

2021 Independent Review of Banking Code of Practice

CONSULTATION NOTE

July 2021

2021 Independent Review of Banking Code of Practice

Consultation

As part of the 2021 Independent Review of the Banking Code of Practice (the Code), interested parties are invited to provide comments on the issues raised in this consultation note, along with any other aspect of the Code that may be relevant to the review by 6 August 2021.

Electronic lodgement of responses is preferred. Please submit responses in a word or RTF format. Responses will be made public on the review's website unless it is indicated that all or part of the response is to remain in confidence.

Please send responses to the following addresses:

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Independent Review of Banking Code of Practice

Consultation Note

1. Introduction

The Australian Banking Association (ABA) has commissioned an independent review of the Banking Code of Practice (the Code).

The review is being undertaken by Mike Callaghan AM PSM (Appendix A).

The Code is a set of undertakings by bank signatories regarding how they will conduct themselves in their dealings with individual and small business customers, as well as specific commitments for banking services. The Code was developed by the ABA.

Clause 6 of the Code says the ABA will arrange for an independent review of the Code at least every three years (a condition of the Australian Securities and Investments Commission (ASIC) approval of a code of conduct is that it must be independently reviewed at intervals no more than three years)¹. The ABA has also committed to the independent review being undertaken in consultation with consumer representatives, small business organisations and other stakeholders. While the review is funded by the ABA, it is independent of the banking industry.

The purpose of this Consultation Note is to invite comments from interested parties on the issues canvassed in this Note. A consolidated list of the questions raised in this Note can be found in Appendix B. While they only cover the provisions of the Code specifically raised in the review's Terms of Reference, comments are also invited on any aspect of the Code that may be relevant to the review.

Responses are sought by 6 August 2021. The review is to report by end November 2021.

2. Scope of the review

The terms of reference for the review can be found in Appendix C. Against the background of the statement that the 'banking industry is committed to earning back trust and creating an enduring, customer focussed culture', the terms of reference state that the objectives of the review are to ensure that:

- 1) The Code continues to respond appropriately to the contemporary environment, and to benefit customers and subscribers.
- 2) Banks and consumers are clear about their rights and responsibilities and the Code articulates the standards of behaviour of banks, including promotion of the Code.
- 3) Consumers of banking services, regulators and other key stakeholders play a part in the ongoing development of the Code.

The review has been asked to make recommendations on how the banking industry can strengthen the operation of the Code and promote informed and effective relationships between banks and their customers.

The terms of reference call for specific attention in the following areas:

- The extent to which the Code remains appropriate having regard to recent reforms to laws and regulations, particularly new obligations arising from the recommendations

¹ ASIC Regulatory Guide 183 Approval of financial services sector codes of conduct (RG 183.82)

from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission).

- The kind of provisions that the ABA and ASIC should consider in identifying enforceable provisions, in line with recommendations from the Royal Commission.
- The extent to which the Code contributes to banking services being inclusive, affordable, and accessible for all customers, including small business, Indigenous customers, customers with a disability, customers in remote, rural, and regional areas, older customers, and customers with limited English.
- The effectiveness of the provisions of the Code and whether they meet consumer and community standards for banks to:
 - act in a fair, reasonable, and ethical manner
 - provide hardship assistance to individual and small business customers
 - support customers during crises such as COVID-19 pandemic
 - resolve complaints and disputes between banks and their individual and small business customers
 - support customers experiencing vulnerability, and
 - make customers aware of the existence and benefits of the Code, including the existence of and their eligibility for basic, low and no fee accounts.
- The review is also to consider the role of the Banking Code Compliance Committee (BCCC), and whether there is a need to adjust its duties and powers, including whether sanctions available are appropriate and whether the Charter is the appropriate instrument to record its duties and powers.

The terms of reference refer to some of the provisions of the Code, and these are the focus of this Consultation Note. But the review is not limited in its assessment of the Code and the terms of reference state that the review is to cover matters raised and considered important by stakeholders.

3. Possible issues for the 2021 review

Following is an outline of possible issues to be covered in the review. The questions posed are ‘conversation starters’ and are by no means exhaustive or conclusive. The review is seeking feedback on any issues considered relevant to the role of the Code in strengthening the relationship between banks and customers.

3.1 Proposed framework for the review’s assessments

A framework is needed to make assessments as to what constitutes ‘effectiveness’, ‘relevance’ or a ‘strengthening’ of the Code, as the review is tasked to do under its Terms of Reference.

The first aspect of the proposed approach is to assess, drawing on feedback from consultations, whether the current Code represents a comprehensive and accessible outline of the standard of service that is consistent with customer and community expectations. The Code has been substantially re-written over the past three years, in consultation with consumer groups and regulators, and the changes have been approved by ASIC. The structure and drafting of the Code, along with protection provided to customers, was a focus of the last independent review and many of the review’s recommendation have been incorporated in the Code. Consistent with its terms of reference, this review will not be revisiting the reasons for the changes to the Code but will assess whether further changes are appropriate, particularly in the light of developments since the last independent review.

The second aspect of the review's approach is to assess, drawing on feedback from consultations and mechanisms for monitoring and enforcing compliance, whether banks are abiding by the commitments they have made by subscribing to the Code. In short, is the Code influencing bank behaviour.

One of the principles underpinning the current Code is that banks are 'committed to making promises and keeping them to deliver good customer and community outcomes.' Making promises is relatively straight forward. The Code contains over 200 commitments by banks. Delivering on those commitments is, however, fundamental if banks are to regain and maintain the trust of their customers and establish an enduring customer focused business.

Commissioner Hayne noted that if industry codes are to be more than public relations puffs, the promises must be enforced. While customers will have confidence in the Code if they knew commitments could and would be enforced, their trust in the banking industry may be even stronger if they were confident that commitments were being honoured, without the need for enforcement.

3.2 Customer versus community expectations

The review has been asked to assess whether the provisions of the Code meet 'consumer and community' expectations. One of the principles of the Code refers to meeting 'community outcomes'. Do customer expectations and outcomes regarding banking services differ from community expectations?

The focus and expectations of customers may be on their specific, individual dealings with their bank, while the community's expectations may refer to the standard of service that banks provide to the community as a whole. As such, the community may have the expectation that banks should have in place systems to ensure that the commitments they make in subscribing to the Code are honoured for all customers.

Commissioner Hayne noted in his interim report that all four major banks had publicly recognised that their conduct had fallen short of what the community expected². In his final report, one of the reasons Commissioner Hayne recommended there be enforceable provisions in the Code is because the consequences of an individual breach may not be enough to make industry participants prevent systemic failures in the application of the Code. Perhaps one consequence of the Royal Commission is that banks have to pay greater attention to whether the commitments in the Code meet community expectations around ensuring that all commitments in the Code will be honoured, that is, a commitment to have in place mechanisms to prevent systemic failures.

4. The extent to which the Code meets community expectations

Task

The review has been asked to assess the appropriateness of the Code given recent changes to laws and regulations, particularly those arising from the recommendations from the Royal Commission.

Background

Much has happened to the Code and the banking environment since the last independent review reported in 2017. The key changes are outlined below.

² <https://financialservices.royalcommission.gov.au/Documents/interim>.

4.1 Re-write of the Code

A substantial plain-English re-write of the Code was released in 2019³. It introduced guiding principles to underpin the Code (trust and confidence, integrity, service, transparency, and accountability), along with the introduction of a range of new measures that lifted and clarified the standards of good banking practice when dealing with individual and small business customers. The terms of reference state that it is not anticipated that this review will reconsider the rationale for these changes but may consider submissions on their operation and whether any adjustments are required.

4.2 Establishment of BCCC

Along with the introduction of the 'new' Code in 2019, the previous Code Compliance Monitoring Committee (CCMC) was replaced with the BCCC, which had expanded powers under a new charter and a broader jurisdiction to consider breaches of the Code. The BCCC's power to apply sanctions to a Code subscribing bank were extended, including publicly naming a bank in its Annual Report and website.

4.3 Establishment of Australian Financial Complaints Authority

The Australian Financial Complaints Authority (AFCA) was established in November 2018 and replaced the bank funded Financial Ombudsman Service Limited. AFCA is a one-stop-shop external dispute resolution framework for dealing with complaints about financial firms. The obligations in the Code are among the factors that AFCA considers when dealing with complaints from consumers with their banks. In 2021 the Government announced a review of AFCA by Treasury to consider whether AFCA has been effective in resolving complaints in a way that is fair, efficient, timely and independent.

The BCCC is a separately funded (by the ABA) operational business unit of ACFA.

4.4 Royal Commission

A major development impacting on the banking industry since the last independent review of the Code was the Royal Commission. Commissioner Haynes submitted his final report in February 2019⁴.

The Royal Commission exposed significant misconduct in the banking industry and specifically recommended changes to the Code. Revisions were made to the Code, which took effect from 1 March 2020, in response to the recommendations from the Royal Commission. Among the changes were:

- prohibiting charging default interest on distressed agricultural loans while farmers are affected by drought or natural disaster
- providing inclusive and accessible banking services to those with limited English and those living in remote areas, and
- removing informal overdrafts and dishonour fees from basic, low or no fee accounts for concession card holders.

4.5 COVID-19 Pandemic

COVID-19 had a significant impact on the Australian economy and on bank customers. COVID-19 temporarily closed or reduced hours for branches and many employees were re-deployed to deal with COVID-19 related issues. There was a considerable increase in requests to banks for financial difficulty assistance. Banks introduced a range of measures to assist individual and small business customers experiencing financial hardship during the COVID-19 pandemic.

³ <https://www.ausbanking.org.au/banking-code-of-practice-2021-release/2021-code-a4-booklet-with-covid-19-special-note-web/>

⁴ <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

In June 2020, the ABA added a COVID-19 Special Note to the Code. This Special Note came into effect on 1 July 2020 and has been extended to 1 September 2021. The Special Note describes how the effects of COVID-19 may mean Code-subscribing banks are unable to fully comply with timing requirements for notices and communications under the Code.

4.6 Amendment to definition of ‘banking service’ and ‘small business’

Further changes to the Code were made in January 2021, including amending the Code’s definition of ‘banking service’ which addressed an anomaly in the Code’s previous wording that had the unintended result of excluding certain types of small business banking customers who would otherwise meet the Code’s definition of ‘small business’.

Other changes included the ABA’s acceptance of the definition of small business in line with the recommendations by the review of the definition by the consulting firm Pottinger in October 2020⁵. An outstanding recommendation from Pottinger was to amend the definition of ‘Related Entities’. While the review has been asked to consider appropriate amendments to the definition of related entities, this aspect of the review is being undertaken by legal experts engaged by ABA. Changes to the Code in relation to the definition of small business will be included in the updated Code following this review. Another change was to align the Code’s timeframes for responding to complaints in line with ASIC’s Regulatory Guide 271 *Internal dispute resolution*, which is due to commence on 5 October 2021.

4.7 Code approved by ASIC

Since 2018, the Code and subsequent changes have been approved by ASIC. The Code was the first substantive industry code of conduct approved by ASIC under the Corporations Act⁶. In approving the 2019 Code (which followed extensive engagement with the ABA) ASIC considered that:

- the rules in the Code are binding on ABA members and form part of the contracts between banks and their customers
- the Code was developed and reviewed in a transparent way, which involved significant consultation with relevant stakeholders, and
- the Code is supported by an effective administration and compliance mechanism.

ASIC’s Regulatory Guide 183 states ‘where approval by ASIC is sought and obtained, it is a signal to consumers that this is a code they can have confidence in’.

4.8 Status of industry codes

The last independent review of the Code (Khoury review) noted that there were many criticisms of the Code⁷. The criticisms included that the Code was complex and inaccessible, contained too many caveats and exclusions, failed to respond to the needs of a wide range of customers with vulnerabilities or special needs, and was weak and lacked sufficient sanctioning powers.

Many stakeholders rejected the concept of self-regulation and would not accept anything other than legislation and government regulation.

While there were earlier doubts about the relevance of industry codes in the financial sector, the Royal Commission endorsed the role of codes and self-regulation in the financial services industry. Commissioner Hayne rejected a proposal by Treasury to provide ASIC with rule-making powers similar to those under the Competition and Consumer Act 2010. He said harnessing the views and collective will of relevant industry participants was essential to the creation of an industry code.

⁵ <https://www.pottinger.com/sbr.html>

⁶ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-358mr-asic-approves-an-updated-banking-code-of-practice/>

⁷ <http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf>

Commissioner Hayne said he would not discard these benefits by giving ASIC the entire responsibility for the creation of the kind of norms now set out in the Code and which have been developed and applied within significant parts of the banking sector for many years. In his view it was now time to give certainty and enforce the key provisions that govern the terms of the contract made between the financial services entity and the customers or guarantors.

4.9 Recent changes to laws and regulations

There have been a number of changes to laws and regulations since the last independent review of the Code which will have a bearing on a bank's dealings with its customers. This raises the question whether the Code needs to be updated to reflect these developments. Some of the recent reforms are noted below.

4.9.1 Mandatory Credit Reporting

The *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* was passed on 3 February 2021. The Act expands the information banks must report to credit agencies about the credit history of the customer. The Act also sets out standards for how people in financial hardship should be treated by credit-reporting agencies and creates two new categories of 'hardship flags' that may be placed into the credit reports of individuals. Should the Code cover how banks will operationalise this new regime?

4.9.2 Open Banking

Open banking gives customers the ability to share their banking data with third parties that have been accredited by the Australian Competition and Consumer Commission (ACCC). The Consumer Data Right (CDR) aims to give consumers the right to share their data between providers through secure technology.⁸ While banks can only share data when the consumer tells them to do so, consumer representative bodies have suggested there are issues regarding the safe and secure handling of data, particularly in the context of financial abuse, elder abuse, and domestic violence. Should the banks commit to provide protection for consumers beyond that mandated under the CDR regime. More generally, banks are increasingly using digital technologies which offer many benefits for consumers but also raise a number of concerns if improperly used. Should the banks commit to the ethical implementation and use of technological developments?

4.9.3 Design and Distribution Obligations

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 introduced targeted and principles-based design and distribution obligations in relation to financial products. The obligations require issuers and distributors to have an adequate product governance framework to ensure products are targeted at the right people. In support of its new 2020 General Insurance Code of Practice, the Insurance Council of Australia released a Guide for the design and distribution of add-on insurance distributed through motor dealer intermediaries.⁹ Should the banks similarly indicate how they will meet the new design and distribution obligations?

4.9.4 Buy Now Pay Later

Buy Now Pay Later products have transformed the credit landscape. The Australian Finance Industry Association (AFIA) have introduced a Buy Now Pay Later Code of Practice. AFIA says the code is to allow the Buy Now Pay Later industry to take a proactive approach to increasing consumer protections and go beyond current regulatory obligations. Given that banks are starting to enter the Buy Now Pay Later sector, but are not members of the AFIA code, should the banks at least match, if not exceed, the consumer protection provided in the AFIA Buy Now Pay Later Code?

⁸ <https://www.cdr.gov.au/>

⁹ [2020 General Insurance Code of Practice](https://insurancencode.org.au/resources/general-insurance-code-of-practice-2020/) <https://insurancencode.org.au/resources/general-insurance-code-of-practice-2020/>

Questions:

Extent to which the Code meets community expectations

- 1) **Overall, does the Code adequately articulate the standards of service and behaviour currently expected by individual and small business customers?**
- 2) **Does the Code remain relevant given changes to legislation and regulations affecting banking services? In particular, does the Code need to be amended in the light of such developments as: Mandatory Credit Reporting; Open Banking; Design and Distribution Obligations; and, Buy Now Pay Later.**
- 3) **Do the changes to the Code sufficiently respond to the findings from the Royal Commission, particularly in meeting community expectations that banks will have in place the systems to ensure that the commitments in the Code will be honoured by all member banks?**
- 4) **Have the changes to the Code and the bank's performance in meeting their obligations improved the relationship between banks and their customers?**
- 5) **Are individual and small business customers confident that banks will deliver on their commitments under the Code?**
- 6) **Are there outstanding issues from the last independent review of the Code?**

5. The Code's audience

A major change to the Code in 2019 was that it was re-written in plain English. Submissions to the Khoury review by both the banking industry and consumer representative groups endorsed a move to a plain English Code¹⁰. The Khoury review observed that the 2013 version of the Code was complex, excessively legalistic and it was not clear who was the intended audience for the Code.

The Code was redrafted to be 'customer friendly'. The customer is now the intended audience for the Code. In the ABA's response to the Khoury report, it stated 'In the past, the Code was primarily directed to the banks to make sure they had in place the right compliance systems and practices. Now, the Code needs to be directed to our customers to make sure the way they transact and interact with their bank is supported by best practices in bankingIt is important our customers find the Code easy to read and navigate, and easy to understand their banking rights and responsibilities¹¹.' A condition of ASIC's approval of a code is that it uses 'plain language' to deal with the code's scope, objectives, and rules.

The Khoury review noted, however, that the Code must serve different audiences. While recommending that it should be written in simple, clear language, it pointed out that comparatively few individual customers and small businesses with a problem with their bank will turn to the Code. However, consumer representatives – lawyers, financial counsellors, social workers assisting people with their finances – will be interpreting and assisting consumers in exercising their rights under the Code.

The audience is now clearly the customer (including through consumer representatives), but the Code still has to have specific precision for banks to set policy and business rules as well as design systems and train the day-to-day decision makers.

Another purpose of the Code is to outline the commitments by banks that can be enforced through the courts under contract law or through AFCA. In this regard, the Code must have sufficient clarity as to the commitments the bank is making to its customers so that these commitments can be enforced through the courts.

¹⁰ <https://cobpreview.crkhoury.com.au/public-submissions/>

¹¹ <https://www.ausbanking.org.au/wp-content/uploads/2019/05/Banking-Industry-response-to-Khoury-Review.pdf>

The Khoury review's response to dealing with multiple audiences was to recommend a restructure of the Code into layers – a preamble, a set of principles, the obligations or specific commitments that banks make, and industry guidelines that sit outside the Code and provide guidance to banks on how the Code can be implemented.

While a clear statement on how banks commit to deal with their individual and small business customers is appropriate, ultimately the main factor that will strengthen the relationship between banks and their customers is what banks do, rather than what they say they will do. If there should be a trade-off between making the Code easy to read for customers or strengthen the prospects that the commitments will be honoured and enforced, the priority should perhaps be on the latter.

A development since the customer focused, plain English re-write of the Code in 2019 is the introduction of 'enforceable provisions' in response to recommendations from the Royal Commission. Commissioner Hayne stated, "I consider it important that some provisions of industry codes be picked up and applied as law, so that breaches of those provisions will constitute a breach of the law." Commissioner Hayne was concerned that the range and diversity of code obligations, and some developments in common law, may have contributed to uncertainty as to what provisions may be relied upon. This may raise the issue of the compatibility of a customer focused, easily understood Code, with provisions that have sufficient specificity such that they can be designated as enforceable provisions.

The more detailed documents covering how the banks should implement the Code are contained in the ABA's industry guidelines, along with the BCCC's good practice guidance notes and reports. All these guidance notes are outside the Code and are not enforceable under the law, although AFCA has been using industry guidelines as a standard which banks are being held to account. In some cases, the ABA Industry Guidelines do provide additional protection for consumers and in other areas, elaborate on general commitments in the Code. Only a few of the ABA Guidance Notes are mentioned in the Code. If the Code represents a commitment to the community on good banking standards for all individual and small business customers, there may be a place for a commitment in the Code for banks to put in place the systems and measures to ensure that the Code will be implemented.

Questions

The Code's audience

- 1) ***Has the customer friendly re-write of the Code resulted in more customers accessing and relying on the Code?***
- 2) ***Has an appropriate balance been achieved between making the Code easy to read and navigate for the customer, while giving the banks enough guidance to implement the Code? Does the Code have sufficient detail such that key provisions can be enforced, including by being designated as enforceable provisions under the law?***
- 3) ***While the Code says that relevant provisions apply to its terms and conditions for all banking services and guarantees, do they have sufficient clarity such that a court or external dispute resolution mechanism can treat a breach of a provision as a breach of contract?***
- 4) ***Should the Code include a commitment by the banks that they will put in place the systems and mechanisms to ensure that all provisions in the Code will be implemented?***

6. Acting in a fair, reasonable, and ethical manner

Task

The review has been asked to assess the effectiveness of the provision for banks to act in a fair, reasonable, and ethical standard, and whether it meets customer and community expectations.

Code provision

Clause 10 states that ‘We will engage with you in a fair, reasonable and ethical manner’.

Background

The BCCC states in Guidance Note 2 that Clause 10 is one of the Code’s most important clauses, in that it goes to the culture of the way bank staff engage with customers¹².

In going to the culture of the bank, in many respects Clause 10 underpins the other commitments in the Code which cover a bank’s dealings with its customers. But the commitment to act in a fair, reasonable and ethical manner should not be limited to the specific commitments in the Code, and should apply to every aspect of a bank’s dealings with its customer. It is on this basis the BCCC said that it may assess whether a bank’s conduct complies with clause 10 alone, or alongside other Code obligations. The example it cites is that if the BCCC investigates an alleged breach of clause 167 (financial difficulty), it will consider whether the bank has acted in a fair, reasonable, and ethical manner. It does not give an example of where it might investigate a breach of Clause 10 on a standalone basis.

In practice, whether a bank meets the standard of acting in a fair, reasonable, and ethical manner may focus on an assessment of whether banks are meeting their other commitments under the Code. In BCCC Finding CX3998, the BCCC found that a bank breached six clauses of the then applicable 2013 Code along with the equivalent of Clause 10 in the 2013 Code.¹³ The BCCC found that the bank’s failure to build a strong compliance structure led to numerous systemic and serious breaches which impacted many of the business units’ customers. For these reasons, the BCCC found that the bank’s engagement with its customers was not ‘guided or informed’ by its commitment to engage in a fair, reasonable, and ethical manner.

In BCCC Finding CX6933, the BCCC found that a bank breached Clause 17 (timely, clear, and useful communication) and this breach was considered systemic¹⁴. The BCCC also found that the bank breached Clause 10, and this breach was both systemic and serious. The BCCC concluded that Clause 10 had been breached and was systemic because of the large number internal complaints related to the breach and requests for remedial action.

As noted by the BCCC, whether a bank is acting in a ‘fair, reasonable and ethical ‘manner can be assessed on a stand-alone basis. In the 2013 Code, CCMC could not monitor compliance with the equivalent of Clause 10 because it was considered an ‘aspirational’ commitment and concepts such as fairness were difficult to measure. However, concepts such as ‘fairness’ and ‘reasonableness’ are standards that are applied in other parts of the law, including consumer law. Moreover, under paragraph 912A(1)(a) of the Corporations Act 2001, there is an obligation on Australian Financial Services licence holders to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’. Prior to 2019, the main consequence of a breach of this obligation was licensing action against an existing licensee or refusal of a new licence.

Since 2019, a new package of civil penalty remedies for breach of the general obligation to act ‘efficiently, honestly and fairly’ came into effect. If Clause 10 is considered central to the Code, as

¹² [Guidance Note No. 2: Clause 10 - fair, reasonable and ethical behaviour - The Banking Code Compliance Committee](#)

¹³ [BCCC Finding CX3998 - The Banking Code Compliance Committee](#)

¹⁴ [BCCC Finding - CX6933 - The Banking Code Compliance Committee](#)

the BCCC does, this may raise the question whether it should be an example of an 'enforceable provision'. There is a question, however, whether it is appropriate for parallel civil penalty regimes in the Corporations Act and the Banking Code. Issues around what may constitute an enforceable provision are discussed in section 13 of this note.

Questions:

Acting in a fair, reasonable and ethical manner

- 1) ***Is the commitment for banks to act in a fair, reasonable and ethical manner (Clause 10) one of the most important clauses in the Code?***
- 2) ***Does Clause 10 underpin the other commitments in the Code as well as every other aspect of a bank's dealings with its customers?***
- 3) ***Is Clause 10 currently enforceable under the law?***

7. Customers experiencing financial difficulties

Task

The review has been asked to consider the effectiveness of the provisions providing assistance to individual and small business customers experiencing financial difficulties, and whether these provisions meet consumer and community expectations.

Code provision

Part 9, Chapters 39-45 cover how banks deal with customers experiencing financial difficulty. Part 6, Chapters 21 to 24 cover when small businesses are in financial difficulty and include enforcement of loans against small businesses; when banks decide not to extend a loan; and the appointment of external property valuers, investigative accountants, and insolvency practitioners.

Background

Compared to the 2013 Code, the re-write in 2019 provided more prominence 'for when things go wrong', gives a definition of what is meant by financial difficulty, and provides more certainty on the process and protection for individual and small business customers and guarantors..

Does the Code provide clear information on whether and how a bank can help individual and small business customers? With the code having one section on 'Lending to small business' (Part 6) and another on 'When things go wrong' (Part 9), is there any doubt as to who is covered in Part 9, specifically, to what extent if it applies to small business? Perhaps adding to uncertainty are the references in Part 9 to consumer rights under the National Credit Code, 'if they apply'. It is not clarified in the Code who are not covered by the National Credit Code. Yet there are other provisions that say the bank will help the customer even if they are not covered under the National Credit Code. For example, Clause 174 says 'We will tell you about your rights to make a complaint to our external dispute resolution provider if we do not assist you under the National Credit Code'. Overall, some customers may not be clear as to what extent they are covered under Part 9.

Another area where the Code may not provide sufficiently clear information to customers in financial difficulty is the reference to legislation without explanation as to the relevance to the customer. In addition to references to the National Credit Code, if it applies (without explanation as to when it applies), clause 180 says 'we will comply with the ACCC's and ASIC's Debt Collection Guideline: for Collectors and Creditors. Similarly, Clause 181 says 'we will comply with the Code of Operations Recovery of Debts from Department of Human Services Income Support Payments or Department of Veteran Affairs Payments. In both instances, there is no information on the relevance of these codes. It is an added protection for consumers that banks commit under the

Code to comply with the Code of Operations for the Recovery of Debts, but perhaps the Code should also provide that banks will advise customers of the contents of the Code of Operations, specifically the limit on the amount that a bank may take from government benefits in reduction of a debt owed to a bank. It is understood that an update of the Code of Operations will refer to banks making best endeavours to advise customers of their rights under the Code of Operations.

Clauses 180-182 of the Code states that banks will comply with the ACCC's and ASIC's Debt Collection Guideline: for Collectors and Creditors and that if a customer's debt is sold to another party, the banks will only choose a party that has agreed to comply with these guidelines. In 2019 the ABA issued an Industry Guideline covering the sale of unsecured debt.¹⁵ The guideline says it complements the provisions in the Code dealing with customers who may be vulnerable (Chapter 14), financial hardship (Chapter 41), and recovering a debt (Chapter 43). In addition, it says 'This Industry Guideline is intended to outline additional safeguards for customers when banks are selling unsecured debt to another party'. Should these additional safeguards for customers be included in the Code given that it is enforceable.

An additional protection for consumers that could be considered for inclusion in the Code is to outline what represents 'meaningful and sustainable' debt collection activity. Paragraph 14 (a) of the ACCC and ASIC Debt Collection Guideline says that repayment arrangements should be meaningful and sustainable. A situation where repayment arrangements run for many years without any reduction in the principal balance may not be viewed as being 'meaningful'.

The review would be interested to receive guidance on the likelihood of customers actually turning to the Code to seek information on how to deal with financial difficulties. It may be more likely that customers obtain information from bank websites, directly approaching their bank or a financial counsellor, such as through the National Debt Helpline.

When a customer seeks assistance, particularly from their bank, it is important that they receive comprehensive and consistent advice as to how the bank can help. In this regard, perhaps one of the most important clauses in the Code on this issue is 168, where banks commit to make information publicly available about their processes for working with customers in financial difficulty, and clause 167, which says banks will work with customers to help find a sustainable solution to the customer's difficulties.

Perhaps the Code should specifically include a provision that banks will advise customers of all their rights under the Code with respect to financial hardship when a customer approaches a bank seeking information on options in dealing with their financial difficulties.

The ABA Industry Guideline on 'Promoting understanding about banks' financial hardship programs' says the information on financial hardship on banks websites should be suitable, prominent, easily identifiable and accessible¹⁶. Although the guideline states that it does not have 'legal force or prescribe binding obligations on individual banks.

The Code may need to go beyond saying that information will be publicly available, to say the information will be 'suitable, prominent, easily identifiable, accessible, and comprehensive.'

There are clauses in the Code that do not provide much assistance to customers as to how their bank can help them. For example, Clause 169 states, under a heading that refers to what the bank will consider when deciding on assistance options, that 'when we are deciding whether, and how, to help you with financial difficulty, we will take into account information available to us, including information you give us about your financial situation'. This provides no guidance as to what banks will consider when deciding assistance options. Should the Code have something meaningful to say on this issue?

¹⁵ <https://www.ausbanking.org.au/wp-content/uploads/2019/11/Industry-Guideline-on-the-Sale-of-Unsecured-Debt-November-2019.pdf>

¹⁶ [Updated financial hardship guideline Nov 2016.pdf \(ausbanking.org.au\)](#)

Clause 165 says that the banks will employ a range of practices that can identify common indicators of financial difficulty and if they identify that a customer is having financial difficulties, they may contact the customer and provide options to help the customer. The provision states that the bank 'may' contact a customer identified as experiencing financial difficulties. It does not elaborate on the factors that will be taken into account in deciding whether to contact the customer. The review would appreciate receiving feedback on how active the banks are in identifying and contacting customers facing financial difficulty.

BCCC reports that requests for financial difficulty assistance increased from 351,245 in 2018-19, to 894,112 in 2019-20¹⁷. As BCCC notes, this increase is not surprising given the impact of COVID-19, but the number is likely to be higher because several banks COVID-19 deferral packages provided to customers were not reported.

Notwithstanding a sharp increase in requests for financial difficulty assistance in the six months to June 2020, there is not a significant difference in reported breaches of Part 9 in the first and second half of 2019-20. In fact, the number of reported breaches fell from 3,949 for the period June to December 2019 to 3,662 in the period January to June 2020. The nature of the reported breaches between the two periods are the same, mainly requests for financial difficulty assistance not considered or not considered within time frames and debt collection breaches.

For the period June to December 2019, 1,000 of the reported breaches were from one major bank and involved an issue where it was charging interest payments on Interest Only loans where customers had financial difficulty arrangements in place. One major bank accounted for most of the 1,703 breaches of the debt collection obligations.

The number of breaches of the Code directly attributed to COVID-19 in the period January to June 2020 was 687¹⁸. Most of these breaches related to handling delays and failure to meet requirements for hard-ship assistance. More than 50,000 customers were affected by COVID-19 related breaches of the Code. Again, this number is low relative to the number of requests for financial difficulty assistance at the height of the pandemic.

The discrepancy between the very significant increase in requests for financial difficulty assistance and a decline in reported breaches of Part 9 in the period from January to June 2020, may indicate that banks were more diligent (or perhaps more liberal) in meeting their commitments under the Code, or it could suggest that the monitoring and reporting of breaches was not comprehensive.

The most recent BCCC report on compliance with the Code (for the period January to June 2020 refers to the number of requests for financial assistance. However, it does not provide data on the number of customers who received hardship assistance or the nature of the assistance provided. The BCCC's compliance report for 2018-19 does provide data on the percentage of requests for financial difficulty assistance granted in 2017-18 and 2019-19, along with data on the types of assistance granted. Publication of data on the percentage of requests for financial difficulty assistance granted each year, along with the forms of assistance provided, would give an indication of the ongoing impact of the banks commitment to helping customers in financial difficulty. It would also be informative if the banks identified cases where customers seek financial difficulty assistance on a repeat basis.

Part 9 of the Code also covers banks handling of deceased estates. Chapter 45 contains undertakings as to how banks will deal with representatives of deceased estates. There are also undertakings with respect to what banks will do in the event of a customer's death. An issue the review may need to consider is whether there are gaps in dealing with deceased estates or whether there are aspects that need to be clarified.

¹⁷ [BCCC Report: Banks' compliance with the Banking Code of Practice - January to June 2020 - The Banking Code Compliance Committee](#)

¹⁸ [BCCC Report: Banks' compliance with the Banking Code of Practice - January to June 2020 - The Banking Code Compliance Committee](#)

Questions:

Customers experiencing financial difficulties

- 1) ***Is the Code in line with customer and community expectations regarding the assistance banks should provide individual and small business customers facing financial difficulties?***
- 2) ***Do banks assist customers facing financially difficulties in line with the commitments in the Code?***
- 3) ***Does the Code provide clear and comprehensive information on whether and how their bank will assist them if they are in financial difficulties? Should there be more guidance as to what banks will consider in deciding whether and how to assist customers in financial difficulties?***
- 4) ***How active are the banks in identifying customers who may be facing financial difficulties and contacting them to discuss their situation and offer assistance?***
- 5) ***Is it clear as to what customers are covered under Part 9 of the Code?***
- 6) ***Do the banks actively promote how they can help customers in financial difficulty? Is the publicly available information easily identifiable, accessible, and comprehensive?***
- 7) ***Should the Code include a provision that banks will advise customers of all their rights under the Code with respect to financial hardship assistance when a customer approaches a bank seeking information on dealing with financial difficulties?***
- 8) ***Should the additional safeguards for consumers contained in the ABA Industry Guideline: The Sale of Unsecured Debt be included in the Code?***
- 9) ***Should the Code outline what constitutes 'meaningful and sustainable' debt repayments in circumstances of financial hardship?***
- 10) ***Should the BCCC regularly publish data on the percentage of requests for financial difficulty assistance granted by banks, along with the nature of the assistance provided?***
- 11) ***Is the Code appropriate with respect to dealings with deceased estates? Are there potential gaps, and/or could the coverage of the undertakings be clarified?***

8. Hardship assistance during COVID-19

Task

The review has been asked to assess the effectiveness of provisions in the Code with respect to support for customers during the COVID-19 pandemic, including reviewing the operation of the COVID-19 Special Note.

Code provision

The only specific reference in the Code to the COVID-19 pandemic is the Special Note that was added in June 2020 and applies until September 2021. The note states that the effects of COVID-19 may mean that banks are unable to fully comply with strict timing requirements for notices and communications under the Code.

Background

Whether the Code has been effective with respect to banks helping customers in response to the COVID-19 pandemic will in part depend on whether the banks implemented their commitment to helping customers in financial difficulty as outlined in Parts 6 and 9, which were discussed above.

However, the circumstances of a pandemic and resulting economic shock were probably beyond what was envisaged when the Code was drafted. The number of customers to be supported was significant and the support required, and provided, was proactive and aimed at helping customers avoid financial difficulties and hardship.

Banks also had to support customers in lockdown, where customers could not engage with their bank on a face-to-face basis. COVID-19 temporarily closed or reduced hours of branches. A result of COVID-19 was significantly greater use of digital channels for communication and financial transactions. In this situation, a relevant provision of the Code was Part 4 dealing with inclusive and accessible banking, particularly the commitment in clause 38 for the banks to take extra care for customers experiencing vulnerability. In keeping with this commitment, the banks were required to look after customers, particularly the elderly, without a computer or a smartphone and assist them with the use of digital channels for undertaking transactions. Again, the nature and extent of this support was probably not envisaged when the Code was drafted.

The banks did offer a significant level of support to individual and small business customers during the COVID-19 pandemic, including as a channel for Government support. Banks offered a range of assistance, including deferral of loan repayments, waiving fees and charges, debt consolidation, and deferring interest payments on a case-by-case basis. As noted previously, there was a very significant increase in requests for financial difficulty assistance and loan deferrals at the height of the crisis. Banks agreed that customers who deferred their loans as part of a COVID-19 assistance offering would not have missed repayments reflected on their credit reports.

COVID-19 assistance was widely promoted by each bank. It is highly unlikely that customers would refer to the Code to gain information on the support available from banks during the pandemic. Nevertheless, when the COVID-19 Special Note was added in June 2020 which indicated banks may not be able to meet timing requirements under the Code for notices and communications. While the banks did offer a significant level of support to individuals and small businesses, it may have been appropriate for the ABA to refer to the commitment to assist customers during the pandemic in the Special Note. The COVID-19 Special Note gave the appearance of focusing on the position of the banks, with no regard to what customers may be experiencing. The COVID-19 experience demonstrates that the application of the Code has to adjust to circumstances and cannot be excessively prescriptive. There is an issue, however, whether the Code should specifically refer to a commitment by the banks to assist customers and their communities facing financial difficulties in an emergency, such as a pandemic, but also in the event of floods, fires, droughts, cyclones and earthquakes. This type of assistance was referred to in the ABA's 2016 Industry Guide on bank's financial hardship programs.

As regards to the COVID-19 Special Note that was added to the Code, the BCCC issued a Guidance Note No 3 regarding complaints handling timeframes and customer notifications during the pandemic. The Special Note says, 'On acknowledging your complaint, we will advise you of the possibility of delays to the usual required notifications during the complaints process'. BCCC said that a failure to include notification in written complaints with customers will constitute a breach of the Code. However, because some banks indicated that they did not wish to impose additional stress to customers by saying there may be delays in dealing with their complaints, the BCCC advised that failure to notify a customer of possible delays would not be a breach if the bank complied with the timelines in the Code. This may demonstrate that a degree of discretion is required in interpreting the provisions in the Code.

Breaches of the Code attributed to COVID-19 in the period January to June 2020 was discussed in section 7 of this Note.

In May 2021, the BCCC did sanction a bank (naming it on its web site and in its 2020-21 Annual Report) for systemic and serious breaches of the Code. The bank was found to have breached Clause 17 and 10.¹⁹ The breaches took place during the pandemic and the BCCC stated 'While

¹⁹ [BCCC Finding - CX6933 - The Banking Code Compliance Committee](#)

the pandemic may have contributed to extreme stress among customers regarding their financial position...the conduct and treatment would still have been inappropriate and unacceptable to the BCCC in any situation, pandemic or not'. Yet one of the reasons the BCCC found the breach of Clause 10 to be serious was because of the banks 'lack of communication with its customers navigating the COVID-19 pandemic'.

The COVID-19 Special Note took effect from 1 July 2020 and is not covered in the BCCC's most recent report on compliance with the Code which is for the period January to June 2020. Nevertheless, the BCCC noted in its report on compliance with the Code from January to June 2020 that 'COVID 19 does not appear to have significantly affected banks' ability to comply with the Code when it is considered in the context of the overall impact of the pandemic on the Australian economy, customers' lives and livelihoods and banks' business operations'.²⁰

The review would be interested in receiving feedback on the application of the COVID 19 Special Note to the Code.

Questions:

Hardship assistance during COVID-19

- 1) ***Was the support offered to customers during the COVID-19 pandemic in line with expectations of customers and the community? Were there any gaps in the assistance provided during COVID-19?***
- 2) ***Should the Code specifically include a commitment that banks will support customers facing financial difficulties in emergencies or special circumstances, such as a significant economic shock, fire, flood, drought, flood, and earthquake?***
- 3) ***Were customers impacted by the COVID-19 Special Note to the Code?***
- 4) ***Could breaches of the Code be considered more serious if they occurred while customers were navigating the COVID-19 pandemic which contributed to extreme stress among some customers?***

9. Inclusive and accessible banking services and supporting vulnerable customers

Task

The review has been asked to assess the extent to which the Code contributes to banking services being inclusive, affordable and accessible for all customers, including small business customers, Indigenous customers, customers with disability, customers in remote, rural and regional areas, older customers and customers with limited English. The review has also been asked to assess whether the Code meets consumer and community standards for banks to support customers experiencing vulnerability.

Code provisions

The commitments in the Code relevant to the delivery of inclusive and accessible services and supporting customers experiencing vulnerability are covered in a number of clauses in the Code.

Clause 14 refers to banks' commitment to comply with the ABA protocol when closing a branch and to provide banking services to personal and small business customers in remote, rural, and regional areas. Part 4 is titled 'Inclusive and accessible banking' and clause 32 says banks are committed to providing banking services which are inclusive for all people including older

²⁰ [BCCC Report: Banks' compliance with the Banking Code of Practice - January to June 2020 - The Banking Code Compliance Committee](#)

customers, people with a disability, Indigenous Australians, including in remote locations, and people with limited English.

Clause 34 refers to improving the accessibility of banking services for people with a disability, older customers, and people with limited English. This commitment is qualified with the proviso that banks will take 'reasonable measures. What constitutes 'reasonable measures'? Clause 35 covers provision of banking services to Indigenous customers and includes the recommendation from the Royal Commission for banks to help customers meet any identification requirements by following AUSTRAC's guidance on identification and verification of persons of Aboriginal and Torres Strait Islander heritage.

Clause 36 refers to providing banking services to remote locations. Clause 38 covers the commitment to take 'extra care' with customers experiencing vulnerability, and clause 39 says banks will train their staff to act with 'sensitivity, respect and compassion if you appear to be in a vulnerable situation'. Chapter 15 and 16 deals with the provision of banking services for people with a low income, including the availability of basic accounts or low or no fee accounts.

Part 6 of the Code covers lending to small business. Chapter 20 says banks will help a small business when it applies for a loan, including outlining information requirements, time to take a decision, clearly setting out general terms and conditions, and the reasons for not approving a loan if that is the case. The rest of part 6, Chapters 21-24 deal with protections for small businesses when things go wrong – when the bank will not force a loan, including against non-monetary defaults, deciding not to extend a loan and when to appoint an external property valuer, accountant and insolvency practitioner.

Background

Many of the commitments regarding providing inclusive and accessible banking services to specified customers are general – such as the commitment to being inclusive and accessible and taking extra care – rather than specific, measurable steps that the banks are committed to implementing.

Among the more specific commitments in Part 4, is the banks' undertaking to train staff to act 'with sensitivity, respect and compassion if you appear to be vulnerable'. In addition, banks commit to provide cultural awareness training to staff who regularly assist customers in remote Indigenous communities. Whether such training took place can be monitored, however, whether it translates to bank staff taking 'extra care' with vulnerable customers or assisting Indigenous customers, including in remote areas, can only be effectively assessed on a case-by-case basis. It can, however, be monitored whether bank staff do follow AUSTRAC guidance on identification and verification of persons of Aboriginal and Torres Strait Islander heritage.

As mentioned in the section of this note dealing with COVID-19, a consequence of the pandemic and the lock downs may have posed additional issues associated with making banking services accessible, particularly with greater reliance on the digital delivery of services.

Clause 36 contains a general commitment to assist customers in remote communities to access banking services. The ABA has implemented a number of initiatives to enhance access to banking services in remote communities, including an ATM fee free scheme, exploring opportunities to partner with specialist organisations to increase accessibility, and has issued an ABA Indigenous Statement of Commitment.²¹ Clause 36 may benefit if it included some indication as to what banks are doing to assist customers in remote locations.

In terms of bank compliance with the commitments in Part 4 of the Code, the BCCC reports 504 breaches in the six months to June 2020, up from 154 for the previous six months²². The BCCC

²¹ <https://www.ausbanking.org.au/wp-content/uploads/2019/08/ABA-Indigenous-Statement-of-Commitment.pdf>

²² [BCCC Report: Banks' compliance with the Banking Code of Practice - January to June 2020 - The Banking Code Compliance Committee](#)

observes that the increase in breaches can be attributed in part to the impacts of the pandemic and bushfires, but also increased monitoring and awareness of this part of the Code. Most of the breaches involved failure to identify or take extra care with customers who may be vulnerable or not offering no-fee accounts to low- income customers.

As regards breaches of Part 6, lending to small business, the BCCC reports that breaches increased from 68 in the period June to December 2019 to 316 in January to June 2020. Most of the increase in breaches involved Chapter 20, helping a small business when it applies for a loan, but there was also a sizeable increase in breaches of chapter 24 that covers the appointment of external property valuers, investigative accountants and insolvency practitioners.

The BCCC has underway an inquiry into banks' compliance with the Code's inclusivity, accessibility, and vulnerability commitments. The focus of the review is how banks comply with Code 4 obligations throughout the entire consumer and small business experience.

Other codes of conduct in the financial services industry have extended provisions to support vulnerable customers beyond those in the Code. These other codes may provide a guide for enhancing the Code. For example, the 2020 General Insurance Code includes commitments in the following areas: providing services to customers affected by family violence; identifying if customers require additional support from someone else (such as a lawyer, consumer representative, interpreter, or friend); providing access to an interpreter if requested or needed; and developing processes and procedures for dealing with customers with a mental health condition.

A condition of the ACCCs authorisation of the changes to the Code in 2019 was that banks were to be proactive in identifying eligible customers for basic accounts.²³ The reason for this provision was because basic accounts would be less profitable for banks than fee paying accounts and basic accounts were not being introduced for commercial reasons but as a result of community and government pressure. The specific condition was that banks must periodically, and at least once a year, take reasonable steps to identify customers who are, or may be, eligible for basic accounts. The banks are also required to provide written reports to the ACCC on the action they have taken along with the number of basic accounts open. No reports have yet been published.

The review would welcome comments from interested parties as to whether the Code contributes to more inclusive and accessible banking services. While trends in lending data can be monitored, such as the flow of credit to small business, the challenge is to isolate the contribution of the Code and importantly, whether changes could be made to improve its effectiveness.

Questions:

Inclusive and accessible services and supporting vulnerable customers

- 1) *Has the Code contributed to banking services being inclusive, affordable, and accessible to all customers?***
- 2) *Does the Code meet consumer and community standards for banks to support customers experiencing vulnerability?***
- 3) *Could the Code be strengthened in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported? Should the Code include more specific undertakings regarding the steps that banks will implement so that services are inclusive and accessible to all customers?***
- 4) *Do banks take a broad approach to ensuring their products and services are sufficiently inclusive or accessible, or is it largely focused on physical aspects of accessibility, such as branch set up?***

²³ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association>

- 5) *Have the banks been proactive in identifying existing customers who are, or may, be eligible for basic accounts?*
- 6) *Is Part 6 sufficient in outlining how banks will help small business obtain finance?*
- 7) *Should the Code incorporate some of the provisions in other codes of conduct (such as the 2020 General Insurance Code) that cover dealings with vulnerable customers?*

10. Promoting the existence and benefits of the Code

Task

The review has been asked to assess the effectiveness of the provisions in the Code to make customers aware of the existence and benefits of the Code, including the existence of and their eligibility for basic, low fee and no fee accounts.

Code provisions

Chapter 2 of the Code imposes on banks the obligation to promote the Code, ensuring that it is available in different ways, including hard copy and electronically. The Code provides that customers can ask for a copy of the Code. Chapter 8 states that banks will give customers clear information about the products and services so that they can make informed decisions.

Chapter 16 provides that banks will raise awareness of affordable banking products and services such as basic, low or no fee accounts, including that government concession card holders are eligible for these accounts. Chapter 15 provides that if a person with a concession card applies for a new transaction, the bank will provide information about any basic accounts or other standard services that have low or no standard fees. The chapter defines the features of basic accounts.

Background

The BCCC report on 'Banks transition to the 2019 Banking Code of Practice', noted that the majority of the banks indicated how they will comply with the obligation under Chapter 8 to provide information to customers, although 8 out of 19 banks surveyed did not provide a substantive response²⁴. The BCCC expressed concern that there were inadequate controls and monitoring across all channels for informing customers and little detail was provided about the frequency in which their controls would be tested.

In a desktop audit of banks' sites, the BCCC noted in its report on transition to the 2019 Code that it was satisfied that information was available in the areas of the Code dealing with privacy policy and internal and external dispute resolution.

The review will conduct a desktop audit of banks' web sites to assess the extent that they currently make customers aware of the existence and benefits of the Code and basic or low/no fee accounts. One issue to consider is what constitutes 'promoting' the Code. For example, would a bank fulfill its commitment to promote the Code by having on its website a brief reference to the Code and link to the ABA website?

Effectively raising awareness of the benefits of the Code to customers may not involve promoting the document itself, but the commitments contained in the Code, such as the existence of basic accounts, support for customers in financial difficulty, managing accounts, handling complaints and so on. Customers are more likely to seek and be more receptive to information about a particular aspect of their relationship with their bank, rather than on the Code itself. The review will seek to assess the extent to which banks promote the Code, but also the specific obligations the banks have under the Code.

²⁴ [BCCC Inquiry: Banks' transition to the 2019 Banking Code of Practice - The Banking Code Compliance Committee](#)

The ultimate test is whether customers are aware of these obligations and this is best done through consumer surveys of their knowledge of the promises banks make in the Code.

Questions:

Promoting the existence and benefits of the Code

- 1) ***Are the provisions in the Code requiring banks to promote the Code effective?***
- 2) ***What constitutes promoting the benefits of the Code? Does it involve referring to the Code on bank web sites and having copies of the Code available in bank branches? Should it include bank staff advising customers in their dealings with the bank that their rights and obligations are covered in the Code – for example by referring to the Code when a customer logs onto their internet banking?***
- 3) ***Do banks effectively promote the availability of basic and low or no fee accounts, including outlining eligibility for these accounts?***

11. Resolving complaints and disputes

Task

The review has been asked to assess the effectiveness of the provisions of the Code in resolving complaints and disputes between banks and their individual and small business customers.

Code Provision

Part 10 of the Code deals with 'Resolving your complaint'. Chapter 46 provides that banks will have a Customer Advocate who will facilitate fair customer outcomes. Chapter 47 says customers can complain to a bank in the first instance, and if unable to be resolved, the customer will be given information on how to take the complaint to ACFA. Under clause 197, banks undertake to publish the availability of internal and external dispute resolution processes. Chapter 48 says banks will be fair and reasonable and provide timelines for responding to a complaint.

Background

ASIC Regulatory Guide 183 says that for a code to be approved it must have internal dispute resolution processes and an ASIC- approved external dispute resolution scheme. The external dispute resolution schemes are explicitly required to take into account the operation of any relevant industry code in determining a consumer complaint.

The BCCC reports 1,206 breaches of Part 10 for the period January to June 2020, down from 1,248 breaches for July to December 2019. Where banks provided further details, most complaints related to complaints over handling delays or staff failing to register complaints when they expressed dissatisfaction.

Banks resolved 1,624,137 complaints in 2019-20. One major bank accounted for 70 per cent of the complaints in 2019-20.

ACFA reports that in 2019-20 it received 46,820 banking and finance complaints, an 11 per cent increase from the previous year. Most complaints were about credit cards, followed by home loans and personal loans, with the most common issue being credit reporting followed by unauthorised transactions and responsible or appropriate lending.

ASIC has approved the provisions in the Code dealing with complaints and disputes to be updated in line with the release of ASIC Regulatory Guide 271, which is due to commence on 5 October 2021. There are new timeframes for dealing with complaints.

Clause 198 of the Code says that the banks' dispute resolution processes 'will comply with ASIC guidelines. If the aim for the Code is to give consumers a comprehensive, but readily accessible, outline of their rights, it may be appropriate for banks to outline in the Code what are consumers rights under the relevant ASIC regulatory guidelines.

Clause 193 of the Code says banks will have a Customer Advocate 'to help facilitate fair customer outcomes and minimise the likelihood of future problems. There is also reference, and a link, to the ABA's *Guiding Principles for Customer Advocates*'. The ABA states in the guiding principles that the purpose of the Customer Advocate is to make life easier for the customer when things go wrong and minimise the likelihood of future problems. It also states that banks may design the role of Customer Advocate differently 'considering their specific needs, current arrangements and aspirations, as well as customer and community expectations'.

ASIC Regulatory Guide 271 says a financial firm may offer a complainant the option of escalating their complaint to a customer advocate as an alternative to AFCA, after the response from the internal dispute resolution process, however when making the offer, the firm must not prevent the customer from exercising their right to access AFCA. If the customer chooses to use the customer advocate, the total time spent dealing with a complaint must not exceed the relevant maximum time frame.

The review would be interested in feedback on whether the role of the Customer Advocate is sufficiently understood by customers, and if not, should more explanation be included in the Code.

Questions:

Resolving complaints and disputes

- 1) ***How effective are the provisions in the Code requiring banks to first refer customers to their internal dispute resolution processes and if the complaint cannot be resolved successfully, referring the customer to AFCA?***
- 2) ***Should the Code have more information on the relevant ASIC regulatory guidelines for handling customer disputes.?***
- 3) ***Do customers understand the role of the Customer Advocate? Are customers using the Customer Advocate?***

12. Government's proposed changes to regulatory framework for consumer credit.

Task

The review has been asked to consider the effect of the Government's proposed changes to the regulatory framework for consumer credit and how this (proposed) new regulatory environment will interact with the Code. The most significant change proposed by the Government involve changes to the responsible lending obligations in the National Credit Act.

Code provision

Chapter 17 of the Code covers a responsible approach to lending. Clause 49 says when considering a loan, or increase in loan limit, banks will 'exercise the care and skill of a diligent and prudent banker'. Clause 50 says if the customer is an individual, not a business, the bank will comply with the law. This means the bank will comply with the responsible lending requirements under the Credit Act. Clause 51 says if the customer is a small business, when assessing whether

the customer can repay the loan the bank will consider the appropriate circumstances reasonably known to the bank about the customer's financial position and the customer's account conduct.

Background

Breaches of responsible lending obligations in Chapter 17 was the third highest of all breaches in 2019-20. The nature of the breaches included: credit assessments being incomplete, unsatisfactory, or using inaccurate information; the loan being unserviceable, unaffordable, or unsuitable, and the provision of misleading or incorrect advice.

BCCC has observed that banks' frameworks for monitoring the responsible lending obligations are the most formally structured and well embedded across all the key obligations in the Code.

The National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, amends the Credit Act to remove the obligation on lenders to ensure that loans they issue are suitable for their customers, with the exception of small amount credit contracts and consumer leases²⁵. Lenders will be able to rely on the information provided by borrowers, replacing the current approach of 'lender beware' with a 'borrower responsibility' principle. Banks, as ADIs, will continue to comply with APRA's lending standards, which ensure lenders have appropriate settings for managing risks to financial soundness throughout the life of the loan.

The Explanatory Memorandum for the Bill says the credit risk management standards that ADIs are expected to meet include sound lending practices similar to the responsible lending obligations²⁶. A change to regulations has removed ambiguity regarding the application of consumer lending laws to small business lending. This change means a loan for any genuine partial small business purpose is exempt from responsible lending protections of the Credit Act.

The chair of APRA, Wayne Byres, commented 'I don't think we would see banks, in response to changes in law, materially changing lending standards in any way'.

Several interested parties, including consumer representative bodies, are opposed to the Government's proposed changes to the responsible lending obligations and they are subject to public debate. The review has been asked, however, to consider how the changes to the regulatory framework for consumer credit would interact with the Code should they be enacted.

In terms of the potential impact of the proposed changes to the Consumer Credit Act, the BCCC noted in a submission to Treasury that the proposed legislation will effectively remove the framework under which banks currently comply with the 'care and skill of a diligent and prudent banker' requirement (clause 49 of the Code).²⁷ BCCC said it was not clear whether or how Clause 49 will apply to lending to individual customers in a credit-risk lending regime. BCCC was also concerned that the proposed changes will considerably diminish the operation and effect of the Code as a protection for individual customers.

Notwithstanding the BCCC's reservations, the requirement under Clause 49 for banks when considering a loan to 'exercise the care and skill of a diligent and prudent banker' may still be compatible with the proposed changes to the Credit Act. The majority view of the Economics Legislation Committee's examination of the Bill noted '...these regulatory changes will not undermine consumer protections and that the principal of 'responsible lending is deeply embedded in Australia's broader regulatory framework, which credit providers and credit assistance providers must still operate within and comply with'.

If the responsible lending obligations are amended, the wording of the Code would need to change. Clause 50 currently says that for individual customers who are not a business, banks will

²⁵ [National Consumer Credit Protection Amendment \(Supporting Economic Recovery\) Bill 2020 \(legislation.gov.au\)](https://www.legislation.gov.au/idx/instruments/2020-0001)

²⁶ [201130 - WIP EM Credit reforms \(aph.gov.au\)](https://www.aph.gov.au/201130-WIP-EM-Credit-reforms)

²⁷ [BCCC submission to Treasury's consultation on Consumer Credit Reforms - The Banking Code Compliance Committee](#)

implement a 'responsible approach to lending' by complying with the law. If the 'law' changes, then the wording of clause 50 will no longer be relevant and the commitment to exercising the care and skill of a diligent banker for individual customers may need to be amalgamated with that for small businesses in clause 51.

Questions:

Proposed changes to responsible lending obligations

- 1) ***What are the implications for the Code of the Government's proposed changes to the responsible lending obligations in the Credit Act?***
- 2) ***If the current responsible lending obligations are removed from the Credit Act, should the Code be amended such that the commitment to exercise the care and skill of a diligent banker be the same for individuals and small businesses?***

13. Enforceable Provisions

Task

The review has been asked to consider the enforceable code provisions regime introduced following the Royal Commission and the kind of provisions that the ABA and ASIC should consider in their process of identifying provisions that should be designated under the regime.

Background

Under the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, ASIC may approve codes of conduct via legislative instruments which may contain enforceable provisions²⁸. A breach of an enforceable provision may attract civil penalties (including pecuniary penalties) and /or other administrative enforcement action from ASIC.

Commissioner Hayne recommended that certain provisions in codes of conduct should be designated as enforceable to provide individuals with greater certainty and enforceability on key code provisions. He noted that as codes are a form of industry self- regulation, in the first instance industry should identify which provisions of their code may be considered enforceable provisions.

Among factors outlined in the legislation that should be considered in determining whether a provision should be enforceable include:

- the provision is drafted in a way that can be legally enforced
- the provision represents a commitment to a person by a subscriber, and
- a breach of the provision is likely to result in a significant detriment to the person.

In his final report, Commissioner Hayne gave examples from the Banking Code 2019 which could be designated as enforceable provisions. These were: the obligation to engage with customers in a fair, reasonable, and ethical manner; the obligation to exercise the care and skill of a diligent and prudent banker when extending credit; and provisions dealing with guarantees.

The Explanatory Memorandum for the legislation states that examples of provisions which could be designated as enforceable may include:

- cooling off periods
- providing information to consumers, and

²⁸ [Financial Sector Reform \(Hayne Royal Commission Response\) Act 2020 \(legislation.gov.au\)](https://www.legislation.gov.au)

in a relevant court or tribunal, the first port of call perhaps should be to re-visit the wording of the provision in the Code and see if the uncertainty can be removed.

A factor that may need to be taken into account in considering possible provisions to be designated as enforceable is the contribution they can make to the overall enforcement of the Code. While a customer may successfully pursue a breach of a provision of the Code through a court or ACFA, this may not be enough to make banks correct their ways. As outlined in the section of this note covering the role of BCCC, there is ongoing concern about the number of breaches of the Code and whether the BCCC has sufficient 'teeth' to change bank behaviour.

Possible examples of provisions that could be designated as enforceable which would help encourage compliance with the Code and would minimise confusion among consumers as to what parts of the Code are enforceable, would be to designate as enforceable provisions which contain commitments by the banks to implement the systems, controls, training and monitoring to ensure that they honour the commitments they make to customers in the Code. The provisions being designated as enforceable can be seen as contributing to reassuring consumers that they can rely on the Code. Moreover, as outlined in BCCC Finding CX3998, the failure of a bank to build strong compliance structures led to numerous systemic and serious breaches of the Code which affected many customers³¹.

In a similar vein, provisions of the Code which essentially underline all the commitments in the Code along with all aspects of how banks deal with their customers, may be candidates for being designated as enforceable. For example, the BCCC has indicated that it considers Clause 10 and the commitment by banks to engage with their customers 'in a fair, reasonable and ethical manner' as the most important clause in the Code because it goes to the culture of the bank and the basis of all their dealings with their customers. Designating Clause 10 as an enforceable provision may be seen as reinforcing and underpinning all the commitments in the Code. However, if Clause 10 was an enforceable provision under the Code, there may be an issue about having different civil penalty regimes applying to parallel provisions in the Banking Code and the Corporations Act.

Questions:

Enforceable provisions

- 1) ***What are the features of provisions in the Code that could be considered by ASIC and the ABA in deciding which provisions should be designated as enforceable?***
- 2) ***What are the provisions which represent specific commitments and where a breach is likely to cause significant detrimental harm to a customer?***
- 3) ***To what extent would a provision have to go beyond the existing law to be considered as a possible candidate for being designated as an enforceable provision?***
- 4) ***If some provisions are designated as enforceable, how can consumers be assured that they can rely on all provisions in the Code?***
- 5) ***Should a factor to take into account when considering which provisions to designate as enforceable be the extent that the provision underpins the overall implementation of the Code and, in doing so, would help reassure consumers that they can rely on the enforceability of all provisions in the Code?***

³¹ [BCCC Finding CX3998 - The Banking Code Compliance Committee](#)

14. BCCC

Task

The review has been asked to assess whether there is a need to adjust the duties and powers of the BCCC, whether the sanctions available to the BCCC remain appropriate and whether the Charter is the appropriate instrument to record these duties and powers.

Code provision

BCCC is an independent compliance monitoring body established under Clause 207 of the Code. The powers and role of the BCCC are outlined in Clause 211. They cover: monitoring bank compliance with the Code; investigating alleged breaches; making findings and recommendations on breaches; apply sanctions; provide guidance to banks on compliance; apply sanctions; provide guidance to banks on compliance; drive improvements in compliance as well as promoting the Code and the role of the BCCC.

Background

The BCCC replaced the former Code monitoring body, the Code Compliance Monitoring Committee (CCMC). Compared with the CCMC, the BCCC has new powers and an enhanced mandate.

The terms that govern the powers and operations of the BCCC are set out in its Charter³². Unlike the CCMC, where its charter formed part of the 203 Code, the BCCC Charter is a standalone document that can be found on the BCCC website.

The BCCC says it has developed a new approach to monitoring consistent with its Charter, specifically:

- considering a bank's promise to engage with customers in a fair, reasonable and ethical manner in every aspect of its monitoring work
- concentrating on monitoring potentially systemic and serious matters, and
- encouraging continuous improvement in banking practice.

Clause 209 says that 'if you want to report an alleged breach of the Code you can contact the BCCC, although Clause 210 says if a customer has a specific dispute with their bank that involves a breach of the Code, they should first contact their bank then the banks external dispute resolution provider.

The BCCC receives a relatively small number of complaints from individuals and most are referred to banks' internal dispute resolution mechanisms, or to AFCA, because the BCCC cannot resolve an individual complaint.

The key component of the BCCC's monitoring efforts is self-reporting of breaches by banks. Banks are required to lodge with the BCCC a Banking Code Compliance Statement every 6 months. The statement provides information on how and why banks breached the Code and is intended to demonstrate banks' own efforts to monitor the Code as well as help the BCCC identify current and emerging risks and provide guidance to banks to improve their practices.

The BCCC's latest compliance report indicates that 19 banks that subscribe to the Code reported 40,629 breaches of the Code for the 12 months July 2019-June 2020³³. This was a 160 per cent increase in breaches over the previous 12 months. The four major banks account for nearly 90 per

³² [BCCC-Charter.pdf \(ausbanking.org.au\)](https://www.bankingcode.org.au/BCCC-Charter.pdf)

³³ [BCCC Report: Banks' compliance with the Banking Code of Practice - January to June 2020 - The Banking Code Compliance Committee](#)

cent of all breaches reported in 2019-20, with one of the major banks accounting for 40 per cent of the total.

The reason provided by banks for the substantial increase in breaches is that it was due to: better detection and identification of potential Code breaches as a result of an improved risk culture, employee training and awareness, and increased monitoring; the addition of new breach obligations in the Code; increased focus on identifying more than one Code breach per incident; and, greater diligence and additional resources to ensure breaches are identified, recorded and appropriately reported.

In addition to self-reporting by the banks, the BCCC has discretionary power to investigate potential Code breaches from its monitoring activities and concerns raised by customers. The BCCC has published six Code breach findings because of its investigations work during 2019-20. The BCCC has the power to apply sanctions where: the breach is serious or systematic; the bank has failed to remedy a breach; failed an undertaking given to BCCC; failed to take adequate steps to prevent a serious or systemic breach; has not operated and complied with reasonable requests of the BCCC.

The BCCC's sanctions are: require the bank to rectify a breach; undertake a compliance review of remediation action; formally warn a bank; name a bank in the BCCC Annual Report or on its web site; report serious or systemic ongoing instances of non-compliance to ASIC.

ASIC Regulatory Guide 183 provides that among the requirements for a financial services sector code to be approved, subscribers must be subject to a range of sanctions for breaches that go beyond paying compensation or rectification to individual consumers.³⁴ In addition to the sanctions the BCCC can apply under its Charter, others suggested by ASIC in Regulatory Guide 183 include: corrective advertising orders; fines; suspension or expulsion from the industry association; and, suspension or termination of subscription to the code.

The 2020 General Insurance Code provides that the Code Governance Committee, which is the body responsible for monitoring and enforcing that code, may impose a community benefit payment of up to \$100,000 for a significant breach of the code.

The BCCC named one bank in its 2019-20 Annual Report and on its website for serious and systemic breaches of the Code³⁵. (The breaches occurred before the BCCC replaced CCMC and were of the 2013 Code). In the case of the bank named, the BCCC reported that the bank had undertaken work to address the shortfalls and root causes of its breaches.

In May 2021, the BCCC named another bank on its website for serious and systemic breaches of the Code³⁶. The bank named publicly apologised for the breaches, contacted customers and remediated the impact of the breach, and implemented a Management Action Plan to understand what occurred leading up to the breaches and how the bank can improve.

Some of the BCCC's activities to help banks meet their obligations include Guidance Notes on: COVID-19 Special Note; Breach Identification and Reporting; and Clause 10- fair, reasonable, and ethical behaviour. The BCCC has also published the report Building Organisational Capability, which is designed to help banks improve compliance with the Code.

Clause 13.4 of BCCC's Charter says that the ABA, after considering the BCC's business plan and budget for the following financial year, will ensure the BCCC has sufficient resources to carry out its functions.

³⁴ <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/>

³⁵ [BCCC 2019-2020 Annual Report - The Banking Code Compliance Committee](#)

³⁶ [BCCC Finding - CX6933 - The Banking Code Compliance Committee](#)

Questions:

BCCC

- 1) *Is the BCCC's monitoring of compliance with the Code, investigation of potential breaches, and guidance provided to banks contributing to improved compliance with the Code?***
- 2) *Is the Charter the appropriate instrument to record BCCC's duties and powers in monitoring compliance with the Code?***
- 3) *Is self-reporting of breaches by banks an effective approach to assessing their compliance with the Code?***
- 4) *Are the range of sanctions available to BCCC appropriate, particularly in responding to serious and systemic breaches of the Code?***
- 5) *Does the experience to date of the two banks being publicly named for breaches indicate that the sanctions are effective in influencing the banks to improve their systems to prevent further breaches? Should consideration be given to imposing financial sanctions for systemic breaches?***
- 6) *Does the BCCC have sufficient financial resources to carry out its functions?***

Independent Reviewer - MIKE CALLAGHAN AM PSM

Mike Callaghan is chair of the Commonwealth Grants Commission and chaired the 2020 Review of the Retirement Income System. He spent 38 years in the Australian Treasury, including: Deputy Secretary Macroeconomic Group; Australia's G20 Finance Deputy; Prime Minister's Special Envoy International Economy; and Deputy Secretary Revenue Group.

He was an Executive Director at the IMF from 2000 to 2004 and served as Chief of Staff to the Treasurer, the Hon Peter Costello from 1999 to 2000.

Mike has chaired independent reviews for the Australian Government covering tax, insurance, and economic regulation. He has also undertaken reviews and consultancies for the IMF and World Bank and served as the independent chair for two replenishments of the ADB's Asian Development Fund.

From 2018 to 2020 he was Chair on the Aged Care Financing Authority, and from 2012 to 2014, Mike was Director of the G20 Studies Centre at the Lowy Institute. He was on the Board of the Australian Reinsurance Pool Corporation from 2017 to 2019.

Mike has economic and law degrees from ANU, is a graduate of the Royal College of Defence Studies in London, and a graduate from the Australian Institute of Company Directors. He is a Member of the Order of Australia and has been awarded the Public Service Medal and the Centenary Medal.

CONSOLIDATED LIST OF QUESTIONS

Extent to which the Code meets community expectations.

- 1) Overall, does the Code adequately articulate the standards of service and behaviour currently expected by individual and small business customers?
- 2) Does the Code remain relevant given changes to legislation and regulations affecting banking services? In particular, does the Code need to be amended in the light of such developments as: Mandatory Credit Reporting; Open Banking; Design and Distribution Obligations: and, Buy Now Pay Later?
- 3) Do the changes to the Code sufficiently respond to the findings from the Royal Commission, particularly in meeting community expectations that banks will have in place the systems to ensure that the commitments in the Code will be honoured by all member banks?
- 4) Have the changes to the Code and the bank's performance in meeting their obligations improved the relationship between banks and their customers?
- 5) Are individual and small business customers confident that banks will deliver on their commitments under the Code?

The Code's audience

- 1) Has the customer friendly re-write of the Code resulted in more customers accessing and relying on the Code?
- 2) Has an appropriate balance been achieved between making the Code easy to read and navigate for the customer, while giving the banks enough guidance to implement the Code? Does the Code have sufficient detail such that key provisions can be enforced, including by being designated as enforceable provisions under the law?
- 3) While the Code says that relevant provisions apply to its terms and conditions for all banking services and guarantees, do they have sufficient clarity such that a court or external dispute resolution mechanism can treat a breach of a provision as a breach of contract?
- 4) Should the Code include a commitment by the banks that they will put in place the systems and mechanisms to ensure that all provisions in the Code will be implemented?

Acting in a fair, reasonable and ethical manner

- 1) Is the commitment for banks to act in a fair, reasonable and ethical manner (Clause 10) one of the most important clauses in the Code?
- 2) Does Clause 10 underpin the other commitments in the Code as well as every other aspect of a bank's dealings with its customers?
- 3) Is Clause 10 currently enforceable under the law?

Customers experiencing financial difficulties

- 4) Is the Code in line with customer and community expectations regarding the assistance banks should provide individual and small business customers facing financial difficulties?
- 5) Do banks assist customers facing financially difficulties in line with the commitments in the Code?

- 6) Does the Code provide clear and comprehensive information on whether and how their bank will assist them if they are in financial difficulties? Should there be more guidance as to what banks will consider in deciding whether and how to assist customers in financial difficulties?
- 7) How active are the banks in identifying customers who may be facing financial difficulties and contacting them to discuss their situation and offer assistance?
- 8) Is it clear as to what customers are covered under Part 9 of the Code?
- 9) Do the banks actively promote how they can help customers in financial difficulty? Is the publicly available information easily identifiable, accessible and comprehensive?
- 10) Should the Code include a provision that banks will advise customers of all their rights under the Code with respect to financial hardship assistance when a customer approaches a bank seeking information on dealing with financial difficulties?
- 11) Should the additional safeguards for consumers contained in the ABA Industry Guideline: The Sale of Unsecured Debt be included in the Code?
- 12) Should the Code outline what constitutes 'meaningful and sustainable' debt repayments in circumstances of financial hardship?
- 13) Should the BCCC regularly publish data on the percentage of requests for financial difficulty assistance granted by banks, along with the nature of the assistance provided?
- 14) Is the Code appropriate with respect to dealings with deceased estates? Are there potential gaps, and/or could the coverage of the undertakings be clarified?

Hardship assistance during COVID-19

- 1) Was the support offered to customers during the COVID-19 pandemic in line with expectations of customers and the community? Were there any gaps in the assistance provided during COVID-19?
- 2) Should the Code specifically include a commitment that banks will support customers facing financial difficulties in emergencies or special circumstances, such as a significant economic shock, fire, flood, drought, flood, and earthquake?
- 3) Were customers impacted by the COVID-19 Special Note to the Code?
- 4) Could breaches of the Code be considered more serious if they occurred while customers were navigating the COVID-19 pandemic which contributed to extreme stress among some customers?

Inclusive and accessible services and supporting vulnerable customers

- 1) Has the Code contributed to banking services being inclusive, affordable, and accessible to all customers?
- 2) Does the Code meet consumer and community standards for banks to support customers experiencing vulnerability?
- 3) Could the Code be strengthened in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported?
- 4) Do banks take a broad approach to ensuring their products and services are sufficiently inclusive or accessible, or is it largely focused on physical aspects of accessibility, such as branch set up?
- 5) Should the Code include more specific undertakings regarding the steps that banks will implement so that services are inclusive and accessible to all customers?
- 6) *Have the banks been proactive in identifying existing customers who are, or may, be eligible for basic accounts?*

- 7) Is Part 6 sufficient in outlining how banks will help small business obtain finance?
- 8) Should the Code incorporate some of the provisions in other codes of conduct (such as the 2020 General Insurance Code) that cover dealings with vulnerable customers?

Promoting the existence and benefits of the Code

- 1) Are the provisions in the Code requiring banks to promote the Code effective?
- 2) What constitutes promoting the benefits of the Code? Does it involve referring to the Code on bank web sites and having copies of the Code available in bank branches? Should it include bank staff advising customers in their dealings with the bank that their rights and obligations are covered in the Code – for example by referring to the Code when a customer logs onto their internet banking?
- 3) Do banks effectively promote the availability of basic and low or no fee accounts, including outlining eligibility for these accounts?

Resolving complaints and disputes

- 1) How effective are the provisions in the Code requiring banks to first refer customers to their internal dispute resolution processes and if the complaint cannot be resolved successfully, referring the customer to ACFA?
- 2) Should the Code have more information on the relevant ASIC regulatory guidelines for handling customer disputes and a commitment that the Code will be updated in line with changes to these guidelines?
- 3) Do customers understand the role of the Customer Advocate? Are customers using the Customer Advocate?

Proposed changes to responsible lending obligations

- 1) What are the implications for the Code of the Government's proposed changes to the responsible lending obligations in the Credit Act?
- 2) If the current responsible lending obligations are removed from the Credit Act, should the Code be amended such that the commitment to exercise the care and skill of a diligent banker be the same for individuals and small businesses?

Enforceable provisions

- 1) What are the features of provisions in the Code that could be considered by ASIC and the ABA in deciding which provisions should be designated as enforceable?
- 2) What are the provisions which represent specific commitments and where a breach is likely to cause significant detrimental harm to a customer?
- 3) To what extent would a provision have to go beyond the existing law to be considered as a possible candidate for being designated as an enforceable provision?
- 4) If some provisions are designated as enforceable, how can consumers be assured that they can rely on all provisions in the Code?
- 5) Should a factor to take into account when considering which provisions to designate as enforceable be the extent that the provision underpins the overall implementation of the Code and, in doing so, would help reassure consumers that they can rely on the enforceability of all provisions in the Code?

BCCC

- 1) Is the BCCC's monitoring of compliance with the Code, investigation of potential breaches, and guidance provided to banks contributing to improved compliance with the Code?
- 2) Is the Charter the appropriate instrument to record BCCC's duties and powers in monitoring compliance with the Code?
- 3) Is self-reporting of breaches by banks an effective approach to assessing their compliance with the Code?
- 4) Are the range of sanctions available to BCCC appropriate, particularly in responding to serious and systemic breaches of the Code?
- 5) Does the experience to date of the two banks being publicly named for breaches indicate that the sanctions are effective in influencing the banks to improve their systems to prevent further breaches? Should consideration be given to imposing financial sanctions for systemic breaches?
- 6) Does the BCCC have sufficient financial resources to carry out its functions?

Banking Code of Practice

Independent Review 2021

TERMS OF REFERENCE

The Banking Code of Practice (the Code) is the instrument through which the industry sets standards of good banking practice. The Code applies to individuals and small businesses, and their guarantors.

Regulatory Framework

The Code is the first substantive industry code to be approved by ASIC (in 2018) under the Corporations Act, and the Australian Banking Association (ABA) has sought and obtained approval for all subsequent changes to the Code.

The Code is enforceable, with its provisions forming part of banks' agreements with their customers³⁷.

The 2021 review will be the first major review of the Code since the report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was finalised. The Royal Commission made several recommendations to amend the Code (which have been implemented or are underway), and a series of recommendations that substantially alter the regulatory framework for financial services in Australia.

In particular, as a result of the Royal Commission recommendations, the regime for industry codes in the financial sector was strengthened, and now includes provision for 'enforceable code provisions' – adding another (statutory) layer to code enforceability.

In addition, the Government has proposed significant changes to the regulatory framework for consumer credit. The effect of this new regulatory environment and how the Code interacts with it are key matters for the review.

Objectives

The banking industry is committed to earning back trust and creating an enduring, customer focussed culture. The Code is a key instrument through which this general cultural commitment, together with a range of specific commitments, is expressed and operationalised.

Consistent with the law and regulatory guidance, the Code provides for its review at a minimum of three-year intervals. The objectives of the review are to ensure that:

- 1) The Code continues to respond appropriately to the contemporary environment, and to benefit customers and subscribers.
- 2) Banks and consumers are clear about their rights and responsibilities and that the Code articulates the standards of behaviour expected of banks, including promotion of the Code.
- 3) Consumers of banking services, regulators and other key stakeholders play a part in the ongoing development of the Code.

³⁷ As in the Code, the use of the term customer(s), where relevant, includes individuals, small businesses and guarantors.

Scope

The review will make recommendations on how the banking industry can strengthen the operation of the Code and promote informed and effective relationships between banks and their individual and small business customers.

The Code reviewer will have regard to the fact that the code underwent substantial modifications following the last review (which reported in 2017), and has been subject to further modifications, including those made to implement recommendations of the Royal Commission. It is not anticipated that the review will reconsider the rationale for these changes. However, the review may accept submissions on the operation of the changes and consider whether any adjustments are required to ensure they achieve their intended effect.

The review will also note, in relation to the definition of 'small business' in the code, the report of the independent Pottinger Review³⁸, commissioned by the ABA in 2020 and the industry's response to that review (which accepts all recommendations), and will not be required to consider the issues raised, or recommendations made therein, unless there is a compelling reason to do so. However, as noted in the ABA response to the Pottinger Review³⁹, the review will consider developing appropriate amendments to implement Recommendation 6 which relates to refinement of the definition of Related Entities. This aspect of the review will be undertaken by external legal experts engaged by the ABA.

The changes to the Code as a result of Recommendations of the Pottinger Review will be included in the updated Code following this review.

The review will give specific attention to assessing and considering:

- 1) The extent to which the Code remains appropriate having regard to the recent reforms to the laws and regulations covering banking services to individual and small business customers, and in particular:
 - a) The effect of new legal obligations arising from implementation of the recommendations of the Royal Commission and other government reforms [including in respect of any changes to responsible lending obligations].
 - b) Whether these new obligations require any further amendment to the Code.
- 2) The 'enforceable code provisions' regime introduced following the Royal Commission and the kind of provisions that the ABA and ASIC should consider in their process of identifying any provisions that should be designated under the regime (having regard to the Act, regulations and any relevant ASIC guidance).
- 3) The extent to which the Code contributes to banking services being inclusive, affordable and accessible for all customers, including: small business customers, Indigenous customers, customers with a disability, customers in remote, rural and regional areas, older customers and customers with limited English.
- 4) The effectiveness of the provisions of the Code and whether these provisions meet consumer and community expectations for banks to:
 - a) act in a fair, reasonable and ethical manner
 - b) provide hardship assistance to individual and small business customers experiencing financial difficulties

³⁸ [https://www.pottinger.com/uploads/1/9/5/1/19512909/pottinger - independent review of the definition of small business - 26 october 2020.pdf](https://www.pottinger.com/uploads/1/9/5/1/19512909/pottinger_-_independent_review_of_the_definition_of_small_business_-_26_october_2020.pdf)

³⁹ www.ausbanking.org.au/submission/aba-response-to-pottinger-review/

- c) support customers during crises such as the COVID19 pandemic (drawing on lessons learned from any consequent impact on banks' ability to comply with the code, and having regard to the utility of the COVID19 Special Note)
 - d) resolve complaints and disputes between banks and their individual and small business customers
 - e) support customers experiencing vulnerability, and
 - f) make customers aware of the existence and benefits of the Code, including the existence of and their eligibility for basic, low fee and no fee bank accounts.
- 5) The role of the Banking Code Compliance Committee (BCCC), and whether there is a need for adjustment to its duties and powers, including:
 - a) whether the sanctions available to the BCCC remain appropriate, and
 - b) whether The Charter is the appropriate instrument to record these duties and powers.
 - 6) Particular matters of concern raised by stakeholders and considered by the reviewer to be important to address.
 - 7) The frequency with which the Code should be reviewed.
 - 8) Any other matters required to be considered under ASIC's Regulatory Guide RG183.

Independent Reviewer

The ABA has appointed Mike Callaghan, an independent person with relevant qualifications and experience to conduct this review.

The reviewer will be assisted by a Customer Advisory Panel who will be consulted at the reviewer's discretion. The panel will include two consumer representatives and one small business representative. The ABA will seek the input of the Consumer Federation of Australia (CFA) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to appoint the members of this panel.

Consultation

In commissioning this Code review and identifying the Terms of Reference, the ABA has sought the views of the ABA's Consumer Outcomes Group⁴⁰ and a number of other stakeholders.

The Code reviewer will conduct the review publicly and ensure effective consultation with:

- the banking industry including the ABA and its members
- the Australian Securities and Investment Commission (ASIC)
- consumer and small business organisations including the ASBFEO, COSBOA, and the member organisations of the CFA
- organisation(s) representing Australia's First Nations People
- organisation(s) representing people with disability
- relevant regulatory bodies including the Council of Financial Regulators, and the BCCC, and
- other interested stakeholders, including AFCA.

Consultation will include a public submissions process.

⁴⁰ The Consumer Outcomes Group includes representatives from Financial Rights Legal Service, Financial Counselling Australia, Council on the Ageing, Legal Aid Australia, South-East Community Links and Consumer Action Law Centre.

Final report

The Code reviewer will assess submissions received on the Terms of Reference and feedback provided and prepare a draft report to facilitate further consultation.

A final report will be published with findings and options about changes to improve the operation and performance of the Code. The findings and options presented by the report will take into account the submissions of all interested parties but will be determined and framed according to the independent judgement of the Code reviewer.

The findings and options will be those of the Code reviewer. The ABA and its member banks will need to consider the report and determine their response and any next steps.

The banks are committed to meaningful change that is supported by independent advice and a transparent and public process, and they will have regard to the findings and options identified by the report in determining and implementing appropriate changes to the Code, consistent with their obligations including under the competition law.

Timing

The independent review is to be conducted in a timely, transparent and accountable manner. As outlined in the table above, a final report will be published by the end of November 2021.

The implementation of the final report's recommendations will require assessment by the banking industry and changes to be determined. Commencement and transitional arrangements for the new Code will reflect the nature of the changes made.

The banking industry is committed to ensuring that the time taken in responding to the recommendations, making any changes to the Code, and implementing the changes is completed in as timely a fashion as possible.

Independence

The ABA will appoint the Code reviewer. While the banking industry will fund the review, the banking industry will not have any influence over the findings and options identified by the Code reviewer beyond our input as a participant in the review, and the Code reviewer and secretariat will act independently and not in the interests of, or on behalf of, the ABA or its members.