated as financial services. The recent Ramsay Review stated:

> *There is no uniform regulatory framework applying to the activities of debt management firms in Australia. Most of the services provided by debt management firms do not meet the definition of 'financial services' or 'credit activity' and, therefore, most debt management firms are not required to hold a licence under the financial services or credit regime and are not required to be a member of one of the ASIC approved EDR schemes. Instead, general consumer law prohibitions against misleading and deceptive conduct and unconscionable conduct apply.*[16]

The Senate Economics References Committee Report on Credit and hardship recommended that the government implement a regulatory framework for all credit and debt management, repair and negotiation activities that are not currently licensed by the Australian Financial Security Authority.[17]

In the meantime Financial Rights notes that there are no peak bodies in the Debt Management Firm space to even develop an industry-wide code of practice. Having said that Credit Repair Australia, one of the larger credit repair companies have – in the absence of broader industry

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[12] https://consumercredit.treasury.gov.au/content/downloads/SACC-submissions/Interim-Report/CHERPA.pdf

[13] https://consumercredit.treasury.gov.au/content/downloads/SACC-submissions/Interim-Report/CHERPA.pdf

[14] http://www.ncpa.net.au/about-us/code-of-conduct.html

[15] http://www.acdba.com/images/acdba/ACDBA-Code-of-Practice-Mar16.pdf

[16] p.198, Review of the financial system external dispute resolution and complaints framework, April 2017 http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Reviews%20and%20Inquiries/2016/Review%20into%20EDR/Key%20Documents/PDF/EDR%20Review%20Final%20report.ashx

[17] Recommendation 8, Senate Economics References Committee, Credit and financial services targeted at Australians at risk of financial hardship, 22 February 2019, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report

agreement - attempted to implement basic minimum standards on their own with the Credit Repair Australia Code of Conduct for Credit Restoration Services.[18]

The Senate Economics References Committee Report on Credit and hardship also recommended that

> *the buy now pay later sector develop an industry code of practice.*

Ensuring that all financial service providers undertaking regulated activities across the spectrum become subject to a code will mean that all consumers using any financial service will be able to expect some minimum standards with respect to their interactions with these companies, particularly when things go wrong. It will ensure industries professionalise, take ownership over their industry segments, raise standards and improve quality of service across the board and ultimately improve business outcomes and bottom lines.

If exceptions were allowed consumers will be placed back in the situation they are in at the moment – having to investigate whether the financial services provider that they have engaged or plan to engage is a code participant. This would require ASIC to undertake an expensive and extensive consumer education exercise that would be bound to fail.

More importantly, it is in the interests of all financial services providers to meet minimum standards of practice for competitive neutrality purposes and to protect the reputation of their industry as a whole. Loopholes and gaps in the framework will lead to regulatory gaming and avoidance which will continue to fail to serve consumer interests and will continue to undermine consumer confidence in the financial services sector.

Finally where a code does not exist and the nature of the particular sector is such that it cannot or will not reach agreement to develop an effective code, ASIC should be empowered to intervene to assist the sector to establish a Code or recommend comprehensive legislative intervention. It would be a poor outcome for consumers if the result is that the mature industries are meet high standards and the less mature industries effectively get off scot free. It would also create a disincentive for some industry sectors to develop the requisite maturity to increase standards.

Consequently Financial Rights supports ASIC requiring unlicensed entities that they regulate to abide by codes relevant to their sector or requiring an industry with unlicensed entities to develop a code of practice where one does not exist. We note that the Australian Finance Industry Association's Online Small Business Lenders Code of Lending Practice would fall into this category and should be made to undergo the ASIC approval process and made enforceable.

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

In summarising Commissioner Hayne's position with respect to making codes mandatory the Treasury consultation paper states

[18] https://www.creditrepair.com.au/images/pdf/Credit-Restoration-Code-of-Conduct.pdf

*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.*

We generally support this and note that there are consequently three key elements that would need to be present for ASIC/the Government to act to prescribe a code. These are:

- a defect (or defects) in the Code exists which has prevented its approval – ie the Code does not meet the standards required under RG 183; and
- the industry is failing to act is a timely manner to resolve the problem – ie they are unduly delaying the process; or
- the industry does not have a Code at all, and has not taken adequate steps towards establishing a Code.

If there is one defect or many defects in the code that means that the code does not meet the requirements of an emboldened RG 183 and therefore can not be approved by ASIC, then the first part should be satisfied.

For example, if a Code fails to address a key recommendation of an independent review, or includes an 'exceptional circumstances clause' so expansive so as to render the Code meaningless, then that would be a defect that requires the industry to reconsider its position to resolve the problem.

It would be up to the industry to act in timely matter to address the concern. Timeliness is key. We note that the ABA Banking Code took a little over 6 months to approve with the code submitted in December 2017 and final approval received in July 2018.

We would suggest a hard timeline be put in place to ensure that industry acts to meet the standards required of them under RG 183. A hard timeline would incentivise the industry to act. Otherwise it would be in the interests of the industry to simply delay action as long as possible. There should however be some flexibility given factors beyond a sector's control.

While prescription should only be used as a last resort, the threat of prescribing a code in the face of a recalcitrant industry sector must be real.

## 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?

Financial Rights supports the application of the Treasury Industry Codes of Conduct Policy Framework and the factors considered in this process to be a good starting place when considering making a code mandatory.

We also support the following other factors to be taken into consideration:

- If the changes recommended by Commissioner Hayne are not implemented.
- If a code does not meet the criteria set by ASIC RG 183 and the industry simply will not act to meet the criteria to ASIC's satisfaction (as stated above).

- The reason for a delay in resolving defects needs to be considered. If the reason is, for example, not because of industry inaction but rather because of the length of time the ACCC is taking to consider a competition issues, then there needs to be some flexibility. If the reason is due to industry reluctance or recalcitrance to adequately address a consumer concern say, for example, not implementing a much needed consumer protection due solely to cost issues that are not supported by evidence, then the industry should given less leeway.

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

Supervision and compliance monitoring of codes should be high otherwise there is little point to developing an enforceable regime.

Financial Rights puts forward certain principles/ basic characteristic to be met to ensure that code supervision and compliance monitoring meets high benchmarks:

***Independence***

Code monitoring bodies need to be independent of the industry whose code they are monitoring. Without independence consumer confidence in the decisions made by the body will be fundamentally undermined. Under RG 183.76 this independence is described as :

> *independent of the industry or the industries that subscribe to the code and provide the funding (e.g. with a balance of industry representative and consumer representatives and an independent chair);*

Financial Rights accepts that this is appropriate to ensure all views and perspectives are represented.

***Adequate resources***

In order to appropriately fulfil the functions of the code monitoring and compliance work the code monitoring body needs to be adequately resourced including secretariat staff, funding for compliance work, research and analysis, promotion, marketing, and other administration costs.

It is Financial Rights' experience that many code monitoring bodies have been underfunded and unable to carry out the full remit of their functions including data gathering and analysis and own motion inquiries. This is symptomatic of a lack of commitment to self-regulation and identifying, analysing and addressing individual and systemic consumer issues.

***Able to receive, investigate and determine complaints about code breaches***

One of the main roles of any code monitoring body must be to receive, investigate and determine complaints about code breaches. This goes to a code's ability to directly protect consumers, ensure code compliance and raise industry standards. Without this, identified code breaches will go undetected or unsanctioned and there will be no incentive for industry members to comply.

Consumers, small businesses and consumer advocates should all be able to make complaints to the code body about code breaches. Individual subscribers should be required to self-report breaches of the code. There should also be memoranda of understanding to ensure that the Australian Financial Complaints Authority can report code breaches to the appropriate code body or bodies. There should be no restrictions from investigating a complaint that has been considered by another forum already or is under current investigation by another forum as currently exists under the Banking Code Compliance Committee.[19]

***Empowered to impose appropriate sanctions and remedial action***

Code monitoring bodies should have the ability to impose appropriate sanctions. The current RG 183.70 states with respect to sanctions power that:

> *[i]t is important that subscribers are also subject to a range of sanctions for code breaches that go beyond providing compensation or rectification to individual consumers. These sanctions might include:*
>
> *(a) formal warnings;*
>
> *(b) public naming of the non-complying organisations;*
>
> *(c) corrective advertising orders;*
>
> *(d) fines;*
>
> *(e) suspension or expulsion from the industry association; and/or*
>
> *(f) suspension or termination of subscription to the code.*

Financial Rights notes that this is a non-exhaustive list and no code that we are aware of has include all of these sanctions – most choosing the most benign sanction powers for inclusion in their code.

For example, there are only four sanctions available to the General Insurance Code of Practice Code Governance Committee (**CGC**) under the General Insurance Code at subsection 13.15:

> *(a) a requirement that particular rectification steps be taken by us within a specified timeframe;*
>
> *(b) a requirement that a compliance audit be undertaken;*
>
> *(c) corrective advertising; and/or*
>
> (d) *publication of our non-compliance.*

When comparing this list to RG 183.70, the current General Insurance Code only includes one sanction listed, i.e. corrective advertising. The "publication of our non-compliance" sanction is not "publicly naming" as foreseen under 183.70.

[19] BCCC Charter Clause 5.3(d) Matters the BCCC cannot consider "Allegations that have already been heard by, or are under investigation by, another forum (whether as a standalone matter or as part of any process or proceeding). If the relevant forum has declined to determine whether a breach of the Code has occurred, the BCCC can consider the matter."

Financial Rights notes that the public naming of a subscriber in breach of a Code has been used sparingly. The first (and seemingly only) time a Banking Code subscriber was named was when Westpac was found to be in serious breach of Clause 28.4(d) and 28.5 of the 2003 Code in 2008. All other breaches listed in the CCMC's Annual Reports (serious or otherwise) leave banks unnamed.

We note that no code has chosen to include the full complement of sanctions – in particularly no Code includes the possibility of a fine. We believe all code monitoring bodies should have this power.

Financial Rights believes that code committees should have available to them all the sanction powers in the tool kit. This is not to say that they should use them regularly, but simply to say the power should be available to them in situations that they feel are appropriate.

Finally, we support Consumer Action's call for code monitoring bodies be able to require signatories to a code to compensate customers affected and disgorge profits associated with breaches.

***Data collection, analysis and reporting***

Data collected directly from the industry on code compliance, systemic issues and other industry statistics is critical to improving code compliance and raising industry standards. Financial Rights points to the CGC General Insurance Industry Data Reports as a clear example of the use and analysis of particular datasets can lead to recommendations to improve industry practice.

***Public reporting of annual code co**mp**liance***

Basic annual statistics of code compliance are important signals to consumers, industry and regulators how an industry is travelling with respect to code compliance.

***Conduct inquiries into, and report to ASIC on, serious breaches of the code and systemic issues***

One of the key roles of the code body is to identify systemic breaches of the code in order to raise industry, consumer and regulator awareness of issues that have been heretofore hidden.

This requires the ability to instigate own motion inquiries.

We note that AFCA is required to report systemic Issues, serious contraventions and other breaches to ASIC: section 1052E. Code monitoring bodies should also be required to report systemic issues and breaches of their codes to ASIC.

***Recommend amendments to the code in response to industry or consumer issues or other issues identified in the monitoring process***

This is important to ensure that the code continuously keeps up to date addressing consumer concerns.

***Promote the code***

Awareness of codes, their role and the role of code monitoring committees is low amongst consumers and even among many consumer representatives and advocates. While many current codes include clauses to assist in the promotion of their codes and the role of the code monitoring committee, some codes fall short. Promoting awareness amongst consumers is critical if codes of practice are going to encourage best practice in the industry.

***An appropriate composition of the code compliance committee***

The composition of individual code monitoring bodies and arrangements for enforcement should be subject to ASIC approval. While the picking and choosing of individuals to fulfil the role should not be subject to ASIC approval, the only caveat on this would be where there is a clear breach of the composition – for example, there is no consumer representative where one is required.

***Other characteristics required for a code monitoring body***

- Ensuring that staff are appropriately trained in the code and that subscribers make provision for this training
- Ensuring that there is a regular, independent review of the content and effectiveness of the code and its procedures
- External or independent auditing or monitoring of subscribers.

**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?**

Yes code provisions should be monitored to ensure they remain relevant, adequate and appropriate. This should be conducted by both the code monitoring body in the normal course of their work and by an independent review every three years. One of the terms of reference of the required independent review of an approved Code should be to consider whether the Code continues to meet the benchmarks of RG 183. If the Independent Reviewer concludes that the Code no longer meets one or more of the benchmarks, this should trigger a review of the approval status of the Code by ASIC. Failure to conduct timely reviews, or to appoint appropriate independent reviewers, should also trigger a review by ASIC.

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

Yes there should be regular reviews of codes every three years as per RG 183. Given the pace of change in the financial services sector, three years is remains more than appropriate. We would not support any increase to this. We see no reason from changing this, particularly given

the fast paced nature of technological and industry change as well as changing community expectations.

We also note that the Consumers Federation of Australia has published good practice principles for consumer advocate involvement and expectations of development and reviews of industry codes and external dispute resolution (EDR) schemes.[20] These principles should be embedded in the review process.

**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?**

No.

**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?**

Yes.

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

The remedies available to a consumer for a breach of a promise in a code should be in addition to any other cause of action they may have under general law, legislation or more specifically under contract law.

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

No.

We strongly believe that ASIC should be provided with the full regulatory toolbox and apply civil penalties for individual enforceable code breaches – as currently occurs under the CCA model.

The current ability to be able to apply civil penalties for individual enforceable code breaches under the CCA should be carried over. An exception or qualification for the financial services industry is in no way justified or appropriate.

Regulators have limited resources and must make strategic decisions about what matters to pursue. It is highly unlikely ASIC will take action in relation to a Code breach unless it is very serious (in terms of consumer harm or likely consumer harm) or systemic, and more than likely

[20] http://consumersfederation.org.au/wp-content/uploads/2018/05/Guidelines-Codes-EDR-Schemes.pdf

will have to be both to warrant court action being initiated by the regulator. As such, it is unnecessary to create an additional threshold in the legislation itself.

However, if the Government is of the view that such a threshold is appropriate, it should not be set so high as to create an unreasonable barrier to action. We submit that requiring a breach to be "egregious" (defined as: "shocking, appalling, hideous") would create an unreasonable barrier to action. "Serious or systemic breaches" is a more appropriate threshold.

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

Determinations by external dispute resolution are only binding on the parties industry if the consumer accepts the Determination. If the consumer doesn't accept the Determination, the consumer can take the matter to a Court or Tribunal. This principle is supported by RG 139.88 which states:

> *the EDR scheme outcome should not bind the consumer or investor if they do not choose to accept it. … Note: If the complainant or disputant accepts the EDR outcome, the scheme or member may require the complainant or disputant to accept the EDR outcome as full and final satisfaction of their claim and it will be binding on both parties (i.e. the balance of the claim cannot be pursued in court).*

We disagree with the view put forward by Commissioner Hayne that resorting to EDR should be treated as an election not to pursue remedies for breaches of enforceable code provisions unless good cause is shown to the contrary.[21]

EDR is a cheap alternative to court action that provides flexible solutions to disputes with 'teeth' because the ombudsman can make decisions binding upon the trader.

Consumers are encouraged to enter into EDR because they are comforted by the fact that they do not lose their rights to go to court. In practice, very few consumers reject EDR determinations in favour of going to court. In reality most do not have the resources to take this option. If this were to change, consumers would need legal advice to determine the relative merits of going to court versus lodging in EDR, completely negating the non-legal intent of the scheme.. This would be a poor outcome for those consumers, EDR and an already overwhelmed and under-resourced court system.

There is also no risk to the consumer that the matter will be appealed to court. Risk of appeals by FSPs would bring costs and other risks to consumers, and dampen access to justice.

We note that all Australia, New Zealand, UK, Singapore and Canada all have external dispute resolution schemes that do not bind consumers to determinations.[22]

Further the Ramsay Review recommended that:

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[21] Page 111

[22] Page 32, *Review of the financial system external dispute resolution and complaints framework, Final Report*, April 2017 https://treasury.gov.au/sites/default/files/2019-03/R2016-002_EDR-Review-Final-report.pdf

*the single EDR body will provide a single point of redress for consumers and small business. It will have the power to make determinations that are binding on financial firms.*[23]

This has been implemented under AFCA rules[24] and must remain the case.

We note that AFCA does not have the power to impose all the remedies available under the CCA. This might mean in practice that consumers who opt to go to court in the first place, or after rejecting an AFCA Determination, may have access to greater remedies than consumers who accept and AFCA Determination. We do not see this as a problem in principle. The large majority of consumers will still opt to go to AFCA because their primary concern is to settle the dispute with the Financial Firm as opposed to seeking injunctions and civil penalties against the provider.

## 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?

As detailed above we take the view that the current status quo should be retained that is determinations by external dispute resolution should be binding on the industry member (as long as the consumer accepts the Determination). If the consumer doesn't accept the Determination, the consumer can take the matter to a Court or Tribunal.

If the consumer accepts the Determination, then they should not be able to take court action in relation to the same events.

However we note two issues:

Firstly consumers who have already settled matters at AFCA, or have accepted an AFCA Determination, should still be able to be witnesses in systemic matters investigated and brought by ASIC, including for breaches of enforceable Codes.

Secondly, somebody who has already settled a matter, or accepted an AFCA Determination, who is affected by a systemic Code breach that is subsequently investigated by ASIC should not be excluded from any compensation orders arising out of any action taken by ASIC if they would otherwise be part of the class.If they have already been compensated to some extent for the same breach, then that amount should simply be deducted from the amount due as a result of the ASIC action.

[23] Page 12, *Review of the financial system external dispute resolution and complaints framework, Final Report*, April 2017 https://treasury.gov.au/sites/default/files/2019-03/R2016-002_EDR-Review-Final-report.pdf

[24] AFCA Complaints Resolution Scheme Rules, 1 November 2018 https://www.afca.org.au/public/download.jsp?id=6893

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

As mentioned above, this would undermine one of the fundamental principles of external disputes resolution and a key reason for its success. Making consumers elect one forum or the other from the outset will create a legalistic system where consumers need to access quite sophisticated legal advice to assess the merits of their relative options. This is at odds with the point of having an accessible, alternative forum to provide access to justice.

It will also mean that some well resourced consumers go to court unnecessarily, when their dispute could have been effectively dealt with by AFCA, while disadvantaged consumers do not lodge in AFCA for fear of losing rights that are largely illusory, because they do not have the means to enforce them in any event.

## Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,

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