



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:EElb1655352

12 April 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email: enforceablecodes@treasury.gov.au

Dear Sir/Madam,

Enforceability of financial services industry codes

The Law Society of NSW appreciates the opportunity to comment on the consultation paper “Enforceability of financial services industry codes: Taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission”. The Law Society’s Business Law Committee contributed to this submission.

The Law Society welcomes the increased interest in the utility of industry codes in the financial services sector. However, industry codes should not be used to displace current law. We have some general comments, for the Treasury’s consideration, and we also address some of the questions in the consultation paper below.

General comments

We consider that the Banking Code of Practice sets the benchmark for industry codes. It has a lengthy history and is administered by the Australian Banking Association (“ABA”), a highly representative body of sophisticated financial institutions. However, the majority of industry codes have not been drafted and maintained with similar rigour. For instance, the ePayments Code has, for some time, been in need of updating to reflect emerging payment and data scraping technologies. Many of these emerging technologies enhance the responsible lending assessments of credit providers, but their use currently causes consumers to lose the protection of the Code in the event of an unauthorised transaction. Given that not all industry codes have been created or administered to an equal standard, the Treasury and the Australian Securities and Investments Commission (“ASIC”) should be cautious in seeking to render any provisions of a code mandatory unless it has been established by a representative body of the relevant regulated community, it is actively monitored and regularly reviewed.

Question 2: What issues need to be considered for financial services industry codes to contain ‘enforceable code provisions’?

We consider that enforceable industry codes may not be suitable for all segments of the financial services sector. For example, there are thousands of Australian Credit Licence

("ACL") holders, making up a highly diverse community, ranging from retail banks through to consumer leasing businesses. There is, in our opinion, no adequate representative industry body that is capable of drafting a universal industry code applicable and relevant to all ACL holders. Some segments of the ACL cohort may subscribe to a specific industry segment-endorsed code that reflects the considered views of its representative body and members and is actively applied and maintained. But the necessary degree of proactive engagement by industry stakeholders will not be uniform across the sector.

Question 14: Should only egregious, ongoing and serious breaches of enforceable provisions of an industry code attract a civil penalty?

We do consider that egregious, ongoing and serious breaches of enforceable provisions of an industry code would need to have clearly identifiable sanctions. It may be that providing the sanctions in the code itself may be the most effective way to achieve this.

Questions 15: In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?

There should be some right of appeal on points of law from external dispute resolution ("EDR"). There does not need to be a right of appeal on points of fact, as this would undermine the utility of EDR to consumers and financial institutions alike.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Elizabeth Espinosa,
President