

# SUBMISSION

## Submission to Treasury — Enforceability of financial services industry codes

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28 February 2020

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Treasury  
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Via email: [FSRCconsultations@treasury.gov.au](mailto:FSRCconsultations@treasury.gov.au)

28 February 2020

Dear Sir/Madam

**Royal Commission Recommendation 1.15 — Enforceability of financial services industry codes**

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Exposure draft consultation: Implementing Royal Commission Recommendation 1.15 — Enforceability of financial services industry codes.

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.9 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 16 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact Byron Addison, Senior Policy Advisor me on (02) 8079 0834 or by email [baddison@superannuation.asn.au](mailto:baddison@superannuation.asn.au) or me on (02) 8079 0808 or by email [gmccrea@superannuation.asn.au](mailto:gmccrea@superannuation.asn.au). We acknowledge that the deadlines for this consultation are tight but we would welcome the opportunity to discuss our submission with you if time permits.

Yours sincerely



Glen McCrea  
Deputy CEO and Chief Policy Officer

## A. Executive summary

ASFA is broadly supportive of the measures outlined in the Exposure Draft *enforceable code provisions* as a means of making codes of practice more effective for the consumers they are designed to protect.

We acknowledge that the draft legislation is designed to be principles-based to allow flexibility for the range of different codes it covers however we have some observations to make about the practical application of some of the proposals and the broad criteria chosen as the basis for determining whether a provision of the code should be an enforceable code provision.

Our chief observations are:

- Enforceable code provisions should be limited to those provisions which support consumer protections, define specific requirements or obligations, and do not overlap with other law, regulatory jurisdictions or penalty regimes.
- The criteria in the Exposure Draft for the determination of enforceable code provisions are broad and ASFA considers that the Explanatory Memorandum should be updated to make it clear what constitutes an enforceable code provision. It would be beneficial if further and more detailed examples could be provided for what types of provisions might and might not be enforceable.
- ASFA does not support the use of civil penalties in relation to Codes. They are likely to overlap with other enforcement arrangements and penalty regimes and discourage Codes adopting ambitious provisions which would otherwise lead to better practice For RSE licensees in many cases the fund members would ultimately pay for the cost of any civil penalties.
- If civil penalties are to apply they should be appropriate, proportionate and there should be a materiality test. If they relate to a systemic breach, the penalty should apply only once and not to individual breaches. Ideally any remedies for code breaches should be limited to the statutory right to compensation for loss.
- Non-enforceable provisions in a code may still provide substantial benefits to consumers through raising standards where possible and requiring an explanation to consumers where compliance is not possible.

### The Insurance in Superannuation Voluntary Code of Practice (The Insurance in Super Code)

As the example of the Insurance in Super Code demonstrates it may be difficult to determine enforceable code provisions where statute and regulation surrounding a code are in a state of flux and their impact on and overlap with the code are hard to forecast.

For example there are a number of looming legislative, regulatory and prudential reforms which will have an impact on the Insurance in Super Code including but not limited to: SPS 250 Insurance, the Royal Commission recommendation 4.8 *Removal of claims handling exemption*; changes to RG 165 *Licensing: Internal and external dispute resolution*; ASIC Report 633 (*Review of TPD Claims*) and CP 325 *Product design and distribution obligations*. Determining whether Insurance in Super Code provisions are 'inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities' or whether they impose 'an obligation on a subscriber that is more onerous than that imposed by this Act ...' is challenging where the relevant and overlapping legislation and prudential standards are fluid.

## B. General comments

### Civil penalties

We are not supportive of the use of civil penalties for breaches of enforceable code provisions for RSE licensees. RSE licensees operate in an already heavily regulated system and we see little benefit in adding to the existing regulatory burden. The existence of civil penalties may also act as a general discouragement for code owners to identify and put forward provisions which otherwise might be classed as enforceable.

It is not clear how civil penalties will be applied. If civil penalties are to be attached to breaches of enforceable code provisions they must be proportionate and appropriate. ASFA recommends that a materiality threshold apply. For systemic breaches, for example a system error which leads to multiple member communications being sent out after an enforceable deadline, the civil penalty should apply only once and not to each individual breach.

Ideally any remedies for code breaches should be limited to the statutory right to compensation for loss.

For certain RSE licensees any civil penalty would be payable ultimately by the broader membership, even if taken from a reserve. We question the benefit of the application of civil penalties in these circumstances.

### 300 penalty units

We understand that the reference to 300 penalty units in section 1101AC is meant to set 300 as a maximum but we recommend that this be amended to 'not exceeding 300' to make this clearer, in line with the wording used in subsection 1101AD(3).

### Enforceable code provisions

Commissioner Hayne in his Final Report made clear his support for self-regulation and that he did not anticipate that all provisions of a code would become enforceable. We also understand that the expectation of the Government is that the number of code provisions to be determined as enforceable is relatively few.

Finding the right balance will be crucial and we consider that the primary tests should be consumer protection and whether there is a clear and specific obligation.

However the criteria in the Exposure Draft for determining whether a code provision should be enforceable are very broad and for that reason capable of wider application to code provisions than we consider the policy intends. We accept that principles-based legislation is designed to provide flexibility and for that reason we recommend that the Explanatory Memorandum be updated to provide more detailed examples to clarify the application of the criteria which we understand should be narrow and targeted.

An example of the broadness of the criteria for determining enforceable provisions is the reference to 'could result in significant detriment to the person' in subparagraph 1101A(2)(b)(i). 'Could' is very open-ended and suggests that it might apply to circumstances where significant detriment may not in fact have occurred. It is also not clear what constitutes 'significant detriment' especially in a system where a member has a number of legal and internal and external dispute resolution avenues to gain compensation.

### Mandatory codes

The draft legislation does not mandate public consultation prior to Government prescribing a mandatory code. The Explanatory Memorandum does however indicate that 'any mandatory code will be prepared by

Treasury in consultation with ASIC, industry, and consumer groups, and will be subject to a public consultation process.’

ASFA recommends that public consultation be made mandatory or that government be required to consider prescribed matters. For example, whether the code is required to mitigate known or expected consumer detriment or that the cost and other impacts of implementing the code are not disproportionate to the expected consumer benefits.

### **Determining enforceable code provisions where related legislation and other instruments are in a state of flux**

The determination of enforceable code provisions will be challenging where statute, regulation and prudential standards relating to the code are in a state of flux and their impact on and degree of overlap with the code are hard to forecast.

In the case of the Insurance in Super Code there are a number of prospective legislative, regulatory and prudential reforms which will have an impact on the Code. These include but are not limited to:

- SPS 250 Insurance (which may affect the affordability and occupational default sections of the Code)
- The inclusion of insurance in APRA’s published heatmaps;
- The Royal Commission recommendation 4.8 *Removal of claims handling exemption* (section 7 of the Code);
- Changes arising from ASIC Report 633 (*Review of TPD Claims*) (section 7 of the Code);
- Changes to RG 165 *Licensing: Internal and external dispute resolution* (section 13 of the Code); and
- CP 325 *Product design and distribution obligations* (sections 4 and 9 of the Code).

Determining whether Insurance in Super Code provisions are ‘inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities’ or whether they impose ‘an obligation on a subscriber that is more onerous than that imposed by this Act ...’, which are requirements under subsection 1101A(3), will be challenging where the relevant and overlapping legislation and prudential standards are fluid.

### **‘If not, why not’**

Some codes contain ‘if not, why not’ provisions that set a target or requirement which is designed to be a benchmark but which recognise that for various reasons some code signatories may not be able to meet the benchmark because of characteristics specific to their membership profile.

Such provisions are not intended to be strictly enforceable but may provide real benefits to members where some signatories to the code comply with them while others who are unable to provide reasons to their members and other related parties to explain why they cannot meet the requirement.

It would be useful for further clarification to be provided for the treatment of such provisions in a regime of approved codes of conduct.