Australian Banking Association

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By email: enforceablecodes@treasury.gov.au

Dear Sir

Consultation Paper: *Enforceability of financial services industry codes: taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission*

Thank you for the opportunity to comment on the issues raised in this Consultation Paper.

About ABA

The ABA is responsible for administering the Banking Code of Practice (Code) and provides funding for the independent Banking Code Compliance Committee (BCCC).

With the active participation of 24 member banks in Australia, the Australian Banking Association provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.

The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and community. It strives to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Key Points in response to the Consultation Paper

Recommendation 1.15 should be implemented in a manner consistent with Commissioner Hayne's clear intention to preserve the benefits and fundamental self-regulatory characteristics of financial sector codes.

The objectives outlined in the Final Report are that customers can easily identify key Code provisions protecting their rights and be confident that those provisions are enforceable. These objectives can be achieved consistently with Commissioner Hayne's intention to preserve the fundamental characteristics and benefits of the existing code system if the following principles are adopted:

- The enforceable codes framework, and compliance with it, should be as simple as possible, bearing in mind the Royal Commissioner's statements on the need to reduce complexity in financial system regulation.
- There should be a sensible framework and criteria to identify key code provisions – this could be achieved by limiting enforceable code provisions to:

- Provisions that set out specific obligations, rather than those that record guiding statements or principles;
- Provisions that provide material protection to customers (where a breach is likely to result in a significant level of loss);
- Provisions that provide a clear and specific extra protection to customers beyond the existing laws, and not provisions that duplicate existing laws;
- Provisions dealing with matters already within ASIC's regulatory jurisdiction (and not those already the subject of an enforcement regime, for example within the remit of APRA, AUSTRAC, or the Office of the Australian Information Commissioner).

These criteria should, in our submission, be set out in legislation – perhaps coupled with a power to make adjustments to them by regulation as the need arises.

- There should be a statutory right to damages to compensate for loss arising from breaches of the enforceable code provisions and this right should be enforceable either by the customer or by ASIC on the customer's behalf.
- Civil penalties should not form part of a voluntary enforceable codes regime. This would potentially undermine the existing code regime by altering its self-regulatory character. It would also likely reduce or eliminate the incentive for banks to participate voluntarily, requiring mandating of codes and ultimately failing to achieve the outcome desired by the Royal Commissioner. Where provisions are so significant that it is considered civil penalties should be available for a breach, these provisions should be determined by the parliament and form part of the financial services law.
- Default mandatory codes, that is codes that are developed by Government and applied as a default to cover those participants who are not subscribers to an approved code, should be considered only as a last resort. ASIC should have flexibility to impose such a code on industry participants who are not subscribers to an approved code, but not on those who are subscribers to an approved voluntary code.

Answers to specific questions raised in the Consultation Paper are set out in Appendix 1.

Introduction

The Banking Code of Practice (**Code**) is the first substantial Australian financial sector code to be approved by ASIC under the Corporations Act. The Banking Code is also the only such code to expressly state that the terms of the code form part of a customer's contract with their bank. This provides a sound foundation for code enforceability[1]. A breach of a Banking Code provision is a breach of contract and so a remedy can be sought by the customer through the courts, as well as the Australian Financial Complaints Authority (AFCA) who can take account of industry codes under its mandate to determine what is fair in all the circumstances.[2]

ASIC approval should remain central to any new framework to implement the Royal Commission's recommendations, and that process can be supplemented to address matters raised by the Commission. This process should have regard to the broader context of the Royal Commission report in which the Commissioner expressed views about the operation of codes in the financial sector.

It is clear from the broader discussion of codes in the Final Report, that Commissioner Hayne both recognises, and seeks to preserve, the benefits of self-regulation in the financial sector:

> "I do not intend to interfere with the broader development of, or operation of, industry codes. Nor do I intend to modify or limit ASIC's powers to approve the non-enforceable provisions of industry

[1] This has been a feature of the Banking Code since its inception in 1993 - before it became a condition of ASIC approval under ASIC Regulatory Guide 183
[2] See AFCA rule A.14.2(b)

> codes….I draw attention to this point because I consider it important that the banking industry, and (as I will come to) the insurance industry, continue to develop their industry codes over time. I expect that the non-enforceable provisions of industry codes will continue to play an important role in setting standards of behaviour within those industries over time."[3]

Moreover, we note and endorse the observation in the Consultation Paper that:

> "Industry codes may develop and evolve over many years, coming to encapsulate industry norms in a way that a code prescribed from outside, even by a closely engaged regulator, would not. This development of norms within industry lends a crucial element of self-regulation to the codes by which the subscribers abide."[4]

Further, the Commissioner rejected a suggestion by Treasury, in its submission to the Royal Commission, that the solution could be for ASIC to be given a rule-making power to enforce norms currently enshrined in industry codes. He stated his reasons for this rejection:

> "I do not favour pursuing this course. 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. I would not discard those benefits by giving ASIC the entire responsibility for creation of the kinds of norms that are now set out in the 2019 Banking Code and that have been developed and applied within significant parts of the banking sector for many years**."[5] [emphasis added]

Finally, the Commissioner was clear that the regulatory regime is already overly complex, and that his recommendations were not intended to create a new and separate layer of regulation:

> "Treasury, and many of the entities that made submissions, urged the need for caution before recommending change. This is undeniably right.
>
> As I said in the Interim Report, adding a new layer of regulation will not assist. It will add to what is already a complex regulatory regime."

In our submission, the factors outlined above demonstrate that implementation of recommendation 1.15 should be guided by two key objectives:

1. The preservation of the fundamental character of industry codes as self-regulatory phenomena; and
2. The continuation of industry participation in the development and enforcement of industry codes.

Against that background, we make the following observations and submissions regarding an appropriate way forward.

The problem that the Royal Commission recommendation seeks to address

The appropriate starting point in designing a solution to address recommendation 1.15 is to identify the problem that the Commissioner intended to address. The commentary in the Final Report reveals that the Commissioner considered that:

- There is uncertainty around a customer's right to enforce promises made in codes:

  > "In the circumstances, there may be some uncertainty about which provisions of industry codes can be relied on, and enforced, by individuals. Uncertainty of this kind is highly undesirable. All participants in the financial services industry – including consumers – must know what rules govern their dealings. This is especially so, given that rights under contracts

[3] At p. 111
[4] At p. 3.
[5] At pages 107-108

> with financial services entities are capable of being traded, assigned and subrogated. Parties to contracts, not only the immediate but also any successor parties, must know what terms govern their relationship."[6]

- Experience shows that systemic issues with code compliance have 'not always been resolved in ways that have encouraged or secured future compliance with norms'[7].

The Commissioner expressed the view that the first point – the need for certainty around the customers' right to enforce – could be dealt with by designating certain provisions of codes as 'enforceable code provisions'.

In relation to the need to address 'systemic issues', the Commissioner considered that dealing with the enforceability issue would also likely address this:

> "Problems of that kind [systemic issues] are likely to be reduced, and perhaps even eliminated, if breaches of enforceable code provisions are made contraventions of the relevant statute and can thereby be enforced through the courts."[8]

The key objects that the Final Report puts forward as a solution to the problems raised are then:

1. Certainty around which provisions of codes are to be taken as enforceable as between a customer and their financial institution; and
2. Confidence that any breach of such provisions can be enforced by the customer either through external dispute mechanisms or, if they so elect, the courts.

Identifying the enforceable code provisions

The task of identifying appropriate 'enforceable code provisions' cannot be regarded as completely separate from that of designing a regime for remedies for their breach. If our submission - that remedies be confined to providing for statutory rights to damages - is accepted, then there is less cause for concern in terms of the number of code provisions that may be categorised as such. On the other hand, if code breaches were to attract the operation of the Corporations Act civil penalties regime, tighter criteria for identifying such provisions may be appropriate. That said, we think that the identification of these types of provisions should be broadly guided by the following criteria.

Criterion of specificity

The criterion for determining which provisions should be designated as 'enforceable code provisions' specified by the Commissioner is "the provisions that govern the terms of the contract made or to be made between the bank and the customer or guarantor" (rec.1.16). Put another way, in the text of the Final Report, the Commissioner characterises these provisions as those:

> "expressed as promises, capable of direct application to the relationship between an individual and a financial services entity."[9]

This is directed at bringing certainty that customers will be able to enforce important provisions that form part of their agreements with banks. The Commissioner's formulation also carries with it the inherent characteristic of specificity. This would be lost if it were sought to apply the regime to guiding statements or principles, such as 'we are committed to earning and retaining the trust of our customers and the community', or 'we will be accountable in our dealings with you', or 'to comply with all laws', for example. Rather, enforceable code provisions should, in the main, be those that set out commitments in a clear and unambiguous manner. The best example of this kind of provision is, in our view, the guarantee provisions in Chapters 25 to 29 of the Code.

[6] At page 106.
[7] At page 109.
[8] At page 109.
[9] At page 105.

Criterion of materiality

Enforceable code provisions should be limited to provisions that are significant. By significant, we mean provisions that will realistically protect against behaviour that could give rise to real and identifiable damage or loss to customers in situations where customers should be protected.

Criterion of adding to, rather than duplicating, existing laws

Consistent with ASIC Guidance, codes should do more than merely restate the law. However, sometimes industry codes contain provisions designed to expand on or make clear what compliance with existing laws looks like. When industry codes are limited to taking effect as contractual promises, this approach does not generally create problems. The contractual promises operate at a different legal level from the statutory requirements and do not interfere with them. However, if enforceable code provisions are given statutory force and statutory remedies, this approach carries the risks of causing confusion. Confusion makes the operation of the law more difficult for not just regulated entities, but also for the regulators and for consumers.

For example, there are already several consumer protection laws that regulate conduct generally. These include the misleading and deceptive conduct laws, the unfair contract terms laws, statutory unconscionability, the general licensing and other obligations under the financial services licence and credit licence regimes, and the National Credit Code (NCC). If similar provisions in codes are to be made enforceable code provisions, this could lead to duplication and confusion with those laws. This is especially so when provisions like section 912A(1)(a) of the Corporations act – that makes it a condition of financial services licenses that the licensee must 'do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly' – have been made civil penalty provisions.

We think there should be a clear principle that any industry code provision that covers activity already subject to statutory regulation should not be an enforceable code provision.

Instead, enforceable code provisions should be limited to provisions that provide a clear and specific extra protection to customer beyond the existing laws.

Criterion of regulatory agency jurisdiction

Industry codes often contain provisions that relate to specific regulatory problems that have their own laws and their own specific regulators. Anti-money laundering rules are the province of AUSTRAC. Privacy rules are the province of the Privacy commissioner. Bank regulation and prudential regulation are the province of APRA.

ASIC should not be given a separate and parallel jurisdiction over these areas through the application of an enforceable code provision. That would be to make ASIC a 'de facto regulator' of those matters and would confuse all concerned by introducing more than one avenue of redress in respect of the same conduct.

Summary of Criteria

Accordingly, we think enforceable code provisions should be limited to:

1. Provisions that set out specific obligations, rather than those that record guiding statements or principles;
2. Provisions that provide material protection to customers (where a breach is likely to result in a significant level of loss);
3. Provisions that provide a clear and specific extra protection to customers beyond the existing laws, and not provisions that duplicate existing laws;
4. Provisions dealing with matters already within ASIC's regulatory jurisdiction (and not those already the subject of an enforcement regime, for example within the remit of APRA, AUSTRAC, or the Office of the Australian Information Commissioner).

These criteria should, in our submission, be set out in legislation – perhaps coupled with a power to make adjustments to them by regulation as the need arises.

Contractual Application alone is not a sufficient criterion

Recommendation 1.15 of the Final Report refers to granting enforceable code provision status on Code provisions that govern the terms of the contract. However, in our submission, this is not intended to be the sole criterion, and should only be applied together with the other criteria we have suggested above.

This is because:

(a) Arguably much of the Code governs the terms of contracts and it was not the Commissioner's intention to give all of the code 'enforceable code provision' status.

(b) If a provision governs the terms of the contract, then it also gives rise to contractual remedies. Contractual remedies are real remedies, and in many cases the courts and AFCA can make appropriate awards to deal with the problem on the basis of these contract remedies;

(c) The general approach of Australian regulatory law has been not to provide statutory remedies for contract terms generally, but to limit this to specific aspects of the contract. The unfair contract terms regime and the National Consumer Credit Protection Act (NCCPA) and NCC are examples of this approach, where statutory support is given to certain aspects of a contract only, and not to a wide range of contract terms;

(d) It would lead to the curious result that some contract breaches, even of quite important terms, would not have statutory remedies because those terms are not mentioned in the Code, whereas other contract breaches of less significant terms would have statutory remedies.

In particular, we are concerned that Treasury may receive some submissions that recommend that the Chapter 21 and Chapter 22 small business default provisions are made enforceable Code provisions. In our view this is not appropriate. These provisions deal with how banks enforce contractual rights on a loan default. Since these provisions are incorporated into the loan contract, they already shape the bank's default rights without the need for any extra statutory overlay. For example, a bank cannot require repayment without the 30 days' notice referred to in paragraph 75, because the incorporation of paragraph 75 into the loan contract means that the bank in fact has no contractual right to do this in the first place. In addition, these provisions are already subject to the unfair contract terms regime, and so to apply an additional separate statutory regime to them would create confusion and could create different classes of unfair contract terms. These sorts of issues are more appropriate for AFCA and the courts to deal with, rather than a statutory regime.

In terms of ASIC's role in approving codes, ASIC should consider whether the enforceable code provisions identified by the applicant meet the criteria for enforceable code provisions, and whether all such provisions have been identified, but not make subjective judgements about the merits of the enforceable code provisions.

Remedies for breach of enforceable code provisions

Although the Interim Report raised the possibility of ASIC enforcing codes, the Final Report is silent on this, focussing instead on the need for customers to have certainty that they can enforce important Code provisions either through the AFCA or through the courts if they so elect as outlined above.

As noted in the Consultation Paper, the Commissioner recommended that the remedies available for breach of enforceable Code provisions be modelled on those in Part VI of the Competition and Consumer Act (CCA). However, in our submission it is clear that the recommendation is not intended to be read as a reference to all of the remedies available in Part VI. That Part has broad application across the CCA and is not code-specific.

In our submission, the appropriate provisions of Part VI to incorporate into the new regime to address the problem as defined in the Final Report are sections 80 and 82 of Part VI – the right to restrain a breach by injunction and the right to sue for damages for breach of an enforceable code provision. This could potentially be supplemented by inclusion of a power for ASIC to bring an action for damages on

behalf of customers, as is the case for some other provisions (the unfair contract terms regime is an example). Including equivalent provisions such as these would achieve the objectives outlined by Commissioner Hayne.

In our view it is undesirable, certainly in respect of the 'voluntary' code regime proposed by the Commissioner (as opposed to any mandatory code regime), for any civil penalty or associated infringement notice regime to be applied.

Consequences for breaching legal obligations come within a spectrum from criminal offences to civil actions for damages. Civil penalties are a kind of hybrid of these two ends of the spectrum.[10] The issue that the Commissioner sought to address was, as outlined above, the need for certainty around the enforceability of the right to damages. As noted above, the Commissioner opined that certainty of enforceability, if achieved, could adequately deal with systemic issues with compliance – the only other issue he raised. If the Commissioner considered that remedy to be inappropriate, and that the regime should include a fundamental shift of focus to include a civil penalty regime – a move along the spectrum toward penal consequences - he could have been expected to say so expressly.

For those who would argue that the Commissioner could be taken to make this suggestion indirectly by his reference to Part VI of the CCA, it should be noted that civil penalties are only of marginal relevance for codes under Part VI. Civil penalties (and infringement notices) are only relevant under Part VI where the relevant code itself contains a civil penalty provision, and only two prescribed *mandatory* codes under that regime contain such provisions, and then only for certain 'serious or egregious' breaches.[11]

If such a regime is introduced, it would require ASIC to be the enforcer and is likely to alter the regulatory landscape for codes. In our submission, if ASIC were to enforce codes in the same way that other civil penalty provisions are enforced, it would potentially lower the incentive to propose and develop standards that go beyond the law.

Designating ASIC as Code enforcer would also potentially render uncertain the role of industry-funded Code enforcement entities such as the Banking Code Compliance Committee.

The Consultation Paper raises the prospect that:

> "Rather than providing for individual enforceable code provisions to be subject to a civil penalty, as is the case in the CCA model, it may instead be preferable that there be a general civil penalty where there are systemic or egregious breaches of a code, and that this penalty would be consistent with the amount currently set out in the Corporations Act."

If civil penalties were to be incorporated as part of the enforceable codes regime, then it would be appropriate to apply them only in the instances outlined – noting that careful attention would need to be paid to defining what amounted to 'serious or egregious' breaches. However, in our submission the application – especially of the Corporations Act civil penalty regime - goes beyond the recommendations of the Royal Commission and could potentially be inconsistent with the Commissioner's intention to preserve the current code system. This is because even if the Commissioner's reference to the remedies in Part VI were taken to include a civil penalty regime, he would no doubt have been aware of the limitation in Part VI to civil penalties of "not exceeding 300 penalty units" (s51AE). While that could, given the limited application of such civil penalties in the existing regime, perhaps sit with a system of voluntary code subscription and industry self-regulation, the suggestion in the paper would involve penalties of up to, for some entities, $525 million per breach.

A number of important questions would arise if a civil penalties regime based on that set out in the Corporations Act were introduced:

1. Is it appropriate for industry to mandate that its members subscribe to a code that attracts the same character of sanctions as those available in respect of serious breaches of financial services legislation?

[10] See Australian Law Reform Commission, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report 95, December 2002, p.115.
[11] The Treasury, Industry Codes of Conduct Policy Framework, November 2017.

2. Is it appropriate to fund an enforcement body (such as the BCCC) that becomes in effect a de facto Government regulatory agency?
3. Is it appropriate to draft Plain English codes accessible to customers? Or does the potential for substantial sanctions require a retreat to more precise, legalistic language?

If any civil penalty and infringement notice regime were to be contemplated, it should be confined to the mandatory code regime and should have maximum limits comparable to those in Part VI of the CCA.

Role of Code Compliance Committees

Going to the Commissioners second concern, that experience shows that systemic issues with code compliance have 'not always been resolved in ways that have encouraged or secured future compliance with norms'[12], the regime should provide for the continued operation of well resourced code compliance committees, and require that these committees have certain, minimum powers and sanctions available to them.

For example, the BCCC has discretion to determine what sanctions to apply for a breach of the Code after considering the seriousness of the breach, and include power to refer serious and systemic breaches to ASIC. Sanctions available to the BCCC are:

a) To require a Code subscriber to rectify or take corrective action on the breach identified
b) To require a Code subscriber to undertake a compliance review of their remediation actions
c) To formally warn a Code subscriber
d) To require a Code subscriber to conduct a staff training program on the Code
e) To name the Code subscriber in the BCCC annual report or website; and
f) To report serious or systemic ongoing instances, where a Code subscriber has been non-compliant, to ASIC.

Default mandatory codes regime

To provide for the situation where industry and ASIC could not agree on a code, the Royal Commission recommended that there be a mandatory code regime:

> "the law should be amended to provide for the establishment and imposition of mandatory financial services industry codes, so that the relevant mechanisms are in existence should they need to be exercised. Those provisions should be in a similar form to the provisions that exist in the Competition and Consumer Act, including section 51AE of that Act."

An issue that arises from this part of the recommendation is that mandatory codes under the CCA apply industry-wide. This leaves the question of what will be the situation under the regime if ASIC approves, for example, the Banking Code of Practice administered by the ABA and agrees to appropriate enforceable provisions, but then does not approve the code administered by the Customer Owner Banking Association (COBA)? Or if that entity did not choose to seek ASIC's approval of its code? How will ASIC compel COBA members to subscribe to an approved code? Will ASIC override the ABA code with a new mandatory code for the whole industry? Or prescribe the ABA code as mandatory for the whole industry?

It is not clear but seems likely that the intention of the Commission is that, at least in the first instance, the 'enforceable code' regime be modelled on the prescribed voluntary code regime under the Competition and Consumer Act. That is – the only parties bound by the enforceable provisions will be those that voluntarily subscribe to the relevant code, as opposed to the prescribed mandatory industry code regime under the CCA, under which codes bind all participants in an industry.

[12] At page 109.

This leaves the question of how to address the problem noted by the Commission (and the ASIC Enforcement Review before it), that not all participants in an industry subscribe to a code, or to the same code, and hence will not be bound by provisions in the code/s.

The ASIC Enforcement Review's solution to this problem was to recommend that ASIC have power to require that participants in certain industries subscribe to an ASIC approved code. The ASICERT expressly contemplated that there could be more than one approved code in any industry. So, for example, members of the ABA could be bound by its code, whereas members of COBA could submit their code to ASIC separately for approval.

It is not clear how this problem will be addressed under the Hayne regime. If the ABA and ASIC agree on designated enforceable code provisions and a new version of the Code is approved, ABA members will be covered by these new 'laws' but members of COBA, or members of neither organisation, will not.

In addition, we would be concerned about other participants providing retail banking services such as non-ADI lenders operating without any approved code. This situation would lead to vastly inconsistent protections for consumers receiving substantively the same service, and cause confusion for consumers generally.

Any new mandatory code regime should incorporate the flexibility to allow for their application to parts of industries so that they do not interfere with the existing voluntary ASIC-approved code regime. The value of this regime – voluntary codes approved by ASIC – should be acknowledged by encouraging industry participation in such codes and applying the mandatory regime only to those who choose not to participate in the voluntary regime.

Thank you again for the opportunity to make this submission. We would be pleased to discuss any the issues raised above.

Yours sincerely,

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Australian Banking Association

Appendix 1 – Answers to specific questions from the Consultation Paper

Questions

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

   Subscription to an approved industry code demonstrates individual entities' commitments to the provisions of the code and to be bound by the Code framework for enforceability. This is a signal to the entity's customers that it is committed to high standards of service, ethics and integrity.

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

   The criteria for identifying enforceable code provisions as outlined in the body of this submission should be considered.

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

   The criteria currently outlined in Regulatory Guide 183, as well as the need for the Code to contain 'enforceable code provisions' in accordance with the criteria spelled out in amending legislation (our views on which are contained in the body of this submission). Consistent with ASIC's current criteria for code approval, any new criteria should focus on the process for developing the code, the level of stakeholder consultation and the monitoring, supervision and enforcement provisions. The criteria should reflect whether provisions meet the criteria for enforceable code provisions, and whether all such provisions have been identified, but not require ASIC to make subjective judgements about the merits of the enforceable code provisions.

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

   This depends what is meant by 'prescribe'. Voluntary industry codes can be prescribed under the Competition and Consumer Act, but it should be noted that these codes will only apply to those who voluntarily subscribe. If the Government wishes to impose a code on industry participants then this becomes a question of a mandatory code prescription.

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

   It could, consistent with the recommendations of the ASIC Enforcement Review, be a condition of licences or other regulatory instruments that participants in certain industries should be subscribers to an ASIC-approved code.

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

   This should be a last resort and apply only to industry participants who are not already subscribers to an ASIC-approved code.

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?

   The key factor should be whether participants in the relevant part of the financial sector subscribe to an ASIC approved code.

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

   Codes should generally be subject to compliance monitoring by an independent compliance committee such as the Banking Code Compliance Committee. Those committees should be appropriately funded and have minimum powers and sanctions available to them. Other means of monitoring include customer action through complaints to AFCA or action in courts.

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?

   Codes should be periodically subject to independent review, with the benefit of comprehensive stakeholder consultation – generally three years is appropriate.

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

    Yes – every three years.

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?

    For the (Banking) Code, there already are other remedies – including contract-based enforcement and potential sanction by the BCCC.

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?

    There should be a statutory right to damages for breach of enforceable code provisions. This could be exercisable by the customer through AFAC or the courts, or potentially by ASIC on the customers behalf. Other powers of the ACCC in relation to codes under Part IVB are in practice very limited as they are enlivened only in the relatively rare instances where codes themselves contain civil penalty provisions.

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

    For appropriate 'enforceable code provisions', they should reinforce and render certain those rights. That appears to have been the Commissioner's intention, for the reasons outlined in this submission.

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

    If civil penalties were to be incorporated as part of the reformed codes regime, then it would be appropriate to apply them only in the instances outlined – noting that careful attention would need to be paid to defining what amounted to 'serious or egregious' breaches. However, in our submission the application – especially of the Corporations Act civil penalty regime – would go beyond the recommendations of the Royal Commission and could potentially be inconsistent with the Commissioner's intention to preserve the current code system (for more see the discussion of this in our submission).

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

    The current framework under which customers can, within certain timeframes, choose whether to accept an EDR decision, is appropriate.

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?

    N/A -see response to question 15.

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

    N/A -see response to question 15.