



**CONSUMERS'
FEDERATION
OF AUSTRALIA**

Developing and promoting
the consumer interest

Consumers' Federation of Australia submission to the review of the National Insurance Brokers Association of Australia (NIBA) Code, May 2021

The Consumers' Federation of Australia (CFA) is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations.

CFA advocates in the interests of Australian consumers with and through its members, supports consumer representatives to industry and government processes, develops policy on important consumer issues and facilitates consumer participation in the development of Australian and international standards for goods and services.

CFA is a full member of Consumers International, the international peak body for the world's consumer organisations.

We acknowledge the funding that the National Insurance Brokers Association of Australia (NIBA) has provided CFA to allow us to make this submission and contribute to ongoing discussions about the new Code. The case studies attached to this submission at Appendix 1 were provided by the Financial Rights Legal Centre, which is a member of CFA.

NIBA's ambition to have a Code which is a benchmark for industry self-regulation is very welcome, although we consider that both the current 2014 Code and the 2021 proposed code changes are some distance from meeting this standard. The Discussion Paper is a good summary of many of the main issues, but much remains to be done to translate this analysis into the Code itself. There is a substantial disconnect between the discussion paper and the draft Code, with the latter being legalistic, poorly written and lacking clear commitments to consumers. Therefore, we mainly focus in this submission on the discussion paper, though we look forward to being able to comment in detail on a new draft Code.

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Key features of a good Code

Building on Australian Security and Investment Commission (ASIC) guidance in RG 183 (Approval of financial services sector codes of conduct), we consider that good Codes include the following features:

- Underpinned by a view of what the industry concerned can and should offer consumers to address issues of real concern
- Sets standards that elaborate on, exceed or clarify the law, and represents a commitment to consumers
- Binds all subscribers through contractual arrangements
- All businesses within a relevant market subscribe to it
- Covers all situations in which the subscriber is acting in the course of its business with an individual consumer, whether a current, past or prospective client
- Covers all people working for the subscriber in a consumer relationship, whether an employee or in a different relationship
- Achieves a good balance between high-level standards/principles and more detailed provisions, and prompts subscribers to consider how best to apply the Code within their own business
- Clearly written in a non-legalistic way and is not too long
- Communicates what consumers can reasonably expect from subscribers and, so far as possible, avoids vagueness (e.g. ‘we will’ rather than ‘we may’)

- Accompanied by supporting material which sets out examples and guidance for subscribers, advisors and consumers, and training within subscribing businesses
- Developed and reviewed in a transparent manner, which involves consulting with relevant stakeholders including consumer representatives
- Reviewed periodically by someone who is independent and engages stakeholders – often enough to ensure it is up to date and represents emerging good practice but not so often that the ‘steady state period’ is too short
- Allows for other necessary changes between review periods
- Is monitored by effective administration and compliance mechanisms including a Committee comprising a majority of members who are independent, including some with a consumer advocacy background, and with an independent chair
- Has in place arrangements for both application, enforcement and restitution in individual cases and the identification and resolution of systemic issues within subscribers and across the market
- Committee is appropriately resourced (in terms of both funding and people in the secretariat) to undertake necessary work
- Includes remedies and sanctions which are available for breaches of the Code.

Summary of main CFA points in this submission

- The Code needs substantial work if it is to become a benchmark for others. At present even the new draft is substantially less good than some other codes such as the Banking Code.
- The framing of the Code as being between the subscriber and NIBA, with no rights created for consumers, is curious, unhelpful and inaccurate. A Code fundamentally comprises a series of commitments from subscribers to consumers
- The draft Code provided borders on being unreadable. It is unduly legalistic in tone, and is too often written in a hedged way so as to reduce the strength of subscribers’ commitments. We recommend that the independent reviewer redrafts the Code to reflect the conclusions of this review and so that it aligns with good practice Code drafting seen with the ABA Code and GICOP. The proposed re-written code that NIBA has provided can be used to identify NIBA’s substantive position on certain issues, but it should not be the foundation for the next iteration of this Code.
- It must elaborate on, exceed and clarify the law, otherwise the Code has no value to consumers.
- The Code needs to be approved by ASIC and be enforceable either by requiring that the Code be included as a part of the contract with consumers or via the new enforceable codes laws.
- The primary purpose of the Code Committee is to monitor the application of the Code by subscribers and to identify and investigate systemic issues, rather than to resolve individual complaints, which is the role of the Australian Financial Complaints Authority (AFCA). There should be commitments in the Code about the Committee’s role, powers, independence and adequate resourcing to fulfil its role.
- We welcome the suggestion of a statement by NIBA about the ambition of the Code, which should focus on the role of brokers in achieving good consumer outcomes. This text does not necessarily need to form part of the Code.
- The Financial Adviser Standards and Ethics Authority (FASEA) code sets out appropriate standards that a consumer might reasonably expect from an expert adviser who they believe

to be acting on their behalf. We do not consider these to be exceptionally high standards, and we would suggest that they form a useful starting point for the development of standards in this Code. If NIBA considers that its members are not able to meet any of the FASEA standards, it should specify which individual standards are too demanding for members and why

- The Code should aim to ensure subscribers commit to avoiding and preventing conflicts of interest altogether, so that consumers can be confident that the broker is acting in their best interests. Research on information remedies such as disclosure suggests that this is rarely an effective consumer safeguard and is unlikely to work in this sector.
- The focus on vulnerability is welcome.
- The section in the draft Code on complaints is a long way from being fit for purpose.

We respond below to the detailed questions in the Discussion paper.

Issue 1: Higher standards

The Code should go beyond the law and not simply restate it. The revised Code should set higher standards and set direction for the profession, including in relation to ethical conduct

1. Should the Code include:
 - a. Clearer objectives or guiding principles as a preamble to the Code?
 - b. Examples of behaviour that goes against the guiding principles that community expectations deem unacceptable? If so, are there any behaviours in particular that are relevant that should be stated in a revised Code?
 - c. A commitment by the subscriber to adopt the recommendations of the IBCCC own motion enquiry?
 - d. A statement on ethics? If so, should it go as far as the FASEA standards (noting that insurance brokers and general insurance were expressly exempted)?

We agree that the Code should go beyond the law – if codes do not do this, they have little or no value. It is unhelpful that the first Standard in the Code is *'We will comply with all relevant law.'* This should not need saying.

This is not to argue that the Code should remove all references to or descriptions of relevant consumer protections set out in legislation. These can provide consumers with the context in which further commitments are made to 'elaborate on, exceed or clarify the law¹.' ASIC says² that it expects *'an effective code to do at least one of the following:*

(a) address specific industry issues and consumer problems not covered by legislation;

(b) elaborate on legislation to deliver additional benefits to consumers; and/or

¹ RG 183.22(c) <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

² RG 183.5

(c) clarify what needs to be done from the perspective of a particular industry, practice or product to comply with legislation.'

The Discussion Paper asks whether it would be helpful to have some kind of preamble or vision statement to frame the Code. We agree that it would be helpful for NIBA to set out the ambition of the Code, to help shape the Code's content, reflecting NIBA's aspiration for the Code to be 'a benchmark of industry self-regulation.' This should focus on the role of brokers in achieving good consumer outcomes. This text does not necessarily need to form part of the Code.

We support the idea of providing examples of practices that might breach the Code. These should sit alongside rather than in the Code. The examples listed in the Discussion Paper are good, though we would like the opportunity, alongside other stakeholders, to comment on these when they are translated into draft guidance.

The Code Committee usually conducts at least one own motion inquiry (OMI) a year and may make recommendations relating to some or all Code subscribers. Obviously we would expect subscribers to implement any relevant recommendations, and we would like the Committee to have powers to enforce these. Arrangements relating to OMIs, including industry compliance, should be set out in the Committee's Charter not the Code. The Committee needs to be empowered to enforce OMI recommendations when necessary and impose sanctions when subscribers are not meeting the expectations being set by the Committee through its OMIs.

The Discussion Paper considers whether ethics should be incorporated into the Code, noting that the Code already requires subscribers to provide services '*efficiently, honestly and fairly.*' In particular it asks whether the Code should '*go as far as the FASEA standards*'.

We appreciate that the FASEA Code is termed a '*Code of Ethics*', but most or all of the content is not really about ethics but rather appropriate standards that a consumer might reasonably expect from an expert adviser who they believe to be acting on their behalf.

We do not consider these to be unduly high standards, and it would be appropriate to adopt them in this Code. We would suggest that they are imported directly into the Code rather than a reference being made in this Code to the FASEA Code. If NIBA considers that its members are not able to meet some of the FASEA standards, it should specify which individual standards it thinks are too demanding for members and why. We consider that this approach would be consistent with NIBA's existing aims³, to '*develop and promote high standards of professional practice for insurance brokers in Australia for the benefit of their clients and the community... through... a framework for high standards of ethical and professional conduct by Members.*'

³ <https://www.niba.com.au/about-niba>

2. Should the revised Code be clearer about what “efficiently, honestly and fairly” means by:

- a. Providing examples/more detail?
- b. Adopting some/all of the FASEA Code of Ethics?
- c. Extending some/all ethical/behavioural commitments to all interactions the subscriber has, regardless of the relationship (e.g., client or prospective client, insurer, or service provider)?
- d. Including ethical commitments in objectives/guiding principles?

The Discussion Paper asks whether the revised Code should be clearer about the meaning of ‘efficiently, honestly and fairly.’ The benefits of a principles-based approach include being flexible enough to take account of changes to circumstances and practices and encouraging businesses to take a reflective stance rather than narrow and unthinking compliance, as well providing higher-level, non-legalistic expectations that can be communicated more easily to consumers. We are not in favour of a more detailed definition of these words, which would inevitably become more prescriptive, though we support the provision of examples which might bring the principles to life. Decisions by AFCA and the Code Committee over time will add some texture to the principles.

It is important too that the Code is not drafted in a way that limits the fulfilment of what ‘efficiently, honestly and fairly’ means to a series of narrow commitments.

As noted above, we consider that the content of the FASEA Code of Ethics is appropriate to this sector and sets standards which are proportionate. The default should be that all the FASEA standards are imported into the Code, with NIBA explaining whether it considers any to be inappropriate and if so why. We would suggest these are framed as Standards at the start of the Code.

The Code should apply to all interactions between a subscriber and a current, prospective or former client. It should apply to interactions between a subscriber and another business where this might affect the interests of a current, prospective or former individual client.

3. Should the Code be formally adopted by insurance broking companies as part of their strategy and values, with all staff trained on it?

This would appear to be consistent with NIBA’s existing aims, and we support it.

We note that clause 150 of ASIC’s guidance in RG271⁴, which covers internal dispute resolution (IDR) and comes into effect in October, already requires that ‘Firms should provide targeted induction and ongoing training to staff who handle complaints. Topics may include.... financial services consumer protection laws, AFCA position statements **and industry codes of practice.**’ But we agree that subscribers should go beyond this, so that the Code is truly embedded across businesses.

⁴ <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-271-internal-dispute-resolution/>

4. NIBA has proposed changes that extend standards beyond their legal obligations. Are there specific issues or Standards that require additional work or attention?

The biggest areas where the Code should extend standards beyond legal obligations are eliminating conflicts of interest and conflicted commission-based remuneration. The law currently does not require much more than information disclosure. NIBA should commit to much more than that.

Issue 2: Broad application

The Code should apply to all services provided by a broker to a client, with behavioural standards applicable in all interactions with a client

1. *Should the revised Code state certain practices and behaviours that should apply when a subscriber is retained by a client? If so, what?*

Yes, the purpose of the Code is to set standards of behaviour that brokers will meet.

2. *Should practices and behaviours be different for clients depending on the type of advice they are receiving from a subscriber (eg personal advice, general or informational, or wholesale client advice)?*

We consider that the same high-level practices and behaviours should generally apply across the range of interactions with individual consumers. Where NIBA considers that there is a need for a lower standard, it should identify this and explain why.

3. *Should these practices and behaviours apply regardless of the size of the client? [Note: the current Code is not limited to individuals and small enterprise.]*

CFA's members represent individuals and small businesses, and we do not have any comments in relation to large enterprises as consumers.

4. *Should a subscriber be permitted to be excused from compliance of the Code by agreement where the client is a large enterprise?*

CFA's members represent individuals and small businesses, and we do not have any comments in relation to large enterprises as consumers.

5. *Should certain practices and behaviours be limited to "Clients" or extend more broadly, for example, to potential clients, third parties, and agents?*

The Code should cover all situations in which the subscriber is acting in the course of its business with an individual consumer, whether a current, past or prospective client; it should cover all services, whether core or associated ones; and it should cover all people working for the subscriber in a consumer relationship, whether an employee, authorised representative or in a different relationship.

Issue 3: Agents and third parties

A Code subscriber should ensure that its third-party agents and service providers abide by the Code to the extent applicable

1. Should the Code Standards include behavioural standards that apply to a subscriber's third party agents?

A Code subscriber should ensure that its third-party agents and service providers abide by the Code. Code obligations should apply consistently and seamlessly to all aspects of an insurance broker's business, including associated services such as debt collection, premium finance, financial advice and other functions provided by third parties. Consumers' expectations do not generally vary by the legal nature of the relationship between the business and the individual they are dealing with, or the extent to which it is a core or associated service, and it is not reasonable to expect consumers to explore this.

2. Should a subscriber be required to ensure that a third party agent adhere to relevant standards? What level of responsibility should a subscriber have for third party breaches?

Unless the third-party agent is a direct subscriber to the Code, the application and enforcement of the Code must inevitably be through Code subscribers for whom agents are working. Where an agent is working for a subscriber, the standards and level of responsibility should be the same as if the agent were a member of the subscriber's staff.

3. What types of monitoring and review systems should subscribers have in place in relation to third party compliance with a revised Code?

We would suggest that this is not a matter for the Code. We do not support the Code specifying in detail how subscribers should organise themselves so as to ensure compliance. We prefer the Code to focus on standards and consumer outcomes, with subscribers making judgments about how best to embed compliance systems within their businesses.

4. Should it be possible for AFCA or the IBCCC to directly sanction a Code Member's third party who breaches the Code? How would this affect AFCA or IBCCC resourcing requirements and administration?

The Code member is responsible for the actions of its third parties and so it is neither necessary nor desirable for the jurisdiction of ACFA or the Code Committee to be extended to cover third parties. Instead, Code members should be accountable for their third parties' behaviour and actions, with such third parties being treated as if they were employees of the subscriber.

Issue 4: Broker's role

The limits of a broker's role need to be clearly spelled out to a client prior to insurance being placed to allow informed decision making

1. In cases where there is no possible or actual conflict of interest, should a subscriber be required to inform a client every time an employee involved in an insurance placement acts as agent for an insurer even when the activity is administrative in nature? If so, how should the disclosure occur?

Where there is no possible or actual conflict of interest, consumers do not need to be informed of detailed processes behind the scenes.

2. Is it desirable for a subscriber to state which markets were canvassed in order to provide the options for cover? If so, how and when should the disclosure occur? What information do consumers need to make an “informed” decision about insurance services?

It is essential, not just desirable, for consumers to understand the scope of the service they are paying for. When brokers advertise their services they should make clear how much of the market they look at and why, and then this should be repeated when individual consumers are given advice.

3. Is it appropriate that such advice be given “at the time” Insurance Services are provided? Or should advice be given prior to an insurance broker being retained to give advice to enable a consumer or small business owner the opportunity to seek alternative advice?

See above.

4. Should Code Standards be available to those who are not yet “Clients” of the subscriber?

Yes. Once a broker and a consumer are interacting in any way relating to insurance, the broker is acting in the course of their business. Defining ‘client’ narrowly would amongst other things create a dangerous loophole in the Code and allow unscrupulous brokers to behave in a way that is out of line with the Code prior to a more formal relationship being established.

5. Should the subscriber be required to go further and advise why a limited market was approached?

Yes, as this is fundamental to the service being provided, though the explanation needs to be concise and comprehensible to a non-expert.

6. What additional information is required to enable a client to make an “informed decision” on insurance and risk options provided for clients receiving Personal Advisory Service?

As noted above, brokers should be required to tell consumers how much of the market they cover, and where they only work with a select few insurers they should say who these are and why they won’t go out to the wider market.

7. What additional information would assist clients who only receive general insurance or factual advice rather than Personal Advisory Services?

We would suggest that clients are told this is general sales information and so not based on their personal circumstances. They should also be told if the broker is going to get a commission for selling that insurance product and what this pays for given that the broker is not giving the client tailored advice (for example, the commission pays for doing the paperwork, providing risk assessments to the insurer, passing on quotes to the consumer, etc.)

Issue 5: Conflicts of Interests

The Code should contain a revised Conflicts of Interest section promoting transparency and informed consent from clients where a conflict of interest may arise

1. Is “transparency” the objective in a Standard that deals with conflicts of interest? If not, what current issues should such a Standard be addressing?

The Code should commit subscribers to avoiding and preventing conflicts of interest altogether, so that consumers can be confident that the broker is acting in their best interests.

Sunita Sah’s research paper⁵ on ‘*Conflicts of Interest and Disclosure*’ for the Hayne Royal Commission provides a nuanced view on the likely effectiveness of disclosure of conflicts. She suggests that it can sometimes have a positive effect, for example in incentivising businesses to end conflicts rather than have to disclose them; but she notes that much depends on the professional norms of the sector concerned. She says: ‘*disclosure can have the beneficial effect of decreasing bias in advice for expert professional advisers whose norms emphasize placing advisees’ interests first. These findings suggest that conflict of interest disclosure is more beneficial than previously assumed, as it can act as a reminder of norms to place clients first. Note that if the norms for professional advisers are to give self-interested advice then disclosure is still likely to increase bias in advice. In other words, disclosure can either help or harm and the norms of the environment in which advice is given determines whether disclosure increases or decreases advice quality.*’

This analysis very much focuses on how disclosure might influence advisor behaviour and raises the question of whether insurance broking is a market characterised by norms which ‘*emphasize placing advisees’ interests first*’. We would suggest that it is not. And as Sah notes, ‘*even the clearest and boldest disclosure may fail to protect consumers.*’

The flipside of the impact of disclosure on broker behaviour is the impact that it might have on consumers. There is extensive research on the effectiveness of mandated information provision on consumer behaviour, particularly in relation to financial services where this is a common regulatory intervention. One recent paper⁶ reports on the results of randomized controlled trials with 124,000 savings account holders in the UK. This very large-scale piece of research found that the provision of information did not generally stimulate consumer action, even where there were financial benefits, essentially because consumers had a limited amount of attention and did not perceive the benefits of engagement and action. The study suggested that while there might be an understandable focus on trying to improve the effectiveness of information remedies, this would most likely have very limited impact in the short to medium term. The authors comment: ‘*Our qualitative research further indicates that while optimizing disclosure design can improve its effectiveness on the margin, inattention is a fundamental barrier to disclosure usefulness. Accordingly, when regulators independently consider whether to mandate each disclosure without accounting for externalities diluting the salience of other disclosures, the low expected return on attention to any given disclosure can reinforce beliefs about the low value of reading the fine print. Moreover, any reform to disclosure design is likely to improve outcomes only slowly as consumers adjust their expectations on the optimal level of attention.*’

⁵ <https://financialservices.royalcommission.gov.au/publications/Documents/research-paper-conflicts-interest-disclosure.pdf>

⁶ Paul Adams, Stefan Hunt, Christopher Palmer and Redis Zaliauskas, ‘*Testing the effectiveness of consumer financial disclosure: Experimental evidence from savings accounts*’, *Journal of Financial Economics* 2021 <https://doi.org/10.1016/j.jfineco.2020.05.009>. We can provide a copy of this on request.

Both these analyses suggest that disclosure can work, but that to do so it requires an ideal set of advisors (in this case, brokers who already think they need to put the interests of their consumers first and where the purpose of disclosure is essentially to remind them of this) and an ideal set of consumers (who have the time and interest to engage with the disclosure and then act on it). Neither ideal would seem to be present in this market.

2. Are there any particular issues that concern consumers and small businesses in the way conflicts of interest are currently managed with insurance brokers?

The fundamental issue is with the consumer thinking that the broker is acting for them in dealing with providers whereas in fact the broker is acting for a provider in dealing with consumers, or where the interests of the broker are not aligned with the interests of the consumer. The 'Paul's story' case study in Appendix 1, provided by the Financial Rights Legal Centre, is just one illustration of this.

One specific area worth addressing relates to owners corporation insurance, where there are commissions paid not only to the broker but also to the owners corporation manager for placing insurance.

The Australian Resident Accommodation Managers' Association and Owners Corporation Network submission⁷ to the ACCC Northern Australia insurance inquiry highlights the scale of the issue: *'It is not uncommon for Body Corporate Management companies to receive a commission of up to 30% of the total cost of insurance. This can amount to tens of thousands of dollars per scheme in insurance commissions.'*

The current approach is focused on disclosure. Consumer Affairs Victoria for example comments⁸:

'Owners corporations managers may be authorised representatives of an insurer and hold an Australian Financial Services licence.

Consumer Affairs Victoria considers that it may be a breach of duty if a manager does not disclose to the lot owners that they:

- *act as an insurance agent offering to contract insurance for the owners corporation*
- *receive commissions from a third party, such as an insurer, for selling that insurance.*

These disclosure requirements exist to prevent a situation where a manager may be, or be seen to be, influenced to place insurance policies with an insurer offering the better commission, rather than choosing the best policy for an owners corporation.

The interests of the owners corporation take precedence over other considerations.'

In its northern Australia Insurance Inquiry⁹, the ACCC recommended that *'State and territory legislation governing strata managers should be amended to prohibit strata managers from accepting payments in relation to arranging strata insurance other than those agreed to, and made by, their body corporate. Strata managers should be required to negotiate any fees or payments for*

⁷ https://www.accc.gov.au/system/files/ARAMA%20%26%20OCN_0.pdf

⁸ <https://www.consumer.vic.gov.au/housing/owners-corporations/finance-insurance-and-record-keeping/insurance>

⁹ <https://www.accc.gov.au/publications/northern-australia-insurance-inquiry-final-report>

arranging insurance directly with the body corporate they are servicing. This would encourage remuneration arrangements that better align the interests of the strata manager and their clients.'

We consider that owners corporation managers should be paid only by owners and not insurers/brokers and we suggest there is an opportunity for NIBA to take the lead here.

3. What type of information or method of disclosure would most assist consumers and small businesses in assessing their options or deciding whether to proceed despite a conflict of interest?

As we set out above, we consider that by far the best option is to remove conflicts rather than seek to explain them.

4. Is adherence to the Standard relating to conflicts of interest a key concern for the community so as to warrant specific monitoring and reporting by the Insurance Brokers Code Compliance Committee?

Yes this clearly is an important issue but we do not consider this to be a matter for this Code review. The Compliance Committee should have the discretion to focus where it considers there is most significant consumer harm and the greatest opportunity for improvement.

Issue 6: Remuneration disclosure

The Code should promote transparency in remuneration disclosure, not simply abiding by the letter of the law. Questions remain about what should be disclosed and how in order to promote transparency and assist effective decision making

- What type of additional disclosure or transparency about remuneration would assist customers make a decision about retaining their insurance broker or accepting their product advice?*
- Would it assist the decision making of individuals or small enterprise to know with which insurer a subscriber has a market derived income arrangement? Would it assist to know monetary and non-monetary benefits? What level of detail would assist them?*
- Should the disclosure or transparency commitment be different for larger clients?*
- Apart from disclosure, what other measures could subscribers commit to in order to enhance conflicts management of market derived income?*
- General insurance brokers benefit from a FOFA exemption. Would it be reasonable for subscribers of the Code to commit to more than Standard 6 to ensure their ongoing exempt status? If so, what commitments would the community expect?*
- NIBA suggests significant changes to the current Standard 6 in relation to both scope of disclosure and how disclosure should be communicated. Is there any additional information that would assist consumers to make an "informed decision" about accepting services or not?*
- Does the proposed remuneration governance policy address the possibility of a conflict of interest? Should the standard apply to subscribers of all sizes and distribution models?*
- What role should the IBCCC take in ensuring a subscriber adheres to NIBA's proposed enhanced communication and governance measures standard?*
- To what extent is full transparency relating to market derived income possible where these arrangements are generally commercially sensitive?*

The ACCC concluded in its Northern Australia Insurance Inquiry¹⁰ that there is an inherent ‘*significant conflict of interest between an insurance broker’s obligations to act on behalf of a consumer while being remunerated by an insurer. Disclosure of the conflict does not overcome the conflict.*’ It noted that total incentive payments could reach in excess of 30% of the cost of the premium, with no apparent relationship between the size of the commission and the work undertaken by an intermediary and limited incentive for intermediaries to secure a lower premium for their client or recommend products on which they do not receive a commission. The Consultation Paper also notes the negative views of the Hayne Royal Commission about conflicts and remuneration.

Reports such as the ACCC’s and the Royal Commission indicate that these arrangements may still act against the consumer interest. Research in 2017 on consumer understanding of commissions undertaken by the Central Bank of Ireland¹¹ found that even where consumers think that remuneration is likely to affect broker decisions in general, they have a potentially misplaced trust in their own individual broker to act in the consumer’s interests. 61% of respondents agreed that financial advisers/brokers primarily advise based on what products will earn them the most commission, and 63% of respondents stated that they trust their financial adviser/broker to understand their needs and to advise on a product that best suits their needs.

The Consultation Paper sets out well the complexity of remuneration arrangements, which may be more nuanced than just a payment for selling a product.

In such circumstances, while we acknowledge the efforts of NIBA to improve disclosure, we are not persuaded that greater disclosure of remuneration will be effective. Although general insurance brokers benefit from a Future of Financial Advice (FOFA) exemption on conflicted remuneration and best interest duties which will be reviewed by 2022, we would suggest that this Code review is an opportunity for NIBA and its members to take the lead now in tackling the fundamental issues associated with all conflicts including those created by remuneration, rather than hoping that more and better communication will be a suitable mitigation.

The Code should commit that subscribers will review their remuneration arrangements with insurance companies, and will eliminate conflicted arrangements or those arrangements that could be perceived as creating a conflict of interest for the subscriber.

Issue 7: Enforceability, remedies, and sanctions

The Code should be clear on how obligations are enforced and allow anyone to report a breach of the Code. While a “Client” can make a complaint, the Code states that a Client cannot rely upon the Code and no legal rights exist between an insurance broker and a Client in relation to Code standards

We are concerned about the text in the current Code, which has been retained in the draft Code, stating that ‘*The Code does not create any legal or other right as between us and you or any person other than NIBA. This means that by agreeing to comply with the Code we do not make any representation to you, or agree with you that, we will meet the Code standards in providing our service (unless specifically stated otherwise in writing to you).*’

¹⁰ <https://www.accc.gov.au/system/files/Northern%20Australia%20Insurance%20Inquiry%20-%20Final%20Report%20-%2030%20November%202020.pdf>

¹¹ <https://www.centralbank.ie/docs/default-source/publications/consumer-protection-research/consumer-understanding-of-commission-payments---november-2017.pdf?sfvrsn=2>

We consider that this is highly unsatisfactory, raising the question from a consumer perspective of whether the Code is worth the paper it is written on. We note that there is a similar provision in the Codes covering general insurance and life insurance, though not the Codes for banking and customer owned banks.

As well as being a very odd way of constructing the Code and a wholly negative message to consumers, this text is also misleading. The Code and its contents can be considered by AFCA, so it does effectively create consumer rights. Rule A14.2 of the AFCA Rules¹² states:

'When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) legal principles,*
- b) applicable industry codes or guidance,*
- c) good industry practice and*
- d) previous relevant Determinations of AFCA or Predecessor Schemes.'*

The life insurance Code at least acknowledges this (*'The Financial Ombudsman Service (FOS)... may consider whether we have complied with the standards of the Code when determining a dispute before it.'*), unlike the NIBA and general insurance Codes. But even this formulation may mislead consumers, given that the text comes immediately after a provision stating that the Code does not create any consumer rights. We much prefer the approach adopted in the banking and COB Codes, which frames the Codes as commitments to consumers.

The ABA and COBA make their Codes a part of the contract with consumers and there is an expectation from ASIC that they are enforceable.

ASIC's guidance in RG 183.27 states:

'In most cases, subscribers will incorporate their agreement to abide by a code by contracting directly with the independent person or body that has the power to administer and enforce that code. In some cases, subscribers will also incorporate their agreement in individual contracts with consumers (e.g. written directly into the terms and conditions of a particular product). We strongly encourage code owners to consider this approach.'

1. Until industry codes become mandatory, what sanction/s should be available to the IBCCC where members unsubscribe when a complaint is made against them? Should the IBCCC have the power to notify ASIC of efforts to evade investigation or compliance with a sanction even if the breach is minor?

The Committee should be able to notify ASIC of anything that it considers appropriate, and it should have the discretion to exercise its judgment about when to use this power.

There is an important question for NIBA about what it will do if a NIBA member unsubscribes from the Code in order to evade committee oversight – we would suggest that it should be expelled from NIBA. The Committee should be able to advise ASIC of serious non-compliance or evasion of scrutiny.

¹² <https://www.afca.org.au/about-afca/rules-and-guidelines/rules>

2. Should anyone have the ability to report an alleged breach of the Code? Where affected customers are not involved, is it appropriate for the report to be submitted directly to the IBCCC without the need for the allegations to be referred to the subscriber's IDR?

References to the Code Committee should primarily be about the identification and resolution of systemic issues rather than aiming to achieve restitution in individual cases, which is more appropriately the role of AFCA. Anyone should therefore be able to refer a case or series of cases to the Committee, and they should not go through the IDR process first. This is for example the approach being adopted in relation to the Customer Owned Banking Code, where the Committee aims to build stronger relationships with consumer advocates and encourage them to submit cases raising systemic issues, rather than relying on individual consumers.

3. In view of the proposed legislative changes allowing ASIC the ability to determine whether code provisions should be enforceable, should NIBA pre-empt the legislative change and prescribe which provisions are enforceable? If so, which Standards or type of standards should be enforceable by a client?

We would suggest that NIBA puts the Code forward to be enforceable under the new statutory regime, and that all provisions of the Code become enforceable.

4. As membership to the Code is currently voluntary, is there a real disincentive for subscribers to sign up to the Code if certain Code provisions are made enforceable by ASIC?

We would suggest this is not relevant to the review of the Code, given that it is not within NIBA's gift. The Code review should aim to create as good a Code as possible, in line with NIBA's stated aims; any steps that ASIC decides to take at a later date is a separate matter, and it will be for ASIC to consider the potential impact on subscriber numbers.

Issue 8: Complaints process

The Code should be clearer on how the complaints process works and consideration be given to whether the timeframes are appropriate. Small enterprises should be provided early in the process with information about options available and sources of support

1. Are insurance brokers facing the same issues as insurers regarding streamlining complaints handling if insurance broker complaint numbers are significantly lower?

Complaints processes should be as straightforward, accessible, and efficient as possible, so that they deliver fair consumer outcomes in a timely way. This should be the aim no matter how many complaints there are. The Code should set standards that elaborate on, exceed or clarify the new RG 271, which comes into effect in October – the proposed draft does not do this.

We welcome the ambition to provide more clarity about the complaints process, but the relevant section of the draft Code is a very long way from being fit for purpose. The draft Code feels much wordier and more complex than the equivalent sections in the Banking Code and GICOP, and we would suggest it is brought more in line with those Codes. Spending multiple paragraphs defining what will be considered a complaint is completely the wrong approach for a Code.

3. Should subscribers be required to refer individuals or small businesses who make complaints to support advocates upon receiving a complaint?

4. Would access to mediation and conciliation early in the complaints process reduce the time to resolution and provide a more efficient dispute resolution outcome for complainants?

No. Subscribers should provide clear and accessible information about where to get free independent advice, but they do not need to refer complainants. As part of this, NIBA and/or members should consider establishing partnerships with advice agencies, who might also be able to assist with staff training. This approach has worked well in different sectors in the UK, with the Money Advice Trust for example running its Vulnerability Academy with UK Finance¹³ as well as producing a regular podcast on vulnerability¹⁴ and working with individual businesses.

This is a complex issue and would need to be explored, introduced and monitored very carefully. Even if this were to produce quicker outcomes (which it may not do, if it introduces an additional stage in the complaints process), it may not produce fair outcomes, unless the mediation is conducted by someone with expertise in both the topic area and mediation techniques. There is some evidence to suggest that when this does not happen, inexpert and/or financially pressured consumers may be put at a disadvantage in mediation with businesses and may accept agreements that are not in their interests. Introducing additional stages in the complaints process might also create complaints fatigue, so that consumers give up on their complaints even where they have merit.

Issue 9: Vulnerable clients

The Code should make provision for the need for Code subscribers to identify and support vulnerable clients

1. Should a revised Code take into account the special needs of vulnerable clients?

The identification of consumer vulnerability as an important gap in the current Code is very welcome. This is in line with moves already implemented or currently being finalised in other financial services Codes, as well as in a range of other sectors in Australia including energy and communications.

2. Should specific groups be identified in the Code such as those described above? Or should the commitment by subscribers be more general given the particular client base of each subscriber? Or make provision for specific types of vulnerable clients like victims of domestic violence or those suffering financial hardship?

The Banking and Insurance Codes both set out a more substantial list than NIBA suggests in its draft. In general, we prefer approaches that set out principles around how to identify and respond to vulnerability rather than creating detailed lists of consumers in vulnerable situations, given the danger of this becoming a tick-box exercise. However given the current understanding of vulnerability within financial services we think it is helpful to set out a non-exhaustive list of what

¹³ <https://www.ukfinance.org.uk/events-training/vulnerability-academy-improving-outcomes-customers-vulnerable-circumstances>

¹⁴ <https://soundcloud.com/vulnerability-matters>

might put a consumer in a vulnerable situation. So we would suggest including and expanding the list in the draft.

In terms of practical implementation, the excellent Capital One guide on vulnerability¹⁵ is particularly worth reading, because it sets out how different forms of vulnerability may manifest themselves and what this means in terms of responses by financial services businesses.

3. Should a revised Code include:

- a. A statement acknowledging the diverse needs of vulnerable clients?*
- b. A commitment to accommodate vulnerable clients by providing assistance when asked?*
- c. A commitment to develop staff awareness and training regarding identification of vulnerable clients and how to take steps to provide them with additional support?*
- d. An ongoing commitment by subscribers to continuously improve their awareness and policies in relation to vulnerable clients?*
- e. Any other provisions?*

We support all of this. One issue to consider is that this is not only a matter of service provision and support, as the questions suggest, but may also relate to the fundamentals of product and service design, and the definition should reflect this. Brokers and insurers should work together on this.

4. Are there vulnerable client issues that are particularly relevant to clients of insurance brokers? How should these issues be addressed?

These are good questions which the Code should encourage subscribers to ask themselves on an ongoing basis. The Code itself does not need to provide this level of detail, though it could be explored in guidance. One example might be strata / owner corps, as many owners/tenants are disengaged.

Issue 10: Accessibility

The Code should be accessible to consumers, for example, through adopting plain language, having non-English language versions, and ensuring the Code can be accessed by the visually or hearing impaired. Promoting awareness and training are important ways of increasing accessibility to subscribers and consumers

The Code is very wordy in numerous places and it has not obviously been drafted with a non-expert audience in mind. We would suggest that you think further about how you expect it to be used by consumers, people advising them and decision-makers, and substantially improve the drafting to make it more accessible.

To take just one example, the new text on 'Covered services exclusions' has a Flesch-Kincaid Grade Level score that equates to 'very hard to read'. The ideal score is 8 as this is the average reading level, with anything above 18 defined as very hard to read. The score for this text is just over 28¹⁶.

¹⁵ https://www.capitalone.co.uk/images/pdf/Vulnerability_Inclusion_Handbook.pdf

¹⁶ <https://www.textcompare.org/readability/flesch-kincaid-grade-level/>

It would be helpful to have numbered paragraphs, as many other codes have (e.g. Banking Code¹⁷, General Insurance Code¹⁸).

1. Is there benefit in reformatting the Code so that it appears more like other codes, for example, the ICA 2020 Code of Practice or the ABA Code?

The more this Code is aligned with other codes, the easier it will be to read and engage with, both for consumer advocates and subscribers. Small brokers need simple, structured, numbered and accessible code commitments. The way the NIBA Code is currently drafted is confusing and hard for subscribers to implement. We are not convinced that this is a matter of appearance or even editing, but rather it needs a fundamental re-write which applies the framing, tone, structure and content of other Codes, so that it provides meaningful commitments and is not legalistic in tone.

2. Is there a need to create broader access to the Code by having versions in other languages and to accommodate the visually and hearing impaired?

Yes this would be sensible.

3. Should complainants be able to “Make a Complaint” on the Code website? If so, should the complaint be received by the IBCCC in the first instance? Should potential complainants be encouraged to seek redress from the subscriber in the first instance before using the “Make a Complaint” button?

No. Complainants should always go to the subscriber first. Then in terms of taking the matter further they need to understand the different roles and powers of AFCA and the Code Committee.

4. What kind of support would subscribers expect from NIBA at launch and on an ongoing basis to ensure that subscribers are aware of and understand their commitments and obligations under the Code?

This is a matter for subscribers and we do not have any comments on it.

5. What else can NIBA do to promote a revised Code?

We would suggest that NIBA seeks to work with front-line consumer, community and financial counselling organisations, who can help explain to consumers what their rights are under the Code and might also be a good source of referrals to the Code Committee.

Other issues not covered in the Discussion Paper

Code committee: This Code is an outlier in terms of its coverage of the role and powers of the Code Committee. Other codes, such as the two in banking and the general insurance Code, each have a section on the Committee, rather the relying solely on the Charter and a Deed as NIBA does. It would be helpful for the Code to reinforce the independence of the Committee and set out key powers that

¹⁷ <https://bankingcode.org.au/app/uploads/2020/06/Banking-Code-of-Practice-July-2020-with-COVID-19-Special-Note.pdf>

¹⁸ http://codeofpractice.com.au/2020/10/ICA001_COP_Literature_Code_OnScreen_RGB_DPS_10.2_LR2.pdf

relate to this. There also needs to be a clear commitment in the Code that the Committee is properly resourced.

Pipeline of future consumer Committee members: CFA recently established a mentoring scheme, with financial help from industry bodies, to support the development of a strong pipeline of future members of bodies such as the Code Committee. This does not need to be mentioned in the Code, but we encourage an ongoing commitment to this initiative.

Three-year review: While we support the idea that Codes should be updated to reflect emerging good practice and changes in industry operations and consumer expectations, we would query whether committing to this is realistic considering the length of time since the last time this Code was reviewed. We note that the current COB code review similarly considered a three-year review cycle but has reverted to five years, although there is a provision allowing for necessary changes between reviews. ASIC-approved Codes have to be independently reviewed every five years¹⁹.

¹⁹ <https://www.legislation.gov.au/Details/C2020A00135>

Appendix 1: Insurance Broker Case Studies from Financial Rights Legal Centre (2018-2021)

Lara's story – Broker is a code subscriber (C205061) – example of poor advice

Lara lost everything when the bushfires came through her town. Lara had insurance over a kit to build a shed on her farm property. Lara is a single mum and was planning to live in the shed with her children. The shed kit was covered by a farm insurance policy that she had obtained using a broker. Lara had insured the shed for \$100,000 (as finished shed presumably) and had paid over \$40,000 for it. When the fires came the shed had not been built yet, but all of the materials were destroyed. The shed was due to be erected on Monday and the fires came the Friday before. The insurer has denied her insurance claim based on the reason that the shed was not built and that it was building materials on the ground.

Lara lodged a complaint against the insurer (see AFCA determination 698845), and as outlined in the determination there was a separate complaint raised as against the Broker. The insurance broker had not warned her that she would not be covered until the shed was constructed. The insurer relied on Lara having not complied with her duty of disclosure. The matter resolved with the Broker prior to any AFCA determination.

Dominik's Story – Broker is code subscriber (C204504) – dispute over commissions

Dominik has an amusement ride small business that has ceased operating (since March) due to COVID19 restrictions on mass gatherings. He has 5 policies at cost of \$38,000 including public liability insurance, which commenced in January 2020. He was trading only for the first 6 weeks of the policy. He used a broker to cover all the weird risks that an amusement park has and a premium funder that the broker recommended. Dominik wanted the insurance policies put on hold until the COVID19 restrictions were lifted, not outright cancelled. The broker instead organised for most of the policies to be cancelled, which attracted large cancellation fees, and premiums were only being about 50% refunded even though the park only operated for less than 2 months of the policy. The broker would not refund any commissions (about \$5000), but said they would be waived the following year. The premium funder was also charging interest on the full 12 months of premiums even though most of the policies were now cancelled.

Several months later and after an AFCA complaint the broker resigned and refunded its commissions and fees on the insurance products that had been cancelled, but the premium funder interest was still in dispute.

Paul's Story – conflict of interest

Paul's broker sold him home insurance. Paul called his broker to tell them about a claim he would like to make regarding damage to his home caused by a third party. The broker advised him on steps to take and Paul followed their instructions. Then Paul's claim was denied by the insurer. Paul has since found out that in the insurance product disclosure statement (PDS) the broker states they are no longer acting as Paul's brokers but instead working as an agent for the insurer. Paul feels this is a conflict of interest and the instructions the broker gave him assisted the insurer with its claim dismissal. During Paul's correspondence with the broker there were never any warnings, apart from the one obscure sentence in the PDS that they were not working on Paul's behalf. Paul was never asked to sign off on having received that information. Paul believes this conflict of interest should be better disclosed and he should have been asked to sign off as an acknowledgment that he understands.

Dayley's story – Broker is code subscriber (C212494) – dispute over commissions

Dayley took out landlord insurance through an insurance broker. Dayley then sold the property three months after taking out the insurance and he asked the broker to cancel the policy. Dayley was refunded the rest of the year's premiums but the insurance broker would not refund its brokerage fee or retained commission. Dayley was not aware that either would be charged and has no idea if this is standard practice. He made a complaint to the broker's internal disputes resolution team and was told they are allowed to charge a fee and a commission, but Dayley can't remember ever seeing this in the financial services guide (FSG).

Jacqui's story – Broker is code subscriber (C206654) – who is the broker working for? Not providing a very good service to customer

Jacqui called the Insurance Law Service for advice on behalf of her building's body corporate. Her building had insurance which was arranged through a broker. In mid-2020 the broker advised Jacqui that their insurer was not going to renew the building's insurance when it expired in three weeks. Jacqui contacted the broker to ask why they were not going to renew and she was told the insurer was no longer following that line of business. Jacqui started shopping around for other insurers and approached ABC INSURANCE. ABC sent an assessor out to assess the building and told Jacqui that the roof had hail damage, possibly from the hail storm that occurred in Feb 2020. ABC told Jacqui they cannot offer body corporate insurance unless the roof is repaired. Jacqui asked her broker to lodge a claim with their original insurer which the broker did. But now no other insurer will cover her building while there is an open claim for the damaged roof. Their building insurance is about to expire and Jacqui doesn't know what to do. Their broker is not offering them any solutions.

Joe's story – Broker is authorised rep of a code subscriber (C202446) – poor quality service from broker, sent wrong policy information and not much help at claims time

In early 2020 the floor tiles in Joe's kitchen started popping up and cracking. Joe asked his broker to lodge a claim with his building insurer and the insurer arranged for an engineer and assessor to come and inspect the damage. Nearly three months later Joe received letter from his broker explaining that the claim had been denied. After receiving the reports from the engineer the insurer decided the damage was not caused by an insurable event. The broker advised Joe that if claim was not withdrawn by Joe before 5pm the same day, the insurer would issue a formal decline letter. Joe rang his broker to ask how he could have so little time to consider the letter. Joe's broker told him he could organise his own engineer at his own expense but the insurer would not give him more than three weeks to decide whether or not to proceed with the claim.

It took Joe several months to get his own engineer's report because of the COVID-19 pandemic. Joe's broker had explained that the main reason for the claim decline was there are no expansion joints to the floor or perimeter area which is result of poor construction practice and failure to install flexible joints. Joe only bought the property 18 months previous to the tile damage and the broker even came to inspect the house and said it looked fine.

Joe's own engineer however found that yes there may have been issues with the tiles, but the actual cause of the damage may have been extreme hot weather which over the years weakened the tiles. Joe thought his home building policy included coverage for extreme heat, but when he spoke to his broker he was told that he must have been sent the wrong policy information. The building policy that the broker actually placed for Joe does not cover damage caused by extreme heat.

Brian's story – Broker is code subscriber (C170288) (2018) – very poor broker services

Brian asked his insurance brokers to arrange comprehensive car insurance for him with INSURER A. Brian was involved in a motor vehicle accident in late 2017. When Brian tried to make an insurance claim with INSURER A he found out that he actually had a policy with INSURER B. The broker had organised the insurance with INSURER B without advising him. Brian's car was replaced new for old, but he wasn't advised by his brokers that his insurance policy with INSURER B had ended once the claim was settled. Then in mid-2018 Brian was involved in an at-fault accident and both vehicles were damaged. Brian tried to claim on his insurance but found out he didn't have a policy. Damage to both the other driver's car and Brian's car was over \$30,000.

Mariangela's story – Broker is code subscriber (C201372) – poor service by broker, client has been left high and dry

In February 2020 Mariangela called the Insurance Law Service a few days before her home building policy was due to expire. She had not received any renewal notice from her insurer or her insurance broker. Mariangela has an open claim with her insurer after a pipe burst in her home over a year before and repairs were still not completed. There is an ongoing dispute with the RED INSURANCE regarding structural repairs and mould growing under the house.

When Mariangela called her broker to inquire about the insurance renewal the broker told her that her insurer RED INSURANCE was no longer going to cover her because it was no longer going to offer the type of cover Mariangela needed for her home. Going forward RED INSURANCE would only offer home building cover for luxury homes in Australia. The broker told Mariangela that all of RED INSURANCE's lower end customers were being transitioned to BLUE INSURANCE. Had Mariangela not called her broker it does not appear her transition to BLUE INSURANCE would have taken place.

When Mariangela's broker showed her the disclosures they were sending to BLUE INSURANCE Mariangela was concerned they were not accurate. Her house was still undergoing major repairs but the broker disclosed in writing that the property was not under construction, not in poor condition, and only referred to a claim related to storm/water/cyclone run off when Mariangela's claim was actually about a burst pipe. Mariangela made a complaint to her broker's IDR department and the broker agreed to correct the disclosures. The broker confirmed that Mariangela's property was insured even though it would be unoccupied. Mariangela needed to move her family to temporary accommodation because of the growing mould.

One year later, in February 2021 Mariangela called the Insurance Law Service again in tears. Her property insurance is once again due to expire and she has been told that BLUE INSURANCE will not renew her policy. Her repairs with RED INSURANCE are still not complete and the property is unoccupied. Mariangela has tried to find other coverage herself but has not been successful. No insurers will give her a policy while she has an open claim.