

EXPOSURE DRAFT

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Inserts for
**Financial Sector Reform (Hayne Royal
Commission Response—Protecting
Consumers (2020 Measures)) Bill 2020:
FSRC rec 1.15 (enforceable code
provisions)**

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule 1.15	1 July 2020.	1 July 2020
2.		
3.		

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Schedule [1.15]—Enforceable code provisions

Corporations Act 2001

1 Section 9

Insert:

approved code of conduct means a code of conduct approved by ASIC by legislative instrument under section 1101A, and includes an approved code of conduct as varied.

code of conduct means a code of conduct that relates to any aspect of the activities of:

(a) financial services licensees; or

(b) authorised representatives of financial services licensees; or

(c) issuers of financial products;

being activities in relation to which ASIC has a regulatory responsibility.

enforceable code provision means a provision of an approved code of conduct identified by ASIC under subsection 1101A(2).

mandatory code of conduct means a code of conduct that is declared by regulations under section 1101AD to be mandatory.

subscriber, in relation to a code of conduct, means a person or entity that agrees, in a way required by the applicant for the code's approval, to be bound by the code.

2 Division 2 of Part 7.12 (heading)

Repeal the heading, substitute:

Division 2—Codes of conduct

3 Section 1101A

Repeal the section, substitute:

1101A Approved codes of conduct

- (1) If an application is made to approve a code of conduct, ASIC may, by legislative instrument, approve the code of conduct.

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- 1 (2) In the approval, ASIC may identify a provision of the code of
2 conduct as an enforceable code provision if ASIC considers that:
3 (a) the provision represents:
4 (i) a commitment by a subscriber to the code to act in a
5 particular way or in a manner consistent with attaining
6 the objectives of the code; or
7 (ii) a commitment to a person by a subscriber to the code;
8 and
9 (b) either:
10 (i) a breach of the provision could result in significant
11 detriment to the person; or
12 (ii) a breach of the provision could significantly undermine
13 the confidence of the Australian public, or a section of
14 the Australian public, in the provision of financial
15 services in this jurisdiction or those who provide
16 financial services in this jurisdiction.
- 17 (3) ASIC must not approve a code of conduct unless it is satisfied that:
18 (a) to the extent that the code is inconsistent with this Act or any
19 other law of the Commonwealth under which ASIC has
20 regulatory responsibilities—the code imposes an obligation
21 on a subscriber that is more onerous than that imposed by this
22 Act or any other law of the Commonwealth under which
23 ASIC has regulatory responsibilities; and
24 (b) each enforceable code provision is legally effective; and
25 (c) it is appropriate to approve the code, having regard to the
26 following matters:
27 (i) whether the obligations of subscribers to the code are
28 capable of being enforced;
29 (ii) whether all members (within the ordinary meaning of
30 the expression) of the applicant who provide financial
31 services covered by the code are likely to become
32 subscribers to the code;
33 (iii) whether other persons or entities providing financial
34 services covered by the code are likely to become
35 subscribers to the code;
36 (iv) whether the applicant has effective administrative
37 systems for monitoring compliance with the code and
38 making information obtained as a result of monitoring
39 publicly available;
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- 1 (v) whether the applicant has effective administrative
2 systems for maintaining, and making publicly available,
3 an accurate list of subscribers to the code;
4 (vi) any other matters that ASIC considers relevant.
- 5 (4) ASIC may, by legislative instrument, revoke an approval of an
6 approved code of conduct:
7 (a) on application by the applicant for the approval; or
8 (b) if ASIC ceases to be satisfied of the matters mentioned in
9 subsection (3); or
10 (c) if a review of the operation of the code is not completed by
11 the applicant within the timeframe required by
12 section 1101AB.
- 13 (5) Subsection (4) does not, by implication, limit the application of
14 subsection 33(3) of the *Acts Interpretation Act 1901*.

15 **1101AA Variations to approved codes of conduct**

- 16 (1) If an application is made to vary an approved code of conduct,
17 ASIC may, by legislative instrument, approve the variation.
- 18 (2) Subsections 1101A(2) and (3) apply in relation to an application
19 under subsection (1) as if it were an application to approve a code
20 of conduct.

21 **1101AB Review of approved codes of conduct**

- 22 (1) The applicant, in relation to an approved code of conduct, must
23 ensure that, every 5 years, an independent review is undertaken of
24 the operation of the approved code of conduct.
- 25 (2) A review under subsection (1) must make provision for public
26 consultation.
- 27 (3) A review of an approved code of conduct must be completed:
28 (a) for the first review—before the end of the 5 year period
29 beginning on the day the code of conduct was approved; and
30 (b) for a subsequent review—within 5 years after the completion
31 of the previous review.
- 32 (4) For the purposes of this section, a review is completed when a
33 report of the review is given to ASIC.
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- 1 (5) Within 10 business days of completing a review, the applicant
2 must publish the report of the review on its website.

3 **1101AC Obligation to comply with enforceable code provisions**

4 If a person holds out that they comply with an approved code of
5 conduct, the person must not breach an enforceable code provision
6 of the approved code of conduct.

7 Civil penalty: 300 penalty units.

8 **1101AD Mandatory codes of conduct**

- 9 (1) The regulations may prescribe a code of conduct for the purposes
10 of this Subdivision and declare it to be a mandatory code of
11 conduct.
- 12 (2) Regulations declaring a code of conduct a mandatory code of
13 conduct may also:
- 14 (a) confer functions and powers on a person or body for the
15 purposes of:
- 16 (i) monitoring compliance with the code of conduct; and
17 (ii) dealing with disputes or complaints arising under, or in
18 relation to, the code of conduct; and
19 (iii) dealing with other associated administrative matters; or
20 (b) provide for and in relation to:
- 21 (i) the keeping of records by persons bound by the code of
22 conduct; and
23 (ii) reporting obligations of such persons.
- 24 (3) If regulations prescribe a code of conduct, the code of conduct may
25 prescribe pecuniary penalties not exceeding 1,000 penalty units for
26 civil penalty provisions of the code of conduct.
- 27 (4) To avoid doubt, subsections 1317G(3) and (4) do not apply in
28 relation to the contravention of a civil penalty provision of a
29 mandatory code of conduct.

30 **1101AE Obligation to comply with mandatory code of conduct**

31 A person must not contravene a mandatory code of conduct.

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1 Division 3—Other matters

2 4 After paragraph 1101B(4)(d)

3 Insert:

4 (da) if a person’s conduct relates to the contravention of an
5 enforceable code provision or a civil penalty provision of a
6 mandatory code of conduct—an order directing the person to
7 perform a service specified in the order, and relating to the
8 conduct, for the benefit of the community or a section of the
9 community; or

10 (db) if a person’s conduct relates to the contravention of an
11 enforceable code provision or a civil penalty provision of a
12 mandatory code of conduct—an order for the purpose of
13 ensuring that the person does not engage in the conduct,
14 similar conduct, or related conduct, during the period of the
15 order (which must not be longer than 3 years), including:

16 (i) an order directing the person to establish a compliance
17 program for employees or other persons involved in the
18 person’s business, being a program designed to ensure
19 their awareness of the responsibilities and obligations in
20 relation to such conduct; and

21 (ii) an order directing the person to establish an education
22 and training program for employees or other persons
23 involved in the person’s business, being a program
24 designed to ensure their awareness of the
25 responsibilities and obligations in relation to such
26 conduct; and

27 (iii) an order directing the person to revise the internal
28 operations of the person’s business which led to the
29 person engaging in such conduct; or

30 5 Paragraph 1317C(ge)

31 After “section 1101A”, insert “or 1101AA”.

32 6 At the end of section 1317DAN

33 Add:

34 ; (e) civil penalty provisions of an approved code of conduct;

35 (f) civil penalty provisions of a mandatory code of conduct.

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7 In the appropriate position in subsection 1317E(3)

Insert:

section 1101AC	failure to comply with an enforceable code provision	financial services
a provision of a regulation made under section 1101AD that includes the words “civil penalty” and one or more amounts in penalty units at the foot of the provision	failure to comply with a civil penalty provision of a mandatory code of conduct	financial services

8 In the appropriate position in Chapter 10

Insert:

Part 10.44—Transitional provisions relating to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020

1671 Transitional—Banking Code of Practice

(1) The following provisions have effect:

- (a) the *Banking Code of Practice*, approved by ASIC on 18 December 2019, is taken to be approved under section 1101A, as substituted by Schedule [1.15] to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020*; and
- (b) Division 2 of Part 7.12, as inserted by that Schedule to that Act, applies to the *Banking Code of Practice*.

(2) In this section:

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1 *Banking Code of Practice* means the *Banking Code of Practice*,
2 published on 12 December 2019 by the Australian Banking
3 Association Incorporated (ABN 60 117 262 978).

4 Note: The *Banking Code of Practice* could in 2020 be viewed on the
5 Australian Banking Association's website
6 (<http://www.ausbanking.org.au>).

7 *National Consumer Credit Protection Act 2009*

8 **9 Subsection 5(1)**

9 Insert:

10 *approved code of conduct* means a code of conduct approved by
11 ASIC by legislative instrument under section 238A, and includes
12 an approved code of conduct as varied.

13 *code of conduct* means a code of conduct that relates to any aspect
14 of the activities of:

15 (a) licensees; or

16 (b) credit representatives;

17 being activities in relation to which ASIC has a regulatory
18 responsibility.

19 *community service order*: see section 182A.

20 *enforceable code provision* means a provision of an approved code
21 of conduct identified by ASIC under subsection 238A(2).

22 *mandatory code of conduct* means a code of conduct that is
23 declared by regulations under section 238E to be mandatory.

24 *probation order*: see section 182A.

25 *subscriber*, in relation to a code of conduct, means a person or
26 entity that agrees, in a way required by the applicant for the code's
27 approval, to be bound by the code.

28 **10 After section 182**

29 Insert:

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182A Community service and probation orders

- 1
- 2 (1) The court may, on application by ASIC, make a community service
3 order, a probation order, or both, against a person who has engaged
4 in conduct that:
- 5 (a) contravenes an enforceable code provision; or
6 (b) contravenes a civil penalty provision of a mandatory code of
7 conduct.
- 8 (2) A *community service order* is an order that directs the person to
9 perform a service that is specified in the order, and relates to the
10 conduct, for the benefit of the community or a section of the
11 community.
- 12 (3) A *probation order* is an order for the purpose of ensuring that the
13 person does not engage in the conduct, similar conduct, or related
14 conduct, during the period of the order (which must not be longer
15 than 3 years), including:
- 16 (a) an order directing the person to establish a compliance
17 program for employees or other persons involved in the
18 person's business, being a program designed to ensure their
19 awareness of the responsibilities and obligations in relation to
20 such conduct; and
- 21 (b) an order directing the person to establish an education and
22 training program for employees or other persons involved in
23 the person's business, being a program designed to ensure
24 their awareness of the responsibilities and obligations in
25 relation to such conduct; and
- 26 (c) an order directing the person to revise the internal operations
27 of the person's business which led to the person engaging in
28 such conduct.
- 29 (4) This section does not limit the court's powers under this Act.

11 Before Division 2 of Part 5-5

30
31 Insert:

32 Division 1A—Codes of conduct

33 238A Approved codes of conduct

- 34 (1) If an application is made to approve a code of conduct, ASIC may,
35 by legislative instrument, approve the code of conduct.
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- 1 (2) In the approval, ASIC may identify a provision of the code of
2 conduct as an enforceable code provision if ASIC considers that:
3 (a) the provision represents:
4 (i) a commitment by a subscriber to the code to act in a
5 particular way or in a manner consistent with attaining
6 the objectives of the code; or
7 (ii) a commitment to a person by a subscriber to the code;
8 and
9 (b) either:
10 (i) a breach of the provision could result in significant
11 detriment to the person; or
12 (ii) a breach of the provision could significantly undermine
13 the confidence of the Australian public, or a section of
14 the Australian public, in the provision of financial
15 services in this jurisdiction or those who provide
16 financial services in this jurisdiction.
- 17 (3) ASIC must not approve a code of conduct unless it is satisfied that:
18 (a) to the extent that the code is inconsistent with this Act or any
19 other law of the Commonwealth under which ASIC has
20 regulatory responsibilities—the code imposes an obligation
21 on a subscriber that is more onerous than that imposed by this
22 Act or any other law of the Commonwealth under which
23 ASIC has regulatory responsibilities; and
24 (b) each enforceable code provision is legally effective; and
25 (c) it is appropriate to approve the code, having regard to the
26 following matters:
27 (i) whether the obligations of subscribers to the code are
28 capable of being enforced;
29 (ii) whether all members of the applicant who provide
30 financial services covered by the code are likely to
31 become subscribers to the code;
32 (iii) whether other persons or entities providing financial
33 services covered by the code are likely to become
34 subscribers to the code;
35 (iv) whether the applicant has effective administrative
36 systems for monitoring compliance with the code and
37 making information obtained as a result of monitoring
38 publicly available;
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- 1 (v) whether the applicant has effective administrative
2 systems for maintaining, and making publicly available,
3 an accurate list of subscribers to the code;
4 (vi) any other matters that ASIC considers relevant.
- 5 (4) ASIC may, by legislative instrument, revoke an approval of an
6 approved code of conduct:
7 (a) on application by the applicant for the approval; or
8 (b) if ASIC ceases to be satisfied of the matters mentioned in
9 subsection (3); or
10 (c) if a review of the operation of the code is not completed by
11 the applicant within the timeframe required by section 238C.
- 12 (5) Subsection (4) does not, by implication, limit the application of
13 subsection 33(3) of the *Acts Interpretation Act 1901*.

14 **238B Variations to approved codes of conduct**

- 15 (1) If an application is made to vary an approved code of conduct,
16 ASIC may, by legislative instrument, approve the variation.
- 17 (2) Subsections 238A(2) and (3) apply in relation to an application
18 under subsection (1) as if it were an application to approve a code
19 of conduct.

20 **238C Review of approved codes of conduct**

- 21 (1) The applicant, in relation to an approved code of conduct, must
22 ensure that, every 5 years, an independent review is undertaken of
23 the operation of the approved code of conduct.
- 24 (2) A review under subsection (1) must make provision for public
25 consultation.
- 26 (3) A review of an approved code of conduct must be completed:
27 (a) for the first review—before the end of the 5 year period
28 beginning on the day the code of conduct was approved; and
29 (b) for a subsequent review—within 5 years after the completion
30 of the previous review.
- 31 (4) For the purposes of this section, a review is completed when a
32 report of the review is given to ASIC.

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- 1 (5) Within 10 business days of completing a review, the applicant
2 must publish the report of the review on its website.

3 **238D Obligation to comply with enforceable code provisions**

4 If a person holds out that they comply with an approved code of
5 conduct, the person must not breach an enforceable code provision
6 of the approved code of conduct.

7 Civil penalty: 300 penalty units.

8 **238E Mandatory codes of conduct**

- 9 (1) The regulations may prescribe a code of conduct for the purposes
10 of this Division and declare it to be a mandatory code of conduct.
- 11 (2) Regulations declaring a code of conduct a mandatory code of
12 conduct may also:
- 13 (a) confer functions and powers on a person or body for the
14 purposes of:
- 15 (i) monitoring compliance with the code of conduct; and
16 (ii) dealing with disputes or complaints arising under, or in
17 relation to, the code of conduct; and
18 (iii) dealing with other associated administrative matters; or
- 19 (b) provide for and in relation to:
- 20 (i) the keeping of records by persons bound by the code of
21 conduct; and
22 (ii) reporting obligations of such persons.
- 23 (3) If regulations prescribe a code of conduct, the code of conduct may
24 prescribe pecuniary penalties not exceeding 1,000 penalty units for
25 civil penalty provisions of the code of conduct.
- 26 (4) To avoid doubt, subsections 167B(1) and (2) do not apply in
27 relation to the contravention of a civil penalty provision of a
28 mandatory code of conduct.

29 **238F Obligation to comply with mandatory code of conduct**

30 A person must not contravene a mandatory code of conduct.

31 **12 Section 241**

32 Repeal the section.

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1 **13 After paragraph 288K(1)(c)**

2 Insert:

3 (ca) civil penalty provisions of an approved code of conduct;

4 (cb) civil penalty provisions of a mandatory code of conduct;

5 **14 Paragraph 327(1)(c)**

6 Omit “section 241”, substitute “section 238A or 238B”.