

10 April 2019

APRA Capability Review Secretariat
The Treasury
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PARKES ACT 2600

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By email: apracapabilityreview@treasury.gov.au

Dear Sir/Madam,

Thank you for the opportunity to provide input into the APRA Capability Review.

Maurice Blackburn notes the purpose of the review, as iterated in the Treasurer's media release of 11 February 2019:¹

The APRA capability review will provide a forward-looking assessment of APRA's ability to respond to an environment of growing complexity and emerging risks for APRA's regulated sectors.

Maurice Blackburn further notes that the review forms part of the Government's response to the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission):²

*Recommendation 6.13:
APRA and ASIC should each be subject to at least quadrennial capability reviews. A capability review should be undertaken for APRA as soon as is reasonably practicable.*

We further note that there is bipartisan support for this review process³.

We note that the Terms of Reference⁴ spells out that in achieving the objectives of this Review, the Panel should evaluate:

Appropriate resource allocation, responsive to emerging issues, and efficient utilisation, and

Staff with necessary expertise ... supported by appropriate tools.

To assist the panel in achieving this, Maurice Blackburn restricts its comments to one element of the 'growing complexity and emerging risks' impacting APRA – that being **the**

¹ <http://jaf.ministers.treasury.gov.au/media-release/015-2019/>

² <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>, p.41

³ <https://www.alp.org.au/media/1567/190222-labor-royal-commission-response.pdf>

⁴ https://treasury.gov.au/sites/default/files/2019-03/c2019-t368439-apra_tor_0.pdf

importance of ensuring that APRA is appropriately resourced to appropriately monitor the behaviours of organisations subject to industry codes of practice.

Specifically, we restrict our comments to matters relating to:

- The Financial Service Council's Life Insurance Code of Practice, and
- The Insurance in Superannuation Voluntary Code of Practice

We draw the panel's attention to two other recommendations of the Royal Commission:⁵

Recommendation 1.15 – Enforceable code provisions

The law should be amended to provide:

- *that ASIC's power to approve codes of conduct extends to codes relating to all APRA-regulated institutions and ACL 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;*
- *for remedies, modelled on those now set out in Part VI of the Competition and Consumer Act, for breach of an 'enforceable code provision'; and*
- *for the establishment and imposition of mandatory financial services industry codes.*

and

Recommendation 4.9 – Enforceable code provisions:

As referred to in Recommendation 1.15, the law should be amended to provide for enforceable provisions of industry codes and for the establishment and imposition of mandatory industry codes.

In respect of the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice, the Financial Services Council, the Insurance Council of Australia and ASIC should take all necessary steps, by 30 June 2021, to have the provisions of those codes that govern the terms of the contract made or to be made between the insurer and the policyholder designated as 'enforceable code provisions'.

We note that these recommendations are not dissimilar to the recommendations 4.1 to 4.4 of the Joint Parliamentary Committee on Corporations and Financial Services inquiry into the life insurance industry.⁶ Similar themes can be found in the damning assessment of the industry codes provided by the Productivity Commission in its report into its investigation of the superannuation industry.⁷

The Royal Commission, like previous inquiries, has determined that industry codes within the financial services industry have failed to protect consumers from corporate misconduct, and that enforceability through ASIC is warranted.

⁵ Ibid, p.24 and 33

⁶ https://www.aph.gov.au/~media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en, p.xvi to xvii

⁷ <https://www.pc.gov.au/inquiries/completed/superannuation/assessment/report/superannuation-assessment-overview.pdf>, ref recommendation 17, p.71

Maurice Blackburn has long argued⁸ that the industry codes within the insurance industry should be required to satisfy the requirements of Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct⁹, including a requirement for ASIC approval and enforceability of robust sanctions.

In April 2018, Maurice Blackburn and CALC wrote to the Chairs of Australia's 20 largest super funds in relation to the code. Part of that letter read:

.... the Code must be binding across the sector. It must capture all trustees that offer insurance within an APRA-regulated superannuation fund.... We consider that ASIC's approval of industry codes is essential to provide consumer confidence in them, and note that ASIC expects a code to be enforceable and effectively administered.

We have also argued that compliance with an enforceable code should be a condition of holding an RSE licence.

In our experience, voluntary financial service industry codes have not worked in the banking and insurance sectors, particularly for consumers. One of the primary reasons for this is that the 'owners of the codes' are generally member-based organisations who are there to represent the interests of their membership¹⁰. Quite often their revenue is derived solely from their membership. This means that they would be understandably reticent to take enforceable action against their members.

To this end, Maurice Blackburn would like to see APRA resourced to play a greater role in the investigation and prosecution of breaches of the enforceable code provisions. We believe that industry-based compliance mechanisms such as the Life Code Compliance Committee (LCCC) are irredeemably conflicted, and should be overseen (if not replaced) by APRA.

Given that there is now bipartisan support for implementing the spirit of the Royal Commission's recommendations on this matter, it is vitally important that APRA be resourced and staffed appropriately to do this.

The final report of the Royal Commission spells out APRA's responsibilities as follows¹¹:

APRA is responsible for (among other things):

- *the licensing, authorisation or registration of the relevant entity subject to the Act;*
- *the suspension, removal, disqualification, revocation or cancellation of that licence (and persons within an entity) issued under the Act;*
- *giving directions where it believes an entity has failed to comply with the Act;*
- *conducting investigations where it believes there is a breach of the Act;*
- *determining prudential standards for conduct relating to prudential matters.*

Maurice Blackburn submits that 'appropriate resource allocation' would mean ensuring that APRA is appropriately resourced to complete the above tasks, allowing for the increased

⁸ See, for example, our submission to the Royal Commission: <https://www.mauriceblackburn.com.au/media/4018/maurice-blackburn-submission-to-the-financial-services-royal-commission.pdf>; our submission to the PJC inquiry into the Life Insurance Industry <https://www.aph.gov.au/DocumentStore.ashx?id=fc48061b-255d-4a69-b640-37bc8f63e7c1&subId=460591>

⁹ <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

¹⁰ E.g. the Australian Banking Association (ABA); the Financial Services Counsel (FSC); Insurance Council of Australia (ICA)

¹¹ <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>, p.446 - 447

workload generated when the insurance related codes of practice (or relevant sections thereof) come under ASIC's enforcement.

We believe that, as part of its role of '*...protecting the interests of depositors, policyholders and superannuation fund members*'¹², APRA should be playing a greater role in reducing the power imbalance that currently exists when a consumer is in dispute with an entity which is part of an industry which is bound by its own, unregulated code.

Maurice Blackburn believes that similar resourcing issues will apply to APRA when other financial service codes come under ASIC's enforcement regime.

Please do not hesitate to contact me and my colleagues on 03 9605 2792 or via KShaw@mauriceblackburn.com.au if we can further assist with Treasury's important work.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'KShaw', is positioned above the typed name.

Kim Shaw
Principal Lawyer
Maurice Blackburn

¹² <https://www.apra.gov.au/about-apra>