



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 21

Approval of codes

June 2001

Your comments

We invite your comments on the *proposals and issues for consideration* in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Thursday 5 July 2001 and should be sent to:

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What this policy proposal is about

1 This paper sets out how ASIC proposes to approach its discretion to approve codes of conduct under 1101A of the *Financial Services Reform Bill 2001* (the Bill).

2 The paper provides:

- (a) an outline of ASIC's codes approval power, including what we will treat as a code, and the circumstances in which approval can be sought (**Section A**);
- (b) details of the statutory criteria for code approval, and how ASIC proposes to interpret and apply these criteria (**Section B**);
- (c) details of other criteria that ASIC will consider when approving a code, and how ASIC proposes to interpret and apply these criteria (**Section C**);
- (d) information on how to meet the statutory and other criteria in the case of a new code, an already operating but unapproved code, and an amended code that had previously been approved (**Section D**);
- (e) information on retaining approved status and on when code approvals will be revoked (**Section E**); and
- (f) a brief description of the regulatory framework within which codes sit (**Section F**).

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Policy proposals

We have six sets of policy proposals. For each of these proposed policies we have listed various aspects of those proposals which we are considering and have raised issues which we would like you to comment on. When necessary we have also included some explanations of our proposals.

Special note: We want to provide you with guidance about our plans for policy and processes as soon as we can to help you plan effectively. While we have done our best to cover the main issues, you will need to make your own preparation plans. It is possible we have missed some issues or have not taken into account the way the new legislation will affect specific industry situations. *We are keen to hear from you on our general approach, and what might be missing from it, as well as your answers to specific questions.*

A ASIC's approval power

Policy proposal	Your feedback
<p>What industry self-regulatory initiatives does our approval power apply to?</p> <p>A1 Our approval power under 1101A of the Bill applies to codes of conduct. It does not apply to other self-regulatory instruments such as industry standards and guidelines.</p> <p>What will ASIC treat as a code of conduct?</p> <p>A2 For the purposes of our powers under 1101A, we consider a code of conduct (code) to be a body of rules which has the following characteristics:</p> <ul style="list-style-type: none">(a) the standards contained in the code must be binding upon, and enforceable against, code subscribers through contractual arrangements;(b) the contractual arrangements that bind the subscribers to the standards in the code are between the following parties:<ul style="list-style-type: none">(i) industry participants and a central body which administers the code; or(ii) an industry participant and a consumer to whom the industry participant provides either or both its financial products or services; or(iii) industry participants and both a central administering body and consumers;(c) it is developed and reviewed in a transparent way, including consultation	<p>A2Q1 Is the proposed approach to what will be treated as a code appropriate? If not, why not, and how should it be amended?</p> <p>A2Q2 Are there other characteristics of codes that should be mentioned? If so, what are they, and why should they be included?</p>

Policy proposal	Your feedback
<p>with relevant stakeholders;</p> <p>(d) it is a living responsive document and must include reporting, monitoring and review mechanisms; and</p> <p>(e) the standards in the code may contain one or more of the following kinds of provisions:</p> <p>(i) provisions that deal with issues not dealt with in legislation;</p> <p>(ii) provisions that elaborate upon legislation to set out something approaching best, or at least good, practice in areas covered by legislation; and</p> <p>(iii) provisions that clarify what needs to be done to comply with legislation.</p> <p>Note: Although we use the term “code of conduct” in this paper – as this is the term used in the legislation – in practice this term is used interchangeably with “code of practice”.</p> <p>A3 We will not consider bodies of rules (self-regulatory arrangements) that do not have the characteristics specified under policy proposal paragraph A2 to be codes for the purposes of this paper.</p> <p>Which codes can we approve?</p> <p>A4 Under 1101A(1) of the Bill, we may approve codes which relate to any aspect of the activities of:</p> <p>(a) financial services licensees; or</p> <p>(b) authorised representatives of financial services licensees; or</p> <p>(c) issuers of financial products;</p> <p>provided that that they are activities for which we have a regulatory responsibility.</p>	<p>A3Q1 Is this exclusion appropriate? If not, why not, and how should it be changed?</p>

Policy proposal	Your feedback
<p>A5 We can approve a code that has a broader application than that described in policy proposal paragraph A4 if the code also comes within the parameters set by 1101A. For example, a code may apply to activities that are covered by the Bill (eg deposit-taking) as well as other activities (eg providing credit). The fact that a code deals with both sorts of activities would not prevent us approving it.</p>	
<p>When can you seek approval?</p> <p>A6 You can seek approval under 1101A in three situations:</p> <ul style="list-style-type: none"> (a) for a new code; (b) for an operating code which has not been approved before; and (c) for amendments to existing approved codes. 	<p>A6Q1 Are there other circumstances where approval of a code may be sought under 1101A?</p>
<p>A7 Our approach to approving codes will be similar in each of these circumstances: see Sections C and D of this paper.</p>	
<p>How do you seek approval?</p> <p>A8 In our final policy statement on the approval of codes we will indicate who you should write to, to seek approval of a code. We are considering whether it is necessary to have a formal application process or whether to rely on letters from industry bodies or other relevant groups requesting approval for a code and setting out how the particular code meets the criteria for approval.</p>	<p>A8Q1 Should we establish a formal application process? If not, why not?</p> <p>A8Q2 What, if any, further guidance (other than that in our policy proposals in this paper) is needed from ASIC to help applicants seek approval of a code? Why?</p>

Explanation

What industry self-regulatory initiatives does ASIC's approval power apply to?

1 While there are many types of self-regulatory instruments, our codes approval power only applies to codes of conduct.

What will we treat as a code of conduct?

2 In our view, there is an important distinction between industry codes of conduct and other self-regulatory instruments and initiatives, such as industry guidelines and standards. We consider that codes of conduct lie at the top of the hierarchy of self-regulatory instruments, and provide a greater degree of consumer protection outcomes than other self-regulatory instruments. Codes offer a greater degree of consumer protection because:

- (a) they are contractually enforceable;
- (b) compliance with their standards is required to be monitored;
- (c) remedies and sanctions are available for breaches of the code (including by the responsible administrator of the code, where there is one); and
- (d) as they contain mandatory review requirements, they are more likely to be living documents which evolve to meet changing market conditions.

Our proposed classification of what we will treat as a code is designed to ensure that the term “code” is reserved for self-regulatory instruments with these features.

3 There are two main types of arrangement used to ensure the enforceability of codes. The first is where code subscribers enter into contractual arrangements with a central body that is vested with the power to administer and enforce a code. The central body has the power to enforce the standards in the code on those industry participants who become members of the code. An example of such a code is the General Insurance Code of Practice.

4 The second type is where code subscribers incorporate their agreement to abide by a code in individual contracts that they enter into with consumers to whom they provide their services. By doing so, industry participants become contractually bound by the standards in the code, and consumers can directly enforce those standards against the service provider, particularly when dispute

resolution procedures are associated with the code. Examples of such codes are the present Banking, Building Society and Credit Union Codes of Practice.

5 Some codes may contain both elements, ie provide for contractual enforcement both by a central body administering the code and consumers.

6 The proposed criteria for codes are designed to exclude from the scope of the proposals in this paper, voluntary industry standards and similar self-regulatory instruments and initiatives that do not have a required monitoring facility or any associated external enforcement mechanism. No monitoring facility and external enforcement mechanism means fewer incentives for compliance, as well as a reduced level of transparency.

7 It should be noted that, even in the absence of enforcement or compliance mechanisms, the general law may provide some sanctions for non-compliance with an industry standard or guideline. For example, an organisation that misrepresents its compliance with a particular standard or guideline might contravene the prohibitions against misleading or deceptive conduct in Part 2.2 of the *Australian Securities and Investments Act 1989* (ASIC Act) and the prohibited conduct provisions in Part 7.10 of the Bill. In such cases, ASIC may be able to take enforcement action.

Which codes can we approve?

8 We can only approve codes which relate to any aspect of the activities of the following persons where those activities fall within our regulatory responsibility:

- (a) financial services licensees – persons who hold an Australian financial services licence (see the definition in 761A);
- (b) authorised representatives of financial services licenses – persons authorised in accordance with 916A or 916B to provide a financial service or financial services on behalf of the licensee (see the definition in 761A); or
- (c) issuers of financial products – that is, persons responsible for the obligations owed, under the terms of the product:
 - (i) to, or to a person nominated by, the client; or
 - (ii) if the product has been transferred from the client to another person and is now held by that person or another person to whom it has subsequently been transferred – to, or to a person nominated by, that

person or that other person (see the definition in 761E(4)).

B What are the statutory criteria for codes approval?

Policy proposal	Your feedback
<p>What is the preliminary issue for ASIC when determining whether to approve a code?</p> <p>B1 Before we can consider whether or not we will approve a code, we must determine whether the code is of the type referred to in 1101A: see policy proposal paragraphs A4 and A5.</p> <p>What legislative criteria must be satisfied before we can grant approval?</p> <p>B2 1101A(3) sets out a number of specific matters which ASIC must be satisfied about before approving a code.</p> <p>We must be satisfied that:</p> <ul style="list-style-type: none">(a) the code, or the code as proposed to be varied, is not inconsistent with the Law (as amended by the Bill) or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and(b) it is appropriate to approve the code given:<ul style="list-style-type: none">(i) the ability of the applicant to ensure that persons who claim to comply with the code will comply with the code as in force from time to time; and(ii) the desirability of codes of conduct being harmonised to the greatest	

Policy proposal	Your feedback
<p>extent possible.</p> <p>Policy proposal paragraphs B3 to B5 set out how we will assess these criteria.</p> <p>Approved codes must be consistent with other laws</p> <p>B3 In determining whether or not an inconsistency exists with the Law (as amended by the Law) or other relevant laws, we will take the view that:</p> <ul style="list-style-type: none"> (a) where compliance with a code provision would make it impossible to comply with the law then the code provision is inconsistent with the law; but (b) where a code provision: <ul style="list-style-type: none"> (i) provides for a higher standard of conduct or practice than that required by legislation; and (ii) compliance with the code would not be inconsistent with the legislation, <p>then no such inconsistency exists.</p> <p>Examples of this later situation may be where a code provides for a longer notice period than is provided for in legislation or more expansive pre-contractual disclosure than otherwise required.</p>	<p>B3Q1 Is this an appropriate interpretation of 1101A(3)(b)(i)? If not, why not, and how should it be changed?</p>
<p>Approved codes must include mechanisms to ensure compliance</p> <p>B4 In satisfying ourselves that a code includes mechanisms to ensure compliance, we will have regard to:</p> <ul style="list-style-type: none"> (a) the extent to which the code is contractually enforceable (if it is not then we propose not to consider it to be a code: see policy proposal paragraph 	<p>B4Q1 Is the manner in which we propose to interpret 1101A(3)(b)(i) appropriate? If not, why not and how should it be changed?</p>

Policy proposal	Your feedback
<p>A2);</p> <ul style="list-style-type: none"> (b) the adequacy of the monitoring procedures that are in place: see policy proposal paragraph C10; (c) the procedures and arrangements subscribers will be required to have in place to deal with consumer complaints about breaches of the code: see policy proposal paragraph C9; (d) the scope of those persons eligible to make a complaint about a breach of the code: see policy proposal paragraph C9; and (e) the enforceability of the code through both internal and external alternative dispute resolution procedures including the adequacy of the remedies and sanctions available for both: <ul style="list-style-type: none"> (i) breaches leading to financial loss; and (ii) breaches unlikely to cause financial loss. <p>See policy proposal paragraph C9.</p>	
<p>Codes should be harmonised to the greatest extent possible</p> <p>B5 We propose to interpret the requirement for harmonisation as involving a number of factors:</p> <ul style="list-style-type: none"> (a) all approved codes should meet certain standards in terms of development, content, administration and enforceability: see Section C of this paper; (b) it will normally be undesirable to have a number of different codes covering substantially the same subject area; <p>The more codes there are, the more</p>	<p>B5Q1 Is this an appropriate interpretation of 1101A(3)(b)(ii)? If not why not, and how should it be changed?</p> <p>B5Q2 Is policy proposal sub-paragraph B5(b) an appropriate consideration or should it be open to industry associations or other such groups to restrict membership of the code to members of the</p>

Policy proposal	Your feedback
<p>difficult it will be to achieve harmonisation. We will therefore encourage those responsible for codes to allow all relevant industry participants (or all those who engage in the relevant function if it is a functional code) to sign up to the one code.</p> <p>This will reduce the need for multiple codes covering similar areas.</p> <p>(c) it will normally be undesirable to have a number of different codes that cover substantially the same subject area and contain inconsistent standards;</p> <p>Note: For example, it would be a concern to us if the presently harmonised Banking, Building Society and Credit Union Codes were to contain different standards after their present review unless there was also some clear consumer benefit.</p> <p>(d) it might be appropriate to approve a code that seeks to cover substantially the same subject area of an existing code but sets notably higher standards than the relevant existing code. We would not interpret 1101A(3)(b)(ii) in a way that prevents the code setting higher standards from being approved.</p> <p>In this situation, we would need to be satisfied that the code setting higher standards would:</p> <ul style="list-style-type: none"> (i) deliver improved consumer benefits that outweigh any disadvantages arising out of more than one code covering substantially the same subject area; and (ii) meet the other criteria discussed in this paper. 	<p>association or group?</p> <p>B5Q3 In what ways could ASIC encourage those responsible for codes dealing with substantially the same subject area, to sign up to the one code?</p> <p>B5Q4 Is policy proposal sub-paragraph B5(d) an appropriate factor and qualification to the factors in policy proposal sub-paragraphs B5(b) and (c)? If not, why not and how else could the development of higher standards under codes be facilitated?</p>

Explanation

Approved codes must be consistent with other laws

1 In our view, the requirement to maintain consistency with other laws does not prevent a code from containing higher standards than those contained in legislation. This would defeat the potential value of codes in facilitating improved industry standards. Indeed, this is recognised in the Explanatory Memorandum to the Bill which states at paragraph 17.17 that:

“The Government considers that existing industry codes . . . will continue to play an important role in fleshing out best practice standards for compliance with the proposed new regime.”

2 Similarly, the fact that a code deals with an issue that is not covered by legislation should not be considered to be an inconsistency. Again, this would significantly reduce the potential for codes to provide improved consumer protection. On this issue, the Explanatory Memorandum states at paragraph 17.16 that:

“Codes may also be developed that establish best practice in areas not covered by the Act, but where industry and consumers consider the adoption by industry participants of consistent procedures and standards will facilitate business and enhance services offered to consumers.”

Approved codes must include mechanisms to ensure compliance

3 In our view, there are a number of factors that create incentives for compliance, and a combination of factors will normally be required.

4 First, it is important that the code is contractually enforceable. However, this is not enough by itself, for two reasons.

- (a) most consumers do not have the resources to go to court to enforce a contract; and
- (b) unless there are some formal monitoring mechanisms then breaches of a code may go undetected, particularly if no consumer loss is involved.

5 Other factors that we propose to consider when determining if this criterion is met include:

- (a) the adequacy of monitoring mechanisms,

- (b) whether there are procedures and arrangements to deal with consumer complaints about breaches of the code; and
- (c) the availability of remedies and sanctions for breaches.

6 A code subscriber's internal dispute resolution process should be able to consider all breaches of the code. Where a breach has caused financial loss, a consumer should be able to seek remedies through an external dispute resolution scheme (ADR). If there is a breach which does not involve loss, and if an ADR scheme therefore cannot deal with it, consumers must be able to turn to another body with powers to ensure that the code is complied with.

7 We will also consider the breadth of the code's provisions for giving standing to persons to make complaints about breaches of the code. Individual consumers will often have no incentive to pursue breaches that have not caused them financial loss. In these circumstances, we consider that persons other than affected consumers (such as consumer organisations and financial industry regulators) should be able to make complaints about breaches of the code. These entities may be more inclined to play an active and vigilant representative role which is necessary to ensure compliance with codes and thus consumer confidence in them.

Codes should be harmonised to the greatest extent possible

8 The legislation seeks to have approved codes harmonised to the greatest extent possible to ensure consistency across the industry: see 1101A(3)(b)(ii) and paragraph 17.14 of the Explanatory Memorandum to the Bill. Harmonisation of codes can be enhanced if all approved codes meet certain minimum standards for development, administration, and dispute resolution.

9 Where the standards in codes covering the same issues or functions are not identical, but are only slightly different, there is potential for consumers and financial services providers to be confused. We consider that this potential for confusion is generally inconsistent with the intent of the legislation and is undesirable.

10 However, where there are considerable consumer benefits from higher standards in a code, a restrictive interpretation of the requirement that the codes should be harmonised could unnecessarily disadvantage consumers. Accordingly, when being asked to approve a code or an amendment to an existing code that sets notably higher standards than any other code that covers substantially the same subject area, we would need to be satisfied that the code setting higher standards would:

- (a) deliver improved consumer benefits that outweigh the disadvantages arising out of more than one code covering substantially the same subject area; and
- (b) meet the other criteria for approval discussed in this paper.

We consider such an approach also creates incentives for parts of an industry to develop higher standards (and provide consumer benefits) to achieve a competitive edge.

C What are other criteria for codes approval?

Policy proposal	Your feedback
<p>ASIC’s power to consider other matters</p> <p>C1 Under 1101A, we may consider matters other than those listed in 1101A(3) when exercising our discretion about whether or not to approve a code of conduct. We take this view on the basis that the criteria set out in 1101A(3) are not exhaustive.</p> <p>What has guided our development of other criteria?</p> <p>C2 In determining the other criteria we will have regard to when considering approval of a code, we have taken into account the regulatory objectives set down in s1 of the ASIC Act. In particular, those objectives require ASIC to:</p> <ul style="list-style-type: none"> (a) promote the confident and informed participation of consumers in financial markets; and (b) maintain, facilitate and improve the performance and efficiency of the provision of financial services. <p>We have also considered the primary objectives of Chapter 7 of the Law (as amended by the Bill), which seek, among other things, to promote:</p> <ul style="list-style-type: none"> (a) consumer confidence in using financial services; and (b) the provision of fair, honest and professional services (by all licensees). 	<p>C2Q1 Are there other objectives that should also be taken into consideration when developing other criteria for approving codes? If so, why should they be considered?</p>

Policy proposal	Your feedback
<p>Note: See 760A of the Bill.</p> <p>C3 We have also been guided by:</p> <ul style="list-style-type: none"> (a) the report of the Taskforce on Industry Self-regulation, <i>Industry Self-Regulation in Consumer Markets</i>, August 2000 (copies are available from www.treasury.gov.au/self-regtaskforce); and (b) <i>Guide to Fair Trading Codes of Conduct: Why have them and How to prepare them</i>. <p>Note: This guide was prepared by Commonwealth, State and Territory Consumer Affairs Agencies in 1996.</p>	<p>C3Q1 Are there other documents or principles which should guide ASIC's discretionary powers in this area? If so, why should they be taken into account?</p>
<p>What other criteria will we consider when exercising our codes approval power?</p> <p>C4 The other criteria that we will consider when exercising its codes approval power are whether:</p> <ul style="list-style-type: none"> (a) there has been an appropriate process for developing the code or conducting the review that results in amendments to the code; (b) the code contains clauses dealing with scope, objectives, core rules and complaints handling and administration; and (c) the code has effective administration arrangements. 	<p>C4Q1 Are there other criteria we should consider when exercising our codes approval role? If so, why?</p>
<p>What are the appropriate preliminary procedures for developing or amending a code?</p> <p>C5 Where a code is being submitted to us for</p>	<p>C5Q1 Are these preliminary</p>

Policy proposal

approval (either as a new code or as an amended code), we expect certain procedures to have been followed in the development or amendment of the code.

These procedures would generally involve:

- (a) identifying, at the commencement of the process, all relevant stakeholders (eg consumers affected or likely to be affected by the problem, relevant community and consumer bodies, relevant industry participants and relevant regulators);
- (b) undertaking adequate consultation with all stakeholders to identify the issues and debate appropriate responses;
- (c) adopting transparent procedures (eg issuing a draft code or discussion paper for public consultation purposes);
- (d) assessing whether a code provides the best option to address the identified problems. This will generally entail:
 - (i) identifying any alternative effective means available to the industry to address the problem; and
 - (ii) assessing all options to find out whether a code provides the best option;
- (e) acting without bias towards any group of stakeholders. This can be demonstrated by having a sufficient representation of consumers and industry participants in the body developing the code, and by having processes to give due consideration to different stakeholders' views; and
- (f) seeking early and appropriate involvement of ASIC and other relevant

Your feedback

procedures for developing codes appropriate and comprehensive? If not, why not, and how should it be changed?

Policy proposal	Your feedback
<p>regulators in the processes.</p> <p>What types of provisions will we look for in a code?</p> <p>C6 We would expect most codes we approve to contain clauses dealing with:</p> <ul style="list-style-type: none"> (a) <i>scope</i> – who and what the code applies to (we would encourage those developing consumer codes to consider whether it is appropriate to extend the coverage of the code to also include small business); (b) <i>objectives</i> – it should be clear whether the code is designed to clarify existing obligations, lift industry standards, do both and/or serve some other purposes; (c) <i>core rules</i> – see policy proposal paragraph C7; (d) <i>complaint handling</i> – including internal and external dispute resolution arrangements and appropriate remedies and sanctions – see policy proposal paragraph C9; and (e) <i>administration of the code</i> including publicity, staff training, reporting, monitoring, review and amendment – see policy proposal paragraph C10. 	<p>C6Q1 Is this list of provisions that we will look for in a code appropriate and comprehensive? If not, why not, and how should it be changed?</p>
<p>What issues must the code's core rules address?</p> <p>C7 We will consider the extent to which the core rules address relevant industry or consumer issues. We will consider whether there is evidence that relevant industry and consumer problems have been clearly identified and appropriate solutions have been developed in consultation with the relevant stakeholders.</p> <p>C8 Generally, we consider that evidence of compliance with the preliminary procedures</p>	<p>C7Q1 Are there other things we should be considering when seeking to ensure that the code adequately covers relevant issues? If so, why?</p>

Policy proposal	Your feedback
<p>outlined in policy proposal paragraph C5 will be relevant in satisfying us that all key problems and solutions have been identified. Where a problem identified in the initial consultation exercise is not addressed in the code, we will seek an explanation (eg the issue is best dealt with in another specified way, or there is evidence that the issue is not a problem).</p> <p><i>What provisions are needed to ensure that the code is enforceable?</i></p> <p>C9 For a code to be effective it must be enforceable. In considering whether to approve a code, we will look to see that:</p> <ul style="list-style-type: none"> (a) subscribers are required to have an internal dispute resolution scheme (IDR) which can: <ul style="list-style-type: none"> (i) hear complaints about all breaches of the code; and (ii) require that appropriate remedies and remedial action be taken; (b) subscribers are required to belong to an external alternative dispute resolution scheme (ADR) scheme that: <ul style="list-style-type: none"> (i) can hear complaints about breaches of the code; and (ii) whether there are any limits on the types of complaints it can hear (eg can it only hear complaints where a consumer has suffered loss?); (c) where subscribers can belong to an ADR scheme which cannot consider complaints about all code breaches (eg cases where there is no loss involved), there is another body which can hear excluded complaints about code breaches. This body could, for example, 	<p>C9Q1 Is this approach to ensuring the enforceability of the code appropriate? If not, how should it be altered?</p> <p>C9Q2 Should we take into account any other sanctions under policy proposal sub-paragraph C9(e)? Why?</p>

Policy proposal	Your feedback
<p>be the code administration body or a code complaints committee;</p> <p>(d) any person or body can raise concerns about non-compliance with the body responsible for enforcing the code; and</p> <p>(e) the operator of the ADR scheme the subscriber must belong to (and/or any other body for hearing complaints) has appropriate investigative powers and an appropriate range of remedies and sanctions for breaches of the code.</p> <p>At a minimum, we consider that the available remedies should include compensation for any direct financial loss or damage caused by the breach of the obligation and non-monetary orders obliging the subscriber to take (or not take) a particular course of action in order to resolve a complaint. The range of sanctions could include:</p> <ul style="list-style-type: none"> (i) formal warnings; (ii) publication of the name of the non-complying organisation; (iii) corrective advertising orders; (iv) fines; and/or (v) suspension or expulsion from the industry association. <p>Note: Suspension or expulsion may raise competition issues, and may need to be authorised by the ACCC.</p> <p>What factors are relevant to the effective administration of the code?</p> <p>C10 As a general rule, we will be looking for the following type of evidence to ensure that the code is effectively administered:</p> <ul style="list-style-type: none"> (a) where the code is an industry code, the code should be administered by a body 	<p>C10Q1 Is this list of factors appropriate and complete? If not, why not and what should be added or changed?</p>

Policy proposal	Your feedback
<p>which is independent of the industry or the industries that provide the body's funding. A good indication of independence is that the body is made up of an equal number of consumer and industry representatives with an independent chair;</p> <p>(b) the code administration body should have responsibility for:</p> <ul style="list-style-type: none"> (i) obtaining adequate funding from code subscribers to administer the code; (ii) ensuring compliance with the code is monitored annually and publicly reported upon; (iii) in some instances, hearing complaints about breaches of the code and imposing sanctions and remedial measures where appropriate; (iv) reporting systemic breaches and instances of serious misconduct to ASIC; (v) arranging publicity for the code; (vi) making provision for employee training about the code; and (vii) ensuring that at least every 3 years there is an independent review of the effectiveness of the code and its procedures and recommending amendments if necessary; <p>(c) the monitoring processes overseen by the code administration body should provide for some form of external monitoring from time to time; and</p> <p>(d) where a code is a functional code (ie a code dealing with particular practices that cut across a number of industries), we consider that it may not always be</p>	<p>C10Q2 Should the code administration body be responsible for any other areas under policy proposal sub-paragraph C10(b)? Why?</p> <p>C10Q3 Should we provide more guidance on the monitoring processes that the code administrative body have in place under policy proposal sub-paragraph C10(c)? If so, what kind of guidance and why is it needed?</p> <p>C10Q4 Should we provide more guidance on administrative process expectations discussed in policy proposal sub-paragraph C10(d) in the case of a functional code where the existence of a code administration body is not practical? If so, what kind of guidance and why is it needed?</p>

Policy proposal

practical to have a code administration body. In these instances, however, we will still want to ensure that the administrative processes identified in policy proposal sub-paragraph C10(b) are otherwise provided for and that compliance with these administrative functions will be appropriately monitored and enforced by alternative means.

Your feedback

Explanation

ASIC's power to consider other matters

1 We consider that the legislation does not set out all of the factors that ASIC can consider when exercising its codes approval power: see 1101A(3). This section of the paper deals with the additional factors that we are likely to take into account when exercising our discretion. We have developed criteria in addition to the statutory criteria to ensure that approved codes provide appropriate benefits to their intended beneficiaries.

What has guided ASIC's development of other criteria?

2 As with any exercise of discretionary power, ASIC needs to be guided by the regulatory objectives expressed in its guiding legislation. The regulatory objectives set out in the ASIC Act and the Bill that are most relevant to the exercise of our codes approval power are set out in policy proposal paragraph C2. In developing additional criteria, ASIC has also been guided by previous work on self-regulation and how to make codes operate effectively.

What are the appropriate preliminary procedures for developing or amending a code?

3 The processes followed by industry when either developing a new code or reviewing an existing code are extremely important in determining the effectiveness of the final code and the degree of confidence in it.

Unless processes include:

- (a) identifying and consulting with stakeholders;
- (b) issuing discussion documents;
- (c) evaluating alternative ways of dealing with problems; and
- (d) seeking early and appropriate involvement of ASIC,

there is a risk that the code (or at least parts of the code) will be irrelevant or ineffective or that it will not enjoy the confidence of those it is designed to benefit.

The Bill's Explanatory Memorandum also explicitly recognises the need for some of these preliminary procedures. At paragraph 17.17 it states that:

“It is expected that new and revised codes will be developed by industry in conjunction with ASIC and with consumer organizations.”

What types of provisions will we look for in a code?

4 Previous work, such as the papers referred to in policy proposal paragraph C3, have explored the characteristics of effective codes. This work has shown that codes that include provisions on scope and objectives, core rules, complaints handling and code administration stand a greater chance of being effective.

What issues must the code's core rules address?

5 The core rules are the substance of a code. They are the main vehicle for improving industry practices, and it is therefore essential that core rules address the existing problems in the marketplace. In assessing this issue, we will identify what we believe those problems to be, and will look to see whether they are appropriately dealt with in the code. If they are not, we will consider whether they are appropriately dealt with elsewhere or whether there are compelling reasons for the problems not to be addressed in the code. Such reasons may include that the matter is more appropriately dealt with in legislation.

What provisions are needed to ensure that the code is complied with?

6 Policy proposal paragraph B4 discusses some of the key characteristics required in codes if compliance with a code is to be ensured. Policy proposal paragraph C9 elaborates on these and in particular looks in greater detail at the remedies and sanctions that should be available to deal with breaches of the code.

7 Remedies are important for ensuring that consumers are appropriately compensated when breaches occur and that the problem is fixed. Sanctions have a slightly different function and are important to:

- (a) act as a deterrent to breaching the code; and
- (b) ensure that consumers can have confidence in the code.

Sanctions beyond any necessary remedial action will not need to be applied for every breach but they do need to be available, particularly to deal with wilful and repeated breaches.

What factors are relevant to the effective administration of the code?

8 Numerous works on codes have noted that there should be some type of administrative body charged with overseeing the operation of the code for them to work effectively. Without such a body, there is a risk that oversight of industry compliance with the code will be reduced, that systemic problems will not be identified, and that industry and consumer awareness of the code will be low.

9 Where a code does not apply to a specific industry, such as some functional codes, there may be exceptional cases where alternative types of arrangements need to be made to oversee the code. In these cases, however, we consider there must still be mechanisms to ensure that:

- (a) the code is appropriately monitored, reported upon, reviewed and promoted;
- (b) systemic issues are identified;
- (c) staff are appropriately trained about the code; and
- (d) breaches are appropriately followed up.

10 In rare instances the regulator may play a role in these alternative types of arrangements.

D Meeting ASIC criteria for approval

Policy proposal	Your feedback
<p>How to meet our criteria for approval of a new code</p> <p>D1 Before approving a new code, we will need to be satisfied that the code meets both the explicit statutory criteria set out in Section B and the other criteria set out in Section C.</p>	
<p>Our criteria for assessing an unapproved operating code</p> <p>D2 Subject to policy proposal paragraph D3, when we assess an operating code (an existing code applying to subscribers) that has not previously been approved, we will generally apply the same criteria used for approving a new code. The type of information that will be required is set out in Sections B and C.</p>	<p>D2Q1 Are there other requirements that should be included in our approval criteria for operating, but unapproved, codes? If so, what are they and why should they be included?</p>
<p>How an operating code can meet our criteria for approval</p> <p>D3 We recognise that in some instances an operating, unapproved code may not have been developed according to the processes recommended in policy proposal paragraph C5. In these circumstances, we will place greater reliance on looking at how the code has operated in practice. The applicant should seek to show both:</p> <ul style="list-style-type: none">(a) compliance with the criteria listed in Sections B and C; and(b) evidence from the code’s operating history demonstrating the effectiveness of the code’s coverage, content, administration and dispute resolution	<p>D3Q1 Are there other means by which an applicant for approval of an operating code can establish that a code remains relevant and effective? If so, what are those means, and, why are they relevant?</p>

Policy proposal	Your feedback
<p>procedures.</p> <p>D4 If an operating code is more than 3 years old, it will not be easy for the applicant to establish the code’s continuing relevance and effectiveness unless the code has recently been independently reviewed (eg within the last 3 years). The review should have involved consultation with key stakeholders.</p>	<p>D4Q1 Are there any significant practical problems for requiring an operating code of more than 3 years of operation to be independently reviewed? If so, what are they and how might they be overcome whilst ensuring the relevance and effectiveness of the code?</p>
<p>Our criteria for approving amendments to an approved code</p> <p>D5 An approved code may require amendments due to:</p> <ul style="list-style-type: none"> (a) recommendations resulting from its regular independent review; (b) the emergence of significant new consumer or market problems; (c) significant changes to the relevant laws that regulate the conduct of the industry participants who are members of the code; and (d) any other circumstances requiring procedural or technical changes to the code. <p>D6 We consider that most financial services codes that exist before the eventual passage of the Bill will require substantial amendments before they can be approved. In particular, any disclosure provisions will need to be substantially reviewed to bring them into line with the requirements of the Bill.</p>	<p>D5Q1 Are there other circumstances in which a code will require amendment? If so, what are they?</p>

Policy proposal	Your feedback
<p>D7 Amendments resulting from the circumstances listed in policy proposal paragraph D5 (other than purely technical amendments) must have our approval before being incorporated in an approved code. Otherwise, the code will no longer be approved.</p>	
<p>D8 If the amendments are significant we will look at the <i>whole</i> code when determining whether or not to re-approve the code. What constitutes a significant amendment will need to be assessed in the context of the code itself. Two situations which will normally be seen to give rise to significant amendments are:</p> <p>(a) where the proposed amendments result from the code’s regular three yearly independent review; or</p> <p>(b) where the proposed amendments:</p> <p>(i) are designed to address a significant new consumer or market problem, or significant changes to the relevant laws; and</p> <p>(ii) have a significant impact on the overall operation of the code.</p>	<p>D8Q1 Are there any reasons why we should not review the amended code as a whole in the specified circumstances?</p> <p>D8Q2 Are there other circumstances in which we should review an amended code as a whole?</p>
<p>D9 There are two other types of amendments to a code:</p> <p>(a) amendments that are of a purely procedural or technical nature and do not affect the overall operation of the code.</p> <p>A “purely technical” change may, for example, be a change in the name of an organisation or a statute referred to in a code. ASIC approval does not need to be sought for these amendments. However, we should be formally notified of such changes at the earliest</p>	<p>D9Q1 What are the other types of amendments that fall within the “purely technical” amendments?</p>

Policy proposal	Your feedback
<p>available opportunity; and</p> <p>(b) amendments that are made between the three yearly independent review of a code that are capable of being approved by ASIC as discrete amendments. Amendments that do not have a significant impact on the overall operation of a code will fall within this category. While such amendments require our prior approval, we will not review the code as a whole when approving them.</p> <p>D10 We will only approve amendments to an approved code resulting from the circumstances noted in policy proposal paragraph D8, where the amended code (ie the code as a whole in its amended form) continues to meet our criteria for approval of new codes.</p> <p>D11 We will balance the cost and interruption to existing industry arrangements and consumer protection needs when considering approval for amended codes.</p>	<p>D10Q1 Are there additional considerations that we should include within our approval criteria for previously approved codes that have been amended? If so, what are they and why should they be included?</p>
<p>How to meet our criteria for approval of an amended code</p> <p>D12 In circumstances where policy proposal paragraph D8 applies, we must be satisfied that the amended code as a whole continues to meet both the statutory criteria and other criteria listed in this paper. For these purposes, the applicant for the approval of the amended code may show us that it meets the approval criteria by evidence:</p> <p>(a) similar in nature to that relevant for the approval of the code as a new code; and</p> <p>(b) of the code’s operating history, to the</p>	<p>D12Q1 Is there other evidence which should be relevant to approving amended codes? If so, what is that evidence and why is it relevant?</p>

Policy proposal	Your feedback
<p>extent relevant — for example, to establish the effectiveness of the code in relation to the aspects that have not been amended.</p> <p>D13 In circumstances where policy proposal sub-paragraph D9(b) applies, the applicant must show us that the amendment meets those approval criteria that are relevant using evidence similar to that used for the approval of a new code.</p> <p>How do our approval criteria apply to other code related documents?</p> <p>D14 Generally, we consider that a code must be a free-standing document. A code should normally be self-contained with regard to the matters it deals with including how the code operates and is implemented. However, in some instances, detailed implementation procedures relating to a code may, for practical reasons, need to be contained in other documents, such as the constitution of the entity implementing the code, or a detailed procedures manual.</p> <p>D15 Where documents other than a code contain matters “significantly relevant” to the operation and implementation of a code, we will look at those documents as a necessary part of our code approval process. We will not seek to specifically approve these other documents. We will examine whether the code, when read in conjunction with these documents, is able to meet the approval criteria set out in this paper.</p> <p>D16 As a code is a public document, we consider the transparency of a code to be of critical importance to its effective operation. Therefore, industries that are using codes to address identified consumer protection and</p>	<p>D15Q1 How should we define which matters are “significantly relevant” to the operation of a code?</p> <p>D16Q1 Are there other matters that can reasonably be expected to be included in a document other than a code? If so, what are they,</p>

Policy proposal	Your feedback
<p>market integrity issues or improve industry service standards, must either:</p> <ul style="list-style-type: none">(a) as far as practicable, not include in documents other than the code itself, matters that are of significant relevance to the way in which a code is intended to operate; or(b) where such matters are included in documents other than a code, make those documents publicly available to consumers along with the code. <p>D17 We consider that guidance notes to staff, agents and employees of industry members about applying code standards should be the only significantly relevant matters dealt with outside a code.</p>	<p>and, why should they be excluded from a code?</p>

Explanation

1 Our general criteria for approving codes, and what you must do to show us that the code meets these criteria, is described in Sections B and C. However, if you are seeking approval for an operating unapproved code or an amended code, there are some other matters which you should be aware of.

How an already operating code can meet ASIC criteria for approval

2 Where a code has been in operation for some time, some of the preliminary development procedures set out in policy proposal paragraph C5 may not have been followed. Therefore, when deciding whether an operating code meets the our approval criteria, we will also take into account the code's operating history and continued relevance.

3 Where an operating code is more than 3 years old, market developments may have affected the relevance of the code's provisions. More recent problems may not be addressed in the code. An independent external review is an effective way of assessing whether an operating code remains relevant and effective in addressing emerging consumer and market problems. Therefore, in making our decision, we will take into account any evidence that you have recently undertaken such a review, and that you have made changes necessary to give effect to any recommendations resulting from the review.

Our criteria for approving amendments to a previously approved code

4 When a code is amended (other than by way of purely technical amendments), we consider that it is no longer the same code as the one we approved. If you fail to obtain fresh approval from us for the amended code, it will cease to be an approved code when the amendments come into effect.

5 Amendments to a code resulting from its regular three yearly independent review will normally require ASIC to look at the code as a whole, rather than the discrete amendments made. This is to ensure that the code as a whole remains effective and relevant. Similarly, where amendments to a code are needed as a result of significant changes to the relevant laws, or a significant consumer or market problem that has emerged between the three yearly review, we will look at the code as a whole rather than the discrete

amendments where those amendments have a significant effect on the overall operation of the code. This approach is necessary to ensure that the code remains a living document which is relevant as a whole to existing market conditions.

6 Amendments due to more minor changes to the relevant laws or emerging consumer and market problems will not generally require ASIC to open the whole code for review where such amendments can be considered discretely. This will generally be the case where such amendments do not have a significant impact on the overall operation of the code. However, we will have to determine on a case-by-case basis whether or not any amendments will have such an overall effect on the operation of the code as a whole.

7 We will, when considering applications for approval of amended codes, look to promote consumer protection and market integrity without imposing undue interruption to existing industry arrangements and increased costs.

E Ongoing approval status and code revocation

Policy proposal	Your feedback
<p>How long does an approved code enjoy its approved status?</p> <p>E1 An ASIC approved code will generally continue to enjoy the approved status until:</p> <ul style="list-style-type: none"> (a) approval has been expressly revoked by ASIC: see policy proposal paragraphs E2 and E3; or (b) amendments to an approved code (other than “purely technical” amendments) have been implemented without prior ASIC approval of the amendments: see policy proposal paragraph D7. <p>When will we consider revoking approval of a code?</p> <p>E2 We may revoke any approval we have granted to a code:</p> <ul style="list-style-type: none"> (a) on the application of the person who applied for its approval; or (b) where we are satisfied that the code no longer meets, or substantially meets, the statutory criteria in 1101A(3) for: <ul style="list-style-type: none"> (i) consistency with the Bill and Commonwealth laws; (ii) ability to ensure compliance with the code; and (iii) desirability of codes being harmonised to the greatest extent possible. <p>Note: See Section B of this paper for discussion of the</p>	<p>E1Q1 Are there other circumstances in which an ASIC approved code should lose its approved status? If so, what are they and, why should they affect the approved status of the code?</p> <p>E2Q2 Are there other circumstances in which we should consider revoking approval of a code? If so, what are they?</p>

Policy proposal	Your feedback
<p>statutory criteria.</p> <p>E3 We will also consider revoking an approval where we are satisfied that the code no longer meets or substantially meets our other approval criteria set out in Section C of this paper.</p> <p>E4 When deciding whether to revoke approval of a code, we will balance the need to ensure consumer protection with the need to avoid undue interruptions to existing industry arrangements.</p> <p>E5 We will also follow the principles of procedural fairness when making our decision.</p>	
<p>How will we evaluate a code's ongoing compliance?</p> <p>E6 We may use the following measures to ensure that a code continues to be relevant and effective and to warrant its approved status:</p> <ul style="list-style-type: none"> (a) periodic reporting to us by the administrator or the compliance monitor of the code (eg annual reports and special reports dealing with systemic issues or serious breaches); (b) information derived through our: <ul style="list-style-type: none"> (i) liaison work with consumers and consumer bodies; (ii) industry consultations; and (iii) compliance monitoring and surveillance work and other intelligence sources; and (c) the results of the independent three yearly review of a code. 	<p>E6Q1 Are there other measures that we should consider to ensure that a code continues to be relevant and effective? If so, what are they and why should they be considered?</p>

Explanation

Ongoing obligations for approved codes

1 Codes are living documents. They must continue to be effective and relevant in achieving their stated objectives to be considered as effective self-regulation.

2 Where a code enjoys ASIC approved status, we will continue to monitor it, through mechanisms set out in policy proposal paragraph E6, to make sure the code remains effective and relevant in addressing consumer and market problems that exist or arise in the area of its operations. One of the key ongoing obligations of code administrators and industry participants must be to ensure that the code continues to comply with the relevant approval criteria and any conditions of approval.

When will we consider revoking approval of a code?

3 Consumers need to be confident that a code which is promoted as being approved by ASIC meets the criteria set out in this paper. As market conditions change, so codes can date. Similarly, as attention moves on and off specific industries, so too can an industry's level of commitment to its code vary.

4 It is therefore essential that ASIC takes appropriate action when it considers that a code no longer meets the criteria set out in this paper. Before we revoke an approval, however, we will follow principles of procedural fairness, eg providing an opportunity for corrective action.

F Codes in the regulatory framework

Policy proposal	Your feedback
<p>What role is there for codes after the Bill becomes law?</p> <p>F1 Codes will continue to play an important role after the Bill becomes law. This role will vary depending upon the circumstances but may include:</p> <ul style="list-style-type: none">(a) dealing with issues not dealt with in legislation;(b) elaborating upon legislation to set out something approaching best, or at least good, practice in areas covered by legislation; and(c) clarifying what needs to be done to comply with legislation. <p>Note: See policy proposal paragraph A4 of our FSRB Paper No 2 <i>Licensing: Organisational capacities</i> (April 2001) and policy proposal paragraph A6 of our FSRB Paper No 5 <i>Disclosure: Product Disclosure Statements (and other disclosure obligations)</i> (April 2001), where we acknowledge the role that codes could play in fleshing out statutory obligations.</p> <p>Are codes mandatory?</p> <p>F2 The stated intention of the Government is that codes will not be mandatory under the new legislation. Paragraph 17.15 of the Explanatory Memorandum for the Bill explicitly states that:</p> <p style="padding-left: 40px;"><i>“It will not be mandatory for an industry participant to be party to a code.”</i></p> <p>This means both that the law will not make it compulsory to belong to a code and nor to</p>	<p>F1Q1 Are there other roles that codes can serve? Why?</p>

Policy proposal	Your feedback
<p>seek ASIC approval of a code. It will be up to the discretion of members of a relevant industry, or another relevant industry representative body to apply to us for approval of a code.</p> <p>What is the relationship between codes and the requirements under the law?</p> <p>F3 In some instances we may indicate that compliance with a certain code, or code provision, will satisfy, as good or best practice, a specific aspect of the requirements under the law (including the Law as amended by the Bill).</p> <p>Note: See policy proposal paragraph A4 of our FSRB Paper No 2 <i>Licensing: Organisational capacities</i> (April 2001), where we acknowledge the role that codes could play in fleshing out statutory obligations.</p>	<p>F3Q1 Is it appropriate for ASIC to suggest that compliance with a code amounts to compliance with certain requirements applying to a licensee? If so, why and in what circumstances? If not, why?</p> <p>F3Q2 What are typical subject areas that could be dealt with by codes as amounting to compliance with requirements applying to a licensee (eg Parts 7.6 to 7.8) or with requirements applying to a product issuer (eg Part 7.9)? Why?</p>
<p>What are the consequences of misrepresentations about codes?</p> <p>F4 In some circumstances, representations about codes may result in contravention of the ASIC Act and the prohibited conduct provisions of Part 7.10 of the Bill (including prohibitions against misleading or deceptive conduct, making false or misleading statements and engaging in dishonest conduct). These representations may include:</p> <p>(a) representing a code as having ASIC</p>	

Policy proposal	Your feedback
<p>approval when it does not;</p> <p>(b) representing that an organisation complies with either an unapproved or an ASIC approved code when it does not; and</p> <p>(c) misrepresenting the effect of a code.</p> <p>Where such misrepresentations are made, we will consider the need for investigative or enforcement action.</p> <p>What is the relationship between alternative dispute resolution (ADR) schemes and codes?</p> <p>F5 Under the Bill, all financial services licensees must have approved internal and external dispute resolution procedures: see 912A(g). We consider that our proposals in this paper dealing with dispute resolution arrangements are consistent with our proposals in policy proposal paragraphs A8 and B11 and Explanation paragraph 14 of our FSRB Policy Proposal Paper No 7 on <i>Licensing: External and internal dispute resolution procedures</i> (June 2001).</p> <p>We expect that some relevant ADR schemes and IDR procedures need to deal with complaints and inquiries involving compliance with an applicable industry code that elaborates on legislative provisions and clarifies what needs to be done to comply with the legislation.</p> <p>Consulting other regulators about your code</p> <p>F6 Codes which apply to activities regulated by ASIC may also come within the jurisdiction of other regulators. For example, if a code contains any anti-competitive measures, it</p>	

Policy proposal

may need to be authorised by the Australian Competition and Consumer Commission (ACCC). If it impinges upon issues of privacy, you should consult the Privacy Commissioner. The proposals in this paper are not intended to have any impact on the application of other regulatory regimes.

Your feedback

Explanation

What role is there for codes after the Bill becomes law?

1 When many existing financial services codes were created, there were no industry specific laws dealing with the consumer protection issues that these codes cover. This situation will change with the passage of the Bill, which will provide a common level of consumer protection for all financial services covered by the Bill. A question therefore arises about the continuing role for codes.

2 Our view is that codes will continue to have a role in:

- (a) dealing with issues not covered in legislation;
- (b) building upon protections contained in legislation; and
- (c) clarifying what needs to be done to comply with legislation.

Note: ASIC's thinking on the role of codes post FSRB is set out in greater detail in a speech given by our Deputy Chair, Jillian Segal, in November 2000, on *Monitoring the self regulatory landscape* (see pages 8 to 12). You can find it on ASIC's website at: http://www.asic.gov.au/pdf/monitoring_self_reg.pdf.

Are codes mandatory?

3 There will be no legislative requirement for an industry participant to belong to a code or to have a code approved.

4 Industry arrangements themselves, however, may lead to restrictions being placed on industry participants' ability to conduct certain financial market activities. Such industry arrangements may be linked to code membership requirements. For example, it may be a criterion of membership of an industry association that all members must adopt a particular code. ASIC does not consider such codes to be mandatory in the same sense as a code that is mandatory due to a statutory requirement. It is also noted that to the extent such industry arrangements raise competition issues, they are generally a matter for the ACCC.

What is the relationship between codes and the requirements under the law?

5 There may be times where we might indicate that compliance with a certain code, or code provision, will satisfy a specific requirement under the law. For example, we may make it clear in

our licensing criteria that compliance with a particular code or code provision will satisfy certain licensing requirements.

What is the relationship between alternative dispute resolution (ADR) schemes and codes?

6 Although ADR schemes have many similar characteristics to codes, we have treated approval of ADR schemes as falling outside the proposals in this paper. Our existing policy on approval of external ADR schemes is set out in Policy Statement 139 *Approval of external complaints resolution schemes* [PS 139]. See our FSRB Policy Proposal Paper No 7 on *Licensing: External and internal dispute resolution procedures* (June 2001) that deals with the basis for our approval of external and internal dispute resolution procedures.

Regulatory and financial impact

We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating financial services activity and investor protection. To ensure that we have achieved an appropriate balance, we are also developing a Regulatory and Financial Impact Statement (RIS).

The RIS will address the following seven key elements:

1 Issue / problem

This will discuss the nature and magnitude of the problem.

2 Objective(s) / analysis of the problem

The objective(s), or the outcome sought in relation to the identified issue / problem, will be addressed.

3 Options / solutions

This will identify all the alternative options that could achieve the objective(s) stated above for dealing with the issue being considered (eg no specific action; ASIC policy proposal; media release; information statement; self regulation/quasi regulation; codes of conduct; and co-regulation, compliance and enforcement strategies).

4 Impact analysis (costs and benefits) of each option

Impact analysis will include:

- (a) analysis of the benefits and costs of the options, including any restriction on competition for different persons affected;
- (b) identification of persons or bodies affected by the problem; and those that will be affected by the solutions or options identified (ie applicant/proponent of issue; other interested parties, consumers, business and government);
- (c) a consideration of how each of the proposed options will affect existing law, regulations or policies;

- (d) identification and categorization of the expected impacts of the proposed options as likely benefits or likely costs against each of the persons/bodies identified as likely to be affected;

We will try to quantify these effects where possible (for example, will there be any restriction on competition as a result of the proposed regulation?)

Costs to business affected by a regulatory initiative might include: administrative costs; complying with new regulatory standards; licence fees; delays etc.

Costs to consumers affected could also include higher prices for goods and services; reduced utility of goods and services; delays and more difficult or expensive options for seeking redress.

- (e) benefits of the options will also be identified (even where they are not quantifiable); and
- (f) the data sources used and assumptions made in making these assessments will be identified.

5 Consultation

The consultation undertaken in the policy process will be detailed.

6 Conclusions and recommended option

The preferred option(s) will be given, and reasons why.

7 Implementation and review

This will discuss how the proposed option will be administered, implemented, or enforced (eg instrument of relief; policy statement; practice note; no action letter).

In order for us to fully assess the financial and regulatory impact of our proposals, we invite you to consider possible options that would achieve our objectives, comment on the impact that these policy proposals might have, and in particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

Any comments that we receive will be taken into account when preparing our final RIS.

Development of policy proposal

We have developed this policy proposal paper by considering:

- (a) the intention of the Bill as indicated in the Explanatory Memorandum to the Bill and the Second Reading Speech in the House of Representatives on the introduction of the Bill into Federal Parliament;
- (b) the Report on the Bill by the Parliamentary Joint Committee on Corporations and Securities issued in August 2000;
- (c) the Government's response to the Report, issued on 29 March 2001;
- (d) relevant comparisons with current legislative requirements for the regulation of financial services activity under the law;
- (e) a review of existing ASIC policies and practices relevant to the regulation of financial services activity under the law; and
- (f) a review of public submissions on the Exposure Draft Bill issued by the Government in February 2000.

We have also taken into account:

- (a) *Industry Self-Regulation in Consumer Markets*, Taskforce on Industry Self-regulation (August 2000)
- (b) *Guide to Fair Trading Codes of Conduct: Why have them and How to prepare them*, Commonwealth, State and Territory Consumer Affairs Agencies (1996)
- (c) *Monitoring the self regulatory landscape*, speech by Jillian Segal, ASIC Deputy Chair (November 2000)

Key terms

In this policy proposal:

“ADR” means an external alternative dispute resolution mechanism;

“ACCC” means the Australian Consumer and Competition Commission;

“ASIC” means Australian Securities and Investments Commission;

“ASIC Act” means the *Australian Securities and Investments Commission Act 2001*;

“Bill” means the *Financial Services Reform Bill 2001*, the Law as amended by the Bill or that bill as enacted as applicable and includes and regulations made for the purposes of the Bill;

“code” means a Code of Conduct that has the characteristics described in policy proposal paragraph A2;

“EFT Code” means Electronic Funds Transfer Code;

“IDR” means an internal dispute resolution mechanism;

“Law” means the Corporations Law (including as intended to be replaced by the *Corporations Bill 2001*);

“licensee” means a person who holds an Australian financial services licence;

Note: This is a definition is contained in 761A

“PS 136” (for example) means an ASIC Policy Statement (in this example numbered 136);

“982A” (for example) means a clause of the Bill; and

“s782” (for example) means a section of the Law.

What will happen next?

Stage 1

6 June 2001 ASIC policy proposal paper released

Stage 2

June 2001 Consultation period on the contents of this policy proposal paper.

5 July 2001 Comments due on the policy proposal.

13 July to September 2001 Drafting of policy statement

Stage 3

Late September 2001 Policy statement released.

Your comments

We invite your comments on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Thursday 5 July 2001 and should be sent to:

**Roxanna Irvin
FSR Project Office
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Australian Securities and Investments Commission
GPO Box 4866
Sydney NSW 1042
email: FSRProjectOffice@asic.gov.au**

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Related papers

This policy proposal paper is one of a set of four proposal papers issued together in June 2001 on the implementation of the *Financial Services Reform Bill 2001*. As outlined in our paper *Building the FSRB Administrative Framework* (April 2001), we issued an earlier set of policy proposal papers in April 2001. We intend to issue further policy proposal papers in the coming months all related to the implementation of the Bill.

The policy proposal papers issued together in June are:

- *Licensing: Principals and representatives*
FSRB Policy Proposal Paper No 6
- *Licensing: External and internal dispute resolution procedures*
FSRB Policy Proposal Paper No 7
- *Licensing: Discretionary powers*
FSRB Policy Proposal Paper No 8
- *Approval of codes*
FSRB Policy Proposal Paper No 9

The earlier policy proposal papers issued together in April are:

- *Building the FSRB Administrative Framework – Policy to implement the Financial Services Reform Bill 2001*
- *Licensing: The scope of the licensing regime: Financial product advice and dealing*
FSRB Policy Proposal Paper No 1
- *Licensing: Organisational capacities*
FSRB Policy Proposal Paper No 2
- *Licensing: Adapting IPS 146 to the Financial Services Reform regime*
FSRB Policy Proposal Paper No 3
- *Disclosure: Product Disclosure Statements (and other disclosure obligations)*
FSRB Policy Proposal Paper No 4
- *Disclosure: Discretionary powers and transition*
FSRB Policy Proposal Paper No 5

- *Licensing Process Guideline: How do you get an Australian Financial Services Licence?*

Copies of policy proposal papers

You can get copies of ASIC policy proposal papers from:

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