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Manager
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The Treasury
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Dear Sir/Madam

Submission on the enforceability of financial services industry codes

Application of industry codes with nominated mandatory provisions

In general, I would support amendments to the Corporations Act 2001 (CA) requiring industry codes to apply to all banking and financial sectors and for those codes to have nominated mandatory provisions. However, in relation to the application of the codes, I would argue that the current approval process should be repealed and replaced by provisions requiring ASIC to register all industry codes.

An approval process implies that there has been substantial vetting of a code and that the terms of the code have the express imprimatur of the regulator. This process has long ceased to be used in the issue of prospectuses. While there are significant differences in the underlying policy regulating prospectuses i.e. that the investor bears some of the risk, the adoption of a registration process would quarantine ASIC from criticism in the event that a code was found not to increase industry standards, or was used by a financial institution to evade contractual obligations. Similarly, if the code was inconsistent with, or in breach of, other Commonwealth and State laws.

I would support the implementation of a registration process with specific provisions in the Corporations Act (CA) empowering ASIC to issue orders varying the application of a code, or specific provisions of a code. This would arise where it was necessary to clarify issues regarding a code's application, or to remove any ambiguity in the interpretation or operation of the code's provisions. To give flexibility in the regulation of a code, provisions should be included in the CA that would allow ASIC to issue orders that have retrospective operation. This would cover circumstances where it was necessary to ensure that a financial institution applies the provisions of an applicable code in a fair, reasonable and ethical manner.

As a corollary, the CA should be amended to authorise ASIC (after consultation with APRA or other relevant regulators) to issue enforceable general and specific directions regarding obligations under a code. General directions would be given where there is a systemic failure by institutions to adhere to the principles

underpinning a code, or specific provisions of a code as reported by the relevant independent body which administers or enforces the code.
Where a code is used by a financial institution to gain an unfair advantage or to act unconscionably, or is being used to evade contractual obligations, this conduct should be addressed through ASIC issuing a specific direction to the institution. The purpose of the direction would be to require the institution to take corrective action, including the adoption of a compliance and training regime which would operate automatically as a condition attaching to the institution's financial services licence or authority under the Banking Act 1959. The issue of a special direction should also be triggered at the request of the relevant independent body which administers or enforces the applicable code.

Mandatory Codes

Where it is proposed to make a code mandatory, I would support amendments to the CA to prescribe the code by regulation along similar lines to the provisions under Part VI of the Competition and Consumer Act 2010 (CCA). However, where a code is prescribed under the CA, there should be transitional provisions in the Act for the mandatory code to prevail in the event of any inconsistency between the code and the terms of the contract relating to the supply of a financial or banking service[1]. There should also be an obligation under the CA for the financial institution to inform ASIC where there is an apparent conflict or ambiguity between provisions of an applicable mandatory code and the contractual arrangements with customers for the provision of a financial service.

Adoption of remedies under the Competition and Consumer Act 2010

In general, I would agree with the CA being amended to include the range of statutory remedies currently available under the Competition and Consumer Act 2010 (CCA) for breaches of prescribed mandatory codes. However, the remedies should also apply were there are breaches of code provisions nominated by financial institutions as having a mandatory application to the supply of financial and banking services

Importantly, the remedies available should apply to a person who has an indirect interest arising out of the provision of a financial service where the person has suffered loss through non-compliance with the provisions of a mandatory code or mandatory provisions of a code.

The advantage in adopting the CCA enforcement provisions is that they include statutory remedies which are wider in application than remedies available under the common law. Importantly, they would include powers for a Court to modify contractual terms relating to the supply of a financial or banking service as well as a power to rescind contracts where third parties are subsequently involved as a result of the failure to render a service to the customer. This would be an important remedy where there was an egregious breach of a mandatory provision by a financial institution to act in a fair, reasonable and ethical manner. This could arise where a financial institution, (such as a bank) exercises rights to sell a mortgaged rural property during times of severe drought without taking reasonable steps to explore other viable alternatives.

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[1] The reference to banking services has been included to cover financial products provided by a bank which are excluded under s.764A of the CA but which are be covered under the Banking Code of Practice.

If the enforcement provisions of the CCA are adopted by legislative amendment, it is recommended that those provisions be modified so that a financial institution is precluded from enforcing contractual rights pending once enforcement proceedings have commenced. However, this would be subject to the court making orders to the contrary.

Monitoring Industry Codes

I would support the creation of an industry funded body to monitor the drafting, operation and modification of registered and mandatory codes prescribed under the CA. To operate effectively, the board of the body should comprise of industry representatives, nominees from the Australia Financial Complaints Authority and other industry stakeholders including enforcement bodies established under the various codes. Given that the body will deal with the 12 industry codes listed in Appendix B of consultation paper (and any codes that may be subsequently implemented under CA), there will be a need to establish a number of expert sub-committees to assist the board in the performance of its functions. It is anticipated that these committees would review each of the registered codes on a regular basis, or as required by the board, and would assist in the negotiation and drafting of amendments to the codes. While this may be an internal governance issue, matters pertaining to the functions of the new body, including the review of registered codes, should be underpinned by legislation as is the case with Australian Financial Complaints Authority.

In the establishment of monitoring body, there is an issue as to whether ASIC should have direct involvement in the body or whether the body should act in an independent capacity. In my view ASIC should not be a member of the body. However, the body should report directly to ASIC on the review of industry codes, perhaps on a half yearly basis, and should be subject to general direction by ASIC in the exercise of its functions.

A key function of the monitoring body should be to make recommendations on the need for regulatory intervention by ASIC where systemic breaches of a code are detected, or where amendments to a code are necessary to improve industry standards. ASIC should also have powers under the CA to refer matters to the monitoring body for review and consideration and, if necessary, to give directions as to the drafting of industry codes. This would be additional to the issue of guidelines for the approval or registration of codes depending on the process adopted under the CA.

Pursuance of Court remedies

In general terms, I would support the proposal that an election by a consumer to resolve a matter by way of an EDR mechanism should preclude the person from subsequently pursuing a court remedy. However, the CA should give a court a discretion where it is in the interests of justice for the consumer to litigate the matter before the court. For, example, where there was apprehended bias in favour of the financial institution which has breached a code provision; or where the consumer was suffering from some special disadvantage (was illiterate or lacked capacity); or where the circumstances prevented the consumer from commencing court proceedings in the first instance and have precluded the consumer gaining an adequate remedy through the EDR mechanism. The court should also be given a discretion where ancillary orders in equity are required to adequately resolve the

matter. However, any application to the court should be limited to a period of three years from the date proceedings under the EDR mechanism ended, or as otherwise prescribed by regulation.

In conclusion, I would like to thank the Taskforce for the opportunity to provide this submission in response its consultation paper.

Yours sincerely

Peter R Boland
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