



# Australian Banking Association

5 October 2021

Mr Mike Callaghan  
Independent Reviewer

Via email: [submissions@bankingcodereview.com.au](mailto:submissions@bankingcodereview.com.au)

Dear Mr Callaghan,

The Australian Banking Association (**ABA**) welcomes the opportunity to provide a response to the interim report of this review of the Banking Code of Practice (**the Code**).

The ABA and our members are committed to a continuing process of cultural change and improvement to ensure banks are always striving to meet the highest expectations of our customers, stakeholders and the broader community. The ABA would like to take this opportunity to thank all stakeholders who have taken the time to provide input into this review and the efforts of the review team to date.

The banking industry is committed to maintaining the momentum of change brought about by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Banking Reform Program and the volume of change that has occurred as a result.

This review of the Code is an important opportunity to maintain change in defining new commitments to improve outcomes for customers, as well as improve the systems and processes that are in place to support banks in implementing the Code.

The ABA supports a view of the Code which sees it as central to ensuring banking is customer focussed and in this context the ABA proposes drafting the Code to make it as accessible as possible to everyone but in particular, customers and bank staff who are the two equal primary audiences of the Code. Further, the ABA proposes to introduce an annual Banking Code awareness week to continue maintaining the momentum of improvement in banks' focus on the Code and its commitments.

The ABA has recommended a series of changes to strengthen commitments to customers in this version of the Code in relation to financial difficulty, for customers experiencing vulnerability, deceased estate processes, the use of interpreters, the impact of Comprehensive Credit Reporting and how banks manage unsecured debt. Further detail on these recommendations are included below.

I am pleased to submit the ABA's response for your consideration. I look forward to working with you throughout the review process and thank you for your valuable contribution.

Yours sincerely,



Anna Bligh AC  
Chief Executive Officer



## ABA response to interim report

### Introduction

The Banking Code of Practice (**the Code**) is a central component of the broader banking sector regulatory framework and is a critical part of ensuring banks focus on ensuring good outcomes for customers. The ABA and the banking sector acknowledge the work of the Independent Reviewer to date in conducting this review and appreciate the opportunity to provide this response.

The ABA notes the acknowledgement in many submissions to the review that the banking industry has undergone a significant cultural change over recent years and the Code has been an important part of this. The ABA and our members are committed to continuing this change and believe this review will ensure the Code continues to enshrine a high level of commitment to customers and continues to meet the expectations of customers, other stakeholders and the broader community.

### Influence of the Royal Commission

The ABA agrees with the Independent Reviewer's assessment that the outcomes of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ("Royal Commission") have had a substantial impact on the Banking Code – both in improved customer outcomes but also in the cultural focus on the importance of the Code and on compliance across the sector, in both letter and spirit.

The banking sector has experienced significant change to its operations because of the Royal Commission. It has also experienced significant change to its governance, culture and accountability as a result of the 2018 APRA Prudential inquiry into CBA and the meaningful self-assessments and subsequent transformation programs that occurred as a result of APRA's Culture, Governance and Accountability (CAG) reports into other banks across the industry.

In 2016 the ABA launched a Banking Reform Program which introduced a series of new commitments including a major review of the Banking Code of Practice, a new approach to whistleblowing to support employees to speak up and report inappropriate conduct, a process to remove individuals from the industry for poor conduct, the introduction of a user pays model to support a strong regulator in the Australian Securities & Investments Commission (**ASIC**), the introduction of the Customer Advocate function, and a review of product sales commissions and product based payments (Sedgwick Review).

ASIC approved the new Code in July 2018. The Royal Commission hearings and Final Report released in February 2019 had a substantial impact on focusing the sector on the importance of the new Code and improving customer outcomes and compliance.

Looking to the immediate future, during October this year, the banking sector (along with other financial sector entities) will be implementing six major reforms arising from the Royal Commission to support improved customer outcomes:

- Hawking prohibitions - banks will be banned from hawking products to customers where contact is unsolicited.
- Deferred sales – banks will have to comply with a four-day waiting period before selling add-on insurance.
- Internal dispute resolution - customer complaints will need to be resolved faster - within 30 days, with clear reasons provided to the customer as to the outcome reached.
- Design and Distribution Obligations – product issuers will need to create target market determinations for financial products, requiring steps be taken to distribute products having regard to their suitability for categories of customer. This is in addition to the Product Intervention Power now in place allowing ASIC to ban products where evidence of customer detriment is apparent.



- Breach reporting - banks will be required to report much more information about non-compliance and misconduct to ASIC and in a more timely fashion.
- Reference Checking protocol for mortgage brokers and financial advisors – a financial services licensee or a credit licensee that is considering employing or authorising a mortgage broker or financial advisor will have to obtain a reference from their most recent broker or advisor authorised representative with the aim of removing ‘bad apples’ from the industry.

Further, as a result of the Banking Reform Program, banks have also changed the way front line staff are incentivised to sell retail banking products. A recent review released in July this year found that links between remuneration and sales are now rare, performance assessments of employees and access to variable rewards are now typically assessed on a ‘whole of role’ basis, including ‘how’ results are achieved, as opposed to sales performance. To ensure banks maintain a strong focus on this issue the ABA has agreed to undertake the next review of remuneration practices in 2023.

In summary, there is no doubt this period has seen transformational change in every aspect of banking. The ABA believes that all banks have made significant progress in implementing a customer focused approach to their businesses, and that the commercial success of banks is now clearly reliant on building and maintaining customer trust. The task for banks now is to maintain the impetus of cultural improvements to ensure the needs of the customer remain at the centre of their focus and that community expectations continue to be met.

The ABA agrees this triennial review of the Code is an opportunity to continue to enhance the commitments to customers in the Code as well as make measurable improvements in the systems and processes that are in place to support banks in implementing the Code.

## Importance of the Code

The ABA acknowledges that there are a range of ways to view the Code, from considering it as a set of important and specific obligations to be complied with, to viewing it as central to creating a customer focussed and successful organisation. The ABA acknowledge that there is likely to be a range of views among bank staff across this spectrum. The ABA notes senior leaders of all member banks have emphasised the importance of the Code and that they see it as a critical part of putting the customer firmly at the centre of banking.

The following points are important in this regard:

- The ABA supports a view of the Code that enshrines it as a tool to ensure banks do what is right for customers and is critical to the success of the industry and therefore welcomes any recommendations from the Independent Reviewer which will assist banks in ensuring a customer focussed mindset with respect to the Code.
- A focus on compliance with the Code’s specific commitments, following the revelations of the Royal Commission, which identified many failures of compliance systems, has been an important part of the industry rebuilding and ensuring better outcomes for customers. However, this focus should not distract from the fact that the fundamental purpose of the Code is about customer outcomes.
- The ABA notes that, to some extent, a focus on strict compliance, for the Code as well as for legislative requirements, can be a reaction to monitoring and enforcement. For example, for the Code, if the Banking Code Compliance Committee (**BCCC**) focusses too narrowly on compliance for its own sake, this can lead banks down the same path.
- In this context, issues raised earlier in the review process, such as the purpose of reporting to the BCCC, whether such reporting should be subject to a materiality threshold, and how the BCCC can make the best use of its resources, are important.



- An example of good practice that will encourage customer focus is the recent BCCC investigation into Chapters 13 and 14 of the Code, in which the BCCC has adopted a forward-looking approach of identifying best practice. The ABA believes this kind of approach is helpful for ensuring banks focus on how the Code can most effectively improve outcomes for customers rather than fostering a mindset that is narrowly focussed on compliance at the expense of the greater goals.
- All member banks see the Code and its promises as central to their relationships with customers. To ensure these promises are met to all customers – to small businesses and individuals – across all parts of their businesses, banks have carefully embedded the obligations across their systems and processes. While Code breaches will inevitably occur, because systems and processes are not foolproof and many Code obligations are dependent on human interactions, ongoing monitoring of these systems and processes minimises the risk breaches occurring. This approach demonstrates how banks make the Code and its commitments to customer central to their operations and front-of-mind to their staff.

The ABA proposes the following measures to further embed a customer-focussed mindset:

- Drafting in the Code should make clear the intentions of the industry to put the customers interests first which may include emphasising the core commitments made in the Code and ensuring they have the appropriate prominence, and also expanding on customer focused language where appropriate.
- Commencement of an annual Banking Code awareness week to promote and explain its existence, purpose and benefits to both customers and bank staff. While still a concept at this stage, it is anticipated activities which might be involved in 'Code Week' include, internal communications campaigns, ABA hosted workshops and roundtables, learning events and case studies that demonstrate good customer outcomes resulting from embedding the Code both in letter and in spirit. Participants in events could be drawn from regulators, law firms, consumer groups and academia.
- Events in Code Week would incorporate involvement of the CEOs and other leaders from all banks to create the right 'tone from the top'. Code Week could also be used to talk about areas where there are ongoing issues with compliance due, for example, to insufficient staff awareness.
- Following the last Code review, the ABA developed Code training modules for frontline staff to embed the Code's principles across banks, this suite of training will need to be updated to reflect changes from this review and the ABA also proposes to use this update to ensure it reflects a more prominent customer mindset.

## **Emphasising enforceability of commitments**

In relation to the Reviewer's suggestion that maintaining momentum in the Code could occur by emphasising the enforceability of commitments, the ABA agrees the culmination of optimal customer outcomes are a result of effective awareness and customer focus, and dedicated compliance with the Code within banks.

Part two of the Code makes it clear banks will honour the commitments they make to customers in the Code and that one way this will be achieved is by ensuring staff and representatives are trained so that they can understand the Code and how to comply with it when they are providing banking services.

The ABA agrees that consideration could be given to including a provision aimed at maintaining banks focus on compliance.

As noted by the Reviewer, this focus on compliance must be supported by, and work in parallel with, the right cultural focus on customers.



## The Code's audience

The ABA understands that many within the industry, or who work as advisors to customers of the industry, have different views on the Code's audience. Following the Independent Reviewer's comments in the Interim Report, the ABA has sought to reconsider the views of the industry.

The industry regards the Code as forming a contract between customers and banks, therefore although banks acknowledge that most customers may have limited awareness of the Code and in many cases be unlikely to read it, banks consider customers (and their representatives) and bank staff to be the two equal primary audiences of the Code.

Nonetheless, ideally the Code should be accessible by as broad an audience as possible. There are a range of groups who have legitimate needs to read and understand the Code, these include not only bank staff (at all levels), customers, and customer representatives, but also other industry associations, regulators, and interested parties from the banking industry internationally. Banks need to understand clearly what their obligations are so that they can put in place appropriate solutions for compliance and for this reason they form a key part of the audience. It is on this basis that, the ABA sometimes refers to the code as a 'rule book for banks' and for this reason we believe that bank staff are a key audience for the Code. Looked at this way, precision in meaning is an important feature of code drafting. In addition to enabling banks to understand their obligations, precision also aids enforcement and accessibility by customer representatives such as lawyers and financial counsellors.

However, it is also important that the Code is accessible for customers who want to consult it to understand what their rights are and how they might enforce them. For this, while precision remains at the heart of drafting, the greatest effort should be made to achieve brevity and use of plain English when drafting code provisions.

The style adopted in the current code of directing promises at the customer – i.e. "we will..", "your rights are", is emblematic of the culture the code seeks to instil in the industry – that is – the customer is the focus. For this reason the ABA believes this style should be retained. Our understanding is that consumer advocates broadly support this approach.

## Content and structure of the Code

Reflecting on the matters raised in the Interim Report, the ABA believes that the interests of banks' customers could be served better if the following were made clearer in the Code. These matters could, for example, be clearly set out in a new section at the front of the code.

### Core commitment

Australian banks are committed to conducting business with their customers consistent with obligations under the Code (fairly, reasonably and ethically) and with the licensing conditions under the Corporations Act and Credit Act (efficiently, honestly and fairly).

In order to emphasise the banks' commitment to these principles, and to highlight how they underpin the objectives of, and commitments made in the Code, the ABA recommends that there be a prominently placed section within the Code that clearly sets out the commitment.

The same section should set out how customers aggrieved by any breach of these principles can seek redress without cost to them by accessing the Australian Financial Complaints Authority (**AFCA**) (which has regard to the Code and also has an overall 'fairness' remit as part of its decision-making process). Code commitments also form part of banks' contracts with customers, where relevant. These contracts are enforceable through the judicial system, in addition to the above.

The section could also note that banks, like other financial services and credit licensees, are subject to licensing obligations that include similar principles and that this essentially provides another avenue for ensuring adherence to banks commitments to these ideals, over and above customers individual rights of redress as set out above.





## The Code and associated documents

The ABA agrees there is room for enhanced transparency around the existence and effect of code associated documents such as protocols and guidelines. The purpose of industry guidelines is to define industry best practice across the banking sector in critical areas such as financial hardship, vulnerability and accessibility to banking services. It is also to achieve consistency in how banks approach these issues and to assist banks in operationalising the agreed approach. Guidelines allow for sufficient flexibility in enabling banks to update or change approaches for the benefit of customers as better practices are discovered than is possible through a legislative process. Where they consider it appropriate, enforcement entities like AFCA or the courts can consider the content of ABA Guidelines in making their determinations of individual cases.

In our view, the applicable principles for documents associated with the Code should be:

1. The primary code document should contain or specifically incorporate anything that is expressed as, or intended to be, a clear commitment to customers.
2. Where the ABA has prepared Industry Guidelines to set out best practice related to Code commitments, the existence of these should be referenced (and for online versions, linked) in the primary Code document. There should be a statement in the Code that sets out the nature and purpose of guidelines generally. This should include that guidelines set out processes and procedures to meet best practice in complying with the Code. While any divergence from procedures set out in the guidelines can be considered by AFCA or any other tribunal, such divergence does not ordinarily, of itself, give rise to a breach of the Code.
3. As outlined above, there may be instances where ABA protocols, guidelines or third-party documents are specifically incorporated into the Code in the form of an express commitment to comply with them. Examples in the current Code are the ABA Branch Closure Protocol, the ASIC / Australian Competition & Consumer Commission *Debt collection guidelines for collectors and creditors*, and the *Code of Operation* managed by Services Australia. In such cases, these documents are enforceable to the same extent as other parts of the Code.
4. However, as a general principle, ABA guidelines should *not* contain specific commitments to customers, and should not be incorporated in the primary Code document. There are at least three reasons for this:
  - a. The primary Code document should, to the extent possible, be reserved for clear commitments to customers.
  - b. Incorporating material that does not include clear commitments will make the Code voluminous and difficult to read.
  - c. Guidelines and similar documents should be open to flexible amendment where appropriate and not be constrained by the regulatory requirements that apply to the making of amendments to the primary Code document.

## References to legislation

As the ABA noted in its submission to the Consultation Paper, unintended or undesirable results can arise where the code merely recites banks' obligations that exist at law. Nevertheless, the ABA notes the observation in the Interim Report that "consumers would presumably be interested in knowing what all their rights are, both those covered by legislation along with the undertakings in the Code."

One approach that might address both of the above concerns would be to allow for the code to include reference to other legislation where appropriate and necessary to inform customers of their rights under the law, but in such a way as to avoid creating parallel regimes within the Code. For example, the Code could refer to obligations arising under the Privacy Act and Australian Privacy Principles and contain some information on how customers should go about obtaining redress, where they believe those obligations have not been met by banks.



However, it could be made plain that this does *not* mean that breaches of the Privacy Act or Australian Privacy Principles are also breaches of the Code. This approach would avoid creating duplicate regimes for enforcement and processing such as breach reporting.

The approach set out above would serve to inform customers without creating unnecessary duplication (or gradual inconsistency) that comes with replicating obligations that already exist in legislation.

## Principles based drafting

It is appropriate that the Code include principles-based commitments such as those outlined above (on honesty, efficiency and fairness) and that it be made clear that more prescriptive parts of the Code are, ultimately, in service to the broader commitments. However, there are occasions where it is appropriate to include more prescription in the Code to make clear both to banks and customers what the content of the relevant commitment is.

In our view, the proposals set out above allow for the right balance to be struck in terms of principles based and prescriptive drafting.

## ABA recommendations

The ABA proposes strengthening the customer commitments in the Code in the following ways:

### Financial difficulty

ABA member banks have continually evolved and improved their response to customers who are in financial difficulty. For example, the updates made to the Sale of Unsecured Debt Guidelines and supporting the development of a new regulatory regime for debt management firms.

There is clear evidence that the earlier customers approach their bank to discuss their financial situation with a view to agreeing alternative arrangements, the more likely it is their bank can support them in making a full recovery. The ABA proposes that this section of the Code be expanded to make it clear to customers that they should approach their bank as soon as they know it is likely they will be unable to meet their financial commitments, not just when they are unable to pay. The intention of this is to make it clear to customers and their representatives that customers are encouraged to approach their bank as soon as they believe they may be in trouble, not wait until they miss payments on their credit products. This change gives banks the opportunity to come to an arrangement with customers earlier, reducing stress on customers and could substantially improve their path to recovery.

Banks have also improved their response to customers experiencing financial difficulty due to disasters including floods, fires and the COVID-19 pandemic. The ABA proposes to include a new commitment in this section to enshrine the assistance banks offer customers experiencing financial difficulty as a result of a natural disaster.

### Comprehensive Credit Reporting

The hardship reporting component of Mandatory Comprehensive Credit Reporting comes into effect for the major banks from 1 July 2022. The updated Banking Code of Practice is an opportunity to clearly explain a customer's rights in relation to this regime. The ABA recommends updating Clause 178(c) to make it clear that banks will tell the customer what the impact on their credit report will be when they accept or refuse a hardship or collections arrangement.

Recent research conducted by the ABA found that 77% of people in the community thought banks had a responsibility to educate consumers about Comprehensive Credit Reporting and 70% wanted banks to tell them how to avoid adverse credit information. Clearly this regime is an issue customers will want to know more about and communication about how it will impact them and what their rights are should have an important place in the updated Code.



## Vulnerability

Determining the most appropriate support for customers experiencing vulnerability is a rapidly evolving area of consumer and community expectations. Banks have been leaders in pioneering support for customers in vulnerable circumstances, including customers experiencing family and domestic violence and financial abuse. For example, the ABA is developing a guideline on vulnerable customers; and banks have been proactive in identifying where payment transaction descriptions have been used to perpetrate abuse and stopping this from happening.

This review is an opportunity to enhance the Code to reflect improved practices in this area and to make it clearer to customers experiencing vulnerability the support and assistance that banks may be able to offer.

The ABA is aware that the current wording in paragraph 38 of the Banking Code ‘*we may become aware of your circumstances only if you tell us about them*’ does not meet with the current expectations of the community, consumer representatives or other examples of best practice.

The ABA proposes amending paragraph 38 (in consultation with consumer representatives) to ensure it appropriately reflects the balance of responsibility between banks and customers, while still encouraging customers to share their circumstances with their bank. We will consider the wording used in the General Insurance Code, Clause 93 “*We encourage you to tell us about your vulnerability so that we can work with you to arrange support — otherwise, there is a risk that we may not find out about it.*’

The ABA also proposes including in the Code a definition of “customers experiencing vulnerability” in consultation with consumer representatives. The best outcome would be a definition which acknowledges the broad experience of vulnerability and that anyone can be vulnerable, while being mindful of the challenges of operationalising a definition in such a sensitive and complex area. The ABA’s preference would be to incorporate a definition that is adopted across industry, including by financial services regulators. For example, the UK Financial Conduct Authority defines a vulnerable customer as “*someone who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care.*”

Finally, the ABA notes that several submissions have made suggestions to add to the list of circumstances that may make a customer vulnerable in Clause 38. The ABA proposes amending this clause to make it clear that this list is not intended to be exhaustive but is also willing to consider any additions to the list that the independent reviewer recommends.

The ABA believes these proposals will help to further cement banks’ positive approach for supporting customers experiencing vulnerability using a more principles-based and less legalistic set of commitments.

## Interpreters

The 2016 Census reports the number of Australians who say they speak English not well or not well at all was 820,000. An important part of delivering inclusive banking services for people with limited English is to ensure customers know banks will provide interpreter services free of charge when a customer requests one, or bank staff assess that a customer may require one, subject only to this being reasonably practical in the circumstances.

The ABA proposes this update of the Code should include a clear commitment on the provision of interpreters to customers requiring one.

## Deceased estates

Stakeholders have cited a lack of clarity in relation to clear processes and procedures banks use when dealing with deceased estates. Given resolving the financial affairs of a next of kin or significant other can be overwhelming, it is particularly important that the protections introduced in Chapter 45 at the last Code review, be strengthened to clearly define the support customers can expect from their bank when winding up affairs of this nature.





### **Unsecured debt**

In partnership with members, the ABA has developed a series of industry guidelines in areas like financial difficulty, accessibility and as relevant to this topic, how banks manage unsecured debt.

Industry guidelines play an important role in achieving consistency across the ABA membership to improve customer protections and as their main audience is banks, they allow for additional detail and operational advice for banking sector staff.

However, the ABA considers there is precedent in some instances for components of industry guidelines to be incorporated into the Code. The ABA proposes that several parts of the Sale of Unsecured Debt Guideline could be referenced with the intention of clearly explaining a customer's rights including:

- When contracting with debt buyers for the sale of unsecured debt, banks should have processes in place to monitor how debt buyers are undertaking their collections activities.
- Banks recognise that initiating bankruptcy proceedings, especially in relation to unsecured debt, is a serious step that has significant repercussions for their customers. Where a debt buyer believes that commencing bankruptcy proceedings is necessary to recover an unsecured debt, banks will require that the debt buyer consults with them prior to commencing these proceedings.
- If a debt relates to a customer experiencing vulnerability and the bank is of the view that the vulnerability is likely to be ongoing and that there is no reasonable prospect of the debt being recovered, then the bank should not sell that debt to a third party.