THE PLACE OF CODES OF CONDUCT IN REGULATING FINANCIAL SERVICES

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Codes of conduct in financial services regulation are used to draw industry into the regulatory system. This enrolment presupposes a consonance between regulatory objectives and the industry bodies. This historical examination of the evolution of particular codes suggests that this is not always so. Further, by maintaining a code of conduct, industry can retain a certain degree of autonomy and regulators can shift regulatory risk to industry. Yet by supporting a system of codes of conduct dealing with relations with consumers of financial services, industry is also 'responsibilised' in its contact with consumers. This article traces the legislative and regulatory approaches to financial services codes of practice as a form of self-regulation and an aspiration for best practice. It examines the safeguards built into the approvals process to ensure that these self-regulatory rules are effective and that consumers can trust the code system. And it suggests 'light-handedly' that we should be aware of arguments for a retreat from 'direct' regulation to codes.

Introduction

The website of the financial services regulator, the Australian Securities and Investments Commission (ASIC), displays six 'voluntary' industry codes of practice which complement the Financial Services Regulation (FSR) legislative regime.[1] These are the Code of Banking Practice, Credit Union Code of Practice and the Electronic Funds Transfer Code of Practice, the General Insurance Code of Practice and the General Insurance Brokers' Code of Practice, and the Financial Planners Code of Ethics and Rules of Professional Conduct. ASIC also includes on its website the Internet Code of Conduct.[2]

Each of these codes deals with slightly different aspects of the conduct between a financial services provider and consumers of that service. The Code of Banking Practice and the Credit Union Code of Practice deal with disclosure of fees, changes to terms and conditions, rights of guarantors, and

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1 Australian Securities and Investment Commission (ASIC), www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Codes+of+practice?openDocument, 4 November 2006.

2 The ASIC website also mistakenly includes the Consumer Credit Code, which is not a code of practice but legislation by which the Queensland Act provides a template code for the other states.

debt collection. The General Insurance Code of Practice is concerned with Buying Insurance, Insurance Claims, Responding to Catastrophes and Disasters, Information and Education, Complaints Handling Procedures, and Code Monitoring and Enforcement. The General Insurance Brokers Code of Practice sets out rules on disclosure, renewal and cancellation of policies, and policy documentation. The Financial Planners' Association Code of Ethics and Rules of Professional Conduct deal with disclosure of fees and confidentiality. The Electronic Funds Transfer Code of Practice deals with ATMs, and EFTPOS transactions, credit card transactions which are not signed for, internet and telephone banking, and stored value facilities such as pre-paid phone cards. It sets out disclosure obligations, liability for unauthorised transactions, obligations about passwords, and complaints procedures. The Internet Code of Conduct is a best-practice model for internet-based business directed at consumers.[3]

Depending on how it is viewed, the code of conduct is another spanner in the 'regulatory toolkit' or another way to 'enrol' industry in its own 'decentred' regulation. Black argues that the term 'self-regulation' is not analytically useful as, although 'self-regulatory' bodies may complement government regulation, the term fails to capture the highly decentralised and fragmentary nature of any regulatory system. Further, she suggests that to name a system as 'hybrid' regulation is not sufficient. Black argues for an 'enrolment perspective' to portray the actors, their capacities and potential, and the nature of their relationships with each other within a regulatory system.[4]

The industry code of conduct or code of practice does not stand alone. It may be voluntary or mandatory, prescribed or approved.[5] In this, it is a subject of meta-regulation, the systematisation of regulation itself, another means to check on the workings of industry.[6] The private/public systems of rules that constitute a code of conduct are linked to that other private/public locus of regulation, the approved consumer dispute resolution scheme. The rationale for this complex system of private/public rules and dispute resolution is indeed to find an informal inexpensive way to manage consumer redress. But, more fundamentally, it is a means in the great search for compliance,[7] itself a subset of 'governance through rule-making'.[8] Compliance, like faith, is a noun in search of a verb, and we have to ask what it is that the providers of financial services and products are asked to comply with.[9] There is already a huge volume of legal rules and regulations. There is 'principles-based' legislation

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3 Commenting on e-regulation, see Kingsford Smith (2001), p 542.

4 Black (2003a), pp 63–91; Black (2003b), p 1.

5 See *Trade Practices Act 1974* (Cth), ss 51ACA–51AE; *Australian Securities and Investments Commission Act 1998* (Cth), s 12FA (now repealed); *Corporations Act 2001* (Cth), s 1101A.

6 See Gunningham and Grabosky (1998); Parker (2002); Morgan (2003).

7 On promoting the compliance culture, see Australian Law Reform Commission (2002).

8 See Levi-Faur (2005), p 17.

9 Yeung (2004), p 11.

along with detailed rules, yet the regulator, ASIC, does have the capacity to move flexibly and alter the law through the regulations to the Act.[10] Thus responsiveness and flexibility in detailed rule-making do not depend on rules in codes of conduct. Why do we need these 'hybrid' systems of rules and adjudication? What purpose do they serve? Should it not be enough to expect the provider actors in the financial services sector to abide by the law? But can we trust them to do so? If regulation and compliance are part of the search for trust in business,[11] is self-regulation through codes of practice simply another technique in this quest? Or, to put this alternatively, in what way and for what purpose are industry actors in financial services enrolled in FSR?

To some extent, the answers to these questions are historical. These industry-based systems of code and dispute-resolution schemes developed on a sectoral basis prior to the reform of the sector through FSR. The answer may be that they have simply been incorporated into the new regulatory path and drawn closer to the state by the requirement or opportunity for approval, and the evolution of what is required for approval. Yet this is to misunderstand the sector. These codes and dispute-resolution schemes are to do with consumers or the legislative synonym, retail clients. Retail clients enter the market for food, clothing, shelter and employment. These are matters that have long been dealt with in the courts and specialist tribunals. Consumers are also in the market for credit and retirement incomes. These too are dealt with in specialist tribunals — namely the successors to the state Commercial Tribunals and the commonwealth Superannuation Complaints Tribunal. The generic financial services legislation itself deals extensively with disclosure and conduct obligations for retail client protection.[12] It seems mysterious that the banking industry, the insurance industry and the managed investment funds industry should require additional separate rules for standards of conduct and should require separate venues to resolve disputed claims. The will to maintain separateness may be treated anthropologically as the maintenance of a locus of power.

It is curious that it is relations with consumers that have been preserved for the code system. While it might be easy to say that industry has wanted to manage this free of undue interference of the state, an alternate way to look at this is to ask whether the state has wanted this area for regulation. It is reported that 'self-regulation' is suitable if there are no great public interest issues at stake.[13] Yet, as argued elsewhere, there are large issues in the transfer of risks in the financial sector to consumers.[14] If the compliance project is a response

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10 Principles-based regulation refers to an outcomes approach to regulation as opposed to a means approach secured through detailed rules. An example of an outcome approach would be the licence obligation in the *Corporations Act*, s 912A(1)(e) to maintain competence to provide financial services. ASIC may vary legislative provisions by regulation: *Corporations Act*, s1020G(1)(c).

11 Power (1999); Collier (2001), p 191 refers to a function of self-regulation being to 'instill confidence in market stakeholders (including consumers)'.

12 *Corporations Act 2001* (Cth), Ch 7.

13 Australian Law Reform Commission (2002), p 30.

14 Pearson (2006), p 99.

by regulators to the increased ability to detect contraventions and the inability of the system to cope with enforcement with respect to each and every contravention then the risk project for regulators is about assessing the risks of non-compliance by the regulated.[15] But there are further questions: what risks should be included in a risk management framework and what risks should a regulator be accountable for?[16] If some rules and consumer dispute resolution are substantially left to industry, this appears to be risk-shifting. So, through codes, financial services industry actors are both 'enrolled' in the regulatory system and, through that enrolment, themselves 'responsibilised'[17] for their relations with consumers.

To partially answer the questions posed above, rule-making and setting standards of conduct through codes of practice are ways to engage or enrol industry in meeting the desired regulatory outcomes expressed in legislation and thus necessarily hybrid. By referring to higher standards than that required by legislative rules, the code systems also foster changes in the behaviour of code adherents.[18] Functional neutrality or the like regulation of like products is a foundation principle of FSR, yet the codes reflect the 'semi-autonomous' spheres of different types of products and institutions — insurance, banking, credit unions. Thus the codes reflect a pre-FSR system and to some extent entrench this, yet paradoxically at the same time draw the actors within these industries into the post-FSR world and its creation of new norms of conduct. ASIC's appeals to 'rationalisation' and 'harmonisation' of codes speak to both norms and post-product functional neutrality. By focusing on the consumer or retail client, the codes address inadequacies in the different segments of the market for financial services while moving those industries towards practices for a more efficient and fair market.[19] Through self-regulation, industry maintains a degree of autonomy and power. Yet, by accepting or even embracing self-regulation of practices that may have high-risk consequences for individual consumers, industry — rather than the regulator — has taken on the risk of (self-) regulatory failure. It is in this way that FSR, through the codes, has encouraged industry to take responsibility for internalising desired norms of conduct, and for the risk of market failure with respect to retail client relations. The acceptance of this responsibility and risk should persuade retail clients to trust financial services actors. And it is here that the transparency, accountability and review of code systems come in.

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15 See Australian Law Reform Commission (2002), pp 143, 144.

16 See Mikes (2005), p 2, where this question is posed for a different purpose.

17 The term 'responsibilisation' is usually used in connection with consumers and engages notions of risk-shifting to consumers. See, for instance, Ramsay (2006), p 13; Power (2005), p 256.

18 On regulation and the role of non-state actors in modifying behaviour, see Black (2002), p 170; Hutter (2006). Note Williams' critique of the possibility of decentred regulation producing conformity to norms or rules and his emphasis on competition for institutional advantage between those within the regulatory networks: Williams (2006), p 212.

19 See the FSR objectives reflected in the *Corporations Act 2001* (Cth), s 760A.

This paper addresses the evolution of thinking on codes of conduct in Australian regulatory circles, and the place of the code of conduct in financial services regulation. It examines the legislative framework for financial services codes, the background to codes as a form of regulation, early financial services and small business codes, the disillusion with codes due to problems with enforcing their provisions, and changes in the approach to regulator approval of codes. The latter traces changes in the view of codes from them being seen as a means to supplement or flesh-out legislative rules to a focus on codes as enhancing best practice. Within this, there are themes of the ability of code proponents to comply with the code, contractual enforceability, harmonisation between financial services codes, and signalling that consumers may repose trust and confidence in regulator-approved codes. The paper looks at the way certain financial services codes have evolved through review and revisions, and the attempts towards a new code in an industry seemingly reluctant to be enrolled.

There is another series of questions about codes, their rules, the adjudication of claims and the making of determinations that are not directly addressed here. This requires a detailed study over time of the nature of the claims and an analysis of determinations by the disputes schemes or ombudsman. These are questions about how hybrid private/public rule-making and judging fit, in a democratic system, with legislative rules, judicial decision-making, and the evolution of law.

Codes in the Legislative Scheme for Financial Services

The endpoint, at this moment in time, is that ASIC has the power to approve codes of practice.[20] ASIC is not required to approve financial services codes and is empowered to do so only on application. Unlike the Australian Competition and Consumer Commission, this does not include the power to mandate codes of conduct. A decision to approve or disapprove a code is not reviewable.[21] To gain ASIC's approval, codes must be enforceable and subject to mandatory revision every three years.[22] Financial services providers who deal with 'retail clients' must have internal dispute-resolution systems and must be members of an external dispute resolution scheme that is approved by ASIC, the regulator.[23] This is a condition of an AFSL licence, and breach of a licence obligation may result in revocation of the licence. ASIC has legislatively conferred power to approve external dispute resolution schemes.[24]

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20 *Corporations Act 2001* (Cth), s 1101A.

21 A code approval decision is not reviewable by the Administrative Appeals Tribunal: *Corporations Act 2001* (Cth), ss 1317B, 1317C(ge).

22 ASIC (2005) 'Policy Statement 183, Approval of Financial Services Sector Codes of Conduct'.

23 *Corporations Act 2001* (Cth), s 912A(1)(g). For an analysis of some schemes, see O'Shea (2004), pp 156–69.

24 *Corporations Act 2001* (Cth), s 912A(2). Regulation 7.6.02 sets out the matters that ASIC must take into account when making standards for internal dispute resolution schemes and the matters that must be taken into account by ASIC when

The industry codes of practice and the external dispute-resolution schemes are linked. For instance, the Code of Banking Practice, which further regulates disclosure and banking contracts and guarantees, is linked to the Banking and Financial Services Ombudsman. The Financial Planners Code of Ethics and Rules of Professional Conduct is linked to the Financial Industry Complaints Scheme.[25] While there is a close relationship in the regulatory scheme between codes of practice and external dispute resolution, the codes do not subsist solely for the purpose of dispute resolution, though the set of rules within the code is also amenable to the relevant dispute-resolution procedures.

ASIC has approved seven dispute resolution bodies[26] and at least one industry code of practice.[27] This power of approval means that the codes of practice are potentially more than voluntarily agreed industry-based rules and that the approved industry dispute resolution schemes have the imprimatur of government in their exercise of administrative power. Although the ASIC website links to the text of the codes of practice maintained by the relevant industry body, the industry bodies responsible for the codes of practice do not link to ASIC.

An Historical Background to Codes of Practice as a Form of Regulation

The use of codes of practice in the financial services context must be viewed against the background of the code as a form of regulation in the economy overall. The modern enthusiasm for codes of practice derives from national

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deciding to approve an external dispute-resolution scheme. The latter matters are the accessibility, independence, fairness, accountability, efficiency, effectiveness of the ADR scheme and other relevant matters: Reg 7.6.02 (3). Note also Australian Standard 4608, to which the Australian Banking Industry Ombudsman contributed. See Lancken, (2001), fn 3.

25 Other Codes of Conduct are the Credit Union Code of Practice, the Electronic Funds Transfer Code of Practice, the General Insurance Code of Practice, the General Insurance Brokers Code of Practice and the Internet Code of Conduct.

26 There are currently seven ASIC approved external dispute-resolution schemes: Financial Industry Complaints Service, Insurance Ombudsman Service (previously Insurance Enquiries and Complaints Ltd), Banking and Financial Services Ombudsman (previously the Australian Banking Industry Ombudsman), Credit Union Dispute Resolution Centre, Insurance Brokers Disputes Limited, Financial Cooperative Dispute Resolution Scheme, Credit Ombudsman Service (previously called the Mortgage Industry Ombudsman Service). The Superannuation Complaints Tribunal is a body set up by statute.

27 In July 2000, ASIC approved the General Insurance Code of Practice pursuant to the *Australian Securities and Investment Commission Act 2001* (Cth), s12FA and *Insurance Act 1973* (Cth), s 113. See Insurance Council of Australia, 'Code of Practice', www.ica.com.au/codepractice/GenInsCoP.pdf#search=%22General%20Insurance%20Enquiries%20and%20Complaints%20Scheme%3A%20The%20First%20Ten%20Years%22. The IABA expected the General Insurance Brokers' Code of Conduct to be approved in 2003.

and international trade practices or fair trading regulatory approaches. Yet the systematisation of rules by and for traders is not new. In business, the voluntary code of practice or system of rules or standards has been with us at least since the early commercial codes of the Mediterranean and later Europe.[28] These progenitors of the Law Merchant facilitated trade and guided dispute resolution. The fashion for codes of practice in Australia is of more recent origin. It arose out of a conjunction of consumer regulators seeking to engage with business through co-regulation, and the search within some industries to find efficient methods of doing business across the industry. Since its late twentieth century inception in Australia, the code of practice has been linked to the resolution of disputes either between code members of the same industry or between members of the industry and consumers. The evolution of thinking about rules in codes as a form of regulation reflects concern to tread lightly in business regulation, the assimilation of small business protections with consumer protection and provision of a forum for alternative dispute resolution.

Some sectors, such as the media industry, had long regulated themselves through a code. The media codes,[29] which were first authorised by the Trade Practices Commission in 1974 to overcome any issue of anti-competitiveness, streamlined systems and helped reduce costs in the industry by preventing television advertisements against agreed standards and the law, and provided for public complaints.

In 1988, the then Trade Practices Commission and the state consumer affairs agencies agreed to promote codes of practice in industry and viewed this as a means of protecting the public interest.[30] Not only did this result in a proliferation of codes particularly in marketing and the provision of services, it also resulted in legislative changes to take account of codes. In New South Wales, Part 7 was inserted into the *Fair Trading Act 1987* (NSW) to provide for mandatory codes of practice. Codes such as the Retirement Village Industry Code were made under section 75(1) of the *Fair Trading Act 1989* and complemented legislation regulating these industries. Two other mandatory codes were prescribed.[31] At a national level, the first Franchising Code of Practice of 1992 was an attempt to solve what was then an intractable problem of regulation of a new dynamic form of business relationship by making the industry responsible for itself.[32]

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28 See, for instance, Baker (1979)

29 See Pearson (1999), pp 331–60.

30 Commonwealth, state and territory consumer affairs agencies mimeo (1991), TPC Guide to Codes of Conduct: Draft for comment.

31 *The Caravan and Relocatable Homes Park Industry Code of Practice Regulation 1992*, s 7, *Residential Tenancies Act 1987*; the Education (Export) Industry Code of Practice 1990.

32 See House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance: Towards Fair Trading in Australia* May (1997), p 85f.

The First Financial Services Codes

The first financial services code was promulgated in 1989.[33] Australia adopted electronic banking from the late 1970s. In December 1989, the Electronic Funds Transfer Code of Practice came into effect and provided that card issuers should have clear terms of use and warrant that they would comply with the code.[34] The code in effect provided standard form terms for the contract.[35] This code grew out of an earlier 1986 document, *Recommended Procedures to Govern the Relationship Between Users and Providers of Electronic Funds Transfer Systems*, which was developed through cooperation with a range of government agencies.[36] This code was first reviewed in 1998.[37] An ADR scheme for banking services, the Australian Banking Ombudsman, was established in May 1989 and come into operation in June1990 as a result of the influence of the British Banking Ombudsman and the banks' recognition that they needed to improve their image and service.[38]

In November 1993, the Australian Bankers' Association released the voluntary Banking Code of Practice. This was controversial, as consumer groups claimed that the government had given ownership of the code to the banks. The impetus for this code had come from a parliamentary inquiry (Martin Committee) into the banking system that supported legislative codification of banking law and recommended a joint project between the Trade Practices Commission and the Australian Law Reform Commission to develop a code.[39] The Banking Code, which elaborated on existing legal obligations between banker and customer, provided that customer was a consumer (an individual acquiring a banking service exclusively for his or her own private or domestic use),[40] contained three parts: Disclosures; Principles of Conduct; and Resolution of Disputes. An important part of this code

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33 For another account of some of these codes, see Lanyon (2001).

34 Electronic Funds Transfer Code of Conduct 1989, *Australian Securities and Investments, Commission Act 1989* (Cth). On the EFT Code, see Searles (1990).

35 Honduis (1991) argues that there is little difference between standard form contract and codes both of which involve self-regulation. Honduis (1991).

36 These were Treasury, the RBA, Attorney-General's, Prime Minister and Cabinet, the Trade Practices Commission and state consumer departments. House of Representatives Standing Committee (1991), pp 385–87.

37 Weerasooria (2000), p 343. The code was expanded in 2001. Bollen (2001), p 14.

38 BFSO Ltd Review of the Banking and Financial Services Ombudsman Scheme Background Paper, June 2004 pp 8, 16; House of Representatives Standing Committee (1991), pp 396-406; Tyree (2002), p 327; www.bfso.org.au/ABIOWeb/ABIOWebSite.nsf/0/3E236F8E72980BD7CA25701100056039/$file/Background+Paper+June+2004_V2.pdf

39 House of Representatives Standing Committee (1991), pp 383–91, Recommendations 75, 76. See also Viney, (2001) 'Review of the Code of Banking Practice Issues Paper'.

40 Code of Banking Practice 1993, 1.1. The application of the Code could be excluded if an individual made a written statement to the bank that the banking service would not be acquired wholly and exclusively for private or domestic use.

comprised the obligations between the bank and a guarantor which modified the law in this area to the advantage of the guarantor. The Code of Banking Practice operated in concert with the EFT Code, though banks were exceedingly slow in giving explicit contractual effect to its provisions.[41] Both of these codes of practice were linked to the then Australian Banking Ombudsman scheme and initially monitored by the then Reserve Bank and Australian Payments System Council. Following the release of the Banking Code of Practice, the government asked the building societies and credit unions to develop codes of practice, and these were introduced in 1994.

The insurance industry was not immune to the 1990s zest for codes of practice and alternative dispute-resolution schemes. The Insurance Enquiries and Complaints Scheme Ltd was established in December 1991 as an independent dispute-resolution body fully funded by insurers.[42] The Commonwealth government announced that it would introduce a compulsory code of practice for general and life insurance in 1993, and it is suggested that one of the reasons for this was inadequate understanding by insureds of their duty of disclosure notwithstanding the legal obligation on insurers to inform insureds of this.[43] The self-regulatory code was a response to the threat of government intervention and, like the bankers, the insurers would 'own' the code. The task force for the code was chaired by the Insurance and Superannuation Commission and included representatives from the Trade Practices Commission and the Federal Bureau of Consumer Affairs.[44] In 1994, the Insurance Council of Australia put forward the General Insurance Code of Practice as a self-regulatory 'living' code for adoption by insurers.[45] At that time, a spokesman for the industry said such a self-regulatory code was appropriate for an industry that did not have any major systemic problems, where people were not locked in, and could change insurers any time they

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41 See 'Credit Code Slow to be Taken Up', *Australian Financial Review,* 21 September 1995, commenting on a report of the Australian Payments System Council.

42 It was initially called the General Insurance Claims Review Panel and in 1993 became the IEC Ltd, which took over the Panel. Daly, ICA NSW State Conference, 20 March 2001. The scheme was limited to disputes concerning the interpretation or application of the policy; the insurer's liability to indemnify the claimant; the amount of any claim; or delay in payment (Terms Of Reference 4.2). See also Isaac (2001); Wallace et al (2000), Ch 9; Adams (1997).

43 Wallace et al (2000), p 169.

44 Code of Practice Taskforce, Insurance and Superannuation Commission, General Insurance Code of Practice Discussion Paper mimeo, December 1993, including Treasurer Press Release 13 September 1993 and Issues For General Insurance Code of Practice.

45 Code of Practice Taskforce, Insurance and Superannuation Commission, General Insurance Code of Practice 1994, 1.6.2 and 1.8. As at 1 December 2000, 72 insurance companies had adopted the Code of Practice.

liked.[46] The code has been operating since 1995 and, having been approved by the regulator, the Insurance and Superannuation Commission, in 1997 become mandatory for insurers writing certain classes of insurance.[47] This move from a system where insurers could choose to abide by the code to legislated mandatory compliance was instigated in response to inadequate voluntary compliance. The code was initially reviewed in 1998.[48] When the code was first released, it was 'slammed' by the consumer organisations as having vague standards that would be impossible to comply with or monitor; they also commented that it should instead have set out best practice rather than jut reflecting current practice, and that there was no real consumer redress.[49] In turn, the code was defended by insurance lawyers who pointed out that it did impose sanctions through naming and shaming and corrective advertising, which would be a commercial incentive to comply.[50] The issues of that time echo those of today — training of representatives, disclosure of relevant information, clear language, efficient processing of claims. This code was monitored by the insurance industry itself.[51]

The Life Insurance Code of Practice (which is no longer extant since its provisions were incorporated into legislation through FSR) began life in 1995. It was also generated as part of the Code Task Force chaired by the Insurance and Superannuation Commission and first released for discussion in August 1994.[52] The code was welcomed in terms of its requirements for training, and inappropriate selling features, less welcomed for compulsory product information brochures, and criticised for sidestepping the issue of licensing agents.[53] This code had the status of an Insurance and Superannuation Commission circular.[54] There were plans to include it in the *Life Insurance Act*

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46 Allan Mason (then Deputy Chief Secretary of the Insurance Council of Australia) in 'General Insurers Agree to Consumer Code of Practice', *Australian Financial Review,* 5 September 1994.

47 *Insurance Act 1973* (Cth), s 113 as amended by *Financial Laws Amendment Act 1997* (Cth).

48 Pooley (1998).

49 Tim Blue, 'Consumers Slam Insurance Code of Practice' *Australian,* 3 July 1995; 'Consumer Raspberry for Insurance Code', *Australian Financial Review,* 4 July 1995. At the end of the previous year, in earlier talks, representatives from consumer groups had walked out of discussion with the ICA claiming that the code did not meet the TPC's standards in its guidelines for codes. 'Walk-out Signals New Low for Talks on Insurance Code', *Australian,* 7 November 1994.

50 'More Controls on Insurance Industry are 'Unwarranted', *Australian Financial Review*, 7 July 1995.

51 The Insurance Enquiries and Complaints Scheme Ltd monitored and reported on compliance with the code.

52 Code of Practice Taskforce, Insurance and Superannuation Commission (1993), General Insurance Code of Practice Discussion Paper mimeo.

53 'Lukewarm Thumbs Up for Draft Code of Practice', *Australian Financial Review,* 31 August 1994.

54 On the legal effect of the administrative guidelines issued by the ISC, see Kingsford Smith (1993), p 9. See also Haly (2004), p 47.

1995 as an amendment. These plans were put on hold because of the Financial System Inquiry in 1996.[55] The Life Code was linked to the Life Insurance Complaints Service (a precursor of Financial Industry Complaints Service Ltd) which started life in May 1995.[56] Unlike the payment systems codes, which as indicated above were monitored externally, the code was monitored by industry itself.

The Insurance Brokers Dispute Facility (now Insurance Brokers Dispute Facility Ltd) was set up in 1995, and is available to resolve disputes between brokers and consumers. It was linked to the General Insurance Brokers' Code of Practice. This code was owned by the National Insurance Brokers Association (NIBA) and was aimed at promoting 'good relations' between brokers, insureds and insurers in the context of the broker acting as the agent of the insured.[57] It applied to brokers with respect to general insurance.[58] A new Insurance Brokers Code of Practice was launched in October 2006, effective from January 2007, supported by government and ASIC. In addition, all members of the National Insurance Brokers Association must subscribe to the 'one-page' NIBA Code of Conduct which is an internal document distinct from the Code of Practice. The NIBA code is concerned with the conduct of brokers such as acting in the best interests of the client and respecting client confidentiality. All members of NIBA subscribe to IBD, as do most other insurance brokers.

In this phase of regulatory development, codes of practice were a way to draw industry bodies such as the Australian Bankers Association, the Insurance Council of Australia and the National Insurance Brokers Association into the 'conversation' about appropriate forms of regulation at a time of significant change in Australia in technology and the nature of the financial

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55 The effect of many of the provisions in the Life Code are now provided for in Chapter 7 of the *Corporations Act 2001* (Cth). For instance, Life Code para 10 was similar to the requirement of a Financial Services Guide.

56 In 1991, the Life Insurance Complaints Committee was formed. There was already a Life Insurance Federation of Australia (LIFA) Inquiries and Complaints Service. In 1993, these two bodies joined to become the Life Insurance Complaints Board and in 1995 it changed its name to the Life Insurance Complaints Service, became incorporated and in 1999 changed its name again to Financial Industry Complaints Scheme. Sourdin and Elix (2002); FICS Limited 'Annual Review' (1999).

57 General Insurance Brokers' Code of Practice, Cl 1. Under the code of conduct, brokers must act in the best interests of the client, provide advice and guidance to enable clients to make informed decisions on risk and insurance protection, provide full and accurate information for effective underwriting, respect the client's confidentiality in relation to all records and information, ensure the validity and accuracy of all documentation, make available all relevant documentation, policies certificates endorsements and premium calculations as may be required, and be professional efficient and responsive in all dealings. In the event of a claim, they must take every step necessary to ensure prompt and fair settlement, work towards maintaining and enhancing the reputation of NIBA and its members, and act in the spirit of the code and encourage others to do likewise.

58 See *Insurance Contracts Act* 1984 (Cth), s 34. (It does not apply to life insurance.)

services industry.[59] The wholesale legislative changes to financial services regulation had not yet occurred; however, it was evident that changes to protect the interest in a fair and transparent market and for consumer protection were necessary, particularly in the areas of pre-contractual disclosure and fair dealing during the life of any contract. Indeed, Wilson has argued that there was an ethical dimension to certain obligations under the Code of Banking Practice.[60] These financial services codes should be viewed as part of law reform rather than as an alternative to law reform, as they were a way of regulatory engagement with industry and nudging industry towards accepting desired outcomes.

Self-regulation and Small Business

When the Liberal government came to power in 1996, the focus switched to enabling small business to participate effectively in the economy. A Small Business Deregulation Task Force was set up. It reported in 1996 and raised concerns about the extent and impact of 'quasi-regulation' on small business. This led to a Commonwealth Interdepartmental Committee on quasi-regulation which in 1997 reported on Grey Letter law.[61] This report identified over 30 000 codes, standards and specifications.[62]

In 1997, a House of Representatives committee reported on fair trading and recommended changes to unconscionability provisions. It also recommended that the *Trade Practices Act 1974* (Cth) be amended to prohibit unfair conduct, one of the indicators of which might be failure to comply with any code of practice in the relevant industry which had been approved by the now Australian Competition and Consumer Commission.[63] A further recommendation was that the *Trade Practices Act* be amended to give the ACCC power to approve a code of practice for fair dealing.[64] Codes of conduct were linked with dispute resolution, and there was a recommendation that there should be mandatory mediation of disputes.[65] In the same year, a further report set out the parameters for good dispute resolution in industry-based schemes [66] and in 1998 a Codes of Conduct Policy Framework was issued.[67]

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59 For an account of those changes in the financial services industry, see Treasury, (1997).

60 'The Code might be regarded as reflecting ethical standards based upon articulated values.' Wilson (2004), p 201.

61 Productivity Commission Office of Regulation Review (1997).

62 Productivity Commission Office of Regulation Review (1997).

63 See House of Representatives Standing Committee on Industry, Science, and Technology (1997), p 182, Recommendation 6.1,

64 See House of Representatives Standing Committee on Industry, Science, and Technology (1997), p 182, Recommendation 6.2.

65 See House of Representatives Standing Committee on Industry, Science, and Technology (1997), p 182, Recommendation 6.79.

66 Department of Industry Science and Tourism (1997).

67 Minister for Customs and Consumer Affairs 'Codes of Conduct Policy Framework', March 1998.

In the event, the precise recommendations of the *Towards Fair Trading Report* were not adopted. Nevertheless, in 1998 a new Part IVB was inserted into the *Trade Practices Act 1974* (Cth) which prohibited contravention of a mandatory code or the prescribed provisions of a voluntary code.[68] Although the *Towards Fair Trading* Report had recommended legislation to regulate the franchising industry and its attendant problems of the relationship between big business and small captive businesses, the method of regulation adopted was a mandatory code of practice. Thus a new version of the Franchising Code of Practice was prescribed in June 1998. This is the only mandatory code under the Act. These *Trade Practices Act* provisions for prescribed voluntary codes were modelled on proposals considered but rejected by the British Office of Fair Trading which in the end opted for a 'seal of approval' approach rather than enforceable standards for those agreeing to comply.[69]

The favouring of codes of practice as a form of regulation continued. In 1999 the Commonwealth Parliaments' Joint Select Committee on the Retailing Sector in a Report entitled *Fair Market or Market Failure?* recommended a Retail Industry Ombudsman backed by a mandatory code of conduct to regulate relationships throughout the supply chain, and in particular vertical transactions.[70] This was a further example of suggesting a solution to a business relationship through a code of conduct that, in this case, would supplement a partial legislative solution that had extended statutory unconscionability to include protection for small business.[71]

In 2000, the government set up a Taskforce on Industry Self Regulation. In its reports, it examined self-regulation generally, looked at the various forms that this might take (including codes of practice), suggested that there should be a relationship between the problem being addressed by self-regulation and the form of self-regulation adopted, and outlined both when self-regulation was likely to be most effective and best practice in self-regulatory schemes.[72]

It is worth outlining the conclusions of the Report on Self Regulation concerning when self-regulation is likely to be most effective. The Report identified three factors: the nature and extent of market failure; the structure of the market; and recognition of business and consumer interests. Self-regulation will be effective, posited the report, if there is a clearly identified problem

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68 *Trade Practices Act 1974* (Cth), Part 1VB.

69 Department of Fair Trading National Competition Policy Review *Fair Trading Act 1987, Door to Door Sales Act 1967*, Final Report (2002), p 46.

70 Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure? A Review of Australia's Retailing Sector,* Recommendations 3 and 5, http://wopared.parl.net/senate/committee/retail_ctte/report/contents.htm, August 1999. The recommendation for a mandatory code has not been acted upon.

71 See *Trade Practices Act 1974* (Cth), s 51AC. Note that s 51AC (3)(g) provides for the court to take notice of relevant industry codes as a factor in considering unconscionability.

72 Taskforce on Industry Self-regulation (2000). The Taskforce was chaired by Professor Berna Collier, then a Deputy Chair of ASIC. www.treasury.gov.au/contentitem.asp?ContentID=1131&NavID=

requiring self-regulation but one that does not pose a high risk to consumers.[73] If the structure of the market is mature, competitive yet cohesive with an active industry association, then self-regulation will work better than in an inchoate business environment.[74] The viability of a self-regulatory scheme depends on business recognising that its own existence depends on consumers. It is also influenced by high consumer recognition of the self-regulatory scheme.[75]

The report outlined best practice in effective self-regulatory schemes — consultation between business, government and consumers to identify both the problem for self-regulation and policy objectives;[76] broad coverage of the self-regulatory scheme within the industry;[77] clear rules so that both industry and consumers understand their respective obligations and rights;[78] a system to monitor the scheme;[79] and transparency, credibility and accountability.[80]

The various reports provide the reasons for this zest for codes of practice. Business would be able to influence its own form of regulation, particularly in being able to choose a voluntary code.[81] Self-regulation would lower compliance costs for business, avoid the 'overly prescriptive' nature of regulation, provide greater consumer choice and improve market outcomes for consumers.[82] Consumers would have an alternative to the costly court option to obtain redress.[83] Yet a warning note was sounded. Because it was assumed that codes are easier to introduce than statutory rules, it was thought that regulators may inappropriately favour these, thus resulting in higher costs to industry because of the requirement of industry involvement. Further, there may be uncertainty as to the enforceability of code rules.[84]

Disillusion and Problems of Enforceability

The last concern was prescient, as it was the enforceability issue that resulted in dismantling the legislatively backed code system in New South Wales. In 2002, as part of the National Competition Policy review process, the New South Wales Department of Fair Trading reported on the *Fair Trading Act 1987* (NSW).[85] By this time, there were no prescribed codes of practice under

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73 Taskforce on Industry Self-regulation (2000), pp 4, 44.

74 Taskforce on Industry Self-regulation (2000), pp 4, 48–50.

75 Taskforce on Industry Self-regulation (2000), pp 4, 48–50.

76 Taskforce on Industry Self-regulation (2000), pp 5, 63.

77 Taskforce on Industry Self-regulation (2000), pp 5, 65.

78 Taskforce on Industry Self-regulation (2000), pp 5, 65.

79 Taskforce on Industry Self-regulation (2000), pp 6, 69.

80 Taskforce on Industry Self-regulation (2000), pp 6, 71.

81 Commonwealth, state and territory consumer affairs agencies mimeo (1991), *TPC Guide to Codes of Conduct: Draft for Comment*, p XX111.

82 Taskforce on Industry Self-regulation (2000), p 1.

83 Taskforce on Industry Self-regulation (2000), p 3.

84 Office of Regulation Review (1999), pp X1,X1V.

85 Depart of Fair Trading National Competition Policy Review *Fair Trading Act 1987, Door to Door Sales Act 1967*, Final Report (2002).

the *Fair Trading Act* as consumer dissatisfaction and 'substantial market failure' had resulted in the codes being repealed and key provisions becoming legislation.[86] The report canvassed whether the provisions in the Act for mandatory codes of practice should be retained and concluded that they should be repealed.[87]

Concerns about the legal status of mandatory codes, and in particular enforcement problems, outweighed the arguments for flexibility and effective complaints resolution. The report said that the New South Wales Court of Appeal decision in *Murphy v Overton Investments* had 'highlighted the conflict between the adoption of an instrument set in a broad framework, employing a flexible format to set guidelines for good practice (a code), and the setting of rules that require mandatory compliance'.[88]

In *Overton v Murphy* [2001] NSWCA 183, Mason P said:

> 15 On 23 December 1997 Windeyer J held that the Code did not directly give rise to private rights enforceable in court (CB 52). An appeal from this decision was effectively dismissed by the Court of Appeal (*Murphy & Ors v Overton Investments Pty Ltd & Anor*, Court of Appeal unreported, 3 September 1998). In a judgment with which Priestley JA and Powell JA agreed, Fitzgerald AJA said (at 24-5): 'In my opinion, the presently material legal effect of the Codes of Practice was, and is, to provide a basis for the imposition of restrictions on Overton and to give effect to the appellant-residents' rights under the Codes by undertaking or order, as provided for by the *Fair Trading Act.* Until that occurs, Overton is entitled to enforce the residence contracts according to their terms.'

In the case, the rights in the particular contract prevailed over the substantive rules of a supposedly mandatory code of practice generally applicable in all retirement home situations. In totally unrelated proceedings in an earlier Federal Court decision, it had been held that a code could not establish standards of reasonableness for compliance with a legislative provision.[89]

The New South Wales Report also considered whether voluntary codes should be enforceable or simply set standards of good industry practice. Since there was no community support for a statutory-based model for voluntary codes, and as the then *Consumer Claims Tribunal Act 1998* (NSW) provided that any code of practice could be taken into account when making orders, the report recommended that no statutory recognition be given to voluntary codes

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86 Department of Fair Trading National Competition Policy Review *Fair Trading Act 1987, Door to Door Sales Act 1967*, Final Report (2002), p 44.

87 Department of Fair Trading National Competition Policy Review *Fair Trading Act 1987, Door to Door Sales Act 1967*, Final Report (2002), p 45.

88 Department of Fair Trading National Competition Policy Review *Fair Trading Act 1987, Door to Door Sales Act 1967*, Final Report (2002), p 43.

89 *Panasonic Pty Ltd v Burstyner* (1993) ATPR 41-224. (Overcome for the purposes of small business statutory unconscionability by *Trade Practices Act* (Cth), s 51AC(3)(g)).

of practice.[90] And in 2003, the provisions in the *Fair Trading Act* (NSW) for codes of practice were deleted.[91]

Enforceability is also a live issue for financial services codes, as seen for instance in the recent challenges to determinations made by the Financial Industry Complaints Scheme Ltd (FICS).[92]

Financial Services Reform and the Approval of Codes

The disillusionment with codes of practice in New South Wales did not hinder Commonwealth developments. In one of the first tranches of financial services reform changes to legislation in 1998, the name of the Australian Securities Commission changed to the Australian Securities and Investments Commission, and ASIC was given the function of promoting market integrity and consumer protection in relation to the payments system.[93] This was to be done by promoting the adoption of approved industry standards and codes of practice, and promoting sound customer–banker relationships through monitoring the operation and compliance with codes.[94] Explicit financial services consumer protection provisions were inserted into the *Australian Securities and Investments Commission Act 1998* (Cth).[95] These were modelled in part on the *Trade Practices Act 1974* (Cth) provisions. The relevant part of the *ASIC Act* — Part 2, Division 2 — included Subdivision F headed 'Alternative Dispute Resolution'. This provided for a scheme for codes of conduct. In this part, ASIC's function in promoting market integrity and consumer protection was formulated in relation to the Australian financial system and the provision of financial services.[96] At this juncture, the code of practice was more closely identified with consumer dispute-resolution. It had always been linked with ADR, though not exclusively so, as the role of the code was important to improving standards of disclosure and conduct.

Under the relevant provision — *ASIC Act*, s12FA — ASIC had the power to approve codes of practice, including those for resolving disputes between

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90 Department of Fair Trading National Competition Policy Review *Fair Trading Act 1987, Door to Door Sales Act 1967*, Final Report (2002), p 47.

91 By *Fair Trading Amendment Act 2003* (NSW), which amended the Act to omit Part 7.

92 *Masu Financial Management P/L v FICS and Julie Wong (No 1)* [2004] NSWSC 826, 50 *ACSR* 554; *AXA v FICS Ltd* [2006] VSC 121. See also O'Shea (2006), p 164.

93 The *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), No 54 1998 inserted s 12A. See s 12A(3).

94 The *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) No 54 1998 inserted s 12A. See s 12A(3)(a),(d)(i)(ii).

95 *Financial Sector Reform (Consequential Amendments) Act 1998* (No 48, 1998), Sch 2.

96 *Australian Securities and Investment Commission Act 1998* (Cth), s12FA. Note that Subdivision F, s 12FA is not included in the Bills Digest of the Financial Sector Reform (Consequential Amendments) Bill 1998 as introduced 14 May 1998.

financial services providers and consumers.[97] The legislation required ASIC to be satisfied with the alternative dispute-resolution procedures before approving a code and set out guidelines for code approval.[98] There were 15 prescriptive requirements.[99] A relevant complaint was one that had first been lodged with the corporation but not resolved to the satisfaction of the complainant. Systemic problems were to be reported to ASIC. The ADR system must be free for complainants. The body overseeing the ADR system must include consumer representation. The ADR system had to operate in accordance with the principles of natural justice. Decisions were to be made by reference to what was fair in all the circumstances. The ADR scheme was to publish procedures and to be adequately resourced. The relevant corporations were to abide by the decisions of the ADR scheme. The scheme had to provide adequate remedies. The scheme was required to publish appropriate statistics of its operations. It was also obliged to provide both ASIC and the relevant industry associations with details of decisions either on all complaints or on a representative selection of complaints. Information on decisions was to include the reasons for decision but exclude information which would identify parties to the complaint. ASIC had the power to revoke approval if the code no longer met these guideline requirements.[100] Pursuant to power under the *ASIC Act*, s 12FA, ASIC issued Policy Statement 139 setting out standards for ADR schemes in the financial sector.[101] The approvals strategy indicates that, although the industry bodies should be responsible for their proposed self-regulatory systems, the system was designed to advance an interaction with consumers that was monitored and not dissimilar to more formal low-cost dispute resolution.

In its submission to the Senate Select Committee on Superannuation and Financial Services in January 2000, ASIC outlined how it contributed to effective self-regulatory schemes — by monitoring compliance with the payments systems codes and by participating in the general debate about making self-regulation effective. It saw the advantages of self-regulation as flexibility and adaptability in giving consumer protection, but also noted that self-regulation may be inappropriate because of over- or under-regulation. ASIC believed that in the dispute-resolution area the time had now come for some rationalisation.[102] This was a busy time for ASIC's work with self-

97 *Australian Securities and Investment Commission Act 1998* (Cth), s 12FA(1).

98 *Australian Securities and Investment Commission Act 1998* (Cth), s 12FA(2).

99 *Australian Securities and Investment Commission Act 1998* (Cth), s 12FA(2)(a)–(o).

100 *Australian Securities and Investment Commission Act 1998* (Cth), s 12FA(3).

101 ASIC, 'Approval of External Complaints Regulation Schemes', Policy Statement 139. This covers issues such as the independence of schemes, wide coverage to hear consumer complaints, low cost of the schemes for consumer access, effective reporting of complaints and trends in complaints, adequate public promotion of the schemes and regular independent reviews of the schemes.

102 The Wallis Report had also made recommendations towards a Financial Services Ombudsman in Recommendations 25 and 26: Treasury, *Financial System Inquiry: Final Report* (1997) (Wallis Report).

regulation. At the time of its submission, ASIC was drafting its Policy Proposal Statement (PPS) on code approval. It was also in conversation with the Insurance Council of Australia regarding approval of its code of conduct and working with other groups which were developing codes, such as the Australian Friendly Societies Association and the Mortgage Industry Association of Australia. In addition, ASIC was contributing to the review of the Banking, Credit Union and Building Societies Codes.[103]

When the *Australian Securities and Investments Commission Act 2001* (Cth) was enacted as part of both financial services reform and resolution of the constitutional issues then besetting companies law, Subdivision F — with its references to alternative dispute resolution and codes of practice — was retained, though not for long. The *Financial Services Reform Act 2001* (Cth), which introduced the new Chapter 7 into the *Corporations Act 2001* (Cth), repealed Subdivision F of the *ASIC Act*. The licence requirements for internal and external dispute resolution procedures in the *Corporations Act*[104] rendered the *ASIC Act*, s12FA, with its focus on dispute resolution, redundant. Yet ASIC still had power to approve codes. Section 1101A in the new Chapter 7 of the *Corporations Act* provided for the approval by ASIC of codes of conduct, though on different terms from the previous grounds for approval in the *ASIC Act*. There was still a recognised role for existing codes, particularly in banking and insurance, to provide for best-practice standards in order to comply with the new extensive legislative requirements.[105]

Under the *Corporations Act,* s 1101A, ASIC has the power to approve codes of conduct that relate to any aspect of activities in relation to which ASIC has regulatory responsibility. This is restricted to the activities of certain persons — financial services licensees, authorised representatives of financial services licensees or issuers of financial products. The changes in ASIC's approval power from the *ASIC Act*, s 12FA to the *Corporations Act*, s 1101A means that formally, financial services codes are now delinked from dispute resolution and extend to all areas of financial services. ASIC may also approve a variation to an approved code. Neither approval nor variation is possible if the code is inconsistent with the *Corporations Act* or other law under which ASIC has responsibilities.[106] In approving a code, ASIC may take into account any other matters that ASIC considers relevant.[107]

There are two factors that ASIC must take into account to approve a code: the ability of the person applying for code approval to ensure that persons who

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103 ASIC, 'Submission to the Senate Select Committee on Superannuation and Financial Services Inquiry into Superannuation and Financial Services' January 2000, pp 45–47. www.asic.gov.au/asic/asic_pub.nsf/byheadline/ASIC's+submission+Senate+Select+Committee+on+Superannuation+and+Financial+Services%3A+Executive+summary?openDocument

104 *Corporations Act 2001* (Cth), ss 912A(1)(g), 912A(2).

105 Explanatory Memorandum, *Financial Services Reform Act 2001* (Cth), p 178.

106 *Corporations Act 2001* (Cth), s 1101A(3)(a).

107 *Corporations Act 2001* (Cth), s 1101A(3)(b).

hold out that they comply with the code will comply with the code,[108] and the desirability of codes of conduct 'being harmonised' to the greatest extent possible.[109] The former of these provides in effect that codes must be contractually binding.[110] By approving a code, ASIC would in effect be preventing the likelihood of contractual performance. By providing in law for the desirability of harmonisation of codes, through approving a code, ASIC may facilitate standard form codes or standards of conduct that would have contractual effect.

ASIC's Approach to Approving Codes of Practice

The views of ASIC post the FSR legislation with its enhanced consumer protection are best reflected in two speeches given by Jillian Segal, then Deputy Chair of ASIC. Her first speech pointed out that the role for codes to date had been about consumer protection not provided for in legislation, and posited that if a role for codes were still to be retained, they should deal with matters not in legislation. Segal pointed to the distinction between elaborating on legislation for compliance purposes and elaborating on legislation for best-practice purposes. A code, said Segal, is only one way of clarifying compliance obligations since administrative guidance — such as policy statements from the regulator — also serves this function. There is also a possibility that codes may duplicate legislation and create inconsistencies, as with disclosure obligations.[111] This was a reversal of earlier approaches to codes which favoured some duplication as having an educative function — for example, in the many codes dealing with marketing which duplicate the prohibition against misleading or deceptive conduct.[112]

In a further speech in 2001, Segal examined self-regulation and the role of the regulator, and acknowledged that ASIC was reliant on self-regulatory schemes to deal with day-to-day complaints and reporting of systemic problems to ASIC. She also noted that codes of practice are not mandatory. At this point in time, it was evident that, although ASIC was cognisant of its power of code approval, it considered that ASIC policy statements may be more useful for achieving FSR objectives. The future of codes, suggested Segal, may be in functionally based schemes rather than based on membership

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108 *Corporations Act 2001* (Cth), s 1101A(3)(b)(i).

109 *Corporations Act 2001* (Cth), s 1101A(3)(b)(ii).

110 At least by offering a unilateral contract through a promise to abide by the code, at most by promising in the code to incorporate the code into contracts with consumers. See also Pearson (1995). Note Black's point that, in the code context, courts have confused contract as an instrument of economic exchange with contract as an instrument of government or non-governmental regulation: Black (1996), p 41.

111 Segal, Financial Services Consumer Conference, 9 November 2000.

112 For example, the first Code of Banking Practice (1993), Cl 18.1 reads: 'A bank shall ensure that its advertising and promotional literature drawing attention to a banking services is not deceptive or misleading.'

of one industry.[113] This echoed the harmonisation, rationalisation theme that was at one with the FSR objectives of creating a regulatory regime that was neutral in its treatment of the functions of financial products.

In the lead-up to the passage of the FSR legislation, ASIC issued nine Policy Proposal Papers including a PPP on the approval of codes.[114] The difficulties in interpreting the new regulatory scheme and the heavy burden placed on ASIC were acknowledged by the parliament.[115] In considering how to respond to its responsibilities regarding code approval, ASIC issued a Regulation Impact Statement which, among many issues, canvassed the options for ASIC in a situation where codes were neither mandatory nor defined as such.[116] ASIC identified the options as: not providing guidance to industry, thus risking inconsistency and codes without a sufficient degree of consumer protection; a prescriptive policy statement; or guidance on best practice for industry codes and on how ASIC will assess an application for regulatory approval. The last of these was the preferred approach.

In June 2001, ASIC issued its PPP No 9, which set out what it would consider a code of conduct for the purposes of its approval power under the *Corporations Act*, s 1101A. The PPP indicates a development in thinking about the role of codes — that there is a hierarchy of guidelines and codes, that it will not be mandatory to belong to a code because the primary obligations are imposed by the Act, that a facilitative role is left to the code, that the code should not 'flesh out' legislation but should enhance best practice, and that codes should be moving towards harmonisation. Previously, as indicated by the *ASIC Act*, s 12FA, the 'regulatory lens' was on dispute-resolution — this had turned again to industry practice. Industry practice was now extensively regulated by law, yet there was still to be a role for codes in enhancing that practice.

In 2005, ASIC issued Policy Statement (PS) 183, 'Approval of Financial Services Sector Codes of Conduct'. The PS sets out how and when ASIC will approve codes of conduct, and gives an overview of the role of codes along with a code approval checklist. Since no sector in the financial services industry is obliged to develop, or gain approval for, a code of practice, it is legitimate to ask what is the point of ASIC approval. The PS answers that it is to signal that this is a code in which consumers may have confidence, as it will

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113 Segal (2001), p 10.

114 ASIC, 'FSRB Policy Proposal Paper (PPP) No 9, Approval of Codes ASIC Policy Proposal', www.asic.gov.au/asic/asic_pub.nsf/byheadline/Policy+proposal+papers+and+papers+for+public+comment?openDocument.

115 Parliamentary Joint Statutory Committee on Corporations and Securities (2001), p 85, www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/fin_services_bill01/report/report.pdf

116 ASIC, 'Policies Implementing the *Financial Services Reform Act*', www.pc.gov.au/orr/ris/examples/fsrglobal/fsrglobal.pdf, 2001.

be responsive to consumer issues and will deliver benefits to consumers.[117] Here, the code is clearly envisaged as promoting trust. This self-confessed alignment of approval with signalling is curious given the paucity of easily available information as to whether ASIC has actually approved any particular code. The contrast between the ASIC web page for ADR schemes — which declares them to be ASIC approved — and the web page for codes — which merely provides links to the codes without any indication of ASIC approval — is noteworthy.

What Can ASIC Approve? What is a Code?

The Policy Statement sets out what ASIC will treat as a code of conduct for the purposes of its approval power. ASIC distinguishes between codes and other self-regulatory arrangements and reserves the word 'code' for a set of rules with certain features.[118] If a body of rules does not have the following characteristics, ASIC will not consider it a code and eligible for approval. [119]

A code of conduct is 'a comprehensive body of rules that sets enforceable standards across an industry (or part of an industry), and delivers measurable consumer benefits'.[120] It is a body of rules with three characteristics: it must be contractually binding and enforceable on members of the code; it needs to be transparent in its development and further review; and it must have effective mechanisms for administration and compliance.[121] The distinction between codes and other forms of self-regulation means that single-issue guidelines and arrangements without compliance, administration and review mechanism are not codes for the purposes of the ASIC test.[122] ASIC explains that it perceives a distinction between codes at the top of the hierarchy of self-regulatory instruments and other indicators of self-regulation, such as industry guidelines and standards. This is because codes offer a greater degree of consumer protection since they are contractually enforceable, monitored, provide sanctions for breaches, and contain mandatory review requirements which facilitate the evolution of the code. Non-code voluntary standards and guidelines are excluded from the possibility of approval because they do not

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117 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.6.

118 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.23.

119 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.14.

120 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.13.

121 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.13.

122 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.23.

have any monitoring or enforcement mechanism; therefore, there are few incentives for compliance and limited transparency.[123]

ASIC elaborates on the characteristics of a code. What sorts of rules should a code have? They should 'set standards that elaborate on, exceed or clarify the law.'[124] That is, the code should do more than restate the law and its rules should provide for a higher standard of conduct.[125] If the code rule provides for a higher standard of practice than required by the law, then there is no inconsistency. A higher standard of conduct may involve rules for greater pre-contractual disclosure or a longer notice period than required by legislation.[126] A code dealing with an issue not in legislation should not be considered inconsistent.[127] If compliance with a code provision would make it impossible to comply with the law, the code would be inconsistent.[128] Code rules should also cover dispute resolution procedures.[129]

Enforceable Standards that are Contractually Binding

ASIC states that code enforceability is essential for consumer confidence in the effectiveness of a code and for consumer redress.[130] It points to two types of arrangements for contractual enforceability. In the first and most common, there is a contractual agreement to abide by the code between subscribers and the central body which is given the power to enforce the code and its standards, as with the General Insurance Code of Practice. The second is where code subscribers incorporate their agreement to abide by the code directly in individual product or service contracts with consumers.[131] A third

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123 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.22.

124 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.22.

125 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.28–29.

126 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.29. ASIC has legislative power to approve a code only if its provisions are not inconsistent with the *Corporations Act* or any other law for which ASIC has responsibility: s 1101A(3).

127 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.37. The Explanatory Memorandum in para 17.16 says: 'Codes may also be developed that establish best practice in areas not covered by the Act: ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.38.

128 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.28

129 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.65

130 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.24

131 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.25

form of contracting is not mentioned. By publicly agreeing to be bound by the code, the industry code member may be open to a unilateral contract with a consumer who acquires financial services from the industry code member. In this way, the rules of the code become contractually enforceable as between the code member and the consumer. The exemplars are the Payments Systems Codes.

Enforceability and Dispute Resolution

Although a code may be contractually enforceable, this will be of no avail unless a person is able to take action. The Payments System links enforceability to dealing with code breaches. In addition to members agreeing to be contractually bound, there must be an independent body to administer sanctions, the code itself must provide for consumer access to internal and external dispute resolution for breaches resulting in 'direct financial loss', and there must be standing to complain about any other code breach to the independent body.[132]

Approving a Code

In order to commence the approval process, a set of self-regulatory rules must first meet the ASIC requirements to be considered a code. This means that the code rules must have been developed in a consultative fashion; elaborate, exceed or clarify the law; be enforceable; provide for monitoring of compliance; and include remedies and sanctions for breaches of the code.[133] Further, as required by statute, the rules must not be inconsistent with law for which ASIC has responsibilities.[134] ASIC will concentrate on the objectives, scope and core rules of the code.[135] It must also consider both the ability of the scheme to ensure that persons who claim to comply with the code rules will indeed do so, and harmonisation of codes of conduct. There are three keys for ASIC to satisfy itself that the code administration body has the ability to ensure compliance with the code: access to appropriate remedies for consumers; sanctions on code members for non-compliance; and independent monitoring of compliance.[136] Access to remedies is cast as a subset of compliance. When consumers complain and gain a remedy, this promotes compliance among all the code members, in turn impacting on standards of conduct on the sector governed by the code. Thus standing to complain about code breaches should not be limited to affected consumers and should extend

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132 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.15

133 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.22

134 *Corporations Act 2001* (Cth), s 1101A(3).

135 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.56–183.61.

136 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.31.

to consumer organisations and financial services regulators.[137] This, says ASIC, would promote greater consumer confidence in the codes. Approval is contingent on independent review of a code at least every three years.[138]

The point of industry seeking ASIC approval of a code appears to be to indicate a willingness to engage in the regulatory process, perhaps forestalling some further regulatory action, gaining consumer credibility, and maintaining control over the rules and processes that feed into the dispute-resolution schemes. The ASIC approvals schema is designed for sophisticated code systems. It provides guidance for particular industries which do not yet have highly developed codes and, through the harmonisation desideratum, paves the way for functional rather than industry-based codes. There is a question as to whether ASIC approval is a sufficient incentive for those groups in the financial services industry without developed codes to sign up to the self-regulatory project as fully enrolled members of FSR.

The Evolution of Financial Services Codes

Many codes badge themselves as 'living' documents, and the self-regulatory activity via codes in the 1990s and the introduction of FSR have not stymied developments. From 1998 onwards, a number of dispute-resolution schemes have been approved by ASIC.[139] There has also been a flurry of reviews and revisions of codes of practice.

In 2001, ASIC launched a new EFT Code.[140] The EFT Code was also amended from April 2002 to extend the coverage of the code to include all forms of electronic banking. The code now covers not only ATM and EFTPOS transactions, but also telephone, internet and PIN-based credit card transactions.[141] This code was not revised directly by industry, but by ASIC through its EFT Working Group.[142]

In 2000, prior to FSR and the introduction of Chapter 7 into the *Corporations Act*, the Australian Bankers' Association commissioned an independent review of the Code of Banking Practice.[143] The original code had contained provisions for review, and this was the first review undertaken. The

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137 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.66.

138 ASIC, 'Approval of Financial Services Sector Codes of Conduct', Policy Statement 183.79.

139 1998 FICS (as Life Insurance Complaints Service), 2000 IEC Ltd, 2002 IBD Ltd.

140 Council of Financial Regulators, *Annual Report 2001*, www.rba.gov.au/PublicationsAndResearch/CFRAnnualReports/2001/Pdf/cfr_annual_report_2001.pdf, (2001).

141 ASIC, '03-413 ASIC Releases 2003 Codes Monitoring Report', www.asic.gov.au/asic/ASIC_PUB.NSF/byid/7394732D75F239FDCA256E030083193E?opendocument, 22 Dec 2003.

142 See Electronic Funds Transfer Code of Conduct as revised by the Australian Securities and Investments Commission's EFT Working Group, issued 1 April 2001, amended 18 March 2002.

143 Viney (2001).

review revealed dissatisfaction with the code among consumer groups and limited interest by the banks in contributing to the review that was overcome only later in the review process.[144] However, when the final report was issued, it was welcomed by the banks and by consumer groups.[145] Following this extensive review, the Code of Banking Practice was substantially amended to take effect from April 2003.[146] The revised code applies to small businesses as well as consumers.[147] Revisions of interest include increased protections for consumers regarding charge backs to the merchant bank in credit disputes,[148] standards of assessing ability to repay in loan transactions,[149] and more extensive obligations to disclose information to prospective guarantors.[150] The code was further reviewed in 2004 and is due for review in 2006. The Australian Bankers' Association now describes the code as the 'banking industry's customer charter on good banking practice'.[151]

In July 1998, following early changes to FSR, ASIC took over responsibility for monitoring the payment systems codes of conduct and the EFT Code from the Australian Payments System Council. ASIC declared that codes were 'important tools for consumer protection and market integrity'.[152] Prior to the FSR legislation, ASIC said 'codes will remain an important part of the regulatory environment'.[153] The value of the ASIC monitoring process was that the reports of the regulatory agency clearly indicated the number of disputes with respect to rules within the Codes of Practice and thus provided an annual public indicator of private compliance with public/private rules

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144 Viney (2001), pp 2, 8f, 18.

145 Consumer Credit Legal Centre flyer, November 2001, www.cclcnsw.org.ay/flyers/November2001.html 9/20/2004.

146 For a detailed account of this review see Lanyon (2001).

147 Australian Bankers' Association inc. 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446 (2004), cl1; cl 40.

148 Australian Bankers' Association inc. 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446 (2004), cl 20.

149 Australian Bankers' Association inc. 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446 (2004), cl 25.

150 Australian Bankers' Association inc. 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446 (2004), cl 28.4; see also cl 28.4(d)(i) which expands the disclosure requirements regarding related security contracts.

151 Australian Bankers' Association inc. 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446 (2004).

152 ASIC, 'Report on Compliance with the Code of Banking Practice, Building Society Code of Practice, Credit Union Code of Practice, April 1998 to March 1999', www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Code_Report.pdf/$file/Code_Report.pdf Jan 2000, p 6.

153 ASIC, 'Compliance with the Payments System Codes of Practice and the EFT Code of Conduct April 1999 to March 2000', www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/code_compliance_report.pdf/$file/code_compliance_report.pdf Feb 2001, p 3.

designed to protect consumers. However, this material was dependent on self-assessment by the banks, and regarded as lacking transparency.[154] The final ASIC report on the Payments Systems Codes was made in December 2003 for the period April 2002 to March 2003. ASIC no longer monitors the Banking Code. In its last report monitoring the Code of Banking Practice, ASIC reported an increase of 18 per cent in disputes under the code.[155] ASIC still monitors the EFT Code.

The revised Code of Banking Practice came into effect in August 2003, was further amended in May 2004, and contains independent monitoring procedures. The code itself provides for a Code Compliance Monitoring Committee jointly appointed by the banks and the Banking and Financial Services Ombudsman that is sufficiently resourced and with power to carry out its own inquiries.[156] ASIC stated that it 'welcomes these new arrangements and also encourages those banks that have not yet signed up to the revised Banking Code to do so as soon as possible'.[157] The Banking Code of Practice is now monitored by the Code Compliance Monitoring Committee, which has published two annual reports and which itself has been reviewed.[158] The CCMC has undertaken a review of bank compliance with the code obligation for banks to help customers overcome financial difficulties with any credit facility, including developing a repayment plan and letting customers know about the hardship provisions in the Consumer Credit Code. The conclusion is that there is generally a commitment to this obligation in both letter and spirit.[159]

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154 Viney (2001), Issues Paper, p 26. The process was that the institutions filled in a self-assessment compliance report and provided the statistics: www.reviewbankcode.com.

155 ASIC, '03-413 ASIC Releases 2003 Codes Monitoring Report', www.asic.gov.au/asic/ASIC_PUB.NSF/byid/7394732D75F239FDCA256E030083193E?opendocument 22 Dec 2003; ASIC, 'Compliance with the Payments System Codes of Practice and the EFT Code of Conduct April 2002 to March 2003', www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Code_Monitoring_Report_02_03.pdf/$file/Code_Monitoring_Report_02_03.pdf, Dec 2003, p 23.

156 Previously Australian Banking Industry Ombudsman. Australian Bankers' Association Inc, 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446, (2004), cl 34.

157 ASIC, 'Compliance with the Payments System Codes of Practice and the EFT Code of Conduct April 2002 to March 2003', www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Code_Monitoring_Report_02_03.pdf/$file/Code_Monitoring_Report_02_03.pdf Dec 2003.

158 The Code Compliance Monitoring Committee, 'Code Compliance Monitoring Committee Inquiry into Bank compliance with clause 25.2 of the Code', http://bankcodecompliance.org/docs/pdfinquiryreport.pdf (2005), p 5.

159 Australian Bankers' Association Inc, 'Banking Code of Practice', www.bankers.asn.au/Default.aspx?ArticleID=446, (2004), cl 25.2; 'Code Compliance Monitoring Committee Inquiry into Bank compliance with clause 25.2 of the Code', http://bankcodecompliance.org/docs/pdfinquiryreport.pdf, (2005), p 5.

A number of matters in the 1994 General Insurance Code of Practice were subsequently dealt with by legislation as a result of FSR.[160] This led to a review and then redrafting of the General Insurance Code of Practice. At the same time, the Insurance Enquiries and Complaints Scheme Ltd changed its name to the Insurance Ombudsman Service and was reviewed.[161] When the draft code was released for public consultation, the Insurance Council of Australia stated: 'Community input is necessary to ensure that the final Code of Practice lifts the standards of the insurance industry, addresses consumer issues and meets community expectations.'[162] The code had been drafted in consultation with both consumer and business groups, and government, then reviewed by a former chair of ASIC.[163] All of the reviewer's recommendations were adopted, including the restoration of monitoring of internal dispute resolution.[164] The final code was released in 2005 and came into effect in July 2006. It is a voluntary code,[165] and now applies to all general insurance products including small business transactions.[166] Brokers may also subscribe to the code.[167]

The comments of David Knott, the reviewer, are instructive, as they impliedly reiterate the view that the contemporary role for the code of practice is to improve on the standards of conduct provided for by legislation. Noting that many — both consumers and those from the insurance industry — had submitted that the aspirations of the code were conservative, Knott said:

> The principle has been adopted (rightly in my view) that a Code of Practice should not simply assert standards and obligations that apply under the law. As a corollary, it is considered that the official regulator of such standards and obligations should retain primary (if not exclusive) jurisdiction for their enforcement. The consequence is that

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160 For example, the obligations of licensees for the training and competence of representatives.

161 This occurred in 2004. In June 2005, the Allen Consulting Group reported on their review of the Insurance Ombudsman Service. The Allen Consulting Group, 'The Insurance Ombudsman Service Independent review Final Report to Insurance Ombudsman Service', www.insuranceombudsman.com.au/pages/include/documents/Issues_Paper.pdf, June 2005.

162 Insurance Council of Australia (2005), 'Public Consultation Draft Code', www.ica.com.au/submission.

163 Groups consulted with included the Consumers' Federation of Australia, the Australian Chamber of Commerce and Industry, the Office of Small Business and the Insurance Ombudsman Service. The reviewer was David Knott. See Insurance Council of Australia (2005), 'General Insurance Code of Practice', www.codeofpractice.com.au/AboutheCode.

164 Knott (2004), para 6.7; General Insurance Code of Practice (2005), cl 7.

165 *Insurance Act 1973* (Cth), s 113 was repealed.

166 Insurance Council of Australia 'General Insurance Code of Practice', www.codeofpractice.com.au/, 2005, cl 1.4.

167 Knott (2004), para 6.3.

> the draft Code is silent in many areas covered by the *Corporations Act* and administered by ASIC.
>
> — Certainly, a Code of Practice that does no more than mimic standards and obligations already compelled by law has little utility. It is also understandable that an industry may feel reluctant so soon after the imposition of a new statutory regime that seeks to increase levels of disclosure and consumer protection, to embrace additional obligations of a type already encompassed by that legislation. Additionally the point can validly be made that a Code of Practice, being a voluntary assumption of obligations, should be principles based and not be heavy laden by prescriptive process.
>
> On the other hand, a Code of Practice that rigidly excludes all areas dealt with by the law is likely to miss opportunities to explain how the industry aspires to implement its obligations to *standards* that are not explicitly imposed by statute. It will frequently be the case that the law is expressed in general terms ... But the existence of such a law should not be taken as a disincentive to the establishment of benchmark *standards of conduct* upon which consumers can place some reliance when dealing with the industry. If the regulator itself issues guidance on the standards required to meet statutory obligations, it may be decided to explicitly adopt that guidance as a minimum Code aspiration. In other cases, the industry might reasonably be expected to put flesh on the skeleton of statutory obligation, particularly in areas where consumers can point to recurring ambiguity or dispute.[168]

The new version of the Insurance Code is designed to raise standards for consumers in areas which include, training of employees,[169] claims[170] and financial hardship.[171] The code, as does the legislation for licensees, requires its adherents to have internal and dispute-resolution procedures, and sets out the principles for complaints handling and standards for resolving disputes internally.[172] A noteworthy feature of the code is that it signs up to the 'financial literacy' project and subscribers undertake to support industry initiatives in explaining insurance to consumers and making information available.[173] The code is supported by government as evidenced by the Foreword to the 2005 code written by the Parliamentary Secretary to the

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168 Knott (2004), paras 6.2.4–6.2.6. See Insurance Council of Australia, 'Code of Practice', www.codeofpractice.com.au.

169 Insurance Council of Australia 'General Insurance Code of Practice', www.codeofpractice.com.au (2005), cl 7.7–7.20.

170 Insurance Council of Australia 'General Insurance Code of Practice', www.codeofpractice.com.au (2005), cl 7.7–7.20.

171 Insurance Council of Australia 'General Insurance Code of Practice', www.codeofpractice.com.au (2005), cl 7.7–7.20.

172 Insurance Council of Australia 'General Insurance Code of Practice', www.codeofpractice.com.au (2005), cl 7.7–7.20.

173 Insurance Council of Australia 'General Insurance Code of Practice', www.codeofpractice.com.au (2005), cl 7.7–7.20.

Treasurer. This code is also monitored by industry. Initially, compliance with the code was to be monitored by IEL Ltd. Since the change of name, it is now monitored by the Insurance Ombudsman Service and through an independent Code Compliance Monitoring Committee that has consumer, Insurance Council of Australia and Insurance Ombudsman Service representatives.[174] While noting that there had been a fall in the instances of non-compliance with the existing code, the Code Compliance Committee noted a failure to decrease the level of non-compliance in respect of the training of agents, and the Insurance Ombudsman has indicated its intention to focus on insurance intermediaries.[175] In 2003–04, the General Insurance Brokers' Code was still being reviewed.[176] A new Code was promulgated at the end of 2006.[177]

One group of financial services intermediaries — financial planners — has a Code of Ethics and Rules of Professional Conduct rather than a Code of Practice. The Financial Planning Association was established in 1992. Members of the FPA are required to subscribe to the code and rules.[178] There are four ethical standards that are 'mandatory and enforceable': integrity, objectivity, competence and fairness. The Rules of Conduct[179] do not go beyond the FSR legal obligations. Together, these are the 'Professional Standards' of the FPA and are enforceable by its Professional Standards Department. Any alleged breach may be investigated by the FPA, and clients may 'lodge a complaint for financial loss' with FICS.[180]

Since FSR, there has been a public crisis of confidence in the financial planning industry.[181] The Financial Planning Association has issued additional

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174 Insurance Council of Australia, 'General Insurance Code of Practice', www.codeofpractice.com.au (2005), cl 7.7–7.20.

175 Insurance Ombudsman Service Ltd *Annual Review 2005*; see Code Compliance Committee Chair's Report p 28; Insurance Council of Australia, 'General Insurance Code of Practice', www.codeofpractice.com.au/AboutheCode (2005).

176 It was expected to be approved by ASIC (personal communication).

177 www.niba.com.au.

178 Financial Planning Association, 'Code of Ethics and Rules of Professional Conduct', www.fpa.asn.au/FPA_Content.aspx?Doc_ID=1032.

179 These involve general conduct, disclosure to prospective clients, financial plan preparation, explanation of a financial plan, financial plan implementation, client service, complaints, documents administration, FPA reporting requirements, minimum education competencies, supervision.

180 See Financial Planning Association, 'Code of Ethics' heading 'Applicability', www.fpa.asn.au/FPA_Content.aspx?Doc_ID=1032.

181 'Tough Rules to Weed Out Incompetence', *Australian Financial Review,* 27 June 2002; 'Financial Planning Advice Under Fire', *Australian Financial Review,* 11 February 2003, p 1; B Dunstan, 'Many Financial Advisers Not Up to the Job', *Australian Financial Review,* 10 February 2003; 'A Fundamental Shift — Apart from Anything ASIC Might Say About Financial Planners, Well-educated Baby Boomers Will Bring the Industry into Line', *Australian Financial Review,* 14 February 2003; Tyndall, 'Planners "Failed to Revive Confidence"', *Australian Financial Review*, 11 March 2003; 'Planners Go Quiet on "Soft Dollar" Perks', *Australian Financial Review,* 6 August 2003.

codes or guidance as a practical application of the rules. In June 2004, it issued a code on alternative remuneration which prohibited volume-based remuneration and required planners to register alternative benefits (ie non-monetary benefits above $300); in January 2005, a guide to rebates and related payments which provided standard definitions and set out how planners should treat and disclose rebates was issued; and in March 2006, the FPA released four principles to take effect on 1 July 2006 which deal with 'actual, apparent and potential' conflicts of interest issues.[182] All of this additional guidance appears to be in response to ASIC initiatives, policy guidance, 'shadow shopping' and media coverage.[183]

The FPA conflict of interest guidance is set out in a way that in many instances links the FPA principles to the FPA's Rules of Conduct and to legal obligations in the *Corporations Act.* This is in contrast with its Ethics and Rules, which make broad statements without any indication that these are legal requirements. Principle two of the FPA 'Principles to Manage Conflicts of Interest' requires members to undertake the due diligence to offer products that suit the needs of clients (a legal obligation) and 'not bring the industry into disrepute'.[184]

Remuneration practices for intermediaries and commission-based selling have been a important regulatory issues since FSR, and it is hoped that the FPA Principles will result in more advisers operating a fee-for-service business model and remove practices that undermine trust. Matt Lawler, the regional general manager of MLC Financial Planning, said the principles would 'remove many of the practices that have undermined the community's trust in financial advisers to date'.[185] Still, there is no monitoring of breaches and no code compliance committee. It is evident that the industry body for investment

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182 In February 2006, ASIC acknowledged the work of the FPA on a code of practice on conflicts of interest which was directed at improving accountability and transparency. ASIC, '06-022 Latest Move to "Fee for Advice" a Positive Step', www.asic.gov.au/asic/ASIC_PUB.NSF/print/06-022+Latest+move+to+%E2%80%98fee-for-advice%E2%80%99+a+positive+step?OpenDocument&Click=; 'Financial Advisers Try to Restore the Investors' Faith' *Sydney Morning Herald*, 3 March 2006; Financial Planning Association of Australia Ltd, 'Guidance to FPA Members on Principles to Manage Conflicts of Interest', www.fpa.asn.au/FPA_LatestNews.aspx?EventGroup+1&EventItem=23, 23 June 2006.

183 See, for instance, ASIC's 2004 account of working to improve the standards of financial planners with five industry groups: ASIC (2004) 'Media and Information Release 04-202: Bad Apples Crunched'.

184 Financial Planning Association of Australia Ltd, 'Guidance to FPA Members on Principles to Manage Conflicts of Interest', www.fpa.asn.au/FPA_LatestNews.aspx?EventGroup+1&EventItem=23, 23 June 2006.

185 Financial Planning Association of Australia Ltd, 'Guidance to FPA Members on Principles to Manage Conflicts of Interest', www.fpa.asn.au/FPA_LatestNews.aspx?EventGroup+1&EventItem=23, 23 June 2006.

advice, the Financial Planning Association, is 'trying'. Yet it is also clear that its efforts fall behind the banking and insurance industry with their much longer experience with self-regulation and codes of practice, engagement with the regulator, and adoption of the importance of consumer input in code formulation and dispute-resolution monitoring. The extent to which the financial advice and planning industry has been 'enrolled' in the regulatory project is not apparent.

The Future?

In 2006, the Regulation Taskforce, headed by the Chair of the Productivity Commission, commented on self-regulation and co-regulation in its 'Rethinking Regulation' report, noting flexibility, responsiveness, the development of 'best practice' beyond government regulation, and no cost to government as the desirable features. By now the warning of limits to the utility of codes had moved on beyond enforceability issues to risk. The report warned of the risk of conferring advantages on some businesses over others, the risk of self-regulatory rules overlapping with other regulations, the risk of increased compliance, the risk of not undertaking rigorous risk analysis before devising solutions, and the risks of increased costs to business in developing self-regulatory systems.[186] And, drawing on its own experiences, one industry — insurance — advocated 'light-handed regulation', by which it means the code and ombudsman system as a less costly, compliance-oriented self-regulatory option than 'direct regulation'.[187] In the context of industry protests at the extent and cost of FSR, and government response to reduce the 'regulatory burden', this reads as a plea to substitute self-regulation for 'government' regulation so that codes — instead of complementing legal rules and setting benchmarks for best practice — become the 'minimum level of market intrusion necessary to give effect to the identified policy objectives'.[188]

Conclusion

This article shows that in some financial services sectors the code of conduct has grown from a tool through which the regulator encouraged and mandated changes in the rules of business to one which reflects and enhances legal rules in the search for better business practices. In one respect, this role of the code in systematising rules and practice is akin to the traditional role of codification of the law, and in another it is closer to the role of law as setting standards of aspiration rather than reflecting existing consensus and standards. In the latter, as indicated in the account of consumer involvement in some codes, there is recognition of the key place of the consumer in the market for financial services and in the market for industry credibility.

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186 Regulation Taskforce (2006), p 149.

187 Insurance Council of Australia (2005), pp 3–7.

188 Insurance Council of Australia, 'Supplementary Submission to the Australian Government Regulation Taskforce', December 2005, p 3.

In addition to rule formulation, through the code system there has been an ability to address social policy issues in consumer protection and work towards (sometimes imperfect) solutions such as safeguarding guarantors, increased safety for those in financial hardship and, no less important though narrower and more technical, charge backs to merchant banks. We see newer questions such as financial literacy being addressed through code revisions. And there is the account of the slog to simply improve process outcomes. Whether any of this does demonstrate that codes are a more flexible and responsive way to regulate than through legislation and regulation is a moot point. Perhaps the single most important feature of the codes is the engagement of industry associations and their members, not always with gusto but mostly willingly. Through this story, consumer advocates have moved from being sceptical critics to meeting with industry in the creation and monitoring of code rules as, in some financial services sectors, codes of practice have transformed from the 'front page' to become part of everyday reality.

Whether codes themselves can serve as a lever with an industry that is reluctant to be 'enrolled' is a difficult question. The banking and insurance industries were once reluctant players. Here, questions of voluntary rules, mandatory adherence to code rules and threats of legislation played their role in drawing industry into its own regulation. All of this was pre-FSR. In that pre-FSR period, it was said that self-regulatory code rules would be suitable for questions that did not involve a high risk to consumers. There is a high risk to consumers in inappropriate investment advice based on conflicts of interest. Legislation is there to prevent this, and a code. Yet it remains to be seen whether a code can effectively put flesh on the bones to create greater compliance and set best practice standards in this area. While the threat of legislation may not be so potent when legislation already exists, there may be leverage in the demonstration of effective, transparently enforceable codes in other sectors, and in the value of harmonisation with effective codes. That some sectors of the financial services industry aspire to be 'responsible' citizens may encourage others.

Consumer trust and confidence in different sectors of the financial services industry have ebbed and flowed. There are risks to the regulator in failing to prevent non-compliance with regulatory rules designed for an efficient and fair market. Self-regulation through a code system is also a form of risk-shifting and a sharing of the 'burden' of regulation. Yet it also creates opportunities for industry to raise standards, enhance consumer confidence and deliver a more competitive product in a fair way.

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