

## Discussion Paper for NIBA Code of Practice Review

The National Insurance Brokers Association of Australia (**NIBA**) is pleased to invite feedback and submissions from consumers, organisations, representative associations, and any other interested stakeholders as part of the review of the NIBA Code of Practice.

### Who Are We?

NIBA is the peak body of the insurance broking profession in Australia and represents around 360 member firms and more than 2000 individual Qualified Practising Insurance Brokers (QPIBs) throughout Australia. In total, NIBA represents an estimated 90% of all insurance brokers in Australia. Since 1982, NIBA has been a driving force for change in the Australian insurance broking industry. It has supported financial services reforms, encouraged higher educational standards for insurance brokers through NIBA and other education providers, and introduced a strong, independently administered and monitored Insurance Brokers Code of Practice.

### The NIBA Code of Practice

The NIBA Code of Practice (**Code**) is an agreement between NIBA and its members and other brokers who subscribe to the Code (**subscribers**), which sets out the minimum service standards that clients can expect from subscribers. The Code and Code Procedures also outline how complaints and disputes regarding potential breaches of the Code can be resolved. A link to the Code and its guidance notes can be found [here](#) and the Code Procedures [here](#).

The Code is independently administered by the Australian Financial Complaints Authority, with Code compliance monitored independently by the Insurance Brokers Code Compliance Committee. The Insurance Brokers Code Compliance Committee Annual Review 2019-20 analysing how subscribers complied with the Code can be found [here](#).

The twelve service standards that subscribers commit to are:

**Standard 1:** *We will comply with all relevant law*

**Standard 2:** *We will transparently manage any conflicts of interest that may arise*

**Standard 3:** *We will clearly tell you if we do not act for you*

**Standard 4:** *We will clearly tell you about the scope of our covered services*

**Standard 5:** *We will discharge our duties diligently, competently, fairly and with honesty and integrity*

**Standard 6:** *We will clearly tell you how our covered services are paid for before we provide them and answer any questions you have*

**Standard 7:** *We will handle any money received in accordance with relevant law and any agreement with you*

**Standard 8:** *We will ensure that we and our representatives are competent and adequately trained to provide the relevant services and will maintain this competence*

**Standard 9:** *We will respond to catastrophes and disasters in a timely, professional, practical and compassionate manner in conjunction with any industry-wide response*

**Standard 10:** *We will ensure that we have an internal complaints and disputes handling process that meets the Code Complaints and Dispute process standards*

**Standard 11:** *We will support NIBA in promoting the Code and make information on the Code (including how to make a complaint) and our Covered Services readily available to you*

**Standard 12:** *We will not engage in activity or inactivity that is reasonably likely to bring the insurance broking profession into disrepute.*

Many of the Standards include additional detail in the Code as to how the Standards might be achieved.

### **The Code Review**

NIBA believes the Code is fit for purpose and remains a leading benchmark for industry self-regulation, including setting the standard for professional commitment to clients in the insurance broking industry internationally. As part of its commitment to professionalism and continuous improvement, NIBA is undertaking a review of the Code to ensure continuing high standards of service allowing the profession to remain in step with regulator and community expectations.

The Code was last reviewed and updated with effect from 1 January 2014. In 2018, NIBA commenced a review of the Code with a view to undertaking consultation during the course of 2019. As Australia moves out of the turbulence of 2020, NIBA has committed to implementing a review of the relevance and currency of the Code in 2021. The NIBA Board has engaged a third-party consultant to conduct an independent review of the Code with a view to submitting the revised Code to ASIC for approval of the Code under Regulatory Guide 183. In undertaking the review, the NIBA Board recognises the importance of ASIC approval of the revised Code as *“it is a signal to consumers that this is a code they have confidence in.”*<sup>1</sup>

In the interests of transparency and continuous improvement, the Code review is not limited in its scope, with NIBA’s intent being to ensure that the Code remains relevant and a benchmark of industry self-regulation in a regulatory environment that has turned its focus more keenly to community expectations, culture, and conduct.

### **Review Pathway**

In anticipation of this request for feedback, the attached Discussion Paper has been prepared by the independent reviewer in order to facilitate formal submissions in relation to the current Code. The Discussion Paper sets out topics for consideration which have been derived from common themes arising from preliminary discussions between the independent reviewer and key stakeholders. The key stakeholders who have contributed their preliminary views include representatives from the following organisations:

- Australian Financial Complaints Authority;
- Australian Securities & Investments Commission;
- Consumers Federation of Australia;
- General Insurance Code Governance Committee;
- Insurance Brokers Code Compliance Committee;
- Insurance Council of Australia;
- NIBA Regulatory Affairs Committee;
- NSW Office of the Small Business Commissioner; and
- Australian Small Business & Family Enterprise Ombudsman.

NIBA has taken time to reflect on the common themes that have emerged from these discussions and has provided the independent reviewer with NIBA’s preliminary comments and suggestions for change in response. In the interests of transparency, NIBA has made NIBA’s proposed changes to the

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<sup>1</sup> ASIC, Regulatory Guide 183, March 2013, 4 [183.3].

current Code available [here](#) as part of the review consultation. It is important to note that the document reflects NIBA’s initial thoughts and does not take into consideration design/layout/readability, which will be considered and addressed before the revised Code is finalised.

In preparing the Discussion Paper, the independent reviewer has also had the benefit of the recent significant code review work undertaken by other financial services industries, and relevant regulatory reviews, including the Final Report issued by the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry (**the Royal Commission**), and the regulatory response to the Royal Commission.

The aim of the Discussion Paper is to foster discussion and feedback on the key areas identified, raise any other key issues to consider, and suggest the best approach to implementation to ensure that any Code changes are reasonable and can be executed in practice to achieve the intended benefits.

### Target Timeline

The planned timeline for the Code review is as follows:

<b>8 Feb – 9 April 2021</b>	Public release of Discussion Paper and request for submissions.
<b>12 April – 21 May 2021</b>	Invitation for key stakeholders to meet Independent Reviewer to discuss submissions and NIBA’s proposed changes.
<b>24 May – 25 June 2021</b>	Receive, review, and assess any feedback from submissions. If necessary, prepare a further draft Discussion Paper arising from stakeholder and public consultation and re-plan timeline to accommodate additional consultation. If additional consultation is required, the timeline below will change.
<b>28 June – 12 July 2021</b>	Finalise outstanding questions and issues prior to issuing final report.
<b>30 July 2021</b>	Final Review Report released to NIBA Board with Code recommendations arising from consultation.
<b>Second half of 2021</b>	Finalise revised Code with NIBA Board approval.  NIBA to submit revised Code to ASIC for approval.  Launch at NIBA Convention 2021.
<b>Mid to late 2022</b>	Revised Code becomes effective following training and roll out assistance to subscribers.

### Invitation to contribute

We encourage you to consider the Discussion Paper and provide a submission using the link [here](#).

Submissions may be made confidentially, or you may choose to make a public submission which will be available on the Code Review Submission page.

Submissions will remain open until **9 April 2021**.

**Dallas Booth**  
**CEO, NIBA**  
**12 February 2021**

## Discussion Paper for Public Consultation

### Introduction

This Discussion Paper has been prepared following a request by the NIBA Board to independently review the 2014 NIBA Code of Practice (**Code**). Following preliminary discussions with key stakeholders, common themes and suggestions for revision of the Code have been identified and distilled. These issues and suggestions are described in this Discussion Paper alongside questions for consideration in order to facilitate discussion and comments by way of public submissions. The questions for consideration are not intended to be exhaustive and the public is encouraged to provide comments and questions broadly as NIBA has indicated:

*“...the Code review is not limited in its scope, with NIBA’s intent being to ensure that the Code remains relevant and a benchmark of industry self-regulation in a regulatory environment that has turned its focus more keenly to community expectations, culture, and conduct.”*

Before setting out the key issues that have emerged, there is value in considering the context in which this review is occurring. Although the original intention of the NIBA Board was to review the Code in the three-year timeframe after it was introduced, it was not possible to predict the true level of regulatory activity and attention the financial services industry has attracted during this time, culminating in the Final Report issued by the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry (**Hayne Royal Commission**) in 2019.

In the lead up to key stakeholder discussions in late 2018, the Hayne Royal Commission heard months of damning evidence about the banking and insurance industries which had significant and immediate impact on the organisations concerned. Although the Hayne Royal Commission did not reveal similar scandals about the insurance broking profession, the industry continues to operate in an environment where there is wide acceptance of the existence of a trust deficit held by the community in relation to financial institutions generally, including financial advisers and other intermediaries<sup>2</sup>. In this context, the insurance broking industry is faced with an opportunity to learn from the experiences of other financial advisers and undertake a review of the Code in a way that reflects the broader call to improve organisational culture, transparency, and client focus.

The industry’s desire to accept this opportunity and effect change (*“before it is imposed upon them”*, as a few stakeholders observed) requires significant leadership and determination given the current commercial challenges faced by insurance broking firms coupled with the lack of a clear and immediate imperative. While other financial advisers floundered, the insurance broking industry emerged unscathed from the Hayne Royal Commission, giving rise to the not unreasonable temptation to describe the Code as *“ain’t broke”*. Submissions provided in the course of this consultation process will be invaluable in guiding the industry’s leadership during these challenging times.

It is important to acknowledge the time that has passed since the Code review began in 2018. The delay in progressing the Code review has attracted strong criticism from some key stakeholders. It would be an understatement to say that a lot has happened since mid-2019. As the industry emerges from the unprecedented disasters of 2020, the NIBA Board

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<sup>2</sup> For example, p 2 <https://download.asic.gov.au/media/4744026/james-shipton-speech-the-trust-deficit-and-corporate-australia-17-may-2018.pdf>

has stated its keen focus on progressing the Code review in 2021 and its commitment to continuously improving the Code and professionalism in the insurance broking industry.

Since first engaging with key stakeholders and describing the key issues that have been raised, there have been a number of developments that further inform the considerations in this Discussion Paper:

1. the regulatory response to the recommendations from the Hayne Royal Commission has progressed, the intended approach clearer, and the focus of issues to be addressed more apparent;
2. the Insurance Council of Australia has completed its long-awaited review of the General Insurance Code of Practice following detailed consultation;
3. the Insurance Brokers Code Compliance Committee has published its own motion inquiry into complaints handling, and further analysed data related to self-reported breaches of the Code; and
4. the NIBA Board has had the opportunity to digest and debate the preliminary comments of key stakeholders, created a document reflecting initial thoughts about changes to the Code, and shared that document as part of this consultation process.

All of these developments, in conjunction with identified key stakeholder issues, assist in progressing the Code review discussion by providing multiple perspectives for consideration: from government; the regulator; the consumer; and the industry body. The purpose of this Discussion Paper, and part of my role as an independent reviewer, is to collect and distil the ideas posed from these various angles, pose questions to test and challenge assumptions, and encourage a (respectfully) robust ventilation of ideas for discussion and consultation. The ultimate mark of success for the review is a revised Code achieved through consensus, accepted and supported by key stakeholders and subscribers alike, which can be practically applied and implemented as a “living Code”. Such a revised Code would go a long way to advance the objectives of an effective industry code of practice: fostering stakeholder trust; professional recognition; and continuous improvement.

With the benefit of considered input on issues, proposed changes, and what changes consumers will find informative and useful in “real life”, the industry’s leadership can gain important insights about regulator, community, and subscriber expectations so that it becomes clearer what standards are required to maintain the insurance broking industry’s reputation and promote professionalism and competency in the industry going forward.

*Marigold Magnaye – Asperdel Consulting  
Independent reviewer  
12 February 2021*

## Executive Summary

Following preliminary discussions with key stakeholders about the review of the NIBA Insurance Brokers Code of Practice, a number of common themes and issues emerged. The issues and suggestions for change may be summarised as follows:

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;
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;
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;
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;
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;
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;
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;
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;
9. **Vulnerable clients** - The Code should make provision for the need for Code subscribers to identify and support vulnerable clients;
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.

Effective and practical implementation of proposed Code revisions are matters to be taken into account as part of the review. Any proposed changes to the Code need to translate to standards which, when put into practice, achieve the benefits intended, including informed decision making, and increasing trust and professionalism in the industry. NIBA's desire to address these considerations transparently is reflected in NIBA sharing proposed changes to the Code and the reasons behind the changes. NIBA proposes including new sections and completely re-writing some of the Code, including key changes to remuneration disclosure standards, and simplifying various sections with a view to broadening the scope of coverage. The Discussion Paper sets out NIBA's proposed changes alongside the outcomes of recent code reviews by other financial services licensees, which reflect community expectations and the financial services industry's recognition of the need to evolve.

## ISSUES FOR CONSIDERATION

### ISSUE #1

**Higher standards** - The Code should go beyond the law and not simply restate it.

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- 1.1 Preliminary discussions with key stakeholders indicate a strong desire to ensure that any revision of the Code reflect higher standards for the profession and not simply restate the legal requirements binding an insurance broker. As a matter of principle, industry codes of practice are offered as a form of self-regulation by which industry participants “*set standards on how to comply with, and exceed, various aspects of the law.*”<sup>3</sup> Codes are expected to go beyond legislative requirements and deliver additional benefit to consumers and/or address specific problems<sup>4</sup>.
- 1.2 Some key stakeholders observed that the current Code does not appear to do more than materially restate the law. It is suggested that a revised Code set the direction for the profession so that behaviour is not only brought up to date with community expectations, but the revised Code also sets a bar for best practice and the future of the profession. Viewed as an opportunity to be aspirational and to give the profession direction as to where it should be going, it is suggested that the Code be re-written from the ground up to allow it to be relevant, responsive to current issues, and so as to set up the profession for continued success.
- 1.3 Some specific suggestions offered by key stakeholders include:
- Adding a preamble to the Code establishing the approach and vision for the Code;
  - Providing non-exhaustive examples of compliance with various Code Standards;
  - Incorporating a standard of ethics for subscribers to the Code.
- These suggestions are described in greater detail below.
- 1.4 NIBA’s preliminary feedback indicates that it proposes to amend and add to the current Code, rather than re-writing the Code in its entirety. Some key stakeholders pre-empted this approach and have suggested that it is a missed opportunity for NIBA to set itself apart from other financial services providers and raise the bar.
- 1.5 In terms of the types of changes that NIBA proposes that go beyond strict legal requirements, these include:
- Determining its compliance with legal obligations through the lens of acting with “*commercial standards of decency and fairness with due regard to the interests of our clients.*”<sup>5</sup>
  - Adding standards relating to “Design and Distribution” ahead of regulation being finalised;
  - Providing greater detail as to how to comply with existing obligations (for example, activities to be undertaken when providing Personal Advisory Services; advice prior

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<sup>3</sup> Treasury, Interim Report Submission to the Hayne Royal Commission, 9 [56]

<sup>4</sup> ASIC Regulatory Guide 183: Approval of financial services sector codes of conduct, RG 183.5. Note: “Consumers” is not defined in RG 183 and ASIC encourages codes to extend beyond retail clients, if appropriate [RG 183.59]

<sup>5</sup> This is a standard usually associated with an insurer’s duty of utmost good faith owed to an insured: Allsop, CJ, *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36.

to placing insurance with overseas foreign insurers; and setting out standards for complaints and disputes); and

- Expanding remuneration disclosure practices, and incorporating a monitoring and review process<sup>6</sup>.

NIBA's preliminary proposed changes to the current Code is available [here](#).

### Preamble to the code standards

1.6 In order to set the tone and direction for the profession, the addition of a preamble to a revised Code has been suggested by some key stakeholders. Having a vision or mission statement as part of the Code preamble can provide a lens through which business decisions about customer interactions can be made by subscribers to the Code. This approach has been adopted in the latest versions of the Australian Banking Association (**ABA**) Code and the Life Insurance Code which begin by stating Guiding Principles by which the code standards are to be interpreted. The Insurance Council of Australia (**ICA**) recommended a similar approach in the Final Report of the 2017 review of the ICA Code of Practice<sup>7</sup>, which was adopted and is reflected in Part 1 of the ICA 2020 Code of Practice<sup>8</sup>. While it is recognised that the current NIBA Code states upfront that it commits subscribers to “*high standards of customer service*”, it is suggested that there is an opportunity to create a greater vision and understanding of what that means.

1.7 Given NIBA's core strategies<sup>9</sup>, it is suggested that it would be appropriate for a preamble of a revised Code to include a statement about enhancing and promoting Professionalism and the standing of brokers. The Insurance Brokers Code Compliance Committee (**IBCCC**) has published an own motion enquiry about professionalism in the industry and, although it made positive findings<sup>10</sup>, the IBCCC made recommendations about what brokers could do to maintain and further develop competency and professionalism and build client and community trust:

- incorporate the Code into their company structure and strategy;
- develop and communicate a common organisational understanding of competency focused on meeting client expectations;
- treat competency-based training as equally important as educational qualifications; and
- train all staff in Code obligations.

While some of these recommendations may be too specific for a preamble that reflects the spirit, intent, and objectives of a revised Code, the IBCCC provides valuable guidance on practical ways in which professionalism may be advanced and potentially reflected elsewhere in a revised Code.

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<sup>6</sup> These changes are addressed further under Issues 5 and 6 of the Discussion Paper

<sup>7</sup> ICA Recommendation 1

[http://codeofpracticereview.com.au/assets/Final%20Report/250618\\_ICA%20Code%20Review\\_Final%20Report.pdf](http://codeofpracticereview.com.au/assets/Final%20Report/250618_ICA%20Code%20Review_Final%20Report.pdf)

<sup>8</sup> <https://insurancecode.org.au/app/uploads/2020/06/2020-GI-Code.pdf>

<sup>9</sup> <https://www.niba.com.au/html/history-and-purpose.cfm>

<sup>10</sup> It was found that the vast majority of Code subscribers demonstrated a commitment to professionalism through competency frameworks and staff training requirements, which often exceeded ASIC standards:

<http://www.fos.org.au/custom/files/docs/professionalism-and-competency-in-the-insurance-broking-industry-report.pdf> p 21.

- 1.8 The changes proposed by NIBA currently do not include a preamble or vision statement. However, this approach has not been expressly ruled out. Rather, NIBA has indicated that introductory sections of the Code are intended to be included following member and other stakeholder feedback.

#### More specific guidance on Standards

- 1.9 Key stakeholders also suggest including further detail in the Code about how to meet Standards, beyond legal requirements. For example, the Standards below do not include guidance on how the Standards might be achieved:

*Standard 11 – We will support NIBA in promoting the Code and make information on the Code (including how to make a complaint) and our Covered Services readily available to you;*

*Standard 12 – We will not engage in activity or inactivity that is reasonably likely to bring the insurance broking profession into disrepute.*

- 1.10 While there is a risk in narrowing the application of Standards by being prescriptive, it is suggested that non-exhaustive examples of adherence to a Standard could be provided in appropriate cases. For example, Standard 12 could incorporate examples of behaviour that are reasonably likely to bring the insurance broking profession into disrepute. Such behaviour has been found by the IBCCC to have occurred in the following cases:

- charging excessive broker fees and misrepresenting the true cost of services;
- misleading a client to encourage the withdrawal of an AFCA complaint;
- altering insurance policies or wrongly completing renewal forms without client/insurer instruction.

Other examples of a breach of Standard 12 could include the following which have attracted broad criticism in recent times:

- engaging in pressure selling to individuals and small businesses;
- selling junk insurance or other add-ons which do not benefit the customer (regardless of whether the broker is acting for the customer or the add-on insurer).

- 1.11 It is suggested that updated examples with respect to other Standards could also be useful. For example, in Standard 8 (which relates to ensuring competency of representatives), the commitments described relate exclusively to training and development. It is suggested that ensuring competency could also include having supervision and compliance monitoring in place to check specific key areas like:

- the quality and appropriateness of advice provided;
- the completeness of files;
- the keeping of file notes of instructions from clients;
- awareness of and adherence to Code obligations by third-party representatives.

By including specific examples, it is suggested that a subscriber benefits from an indication of what “good” and “best” practice looks like without being exhaustive or narrow.

- 1.12 NIBA’s proposed changes do not reflect the types of suggestions key stakeholders provided and described above. However, the proposed changes expand on the Standards in relation to the following:

- Standard 5 – specifying activities to be undertaken when providing Personal Advisory Services, including:-
  - a. conducting reasonable investigation into products applicable to the advice sought;
  - b. identifying how replacement products put the client in a better position than the existing product; and
  - c. outlining the advantages and disadvantages of any recommendations made.

These activities are not limited to Retail Clients as defined in the *Corporations Act (Cth) 2001*;

- Standard 5 – specifying information to be provided and considerations prior to placing cover with an unauthorised foreign insurer; and
- Standard 10 – specifying a process for subscribers to follow when managing complaints and disputes with clients. This is detailed further under Issue#8.

### Greater focus on Ethics

- 1.13 Incorporating ethics into the Code is suggested as another way to demonstrate that the Code goes beyond the law. Currently, a financial adviser, including a licensed insurance broker, is required by 912A(1)(a) of the *Corporations Act* to:

*“...do all things necessary to ensure that the financial services covered by the licence are provided **efficiently, honestly and fairly**” (emphasis added).*

It could be argued that licensed financial services advisers have an obligation to act ethically under the law already. Standard 5 of the current Code also states:

*“We will discharge our duties diligently, competently, fairly and with honesty and integrity.”*

- 1.14 While there is fairly lengthy commentary that accompanies Standard 5, some stakeholders question whether the commitments described go beyond the law or simply restate it. Further, some of the commitments relate only to the provision of “Personal Advisory Services”, rather than broadly covering any advice or service provided.
- 1.15 Key stakeholders suggest that the revised Code adopt some if not all of the Code of Ethics standards developed by the Financial Adviser Standards and Ethics Authority (**FASEA**). The FASEA Code of Ethics was developed following the passing of legislation in 2017 requiring financial advisers to comply with new law relating to higher education standards and a code of ethics. The FASEA Code is designed to encourage higher standards of behaviour and professionalism.<sup>11</sup>
- 1.16 It is important to note that the legislation specifically excludes advice given in relation to general insurance or consumer credit insurance. By virtue of this carve out, insurance brokers advising on general insurance are not required to meet the educational or ethical standards set out in this new legislation.
- 1.17 The FASEA Code<sup>12</sup> contains 12 standards which cover:
- Ethical Behaviour;
  - Client Care;

<sup>11</sup> Financial Planners and Advisers Code of Ethics 2019, Explanatory Statement, para 5

<sup>12</sup> Financial Planners and Advisers Code of Ethics 2019 <https://www.legislation.gov.au/Details/F2019L00117>

- Quality Process; and
- Professional Commitment.

Relevant financial advisers must also act to realise and promote the values of Trust, Competence, Honesty, Fairness, and Diligence. Although the FASEA standards and values are largely limited to behaviour towards “clients” (not limited to Retail Clients), “Honesty” is a value which the adviser must display in dealings with clients and all others with whom the adviser engages in a professional setting.

- 1.18 Another way some financial services providers have addressed the issue of behavioural standards is by including an overarching approach to customers. For example, the Online Small Business Lenders Code of Lending Practice states that *“We will always act honestly and with integrity and will treat you reasonably in all our dealings with you.”*<sup>13</sup> The Banking Code of Practice provides that: *“We are committed to earning and retaining the trust of our customers and the community”*<sup>14</sup>.
- 1.19 NIBA’s proposed changes do not include a Statement of Ethics or a reference to the need to abide by ethical behaviour. The proposed changes repeat the existing commitment to discharge duties diligently, competently, fairly and with honesty and integrity.

## Summary

- Concern has been expressed that the current Code does not state a position that is materially beyond legal obligations.
- There is an opportunity in the revised Code to be visionary and aspirational for the profession, including by establishing guiding principles, and including recommendations from the IBCCC own motion enquiry.
- Setting standards of best practice could include providing examples of what to and what not to do. NIBA has provided some suggested changes for consideration, in addition to potentially expanding an insurance broker’s obligations to a client at law.
- The inclusion of ethical standards is another way to demonstrate the Code goes beyond the law. The ABA Code refers to ethics in its Guiding Principles, however, there is no reference to ethics in the proposed changes from NIBA.

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<sup>13</sup> Online Small Business Lenders Code of Lending Practice, AFIA, page 6

<sup>14</sup> Banking Code of Practice, Australian Bankers Association, 1 March 2020, page 5

### **Some questions for comment**

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)?
  
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?
  
3. Should the Code be formally adopted by insurance broking companies as part of their strategy and values, with all staff trained on it?
  
4. NIBA has proposed changes that extend standards beyond their legal obligations. Are there specific issues or Standards that require additional work or attention?

## 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.

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- 2.1 Some stakeholders expressed concern about limiting standards and commitments made to certain types of clients. It is suggested that a broker should at least be bound by the behavioural standards of the Code regardless of for whom the broker acts and regardless of the activities being undertaken.
- 2.2 For example, key stakeholders observed that certain aspects of Standard 5 are unreasonably limited to clients who receive “Personal Advisory Service”. Standard 5 obliges subscribers to discharge their duties “*diligently, competently, fairly and with honesty and integrity.*” In the commentary to Standard 5, certain commitments are said to apply to clients who are provided with “Personal Advisory Service”. “*Personal Advisory Service*” is defined as advice based on consideration of personal needs, objectives, and finances. NIBA’s proposed changes add additional headings to provide greater clarity on what a Client can expect based on the services they are receiving. In particular, further details are provided on what a Code Member will undertake when providing “Personal Advisory Service”. However, key stakeholders expressed the concern that lay people are unlikely to be able to discern when they fall within the definition of “Personal Advisory Service” or the other “Insurance Services”, and therefore which standards apply to the service they are receiving. Having a client with a crystal-clear understanding of what to expect from their broker and what they will and will not do in arranging cover, is at the heart of the concern held by key stakeholders.
- 2.3 There is an additional concern that an insurance broker has the ability to opt out of some of the commitments described in the Standard 5 commentary by agreement or with notice: “*we will do the following (unless we agree with you or tell you otherwise)*”. The subscriber potentially has the power to unilaterally absolve itself from some of the Code commitments merely by providing notice to a client, without any indication of how this is communicated or the reasonableness of the notice. While the intention of the carve out is likely to arise from a desire to ensure that a client is aware of the scope of a retainer, concern lies in the potential for individuals or small businesses to lack an appreciation of the import of broker communications which effectively narrow commitments under the Code.
- 2.4 NIBA’s proposed changes seem to recognise the concern raised and seeks to amend Standard 5 to remove “*(unless we agree with you or tell you otherwise)*” as a general qualifier and “*only apply it where appropriate and necessary for each requirement*”. However, a similar qualifier has been inserted with respect to the provision of Personal Advisory Service, “Other services relevant to buying insurance”, and in relation to claims.

## Summary

- Key stakeholders expressed concern that aspects of the Code limit commitments made in the Code to certain types of insured clients.

- It is proposed that, when dealing with or for its clients regardless of their status, subscribers should be required to adhere to the relevant aspects of the revised Code at all times, including with respect to behavioural requirements at the very least.
- NIBA proposes making some changes to remove some of the limitations so that the qualification to commitments applies where “*appropriate and necessary*”. Additional detail about what to expect from “Personal Advisory Service” has also been proposed by NIBA.

### **Some questions for comment**

1. Should the revised Code state certain practices and behaviours that should apply when a subscriber is retained by a client? If so, what?
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)?
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.]
4. Should a subscriber be permitted to be excused from compliance of the Code by agreement where the client is a large enterprise?
5. Should certain practices and behaviours be limited to “Clients” or extend more broadly, for example, to potential clients, third parties, and agents?

## 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.

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- 3.1 Key stakeholders have expressed concern about how the Code applies to third parties acting for subscribers and what (if any) responsibility a subscriber has in relation to the behaviour of its third party agents. Such third parties would usually include those introducing potential clients to the subscriber, or distributors and Authorised Representatives providing financial services on behalf of the subscriber.
- 3.2 The Code does not state that third party agents are required to abide by the Code. The extent to which the Code deals with a subscriber's representatives appears in Standard 8:
- "We will ensure that we and our representatives are competent and adequately trained to provide the relevant services and will maintain this competence." [sic]*
- "Representatives"* is defined as:
- "anyone who acts on behalf of a Code Member in providing the Covered Services, including but not limited to their employees."*
- "Covered Services"* includes *"Insurance Services"* and *"Associated Services"* (including claims administration, risk inspection, premium funding), so that the Code is potentially broad enough to cover all third party agents involved in services provided to a client. However, beyond competency and training, there is no clear requirement that third parties should be required to comply with the Code, for example, by way of contract.
- 3.3 It is suggested that subscribers should require their third party agents to comply with Code Standards which are relevant to them. At the very least, behavioural standards should apply. If the Code is revised in this way, consideration needs to be given to a subscriber's responsibility for making third party agents aware of relevant Code Standards and what is required from a monitoring and supervision perspective. Consideration should also be given to how breaches of the Code by third party agents are enforced, and what sanctions (if any) should be applied to a subscriber for third party breaches.

### ICA Code of Practice

- 3.4 Part 4 and 5 of the ICA 2020 Code of Practice adopts the ICA review recommendations relating to:
- Having policies and procedures for Employees and Distributors to conduct sales appropriately and prevent unacceptable sales practices;
  - Require Distributors to notify insurers of any Complaints made within two business days, so that insurers can commence the Complaints process as early as possible.
  - Require Distributors to notify insurers of any Code breaches when acting on the insurer's behalf.
  - Require insurers to monitor the sales practices of its Employees or Distributors, and investigate concerns raised or identified.

## Life Insurance Code of Practice

3.5 In Standard 10 of this code, subscribers commit to:

- Requiring service providers to act with honesty, fairness, respect, transparency and timeliness (10.3);
- Only entering into contracts with service providers who satisfy the subscriber of their expertise, competency and integrity (10.4);
- Requiring service providers to notify the subscriber of any complaint, to be handled by the subscriber's internal dispute resolution process (10.8).

## Banking Code of Practice (published 2018 effective July 2019)

3.6 In Chapter 24 of this code, the subscriber commits to the following:

*"91. We will only appoint appropriately qualified and experienced valuers who are members of professional organisations which abide by a similar code of practice."*

With respect to investigative accountants and insolvency practitioners, subscribers similarly will only appoint qualified practitioners who are members of professional organisations with *"appropriate codes of conduct"* (92.a)).

## NIBA Proposed Changes

3.7 NIBA proposes changes to Standard 8 *"to improve standards and align to the extent relevant, with changes made to the [ICA 2020 Code of Practice]"*. These changes include having policies and procedures for third party representatives that require them to conduct services appropriately and to prevent unacceptable sales practices. The ICA 2020 Code of Practice goes further than the changes proposed by NIBA in relation to stating how concerns will be addressed and outlining what remedies are available, including a refund of premium. However, subscribers will require representatives to cooperate and provide information relevant to their compliance with the Code, with subscribers effectively taking responsibility where representatives are in breach:

*"We are in breach of the Code if our Representatives do not comply with the Code when they are acting on our behalf."*

## **Summary**

- The current Code has limited application to third party agents of subscribers. Subscribers are only required to ensure their agents are competent and properly trained.
- Questions have been raised about a subscriber's responsibility for third parties acting on its behalf and whether and to what extent the Code should apply to third parties.
- If aspects of the Code apply to third parties, consideration needs to be given to enforcement issues, and the levels of responsibility to be retained by the subscriber.
- Other financial services codes have placed greater obligations on their subscribers in relation to their agents.
- NIBA's proposed changes reflect some of the changes adopted in the ICA Code of Practice 2020 and goes further to accept subscribers are in breach of the Code where their representatives are in breach.

### **Some questions for comment**

1. Should the Code Standards include behavioural standards that apply to a subscriber's third party agents?
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?
3. What types of monitoring and review systems should subscribers have in place in relation to third party compliance with a revised Code?
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?

## 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.

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- 4.1 Some key stakeholders raised a concern that consumers are unlikely to appreciate that brokers have a sometimes fluid relationship with the client and insurers during the course of an insurance placement.
- 4.2 Although Standard 3 is fairly clear (*We will clearly tell you if we do not act for you*), a client may not fully appreciate that a broker may wear various "hats" during a placement: for example, acting for an insurer when receiving premium payments, and potentially exercising a delegated authority when arranging insurance using an online placement platform or insurance facility. As a facility or binding authority may only be applied to one policy of many in an insurance programme, query whether strict adherence to the obligation in Standard 3 occurs on each and every occasion in reality. Sometimes, this obligation to inform a client of multiple "hats" is embedded in dense fine print found in terms of business documents provided to a client along with a raft of other disclosure material. Concern arises from the potential that an insured (individual or small enterprise, in particular) may wrongly assume a broker acts on their behalf at all times.
- 4.3 A related issue associated with assumptions about a broker's role relates to consumers being under the misapprehension that insurance recommendations are made after an insurance broker has canvassed all insurance options available. In the usual course, an insurance broker will not investigate all of the insurance cover options available to an individual or small enterprise. Rather, an insurance broker may have negotiated a facility arrangement with a specific insurer or insurers in relation to particular placement types. Or, there may be an internal practice whereby brokers approach a limited list of insurers who have been "approved" for reasons including financial stability of the insurer, remuneration agreements with the insurer, wording or claims experience, and/or other matters relating to their relationship with the insurer.
- 4.4 The insurance broker may be satisfied through their internal compliance review that the limited list of insurers represents a selection based on the best interests of the individual or small enterprise. The concern raised by key stakeholders is that the individual or small enterprise may not appreciate that insurance policy options are (probably) drawn from a small pool of insurers. In this way, a potential insured individual or small enterprise is not fully informed of the situation prior to relying upon advice provided by an insurance broker. This could cast doubt over whether such a client is making an informed decision about their insurance options and who they retain for insurance advice.
- 4.5 Standard 4 of the current Code comes closest to addressing this issue by stating:

*"We will clearly tell you about the scope of our covered services.*

*Before or at the time we provide Insurance Services we will clearly tell you...if there are any material limits on the scope of any Personal Advisory Service being provided and what we believe are the relevant implications of this."*

- 4.6 It is suggested that more disclosure or clarification for clients is required, particularly for individuals and small enterprise who lack the time and money to interrogate or investigate the limits of the broker's advice and service provided. Adding more to the swathes of documentation supplied under regulation is unlikely to properly address the concern.

#### NIBA Proposed Changes

- 4.7 NIBA proposes replacing Standard 4 completely with provisions that are said to focus on the need to make clear whether the broker is providing personal advice or not – that is, making clear whether the subscriber's advice takes into consideration the client's relevant circumstances. The new Standard 4 requires the following:

- Before or at the time of providing Insurance Services, the subscriber will clearly tell the Client if advice is based on a consideration of personal needs, objectives, or financial situation or not (Personal Advisory Services), in addition to any limits on the scope of service provided; and
- Where the subscriber is not providing Personal Advisory Services, the Client is to be clearly told that advice is not based on a consideration of personal needs, objectives, or financial situation of the Client.

- 4.8 A proposed change to Standard 5 goes further by requiring subscribers to undertake the following when providing Personal Advisory Services:

*“...discussing and agreeing the scope of our advice in relation to the agreed subject matter with you (in particular, if there is a limited range of products we will be providing person advice on) and providing sufficient information to ensure you understand the relevant impact of doing so (e.g. if disclosed original objectives and needs won't be met as a result)...”*

*...where you have an existing product that may be replaced with another, conducting reasonable investigation and identifying how the replacement product meets your Relevant Circumstances and puts you in a better position compared to the existing product...”*

*...include in any advice document provided, reasonable detail to allow you to make an informed decision – including outlining the advantages and disadvantages of any recommendations made and information on what alternative products and alternative strategies were considered (if any).”*

This change appears only to apply to Clients receiving Personal Advisory Services, not to all Clients receiving Covered Services, or proposed Clients.

#### **Summary**

- Insurance brokers can act for an insurer at various points during the course of a transaction. Query whether disclosure of these transitory roles is effectively brought to the client's attention or is left to be disclosed in terms of business.
- Individuals and small enterprise are unlikely to appreciate that insurance brokers do not investigate options from the entire market prior to providing options for cover. Concern relates to whether these clients can make informed decisions about insurance advice and/or the adviser they choose.

- NIBA has proposed changes to Standards 4 and 5 of the existing Code to further clarify the reach of a broker's investigations prior to advising on insurance or risk options.

#### **Some questions for comment**

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?
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?
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?
4. Should Code Standards be available to those who are not yet "Clients" of the subscriber?
5. Should the subscriber be required to go further and advise why a limited market was approached?
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?
7. What additional information would assist clients who only receive general insurance or factual advice rather than Personal Advisory Services?

## 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.

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- 5.1 Where a client appoints an insurance broker to act on its behalf, the broker has a fiduciary duty to act in the client's best interests and not profit from the trust of its client. This is an obligation at law and is embodied in the *Corporations Act*, including the duty to act efficiently, honestly and fairly in the provision of financial services.
- 5.2 Conflicts of interest has been highlighted by the Hayne Royal Commission as a key issue across the financial advice industry. It describes the conflict as between "*duty and interest*"<sup>15</sup>, observing that "*more often than not, interest trumps duty*"<sup>16</sup>. How the conflict between duty and interest is managed becomes important and various recommendations are made by the Hayne Royal Commission with respect to investment advisers and superannuation trustees regarding better management of this conflict.
- 5.3 Although no submissions were made to the Hayne Royal Commission about conflict issues relating to insurance brokers, some key stakeholders suggested there is an opportunity to improve the way in which the Code currently deals with conflicts of interest.
- 5.4 Standard 2 of the Code states:  
  
*"We will transparently manage any conflicts of interest that may arise."*  
  
The commentary that accompanies the Standard describes what a conflict is and then states how the Standard is met.
- 5.5 Some of the concerns expressed about Standard 2 and its commentary include:
- The Standard 2 commentary suggests a subscriber can unilaterally "*decide upon and implement an appropriate response to those conflicts*". This section could suggest that disclosure of the conflict is optional;
  - The Standard 2 commentary does not create any obligations that go beyond what may be required at law and there is no guidance on what "*transparently*" means from a vision or principles perspective;
  - The commentary adopts more of a "fine print" approach to managing conflicts and dealing with clients. Rather, consideration should be given to reworking the Standard from the ground up starting from the position of the client and what they need to make an informed decision;
  - It is not clear from the commentary whether all or one of the points are required to achieve compliance with the Standard; and
  - The Standard should set a bar above what is required at law and commit subscribers not to act in a way where inappropriate personal advantage is derived by the relevant provider.

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<sup>15</sup> *Final Report*, p 165

<sup>16</sup> *Final Report*, p 169

- 5.6 ASIC's Regulatory Guide 181 provides fairly detailed guidance on how a licensee can manage conflicts through control, avoidance, and disclosure mechanisms, with all three mechanisms being important. While RG 181 is comprehensive, ASIC has observed that effective industry codes may also elaborate on or clarify the law<sup>17</sup>, even if the standard does not intend to exceed it. With this in mind, the Standard could articulate best practice approaches to the conflict management mechanisms mentioned in RG 181, with particular focus on themes that reflect current community expectation and concern.
- 5.7 Transparency, for example, is an issue that the current Standard refers to, however, some key stakeholders expressed concern that there was nothing to indicate what this might look like or what good or best practice might be. Key stakeholders suggested that, if the purpose of transparency is to encourage openness and greater client trust, the Standard could include a subscriber's commitment to design a disclosure mechanism with the purpose of providing appropriate levels of information to a client to enable it to make an informed decision in a timely and effective manner. Transparency in conflict avoidance mechanisms could include a commitment to encouraging a culture of "speaking up" to ensure conflict management practices are effective and those in breach held accountable. Receiving submissions on what themes or concerns should be focused on in a revision of the Standard, if any, will be invaluable.

#### NIBA Proposed Changes

- 5.8 NIBA proposes to retain Standard 2 as currently drafted and amend the commentary with a view to clearly setting out standards of communication with, and information for clients, regarding types of conflicts. The proposed changes include:
- Making subscriber conflicts of interest policy available to Clients;
  - Where there is a conflict, disclosing its existence with reasons why informed consent from the Client is required;
  - Providing examples where conflicts can arise, including the fact that a relationship with an insurer could reasonably expect to influence the subscriber's advice or where remuneration from a third party gives rise to a conflict of interest.
- 5.9 A key topic that is intrinsically related to conflicts of interest is remuneration disclosure, which is dealt with in detail in Issue #6.

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<sup>17</sup> RG 183.22(c)

## Summary

- Conflicts of interest is a key issue across the financial advice industry. Although no specific issues have emerged in relation to insurance brokers specifically, some suggested changes to Standard 2 have been offered by key stakeholders.
- The feedback received from key stakeholders focussed on being clearer about subscriber obligations at law and refocusing Standard 2 so that it promotes transparent practices and provides guidance with a view to better informing clients and building trust.
- NIBA's proposed changes include providing more general and specific information to a Client, and providing conflict of interest examples which may assist subscribers.
- Receiving submissions on what themes or concerns should be focused on in a revision of the Standard, if any, will be invaluable.

### **Some questions for consideration**

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

## 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.

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6.1 Managing conflicts of interest goes to the heart of remuneration disclosure practices. As discussed in “Issue #5 Conflicts of Interest”, where a client appoints an insurance broker to act on its behalf, the broker has a fiduciary duty to act in the client’s best interests and not to profit from the trust of its client. At law, a fiduciary may retain profit earned through the client arrangement with appropriate disclosure to the client, in addition to informed consent. How this process is managed is critical to whether the conflict of interest is resolved or not.

6.2 Remuneration disclosure is dealt with in Standard 6 of the Code, which states:

*“We will clearly tell you how our Covered Services are paid for before we provide them and answer any questions you have.”*

The commentary associated with Standard 6 goes on to say:

*“Before or at the time you enter into an insurance policy we will clearly tell you:*

- *if we will receive remuneration (e.g a fee payable by you) in addition to or instead of commission/brokerage from the relevant insurer as a result of you accepting an insurance policy arranged by us (including renewals and variations).*

*The commission/brokerage is generally a percentage of the insurers premium. It is included in the premium set out in our invoices and we receive it when you pay the premium or at such other time agreed with the insurer.*

- *if we intend to retain any of the commission/brokerage paid by the insurer or any fee paid by you if the insurance policy is cancelled before the period of insurance ends.”*

6.3 Some key stakeholders raised the concern that the Standard may be limited in effect as disclosure is required:

- where insurer remuneration is “*in addition to or instead of commission*”;
- where such remuneration is “*as a result of you accepting an insurance policy*” (emphasis added)

6.4 Key stakeholders noted that an insurance broking firm may earn many different types of remuneration or receive a benefit from insurers beyond client fees and commission earned in relation to a specific policy placement. As these additional forms of remuneration or benefit are not earned as a direct result of an individual insurance placement, it could be argued that a subscriber is not strictly obliged to make the disclosure to the client under the current drafting of Standard 6.

6.5 Examples of the types of remuneration an insurance broker might earn over and above the fee and commission specific to a single policy (**market derived income**) are:

- *Contingent commissions* – these are usually based on the volume of business referred and/or a share of the insurer’s profit. The formulae used to determine the

amount of contingent remuneration may often be complex and may depend on such factors as premium written, sum insured, rate of insurance renewals, the level of claims, loss ratio etc. While some contingent remuneration arrangements apply to selected business lines, others may apply to the whole portfolio. Contingent remuneration is usually paid to the broker after expiry of an agreed period as a lump sum pursuant to terms of an agreement. In some cases, it is also paid as non-monetary benefits<sup>18</sup>;

- *Override commissions* – these are extra commissions paid by participating insurers for placement of a type of reinsurance, or for premium volume produced in a given geographic area;
- *Premium funding* – these commissions are usually earned per policy funded but paid for by the premium funding firm, rather than the insurer; and
- *Facilities remuneration* – this may be a commission or fee based on the broker agreeing with a single insurer or a panel of insurers that any risk that falls into certain categories or within a pre-agreed set of parameters is placed into the broker facility. Often these arrangements involve the broker receiving additional remuneration for undertaking the underwriting, processing, and/or claims administration functions on behalf of the insurer(s). These are aimed mainly at small and medium sized clients where processing efficiencies can be gained when managing larger volumes.

6.6 In addition to the above monetary remuneration, some subscribers or their related entities may receive other kinds of benefits from insurers. The types of benefits may include:

- event sponsorship;
- employee training/scholarships;
- mentoring and other education programmes;
- entertainment; employee access to discount insurance;
- discounted office space;
- access to insurer placement technology.

6.7 Some key stakeholders raised concern that clients are likely to be unaware of these insurer incentives and that insurance options offered by brokers may be limited to those insurance products with market derived income arrangements in place. Much like the concerns outlined in Issue #4, in the absence of this information, stakeholders raised concerns about whether a customer is in a position to make an informed decision about financial advice provided or their choice of adviser.

6.8 The obvious risk that arises when any market derived income is arranged is how to manage the inherent conflict of interest and to ensure that any advice provided to a client is in fact in the client's best interests. The efficacy of conflict management frameworks is tested in these cases and the culture, discipline, and focus of the broking firm is critical to the success of the conflict management processes put in place. The question becomes should and, if so, how should a revised Code address these challenges to assist subscribers and encourage consumer trust.

6.9 Effective disclosure of itself is a complex issue. If all of these types of market derived income are disclosed in an FSG or terms of business agreement at the time a broker is retained, a broker arguably discharges their strict legal obligations under the *Corporations Act*. However, a concern raised is whether this type of disclosure

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<sup>18</sup> ASIC Report on Insurance Broker Remuneration Arrangements (June 2005), p 17

provides a client with an ability to make an informed decision about the financial advice offered and allow the client to provide proper consent. The pitfalls of simply adding more to the already burgeoning FSGs and PDSs has been academically researched and observed by the Hayne Royal Commission.<sup>19</sup>

- 6.10 If the answer is greater emphasis on effective disclosure, careful consideration needs to be given to what this looks like and what assists clients regardless of the size of the enterprise. Balancing the additional burden on smaller broking firms and their ability to manage the additional demands on time and resource against the net benefit to clients requires careful consideration. It would be invaluable to receive submissions from consumers and small enterprises in particular as to what information they would find useful and appropriate, and how it should be delivered.
- 6.11 Apart from effective disclosure, the issue could also be addressed through subscriber commitments to managing conflicts of interest. Although it is arguably already an obligation, a subscriber could commit to measures with market derived income specifically in mind. For example, by ensuring controls, monitoring, and reporting are regularly updated, in addition to periodic checks regarding facilities themselves to ensure they have been agreed in the client's best interests. Committing to adhering to the spirit of the conflicts of interest framework, rather than the strict legal interpretation could be another way to reinforce the intention to work in the client's best interests.
- 6.12 The question of managing conflicts and effective remuneration disclosure is particularly significant as general insurance brokers are exempt from the 2012 Future of Financial Advice legislative reforms (**FOFA**) which included introducing additional client best interest duties and a ban on conflicted remuneration. In the Northern Australia Insurance Inquiry, First Interim Report (published 18 December 2018), the ACCC took the view that the ban on conflicted remuneration should be extended to insurance brokers (Recommendation 11) as:
- “Commissions and other benefits given to insurance brokers can give rise to an unacceptable conflict of interest. As is already the case for other financial products, insurance brokers should be prohibited from receiving commissions and other benefits where these create a conflict with a broker’s obligation to act in the best interest of their clients. Disclosure alone is insufficient to address these conflicts.”*
- 6.13 In its submissions to the Hayne Royal Commission, NIBA justified the ongoing exemption on grounds including:
- There has been nothing identified by ASIC or in the Hayne Royal Commission regarding insurance broker conduct that would support a recommended change from the exemption;
  - The low FOS and IBCCC complaint and dispute rate evidence the profession is generally acting professionally in the interest of customers, relevant law and community standards and expectations;
  - The US, UK, Ireland, Canada, South Africa, and New Zealand do not apply a ban on commissions;
  - Banning conflicted remuneration would have significant adverse effects on consumers (particularly small business).

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<sup>19</sup> Final Report, p 174-5

6.14 Although the Hayne Royal Commission seemed to suggest that conflict was inevitable so long as advisers stand to benefit financially from clients acting on the advice that is given<sup>20</sup>, the Hayne Royal Commission deferred review of the FOFA exemption for insurance brokers to 2022.

#### NIBA's Proposed Changes

6.15 NIBA proposes replacing the current Standard 6 in its entirety, with subscribers/members focusing on:

- “proper disclosure of the remuneration”;
- Forming a view that remuneration is reasonable in the circumstances (for example, because it reflects reasonable compensation for work done); and
- Forming a view that remuneration will not result in a poor value outcome for the “consumer” – use of this term being distinct from “client” to suggest an assessment that takes on broader considerations of the effect on clients, future clients, and other insurance policyholders.

It is suggested that these changes, in conjunction with greater clarity on subscriber roles (Issue #4) and management of conflicts (Issue #5), will contribute to a “*good consumer outcome, avoid breaching relevant remuneration requirements and reduce the risk of ASIC intervention and complaints*”.

6.16 In terms of specific remuneration disclosure, NIBA proposes it will “clearly tell you”:

- The type/s of remuneration or other benefits attributable to the provision of the services provided to the client;
- The services which attract each type of remuneration;
- Who remunerates or provides the benefit to the subscriber/member;
- When and how remuneration is payable;
- The type/s of remuneration or other benefits the subscriber or related persons<sup>21</sup> receives that a reasonable person would consider could influence them in providing the services; and
- Where there is a conflict of interest, what it is and how its managed.

6.17 The commentary to this standard goes on to state that the subscriber will tell the client about any other forms of remuneration (including market derived income) that it or related persons receive that a reasonable person would consider could influence the subscriber in the provision of the services. It is not clear from the proposal whether the dollar amount of the remuneration or benefit will be disclosed as part of these measures.

6.18 The commentary goes on to set out a remuneration review policy that will be adopted prior to subscribers approving any type of remuneration or other benefit the subscriber may receive for providing services to a client. The policy includes considerations relating to consumer standards and expectations, controls and monitoring, and the effect of non-compliance.

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<sup>20</sup> *Final Report*, p 165

<sup>21</sup> There is a proposed definition of “Associates” of the subscriber.

## Summary

- Standard 6 has been criticised for potentially having limited application (disclosure being required where remuneration is “*as a result of*” a buying decision). With this limited application, questions have been raised about whether it states more than the law requires already.
- There are many different types of market derived income and benefits which insurance brokers may earn which may not be effectively disclosed to intending insured clients. A question arises as to what benefit clients would derive from having this information and what is the best form of disclosure.
- As “effective” disclosure is a complex issue, guidance from stakeholders on how conflicts may be better managed, monitored, and controlled will be invaluable.
- Aside from remuneration disclosure, other ways of improving management of inherent conflicts surrounding market derived income may be addressed through commitments to stronger monitoring, updating facilities regularly, and abiding by the spirit of the policies.
- General insurance brokers benefit from a FOFA exemption on conflicted remuneration and best interest duties which will be reviewed by 2022.
- NIBA proposes completely re-writing Standard 6 with more detail on types of remuneration, who provides the remuneration, and when and how it is payable. Such remuneration disclosure includes various market derived income and ways in which subscribers should manage communication of this remuneration and policy surrounding its governance.

### Some questions for consideration

- 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?

## ISSUE #7

**Enforceability of the revised Code** – 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.

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### ASIC expectations

- 7.1 Enforceability of an industry code is described by ASIC as one of the key threshold criteria for approval. It is essential that code breaches can be dealt with effectively and independently.<sup>22</sup> This requires that:
- (a) **Contractually bound** - Subscribers must agree to be contractually bound by the code;
  - (b) **Third party administrator and enforcer** - An independent person/body is empowered to administer and enforce the code, including imposing sanctions;
  - (c) **Compensation for direct financial loss** - Consumers have access to internal dispute resolution (IDR) and external dispute resolution scheme (EDR) for any code breaches resulting in direct financial loss; and
  - (d) **Broader ability to complain** - There is broad standing to complain about any other code breach to the independent body.<sup>23</sup> Under RG 183.67, ASIC will check that any person or organisation can raise concerns about non-compliance with the code administrator.

Key stakeholders have provided comments about these requirements as described below.

#### Contractually bound

- 7.2 In December 2017, the ASIC Enforcement Taskforce reinforced the view that approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body<sup>24</sup>.
- 7.3 It could be argued that the current Code satisfies this requirement as subscribers are contractually bound to comply under the current Code by agreement with NIBA. However, it is clearly stated in the Code that clients have no legal rights in relation to the obligations and commitments contained in the Code and a Client cannot rely upon the Code as making representations about how a broker will act. Any legal rights that arise from that agreement lie with NIBA.<sup>25</sup> The only recourse a client has is to raise a “Complaint”, with any findings of breach giving the IBCCC the ability to impose binding orders or sanctions against the subscriber. Although the position is no different under NIBA’s proposed changes to the Code, NIBA notes that:

*“NIBA will require members and others to agree to be bound by the Code and enter into an agreement with the IBCCC.”*

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<sup>22</sup> RG 183.25 and RG 183.43

<sup>23</sup> RG 183.25

<sup>24</sup> ASIC Taskforce Review, *Final Report*, December 2017, p 35.

<sup>25</sup> <https://www.niba.com.au/codeofpractice/c2-what-rights-are-provided.cfm>

It is not clear whether this change will be effected through an amendment of the NIBA Constitution or Rules.

- 7.4 In the absence of an agreement between a subscriber and a code monitoring body or some other mechanism, the question of enforceability of the Code under the contract with NIBA depends on the offending subscriber's ongoing contract or membership with NIBA. It is open to a subscriber to decide to unsubscribe from the Code during the course of a Complaint being investigated, or while it is being determined, or at any time. If so, the IBCCC and NIBA have no authority to exercise power over it. This outcome has led some key stakeholders to suggest that adherence to the Code should be made mandatory as part of licensing requirements for insurance brokers. This is a view shared by ASIC and the Hayne Royal Commission<sup>26</sup>.

#### Third party administration and enforcement

- 7.5 It was noted by some key stakeholders that the Code Compliance Committees for the respective Life Insurance and General Insurance Codes of Practice had limited power to impose sanctions as they could only impose sanctions where an insurer had failed to *correct* a Code breach<sup>27</sup>.
- 7.6 The Code and the NIBA Insurance Brokers Code of Practice Procedures relating to binding orders and sanctions (section 6) are not couched in the same terms. Amongst other things, the IBCCC has the ability to publish details of any non-compliance by a Code Member<sup>28</sup>, and recommend to NIBA that the Code Member be removed or suspended as a member of the Code and NIBA<sup>29</sup>. However, it is arguable<sup>30</sup> whether the IBCCC has the ability to notify ASIC of a Code Member who avoids investigation or sanction by unsubscribing from the Code or NIBA membership. NIBA proposes an amendment to the Code that empowers the IBCCC to report "serious misconduct" to ASIC. However, this term is undefined and query whether it is possible to determine "serious misconduct" if the Code Member unsubscribes before an investigation can be undertaken.

#### Compensation for direct financial loss

- 7.7 As discussed above, the current Code states that the Code does not create any legal or other right as between the Client and the subscriber and a subscriber makes no representation to a Client that it will comply with the Code. This position potentially creates an argument that direct financial loss suffered by a Client through breach of the Code is not actionable against a subscriber. If a Client is unable to have access to IDR or EDR for code breaches resulting in direct financial loss, options to receive compensation may be limited.
- 7.8 While NIBA's proposed changes to the Code do not remove the limitations described, the changes do include an additional section relating to significant breaches and extends the IBCCC's powers to compensate a Client for direct financial loss up to

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<sup>26</sup> ASIC Taskforce Review, Final Report, December 2017, Recommendation 19; and Hayne Royal Commission, *Final Report*, Recommendation 4.9

<sup>27</sup> 2014 General Insurance Code of Practice s 13.11. Life Insurance Code of Practice s 13.10. The 2020 General Insurance Code of Practice now allows the Code Governance Committee to impose sanctions if there is a Code breach (para 16 and Part 13).

<sup>28</sup> The NIBA Insurance Brokers Code of Practice Procedures, para 6.1(h)

<sup>29</sup> The NIBA Insurance Brokers Code of Practice Procedures, para 6.1(i)

<sup>30</sup> The NIBA Insurance Brokers Code of Practice Procedures, para 7.8 allows the IBCCC to report "*instances of serious misconduct by a Code Member*" to ASIC.

\$250,000 in certain circumstances. The IBCCC also has the express power to publish the fact of the significant breach and report the breach or serious misconduct to ASIC.

### Broader ability to complain

7.9 Under the current Code, complaints about alleged breaches can only be made by a “Client” of the broker and only in relation to the “Covered Services” provided to them. By definition, a complaint cannot be made by:

- prospective clients;
- insurers;
- other insurance brokers;
- authorities such as AFCA; or
- consumer advocates

unless they themselves have retained the broker and only in relation to the services provided to them.

7.10 The limits placed on who may complain about an alleged breach of the Code appears to fall short of the RG 183.22 requirement for broad standing to be available. ASIC observes that it is important that people and organisations other than affected consumers have the ability to make complaints about code breaches as bodies like authorities and consumer advocates may be better placed than individual consumers to monitor compliance with codes.<sup>31</sup>

7.11 Under 13.1 of the Life Insurance Code of Practice, “[a]nyone can report alleged breaches of the Code to the Life CCC.” The ICA 2020 Code of Practice has also adopted recommendations to allow anyone to report alleged breaches of the Code to the Code Governance Committee<sup>32</sup>.

7.12 NIBA’s proposed changes do not allow anyone to report a breach. Rather, it is proposed that the current Standard is broadened by allowing the Client’s representatives (including family members, MPs, legal representatives, etc) to make a complaint on behalf of the Client.

### **Hayne Royal Commission**

7.13 The Hayne Royal Commission addressed the enforceability of industry codes in its Final Report<sup>33</sup> and recommended that the law should be amended to provide for enforceable provisions of industry codes. Specifically, industry should identify key code provisions that govern the terms of the contract made or to be made between the financial services entity and the customer and designate these as enforceable provisions, with ASIC’s approval. The provisions will be enforceable by statute and customers will be able to elect whether to enforce any breaches of those provisions through existing internal or external dispute resolution mechanisms or through the courts<sup>34</sup>.

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<sup>31</sup> ASIC RG 183.37

<sup>32</sup> Part 13, para 164

<sup>33</sup> *Final Report*, pp104ff by reference to the Banking Code, and pp309ff in relation to the Life and General Insurance Codes.

<sup>34</sup> *Final Report*, p 108.

7.14 Proposed legislative changes effecting the recommendations from the Hayne Royal Commission include giving ASIC powers in relation to financial services industry codes of conduct, including the ability to decide that obligations in these codes are enforceable. The changes regarding industry codes of conduct make up a new section 1101A of the *Corporations Act*. The powers given to ASIC in this section can broadly be summarised as:

- to approve industry codes of conduct;
- to make certain provisions of an industry code of conduct enforceable; and
- to enforce provisions that are enforceable (including a civil penalty for breach of an enforceable code).

In deciding whether a code provision should be enforceable, ASIC is to consider whether:

*“(b) either:*

*(i) a breach of the provision could result in significant detriment to the person; or  
(ii) a breach of the provision could significantly undermine the confidence of the Australian public, or a section of the Australian public, in the provision of financial services in this jurisdiction or those who provide financial services in this jurisdiction.”*

The legislation is still under consideration, and it is possible that some further restrictions will be placed on the kinds of provisions that ASIC may deem enforceable.

## Summary

- For the purposes of approval, ASIC requires an industry code to set enforceable standards across an industry, which is binding on subscribers through contractual arrangements.
- Key stakeholders have raised questions about the current Code in relation to the ability of a customer to enforce the Code, and in relation to limitations on who can allege or report a breach.
- NIBA’s proposed changes extend the IBCCC’s power regarding financial sanctions and their ability to report significant breaches to ASIC. It is also proposed that subscribers enter into an agreement with the IBCCC.
- The ASIC Enforcement Taskforce and the Hayne Royal Commission have made recommendations regarding industry codes, including making subscription to codes mandatory.
- The Hayne Royal Commission has proposed the inclusion of legally enforceable provisions in codes for the Banking and Insurance industries. This proposition has been included in a recently introduced Bill which gives ASIC broad powers to make code provisions enforceable.

### **Questions for consideration**

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?
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?
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?
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?

## 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.

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- 8.1 Mixed feedback was received in relation to the clarity of the complaints process as set out in the Code. Some key stakeholders appreciated the accessibility of information about the process and its description in simple terms in the online version. However, others suggested that there is room for improvement in relation to:
- the layout of how the process works in the Complaints and Dispute section;
  - use of plain English, as confusion could arise due to reference to AFCA Terms of Reference disputes versus Code complaints;
  - reference to AFCA, the Code Administrator, Code Compliance Manager, and the IBCCC makes the process seem complex and, potentially going through the two-step internal dispute resolution process (taking 42 days), could discourage complainants from making a complaint;
  - improving clarity by confining detail to the process to be followed for an alleged breach of the Code compared with a complaint generally;
  - making it clearer that enquiries about making a complaint concerning an alleged breach of the Code can be made to the Code Compliance Manager with information on how to contact the Code Compliance Manager.
- 8.2 Some stakeholders suggested that the 21 day two-stage approach was too long and that the Code should try and set a tighter timeframe as a starting point, subject to reasons to extend. If step 1 of the process is to allow the business unit responsible to try and resolve the complaint, query whether 21 days is required if that unit is intimately involved in the file. In a similar vein, if no additional information is to be relied upon after step 2, stakeholders questioned why a full additional 21 days was required to have the matter resolved by the IDR Manager. The IBCCC's own motion inquiry report into complaint timeframes<sup>35</sup> found there is room for improvement in managing timeframes while handling complaints. The IBCCC looked at actual timeframes for response and resolution as well as the recording and monitoring of timeframes during the IDR process. Only 63% of complaints were resolved within 21 days. Another 12% of complaints took longer than 45 days to resolve.
- 8.3 A two-stage internal dispute resolution approach is not mandated by ASIC, which simply requires that a final response to a complainant is provided within 45 days. During the course of the ICA Code of Practice review, comments received suggested that a two-stage system is too long, difficult and confusing, particularly for individuals experiencing vulnerability<sup>36</sup>. It is suggested that a complainant always deal with someone different from the person whose conduct is the subject of the complaint, with complainants provided with a single decision in response to their complaint. However, insurer members were of the view that a two-step process provides better

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<sup>35</sup> <https://insurancebrokerscode.com.au/app/uploads/2020/03/201910-IBCCC-OMI-IDR-timeframes-Oct-2019.pdf>

<sup>36</sup> *Final Report*, para 10.2

outcomes for most consumers by enabling staff resourcing to be appropriately managed ensuring access to senior staff for complaints. Given the complex issues, the ICA recommended that it continue to work with insurers to determine suitable changes that address concerns regarding the two-step process. The 2020 ICA Code no longer includes a two-step process and complaints are handled by an individual with appropriate authority and experience to be resolved within 45 days.

- 8.4 Other suggestions for improvement of the complaints process included a subscriber having an obligation to provide small enterprises with details of their state or national small business advocates at the step 1 stage to enable these entities to gain any support or guidance they might need, in addition to access to mediation and conciliation services without having to wait until the complaint reached the Code Compliance Manager. This might reduce the timeframe in which the complaint is resolved.

### NIBA Proposed Changes

- 8.5 NIBA proposes to delete the existing section of the Code headed “Complaints and Dispute Resolution Process”. The primary driver for the proposed amendments is to take into account ASIC’s new Regulatory Guide 271 Internal Dispute Resolution (replacing RG 165), which will apply to complaints received by financial services firms on or after 5 October 2021.
- 8.6 Key changes proposed include:
- an expanded definition of what will be treated as a complaint;
  - standards about who will handle the complaint;
  - how the complaint will be handled, including the information to be taken into account;
  - provision to keep the complainant updated every 10 business days;
  - resolution of the complaint within 30 calendar days, unless there are circumstances that arise as stated in the standard; and
  - general complaint handling standards, including information available to the complainant, staff training, and developing and maintaining a positive culture around complaints.

### **Summary**

- Stakeholders offered suggestions to improve the complaints process, including:
  - Layout and greater use of plain English;
  - Creating clarity as to where information about code breaches might be found;
  - Generally making the process clearer.
- The timeframe for IDR processes was raised, with questions about the need for a two-step process or an additional 21 days after an initial finding being made about the complaint.
- It is also suggested that small enterprises be given information about access to state and national small business advocates for support or options.
- NIBA has proposed changes in light of the new regulatory guidance on internal dispute resolution. The changes include provision for keeping complainants up to date, a reduced resolution period (except in certain circumstances), and training and processes to improve complaints handling and culture.

### **Some questions for consideration**

1. Are insurance brokers facing the same issues as insurers regarding streamlining complaints handling if insurance broker complaint numbers are significantly lower?
2. Can NIBA's proposed changes be further improved to address communication concerns or in any other respect?
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?

## ISSUE #9

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

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- 9.1 The need to consider the special circumstances of the vulnerable has been a theme across the review of various financial services codes in recent times - a need echoed in feedback received from key stakeholders in this review.
- 9.2 The current Code does not address identification or standards of interaction with vulnerable clients and it is suggested that changes should focus on individuals who may have a degree of vulnerability due to factors and circumstances including age, physical disability, mental health, coming from a non-English speaking background, being the victim of family violence, or experiencing financial hardship.
- 9.3 Code reviews by the ICA, ABA, and FSC have addressed community expectations to do more to support their customers by including or proposing to include in their code the following types of matters:
- including a new section on vulnerable clients;
  - providing guidance on best practice mental health principles;
  - providing guidance on recognising and responding to instances of family violence;
  - including stronger standards on financial hardship;
  - requiring staff to be trained to identify and engage appropriately with vulnerable clients;
  - having processes in place to support staff where identification is difficult while ensuring that the needs of the client are met.
- 9.4 The ICA has highlighted in particular the complex issues relating to family violence and insurance issues. As family violence is not limited to physical instances of violence but can include psychological, financial, and damage to property, failing to identify scenarios where a perpetrator of family violence is undermining a victim by making changes to insurance arrangements that provide him/her with more control over the benefits of insurance may otherwise have serious ramifications for the victim.
- 9.5 Particularly relevant to the insurance broking industry could be questions about:
- what to do when there are conflicting instructions provided from joint policy holders about cancellation of a policy or payment of a claim;
  - the potential for a perpetrator to instruct a broker to make changes to a policy without reference to the victim;
  - disclosing information about a victim to a perpetrator to the detriment of the victim.
- 9.6 In terms of recognising financial impairment and assisting those in need, this is often overlooked in debt recovery processes employed by insurance brokers. Tasked with receiving and processing vast numbers of transactions and reconciling these with insurers, the matter of debt recovery is often automated or managed through an operations process without regard to individual needs. Finding a balance between operational efficiency (which enables compliance with regulatory money handling requirements) and addressing the needs of clients experiencing financial hardship requires careful consideration in a revised Code.

## NIBA's Proposed Changes

- 9.7 NIBA proposes to introduce a new Standard 13 which outlines the type of support subscribers of the Code will provide to Clients who may be “vulnerable in a number of situations”. The Standard provides that subscribers will develop policies and procedures and training for its Representatives to help identify the vulnerable, understand their needs and how to engage with them to provide support. It is noted that the support does not include support with paying premiums or other products.
- 9.8 Part 9 of the ICA 2020 Code goes into some detail as to how it will support vulnerable clients, and also addresses particular needs in relation to managing and investigating claims. As NIBA's proposed changes do not go so far, query how subscribers will manage any gaps where they are required to comply with the ICA Code when they are acting for the insurer.

## **Summary**

- The financial services industry is gaining increasing awareness of the needs of vulnerable clients and seeking to address these issues in industry codes.
- Vulnerability due to factors and circumstances include age, physical disability, mental health, coming from a non-English speaking background, being the victim of family violence, or experiencing financial hardship have been recognised.
- Commitments in industry codes include acknowledging and accommodating these needs, developing specific policies, staff training, and further work is being done to address insurance industry-specific issues.
- NIBA proposes changes to the Code that address developing policies, procedures and training, although it does not go as far as the more detailed changes to the ICA 2020 Code.

### **Some questions for consideration**

1. Should a revised Code take into account the special needs of vulnerable clients?
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?
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?
4. Are there vulnerable client issues that are particularly relevant to clients of insurance brokers? How should these issues be addressed?

## 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.

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10.1 The success of an industry code can be limited by lack of awareness of the code standards and the ability of consumers to seek redress under it. Some factors that can influence the accessibility of a code are:

- Whether the code is effectively promoted to potential and intending clients and interested third parties;
- Whether the code is effectively promoted among subscribers and their staff;
- Ensuring all relevant parties understand the obligations and commitments made under the code;
- The ease with which alleged breaches can be reported and addressed;
- The availability of reports, compliance results, and guidance about the Code.

The following suggestions below were offered by key stakeholders to improve access to the Code.

### Plain language

10.2 ASIC RG 183 requires plain language provisions that clearly describe what the code is about, with the objectives, scope, and core rules of the code clearly set out.

10.3 Key stakeholders have suggested retaining a plain language expert, rather than a lawyer, to assist in drafting the revised Code to avoid “legalese” and insurance terms of art. This was an approach adopted in drafting the ICA 2020 Code of Practice. A plain language approach is recommended to assist both consumers and subscribers understand the rights and obligations under the Code.

10.4 The current Code includes Guidance Notes in the online version which discusses the legal and regulatory context. Providing information about what the law requires is viewed as useful, however, the current version appears to be guidance to subscribers rather than having consumers in mind. Guidance Notes are not included in the hardcopy version and consistency in the versions is important.

### Broader access

10.5 Key stakeholders noted that there do not appear to be any non-English language versions of the Code. Having a plain language form of drafting will also assist in translating the Code into other languages.

10.6 Users who are visually or hearing impaired may have difficulty accessing the Code without further assistance.

### Ease of access

10.7 Some stakeholders provided compliments in relation to the online and hard copy layout of the Code, others found it difficult to navigate and find information. When the Code was launched in 2014, significant effort was invested in the design of the layout of the Code and the approach adopted has been considered world leading in the

industry. Either way, it has been suggested that numbering sections and paragraphs and otherwise laying out the Code in a more traditional way could assist users navigating through the Code. It was noted that the online version of the ICA Code of Practice appears to combine fairly current online navigation techniques with the ability to download a PDF version in a more traditional document form. This could be a compromise approach that might work for a revised Code.

#### Access to redress

- 10.8 The ICA received submissions to its review suggesting that the Code website have a prominent “Report a Breach” button. This assumes that all of the complaints are directed to the relevant Code Compliance Committee. Query whether the IBCCC would prefer to be the first port of call for alleged breach reports. Although the numbers of complaints are reportedly low, consideration should be given to the additional burden of triaging reports of alleged breaches. This approach, however, could enable the IBCCC to have increased visibility over complaints made, rather than relying upon periodic data returns from subscribers.
- 10.9 The ICA also received submissions suggesting the need for greater promotion of the role of their Code Compliance Committee and information available regarding compliance and reports published. A suggestion was made to adopt a similar approach with a revised Code.

#### Promotion of the Code

- 10.10 This is currently a commitment under Standard 11, although only the online version contains suggestions on how this requirement might be met in a Guidance Note. The current Code commentary does not include guidance in relation to promoting the Code internally or otherwise incorporating the Code as part of the subscriber’s firm culture or strategy, although there is a reference to providing Representatives with “*an understanding of the Code*” in Standard 8.
- 10.11 Until such time as the Code is mandatory, some key stakeholders have observed that there is an opportunity for subscribers to promote the Code as a differentiator, particularly in a post-Royal Commission environment.

#### Code training

- 10.12 It has been suggested that NIBA become more involved in promoting the Code and otherwise developing training and other material to assist subscribers and consumers alike in understanding the objectives, scope, and core rules of the code and how they apply in practice. This kind of support will be particularly important if significant changes to the current Code are adopted.

#### NIBA’s Proposed Changes

- 10.13 NIBA has released the document reflecting their preliminary thoughts on changes to the Code. It is noted that the format in which it has been released is not the final format and consideration of design/layout/readability is pending. NIBA advise that these considerations will be addressed before the revised Code is finalised.

## Summary

- Suggestions have been made to enhance the accessibility of the Code to promote awareness and understanding of the Code among subscribers and customers or intending customers. Adopting a plain language approach is viewed as encouraging accessibility of the Code on many levels.
- Some of the strategies proposed include retaining a plain language expert, accommodating a broader audience, as well as improving access to training and redress for those reporting alleged breaches.
- Stakeholders are looking to NIBA to support transition to a revised Code.

### Some questions for consideration

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

