



5 March 2020

Lyn Beverley  
Committee Secretary  
Select Committee on Financial Technology and Regulatory Technology  
by email: [fintech.sen@aph.gov.au](mailto:fintech.sen@aph.gov.au)

Dear Ms Beverley

## Re: Select Committee on Financial Technology and Regulatory Technology – Question on Notice

Thank you for the opportunity to appear before the Select Committee on Financial Technology and Regulatory Technology in Sydney on 19 February 2020. Consequent to this appearance, I received the following Question on Notice from Senator Smith:

**Your submission discusses the need for a legally enforceable AI Ethics Framework being established as a Code under CDR. How do you see such a Code operating in practice. Can you please provide further detail?**

Our submission refers to the Australian Human Rights' Commission recommendation that:

*The Australian Government should commission an appropriate independent body to inquire into ethical frameworks for new and emerging technologies to:*

- (a) assess the efficacy of existing ethical frameworks in protecting and promoting human rights*
- (b) identify opportunities to improve the operation of ethical frameworks, such as through consolidation or harmonisation of similar frameworks, and by giving special legal status to ethical frameworks that meet certain criteria.<sup>1</sup>*

We then subsequently recommend one of two options:

- FinTech sector could act now and agree to adhere to the AI Ethics Framework via a Code of Practice; or alternatively
- the ACCC CDR Rules should be amended to require CDR participants to meet these standards.

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<sup>1</sup> Proposal 2, Page 57, HRC, Human Rights and Technology Discussion Paper  
[https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights2019\\_DiscussionPaper.pdf](https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights2019_DiscussionPaper.pdf)

## Code of Conduct

Codes of Conduct (or Codes of Practice) are commonly used in the financial services sector (as well as other sectors). As the explanatory memorandum of the recent enforceable code provisions Bill explains:

*1.4 A code of conduct is a set of statements setting out an industry's commitment to deliver a certain standard of practice. Where an industry has the capacity, cohesion and commitment to develop an effective code, consumers can receive greater benefits than might otherwise have been achieved.*

*1.5 Codes of conduct have existed in the financial services sector since the late 1980s, and a number of codes of conduct have been developed since that time. ...*

*1.6 Codes of conduct are a vehicle for industries to self-regulate and set standards on how to comply with and exceed what is required by the law. This can promote better consumer outcomes as well as confidence and trust in the industry.<sup>2</sup>*

Codes of conduct are therefore primarily a form of self-regulation where a sector agrees to act in a particular way. The best known codes are the Banking Code of Practice<sup>3</sup> and the General Insurance Code of Practice.<sup>4</sup>

Codes can however sometimes be mandatory. The *Privacy (Credit Reporting) Code 2014* is a mandatory code that binds credit providers and credit reporting bureaus, supplementing the provisions contained in Part IIIA of the *Privacy Act* and the *Privacy Regulation 2013*. It is also envisioned that ASIC will be provided with the power to mandate codes of practice in the financial services sector under the Enforceable Code Provisions Bill.<sup>5</sup>

Voluntary codes of conduct can be enforceable in a number of ways including by becoming a part of the contract or terms and conditions with the consumer. This is the preferred approach by the consumer movement.<sup>6</sup> There are other alternative ways codes can be enforceable and binding, although these methods remain up for debate:

- Code subscribers can contract directly with the independent person or body that has the power to administer and enforce that code.
- A regulator could consider any internal or external dispute resolution mechanisms to deal with alleged breaches of the code.

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<sup>2</sup> Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC Rec 1.15 (Enforceable Code Provisions) Exposure Draft Explanatory Materials [https://treasury.gov.au/sites/default/files/2020-01/c2020-48919f-explanatory\\_memoandum.pdf](https://treasury.gov.au/sites/default/files/2020-01/c2020-48919f-explanatory_memoandum.pdf)

<sup>3</sup> Australian Banking Association, Banking Code of Practice, <https://www.ausbanking.org.au/wp-content/uploads/2020/02/2020-Code-A4-Booklet-Interactive.pdf>

<sup>4</sup> Insurance Council of Australia, General Insurance Code of Practice 2014 <http://codeofpractice.com.au/>

<sup>5</sup> Financial Sector Reform (Hayne Royal 4 Commission Response—Protecting 5 Consumers (2020 Measures)) Bill 2020: 6 FSRC rec 1.15 (enforceable code 7 provisions) <https://treasury.gov.au/sites/default/files/2020-01/c2020-48919f-exposure-draft-20200130.pdf>

<sup>6</sup> See the Joint consumer submission to the Exposure Draft, Enforceability of financial services industry codes. February 2020, [https://financialrights.org.au/wp-content/uploads/2020/03/200228\\_RCRec115CodeEnforceability\\_EDEM\\_Submission\\_FINAL.pdf](https://financialrights.org.au/wp-content/uploads/2020/03/200228_RCRec115CodeEnforceability_EDEM_Submission_FINAL.pdf)

A code could also be enforceable via the mechanism currently being introduced in the financial services sector following the Banking Royal Commission – that is empowering a regulator to approve an industry code and to designate certain provisions as enforceable code provisions, a breach of which may attract civil penalties.

Finally, another option would be to include a requirement to meet the AI Ethics Framework under the ACCC CDR Rules.

Under any of the scenarios above, it may be necessary to revise and reconsider the AI Ethics Framework to ensure that it includes more specific language that promotes compliance and consequently, be more legally effective.

### **Application to AI Ethics Framework**

In our view the simplest ways for an AI Ethics Framework to become enforceable would be for the FinTech and RegTech sectors to establish a Code of Practice and agree as a part of this to adhere to the AI Ethics Framework.

This would require these sectors to both voluntarily establish a Code of Practice and voluntarily agree to include such a commitment.

Establishing a Code of Practice/Conduct is not outside of the bounds of possibility. The FinTech sector Buy Now and Pay Later (**BNPL**) forms have recently taken steps to establish a Code of Practice.<sup>7</sup> This is in part, in fulfilment of Recommendation 10 of the Senate Economics References Committee's *Credit and Hardship: Report of the Senate Inquiry into credit and financial products targeted at Australians at risk of financial hardship*, February 2019.<sup>8</sup>

The Australian Finance Industry Association (**AFIA**) is currently conducting a six-week public consultation of a BNPL Code. There is as yet no reference to the government's AI Ethics Framework – but there would be nothing stopping the BNPL sector to agree to adhere to the AI Ethics Framework under the Code.

If there were to be a clause committing the BNPL sector to adhering to the AI Ethics Framework, any breach of framework would be a breach of the code. Consequently the subscriber could be subject to investigation, corrective measures and sanctions pursuant to the powers of the proposed Code Compliance Committee.<sup>9</sup> If the Code were to include enforceable provisions under the new bill, and this clause was one of them, the breach could be considered a breach of the law and lead to civil penalties.

It is also not outside the realms of possibility for the FinTech and RegTech sector to seek to establish a voluntary code of practice under the auspices of FinTech Australia. We believe that this is something that needs to be considered.

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<sup>7</sup> <https://www.afia.asn.au/bnpl>

<sup>8</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Creditfinancialservices](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices)

<sup>9</sup>

[https://static1.squarespace.com/static/598589963e00bec843be0ea1/t/5e2fd4428cb7153a935267ff/1580192916032/AFIA+Web+-+Code+of+Practice+for+Buy+Now+Pay+Later+Providers\\_Final.pdf](https://static1.squarespace.com/static/598589963e00bec843be0ea1/t/5e2fd4428cb7153a935267ff/1580192916032/AFIA+Web+-+Code+of+Practice+for+Buy+Now+Pay+Later+Providers_Final.pdf)

Finally we would note that we support an enforceable FinTech Code of Practice including a commitment to the AI Ethics Framework as a step towards greater legally enforceability in line with the Australian Human Rights Commission Proposal 2:

*(b) identify opportunities to improve the operation of ethical frameworks, such as through consolidation or harmonisation of similar frameworks, and by giving special legal status to ethical frameworks that meet certain criteria.*

Yours faithfully,

Drew MacRae  
Policy and Advocacy Officer  
Financial Rights Legal Centre

## About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.