

12 April 2019

Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email enforceablecodes@treasury.gov.au

Dear Sir/Madam,

RE: ENFORCEABILITY OF FINANCIAL SERVICES CODES CONSULTATION PAPER

I refer to the Treasury Consultation Paper – *Enforceability of Financial Services Codes – Taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission*. The Finance Sector Union welcomes the opportunity to make comment on the Consultation Paper and provides the following submission.

The Union believes that the development of enforceable industry codes is a sensible and constructive recommendation arising from the Royal Commission.

The Union's submission focuses on three matters:

1. Codes in the sector affect the rights, obligations and privileges of all stakeholders, including particularly, from the Union's perspective, workers in the sector.
2. Where the Royal Commission, and others focus on the development and review of Codes by "Industry". "Industry" should be understood as affected stakeholders rather than simply financial services entities.
3. There are currently a number of instruments that operate on a sector wide basis and regulate and affect rights. The current informality of these instruments is inappropriate. They should be incorporated into Codes reviewed and approved by ASIC.

Current codes in the sector affect the rights, obligations and privileges of all stakeholders

The current approved codes are referred to in the consultation paper. For the purpose of this discussion we focus on the Code of Banking Practice as an example of a relevant Code.

The Code is written as a series of commitments made by signatories around the provision of banking services. Most of these commitments provide assurances as to how entities will deal with their customers. These customer dealings are primarily done by staff. A number of code provisions explicitly relate to the provision of training to employees and the standard of work to be performed by staff members.

Staff members are held to account by reference to the code. Staff are routinely subject to performance management, and misconduct allegations on the basis that they breached commitments that Banks made in the code. Involvement in code breaches is a gate-closer for short term incentive payments and bonus schemes for almost all workers.

The Union refers to the remedies proposed by the Commission and set out at page 8 of the consultation paper. A number of the potential remedies could be directed towards individuals rather than financial services entities.

The consultation notes the traditional role of codes as *“a vehicle for industries to self-regulate and set standards on how to comply with and exceed what is required by law”*.

The Union understands the proposal contemplated by the Royal Commission would move substantially beyond the current regime. Rather than being instruments of self-regulation they would form a part of the tertiary level of regulation of the sector.

ASIC approved enforceable codes would sit comfortably alongside the already existing powers conferred on ASIC to create, modify, or omit from operation various provisions of the *Corporations Act* affecting conduct and behaviour of financial services entities. Such codes would set out legally enforceable obligations.

The current code regime is already used by banks as a basis to affect the employment and remuneration of workers. Where such codes become more prescriptive and enforceable, it is inevitable that they will be relied upon even more by Banks to regulate their employment relationships.

“Industry” should be understood as affected stakeholders rather than simply financial services entities.

The traditional process for code approval in the sector is that they are developed by financial services entities and brought to ASIC for approval. ASIC may then consult with various affected groups, particularly consumer representative organisations, about their views and perspectives on the proposed code.

The development of codes with enforceable provisions is likely to mean that prescriptive regulation of rights and obligations within the sector occurs less within contracts or statute.

Codes in the sector have often functioned more as marketing material than as legal documents. The observations of Commissioner Hayne, that if such documents are to be taken as more than “public relations puffs, the promises made must be made seriously”.

Given such an increased importance, the traditional process is no longer appropriate. Codes should not be developed by financial services entities and brought to ASIC to check off and for approval, but rather developed by those whose rights and obligations are to be affected – the entities, consumers, impacted workers and government.

Further, codes should be subject to regular review and scrutiny. The Union believes it appropriate for all affected stakeholders to have a role in ongoing review, and to ensure there is a formal assessment of the performance of the Code (with a view to making necessary improvements) at least every three years.

Approved codes should be the instrument of choice for the regulation of rights and obligations between entities

The Union contrasts codes such as the Code of Banking Practice with other instruments that operate by voluntary cooperation between financial services entities – particularly the Australian Banking Association Conduct Background Check Protocol (which regulates the sharing of information about

bank employees (other than financial advisers) and the Reference Check Information Sharing Protocol (which performs a similar function in connection with financial advisers).

These protocols require entities that have signed up to share information about worker's alleged conduct without the affected worker having any capacity to challenge the information. From the perspective of Union members, these protocols operate as unchallengeable blacklists.

The Union believes that the incorporation of protocols like these into approved codes would be to the benefit of all stakeholders. Such a change would like to provide for:

- an approval process where ASIC engaged with stakeholders,
- an enforcement process that was reviewable by Courts and a

Regards,



Julia Angrisano
National Secretary
Finance Sector Union