



INDEPENDENT REVIEW OF THE BANKING CODE OF PRACTICE 2021

INTERIM REPORT

September 2021



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1. Introduction

The Australian Banking Association (ABA) announced on 6 July 2021 that it had commissioned an independent review of the Banking Code of Practice (the Code).

The Code is a set of undertakings by ABA bank signatories regarding how they will conduct themselves in their dealings with individual and small business customers. The Code is independently reviewed at intervals no more than three years.

The background to the review, its terms of reference and the Consultation Note released by the review are available on the review's [web page](#).

The review is being undertaken by Mike Callaghan AM PSM, with the assistance of Abanoub Samaan and Heidi Perko.

In response to the Consultation Note released on 30 June 2021, the review has received 34 submissions¹. These are available on the review's webpage.

There has been widespread consultation with interested parties, with over 60 initial consultation meetings to date. The organisations consulted are listed in Attachment A. The review is continuing with its consultations.

2. Purpose of the Interim Report

Drawing on the submissions and consultation meetings to date, the interim report draws out some overarching themes and issues surrounding the review of the Code, along with some preliminary observations on these issues. It does not provide draft findings or recommendations.

The consultations and submissions have proposed many detailed changes to the Code. These will be covered in the final report. However, the direction the review takes on the broad themes and issues identified in this report will influence its approach to the final report and specific recommendations.

The main issues discussed in the interim report are:

- Influence of the Royal Commission
- Importance of the Code
- Overlap between the Code and the law
- The Code's audience
- Principle-based or prescriptive drafting, and
- Core commitment - fair, reasonable and ethical.

Comments on any of the matters raised in this interim report would be welcomed.

It would be appreciated if comments were received by 4 October 2021.

The review's final report is to be completed by end November 2021.

The review greatly appreciates the cooperation and assistance of all those involved in the consultation meetings and who have made submissions.

Comments on the interim report can be sent:

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¹ <https://bankingcodereview.com.au/#submission>

3. Overview

It was evident from the consultation meetings and submissions that the changes to the Code in 2019 were welcomed by both consumers and bank signatories to the Code.

Since the adoption of the 2019 Code, banks are more focused on implementing and monitoring compliance with their obligations in the Code. This trend is supported by compliance reports from the Banking Code Compliance Committee (BCCC).²

The Royal Commission may have been a major factor influencing a change in banks' attitudes towards the Code.

Most banks stressed the improvements they had made in implementing the Code and their efforts to strengthen monitoring of compliance. Some acknowledged this was still a work in progress.

The ABA's overall view is that the 2019 Code does a good job of articulating the standards of service and behaviour expected by customers and only relatively minor changes are required to update the Code.

Consumer representatives acknowledged that there have been considerable improvements to the Code in the last four years. However, they note that there is room for improvement across almost all areas of banking, particularly in making banking services more accessible and fairer, especially for customers experiencing some form of vulnerability.

Consumer bodies commended the ABA member banks for the valuable support provided to customers facing financial hardship by COVID-19. But they pointed to areas where they consider bank conduct disappoints, noting an inconsistency between banks in implementing Code commitments, along with continuing systemic and cultural problems within banks. They saw the Code as important in dealing with these concerns.

There were calls to strengthen the enforceability of the Code, either by making significant portions enforceable by the Australian Securities and Investments Commission (ASIC) or by strengthening the powers of the BCCC. Consumer bodies called for much of the material in ABA industry guidelines to be incorporated in the Code.

The joint submission³ by consumer organisations contained 103 recommended changes to the Code. The total number of recommended changes raised in submissions and consultations was approaching 200, including not only changes to the content of the Code, but also changes to its structure and drafting.

There is a significant difference between the view of the ABA and that of many stakeholders in terms of the extent to which the Code is meeting community expectations and in turn, the need for changes following this triennial review.

In many respects, the consumer bodies are calling for more detail to be incorporated in the Code as to how banks will implement commitments, including expanding on the range of circumstances where consumers may need assistance, especially those who are vulnerable or facing financial hardship.

A fundamental issue confronting the review is how much detail should be in the Code and the impact this will have on its accessibility, particularly to consumers. Recognising that changes to the Code can be a lengthy process, there is also a need to ensure that it can be, as far as possible, 'future proofed' and responsive to developments.

A consideration in this regard is the extent to which the Code should be more principle-based rather than prescriptive. The former adds flexibility and greater simplicity, and while the latter adds complexity, it could contribute to more consistency in implementation by banks.

² <https://bankingcode.org.au/resource/reports/>

³ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

This raises the question of the relationship between the Code and industry guidelines and the extent to which the guidelines are relevant in resolving a customer's dispute with a bank.

Much of the additional material consumer bodies want included in the Code is currently in guidelines. The reason consumers want them included in the Code is so that they will be enforceable.

One of the reasons the ABA considers it important to keep the guidelines separate from the Code is because the guidelines include 'stretch' targets (commitments) which may take some banks longer to comply with than others. Many of the ABA industry guidelines state they are not binding on the banks. Yet the guidelines are taken into account when a dispute is referred to the Australian Financial Complaints Authority (AFCA).

In terms of looking at the principles that underly the Code, it is important to clarify the enforceability of the commitment of banks to act in a fair, reasonable, and ethical manner. The BCCC considers it to be one of the most important clauses in the Code, and consumers want it to be an enforceable provision by ASIC. But the ABA says difficulty of interpretation presents problems in monitoring compliance and attempts at more prescriptive enforcement may be misguided.

The monitoring and enforceability of Code commitments is an important consideration. Relevant in this regard is the increasing overlap between consumer protections covered in legislation and the Code. The ABA proposes that some of the references to legislation in the Code be removed. Banks note the overlap results in duplication of breach reporting to ASIC and the BCCC, along with possibly changing the role of the BCCC from promoting best industry practice to becoming a regulatory body.

The overlap between the Code and legislation means that some of the commitments in the Code are already enforceable under legislation. The ABA is concerned that the introduction of the enforceable code provision regime introduced following the Royal Commission may see the Code changing from self-regulation aimed at providing consumers with rights not covered by legislation, to acquiring the status of delegated legislation.

In contrast, the consumer bodies advocate⁴ that all Code clauses that make a commitment that goes above other existing law, offers material protection to customers and is reasonably specific, should be made enforceable Code provisions. Although other stakeholders have warned this may confuse customers as to what provisions are enforceable and what is not.

The approach taken with the introduction of the new enforceable provision regime may have significant implications for the status and structure of the Code, along with the Code monitoring arrangements.

These are the overarching issues considered in this interim report and will be important in influencing the direction of the review's final report and recommendations.

4. Influence of the Royal Commission

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission)⁵ had a significant impact on the Code. Not only was the Code amended in response to specific recommendations for changes to the Code, but a more pervasive impact may have been in influencing the banks attitude towards the Code.

The Code has been in existence for over two decades. However, it appears to have gained greater prominence with the banks in recent years. The catalyst is likely to be the Interim and Final Reports of the Royal Commission, along with the APRA Prudential Inquiry into CBA and the NAB Self-Assessment.

⁴ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

⁵ <https://www.royalcommission.gov.au/banking>

In the wake of the significant misconduct in the banking industry exposed by the Royal Commission, banks became more focused on meeting their obligations in the Code to restore how they were perceived by the community. As the preamble in the ABA's terms of reference for this review states:

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

BCCC's compliance report for July 2019 to June 2020⁶ indicates a 160 per cent increase in self-reported breaches of the Code by banks, with the increases for the major banks ranging from 99 to 646 per cent. Among the reasons provided by banks for the increase in breaches are increased awareness and monitoring of the Code, along with improvements in risk cultures.

The statistics suggest that there was a step change in 2019-20 in how the banks approached the Code in 2019, both in terms of awareness and monitoring of compliance. The corollary is that prior to this the banks' approach to the Code was deficient. In consultations with the banks, some – particularly some of the majors – referred to the Royal Commission as a wake-up call.

Some stakeholders suggested the Royal Commission influenced consumers' expectations of the service they expected from banks. This may have been through the exposure of the significant shortcomings by banks, combined with a clearer articulation of the bank services and relationship sought by consumers.

Overall, among the most significant developments since the last independent review appears to be a change in banks' attitude towards the Code in the wake of the Royal Commission.

During the consultations, many banks said they were customer focused and their decisions were based on doing the 'right thing' by their customers. Drawing on the outcome from the Royal Commission and related events, reference was often made to the change from asking 'Can we?' to 'Should we?'

But change in culture takes time and needs to be reinforced. The joint submission by consumer organisations noted that more important than improving the protections for consumers in the Code is the need for the banks to rectify problems with bank cultures, processes and systems that do not prioritise consumer outcomes.

In reviewing the Code and considering what could improve its content and impact, a key consideration should be to identify what will maintain the momentum of the change in banks' attitude towards the Code initiated by the Royal Commission.

This could involve strengthening the principles underpinning the Code and relating them more directly to commitments in the Code, as well as increasing the role of customer outcomes and emphasising the enforceability of commitments.

Issue- Influence of Royal Commission

Ensuring the momentum coming from the Royal Commission in terms of improving awareness and compliance with the Code is maintained.

⁶ <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

5. Importance of the Code

The BCCC's report Building Organisational Capability⁷, provides guidance as to how the banks can enhance organisational processes to improve compliance with the Code. It emphasises the importance of the senior leadership in the banks having a clear communication and training strategy for staff centred around emphasising the importance of the Code.

The bank representatives consulted during the review were asked for their view as to the importance of the Code, such as in the context of communicating its importance to bank staff.

A number replied by emphasising the importance of compliance with the Code, saying they now approach this the same way they monitor compliance with legislation and other regulations. They outlined the steps their organisation had taken to strengthen the monitoring of Code compliance. What was missing was reference to why they think the Code is important.

Other banks said the Code was important because it aligned with their ethos to be a successful, customer centric organisation. One bank representative said the Code is important because it outlines what the bank must do to succeed. Another major bank said that the Code was important because it specified the level of service customers were expecting and there was clear alignment with customer satisfaction and shareholder value.

The Code can be viewed as an obligation on the banks, similar to the legal or regulatory obligations banks must meet. As such, it may be perceived as restricting the activities of the banks.

Alternatively, as expressed by some of the bank representatives, the Code can be seen as being central to the future of the bank by outlining the customer focussed culture that will facilitate the banks ongoing success. This latter view on the importance of the Code is more likely to establish a culture within the organisation committed to delivering the standard of customer focused service outlined in the Code. Such an approach would help maintain the momentum of change initiated by the Royal Commission and avoid banks meeting the letter of the Code, rather than its spirit.

The Code is clearly considered to be important by consumer representatives to how banks deal with their customers. There were many calls for changes to the Code aimed at protecting and/or extending benefits to consumers in a variety of circumstances.

In reviewing the Code, a focus should be on identifying measures that will contribute to banks viewing the Code as a mechanism to 'do the right thing' for their customers, which is in the commercial interests of the bank, rather than seeing it as a regulatory obligation.

Issue- Importance of the Code

Identifying measures that will encourage all banks to view the Code as important in outlining the customer focus that is central to the overall success of their organisation, rather than a regulatory burden.

6. Overlap between the Code and the Law

ASIC's regulatory guide for approval of financial services codes of conduct (RG 183)⁸ says that a code should not restate the law but offer consumers benefits that exist beyond the law.

There is a long standing interaction between what is in the Code and what is in the law. The history of the Code involves provisions which provide protections to consumers not covered by

⁷ <https://bankingcode.org.au/resources/bccc-report-building-organisational-capability-how-banks-can-improve-compliance-with-the-banking-code-of-practice-and-deliver-better-customer-outcomes/>

⁸ RG 183.30 - <https://asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

legislation, but in many areas subsequent legislation captures these protections. This has been described as the “regulatory dance”⁹, with first one, then the other leading the dance.

Nevertheless, a topic raised by many banks during the consultations was the growing overlap between consumer protections in the law and the provisions in the Code and the implications this has for the Code and monitoring compliance with the Code.

Stakeholders noted that in some areas the commitment in the Code was simply for banks to comply with the law, in other areas the Code covered some of the aspects of the law, and in a few cases, there was inconsistency between the law and the Code.

The overlap between the law and the Code is highlighted with the introduction of enforceable provisions. The Explanatory Memorandum¹⁰ for the legislation supporting enforceable provisions states that enforceable provisions should not apply to mere restatements of existing law but where there are new or extended obligations on what is already in the law.

Many of the provisions applying to individuals in the Code are covered in the law, such as in the National Consumer Credit Protection Act 2009 (the Credit Act)¹¹, the consumer protection provisions of the Corporations Act 2001¹² and the requirement of banks offering credit to hold an Australian Credit Licence¹³ and if offering financial services, an Australian Financial Services Licence.¹⁴ There is also a range of other legislation (such as the Privacy Act)¹⁵ and enforceable undertakings by ASIC that apply to undertakings in the Code.

While there is a sizeable element of overlap between the Code and the law, the Code does provide significant benefits to customers beyond that covered in the law. For example, for individuals, the undertakings with respect to providing inclusive and accessible banking and dealing with vulnerable customers are not covered in legislation. In addition, the clauses applying to small businesses are generally beyond benefits and protections in the law.

A particular aspect of the growing overlap between the Code and the law, was the concern of banks over the duplication in reporting breaches under the Corporations Act or financial service laws, and reporting breaches of the Code to the BCCC. This concern by the banks has been heightened with the introduction from 1 October 2021 of ASIC’s ‘enhanced’ breach reporting regime.

Some stakeholders also expressed concern that the increased overlap between consumer protections in the law and the undertakings in the Code may be diluting the concept of the Code as encouraging banks to provide benefits to consumers beyond what is contained in the law. It was suggested that the BCCC may become ‘another regulatory body’ monitoring compliance with the law and it would move away from helping to identify best practice for banks to provide benefits to consumers beyond the law.

The ABA proposes in its submission¹⁶ that as the Code evolves to a new era of ‘co-regulation’ through the overlay of an enforceable provision regime, provisions in the Code that simply refer to legislation or committing to compliance to other regimes, should be removed. They suggest this would avoid duplication and needlessly complicate monitoring of the Code by the BCCC in replicating the responsibility of other bodies. By way of an example, the ABA suggests the removal of clause 11, which says banks ‘*will meet our general duties under law to protect your confidentiality*’. The relevant law is the Privacy Act. However, the reference in the Code to banks responsible lending obligations for individuals in Clause 50, also simply refers to ‘*complying with the law*’. The relevant law for this clause is the Credit Act.

⁹ <http://www.austlii.edu.au/au/journals/UNSWLJ/2015/19.html#Heading43>

¹⁰ 1.33 & 1.64 - https://treasury.gov.au/sites/default/files/2020-01/c2020-48919f-explanatory_memorandum.pdf

¹¹ <https://www.legislation.gov.au/Details/C2021C00292>

¹² <https://www.legislation.gov.au/Details/C2021C00274>

¹³ Part 2-1 of [National Consumer Credit Protection Act 2009](#)

¹⁴ Section 911A of the [Corporations Act 2001](#).

¹⁵ <https://www.legislation.gov.au/Details/C2021C00242>

¹⁶ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Australian-Banking-Association.pdf>

If the Code is the 'rule book' that sets out a consumer's rights in terms of their dealings with banks, consumers would presumably be interested in knowing what all their rights are, both those covered by legislation along with the undertakings in the Code. It may appear strange for a banking code to have no reference to how a bank would protect its customer's privacy or implement its obligation to lend responsibly.

While the Code should not merely restate the law, a balance should be struck between references to meeting obligations under the law, providing guidance or clarifying how those legal obligations will be met, and providing benefits that go beyond the law. This would provide customers with a more comprehensive outline of the service ABA banks will provide them.

Rather than limiting references to legislation in the Code, it may be appropriate to expand on them by giving some guidance as to how the legislative commitments will be implemented. Furthermore, ABA banks should be alert to identifying areas where they could extend the protection consumers receive under the law. Instead of removing references to legislation to deal with the complexity and burden of banks responding to multiple monitoring arrangements, an alternative approach could be to rationalise and focus the monitoring of the Code by the BCCC.

Issue – Overlap between the Code and the law

The implications of the growing overlap between consumer protections covered in the law and the commitments in the Code, including banks responding to multiple compliance regimes.

7. The Code's Audience

When the ABA convenes its committee to amend the Code as part of this triennial review, the first issue that should be clarified is who is the intended audience for the Code.

This question was posed to the banks during the consultations.

Many of the bank representatives said the audience for the Code was their customers. Although when asked whether they believed many of their customers were aware of the Code, other than it being brought to their attention by a third party if they had a dispute with the bank, they agreed that awareness was likely minimal. Consumer surveys and Code submissions also suggest public awareness of the Code is minimal.

One bank said that the Australian Financial Complaints Authority (AFCA) and financial counsellors were the main audience for the Code.

Other bank representatives said the Code was directed at the banks, for it outlined the standard of service banks committed to provide their customers. The imperative was on bank staff to be aware of the commitments in the Code provisions and deliver the promised level of service. Such a view is likely to reinforce within the bank the importance of the Code to the bank.

Some banks said their staff welcomed the re-write of the Code into simpler English in 2019, because they were not lawyers, and it was easier to read and comprehend than legislation or ASIC regulatory notes.

The ABA acknowledged they only expect customers to access the Code when they had a problem with their bank, and feedback indicates when this happens, customers and their representatives find the Code easy to understand and useful.

The joint submission from consumer organisations said the primary audience for the Code should be Code signatories, with secondary audiences being AFCA, BCCC, ASIC, financial counsellors, and other advocates.

Determining the primary audience for the Code will influence how it is drafted. During the consultations, the view was frequently raised about the need to keep the Code simple and accessible to consumers. In contrast, the consumer bodies said that making substantial

commitments to improve consumer outcomes is most important, even if it means adding detail or complexity to the Code.

Financial counsellors said that one of the main benefits they can provide is to advise the customer that they have rights under the law and the Code in their dispute with a bank. In the absence of this intervention, customers may not be aware of their rights. But the resources of counsellors are limited, and many customers would not have the services of a financial counsellor.

This raises the issue of the effectiveness of the banks' commitment to promote the Code, which is something the review is examining. If the customer is the audience, there is a question whether the Code is presented in a form that is readily accessible. Financial counsellors said that while the 2019 version of the Code was an improvement on previous versions, and certainly the legislation, most of their clients would have difficulty understanding the Code. The Code was still not 'consumer friendly' to the bulk of consumers given levels of financial literacy in the community.

There is also the challenge of meeting the needs of customers from non-English speaking backgrounds or where English is not their first language (including some Aboriginal and Torres Strait islander peoples).

It was noted during the consultations that the current version of the Code made no allowance for assisting people with an intellectual disability. In contrast, an increasing number of Government reports and information campaigns provide a version of their documents in Easy Read format that combines text with layout and imagery to simplify and explain information.

While the Easy Read format is a way of presenting information for people not familiar with English, or low literacy or a disability, it can be beneficial to many people who want to quickly understand what a document contains. The New Zealand Bankers Association not only publish their Code of Practice in a variety of languages, but an Easy Read version is also available. Some ABA banks provide an Easy Read version for parts of their material.

A simpler overview of consumers rights and protections covered in the Code, may be a more effective way of alerting customers of their rights and what to expect from banks, as well as making them aware of the existence of a 'rule-book' for the banks if they had a dispute with their bank. However, such a document may not have the detail for the Code to be enforced. While it is important to make the Code consumer friendly and accessible, AFCA and the courts are also an audience for the Code.

This is relevant to another theme raised during the consultations, and that was whether the Code should be more prescriptive and detailed in outlining how banks will implement their commitments, or whether it should be more principle-based. This is discussed further in section 8.

The ABA notes that there is a continuing process of adjustment to seek the best balance between accessible language and a level of specificity that makes implementation and enforcement as easy as possible. The introduction of enforceable provisions may tilt the balance towards greater specificity rather than accessibility.

Determining who is the main audience for the Code raises the question whether the one document is trying to meet too many audiences.

The Code should comprehensively outline the services and protection banks will provide in order to establish an 'enduring customer focused culture' (to use the ABA's words), and this should be in a form of commitments that can be enforced. However, customers should have a general awareness of their rights under the Code, but they may not need to know the specifics unless they have a dispute with their bank involving the provision.

A possible option may be for a very consumer friendly, readily accessible overview of the rights and service consumers can expect from their banks, with the Code itself being a more detailed document outlining the level of service banks are committing to provide.

As noted further in the section below, however, there may be scope to reduce the level of detail in the Code through more principle-based drafting and clarifying the role of industry guidelines in supporting the Code.

Issue- The Codes audience:

Whether the one document is trying to meet the needs of too many audiences.

8. The Use of Principle-Based, Prescriptive Clauses and Industry Guidelines

The Code ranges from broadly drafted, more principle-based statements, to very prescriptive clauses.

Several stakeholders supported increased emphasis on a more principle-based approach to drafting the Code.

This could involve a greater focus on outlining the intended outcome of the commitments in the Code (the principle), with the detail and procedural steps around implementation in supporting material. This would seem to be consistent with the overall approach proposed in the Khoury review.¹⁷

Some of the reasons cited in support of a more principle-based approach included greater flexibility, particularly in dealing with regulatory and technological developments, along with greater simplicity. For example, the limitations of prescribing specific forms of technology were highlighted by pointing out that parts of the 2019 Code are already out of date given technological developments.

The need for the Code to be flexible and able to respond to developments is important given that it now takes increasingly longer to amend the Code.

Some banks noted during the consultations that it was important to ‘future proof’ the Code as far as possible because they will be dealing with the outcome for the triennial review for the next 4-5 years.

Another advantage of a more principle-based approach is that there would be a greater focus on the consumer outcomes being sought by the commitments in the Code, rather than just procedural steps. This would help reinforce, particularly for bank staff, what the Code is ultimately seeking to achieve – namely good consumer outcomes.

The submission from the Financial Services Institute of Australasia (FINSIA)¹⁸ observes that the Code is currently driving an over-reliance upon compliance to rigidly prescribed rules and this is undesirable because it has been shown to diminish self-accountability. As FINSIA notes, ‘a prescriptive approach can never anticipate every circumstance. Very frequently the cause of customer harm and dissatisfaction is the application of rigid policies when the application of professional judgement is needed’.

However, while there was support for a principle-based Code, there were many calls for greater detail to be included in the Code on how banks will implement commitments. The view of consumer bodies appears to be that more prescriptive clauses would assist in achieving greater consistency in implementation across banks.

In addition, there were numerous calls to specify in the Code the specific needs of consumers in particular circumstances. For example, there were proposals to provide substantially more detail

¹⁷ <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>

¹⁸ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-FINSIA.pdf>

in dealing with deceased estates and the treatment of enduring powers of attorney, as well as more detail on the specific needs of vulnerable customers in a wider range of circumstances.

If the Code was amended to incorporate the bulk of the calls for additional detail and extension of consumer benefits, it would be a significantly longer and more complex document.

The 2019 Code has been structured broadly along the lines recommended by the Khoury review – a preamble that includes a set of guiding principles, specific commitments, and industry guidelines that sit outside the Code. The specific commitments are considered enforceable by the ABA, unlike the Statement of Guiding Principles and industry guidelines.

The Khoury review did note that the fact that external dispute resolution processes are able to reference industry guidelines as good practice, this gives them considerable weight while retaining some flexibility.

The relationship between the industry guidelines and the Code needs to be clarified.

Several consumer representatives noted that much of the material in the ABA industry guidelines, which are useful for ABA members and advocates in encouraging best practice, should be included in the Code.

In response to suggestions whether the Code should be expanded in a particular way, the ABA often responds by saying the issue is already covered in an ABA Industry Guideline. For example, in response to questions posed by the review as to whether the Code should provide more guidance as to when and how banks decide to assist a customer facing financial hardship, the ABA replied that this will be included in the update of the ABA Industry Guideline: Financial Difficulty.

There are many ABA industry guidelines. Only a few are mentioned in the Code (such as the ABA Industry Protocol on Branch Closure and the ABA guiding principles for Customer Advocates).

Given few consumers are aware of the Code, it is unlikely they would be aware of the guidelines. It may also be challenging for consumer representatives, lawyers, and financial councillors to keep abreast of the guidelines and their updates. It was evident in some of the submissions to the review that consumer bodies were requesting the banks to cover issues that are already the subject of an ABA guideline. The joint submission by consumer organisations notes that there is a lack of transparency around changes to the guidelines.

Among the reasons the ABA supports separating industry guidelines from the Code include: the less onerous approval process for guidelines; they cover detail and operational advice that should not be in the Code; and they allow for 'stretch' targets which may take some banks longer to comply with than others.

Both consumer groups and the ABA consider the material in the guidelines is not enforceable, unlike the Code, where the commitments form part of the contract between banks and their customers. Most of the ABA industry guidelines state that they are not binding on ABA members.

Very few customers will pursue their complaint with a bank through the courts as a breach of contract. If they are not satisfied with the outcome from the bank's internal dispute mechanism, they are far more likely to take their complaint to AFCA.

ACFA does not determine the legal or contractual rights of either part to a complaint that it is considering. Its decisions are not based on a strict interpretation of the applicable legislation or on the terms and conditions of the disputed financial product or service. Its approach is to assess what is fair in all the circumstances having regard to:

- Legal principles
- Applicable industry codes or guides
- Good industry practice, and

- Previous relevant determinations by AFCA or predecessor schemes.

Hence, irrespective of whether the material is in an ABA guideline and is considered to be separate from the Code, along with statements by the ABA that the guidelines are not binding, they are taken into account when a customer's complaint is referred to AFCA. Moreover, AFCA says it may come to the view that banks should exceed the standard outlined in an industry code or guide.

The joint submission from consumer organisations recommends that important aspects of the ABA guidelines be incorporated in the Code, or alternatively, the guidelines be specified as enforceable and relevant to interpreting corresponding Code provisions. However, as noted they are already taken into account by AFCA in assessing whether a customer has been treated fairly given the circumstances.

RG183, which covers ASIC approval of financial services codes, states that while consumer commitments should be in the code, there may be other related documents which will be key to how the code is administered and operates in practice. ASIC will not seek to specifically approve these code-related documents, but will examine whether the code, when read in conjunction with the documents, meets ASIC requirements for code approval.

Considering the Code and industry guidelines as being separate appears to be an artificial distinction in terms of AFCA's consideration of complaints.

If the ABA industry guidelines were viewed as Code related documents, many of the requests for greater detail on the implementation of Code commitments, could be incorporated in the guidelines. This would allow for a simpler Code document and assist in a more principle-based Code focused on intended customer outcomes. As AFCA noted in its submission to the Royal Commission '*detailed rules cannot constitute an all-embracing comprehensive code of regulation that covers all possible circumstances*'.

A principle-based approach would incorporate the guiding principles currently in the preamble as part of the Code rather than a statement outside the Code.

In addition, such an approach would see the Code drafted more in line with what was proposed in the Khoury review, in particular, that '*every provision should flow from the objectives or outcomes that are being sought*'.

Procedural details on how the commitments will apply to consumers in specific circumstances, could be included in industry guidelines. The industry guide lines applicable to a particular clause could be referenced in the Code. This would assist in alerting consumers and their representatives to the existence of the guidelines.

Issue- Principle-based or prescriptive

Whether a more principle-based approach to drafting, with the procedural detail on the implementation of consumer commitments included in Code-related industry guidelines, would facilitate a simpler and more flexible document, help future proof the Code, and focus it more on intended consumer outcomes.

9. Core Commitment – Fair, Reasonable and Ethical

Clarity is needed on the overarching principle in the Code, and whether it is enforceable. This can form the foundation for considering all other commitments.

Commissioner Hayne sought to identify the underlying principles for the conduct of financial firms. He specified:

- obey the law
- do not mislead or deceive

- act fairly
- provide services that are fit for purpose
- deliver services with reasonable care and skill, and
- when acting for another, act in the best interest of that other.

He said that these principals were fundamental concepts, and each is well-established, widely accepted, and easily understood.

Commissioner Hayne also noted that these norms are reflected in the obligations of Australian financial service licence holders, as stated in section 912A of the Corporations Act - to ensure that financial services or credit activities are provided 'efficiently, honestly and fairly'.

One ABA bank has incorporated the principles outlined by Commissioner Hayne in its statement of ethics.

The BCCC states in Guidance Note 2¹⁹ that Clause 10 of the Code ('we will engage with you in a fair, reasonable and ethical manner') is one of the most important clauses, in that it goes to the culture of the way bank staff engage with customers.

The BCCC says it will assess fair, reasonable, and ethical behaviour having regard to:

- whether the bank demonstrates this guided bank decision making
- community standards and expectations, and
- standards set by AFCA.

Some banks indicated that 'fairness', sometimes expressed as doing the 'right' thing, was central to all their dealings with customers. The BCCC compliance report for July 2019 to June 2020²⁰ notes that an example of good practice in banks' monitoring compliance with financial difficulty and debt management is a bank engaging a specialist team to conduct a fairness review independently of any mortgage enforcement.

The ABA noted in its submission²¹ that it and its member banks recognise the central importance of committing, at a fundamental level, to fair, reasonable, and ethical engagement with customers. It also notes that Clause 10 is effectively enforceable by AFCA and to the extent a court could read it as applicable in an individual case, would be incorporated into the bank's contract with the customer.

However, the ABA goes on to note there are challenges associated with treating broad statements such as Clause 10 as enforceable in any single instance. It says 'The Australian Law Reform Commission recently observed that the concept of fairness (or unfairness) is becoming increasingly common in financial services legislation but is problematic as it means different things to different people. Concepts of 'reasonableness' and ethics can, be open to differing interpretations.' The ABA goes on to say that given inconsistency in the interpretation of these provisions (fair, reasonable, ethical) across the industry, comparing breach numbers across banks does not render a fair comparison.

The Australian Law Reform Commission's report²² referred to by the ABA, covered initial stakeholder views on simplification of the legislative framework for financial services regulation. The Law Reform Commission did not itself make any observation on the concept of 'fairness' in the legislation.

¹⁹ <https://bankingcode.org.au/resources/guidance-note-no-2-clause-10-fair-reasonable-and-ethical-behavior/>

²⁰ <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

²¹ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Australian-Banking-Association.pdf>

²² <https://www.alrc.gov.au/wp-content/uploads/2021/06/FSL1-Initial-Stakeholder-Views.pdf>

The reference in the ABA submission is from a table where one or more stakeholders consulted by the Law Reform Commission had a negative view on a statutory provision. The summary comments from some stakeholders on section 912A of the Corporation Act is:

- *'Needs clarification.*
- *Civil penalty for breach is inappropriate.*
- *'Fairness' sitting alongside 'efficient' may mean different things to different people. This is problematic'.*

One bank during the review's consultation said Clause 10 required clarification.

In contrast, the Law Reform Commission report also lists positive comments from stakeholders on the 'efficiently, honestly, fairly standard', namely '*Sensibly interpreted, and is an effective rules-based standard, yet still operates effectively at a principled level.*' The Commission's report also noted that the AFCA submission to the Royal Commission said that '*fair treatment of customers [should be made] a standalone key principle*'.

It is important to clarify whether '*fair treatment of customers*' is the overarching principle that underpins all the commitments in the Code and is the main prism through which banks should be considering their relationship with customers. This will be a key consideration in the review's final report. The ABA's comments appear to qualify the role of Clause 10.

What constitutes fairness in a given situation can be open to different interpretations. But every bank should be taking decisions as to what it considers to be fair and reasonable for the customers in the circumstances. Others may have different interpretation as to what is fair. However, if a customer has a complaint, the dispute can be referred to the bank's internal dispute resolution process, and if the matter is still not resolved, it can be taken to AFCA.

From the banks' initial engagement with the customer, and any subsequent review through internal or external dispute resolution processes, the key consideration should be if the customer has been treated fairly and reasonably.

If Clause 10 is one of the most important clauses, the Australian Payments Network's submission²³ notes that it is currently not signalled as being such in the Code. As the submission points out, it is a secondary clause in Chapter 4 with the heading '*Trained and competent staff*'. The location, and headings, do not obviously suggest clause 10 is intended to be read as one of the most important clauses in the Code.

If clause 10 is central to the Code, it should be presented as such.

Commissioner Haynes suggested that Clause 10 should be an enforceable provision under the Code. The consumer bodies also support designating clause 10 as enforceable provision.

The ABA notes that a breach of a very similar provision in the Corporations Act and Credit Act (efficiently, honestly and fairly) is already enforceable with breaches attracting up to 2.5 million penalty units (currently \$555 million). A breach of an enforceable code provision may attract civil penalties, including up to 300 penalty points. There is an issue about having different penalty regimes for a very similar provision in the Corporations Act and the Code.

Several stakeholders suggested the wording of clause 10 should perhaps be brought into line with the Corporations Act and Credit Act. The consumer organisations, however, said the requirement to be '*fair, reasonable and ethical*' can be interpreted to go beyond being '*efficient, honest and fair*'. There may be merit, nevertheless, in aligning the commitment to be 'fair' under the Corporations Act and the Code.

To highlight the importance of the clause, and reassure customers, it could be stated in the Code that a breach of the commitment by banks to act honestly and fairly is enforceable under the law.

²³ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-AusPay-Net.pdf>

More generally, there may be merit in clarifying in the Code how all the commitments are enforceable, be it under the law, as part of the contract between the bank and the customer or being taken into account by AFCA.

Issue – fair, reasonable and ethical

Clarifying that engaging with the customer in a fair, reasonable and ethical manner is a key principle that underpins all commitments in the Code, and this should be clearly reflected in the Code, along with advising customers that this commitment is enforceable under legislation.

10. Conclusion

The themes discussed in this interim report are only a subset of the issues to be covered in the review's final report. However, they are overreaching and will influence the direction of the final report. The summary of issues mentioned above is outlined in Appendix B. Comments would be very welcome.

Appendix A – Organisations Consulted

The review held consultation meetings with the following organisations:

AMP Bank

ANZ Bank

Arab Bank Australia

Australian Banking Association

Australian Collectors and Debt Buyers Association

Australian Financial Complaints Authority (AFCA)

Australian Payments Network

Australian Securities and Investment Commission

Australian Small Business and Family Enterprise Ombudsman

Bank Australia

Bank Customer Advocates (not an institution but listed as part of our consultation process)

Bank of China

Bank of Queensland

Bank of Sydney

Banking Code Compliance Committee (BCCC)

Bendigo and Adelaide Bank

Blind Citizens Australia

Citigroup

Commercial Asset Financing Brokers Association (CAFBA)

Commonwealth Bank of Australia

Consumer Outcomes Group:

- Financial Counselling Australia
- Council of the Ageing (COTA)
- Legal Aid Queensland
- South East Community Links

Consumer Action Law Centre

Council for Intellectual Disability

CPA Australia

Customer Owned Banking Association

Eros Association

Financial Counsellors Association of Western Australia

Financial Services Union

First Nations Foundation

HSBC Bank

Indigenous Consumer Assistance Network (ican)

Institute of Certified Bookkeepers
ING Bank Australia
Insurance Council of Australia
Law Council of Australia
Macquarie Bank
Moneymob Talkabout
National Australia Bank
National Farmers Federation (NFF)
National Shooting Council
Rabobank
Rural Financial Counselling Service Network
Sex Work Law Reform Victoria
Shooting Industry Foundation Australia
Suncorp Bank
Tasmanian Small Business Council
Victorian Pride Lobby
Vision Australia
Westpac Banking Group
WEstjustice
Women's Legal Service Victoria
Wunan Foundation

Appendix B – Summary of Issues Raised in Interim Report

Influence of Royal Commission

- Ensuring the momentum coming from the Royal Commission in terms of improving awareness and compliance with the Code is maintained.

Importance of the Code

- Identifying measures that will encourage all banks to view the Code as important in identifying the customer focus that is central to the overall success of their organisation, rather than a regulatory burden.

Overlap between the Code and the law

- The implications of the growing overlap between consumer protections covered in the law and the commitments in the Code, including banks responding to multiple compliance regimes.

The Codes audience

- Whether the one document is trying to meet the needs of too many audiences.

Principle - based or prescriptive drafting

- Whether a more principle-based approach to drafting, with the procedural detail on the implementation of consumer commitments included in Code-related industry guidelines, would facilitate a simpler and more flexible document, help future proof the Code, and focus it more on intended consumer outcomes.

Fair, reasonable and ethical

- Clarifying that engaging with the customer in a fair, reasonable and ethical manner is a key principle that underpins all commitments in the Code, and this should be clearly reflected in the Code, along with advising customers that this commitment is enforceable under legislation.