

11 January 2019

Nick Kirwan
Senior Policy Advisor
The Financial Services Council

By email only - nkirwan@fsc.org.au, cc policy@fsc.org.au,

Dear Mr Kirwan,

We thank you for the opportunity to review and provide formal feedback on draft version 2.0 of the Life Insurance Code of Practice (Consultation Draft Code v2.0).

As you are aware, the Life Code Compliance Committee (Life CCC) is the independent body responsible for the administration and enforcement of the Life Insurance Code of Practice (the Code). It acts in accordance with the Life CCC Charter (the Charter), which sets out the powers, duties, functions and responsibilities of the Life CCC, subject to any provisions in the Code. The Life CCC formed on 1 July 2017 and has been monitoring the compliance of subscribers with the Code since that date.

Prior to outlining our formal feedback on the Consultation Draft Code v2.0, we wish to note three related issues requiring action:

- A. The Financial Services Council (FSC) is yet to formally engage with the Life CCC on the FSC's apparent expectation that the Life CCC will monitor and enforce subscribers' compliance with the new Chapter 2 in the Consultation Draft Code v2.0, including discussion of the resourcing and skill sets required to do so, and the related budget required to monitor the additional subscribers that will be bound by this Chapter.

The Life CCC reiterates its request that the FSC meet with us to specifically address the responsibilities for, commencement of and resourcing of the monitoring and enforcement requirements of Chapter 2 of the Consultation Draft Code v2.0, as part of its response to this submission.

- B. The Life CCC notes that the current review of the Consultation Draft Code v2.0 does not call for feedback on the related Life CCC Charter (the Charter). As previously advised to you, in coming months, the Life CCC will be providing a separate written submission regarding suggested changes to its Charter. The outcome of the requested meeting at A. above will impact upon the Charter review. The proposed Charter changes will be aimed at addressing some limitations and opportunities for enhancement noted by the Life CCC during its first year of operation which will better

enable it to function as an independent, efficient, effective and responsive monitoring body.

Please note that this submission includes a recommendation to remove some Life CCC Charter procedural detail from the Consultation Draft Code v2.0 Chapter 3. This will avoid unnecessary duplication and remove the need for the Code to be amended every time an amendment is made to the Life CCC Charter regarding its operational enforcement activities.

- C. As part of the review of the Consultation Draft Code v2.0, the Life CCC did not formally review Chapter 2 following advice by the FSC that Chapter 2 is a 'lift and drop' of the Insurance in Superannuation Voluntary Code, and is not subject to change. However, the Life CCC wishes to formally note there are some significant discrepancies and conflicts between Chapter 1 and 2 obligations that may result in confusion. The Life CCC recommends some minor redrafting at a minimum to reconcile any competing obligations between the two chapters and to ensure consistency of key terminology.

Life CCC Feedback on the Consultation Draft Code v2.0

This submission focuses on a number of themes that summarise the formal feedback of the Life CCC, in addition to the informal preliminary feedback provided to you in our meeting on 12 December 2018.

As well as the specific themes outlined in the submission below, we have also provided more detailed feedback using comments and track changes to the Consultation Draft Code v2.0 (Appendix A). The Appendix should be read in conjunction with the contents of this submission.

Governance

ASIC approval of the Life Insurance Code of Practice

The FSC has previously stated it would consider seeking approval for the second iteration of its Life Insurance Code of Practice from the Australian Securities and Investments Commission (ASIC) under its Regulatory Guide 183 (RG183) - *Approval of financial services sector codes of conduct*. However, the formal consultation process for the Consultation Draft Code v2.0 is silent on the matter and it remains unclear whether the FSC currently intends to seek such approval.

The Life CCC strongly supports obtaining approval of the Life Insurance Code of Practice (the Code) under RG183. In the current context of heightened regulatory scrutiny and increased community expectations, and with the impending Royal Commission final report likely to include recommendations regarding enhancement of life insurance industry practices, approval of the Code under RG183 would be in the interests of both the industry and consumers. ASIC approval would:

- send a persuasive signal to consumers and other stakeholders of the industry's seriousness in adopting and adhering to the Code; and
- provide additional confidence that the Code meets, and will continue to meet minimum, 'good practice' standards in the Code's ongoing development, content and oversight.

Chapter 3 - Code Governance, Sanctions and Definitions

A significant portion of the Life CCC's Charter in relation to its role, and its monitoring, enforcement and sanctioning responsibilities is replicated, word for word, in Chapter 3 of the Consultation Draft Code v2.0. Whilst this may provide some informational value to consumers regarding governance and oversight, it is arguably unnecessary to spell out in detail the step-by-step operational processes involved, particularly in relation to sanctions. It also negatively impacts upon timely and efficient updates of the relevant sections of the Charter, given that any such updates (and some such recommendations will shortly be drafted by the Life CCC) also currently require changes to the Code.

Accordingly, the Life CCC recommends that section 25 clauses 9 – 17 (inclusive) of the Consultation Draft Code v2.0 be deleted and replaced as follows:

*25.9 The **Life CCC's** decisions are binding on **us**.*

*25.10 If **we** do not comply with a sanction imposed on **us** by the **Life CCC**, this will be regarded as a breach of an **FSC Standard**. The **FSC Board** has the power to undertake disciplinary action in accordance with **FSC Standard No.1**.*

Life CCC Responsibility

*25.11 The **Life CCC** will independently administer, monitor and enforce **Code** compliance by **Code** subscribers to the extent set out and in accordance with the **Code** and the **Life CCC** Charter. This includes:*

- (a) receipt of information on potential **Code** breaches;*
- (b) investigation, at its discretion, of potential **Code** breaches;*
- (c) determination as to whether a **Code** breach has occurred or not and if so, whether it is serious/systemic in nature;*
- (d) agreement of fair and reasonable corrective measures with **us** to remedy the breach;*
- (e) monitoring the timely implementation of agreed corrective measures; and*
- (f) imposition, at its discretion, of sanctions if corrective measures cannot be agreed, or are not implemented on a timely basis;*

*25.12 The **Life CCC** will publish an annual report on its activities, including analysis of **Code** compliance.*

In order to ensure that consumers and other readers and users of the Code (for example, regulators, subscriber personnel, legal representatives...etc) have easy access to the Life CCC Charter if desired, the Life CCC recommends that a hyperlink to the current Charter document be incorporated wherever referenced throughout the website copy of the finalised Code v2.0.

Alternatively, the aspects of Chapter 3 which are lifted directly from the Charter could be clearly identified as such, noting that the Charter is the originating (and in this case, overriding) document, and that it may be amended from time to time outside of the Code review process, and the Code Chapter 3 would then be updated accordingly.

Definition and determination of a Significant Breach

The definition of 'significant breach' in the Consultation Draft Code v2.0 has not been amended per the Life CCC's previous recommendation¹. It is the Life CCC's

¹ In accordance with Life CCC Charter requirements clause 2.1(j), the Life CCC wrote to the FSC Life Board Committee on 28 June 2018, with suggested changes for the current Code.

recommendation that the wording in the Code's definition of 'significant breach' should be expanded to include the term 'by us or the Life CCC'. This is necessary to enable the Life CCC to also (in addition to, and independent of a subscriber) determine whether a matter is a significant breach.

Currently, a matter may only be determined by a subscriber to be significant and is not subject to oversight or a review.

The Life CCC requires the ability to determine a significant breach, in all the following scenarios below, and the current Code and Charter drafting does not enable it to do so:

- when a subscriber reports a significant breach to the Life CCC in accordance with section 13.4 of the Code;
- when a breach is reported to the Life CCC as part of a subscriber's annual compliance statement;
- when the Life CCC investigates a matter; and
- when the Life CCC identifies a breach as a result of its own monitoring work.

The ability for the Life CCC to determine and label a breach as significant (or not) will further enhance the reputation of the industry as well as the Life CCC's education and guidance to subscribers regarding matters the Life CCC considers are significant and therefore require timely reporting and appropriately prioritised remediation.

Sanctions

As an effective enforcement tool, sanctions should be effective, fair, timely and proportionate. The current drafting of the Life CCC Charter – as re-produced in part in the Consultation Draft Code v2.0 section 25 - requires adherence to a prescriptive and lengthy process before any sanction can actually be imposed by the Life CCC and may prevent sanctions being applied early to prevent consumer harm. This diminishes the strength of any sanction as a timely or useful deterrent and limits its effectiveness as a tool to promote Code compliance across the subscriber base.

In addition to our recommendations above on Chapter 3 of the Consultation Draft Code v2.0, the Life CCC recommends that the Charter be amended to expand upon the potential sanctions available and facilitate a more efficient and effective process overall. This recommendation will be expanded upon in our separate submission referenced at B. above.

If a sanction is imposed, the execution of that sanction may take further substantial time to complete. Most sanctions listed in the Consultation Draft Code v2.0 section 25.15 and Charter section 8.3 require the subscriber to undertake the imposed activities. The Committee can only publicly name a subscriber or inform the FSC. It is our view that this significantly curtails the Code's effectiveness.

There are occasions when the Life CCC may need the ability to quickly intervene and impose a sanction where it becomes obvious that the subscriber will not take the appropriate remedial action in a timely manner, in order to prevent further consumer detriment and remediate impacted consumers. To that effect, the sanctioning framework within the Code and Charter requires improvement to give the Life CCC the tools it requires to enforce Code compliance, and impose sanctions in a timely manner if subscribers are not co-operative.

In addition, there is no recognition in the Consultation Draft Code v2.0 or the Life CCC Charter of the relevance, importance or need for different or more stringent sanctions to be

applied where a breach is assessed as serious or systemic. This would imply there is no difference between a breach, a significant breach or systemic and serious breach.²

The current sanctions available to the Life CCC are constrained. In the Life CCC's view, it is appropriate to expand on the sanctions available to it, including:

- power to ask the subscriber to quickly stop selling a product that is not compliant with the Code if the matter is of a serious and systemic nature and agreement on remediation and timeframes cannot be reached;
- power to require the subscriber to undertake a staff training program on the Code³;
- naming a subscriber in the Life CCC annual report or website⁴; and
- reporting serious or systemic breaches where a subscriber has been non-compliant, to ASIC and/or APRA⁵.

Further, the Life CCC notes that there is currently a discrepancy between the Consultation Draft Code v2.0 and the Charter documents regarding sanctions. In the Charter the Life CCC has the ability to publicly name a Code subscriber's non-compliance in any forum, whereas the Consultation Draft Code v2.0 (section 25.12(e)) states only that the Life CCC can request the subscriber to publish non-compliance on the subscriber's website and/or the FSC website.

The Consultation Draft Code v2.0 needs to make it clear that the Life CCC has the ability to name a subscriber that has been non-compliant, in addition to asking the subscriber to publish information of its non-compliance on its own website.

Third Party Distributors

We note the draft provision in section 4.2B of the Consultation Draft Code v2.0. However, we consider that this does not go far enough and recommend that further thought be given to how subscribers can ensure that distributors can, indirectly, be bound, by the Code standards, and to capturing this in the updated Code.

The Life CCC has recently collected substantial data and compliance information from subscribers for the inaugural 2017-18 reporting period. As part of that collection, the Life CCC asked for information about subscriber business that is sold by entities under a different Australian Financial Services Licence (AFSL) to that of the subscriber (third party distributor).

The Life CCC data collection has shown that a large portion of business sold through the direct distribution channel (without the provision of personal advice) is done through third party distributors.

The Royal Commission into Financial Services as well as ASIC's recent '*Report 587- the sale of direct life insurance*' have both highlighted some poor sales practices regarding the sale of direct insurance to consumers. These poor sales practices most often occur via the third party distributors, where the issuing insurer has no obligation to oversee or influence the manner in which its products are sold, whilst benefitting from the sale of those products.

² It would make sense to align the Charter requirements in 7.4(b) for the Life CCC to form a view if the matter is a significant breach (rather than serious or systemic). This would require changing the definition of significant breach, as we have outlined earlier in our submission, and changing the Charter.

³ Banking Code of Practice cl 215(d)

⁴ Ibid 215(e)

⁵ Ibid 215(f)

The conduct of third party distributors can have significant detrimental impacts upon consumers and may cause reputational harm to issuing insurers.

The Life CCC is of the view that the addition and redrafting of some obligations in section 4 of the Consultation Draft Code v2.0 do not go far enough, as section 4.2B only requires 'reasonable steps' to satisfy the subscriber that the distributor's processes and procedures are consistent with good customer outcomes and the obligations under the Code.

The Life CCC recommends the following amendments/enhancements to section 4 of the Consultation Draft Code v2.0:

1. it should define what a 'distributor' is and this definition should extend to all entities that sell products issued by Code subscribers, under the third party distributor's own AFSL;
2. it should specify that subscribers will only form contracts with distributors who can satisfy the subscriber that they abide by the whole Code;
3. the current placement of the obligation in section 4.2B in the sales section suggests it is limited to sales, when it should instead extend to all Code obligations (not just sales) where the third party distributor undertakes other conduct, such as claims or complaints handling. The revised obligation should therefore be moved to Chapter 1, Section1;
4. extend section 4.6 to ensure third party distributors must abide by all the obligations set out in chapter 4;
5. add in an obligation on subscribers to have a term in their distribution contracts that subscribers must obtain from the distributors the complaints they receive in relation to the sales and retention behaviours relating to the subscriber's products;
6. extend the obligations under Section 23.1 to third party distributors, either requiring them, or requiring subscribers to request them to:
 - make information about the Code available on their websites and marketing material, and
 - clearly state which entity issues the life insurance product and is the Code subscriber.

The Life CCC considers that the most effective way to capture third party distributors under the Code would be for the Code to require subscribers to establish a contractual obligation with distributors for the latter to comply with the relevant requirements of Code. The Life CCC would then monitor this through the subscribers who would ultimately be responsible. Given this would require changes to existing contracts, it could be on an 'if not why not' basis for existing contracts as a transitional measure.

Claims and Complaints

During the past 18 months of monitoring the Code, the Life CCC has received a substantial number of alleged Code breach referrals in relation to the obligations outlined in the claims and complaints chapters of the current Code. As a result, one of the Life CCC's main focus areas in review of the Consultation Draft Code v2.0 has been the provision of detailed feedback on obligations capturing claims and complaint activity.

In addition to the specific feedback we have provided on various obligations in section 8 and 9 in Appendix A, the Life CCC recommends that further consideration be given as outlined below.

The Consultation Draft Code v2.0 introduces a new concept not currently in the Code, being the 'closed claim'. However, the draft is currently silent on any obligations to require subscribers to make it clear to a consumer when, how and in what circumstances their claim

may close. The Life CCC recommends including obligations on the subscriber to tell the consumer:

- their claim is going to be closed,
- the reasons for the decision to close,
- the information required to re-open the claim, and
- their ability to disagree with the decision and how to make a complaint.

To improve readability, the Life CCC also suggests that the obligations in sections 8.16 and 8.17 could be broken down into steps to better clarify the requirements of the obligation and to highlight the expectations of subscribers regarding the information they must communicate to consumers. We provide an example of how this could be done in Appendix A.

The Life CCC recommends that the definition of the term 'received' in the Code align with the definition which the Life CCC used in its recent Annual Data and Compliance Programme as follows:

Received Claim: The point in time the first piece of information (not necessarily all information) is received to allow a Subscriber to commence the assessment of a claim. At this stage the Subscriber has confirmed there is a policy in force that could potentially cover the indicated claim event and has recorded the existence of a claim.

The Life CCC notes that the Australian Prudential Regulation Authority (APRA)⁶ supports the use of the Life CCC definition, and has used a very similar definition of 'received' to that which the Life CCC used.

The Life CCC prefers the above wording, rather than the wording in the Draft Consultation Code v2.0 which replaces 'first piece of information' to 'sufficient information'. The risk of 'sufficient information' is that it is unreasonably subjective and may result in significant disputes as to what is 'sufficient'.

Alternatively, the definition needs to clarify what 'sufficient information' means in the definition of 'received' in the Consultation Draft Code v2.0 as this would ensure consistency across the subscriber base and a fairer outcome for all consumers regardless of which subscriber is assessing the claim.

Further clarity also needs to be added to the Consultation Draft Code v2.0 regarding which Code obligations apply to disputed and re-opened claims. It is not clear if consumers are afforded the protections under section 8 when a claim is re-opened or under review. The Life CCC recommends that all obligations under sections 8 and 9 should extend to every re-opened claim or claims under review.

Further, subscribers differ in the way they apply obligations under the current Code to a disputed claim decision. Some may treat the request to review the claim decision strictly as a complaint only. Others may resolve the complaint and re-open the claim to review it. The Life CCC recommends that the Consultation Draft Code v2.0 should be amended to make it clear that for any disputed claim decisions, or requests to review a claim decision, the obligations in section 8 and 9 both apply.

⁶ APRA is using the term Claim Received in LRS 750:

'Claim Received' refers to the point in time where the first piece of information (not necessarily all information) is received by the insurer to allow it to commence the assessment of a claim. At this stage, the insurer has confirmed there is a policy in force that could potentially cover the indicated Claim Event and has recorded the existence of a claim. The 'Claim Received Date' is the date on which the insurer records a claim being received.

Change the onus – obligations to be on the subscriber, not consumer

For a Code to be consumer-centric, the obligations need to be on the subscriber to do or provide something automatically, rather than the onus resting on the consumer to know to ask. In many cases, consumers are not aware of their rights under the Code and do not know that they have the ability to make a request. The Life CCC notes that the Consultation Draft Code v2.0 often requires the consumer to initiate a request.

As an alternative, the Code should require the subscriber to automatically initiate the action or inform the consumer of the right to ask, rather than do it only in response to a request from a consumer. The Life CCC considers this to represent good practice and provide better protection to all consumers, regardless of consumers' awareness of the right to make a request.

The following obligations in the Consultation Draft Code v2.0 are examples which the Life CCC recommend should be redrafted to shift the onus from the consumer to the subscriber: Sections 5.3(C), 5.14 (c), 6.5, 8.5, 8.5A, 8.10(b), 8.13, 8.14(A), 8.19(b), 9.10 (b) and 9.12(b). We have provided more detail in Appendix A regarding how these obligations could be changed.

Clarity & Readability of Code obligations

The Consultation Draft Code v2.0 is intended to be consumer friendly and easy for the consumer to read and understand. The current draft is very long and presents itself as a step-by-step process of how a subscriber will conduct its business.

Some sections appear to provide information, rather than outline an obligation or expected behaviour. These include sections 8.6, 8.17A, 8.14 in the Consultation Draft Code v2.0. The Life CCC recommends that these could be 'boxed out' for helpful transparency and information purposes, rather than being included as an implied obligation.

The Life CCC also recommends a further review of the Consultation Draft Code v2.0 to enhance its 'plain English' wording. Where remaining industry technical or legalistic jargon is identified, alternative explanations or definitions should be provided. For example, the use of the term 'procedural fairness' is not defined. This is a legal term and a consumer would not be aware of its significance or particular meaning. We have further indicated in Appendix A some other technical terms that we recommend require further explanation.

Setting expectations around communication obligations

Section 8.1 of the Consultation Draft Code v2.0 explains who may communicate with the consumer in situations where a Group policy exists, and is dependent on the agreement between the subscriber and Group policy owner. The Consultation Draft Code v2.0 should be clearer about when obligations fall on the subscriber to communicate information, and to whom, in all interactions.

The Life CCC recommends that an explanation similar to that under section 8.1, should be inserted into Section 1 of Chapter 1 of the Consultation Draft Code v2.0 and thereby extend across all Code obligations. For example, communications with consumers for underwriting decisions and complaint decisions may fall to the Group policy owner. Currently this is not a scenario provided for in sections 5 and 9 of the Consultation Draft Code v2.0.

Similarly, provisions may be required for communications when there is a financial adviser acting as an intermediary (and subscribers communicate with the adviser), to ensure this information is passed on to the consumer.

Consistency of terms used between obligations

Some obligations in the Consultation Draft Code v2.0 use unnecessarily inconsistent terms which can create confusion for the reader. For example, sections 9.10 and 9.12 use the terms 'final decision' and 'final response', which likely are intended to mean the same thing. The Life CCC recommends choosing one of those terms and using that term consistently across and within the relevant obligations.

Obligations in sections 8.15, 8.16 and 8.17 and 8.17A also use a variety of terms such as 'decision', 'initial assessment', and 'final decision'. The nuance of the difference between these terms is likely to be lost for the consumer and may cause confusion. The Life CCC recommends defining those terms and where possible streamlining obligations to use the same point in time (and term).

Defining terms used

We suggest that more terms are defined in the Consultation Draft Code v2.0, for the sake of clarity and transparency.

Examples of terms that could benefit from a definition, or guidance regarding their intent include:

- 'reasonable enquiry' in section 8.15, and
- 'sufficient information' in the definition of 'received'.

Similarly, further clarity is needed regarding the varied terms used throughout the Consultation Draft Code v2.0 for medical personnel, including 'treating doctor', 'doctor', 'treating health professional' and 'other health professional'.⁷ In many instances, these terms appear to be used interchangeably and on current drafting, could reasonably confuse or mislead a consumer.

Addition of timeframes to obligations

The Life CCC recommends that the current obligations outlined in sections 26 'Access to information' would benefit from setting an additional expectation of a timeframe within which a subscriber has to provide information, if requested by a consumer. Other obligations in the Code provide for 10 business days, and the Life CCC recommends that a 10 business day timeframe should also be applied to sections 26.2, 26.3 and 26.7.

Transition periods

The Code currently does not provide for transition periods for new subscribers. We strongly endorse this status quo.

⁷ These terms are referenced in sections 5.5, 5.14, footnote 14, 5.20(b), 8.6(a), 8.8A, 8.9, 8.10, 8.14, 8.14A, 8.19, 8.26, 9.10(b), 9.12(b), 10.6, 22.5, 26.5 (b)&(c), Appendix A, and definition of Unexpected Circumstances.

Training and remuneration of staff

The Life CCC recommends the inclusion of a general obligation on the subscriber to ensure all staff are remunerated based on behaviour which is consistent with good customer outcomes and is compliant with the law, rather than drafting specific obligations to capture a sub-set of staff (such as in sections 4.2(A) and 8.20).

This would ensure that all staff are captured including underwriters, administrative staff, sales staff, claims teams, and managers of various departments and ensure their targets and remuneration are aligned to good behaviour and customer-centric incentives, in line with community expectations and the law.

A similar extension requiring all staff to be appropriately skilled and trained to perform their job could be added in Section 1 of Chapter 1 of Consultation Draft Code v2.0, rather than having separate provisions within various sections of the Code targeted to specific staff only.

Entities other than life companies subscribing to the Code

The Life CCC acknowledges that it is valuable if entities other than those captured by section 1.1(a) of the Consultation Draft Code v2.0 can opt in to the Code and be bound by relevant obligations. However, we have observed that all entities who have subscribed or are seeking to subscribe to the Code under section 1.1(b) to date, carry out activities that are not subject to any obligations under the Code, or these activities are otherwise the responsibility of a life insurance subscriber under the Code, rather than the entity captured by section 1.1(b). As such, there is no current scope for the Life CCC to monitor or report on compliance by any entity bound under section 1.1(b).

The Life CCC suggests that the FSC consider amendment of the Consultation Draft Code v2.0 to include obligations that cover relevant activities of entities captured by section 1.1(b).

Conclusion

In conclusion, we note the current timeline proposed for the launch of Code v2.0. Further to our discussion of alternative options on 12 December, we support an extension of timeframes to both facilitate appropriate review and incorporation of all relevant recommendations from the Royal Commission final report. This will also enable a robust consultation period before the launch of the final Code v2.0.

We invite the FSC to approach us to seek clarity on any of our recommendations if required, and look forward to the opportunity to further engage with the FSC on the development of the Consultation Draft Code v2.0. Please contact Ms Sally Davis, General Manager of the Code Compliance and Monitoring team at AFCA, for any initial queries, on 03 9613 7314.

Yours sincerely,



Anne T. Brown
Chair-Life Code Compliance Committee

Appendices:

Appendix A	Consultation Draft Code v2.0_ Life CCC Feedback
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