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**15 April 2019**

Manager  
Financial Services Reform Taskforce  
The Treasury  
Langton Crescent  
Parkes ACT 2600  
E: enforceablecodes@treasury.gov.au

Dear Sir/Madam,

**Thank you for the opportunity to provide feedback as you consider how the Government might take action on the Royal Commission recommendations regarding the enforceability of financial services industry codes.**

#### **AIA Australia's role in code development**

AIA Australia (**AIAA**) has over 45 years' experience as a life insurer, and currently protects the lives of more than 3.5 million Australians. Our purpose is to make a difference in people's lives.

Our involvement with financial services industry codes dates back to 2015, when as a member of the Financial Services Council (**FSC**) and its Life Board Committee, our CEO Damien Mu championed the development of the Life Insurance Code of Practice (**Code**) as an important driver of consumer protections and best-practice industry standards. AIAA was closely involved in the drafting of the Code, and held the view throughout that the Code should be subject to approval and enforceability by ASIC.

When the Code was completed in mid-2016, AIAA set up a roundtable of industry and regulatory stakeholders in Canberra to discuss industry leadership and improvements in insurance in superannuation. This led to the formation of the Insurance in Super Working Group (**ISWG**), which was made up of five industry bodies plus industry and consumer members, including Damien Mu as one of two life insurer representatives.

The ISWG developed a code of practice for trustees to mirror the FSC's Code. It is important to note that while AIAA was involved in and supports the code developed by the ISWG for trustees, this submission focuses solely on AIAA's views on the FSC Code, to which AIAA is itself bound.

#### **Code enforceability**

The Code in its current form is enforced by the independent monitoring and compliance body, the Life Code Compliance Committee (**LCCC**), as well as through external dispute resolution at the Australian Financial Complaints Authority (**AFCA**). Both bodies have the ability to ensure that an insurer rectifies a Code breach, which can include compensating a consumer who suffers financial loss as a result of the breach.

AIAA is supportive of the Code being enforced by ASIC, to give confidence that the life insurance industry is being held to best-practice standards and to ensure that consumers are being adequately protected and supported.

There are some clear matters that must be considered and appropriately addressed before the Code becomes enforceable at law:

1. Identification of which provisions in the Code would constitute a breach of the law if contravened



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2. Clarity and certainty in how the Code's requirements are to be upheld. This will likely require targeted redrafting of the provisions that are determined to be enforceable
3. The materiality of a Code breach in attracting an enforcement action
4. The proportionality of the enforcement response; that is, the remedy must fit the breach
5. The method by which Code provisions are enforced; that is, by a regulatory body, by another body (LCCC, AFCA), or by a customer through the court system, and how the different bodies interact.

### **Identification and redrafting**

Commissioner Hayne recommended that industry identify the provisions of its code that govern the terms of the contract between the financial service entity and the customer, on the basis that these will become the enforceable code provisions, before seeking ASIC's approval of those provisions.

AIAA intends to work closely with the rest of the life insurance industry through the appropriate forums to identify the provisions of the Code that should become enforceable. We believe that this will require establishing criteria for determining which provisions govern the terms of the customer contract, and then systematically running every subsection of the Code through this filter.

Once the industry has determined which provisions of the Code will become enforceable, it will then need to undertake a process of reviewing and possibly redrafting each provision to ensure they are all sufficiently clear to insurers. The Code as currently drafted allows for flexibility in interpretation and implementation; once insurers are at risk of being subject to civil penalties and court action for Code breaches, they will require much greater certainty in the application of the provisions. This process is likely to require formal independent legal advice and assistance.

The example provided in the Treasury consultation paper for a code provision that would become enforceable is the obligation to engage with customers in a fair, reasonable and ethical manner. We would caution that this drafting may not be sufficiently objective to ensure that all code signatories comply with this in a uniform manner, and that all bodies tasked with enforceability interpret this in a uniform way.

### **Remedies**

AIAA is of the view that ASIC should be provided with a full toolkit of remedies in enforcing industry codes; that is, the remedies proposed by Commissioner Hayne from Part VI of the *Competition and Consumer Act 2010* (CCA), and the additional actions which the ACCC is empowered to take in relation to industry codes in the CCA.

However, it is essential that the law makes clear what the level of materiality for a breach would be in order to attract enforcement action. The Annual Industry Data and Compliance Report published by the LCCC in March 2019 reported 164 breach events for the life insurance industry – events resulting in multiple breaches of a Code section – and nearly 8,000 isolated breaches, each affecting a single consumer. In total, 1,766,803 consumers were actually or potentially impacted by breaches of the Code. The LCCC Report does not, however, identify the impact that these breaches had on the individual consumer: whether they suffered detriment as a result of the breach, whether there was a financial impact, and whether the customer expressed dissatisfaction or was even aware of the breach occurring, are unknown factors in this reporting. It is clearly unworkable and potentially undesirable from a public policy perspective for every breach, however minor or administrative, to result in enforcement action.

There is also proportionality required in the enforcement response. This mirrors the recently passed legislation on Design and Distribution Obligations; the Explanatory Memorandum for which noted that “[t]here are civil and criminal penalties that apply to contraventions of the new arrangements. The



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*combination of civil and criminal penalties allows ASIC or the prosecutor (as the case may be) to take a proportional approach to enforcing the new obligations. In addition, a person who suffers loss or damage because of a contravention of certain new obligations may recover that loss by bringing a civil claim."*

We submit that only significant or systemic breaches that cause consumer detriment should attract a remedy from ASIC.

If subscribing to an industry code is to be a condition of an Australian Financial Services Licence (AFSL), it needs to be clear that the licence condition is the subscription to the Code and not full compliance with its terms. It would not be an appropriate remedy for a breach of the Code for a life insurer to lose its AFSL, or have arduous conditions imposed which could result in it being unable to meet the standard ordinarily expected of an APRA-regulated institution.

### **Roles of enforcement bodies**

As noted earlier, the Code is currently enforceable through the LCCC and AFCA. If the responsibility for enforcement is extended to ASIC and also to the courts, it is essential that there is clarity in how these bodies are to work together.

AIAA suggests that the LCCC retain its existing powers of oversight and sanction contained in its Charter. This means that it can continue to enforce every provision in the current Code.

As part of the Rules governing AFCA, where AFCA identifies systemic issues and serious contraventions by a firm, it reports these to ASIC, after first giving the firm an opportunity to provide submissions and further information in response prior to a final decision being made on the breach by AFCA.

Under the new enforceability model, AFCA and the LCCC should both have a clear mandate to report systemic issues and serious contraventions of the enforceable provisions of the Code to ASIC. AFCA's Operational Guidelines provide detail about this process and the behaviours that would be caught.

AIAA submits that this is the appropriate method by which ASIC should be made aware of breaches that may require enforcement action; they have been referred by ASFA or the LCCC, and they are systemic or serious contraventions, and cause consumer detriment.

With multiple enforcement bodies and avenues for redress, it is important that the system establishes a clear and effective process for the resolution of matters. This process should encourage efficiencies in dispute resolution processes, define the grounds for escalations and ensure outcomes are appropriate and proportionate. Where a matter has been appropriately addressed through one forum, the matter should be deemed resolved and not unnecessarily re-opened through an alternative forum. In particular, ASIC and the courts should take into account any prior compensation paid or other redress provided to a consumer as a result of an LCCC or AFCA determination.

In terms of a consumer's ability to take a breach of an enforceable Code provision to court, if the breach has previously received a determination from AFCA that was accepted by the complainant, the parties should be able to agree to be bound by this, with neither party able to take the breach to court for a further ruling. Before deciding to hear a case for a Code breach, courts should consider any previous AFCA determination, and/or whether new evidence has been tendered.



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### **Conclusion**

AIAA strongly believes in the importance of strong and enforceable industry self-regulation, and will continue to play a leadership role in further developing the industry's Code.

We welcome the opportunity to work closely with Treasury, ASIC and other decision-makers to provide a workable solution to the Royal Commission's recommendations, that operates in the best interests of consumers.

Should you wish to discuss any of the information in this submission in further detail please contact Sarah Phillips, Senior Manager, Corporate Affairs, in the first instance on [sarah.phillips@aia.com](mailto:sarah.phillips@aia.com) or 0498 494 791.

Sincerely,

**Jeremy Houghton**  
Head of Strategy & Corporate Affairs  
AIA Australia