



Law Council
OF AUSTRALIA

Legal Practice Section

2 March 2020

Manager
Financial Services Reform Taskforce
Treasury
Langton Cres
PARKES ACT 2600

By email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam

ENFORCEABILITY OF FINANCIAL SERVICES INDUSTRY CODES

1. The Superannuation Committee and Australian Consumer Law Committee of the Law Council of Australia's Legal Practice Section¹ welcome the opportunity to make a submission to Treasury in relation to the Exposure draft Bill *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.15 (enforceable code provisions)*.

Superannuation Committee views

2. The proposed legislation builds on existing law so as to extend the Australian Securities and Investment Commission's (**ASIC**) powers to:
 - approve financial services industry codes of conduct via legislative instrument with clearly designated "enforceable code provisions" (**ECP**) if **ASIC** considers approval of the code satisfies prescribed criteria;
 - noting that breach of ECPs may attract civil penalties and administration enforcement; and
 - permit mandatory codes to be prescribed by Regulation.
3. Although the prescribed criteria includes consideration of factors for ASIC to consider to avoid multi codes etc, it appears odd to have a dual system of "enforceable code provisions" in an optional code, and a mandatory code that all industry participants must adhere to.
4. In order to ensure all operators comply with the same regulatory rules and are "equal before the law", it may be preferable that only mandatory codes contain "enforceable

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

code provisions” – that is, provisions going beyond contractual breach that expose the operator to civil penalty provisions ought only be contained in mandatory codes.

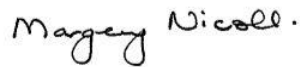
5. The Superannuation Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Superannuation Chair, Dr Lisa Beatty Butler on BeattyLi@cba.com.au.

Consumer Law Committee views

6. The Australian Consumer Law Committee supports the recommendation that industry codes approved by ASIC should include ‘enforceable code provisions’ in respect of which a contravention will constitute a breach of the law. Remedies for breaches will be modelled on those now set out in Part VI of the *Competition and Consumer Act 2010* (Cth). The Australian Consumer Law Committee further supports ASIC being empowered to establish and impose mandatory codes where necessary. Industry codes can be beneficial tools to improve industries standards.
7. The Australian Consumer Law Committee’s concerns, however, include:
 - Leaving it to industry to write the rules;
 - Industry will also determine what is enforceable. A mechanism should be included to ensure industry will not retreat or water down existing code rights to avoid penalties; and
 - There is no compulsion for an industry to seek ASIC approval except if Government intervenes.
8. The Australian Consumer Law Committee supports the alternative approach put forward in the Joint consumer submission of Financial Rights Legal Centre, CHOICE, Consumer Action Legal Centre et al that:
 - All relevant financial service sectors should be required to develop a code of practice and seek approval from ASIC for that code (with a transition period provided);
 - All businesses operating in an industry sector should be required to be a signatory of an approved code relevant to that sector as a licensing condition;
 - As a condition of approval, the provisions of industry codes should be required to be enforceable through mandated incorporation into individual contracts between the consumer and the financial services firm;
 - ASIC should be granted a rule-making power with respect to the introduction of mandatory codes or code provisions where an industry either fails to submit a code for approval within the timeframe provided, or falls short of the meeting the standards for approval;
 - Codes should be monitored by independent code monitoring bodies. The independence, appropriate resourcing, and investigative and sanction powers of code monitoring bodies should be strengthened and guaranteed by legislation;

- Code monitoring bodies should be obliged to report serious and systemic code breaches to ASIC, including naming the relevant financial firms and what action, if any, has been taken to address the issues; and
 - Serious or systemic breaches of industry codes, particularly where they are persistent or not remediated, should be taken into consideration by the regulator in determining whether the general obligation to provide services efficiently, honestly and fairly has been breached (section 912A *Corporations Act 2001* (Cth)), with appropriate remedies flowing from this decision including civil penalties.
9. The Australian Consumer Law Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair, Ben Slade on BSlade@mauriceblackburn.com.au. For the Superannuation Committee in the first instance, please contact the Chair, Dr Lisa Butler Beatty on BeattyLi@cba.com.au.

Yours sincerely



Margery Nicoll
Acting Chief Executive Officer