
FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION
RESPONSE—PROTECTING CONSUMERS (2020 MEASURES)) BILL
2020: FSRC REC 1.15 (ENFORCEABLE CODE PROVISIONS)

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ACCC	Australian Competition and Consumer Commission
AFS License	Australia Financial Services License
ASIC	Australian Securities and Investment Commission
ASIC Act	<i>Australian Securities and Investment Commission Act 2001</i>
Bill	<i>Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.15 (enforceable code provisions)</i>
Competition Act	<i>Competition and Consumer Act 2010</i>
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
Credit Act	<i>National Consumer Credit Protection Act 2009</i>
Credit License	Australian Credit License
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Legislation Act	<i>Legislation Act 2003</i>

Chapter 1

Enforceable code provisions

Outline of chapter

1.1 Schedule # amends the Corporations Act and the Credit Act to strengthen the existing code of conduct framework to allow ASIC to designate enforceable code provisions which, if breached, may attract civil penalties.

1.2 Schedule # also establishes a mandatory code of conduct framework for the financial services industry through regulations, with the ability to add designated civil penalty provision. A breach of a mandatory code of conduct provision may attract civil penalties.

1.3 These amendments implement Recommendation 1.15 of the Financial Services Royal Commission.

Context of amendments

1.4 A code of conduct is a set of statements setting out an industry's commitment to deliver a certain standard of practice. Where an industry has the capacity, cohesion and commitment to develop an effective code, consumers can receive greater benefits than might otherwise have been achieved.

1.5 Codes of conduct have existed in the financial services sector since the late 1980s, and a number of codes of conduct have been developed since that time. However, ASIC approval of codes is optional, and historically ASIC approval has not been sought, or granted, often.

1.6 Codes of conduct are a vehicle for industries to self-regulate and set standards on how to comply with and exceed what is required by the law. This can promote better consumer outcomes as well as confidence and trust in the industry.

1.7 Under the current law, ASIC can approve industry codes of conduct in relation to any aspect of financial services licensees, credit licensees, authorised representatives of financial services licensees, credit representatives and issuers of financial products in relation to the activities of which ASIC has regulatory responsibility (section 1101A of the Corporations Act and section 241 of the Credit Act).

1.8 Where approval by ASIC is sought and obtained, it is a signal to consumers that the code is one in which they can have confidence. An

approved code should respond to identified and emerging consumer issues and deliver substantial benefits to consumers.

1.9 In the Financial Services Royal Commission, Commissioner Hayne identified a number of limitations in the current financial services industry codes framework, some of which had previously been identified in the final report of the ASIC Enforcement Review Taskforce.

1.10 In particular, Recommendation 1.15 of the Final Report proposed that the law should be amended to provide:

- that ASIC’s power to approve codes of conduct should extend to codes relating to all Australian Prudential Regulation Authority-regulated institutions and Credit License holders;
- that industry codes of conduct approved by ASIC may include enforceable code provisions, which are provisions in respect of which a contravention will constitute a breach of the law;
- that ASIC may take into consideration whether particular provisions of an industry code of conduct have been designated as ‘enforceable code provisions’ in determining whether to approve a code;
- that remedies, modelled on those set out in Part VI of the Competition Act, should apply where there is a breach of an enforceable code provision; and
- for the establishment of a mandatory codes of conduct framework for the financial services industry.

1.11 The Government, in its response to the Financial Services Royal Commission, agreed to amend the law to implement Recommendation 1.15 of the Financial Services Royal Commission.

Related recommendations

1.12 Set out below are details of other recommendations proposed by the Financial Services Royal Commission which are related to the implementation of Recommendation 1.15. Responsibility for implementing these recommendation is split between Government and industry.

For Government to implement:

- Recommendation 3.8 – Adjustment of APRA and ASIC’s roles.
- Recommendations 2.8, 7.2 and part of 1.6 – Breach reporting.

For industry to implement:

- Recommendation 1.8 – The Australian Banking Association should amend the Banking Code to provide greater access to banking services.
- Recommendation 1.10 – The Australian Banking Association should amend the definition of ‘small business’ in the Banking Code.
- Recommendation 1.13 – The Australian Banking Association should amend the Banking Code to provide that banks will not charge default interest on loans secured by agricultural land in certain circumstances.
- Recommendation 1.16 – The ABA and ASIC should work to designate enforceable code provisions in the Banking Code.
- Recommendation 4.9 – Certain provisions in the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice should be made enforceable code provisions by 30 June 2021.
- Recommendation 4.10 – The Life Insurance Code of Practice and the General Insurance Code of Practice should be amended to impose sanctions on subscribers for breaches of the relevant code.

Summary of new law

1.13 Schedule # builds upon the existing codes framework contained in the Corporations Act and the Credit Act to allow ASIC to designate enforceable code provisions in approving financial sector industry codes.

1.14 The framework will allow ASIC to approve codes of conduct via legislative instrument which may contain enforceable code provisions. A breach of an enforceable code provision may attract civil penalties (including pecuniary penalties) and/or other administrative enforcement action from ASIC.

1.15 Schedule # also introduces a framework for establishing mandatory codes of conduct for the financial services industry through regulations. Certain provisions within the mandatory code of conduct may be determined as civil penalty provisions. A breach of these provisions may attract civil penalties (including pecuniary penalties) and/or other administrative enforcement action from ASIC. A breach of any of the mandatory codes of conduct provisions may attract other enforcement action from ASIC.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
ASIC may approve industry codes of conduct when it is satisfied that it is appropriate to do so.	ASIC may approve industry codes of conduct when it is satisfied that it is appropriate to do so.
ASIC may identify one or more provisions of the code as enforceable code provisions if ASIC considers that it satisfies specific criteria.	No equivalent.
If ASIC identifies one or more provisions of a code to be an enforceable code provision, it becomes enforceable under statute.	No equivalent.
A court may impose a penalty if a declaration has been made that an enforceable code provision has been breached and there is a contravention of the obligation to comply with that enforceable code provision. The penalty is an amount of up to 300 penalty units.	No equivalent.
ASIC may issue an infringement notice if it considers that a subscriber to the code has breached an enforceable code provision.	Whilst ASIC can currently issue an infringement notice for a range of different contraventions this does not include breaches of an approved code of conduct.
Mandatory codes can be prescribed in regulations.	No equivalent.
Regulations may prescribe a penalty not exceeding 1,000 penalty units for contravention of a mandatory code provision.	No equivalent.
ASIC may vary or revoke an approved code of conduct.	ASIC may vary or revoke an approved voluntary code of conduct.
The applicant in relation to a code of conduct must ensure that an independent review of the code is undertaken every 5 years.	No equivalent.

Detailed explanation of new law

1.16 Schedule # strengthens the existing codes regime in the Corporations Act and the Credit Act to enable ASIC to approve industry codes and to designate certain provisions as enforceable code provisions. A breach of an enforceable code provision may attract civil penalties.

1.17 Schedule # also introduces a framework for establishing mandatory codes of conduct for the financial services industry that will be implemented through regulations. A breach of a provision in a mandatory code of conduct may attract civil penalties and/or other administrative enforcement action from ASIC.

The role of codes of conduct

1.18 Industry codes play an important role in how financial products and services are regulated in Australia.

1.19 The development of industry codes sit at the apex of industry self-regulatory initiatives and can raise standards and complement existing legislative requirements to deliver benefits for both consumers and subscribers to the code of conduct.

1.20 In order for industry codes to be effective, industry capacity, commitment and leadership is critical. The development of industry codes is ultimately a matter for industry.

Approved codes of conduct

How does a code of conduct get approved?

1.21 Schedule # allows an applicant to request ASIC to approve a code of conduct. An applicant, also known as a code owner, is often an industry association or peak body. However, it can be a single licensee.

1.22 A **subscriber** to the code means a person or entity that agrees, in a way required by the applicant, to be bound by the code. This may be through a contractual arrangement with the applicant, or by publicly holding out that they comply with the code. [*Schedule #, item 1, section 9 of the Corporations Act and Schedule #, item 9, subsection 5(1) of the Credit Act*]

1.23 ASIC can approve a code of conduct in relation to any aspect of the activities for which ASIC has regulatory responsibility in relation to:

- AFS License holders;
- authorised representatives of AFS License holders;
- issuers of financial products;
- Credit License holders;

- credit representatives of Credit License holders.

[Schedule #, items 1 and 3, section 9 and subsection 1101A(1) of the Corporations Act, Schedule #, items 9 and 11, subsection 5(1) and section 238A of the Credit Act]

1.24 ASIC can approve a code of conduct for APRA regulated entities. The implementation of Recommendation 6.5 of the Financial Services Royal Commission, extends the AFS Licence regime under the Corporations Act to cover APRA regulated entities.

1.25 In deciding whether to approve a code of conduct, ASIC must be satisfied that:

- to the extent that the code is inconsistent with the Corporations Act or the Credit 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 the Corporations Act or the Credit Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
- any enforceable code provision is drafted in a way that can be legally enforced. If ASIC is not satisfied that these conditions are met, ASIC cannot approve the code. *[Schedule #, item 3, paragraphs 1101A(3)(a) and (b) of the Corporations Act, Schedule #, item 11, paragraphs 238A(3)(a) and (b) of the Credit Act]*

1.26 Identifying enforceable code provisions is an important part of the code approval process. The process of identifying any enforceable code provisions is discussed below.

1.27 Further, if ASIC is satisfied of the above factors, ASIC must also consider whether it is appropriate to approve the code, after having regard to the following matters;

- whether the obligations of subscribers to the code are capable of being enforced;
- whether all members of the applicant (the code owner) who provide financial services or credit services covered by the code are likely to become subscribers to the code;
- whether other persons or entities providing financial services covered by the code are likely to become subscribers to the code;
- whether the applicant has effective administration systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available;

- whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code; and
- any other matters that ASIC considers relevant.

*[Schedule #, item 3, paragraph 1101A(3)(c) of the Corporations Act;
Schedule #, item 11, paragraph 238A(3)(c) of the Credit Act]*

1.28 It is expected that ASIC will consider these matters as a whole and come to a decision about whether, on balance, the code of conduct can be approved.

1.29 If, after having regard to the above matters, ASIC is satisfied that the criteria have been met, then ASIC may approve the code of conduct by way of legislative instrument. Once approved, the code of conduct becomes an **approved code of conduct**.

1.30 ASIC's approval of a code of conduct is made by way of legislative instrument which is subject to disallowance and parliamentary scrutiny (section 42 of the Legislation Act).

1.31 A legislative instrument is appropriate in this instance to allow for effective co-regulation between the regulator and the financial services and consumer credit sector. It is expected that before any code of conduct is approved, ASIC will hold public consultation on the proposed approved code.

1.32 Where ASIC does not approve a code of conduct, this decision is not subject to merits review. *[Schedule #, item 5, paragraph 1317C(ge) of the Corporations Act and Schedule #, item 14, paragraph 327(1)(c) of the Credit Act]*

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

1.33 A code of conduct should do more than simply restate existing laws, rather, the code of conduct should offer consumers' greater benefits than would normally exist under the law.

1.34 It is expected that subscribers to a code of conduct will aim to set and deliver standards that exceed what is required by the law, fill gaps or provide additional protections about matters not covered by the law. In addition, codes of conduct can provide greater clarity or specificity about matters covered by the law.

1.35 By doing so, codes of conduct can promote better consumer outcomes, raise industry standards and increase confidence and trust in the industries to which the codes apply.

1.36 Historically, industry codes have delivered better outcomes for consumers (even without regulator enforceability) than what the applicable financial services legislation at the time was able to deliver. These include consumer-specific provisions in codes that have been

applied as part of external dispute resolution determinations, and broader undertakings (e.g. service standards), through industry commitment.

Legal effectiveness of enforceable code provisions

1.37 Before a code of conduct is approved, ASIC must be satisfied that any provisions that have been designated as enforceable code provisions have been appropriately drafted so that individuals and ASIC are able to rely upon them to obtain a remedy for a breach of the provision.

1.38 The legal effectiveness of enforceable code provisions is not affected by a provision that is inconsistent with financial services or consumer credit law. Instead, an enforceable code provision may be inconsistent with legislation to the extent that it imposes more onerous obligations for a subscriber than would otherwise be required in legislation.

1.39 This may require ASIC to consult with other Government stakeholders to ensure that the enforceable code provisions are appropriate and fit for purpose.

Factors that ASIC must consider before approving a code

1.40 When approving a code of conduct, ASIC must also have regard to the following matters.

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

1.41 This factor requires ASIC to consider whether an obligation is stated with sufficient clarity so that it is capable of being enforced by an individual. In doing so, ASIC may also consider whether there are other mechanisms available to consumers to enforce these provisions, such as through a Court, Tribunal, external dispute resolution scheme or other alternative dispute resolution body.

1.42 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).

1.43 Alternatively, code subscribers contracting 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.

1.44 The success of any code in protecting consumers and raising standards depends on ensuring that subscribers comply with the

provisions of the code and that there are appropriate remedies and sanctions in place to deal with non-compliance. The applicant (or code owner) should be responsible for monitoring, and reporting on, compliance with the code, or for setting up such arrangements.

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

1.45 This factor requires ASIC to consider whether the relevant members of the applicant (the code owner) who may be covered by the code are likely to subscribe to the code once it has been approved.

1.46 Where an applicant brings forward a code for approval it is preferable that all its members (those offering the products or services intended to be covered by the code) will become subscribers.

1.47 This could minimise situations where consumers receive vastly inconsistent protections for substantially the same service, or be confused as to the protections that they should expect to receive.

1.48 This only applies to members of the applicant who carry on activities covered by the code. For example, if the code of conduct relates to domestic banking activities, ASIC does not have to take into account whether members who only engage in activities relating to international banking are likely to sign up to the code.

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

1.49 This factor goes to the harmonisation of relevant industry codes. While it may be appropriate for multiple codes to consider the same issues or functions in some limited circumstances, encouraging all relevant financial industry participants to sign up to the same code will generally be desirable, creating a consistent approach across the financial sector. If a number of codes cover the same issues or functions, resulting in duplication or gaps, consumer outcomes are likely to suffer and it is likely to be more costly for industry participants.

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

1.50 This factor requires ASIC to consider whether the applicant has established effective systems for monitoring compliance by subscribers to the code of conduct and whether this information is publicly reported from time to time.

1.51 Effective and transparent systems for monitoring code compliance are vital to ensuring public confidence in a code and those who subscribe to it. Consumers will have the ability and confidence to

identify subscribers not adhering to the terms of the code and indirectly benefit from the accountability that can be brought upon subscribers through effective monitoring of compliance.

1.52 Effective monitoring arrangements are also important for both industry and the regulator to identify. For example, it will be important to monitor non-compliance with the code, whether particular subscribers are not meeting their commitments, or whether there are broader trends observable within the industry which may need to be addressed.

1.53 This may include an independent body to monitor and report on compliance by the relevant subscribers.

Whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code

1.54 This factor requires ASIC to consider whether the applicant has administrative systems in place for maintaining an accurate, publicly available list of subscribers to the code.

1.55 This allows consumers to identify in real-time who is a subscriber to the code and encourages transparency and accountability within the financial services industry.

Any other matters that ASIC considers relevant

1.56 ASIC may also take into account any other matters that ASIC considers to be relevant to the particular voluntary code of conduct that ASIC is approving.

1.57 It is expected that ASIC will prepare regulatory guidance about relevant factors that ASIC may take into account for these purposes.

Enforceable code provisions

1.58 An ***enforceable code provision*** is any provision of an approved code of conduct that has been identified in a legislative instrument to attract penalties by any person who holds out that they comply with an approved code of conduct. *[Schedule #, item 1 and 3, sections 9 and 1101AC of the Corporations Act, Schedule #, items 9 and 11, subsection 5(1) and section 238D of the Credit Act]*

1.59 Under the enhanced code of conduct framework, in approving a code ASIC may designate certain provisions to be enforceable code provisions. *[Schedule #, item 3, subsection 1101A(2) of the Corporations Act; Schedule #, item 11, subsection 238A(2) of the Credit Act]*

1.60 Commissioner Hayne observed that designating certain provisions as enforceable would provide individuals with greater certainty and enforceability on key code provisions.

1.61 As codes of conduct are a form of industry self-regulation, in the first instance it would be expected that the applicant will identify which provisions of their code may be considered enforceable code provisions. This sentiment was also expressed by Commissioner Hayne in the Financial Services Royal Commission.

1.62 The identification of enforceable code provisions can also occur during the code approval process. Through this engagement ASIC and the code owner can assess and discuss whether there are provisions in the proposed code which should be made enforceable. When considering whether a provision in a code of a conduct should be enforceable, ASIC must have regard to several criteria. These are:

- whether 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; or
- a commitment to a person by a subscriber to the code of conduct; and/either
- whether a breach of the provision could result in significant detriment to the person; or
- whether 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.

*[Schedule #, item 3, paragraph 1101A(2)(a) of the Corporations Act;
Schedule #, item 9, paragraph 238A(2)(a) of the Credit Act]*

1.63 If a particular provision in the code of conduct meets this criteria ASIC may designate the provision as an enforceable code provision. However, this is at the discretion of ASIC.

1.64 It is expected that enforceable code provisions would not be mere restatements of existing law. They should create new or extended obligations, or elaborate on and provide specificity in regards to how subscribers intend to comply with existing law or deal with matters not covered by the law.

1.65 In the Final Report of the Financial Services Royal Commission, Commissioner Hayne cited provisions regarding guarantees in the 2019 Banking Code as an example of what he anticipated would be the types of provisions that would be deemed to be enforceable.

1.66 Other provisions which could be designated as enforceable include provisions in relation to:

- conflicts of interest;

- cooling off periods;
- providing information to consumers; and
- fees and charges.

1.67 Another example may be found in some of the historical protections for guarantors found in the Banking Code, which codified long-standing principles in case law.

1.68 At that point in time, the Banking Code required creditors to take steps to ensure a guarantor understood the relevant transaction. These protections have since been introduced as legal requirements in the Credit Act.

1.69 However, overlaying these provisions as they stood at the time with the criteria identified above could have resulted in them being identified as enforceable. These provisions were often clear commitments made by subscribers and the consequences of breaching these provisions could have resulted in significant harm to the guarantor.

1.70 Provisions that may be included as an enforceable code provision can go beyond provisions that merely make commitments to a particular customer. Instead, ASIC may designate provisions in the approved code of conduct which present commitments to the public at large, a group of people or a third party, such as a guarantor who has obligations under the contract.

1.71 When considering whether a breach of the provision could result in significant detriment, ASIC may consider factors such as:

- 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.

1.72 Enforceable code provisions will be designated in the legislative instrument that approves the code. To ensure that the code provisions are enforceable and legally effective, it is expected that once ASIC identifies a potential enforceable code provision, ASIC may, if necessary, consult with other government agencies such as the Attorney-General's Department to ensure that the provisions are consistent with relevant drafting standards.

1.73 A contravention of an enforceable code provision may attract a penalty of up to 300 penalty units. This is consistent with the enforceable industry codes regime administered by the ACCC in the Competition Act. [*Schedule #, item 3, section 110IAC of the Corporations Act and Schedule #, item 11, section 238D of the Credit Act*]

1.74 It is necessary to delegate the setting of penalties to an ASIC legislative instrument because the enforceable code provisions will be assessed on a code-by-code basis once a code is brought to ASIC for approval.

1.75 Providing for these penalties in a legislative instrument instead of in primary law allows for greater flexibility and responsiveness for industry codes to change with technological and industry advances, less ambiguity in the primary law and provides a quicker process for developing and approving the codes of conduct. This also mirrors the process which Commissioner Hayne envisaged where the code applicant and ASIC work directly together to identify and designate relevant enforceable provisions.

1.76 The criteria that ASIC must meet in order to designate a provision to be an enforceable code provision is contained in the primary law. It is expected that this will also involve informal and formal public consultation.

1.77 The approved code of conduct, including any variations, will be available in consolidated form on the Federal Register of Legislative Instruments and on the ASIC website.

1.78 Once a code of conduct has been approved, and if it contains enforceable code provisions, any person who holds out to comply with the approved code will be obliged under statute to comply with the enforceable code provisions. [*Schedule #, item 3, section 1101AC of the Corporations Act and Schedule #, item 11, section 238F of the Credit Act*]

1.79 If an AFS or credit licensee (or their representative) becomes aware that they have breached an enforceable code provision they will be required to inform ASIC of this breach. This will align with requirements being introduced as part of breach reporting obligations.

1.80 A person holding out that they comply with an approved code of conduct, may do so, for example, by telling the applicant that they subscribe to the code, or by publicly holding out that they comply with the code via their website or advertising material.

How does ASIC vary an approved code?

1.81 An applicant (or code owner) may apply to ASIC to vary an approved code of conduct. It is expected that the applicant would seek to vary a code of conduct to deal with issues identified during an independent review or where a new consumer or market problem is identified. [*Schedule #, item 3, subsection 1101AA(1) of the Corporations Act, Schedule #, item 1, subsection 238B(1) of the Credit Act*]

1.82 When considering whether to vary an approved code of conduct, ASIC must consider the same matters that it was required to consider when considering whether to originally approve the code of conduct.

[Schedule #, item 3, subsection 1101AA(2) of the Corporations Act; Schedule #, item 9, subsection 238B(2) of the Credit Act]

1.83 It would be expected that ASIC uses its judgement in deciding to what extent it reassesses a code of conduct. For example, variations that are minor in nature, or address typographical or grammatical errors would not be expected to require ASIC to review a code in its entirety.

1.84 ASIC can approve a variation of an industry code of conduct via a legislative instrument. Once approved by ASIC, the legislative instrument will be subject to disallowance and parliamentary scrutiny (section 42 of the Legislation Act). *[Schedule #, item 3, subsection 1101AA(1) of the Corporations Act; Schedule #, item 9, subsection 238B(1) of the Credit Act]*

1.85 An ASIC decision to not approve a variation is not subject to merits review. *[Schedule #, item 5, paragraph 1317(ge) of the Corporations Act and Schedule #, item 14, paragraph 327(1)(c) of the Credit Act]*

1.86 Once a variation has been approved via a legislative instrument, the varied code becomes the ASIC approved code of conduct and subscribers must comply with the approved code as varied.

Can ASIC revoke an approved code?

1.87 ASIC may, by legislative instrument, revoke approval of an approved code of conduct. *[Schedule #, item 3, subsection 1101A(4) of the Corporations Act and Schedule #, item 1, subsection 238A(4) of the Credit Act]*

1.88 ASIC may revoke approval of a code:

- on application by the applicant; or
- if ASIC does not continue to be satisfied that the code meets the requirements contained in section 1101A of the Corporations Act or section 238A of the Credit Act; or
- because a review of the operation of the code was not completed within the timeframe.

[Schedule #, item 3, subsection 1101A(4) of the Corporations Act; Schedule #, item 11, subsection 238A(4) of the Credit Act]

1.89 ASIC's revocation of approval and the application of these particular subsections does not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.

Reviewing a code

1.90 The applicant must ensure that an independent review is undertaken every five years which considers the operation of the approved code of conduct. The review must be subject to public consultation. *[Schedule #, item 3, subsections 1101AB(1) and (2) of the Corporations Act and Schedule #, item 11, subsections 238C(1) and (2) of the Credit Act]*

1.91 The five year period commences on the day the code of conduct was approved. *[Schedule #, item 3,, subsection 1101AB(3) of the Corporations Act and Schedule #, item 11, subsection 238C(3) of the Credit Act]*

1.92 Each subsequent review must occur *within* five years after the completion of the previous review. This provides the applicant with the flexibility to undertake a review sooner if they consider that it is appropriate to do so. *[Schedule #, item 3, subsection 1101AB(3) of the Corporations Act and Schedule #, item 11, subsection 238C(3) of the Credit Act]*

1.93 A review is complete once the applicant has provided a copy of the report to ASIC. The applicant must also publish the report on their website within 10 business days. *[Schedule #, item 3,, subsections 1101AB(4) and (5) of the Corporations Act and Schedule #, item 11, subsections 238C(4) and (5) of the Credit Act]*

1.94 Regular reviews of the code of conduct by an independent body means that the code remains current and can respond appropriately to changing industry practices.

1.95 The role of the independent reviewer is to consider, without bias, the broad range of stakeholder views, including both consumer and industry stakeholders. The independent reviewer should consider the relevant factors that ASIC considers when approving the code. Therefore, the review provides an opportunity for stakeholders to give feedback on the effectiveness of the approved code of conduct, and suggestions on how the approved code of conduct may be improved.

Mandatory codes of conduct

1.96 A mandatory code of conduct may be imposed by regulations where a mandatory code is the most appropriate tool to deal with observed issues. This may be a more appropriate tool when, for example, efforts between ASIC and industry to develop an approved code of conduct have not been successful or because industry has not put forward a proposed code in a timely manner.

1.97 Any mandatory code of conduct will be prepared by Treasury in consultation with ASIC, industry, and consumer groups, and will be subject to a public consultation process. Regulations are made by the Governor-General.

1.98 Mandatory codes of conduct regulations will be subject to disallowance under section 42 of the Legislation Act.

1.99 Regulations imposing mandatory codes may confer functions and powers on a person or body for the purposes of:

- monitoring compliance with the code of conduct; and
- dealing with disputes or complaints arising under, or in relation to, the code of conduct; and

- dealing with other associated administrative matters; or
- to provide for record keeping and reporting obligations.

[Schedule #, item 3, section 1101AD of the Corporations Act and Schedule #, item 11, section 238E of the Credit Act]

1.100 The ability to confer powers and functions to a body or person can be important to the operation of the mandatory code of conduct as the industry sector that the mandatory code of conduct applies to may not have the appropriate structures in place to monitor compliance with the code, or deal with disputes arising between consumers and subscribers under the code.

1.101 Once the regulations have been made, a person to whom the code applies must not contravene a mandatory code of conduct. A breach of a provision of a mandatory code of conduct may attract ASIC enforcement. *[Schedule #, item 3, section 1101AE of the Corporations Act and Schedule #, item 11, section 238F of the Credit Code]*

1.102 Under the mandatory codes of conduct regime, the regulations may specify certain provisions to be civil penalty provisions. Individual breaches of the civil penalty provisions are subject to a penalty of up to 1,000 penalty units. *[Schedule #, item 3, subsection 1101AD(3) of the Corporations Act and Schedule #, item 11, subsection 238E(3) of the Credit Act]*

1.103 The maximum penalty amount of 1,000 penalty units highlights the significance of the breach. It is important to have this amount to achieve an effective level of deterrence.

1.104 The higher penalty amount also provides an incentive to code owners to participate in the voluntary code process, where breaches of enforceable code provisions are subject to a penalty up to 300 penalty units.

1.105 For the avoidance of doubt, the corporate multipliers contained in subsections 1317G(3) and (4) of the Corporations Act and subsections 167B(1) and (2) of the Credit Act do not apply to mandatory codes of conduct. *[Schedule #, item 3, subsection 1101AD(4) of the Corporations Act and Schedule #, item 11, subsection 238E(4) of the Credit Act]*

1.106 The mandatory code of conduct regulations will be made by Government, in consultation with relevant internal and external stakeholders including through an informal and formal public consultation process.

1.107 The mandatory code of conduct regulations will be subject to disallowance under section 42 of the Legislation Act and thus subject to parliamentary scrutiny.

Penalties

1.108 ASIC and individual consumers have a range of enforcement options available to them for breaches of civil penalty provisions under the Corporations Act and Credit Act.

1.109 It is expected that ASIC will use their regulatory judgement as to what breaches, and what remedies, they apply in using their regulatory enforcement tools.

1.110 In the Final Report of the Financial Services Royal Commission, Commissioner Hayne recommended that remedies should be available that are modelled on those now set out in Part VI of Competition Act for a breach of an enforceable code provision in an approved code of conduct or a civil penalty provision in a mandatory code of conduct.

1.111 Schedule # to the Bill includes an amendment to the Corporations Act and the Credit Act to specify that the Court may make a community service order or a probation order in relation to a breach of an enforceable code provision in an approved code of conduct or a civil penalty provision in a mandatory code of conduct. This replicates the order available in section 83C of the Competition Act and provides a specific power for the Court to order these non-punitive remedies.

1.112 A community service order can be made by the court to direct the person who contravened the enforceable code provision in an approved code of conduct to perform a service, relating to the conduct, for the benefit of the community or a section of the community. [*Schedule #, item 4, paragraph 1101B(4)(da) of the Corporations Act and Schedule #, item 10, section 182A of the Credit Act*]

1.113 Schedule # of the Bill also includes an amendment to the Corporations Act and Credit Act to specify that a Court may make a probation order.

1.114 A probation order may be ordered by the Court for the purpose of ensuring that a person who contravened an enforceable code provision in an approved code of conduct or a civil penalty provision in a mandatory code of conduct does not engage in the conduct, similar conduct or related conduct, for a period of not longer than three years. Under this new order, the Court can make an order directing the person:

- to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure awareness of the responsibilities and obligations in relation to such conduct; and
- to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the

responsibilities and obligations in relation to such conduct;
and

- an order directing the person to revise the internal operations of the person’s business which led to the person engaging in such conduct.

1.115 This supplements the remedies available to ASIC when it brings an action for breach of enforceable code provisions in an approved code of conduct or civil penalty provisions in a mandatory code of conduct.

Infringement notices

1.116 Schedule # of the Bill allows ASIC to issue an infringement notice for breaches of an enforceable code provision in an approved code of conduct, or a civil penalty provision in a mandatory code of conduct. [*Schedule #, item 6, paragraph 1317DAN(e) of the Corporations Act and Schedule #, item 13, paragraph 288K(1)(ca) of the Credit Act*]

1.117 This amendment adds enforcement of the code provisions to the existing infringement notice regime administered by ASIC under the Corporations Act and the Credit Act.

1.118 Infringement notices are an administrative tool that ASIC can use to deter and punish breaches of the enforceable code provisions in an approved code of conduct and civil penalty provisions in a mandatory code of conduct. This can be used as an alternative to other civil or administrative proceedings.

1.119 ASIC may issue an infringement notice if it believes on reasonable grounds that a person has contravened an enforceable code provision in an approved code of conduct or a civil penalty provision in a mandatory code of conduct. This must be given to the subscriber within 12 months after the day on which the contravention is alleged to have taken place, and ASIC may give a person a single infringement for one contravention, and multiple infringements for multiple contraventions (section 1317DAM of the Corporations Act and section 288J of the Credit Act).

1.120 Under the Corporations Act, the amount of an infringement notice payable to ASIC for the breach of an enforceable code provision in an approved code of conduct or a civil penalty provision in a mandatory code of conduct is 12 penalty units for an individual and 60 penalty units for a body corporate.

1.121 For multiple contraventions, the amount multiplies the number of penalty units by the number of contraventions (subsection 1317DAP(2) of the Corporations Act).

1.122 Under the Credit Act, the amount of an infringement notice payable to ASIC for the breach of an enforceable code provision in an approved code of conduct or a civil penalty provision in a mandatory code of conduct is 50 penalty units for an individual and 250 penalty units for a body corporate.

1.123 For multiple contraventions, the amount multiplies the number of penalty units by the number of contraventions (subsection 288I(2) of the Credit Act).

Pecuniary penalties

1.124 A breach of an enforceable code provision in an approved code of conduct may attract pecuniary penalties of up to 300 penalty units.
[Schedule #, item 3, section 1101AC of the Corporations Act, and Schedule #, item 11, section 238D of the Credit Act]

1.125 A breach of a civil penalty provision in a mandatory code of conduct may attract pecuniary penalties of up to 1,000 penalty units.
[Schedule #, item 3, subsection 1101AD(3) of the Corporations Act and Schedule #, item 11, subsection 238E(3) of the Credit Act]

1.126 If a subscriber has breached an enforceable code provision in an approved code of conduct or a civil penalty in a mandatory code of conduct, ASIC may take action for an order for a pecuniary penalty from the subscriber.

1.127 For the avoidance of doubt, the body corporate multiplier contained in subsections 1317(3) and (4) of the Corporations Act does not apply to the enforceable code penalty framework.

1.128 Therefore, the maximum penalty amount for a body corporate is 300 penalty units for enforceable code provisions in approved codes of conduct, and up to 1,000 penalty units for civil penalty provisions in mandatory code provisions.

Other enforcement options

1.129 An enforceable code provision in an approved code of conduct or a mandatory code of conduct provision will form part of ‘financial services law’. Therefore, if a subscriber breaches any enforceable code provision in an approved code of conduct, or any provision in a mandatory code of conduct, ASIC may take administrative action under the enforcement options available to them.

1.130 ASIC will have a range of other civil enforcement options that it can apply to the Court in relation to breaches of the enforceable code provisions in an approved code of conduct or a civil penalty provision in a mandatory code of conduct.

1.131 These include applying for compensation on behalf of another person, injunctions, accepting and enforcing undertakings, non-punitive

orders such as corrective advertising or applying for a declaration that a particular contract relating to financial products or financial services be void or voidable.

Application and transitional provisions

1.132 The *Banking Code of Practice*, approved by ASIC on 18 December 2019, will be taken to be approved under the new section 1101A as outlined in this Chapter.

1.133 The Banking Code of Practice means the Banking Code of Practice published on 12 December 2019 by the Australian Banking Association.