



ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: ASICenforcementreview@treasury.gov.au

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Dear Sir/Madam

ASIC Enforcement Review – Position and Consultation Paper 4

Industry Codes in the Financial Sector

The Insurance Council of Australia (ICA) welcomes the opportunity to provide feedback on the ASIC Position and Consultation Paper – Industry Codes in the Financial Sector (the Consultation Paper).

The ICA is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by general insurers. ICA members, both insurers and reinsurers, are a significant part of the financial services system.

ICA members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property and directors and officers insurance).

The general insurance industry has a relatively mature and evolved industry code that has been in place for some time. The General Insurance Code of Practice (GI Code) was first introduced in 1994 and has undergone many significant reviews and improvements through effective collaboration and consultation with regulatory and consumer stakeholders over the past two decades. This has ensured it remains relevant and continues to meet its objectives.

The GI Code is a living document and the ICA intends for it to be flexible in order to address community and customer expectations over time. To this end, the ICA announced a review of the GI Code in February 2017, to ensure it was appropriately responding to the needs of consumers in light of a number of external developments over the past 24 months.

In response to the five positions put forward by the Taskforce in relation to industry codes, the ICA is largely comfortable. However, as we detail below, the ICA does not support changes that may dilute industry ownership and responsibility for developing effective and efficient self-regulation.

The ICA considers the GI Code sets the benchmark for industry self-regulation in Australia, and has recommended in its interim report on the GI Code review that improvements are made to the GI Code in order that it is capable of approval by ASIC. From the GI industry's years of experience in implementing, revising and enhancing our voluntary code, we are of the view that any regulatory change should seek to preserve the flexibility of industry codes and foster an environment in which industry can work cooperatively and efficiently with the Regulator and consumer associations to establish best practice.

We would like to make the following comments in response to the proposals outlined in the Consultation Paper:

Code “ownership”

The ICA agrees with the Taskforce's view that the content of codes should not be prescribed by law. To do so would mean that the industry would lose a participatory role in the development of a code.

For the same reason, the ICA disagrees with the suggestion made by the Taskforce in point 2 of the Executive Summary, that ASIC approval should require that a code be formulated by an incorporated and independent code body. The monitoring and enforcement of a code must occur at arm's length through an independent body (for the GI Code, this role is carried out by the Code Governance Committee). However, in the nature of the separation between the legislature and the judiciary, it is the ICA's position that an industry must remain responsible for the policy development of a code, in order for the self-regulatory model to succeed.

Industry participants need to have ownership over the content of a code to ensure that the standards are practical and capable of implementation and adequately address consumer issues. The GI Code has been developed and “owned” by the general insurance industry to great success for the past 20 years.

ASIC approval

The ICA considers ASIC's Regulatory Guide 183 (RG 183) to contain best practice standards for code development and code content. For this reason, the current review of the GI Code has taken into account how the GI Code could be amended in order to meet the requirements for ASIC approval.

One note of caution is that the ASIC approval process may hamper the ability of an industry to quickly and flexibly respond to issues through an update to the code. If each change requires a long and onerous application process, this may impede an industry from making regular improvements as needed.

In terms of the associated costs or regulatory burden that may occur if ASIC approval is sought, the major burden is likely to be in delays to implementation of a code, particularly if ASIC requires amendments prior to the code being approved. Once the ICA has reviewed the GI Code, it will seek to implement the recommended changes as quickly as possible.

Requirement to subscribe

The ICA is not opposed to the suggestion that entities engaged in activities covered by an approved code should be required to subscribe to that code.

The GI Code currently covers the vast majority of providers of general insurance products. It is a requirement of ICA membership that members who provide products covered by the GI Code must formally adopt the Code. There are also a number of non-ICA members who voluntarily adopt the Code.

While mandatory subscription may be of value for those financial services in which code participation is low, it is unlikely to make a material difference to consumers of general insurance products covered by the GI Code.

The ICA queries whether this requirement would result in entities other than issuers of general insurance products being required to adopt the GI Code; for example, insurance brokers and other distributors of general insurance, some of whom are already covered by an alternative code.

Making code subscription an AFSL condition may not be the most effective method of requiring entities to adopt the code. Licence requirements generally cover the main services that a licence holder provides, which seems inconsistent with code subscription. Further, this does not acknowledge those entities that may not hold their own AFSL but which are appropriate code subscribers.

The Taskforce report makes particular mention of the voluntary ePayments Code. The ICA would not be supportive of the general insurance industry being required to adopt the ePayments Code, which currently largely covers banks and credit unions.

Code enforceability

The ICA is comfortable with the Taskforce's position that approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body. This is an appropriate minimum standard of code enforceability.

The GI Code is currently enforceable through a tripartite deed of adoption entered into by a subscriber, the ICA and the incorporated association that constitutes the CGC. This is an effective enforcement mechanism for the general insurance industry, and allows the CGC to have a high level of oversight of the industry and require subscribers to make consistent improvements for the benefit of consumers.

The GI Code is also enforceable through internal dispute resolution and the external dispute resolution (EDR) mechanism of the Financial Ombudsman Service (FOS). The FOS Terms of Reference provide that FOS can take into account industry codes in making dispute determinations, and the ICA has recommended as part of the review of the GI Code that the code enforceability role of FOS is made explicit.

The enforcement mechanisms that have worked successfully for the general insurance industry could be applied to other financial services and their codes in order to achieve improved outcomes for consumers.

The ICA strongly disagrees with the suggestion that codes should be incorporated into contracts with customers. In the course of reviewing the GI Code, the ICA sought independent legal advice on the requirements and impact of RG 183 from Radford Lawyers, an excerpt of which is below:

"[I]f the ICA were to agree to require members as a term of the Code to incorporate compliance with the Code into policy terms...

We would not recommend this without careful consideration. By doing this, a customer could seek to bring an action against a member directly for a breach of the Code based on breach of contract, breach of the duty of utmost good faith under the IC Act, misleading or deceptive conduct under the Corporations Act 2001 (Cth) or ASIC Act 2001(Cth)."

The benefit of keeping code standards part of a standalone self-regulatory model is that it allows the code to contain principles and flexibility into the drafting so that members can determine how they will comply enabling them to continually improve and innovate.

If subscribers are required to make the code enforceable at law through their contracts with customers, that flexibility could well end up being stripped out and the code reduced to prescriptive service standards. Indeed, it is suggested in the Consultation Paper that codes could be 'brief' and contain 'base level (rather than 'best practice') service standards'. The ICA does not believe this is the best option for consumers.

The current review of the GI Code is seeking to address matters such as mental health and family violence. Consumer groups have flagged these as key issues for industry. If the GI Code were to be stripped back to a brief, base level document, it would weaken its ability to respond to such issues and to deliver evolving and improved outcomes for consumers.

Finally, if the GI Code were to be incorporated into customer contracts it could add to the amount and complexity of information provided to customers at the time of purchase, adding to the volume of material customers are expected to digest and navigate. As the product disclosure statement (PDS) forms the basis of the contractual relationship between the customer and the insurer, a requirement for codes to be incorporated into contracts would perversely increase the size and complexity of the PDS at a time when industry is working to improve the effectiveness of this document.

For these reasons, the ICA suggests that providing enforceability through strong oversight and sanction powers through the code body as well as through EDR is the most appropriate means to meet the requirements of RG 183 for approval. This will maintain the ability of financial service providers to adapt to technological developments and changing consumer needs and behaviours.

Code bodies

The CGC is required to be made up of a consumer representative (nominated by the consumer board members of FOS), an industry representative (nominated by the ICA, but who cannot be a current employee of the ICA or of an ICA member), and an independent chair.

The CGC is constituted by the Code Governance Committee Association, which is incorporated under NSW law. The Association has six members, three nominated by the

ICA and three nominated by FOS. The association model ensures that the CGC is independent of and at arms-length from the ICA and its members.

The ICA believes this is the appropriate composition and level of independence for a code monitoring body. While it may not be necessary for the composition of individual code monitoring bodies to be specifically subject to ASIC approval, the ICA assumes that the composition of the CGC would be taken into account by ASIC in the consideration of the GI Code for approval, and is comfortable with its current make up and independence.

If you would like to discuss any of the issues covered in this submission, please contact Fiona Cameron, General Manager Policy, Consumer Outcomes on 02 9253 5132 or fcameron@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO