Submission by the
Financial Rights Legal Centre
Consumer Action Law Centre
CHOICE
Financial Counselling Australia
Consumer Credit Legal Service (WA) Inc
Consumers' Federation of Australia

The Treasury

Enforceability of financial services industry codes

February 2020

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About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took over 22,000 calls for advice or assistance during the 2018/2019 financial year.

About the Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

About CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

About Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors. Financial counsellors assist people experiencing financial difficulty by providing information, support and advocacy. Working in not-for-profit community organisations, financial counselling services are free, independent and confidential

About Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance, and consumer law. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers.

About Consumers' Federation of Australia

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

Introduction

Thank you for the opportunity to comment on the Treasury's exposure draft legislation and materials re: Enforceability of financial services industry codes – implementing recommendation 1.15 of the Banking, Superannuation & Financial Services Royal Commission (**the Royal Commission**), including:

- Exposure Draft— Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.15 (enforceable code provisions) (**ED**); and
- Exposure Draft Explanatory Materials (**EM**);

This is a joint consumer submission from:

- the Financial Rights Legal Centre (**Financial Rights**);
- Consumer Action Law Centre (**Consumer Action**),
- CHOICE;
- Financial Counselling Australia (**FCA**);
- Consumer Credit Legal Service (WA) Inc (**CLSWA**) and
- the Consumers' Federation of Australia (**CFA**).

Commissioner Hayne has recommended, and the Government has accepted, that industry codes approved by the Australian Securities and Investments Commission (**ASIC**) should include 'enforceable code provisions'—identified and drafted by industry—in respect of which a contravention will constitute a beach of the law. Remedies for breaches will be modelled on those now set out in Part VI of the *Competition and Consumer Act 2010*. Furthermore, the Government will be empowered to establish and impose mandatory codes where necessary.

An alternative approach in line with the principles of the Hayne recommendation

We agree that the code system needs fixing. While some industry sectors have produced worthwhile codes in recent years, this progress has not been uniform. Compliance and enforcement by monitoring bodies is under-resourced, and reliant on industry co-operation and data quality, which is patchy at best, even with the better codes. We strongly recommend an alternative approach to meet the principles outlined by the Royal Commission. This alternative approach will

- maintain industry agency over the code development process;
- incentivise industry to strengthen their commitments to consumers;
- provide for strong independent monitoring of codes;

- ensure consumers will be able to rely on the enforceability of codes; and
- lead to meaningful outcomes for consumers.

The alternative approach is as follows:

- 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). This approach aligns with recommendation 18 of the ASIC Enforcement Review Taskforce.
- 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. This approach aligns with recommendation 19 of the ASIC Enforcement Review Taskforce.
- 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—as the Banking and Customer Owned Banking Codes of Practice currently operate.
- 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 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 codified 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.
- 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 of the *Corporations Act 2001*), with appropriate remedies flowing from this decision including civil penalties.

The above approach has a number of advantages over the current approach proposed by Treasury:

- The approach introduces the enforceability and confidence that the Royal Commission recommended and that consumers seek.
- It avoids industry writing law and removes the disincentive to draft strong commitments that move beyond the law.
- The threat of ASIC using a rule making power to bolster weak code provisions will incentivise industry to develop and introduce strong code provisions.
- The threat of imposing a mandatory code will incentivise industry to seek approval of their code.

- Resourcing strong and independent code monitoring bodies—each made up of equal numbers of industry and consumer representatives and an independent chair—will be critical to ensuring that firms meet their code commitments through meaningful sanctions where breaches are not pursued by individual consumers under contract.
- This incentive to meet code commitments will be reinforced by the threat of regulator action for the most serious and systemic breaches as a back stop.
- Businesses will be unable to avoid adhering to codes of practice by withdrawing from a code.

Our organisations urge the Government to consider this alternative approach outlined above and reconsider the current approach to introducing enforceable code provisions.

Concerns with the proposed approach to code enforceability

Our core concern with the proposed approach as expressed in the ED and EM is that it is a missed opportunity to improve the existing framework for financial services industry codes. The proposed Bill is likely to have little impact in practice and may serve to undermine industry effort to improve consumer protections because the incentives in the system do not encourage optimal outcomes:

- There is little incentive for an industry sector to seek approval for their code. While the ASIC approval process is intended to apply a degree of rigour to the code development process, there is no compulsion to seek approval. Indeed, the Australian Banking Association (**ABA**) is the only industry association to have done so. Despite other industry associations announcing plans to follow suit, the spectre of enforceable code provisions is likely to dissuade them from doing so with no real adverse consequence.
- Industry sectors may become more circumspect about what provisions they are willing to put in their codes. While the framework will in part depend on guidance from ASIC, the risk is that if a particular code provision is designated an "enforceable code provision", breach of which is backed by civil penalties, this may lead to industry seeking to water down and/or weaken their commitments so as not to be designated as enforceable. Several industry groups who were in the process of reviewing their codes have already halted that process, pending finalisation of the enforceable code provision reforms.
- In the unlikely event that reputational motivation is somehow sufficient to drive sectors to seek approval of their code, ASIC has limited ability to influence what codes actually contain. They have only one tool: approval or not. At any point, the industry sector can decide to simply walk away from the process if it is too difficult, onerous or cuts into their bottom line.
- Under the current proposal, the only incentive for code approval is that the Government can ultimately step in and impose a mandatory code. The Government may impose a code on a very recalcitrant industry, but it seems unlikely this step will be taken lightly, or quickly. Unfortunately, the likelihood of this happening to improve a mediocre code seems rather remote.

The result of implementing the recommendation as currently proposed would also, in effect, lead to industry writing the law. This is inappropriate. Industry codes are instruments designed to move industry to make commitments beyond the law, rather than drafting or mirroring it.

Designating some clauses to be "enforceable code provisions" also incentivises industry to place greater resources into complying with those "enforceable code provisions" over other commitments made in a code of practice.

The designation of some code provisions to be enforceable also leads to the perverse outcome that many terms in the Banking Code of Practice and the Customer Owned Banking Association Code of Practice that are currently enforceable under contract may no longer be enforceable.

Summary of specific recommendations

This submission provides commentary on the ED and EM that align with the above view. Our recommendations to amend the ED or EM below are provided with a view of reforming the draft legislation towards this preferred model.

These specific recommendations – beyond those outlined above – are as follows:

- Applicants for ASIC approval should not be a single licensee. Where there is no peak association that can represent the interests of a sector, ASIC should be empowered to develop a mandatory code.
- ASIC should be provided with the power to compel an entity to subscribe to a code.
- Voluntary and mandatory codes should apply to all entities in an industry sector.
- Independent and well-resourced monitoring bodies with consumer representation must be mandated.
- Code reviews and subsequent revised codes must be required to be approved and implemented within five years after the previous approval.
- Clarity must be provided to ensure that mandatory codes can be made to apply to all participants in a sector, that is, both subscribers and non-subscribers to an extant code.

Approved Codes of Conduct

Applicants for approval

We note that paragraph 1.21 of the EM states that an applicant requesting ASIC approval for a code could be a single licensee.

We do not agree with this. Currently there are, and have been, a number of very poor codes of conduct that have been established by a single firm, usually a dominating player in a particular sector.[1] We believe that it is inappropriate for a single firm to take ownership of a code that could potentially apply across a sector with multiple firms. A Code covering a single entity is not really a Code at all. An entity is entitled to make customer commitments and hold itself to account for breaching those commitments, but this is not an industry code with a requisite code compliance mechanism. This could also lead to a dominant market player controlling the development of a code that serves their own interests. This will lead to poor outcomes for consumers.

Most sectors of the financial services industry have a representative industry association or peak body who can act, and do act, as code owners. Where there is genuinely no peak association that can represent the interests of a sector — ASIC intervention may be appropriate in developing a mandatory code.

Definition of Subscriber

Item 1, Section 9 of the ED defines a subscriber as:

> *a person or entity that agrees, in a way required by the applicant for the code's approval, to be bound by the code.*

This means that a subscriber may be bound by a code:

> *through contractual arrangement with the applicant, or by publicly holding out that they comply with the code*[2]

It is appropriate to ensure that all those holding out to be subscribers are deemed subscribers. However, the Government must mandate that either:

- all licensees[3] should be required to subscribe to a code; or

[1] Credit Repair Australia Code of Conduct for Credit Restoration Services https://www.creditrepair.com.au/why-credit-repair/responsibility-to-our-customers/

[2] Para 1.22 EM

[3] including AFS License holders; authorised representatives of AFS License holders; issuers of financial products; Credit License holders and credit representatives of Credit License holders, as per items 1 and 3 , section 9 and subsection 1101A(1) of the Corporations Act, and items 9 and 11, subsection 5(1) and section 238A of the Credit Act

- ASIC should be provided with the power to compel entities to be subscribers to a particular code.

Further, all subscribers should be contractually bound to the compliance and monitoring body. Furthermore, subscribers should be required to ensure code commitments are enforceable through mandated incorporation into individual contracts between the consumer and the financial services firm.

Factors that ASIC must be satisfied of before approving a code of conduct

Codes should do more than simply restate existing laws.

Before approving a Code, ASIC must be satisfied as per Section 1101A(3)(a) that:

> *to the extent that the code is inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities—the code imposes an obligation on a subscriber that is more onerous than that imposed by this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities;*

We agree that codes must extend themselves beyond the law.

Code provisions are legally effective

Item 1, Section 1101A(3)(b) requires that

> *each enforceable code provision is legally effective;*

We support this proposed requirement. However, we note that the fact that code provisions will need to be legally effective has been raised by some parts of the industry (the Financial Services Council and the Customer Owned Banking Association) to delay current code review and re-drafting processes. There is a very real potential that this delay will lead to weaker code commitments being made since industry are likely to now be reticent to make strong and significant commitments that could be enforceable via civil penalties.

We do note that that the Banking Code of Practice will be taken to be approved under the new section 1101A. This suggests that the language in this code already meets the standard of being legally effective. However ASIC approval for enforceable provisions will still be required.

Factors that ASIC must consider before approving a code

Under the new regime, ASIC must also have regard to the following matters when approving a code of conduct:

Whether the obligations attaching to subscribers to the code are capable of being enforced

Para 1.42 of the EM states:

> *It is expected that ASIC would look at whether the rules contained in the code are binding on (and enforceable against) subscribers through a contractual arrangement. Contractual arrangements **may** include subscribers incorporating their agreement to abide by a code in individual contracts with consumers (**which would be generally preferred**). (**our emphasis**)*

As noted, it is the strong view of consumer representatives that industry codes should be required to be enforceable through mandated incorporation into individual contracts between the consumer and the financial services firm. This currently applies to the Banking and Customer Owned Banking Codes of Practice. This should be a condition of approval, *not* an option.

The EM states incorporating the code "would be generally preferable." If this is the case, then mandate it as such. Given historical industry recalcitrance to incorporate codes into consumer contracts to date (outside of the banking sector) it is highly unlikely that any industry will voluntarily incorporate the contract. For example, the Insurance Council of Australia (**ICA**) stated in their non-independent recent final code review report:

> *It is the ICA's view that Code enforceability does not require incorporation of the Code in the customer contract.*[4]

The alternative provided in the EM is that code subscribers' contract:

> *… directly with the independent person or body that has the power to administer and enforce that code could be effective, depending upon the details of the arrangement. In addition, ASIC could consider any internal or external dispute resolution mechanisms to deal with alleged breaches of the code.*[5]

Currently code subscribers in general insurance for example:

> *are bound by the Code through entering into a deed of adoption, through which they give the CGC (Code Governance Committee) power to monitor and enforce their compliance with the Code.*

This is therefore likely to continue to be the industry's preferred form of enforceability—in other words, the status quo.

All subscribers should be required to contract with the independent body with the power to administer and enforce the code, and contract with individual customers.

Whether all members of the applicant who provide financial services or credit services covered by the code are likely to become subscribers to the code

All members of a sector should be covered by and subscribe to a code. This aligns with recommendation 19 of the ASIC Enforcement Review Taskforce, which noted "consumer

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[4] Page 74, Final Report, Insurance Council of Australia, *Review of the General Insurance Code of Practice*, June 2018 http://codeofpracticereview.com.au/assets/Final%20Report/250618_ICA%20Code%20Review_Final%20Report.pdf

[5] Para 1.43

confidence is lessened when some industry participants choose not to become signatories to their relevant code".[6]

Whether other persons or entities providing financial services covered by the code are likely to become subscribers to the code

We remain of the view that all members of a sector should be covered by and subscribe to a code.

In almost every sector, there are firms that have chosen not to be a subscriber to the code most relevant to their service. Under the current drafting of this ED, a recalcitrant minority of firms may prevent the majority of the sector reaching total agreement to a code. ASIC should be able to compel recalcitrant members to subscribe.

Whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available

We agree as per para 1.51 of the EM that:

> *Effective and transparent systems for monitoring code compliance are vital to ensuring public confidence in a code and those who subscribe to it.*

We are concerned that the fulfillment of this:

> ***may** include an independent body to monitor and report on compliance by the relevant subscribers. (**our emphasis**)*

An independent monitoring body with consumer representation is fundamental to the effective monitoring of codes. It is not clear how effective administration for monitoring compliance could occur otherwise. No alternatives are raised. Independent monitoring body with consumer representation therefore must be mandated and should not be a mere option. We note that under the mandatory code of conduct framework, regulations will confer functions and powers on a person or body for monitoring compliance; this should not be an option for voluntary codes of conduct.

Codes must be monitored by independent code monitoring bodies made up of an independent chair and an even number of industry representatives and consumer representatives as currently occurs. Code monitoring must be required under legislation to be well resourced too. Under-resourcing code monitoring can be one way to constrain the effectiveness of monitoring. The independence, appropriate resourcing, and investigative and sanction powers of code monitoring bodies should be strengthened and guaranteed by this legislation. It should not be a mere possibility for consideration by ASIC.

[6] Page 34, Treasury, *ASIC Enforcement Review Taskforce Report*, December 2017

Code monitoring bodies should also be obliged by legislation 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.

Any other matters that ASIC considers relevant

We support ASIC preparing regulatory guidance about relevant factors that ASIC will take into account. However, a number of the central issues relating to enforceability have long been a part of ASIC guidance and has led to their being ignored by industry.

For example, requiring incorporation of the code into contracts is an option already considered by ASIC and only two codes have ever taken this up.[7]

We believe that a number of matters that are likely to be incorporated into ASIC regulatory Guidance should be incorporated into this legislation. Namely:

- all members of a sector should be covered by and subscribe to a Code;
- all subscribers should be required to contract with the independent body with the power to administer the code;
- the independence, appropriate resourcing, and investigative and sanction powers of code monitoring bodies should be strengthened and guaranteed by legislation; and
- industry codes should be required to be enforceable through mandated incorporation into individual contracts between the consumer and the code subscriber.

Enforceable code provisions

We note that under item 3, paragraph 1101A(2)(a) and (b) of the *Corporations Act 2001*; and item 9, paragraph 238A(2)(a) of the *National Consumer Credit Protection Act 2009*, to be an enforceable code provision that ASIC will have to consider whether:

1. the provision represents a commitment by a subscriber to the code to act in a particular way or in a manner consistent with attaining the objectives of the code;

   and either

   a. a breach of the provision could result in significant detriment to the person; or

   b. a breach of the provision would significantly undermine the confidence of the Australian public, or a section of the Australian public in either the provision of financial services in Australia or those who provide financial services in Australia.

or

2. the provision represents a commitment to a person by a subscriber to the code of conduct;

[7] RG183.127, RG 183 Approval of financial services sector codes of conduct, March 2013, https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf

and/either

a. a breach of the provision could result in significant detriment to the person; or

b. a breach of the provision would significantly undermine the confidence of the Australian public, or a section of the Australian public in either the provision of financial services in Australia or those who provide financial services in Australia.

This must be broadly interpreted to capture almost code commitment made under a code. Any serious and systemic breach of a code commitment goes directly to undermining the confidence of the Australian public in the provision of financial services.

A promise is a promise. If a code subscriber breaches a code commitment in a serious and systemic manner surely, this undermines public confidence in that institution or even the entire service provision. For example, the Banking Code of Practice features the following commitment:

We will promote the Code[8]

While it may seem unlikely that a code subscriber would ever breach this simple and straightforward commitment we note that, for example, the Code Compliance Monitoring Committee of the Banking Code of Practice have previously found that only 31% had descriptions on websites explaining the benefits of the code.[9] However if a subscriber were to purposefully breach this clause in a systemic and serious way (for example, because they do not ideologically support the code or do not support some sections of the code that they felt forced upon them) and are unwilling to correct their behaviour, this would, in our view, lead to a serious undermining of the confidence in that institution and the sector. By not promoting the code, customers of an institution may not be made aware of their rights in a timely fashion.

So called 'fuzzy' clauses relating to, for example, treating customers with respect, also meet the requirements as set out at draft section 1101A(2) as these are "commitment[s] to act in a particular way" and can and do lead to detriment to the person including material losses.

The reason that an expansive interpretation must be applied is that, if only some commitments are strictly enforceable, it will incentivise industry to place greater resources into complying with those enforceable code provisions over other commitments made in a code.

It is important to note that we do *not* expect clauses like the above to ever need to be enforced by ASIC. Whilst not being completely outside the realms of possibility, the above scenario is highly unlikely.

However, where there are exceptions, loopholes and qualifications under the law, regulatory arbitrage and avoidance follow. Commissioner Hayne made this clear when recommending that,

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[8] Clause 4, *Banking Code of Practice*, 1 July 2019, https://www.ausbanking.org.au/wp-content/uploads/2019/06/Banking-Code-of-Practice-2019-web.pdf

[9] CCMC, *Visibility and Access An examination of web-based information available to customers relating to the Code of Banking Practice, internal dispute resolution and external dispute resolution*, 2010 http://www.ccmc.org.au/cms/wp-content/uploads/2013/11/CCMC-Inquiry-Report-Banks-Visibility-and-Access-September-2010.pdf

as far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.

We therefore reiterate the view that:

- 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 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*), with appropriate remedies flowing from this decision including civil penalties. This should apply to all sections of the code.

We note that para 1.71 of the EM outlined factors that ASIC may consider when deciding whether a breach has led to significant detriment to a person including:

- the nature and extent of the potential detriment, which may include non-financial detriment;
- the potential financial loss to consumers; and
- the impact of the detriment on consumers

This is appropriate but should be included in the legislation as a non-exhaustive list.

Reviewing a Code

Three year not five year reviews

Item 3, subsections 1101AB(1) and (2) and item 11, subsections 238C(1) and (2) of the ED requires that that an independent review is undertaken every five years which considers the operation of the approved code of conduct.

This is a step backwards for consumers. Currently reviews are conducted every three years as per RG183.82-85.

We note that the last review of the General Insurance Code was conducted in 2012-13 and not implemented until 2014. The current draft code will not be implemented until 2021. So even though industry is currently required to update a code every three years, it will be seven years until consumers will be able to enforce improved protections and rights.

The delay here is an overarching reason why consumers have lost confidence in the financial services sector. The lack of continuous improved commitments under codes was a contributing factor to why a Royal Commission into the sector was required.

Extending code reviews to every five years is a step backwards. It will lead to longer delays in improvements to consumer protections. Financial services is a fast moving and evolving sector. Timely consideration of issues of concern to consumers to improve code commitments and

address problems is critical to improve outcomes for consumers and increase confidence in the industry. Code reviews should not be left to every five years.

We suggest that the requirement could be re-drafted and improved by ensuring that a review and the subsequent revised code be required to be approved and implemented within five years after the previous approval.

This would not deal with the issue of incentivising industries to seek ASIC approval but it would ensure that those who do, do not delay keeping their codes up-to-date.

Code reviewers and the codes should address consumer concerns

We also believe it is critical to ensure that the review and subsequent code arising out of a review must identify and address existing and/or emerging problems in the marketplace. As per current RG 183, when seeking approval for a code:

- Applicants should then explain how these issues are addressed in the code;[10]
- If identified consumer concerns or undesirable practices are not addressed in the code, there should be a detailed explanation for why this is so.[11]

The review must be subject to public consultation and the entire approval process needs to be transparent.

Mandatory codes of conduct

As outlined above, our core concern with the approach being taken to implementing this recommendation is that it will introduce exactly the wrong incentives into the code development and approval process, and the only incentive available is the blunt force of introducing a mandatory code.

ASIC will have limited ability to influence what codes actually contain. They have only one tool: approval or not. There is no reason the industry sector won't decide to simply walk away from the process if it is too difficult.

This is particularly the case with respect to a code that includes a small number of clauses that do not go as far as either consumers or ASIC would want the sector to go. The only incentive is the big stick of imposing a mandatory code. Certainly ASIC may move to impose a code on a very recalcitrant industry, but it seems highly unlikely this step will be taken lightly, or quickly. Unfortunately, the likelihood of this happening to improve a mediocre code seems remote.

There is no small stick mechanism proposed for ASIC to incentivise industry to strengthen code commitments. This will inevitably lead to weaker codes of practice and ultimately poorer outcomes for consumers.

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[10] RG 183.61

[11] RG 183.62

This would be a perverse outcome to arise out of the Royal Commission. We have outlined our preferred approach in the introduction above.

We wish to raise two further issues that may require clarification under the ED or the EM.

First, it is not clear whether a mandatory code can be made to apply to all participants in a sector, that is, both subscribers and non-subscribers to a voluntary code owned by an industry body.

Secondly, it is not clear whether a non-subscriber can be required to subscribe to a code under this reform or under any other existing laws or regulatory powers. There is a very real risk that some individual firms may choose not to subscribe to a voluntary code. Subscribers have pulled out of codes in the past and will do so in the future. Subscribers have pulled out for many reasons including simply not valuing a code or not being able to comply. The risk of this occurring will increase now that they may be subject to civil penalties for a breach of an enforceable code provision.

It is unclear whether ASIC directions powers or licence powers could be used to require the individual firm to subscribe to a code. It is also unclear whether the mandatory code powers created in this ED will enable ASIC to impose a code on an individual firm or a small subsection of firms not willing to subscribe.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Drew MacRae, Financial Rights, Policy and Advocacy Officer on drew.macrae@financialrights.org.au or 02 8204 1386.

Kind Regards,

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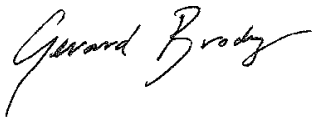

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