



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

12 April 2019

Mr James Kelly
Division Head
Financial Services Reform Taskforce
The Treasury

Email: enforceablecodes@treasury.gov.au

Dear Mr Kelly,

In brief:

AIST supports industry codes as a means of lifting standards or for assessing if community expectations and members best interests are being met. Codes may contain both enforceable and aspirational provisions and there should be a clear and uniform approach to the identification and treatment of each type of provision. Code enforcement should generally be the responsibility of an independent body (such as a regulator) rather than a code owner.

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

The Australian Institute of Superannuation Trustees welcomes the opportunity to respond to this consultation paper.

Focus on Insurance in Super Code

While AIST is commenting generally on the proposals in the papers and responding to many of the specific consultation questions, our focus is nonetheless on the Insurance in Superannuation Voluntary Code of Practice. This Code is listed in Appendix B of the consultation paper as a current code and was the subject of specific if limited consideration in the final report of the Banking, Superannuation and Financial Services Royal Commission.

AIST is a joint-owner of the Insurance in Super Code along with ASFA and the FSC and was heavily involved in its development and current implementation. More than 40 AIST members - covering the overwhelming majority of the estimated 6 million plus profit-to-member super fund members - have subscribed to the Code and are in transition to meeting its higher standards. AIST is also involved in formal initiatives to further develop the Code, such the standardisation of insurance terms.

AIST strongly supports the Insurance in Superannuation Code as a means of lifting standards for insurance provided in superannuation. The Code provides:

- A framework that sets expectations about the maximum amount of superannuation contributions that should be used for automatically provided life insurance premiums.
- Simpler and clearer processes for members to opt out of automatic life insurance.
- Simplified disclosure and communications about insurance.
- Requirements to reduce multiple insurance policies by cancellation of some insurance cover, in cases where member accounts are inactive.
- Better and more timely assistance to members during claims.

AIST is not directly involved in the other codes listed in Appendix B, although the FSC's Life Insurance Code of Practice regulates the activities of life insurance companies, including in relation to insurance within superannuation.

AIST response to the recommendations of the Financial Services Royal Commission

Throughout his report the Commissioner emphasised the importance of industry codes and often assessed whether entities were meeting community expectations by reference to existing codes, although he did not discuss the Insurance in Super Code in any detail. AIST supports the emphasis of the Commissioner.

As the consultation paper notes, the Commissioner identified several issues with industry codes:

- Inadequate standards;
- Incomplete coverage;
- Inadequate monitoring and enforcement;
- Inadequate consequences for non-compliance.

While Recommendation 1.15 is the lead recommendation on enforceable code provisions that addresses these issues, a number of recommendations in the final report further develop the proposals in relation to certain existing codes. In Recommendation 4.9 this included the Insurance in Super Code, although there was very little commentary about it.

Reflecting the cases studies and witnesses before the Commission, Recommendation 4.9 references the organisations that appeared before him and the documents they provided. This did not include AIST, although we addressed the Insurance in Super Code in our submissions to the Commission.

Although Recommendation 4.9 refers to the Insurance in Super Code, it is unclear if the Commissioner gave any specific attention to it.

The AIST response to Recommendation 4.9 is relevant to the present consultation and states:

The Insurance in Super Code was jointly developed by super funds, insurers, administrators and industry bodies, and the code is now owned by AIST, ASFA and the FSC. There has been a very high uptake of the code by AIST members, with 96% of their members now covered by the code, and an overwhelming commitment to its efficient implementation.

This provides a sound basis for further development of the code. Implementation and development of the code should continue as an industry initiative, and not just as a subset of the FSC Life Insurance Code.

AIST supports the careful and considered transition of the Insurance in Super Code from a voluntary to a binding code following completion of the implementation phase in June 2021. It would then become a condition for holding a RSE Licence. The Government should establish a joint ASIC/APRA taskforce to monitor, report and direct on the Insurance in Super Code of Practice, with ASIC taking the lead role.

The taskforce should:

- monitor and report on adoption and implementation of the code by funds*
- provide guidance on and monitor enhancements to strengthen the code, particularly implementation of standard definitions and moving to a short-form annual insurance statement for members*
- advise the industry what further steps need to be taken for the code to progress the code, including consultation to ensure it is optimally effective*
- annually report findings on industry progress on the code.*

Response to questions on Recommendation 1.15

Many of the questions posed in the consultation paper have also been canvassed and addressed previously. Rather than provide detailed responses, this submission identifies our responses in summary form and notes that they have been expanded upon in other documentation.

In particular, AIST recommends that an appropriate next step in the current process is to map the issues identified in the consultation paper against the guidance in Regulatory Guidance 183 *Approval of financial services sector codes of conduct*.

Questions

1. What are the benefits of subscribing to an approved industry code?
 - a. Lifting standards for consumers over and above legal requirements.
 - b. Sets minimum standards for the subscriber to attain and then exceed.
 - c. Complements legislation by filling gaps in the legislative framework and provides additional details of good behaviour.
 - d. Increases consumer confidence and transparency of industry.
 - e. Provides guiding principles to assist subscribers and inform consumers.
 - f. Flexible, adaptable and less complicated basis for addressing new and emerging issues; continuous improvement.
 - g. Assists in the identification of systemic issues.
 - h. Demonstrates that industry has a common view on required levels of conduct and disclosure.
 - i. Provides a basis for assessing standards and performance in an industry.
2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?
 - a. Ensuring codes set best or good practice standards rather than just minimum standards.
 - b. Aspirational elements of a code should not be enforceable.
 - c. Consistent approach to identifying enforceable provisions (ie, which provisions require strict compliance).
 - d. Dealing with 'if not, why not' provisions on an equitable basis
 - e. Level of materiality.
3. What criteria should ASIC consider when approving voluntary codes?
 - a. The statutory and other relevant criteria identified in ASIC RG 183.
 - b. The extent to which the code contains anti-competitive measures, and the code owner/s has relief in relation to these.
4. Should the Government be able to prescribe a voluntary financial services industry code?
 - a. Yes, a code may be preferable to a regulatory solution where:
 - i. The relevant part of the industry demonstrates sufficient goodwill to address the issue in question in cooperation with the Government;
 - ii. A flexible, adaptable and less complicated basis for addressing new and emerging issues is required.
5. Should subscribing to certain approved codes be a condition of certain licences?
 - a. Yes, where licences for particular purposes or products are associated with benefits and adoption of higher standards prescribed by an associated code may be appropriate.

- b. Superannuation receives tax benefits, is compulsory, and subject to restrictions on assess, and may provide insurance benefits.
 - c. Default contributions must be made into a MySuper product, and these products have additional and higher standards, and must provide minimum levels of death and TPD insurance cover.
 - d. In circumstances such as these, subscribing to the Insurance in Super Code should be a condition of a MySuper licence.
6. When should the Government prescribe a mandatory financial services industry code?
 - a. Where a market failure has been identified.
 - b. Where a regulatory solution may be difficult or take too long to achieve.
 - c. The Insurance in Super Code was written as a voluntary code, and its transition to a binding code will require time to appropriately rewrite it, especially in regard to enforceable provisions. It will also be necessary to identify enforceable code provisions and ensure that they are sufficiently clear to be enforceable provisions. This should be a matter for industry, but Government should allow reasonable time for transitions in the event of a mandatory code being prescribed.
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?
 - a. As above
8. What level of supervision and compliance monitoring for codes should there be?
 - a. Supervision and compliance monitoring are generally the appropriate role for the governmental regulators of the industry, such as ASIC.
 - b. Alternatives may include other government and independent bodies such as the Australian Financial Complaints Authority.
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?
 - a. Yes, code owners have an obligation to monitor the code on an ongoing basis and must have documented processes to do this.
 - b. While this should primarily be the responsibility of the code owners, this should also include a requirement to consult with those impacted by the code – and especially consumers.
 - c. This should include consumer testing of relevant document documentation to ensure it is relevant and meaningful.
 - d. This process should be oversighted by governmental regulators.
 - e. In the case of the Insurance in Super Code, this should be the APRA/ASIC taskforce recommended by the Productivity Commission.

10. Should there be regular reviews of codes? How often should these reviews be conducted?
 - a. Yes, codes should be regularly reviewed, the exact time depending on the nature and circumstances of the code.
 - b. A 3 yearly review should occur following the initial implementation of a code, but subsequent reviews should occur each 5 years (unless a major event necessitates an earlier review).
 - c. The review process should generally commence 3 years from the start of the code implementation process.
 - d. The code should also be flexible enough to allow for reviews to be undertaken outside the formal review cycle.

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?
 - a. There must be flexibility and a range of remedies available to deal with the range of circumstances.
 - b. These circumstances range from minor, accidental ad hoc breaches to major, systematic system-wide breaches. Different remedies may be considered depending on these circumstances.

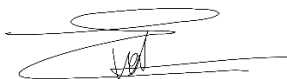
12. Should ASIC have similar enforcement powers to the Australian Competition and Consumer Commission (ACCC) in Part IVB of the Competition and Consumer Act in relation to financial services industry codes?
 - a. Yes, being such an industry code means that the code has the force of law. A breach of the law is a breach of the CCA.
 - b. ASIC's powers should be aligned with the ACCC's in order to allow ASIC to apply proportionate responses (eg, warnings and 'name and shame' options for less serious breaches).

13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?
 - a. As a general principle, the operation of a code should not interfere with a consumer's right to enforce their contractual rights.
 - b. There should be a consistent approach to the determination of enforceable code provisions between financial industry codes.
 - c. ASIC and AFCA may have a role in supporting uniformity.
 - d. In banking, a contract is typically between a consumer and a bank. This consultation process should address how a consumer could effectively enforce a group insurance provision, where the contract is between a superannuation fund and an insurer.
 - e. The consultation process should also identify the role of the relevant governmental bodies (eg, ASIC and AFCA) and the appropriate division of enforcement powers between them.

14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?
- No, but there should be consideration of materiality and proportionality.
 - There is a possibility that plaintiff law firms will bring class actions for minor code breaches (eg, taking one day later for a notice under a code than is required) and this should not be supported by the regulatory framework.
 - On the other hand (and as repeatedly emphasized by the Commissioner), material breaches should also be considered to be a breach of the general obligation under s.912A(1)(a) of the Corporations Act to do all things necessary to ensure financial services are provided efficiently, honestly and fairly.
15. In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?
- Generally, consumers rights should not be constrained.
 - However, if AFCA has found in favour of a consumer, then a court should be required to consider this in determining whether to hear a matter.
 - Also, if a consumer has no new evidence to that considered by AFCA, this should also be taken into account by a court.
 - A settlement agreement should be able to include a provision that the settlement finally settles the matter.
 - A court should generally take the view that a matter should not be relitigated if a consumer has already been compensated.
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 above.
17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?
- Consumer interests may not be properly protected.
 - Reputation of the industry may suffer.

For further information regarding our submission, please contact Senior Policy Manager David Haynes at 03 8677 3800 or at dhaynes@aist.asn.au

Yours sincerely,



Eva Scheerlinck
Chief Executive Officer

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$1.3 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.