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| **EXPOSURE DRAFT** |

Inserts for

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.15 (enforceable code provisions)

| Commencement information |
| --- |
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Schedule 1.15 | 1 July 2020. | 1 July 2020 |
| 2.  |  |  |
| 3.  |  |  |

Schedule [1.15]—Enforceable code provisions

Corporations Act 2001

1 Section 9

Insert:

***approved code of conduct*** means a code of conduct approved by ASIC by legislative instrument under section 1101A, and includes an approved code of conduct as varied.

***code of conduct*** means a code of conduct that relates to any aspect of the activities of:

 (a) financial services licensees; or

 (b) authorised representatives of financial services licensees; or

 (c) issuers of financial products;

being activities in relation to which ASIC has a regulatory responsibility.

***enforceable code provision*** means a provision of an approved code of conduct identified by ASIC under subsection 1101A(2).

***mandatory code of conduct*** means a code of conduct that is declared by regulations under section 1101AD to be mandatory.

***subscriber***, in relation to a code of conduct, means a person or entity that agrees, in a way required by the applicant for the code’s approval, to be bound by the code.

2 Division 2 of Part 7.12 (heading)

Repeal the heading, substitute:

Division 2—Codes of conduct

3 Section 1101A

Repeal the section, substitute:

1101A Approved codes of conduct

 (1) If an application is made to approve a code of conduct, ASIC may, by legislative instrument, approve the code of conduct.

 (2) In the approval, ASIC may identify a provision of the code of conduct as an enforceable code provision if ASIC considers that:

 (a) the provision represents:

 (i) a commitment by a subscriber to the code to act in a particular way or in a manner consistent with attaining the objectives of the code; or

 (ii) a commitment to a person by a subscriber to the code; and

 (b) either:

 (i) a breach of the provision could result in significant detriment to the person; or

 (ii) a breach of the provision could significantly undermine the confidence of the Australian public, or a section of the Australian public, in the provision of financial services in this jurisdiction or those who provide financial services in this jurisdiction.

 (3) ASIC must not approve a code of conduct unless it is satisfied that:

 (a) to the extent that the code is inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities—the code imposes an obligation on a subscriber that is more onerous than that imposed by this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and

 (b) each enforceable code provision is legally effective; and

 (c) it is appropriate to approve the code, having regard to the following matters:

 (i) whether the obligations of subscribers to the code are capable of being enforced;

 (ii) whether all members (within the ordinary meaning of the expression) of the applicant who provide financial services covered by the code are likely to become subscribers to the code;

 (iii) whether other persons or entities providing financial services covered by the code are likely to become subscribers to the code;

 (iv) whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available;

 (v) whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code;

 (vi) any other matters that ASIC considers relevant.

 (4) ASIC may, by legislative instrument, revoke an approval of an approved code of conduct:

 (a) on application by the applicant for the approval; or

 (b) if ASIC ceases to be satisfied of the matters mentioned in subsection (3); or

 (c) if a review of the operation of the code is not completed by the applicant within the timeframe required by section 1101AB.

 (5) Subsection (4) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.

1101AA Variations to approved codes of conduct

 (1) If an application is made to vary an approved code of conduct, ASIC may, by legislative instrument, approve the variation.

 (2) Subsections 1101A(2) and (3) apply in relation to an application under subsection (1) as if it were an application to approve a code of conduct.

1101AB Review of approved codes of conduct

 (1) The applicant, in relation to an approved code of conduct, must ensure that, every 5 years, an independent review is undertaken of the operation of the approved code of conduct.

 (2) A review under subsection (1) must make provision for public consultation.

 (3) A review of an approved code of conduct must be completed:

 (a) for the first review—before the end of the 5 year period beginning on the day the code of conduct was approved; and

 (b) for a subsequent review—within 5 years after the completion of the previous review.

 (4) For the purposes of this section, a review is completed when a report of the review is given to ASIC.

 (5) Within 10 business days of completing a review, the applicant must publish the report of the review on its website.

1101AC Obligation to comply with enforceable code provisions

 If a person holds out that they comply with an approved code of conduct, the person must not breach an enforceable code provision of the approved code of conduct.

Civil penalty: 300 penalty units.

1101AD Mandatory codes of conduct

 (1) The regulations may prescribe a code of conduct for the purposes of this Subdivision and declare it to be a mandatory code of conduct.

 (2) Regulations declaring a code of conduct a mandatory code of conduct may also:

 (a) confer functions and powers on a person or body for the purposes of:

 (i) monitoring compliance with the code of conduct; and

 (ii) dealing with disputes or complaints arising under, or in relation to, the code of conduct; and

 (iii) dealing with other associated administrative matters; or

 (b) provide for and in relation to:

 (i) the keeping of records by persons bound by the code of conduct; and

 (ii) reporting obligations of such persons.

 (3) If regulations prescribe a code of conduct, the code of conduct may prescribe pecuniary penalties not exceeding 1,000 penalty units for civil penalty provisions of the code of conduct.

 (4) To avoid doubt, subsections 1317G(3) and (4) do not apply in relation to the contravention of a civil penalty provision of a mandatory code of conduct.

1101AE Obligation to comply with mandatory code of conduct

 A person must not contravene a mandatory code of conduct.

Division 3—Other matters

4 After paragraph 1101B(4)(d)

Insert:

 (da) if a person’s conduct relates to the contravention of an enforceable code provision or a civil penalty provision of a mandatory code of conduct—an order directing the person to perform a service specified in the order, and relating to the conduct, for the benefit of the community or a section of the community; or

 (db) if a person’s conduct relates to the contravention of an enforceable code provision or a civil penalty provision of a mandatory code of conduct—an order for the purpose of ensuring that the person does not engage in the conduct, similar conduct, or related conduct, during the period of the order (which must not be longer than 3 years), including:

 (i) an order directing the person to establish a compliance program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to such conduct; and

 (ii) an order directing the person to establish an education and training program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to such conduct; and

 (iii) an order directing the person to revise the internal operations of the person’s business which led to the person engaging in such conduct; or

5 Paragraph 1317C(ge)

After “section 1101A”, insert “or 1101AA”.

6 At the end of section 1317DAN

Add:

 ; (e) civil penalty provisions of an approved code of conduct;

 (f) civil penalty provisions of a mandatory code of conduct.

7 In the appropriate position in subsection 1317E(3)

Insert:

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| --- | --- | --- |
| section 1101AC | failure to comply with an enforceable code provision | financial services |
| a provision of a regulation made under section 1101AD that includes the words “civil penalty” and one or more amounts in penalty units at the foot of the provision | failure to comply with a civil penalty provision of a mandatory code of conduct | financial services |

8 In the appropriate position in Chapter 10

Insert:

Part 10.44—Transitional provisions relating to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020

1671 Transitional—Banking Code of Practice

 (1) The following provisions have effect:

 (a) the *Banking Code of Practice*, approved by ASIC on 18 December 2019, is taken to be approved under section 1101A, as substituted by Schedule [1.15] to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020*; and

 (b) Division 2 of Part 7.12, as inserted by that Schedule to that Act, applies to the *Banking Code of Practice*.

 (2) In this section:

***Banking Code of Practice*** means the *Banking Code of Practice*, published on 12 December 2019 by the Australian Banking Association Incorporated (ABN 60 117 262 978).

Note: The *Banking Code of Practice* could in 2020 be viewed on the Australian Banking Association’s website (http://www.ausbanking.org.au).

National Consumer Credit Protection Act 2009

9 Subsection 5(1)

Insert:

***approved code of conduct*** means a code of conduct approved by ASIC by legislative instrument under section 238A, and includes an approved code of conduct as varied.

***code of conduct*** means a code of conduct that relates to any aspect of the activities of:

 (a) licensees; or

 (b) credit representatives;

being activities in relation to which ASIC has a regulatory responsibility.

***community service order***: see section 182A.

***enforceable code provision*** means a provision of an approved code of conduct identified by ASIC under subsection 238A(2).

***mandatory code of conduct*** means a code of conduct that is declared by regulations under section 238E to be mandatory.

***probation order***: see section 182A.

***subscriber***, in relation to a code of conduct, means a person or entity that agrees, in a way required by the applicant for the code’s approval, to be bound by the code.

10 After section 182

Insert:

182A Community service and probation orders

 (1) The court may, on application by ASIC, make a community service order, a probation order, or both, against a person who has engaged in conduct that:

 (a) contravenes an enforceable code provision; or

 (b) contravenes a civil penalty provision of a mandatory code of conduct.

 (2) A ***community service order*** is an order that directs the person to perform a service that is specified in the order, and relates to the conduct, for the benefit of the community or a section of the community.

 (3) A ***probation order*** is an order for the purpose of ensuring that the person does not engage in the conduct, similar conduct, or related conduct, during the period of the order (which must not be longer than 3 years), including:

 (a) an order directing the person to establish a compliance program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to such conduct; and

 (b) an order directing the person to establish an education and training program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to such conduct; and

 (c) an order directing the person to revise the internal operations of the person’s business which led to the person engaging in such conduct.

 (4) This section does not limit the court’s powers under this Act.

11 Before Division 2 of Part 5‑5

Insert:

Division 1A—Codes of conduct

238A Approved codes of conduct

 (1) If an application is made to approve a code of conduct, ASIC may, by legislative instrument, approve the code of conduct.

 (2) In the approval, ASIC may identify a provision of the code of conduct as an enforceable code provision if ASIC considers that:

 (a) the provision represents:

 (i) a commitment by a subscriber to the code to act in a particular way or in a manner consistent with attaining the objectives of the code; or

 (ii) a commitment to a person by a subscriber to the code; and

 (b) either:

 (i) a breach of the provision could result in significant detriment to the person; or

 (ii) a breach of the provision could significantly undermine the confidence of the Australian public, or a section of the Australian public, in the provision of financial services in this jurisdiction or those who provide financial services in this jurisdiction.

 (3) ASIC must not approve a code of conduct unless it is satisfied that:

 (a) to the extent that the code is inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities—the code imposes an obligation on a subscriber that is more onerous than that imposed by this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and

 (b) each enforceable code provision is legally effective; and

 (c) it is appropriate to approve the code, having regard to the following matters:

 (i) whether the obligations of subscribers to the code are capable of being enforced;

 (ii) whether all members of the applicant who provide financial services covered by the code are likely to become subscribers to the code;

 (iii) whether other persons or entities providing financial services covered by the code are likely to become subscribers to the code;

 (iv) whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available;

 (v) whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code;

 (vi) any other matters that ASIC considers relevant.

 (4) ASIC may, by legislative instrument, revoke an approval of an approved code of conduct:

 (a) on application by the applicant for the approval; or

 (b) if ASIC ceases to be satisfied of the matters mentioned in subsection (3); or

 (c) if a review of the operation of the code is not completed by the applicant within the timeframe required by section 238C.

 (5) Subsection (4) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.

238B Variations to approved codes of conduct

 (1) If an application is made to vary an approved code of conduct, ASIC may, by legislative instrument, approve the variation.

 (2) Subsections 238A(2) and (3) apply in relation to an application under subsection (1) as if it were an application to approve a code of conduct.

238C Review of approved codes of conduct

 (1) The applicant, in relation to an approved code of conduct, must ensure that, every 5 years, an independent review is undertaken of the operation of the approved code of conduct.

 (2) A review under subsection (1) must make provision for public consultation.

 (3) A review of an approved code of conduct must be completed:

 (a) for the first review—before the end of the 5 year period beginning on the day the code of conduct was approved; and

 (b) for a subsequent review—within 5 years after the completion of the previous review.

 (4) For the purposes of this section, a review is completed when a report of the review is given to ASIC.

 (5) Within 10 business days of completing a review, the applicant must publish the report of the review on its website.

238D Obligation to comply with enforceable code provisions

 If a person holds out that they comply with an approved code of conduct, the person must not breach an enforceable code provision of the approved code of conduct.

Civil penalty: 300 penalty units.

238E Mandatory codes of conduct

 (1) The regulations may prescribe a code of conduct for the purposes of this Division and declare it to be a mandatory code of conduct.

 (2) Regulations declaring a code of conduct a mandatory code of conduct may also:

 (a) confer functions and powers on a person or body for the purposes of:

 (i) monitoring compliance with the code of conduct; and

 (ii) dealing with disputes or complaints arising under, or in relation to, the code of conduct; and

 (iii) dealing with other associated administrative matters; or

 (b) provide for and in relation to:

 (i) the keeping of records by persons bound by the code of conduct; and

 (ii) reporting obligations of such persons.

 (3) If regulations prescribe a code of conduct, the code of conduct may prescribe pecuniary penalties not exceeding 1,000 penalty units for civil penalty provisions of the code of conduct.

 (4) To avoid doubt, subsections 167B(1) and (2) do not apply in relation to the contravention of a civil penalty provision of a mandatory code of conduct.

238F Obligation to comply with mandatory code of conduct

 A person must not contravene a mandatory code of conduct.

12 Section 241

Repeal the section.

13 After paragraph 288K(1)(c)

Insert:

 (ca) civil penalty provisions of an approved code of conduct;

 (cb) civil penalty provisions of a mandatory code of conduct;

14 Paragraph 327(1)(c)

Omit “section 241”, substitute “section 238A or 238B”.