

ENFORCEABILITY OF FINANCIAL SERVICES INDUSTRY CODES - A SUBMISSION FROM THE INSURANCE BROKERS CODE COMPLIANCE COMMITTEE (IBCCC): 10th MAY 2019.



Industry codes of practice occupy an unusual place in the prescription of generally applicable norms of behaviour. They are offered as a form of 'self-regulation' by which industry participants 'set standards on how to comply with, and exceed, various aspects of the law'.¹⁷⁰ They are offered, therefore, as setting generally applicable and enforceable norms of conduct. Industry codes pose some challenge to the understanding that the fixing of generally applicable and enforceable norms of conduct is a public function to be exercised, directly or indirectly, by the legislature.

Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, February 2019 (FSRC Final Report), p.106.

1. BACKGROUND

- 1.1. This Submission responds to the Treasury Consultation Paper (18 March 2019) into the enforceability of financial services codes.
- 1.2. A Joint Submission has been made (April 2019) by the Chairs of the other Codes. The Chair of the IBCCC was overseas at that time and the IBCCC has decided that a Submission from the full committee is the preferable way for it to proceed.
- 1.3. The IBCCC felt it was necessary to make this separate Submission to emphatically express our strong view that some proposals under consideration may dramatically change the nature and function of Codes to the detriment of both consumers and insurance brokers.
- 1.4. This Submission is based on the experience of the IBCCC members as members of the IBCCC and in other roles they have fulfilled at various times in their careers.

<i>Name</i>	<i>Relevant Experience</i>
Michael Gill Independent Chair	<ul style="list-style-type: none"> • Legal practitioner admitted 1970 • Former President of the Law Society of NSW and the Law Council of Australia • Heavily involved in legal profession reform including regulation and ethics. • Established LawCover and SMIF (compulsory professional indemnity insurance schemes) for NSW and other solicitors and acted on many claims. • Drafted the original Insurance Brokers Code in 1994

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<i>Name</i>	<i>Relevant Experience</i>
	<ul style="list-style-type: none"> • Chair of the General Insurance Code from 1994 until 2014.
<p>Julia Davis Consumer Representative</p>	<ul style="list-style-type: none"> • Legal practitioner admitted in USA in 2010 and admitted in NSW in 2013 • Policy & Communications officer at the Financial Rights Legal Centre since 2013 • Consumer Representative on the IBCCC since its inception in 2014 • Extensive experience working with insurance industry stakeholders and regulators to advocating for the improvement of policies and codes for the benefit of consumers • Heavily involved in community and consumer sectors including as a board member for Community Legal Centres NSW and as a member and Chair for the Tenants Union NSW board of directors
<p>David Duffield Industry Representative</p>	<ul style="list-style-type: none"> • Joined the Insurance broking industry in 1973 • Actively involved in the servicing of clients from diverse industry sectors including settlement of large or complex claims • Australian CEO of major international broker • Chief client officer across the Asia Pacific Region helping staff in developing countries understand what good insurance broking practice looks like • Former president of the National Insurance Brokers Association during which time the current broker code was refreshed and launched • Active involvement in leading client dispute resolution across Australia, New Zealand and Asia

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1.5. This Submission also has regard to the IBCCC opinion that the various industry Codes are different from each other and should be. Specifically, the members of the Insurance Brokers Code (insurance brokers) are large in number (294), are generally small businesses and their interests are frequently aligned with that of their customers, especially as regards the making and collection of insurance claims where the brokers skills in designing and implementing the right cover is put to the test. Insurance Brokers generally have an immediate and ongoing business imperative for satisfying their customers. Insurance brokers perhaps have the highest level of trust with their clients and consumers than other financial services sector participants. This view is based on the regular advice sought and provided by brokers. Brokers have a very low number of disputes referred annually to AFCA or its predecessor.

1.6. The work of Insurance Brokers and any particular concern about the Insurance Brokers Code received little attention from the Royal Commission. Indeed Page 273 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (RCR) states:

“The insurance industry has three industry codes of practice: the General Insurance Code of Practice, the Life Insurance Code of Practice, and the Insurance in Superannuation Voluntary Code of Practice.”

Nevertheless, the results of the work of the Royal Commission contains many useful lessons for the Insurance Brokers Code and Insurance Brokers generally.

<i>Name of Code</i>	<i>Members/Subscribers</i>
Insurance Brokers Code of Practice	294
General Insurance Code of Practice	178
Customer Owned Banking Code of Practice	63
Life Insurance Code of Practice	26
Banking Code of Practice	14

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- 1.7. This Submission is largely in line with the Chairs Joint Submission and we endorse much of the argument made in that Submission. We will not repeat it here. If this approach causes any confusion, we are happy to clarify it in the proposed meeting with Treasury which we also support.

SUBMISSION POINTS

CODES AND THEIR OWNERSHIP

It is important to recognise the proper place of the proposed Code of Ethics. Codes of ethics are not laws. Codes of ethics are important to fostering public confidence and practitioner integrity in a profession. They are composed by industry practitioners according to agreed industry processes. Laws, by contrast, are the product of a public process conducted under the authority of democratic institutions. It is laws, and not codes of ethics, that are the proper repositories for basic norms of conduct. This qualitative disparity mandates a difference in approach to contraventions of each.

While codes of ethics have a part to play in setting professional standards of behaviour, the industry must be conscious of their boundaries. The investigation and punishment of breaches of law should not be outsourced to private bodies. Licensees and industry bodies should not try to resolve breaches of law by advisers internally but must notify ASIC or other appropriate authorities. A breach of the code of ethics must not be allowed to obscure, or be treated as more significant than, a breach of the law.

Though laws and professional codes serve different normative purposes, the discipline they impose can have similar objectives. Both ASIC and the FPA emphasised the protection of the public as their overriding disciplinary aim

FSRC Final Report, p. 211.

- 1.8. A voluntary code is an important means (perhaps the most important) whereby members (in this case, Insurance Brokers) set and maintain the standards they expect of each other.
- 1.9. Other stakeholders, including customers and consumers, are consequential beneficiaries
- 1.10. The power of a code in raising industry standards lies primarily in the membership's ownership. Thus, anything which may diminish or threaten that sense of ownership (and thus its effectiveness) should be avoided where possible. Ultimately, code

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provisions should be what the members genuinely want. The Royal Commission appears to have accepted this core point in its comments about Codes of Ethics.

- 1.11. Potentially damaging provisions include sanctions imposed and enforced by regulators, inappropriate involvement by and power in external legal regulators and the imposition of legal type penalties/fines.
- 1.12. At the same time, for a code to achieve one of its main aims (e.g. improving relationship and trust between the industry and its customers) there must be close consultation with stakeholders and regulators in a codes formative process and in its monitoring and administration (e.g. a consumer representative on the relevant committee and committee independence).
- 1.13. The role of a regulator (such as ASIC) must be carefully considered so that it does not damage the effectiveness of the code. For example, in the code drafting process, it must be careful at all times to appreciate that the code ownership by its members is sacrosanct.

As ASIC indicated in Regulatory Guide 183, which related to the approval of codes, harnessing the views and collective will of relevant industry participants is essential to the creation of an industry code.

RCR p.107

- 1.14. At the end of the day, for the code to be most effective, it must be enthusiastically owned and supported by its members.
- 1.15. Changing the nature of Codes to be more quasi-legislative will fundamentally change the role and value that Codes currently play in the Australian financial system. In a time of low levels of trust in financial services, now may be a time to rely more heavily in legal regulation instead of self-regulation.

THE COMMITTEE ROLE AND THE NEED TO AVOID CONFUSION

The monitoring bodies will play an important part in setting the tone and the culture of those who act as financial advisers.

RCR p. 210

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- 1.16. The role of the IBCCC must
- 1.16.1. Be completely independent of the members and the relevant industry body/s
 - 1.16.2. Not be confused with or overlap, or be seen as too close to an external regulator
- 1.17. Specifically, the enforcement of a code should not be a split between or a combination of industry ownership, the independent committee and an external regulator. The latter should rely on its own legal powers and sanctions when taking enforcement action.

LAW AND BEHAVIOUR; THE TWIN CHALLENGES

THE SIX NORMS OF CONDUCT (RC's interim report volume 1 page 290, item 3.1).

3.1 Change the law?

As noted elsewhere in this report, I begin from the premise that breaches of existing law are not prevented by passing some new law that says 'Do not do that'. And given the existing breadth and complexity of the regulation of the financial services industry, adding any new layer of law or regulation will add a new layer of compliance cost and complexity. That should not be done unless there is a clearly identified advantage. It should be considered recognising that there is every chance that adding a new layer of law and regulation would serve only to distract attention from the very simple ideas that must inform the conduct of financial services entities:

- *Obey the law.*
- *Do not mislead or deceive.*
- *Be fair.*
- *Provide services that are fit for purpose.*
- *Deliver services with reasonable care and skill.*
- *When acting for another, act in the best interests of that other.*

These ideas are very simple. Their simplicity points firmly towards a need to simplify the existing law rather than add some new layer of regulation. But the more complicated the law, the easier it is to lose sight of them. The more complicated the law, the easier it is for compliance to be seen as asking 'Can I do this?' and answering that question by ticking boxes instead of asking 'Should I do this? What is the right thing to do?' And there is every reason to think that the conduct examined in this report has occurred when the only question asked is: 'Can I?'.

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- 1.18. The Royal Commission Report recognises that more law and regulation are not always the best or most likely solution. Restoring “Should I do this?” as the key question requires the right combination of laws which are most likely to achieve that objective alongside similar behavioural/ cultural change.
- 1.19. With the possible exception of the Insurance Brokers Code, the Codes generally face the reality that the trust relationship between consumers and the financial services sector is so broken that law and regulation should be used to do all it can to close the gap, to rebuild trust and confidence to an acceptable degree.
- 1.20. The Codes should be encouraged to run a parallel strategy with a specific focus on behavioural change within industries and members.
- 1.21. To that end, the Codes should:
 - 1.21.1. Become an implied term of each customers relevant contract
 - 1.21.2. Have the power to sanction each breach whether remedied or not
 - 1.21.3. Use publication as a significant type of sanction
 - 1.21.4. Establish a dashboard style of compliance measurement by which each member will receive an annual compliance rating, perhaps from 1 star to 5 stars
 - 1.21.5. Reinstate the notion of “the living code” so that changes and clarifications can be dealt with quickly, thus maintaining the integrity of the code
 - 1.21.6. Have regular meetings between the Committee and the Industry sponsor to ensure that the members and the relevant industry are real time aware of all significant issues and address them
 - 1.21.7. Be reinforced with annual mandatory training programmes facilitated by the industry bodies and informed by code and consumer experience.
- 1.22. For both the Codes and the law/regulation (especially as regards significant law reform), an evaluation plan should be in place to collect measurable, objective (not just anecdotal) evidence that the relevant objectives of the Code or the law are being achieved in the sense of service delivery to the customers/consumers.
- 1.23. Before any major changes are made to how the Codes operate or are enforced, real benchmarks should be set so that it can be determined if those changes are really making the Codes more effective.

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2. CONCLUSION

- 2.1. We urge Treasury to move with caution; *“don’t throw the baby out with the bath water”*. Recognise the role and value of the Codes.
- 2.2. As was found by the Royal Commission, law, regulation and regulators have not demonstrated that they are the answer and may be a part of the problem.

Michael Gill, Independent Chair

Julia Davis, Consumer Representative

David Duffield, Industry Representative

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