

# Enforceable code provisions

Recommendation	Existing law	Summary of proposed reform	Comments
<p><b>Recommendation 1.15</b></p> <p>The law should be amended to provide:</p> <ul style="list-style-type: none"><li>• that ASIC's power to approve codes of conduct extends to codes relating to all APRA-regulated institutions and ACL holders;</li><li>• 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;</li><li>• 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;</li><li>• 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</li><li>• for the establishment and imposition of mandatory financial services industry codes.</li></ul>	<p>ASIC can approve industry codes of conduct in relation to any aspect of financial services licensees, credit licensees, authorised representatives of financial services licensees, credit representatives and issuers of financial products in relation to the activities of which ASIC has regulatory responsibility (section 1101A of the Corporations Act and section 241 of the National Consumer Credit Protection Act).</p>	<p>The proposed reforms build on the existing framework that allows ASIC to approve industry codes of conduct, to allow ASIC to designate enforceable code provisions and allow the Minister to prescribe and declare a code of conduct to be mandatory through regulations.</p> <p>The approval of codes and designation of enforceable provisions will be through legislative instrument.</p> <p>Breach of an enforceable code provision or civil penalty provision under a mandatory code may attract civil penalties, not exceeding 1,000 penalty units (currently \$210 per penalty unit).</p> <p>ASIC's other enforcement powers include infringement notices for breach of an enforceable code provision or civil penalty provision of a mandatory code, as well as community service and probation orders against persons who contravene such provisions, which must be made by a court on application by ASIC.</p> <p>A court may also direct a person who has breached such a provision to perform a service for the benefit of the community or a section of it, or may make an order for the purpose of ensuring the person does not engage in the or similar or related conduct during a period of up to 3 years. Examples of such orders include directions for the person to establish compliance or education and training programs.</p> <p>There are conditions for which kinds of provisions ASIC may determine as enforceable. The provision must represent a commitment to act in a particular way or to a person, and breach of the provision must be able to possibly result in significant detriment to the person or could significantly undermine the confidence of the, or a section of the, Australian public in either the provision of or those who provide financial services in Australia.</p> <p>The applicant of an approved code of conduct must ensure an independent review of the code is undertaken every 5 years, with public consultation.</p>	<ul style="list-style-type: none"><li>• Note that under these mandatory code provisions, ASIC could draft a code and regulations could be made making it mandatory, with no industry consultation or participation.</li><li>• Note that in the Final Report, Commissioner Hayne recommended that the mandatory code power should only be used if industry did not put forward its proposed enforceable code provisions in a timely manner (p 110).</li><li>• It also seems that an applicant making a proposal for a code being approved would have little say in what obligations under it would be enforceable code provisions – it is entirely in ASIC's discretion. Commissioner Hayne was of the view that the proposal should itself identify the enforceable code provisions, and ASIC would then assess these proposals (p 110).</li></ul>