



INDEPENDENT REVIEW OF THE BANKING CODE OF PRACTICE 2021

FINAL REPORT

November 2021



26 November 2021

Ms Anna Bligh AC
Chief Executive Officer
Australian Banking Association
Level 18
6 O'Connell Street
Sydney NSW 2000

Dear Ms Bligh,

In accordance with the terms of reference attached to my Letter of Engagement, I am pleased to present the final report of the 2021 Independent Review of the Australian Banking Association's Banking Code of Practice.

My overall assessment is that the current Banking Code of Practice is an improvement on the previous version and banks are more focused on complying with the Code than they were in the past.

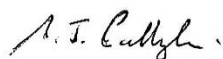
The objective of the triennial review should be to maintain this progress.

The Banking Code of Practice does not need a complete overhaul or rewrite, but it can be improved in important areas and compliance significantly strengthened. This is the focus of the recommendations in the report.

I thank the banks, consumer organisations, industry associations, regulators and the many other stakeholders consulted during the review and who made submissions.

I particularly thank Abanoub Samaan and Heidi Perko for their great assistance in undertaking the review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. J. Callaghan'.

Mike Callaghan AM PSM

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Observations

Following are some broad observations drawn from the issues covered in the report of the 2021 Independent Review of the Australian Banking Association's (ABA) Banking Code of Practice (the Code).

Improvements in the Code

The ABA's Code was introduced in 1993. It is one of the oldest examples of self-regulation in the financial sector. But its effectiveness has waxed and waned.

In 2019, Wayne Byres, Chairman of the Australian Prudential Regulation Authority (APRA), gave a speech entitled 'Is self-regulation dead?'¹. His message was that while self-regulation in the financial sector was not dead, it was not in peak physical condition. He observed:

'...we still too often see in the financial sector a failure to self-regulate in a manner that appropriately balances the interests of all stakeholders.'

The current Code was re-written following the last independent review in 2017 and in the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission).²

It is an improvement on the previous 2013 version³. It is easier to read, and consumer protection has been extended, particularly for vulnerable customers.

However, the effectiveness of the Code does not merely depend on its content, but whether it affects the behaviour of banks. On this point, it appears that banks are more focused on complying with the Code than they were in the past.

In their response to the significant increase in self-reported breaches to the Banking Code Compliance Committee (BCCC) in 2019-20, the banks said this reflected their increased awareness and monitoring of the Code, along with improvements in risk cultures.

The catalyst for the improvement in bank monitoring of compliance is likely to be the Interim and Final Reports of the Royal Commission, along with the APRA Prudential Inquiry into the Commonwealth Bank of Australia⁴ and the NAB self-assessment⁵. It was a bruising period for some of the banks and their reputations suffered.

The result was that they needed to rebuild trust in the community. And still do.

The ABA should use this triennial review to maintain and strengthen the momentum coming from the Royal Commission in improving the effectiveness of the Code. It is encouraging that the ABA agreed with this objective in its response to the review's Interim Report⁶.

But there are challenges to overcome.

¹ APRA, *Is self-regulation dead?* Wayne Byres, published 8 August 2019 - <https://www.apra.gov.au/self-regulation-dead>

² *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Commissioner Kenneth Madison Hayne AC QC, published 4 February 2019 - <https://financialservices.royalcommission.gov.au/Pages/default.html>

³ ABA, *Code of Banking Practice and Code Monitoring Committee Mandate*, published 2013 - <https://bankingcode.org.au/app/uploads/2019/06/2013-Code-of-Banking-Practice-and-CCMC-Mandate.pdf>

⁴ APRA, *Prudential Inquiry into the Commonwealth Bank of Australia (CBA) Final Report*, published 30 April 2018 - https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry_Final-Report_30042018.pdf

⁵ NAB, *Improving our governance, accountability and culture* - <https://www.nab.com.au/about-us/corporate-governance/self-assessment>

⁶ Pg.4, ABA, *Response to Interim Report*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

Keeping an open mind

1. The first challenge is to keep an open mind on the scope for changes to the Code.

The banks: During the consultations with each of the ABA member banks, some saw little need for further changes to the Code, particularly if it would require adjustments to their systems. They also gave the impression that they were broadly satisfied with their compliance with their Code commitments.

While the banking industry as a whole may see a need to re-build trust in the community, some banks appear to consider that they were not tainted by the Royal Commission, and this is likely to be influencing their view towards the Code.

Another view coming through the consultations was that the banks' proactive and extensive response to supporting customers during the COVID-19 pandemic had raised their reputation in the community. The implication is that the imperative of continuing to rebuild trust had diminished.

Other banks indicated that they were still in the process of strengthening and improving their systems in response to the Royal Commission. This included both monitoring and compliance with the Code. It was a work still in progress. These banks appeared more open than others to make changes to improve compliance and strengthen the Code.

The ABA: While the ABA noted in its submission that it considered relatively minor changes would be required to update the Code to currently expected standards, it did identify a number of areas where the Code could be improved. It also said it was open to recommendations to changes in other areas.

Consumer organisations: The consumer organisations acknowledged the considerable improvements in the Code. Particularly the effort by banks to assist customers experiencing hardship, along with the support provided to customers during the pandemic and extreme weather events.

The consumer bodies believe the Code does not require a complete overhaul, but they are seeking a large number of changes where they say there is evidence of consumer harm. They also say there are too many instances where Code commitments and regulatory obligations are regularly breached or seemingly disregarded. This view was shared by other stakeholders consulted.

Customers: The review heard examples of poor outcomes for customers from their dealings with banks, along with inconsistencies within and between banks in implementing Code commitments.

Even if the bulk of customers have few or no complaints with their banks, every incident of poor treatment can cause significant distress to the customer involved. Moreover, it is often the more vulnerable who are exposed to poor outcomes.

The review's recommendations: Much has changed in the economic, legislative and regulatory environments affecting banks since the last review in 2017. Changes that have implications for the Code.

The magnitude of the regulatory change in recent years may have resulted in a degree of reform fatigue by the banks, but this should not influence the appetite for strengthening the Code.

In addition, while the BCCC compliance reports show a marked increase in reported breaches in 2019-20, there was a wide variation across banks. This increased focus on monitoring Code compliance may not be uniform across all ABA member banks.

The reality is that the Code does not need a complete overhaul or rewrite. But it can and should be improved.

This review recommends changes to the Code to:

- extend consumer protection and benefits
- clarify the operation of the Code, and
- strengthen compliance.

In some areas, the recommendations are to bring the structure of the Code more in line with those recommended in the last independent review.

Preconceived views that the Code requires little updating should be avoided. It requires significant updating in a number of areas.

Next Steps: Any changes to the Code following this review will have to be endorsed by all signatory banks, along with obtaining the approval of the Australian Securities and Investments Commission (ASIC). Recognising it is a document drafted by committee, it is to be hoped that any variation between banks in their appetite for change does not translate into a minimalist approach to improving the Code.

Bank attitudes toward the Code are important

2. The second, and related, challenge to strengthening the effectiveness of the Code involves bank attitudes towards the Code.

From consultations with each ABA member bank, it appears that some see the Code as largely a regulatory burden, comparable with other regulatory and legislative requirements imposed on them.

In contrast, others see the Code as being aligned with their customer orientated ethos, outlining the standard of customer service required to be commercially successful.

While all banks should comply with regulatory requirements, the importance they place on the Code will influence their approach to complying with a set of voluntary commitments.

If the Code is perceived as mainly an obligation that can restrict a bank's activities and commercial interests, compliance may not have the same priority as it would if the Code were viewed as important to the bank's commercial success.

In the former case, the motivation may be to do the minimum amount to avoid a breach – at times complying with the letter of the Code rather than its spirit.

In contrast, where the Code is viewed as central to outlining the customer outcomes that will facilitate the bank's ongoing success, this is more likely to contribute to a proactive culture of compliance within the bank. The bank is also likely to be more receptive to advice from the BCCC in identifying compliance best practice.

Attitudes towards the importance of the Code may be in the process of change within some banks.

The review's consultation meetings with bank Customer Advocates were informative. An important role of the Customer Advocate in some banks is to represent the interest of the consumer in the bank's internal processes and product design. In response to a query why it was necessary to represent consumer interests in a bank that claimed it now had a customer centric ethos, the response was that change in culture takes time.

This triennial review should reinforce the changes in culture underway in the banks.

A clear objective is required

3. The third challenge facing the ABA, again related to the above challenges, involves articulating a clear objective for the Code.

The importance a bank places on the Code will be influenced by how it views the Code's objective.

The preamble to the current Code has under the heading, 'What is the Code?', the statement that 'it sets out the standards of practice and service in the Australian banking industry'. This is a description of what the Code is, not what it is seeking to achieve.

The first task for ABA member banks when they consider amending the Code as part of the triennial review, should be to agree on a clear statement of its objective – specifically, what it is seeking to achieve for bank customers. This could be expressed along the lines that:

'The Code sets out the commitment by ABA member banks to deliver the high standard of banking services expected by customers and the Australian community'.

In essence, the aim of the Code should be to deliver 'good' outcomes for bank customers, particularly having regard to the challenging circumstances that some customers face. In agreeing on an objective for the Code, the ABA could draw on the UK Financial Conduct Authority's proposed consumer duty of care for financial firms⁷.

Outcomes v process: The Code currently consists of numerous procedural steps that banks should follow in their dealings with customers.

The consumer organisations want more prescriptive provisions. This is seen as a way of achieving greater consistency in compliance across banks, as it is easier to enforce a commitment if it involves specific actions that banks must take.

However, not every aspect of a bank's dealings with its customers in every circumstance can be prescribed in the Code.

The focus should always be on achieving good outcomes for customers and not just procedural steps for banks to follow. Assessing whether a bank is achieving the outcomes customers and the community expects will require an element of judgement.

There is the danger, however, that the objective of achieving good outcomes for customers may be lost among the procedural detail.

⁷ FCA, CP21/31: *A new Consumer Duty*, published 14 May 2021 - <https://www.fca.org.uk/publications/consultation-papers/cp21-13-new-consumer-duty>

The ABA noted in its response to the review's Interim Report that it proposed measures to 'further embed a customer-focussed mindset', including an annual Banking Code awareness week to promote and explain its existence⁸.

The best place to start, however, would be with the Code's objective.

The Code should begin with a clear statement of its overall objective, anchored in achieving good outcomes for customers having regard to their individual circumstances – or as commonly expressed, 'doing the right thing by the customer'. Then the outcome sought for customers from each part of the Code should be stated at the start of that part, with the provisions flowing from what is required to achieve those outcomes.

The process of agreeing on the wording of the objective of the Code may in itself help to imbed the importance of the Code across all ABA banks.

Maintaining the status of the Code as self-regulation

4. The fourth challenge is to maintain the status of the Code as self-regulation.

This is the Code's strength – banks voluntarily committing to provide customers a level of service and protection that goes beyond that required by law.

However, the growing overlap between consumer protections in the law and the provisions in the Code, along with developments such as the introduction of the enforceable code provision regime and enhanced breach reporting by ASIC, may bring into question the status of the Code as self-regulation, along with the role of the BCCC.

The history of the Code involves provisions that provide benefits to consumers not in the law, but in many areas subsequent legislation captures these protections.

The ABA member banks need to maintain this interaction between the Code and the law. They should always be alert to using the Code to provide guidance and clarify how they will meet their legal obligations, and importantly, provide benefits that go beyond the law.

If many provisions are designated as enforceable under the new enforceable code provision regime, the Code could shift from being self-regulation to more like delegated legislation, with ASIC becoming the primary Code monitoring body. In such a scenario, the incentive for banks to provide consumers with protection and benefits that go beyond the law will diminish.

The key criteria in identifying provisions to be designated as enforceable should be the extent to which they will support the role, operation, and enforceability of the Code as self-regulation.

Under ASIC's breach reporting reforms, there is likely to be a substantial increase in the volume of matters being reported to ASIC by banks. It will require a re-think of the BCCC's breach reporting requirements to reduce duplication and avoid an excessive administrative reporting burden on the banks.

The response to these developments, along with efforts to achieve greater consistency across banks in breach reporting, should not involve reducing BCCC compliance reports to provisions that are easier or more convenient for the banks to monitor and report – such as

⁸ Pg.4, ABA, Response to Interim Report, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

transactional or prescriptive provisions – rather than those involving subjective judgements by the banks.

If this was the case, it would undermine the Code and the role of the BCCC.

The focus of the Code, and the BCCC's activities, should always be on whether customers are receiving good outcomes from their dealings with their banks. This cannot be confined to just monitoring bank's procedural steps.

Strengthening the framework for compliance

5. The fifth challenge is to improve compliance with the Code.

The effectiveness of the Code critically depends on the extent to which banks meet their commitments.

Concrete steps towards strengthening Code compliance would help reinforce consumer and community trust in the banks.

Banks should commit to take all reasonable steps to ensure appropriate systems, processes and programs to support an integrated approach to Code compliance are in place. In addition, the banks should commit to a program of periodically reviewing the effectiveness of each component of their compliance framework through their internal and external audit arrangements, with the results of these audits submitted to the BCCC.

A summary of the outcome of these audits should be included in each bank's annual report.

The BCCC has an important role in monitoring and driving best practice Code compliance, but under a system of self-regulation, it is appropriate for each bank to publicly report on the steps it is taking to ensure it meets the commitments in the Code.

Mike Callaghan

Recommendations

Maintaining momentum from the Royal Commission

- 1) The ABA should use this triennial review to maintain the momentum coming from the Royal Commission in terms of improving Code awareness and compliance. The Code does not need a complete overhaul, but to maintain momentum there should be no preconceived view to keep change to a minimum. The objective of the Code and enforceability of commitments needs to be clear. Consumer benefits and protections need to be strengthened and clarified, and the commitment to compliance made more tangible.

Importance of the Code

- 2) Banks should view the Code as important in outlining the customer focus that is central to the overall long-term success of their organisation, rather than a regulatory burden. Senior leadership in the banks should send a clear message to staff as to the importance of the Code to the bank.

The Code's audience

- 3) While the Code should be accessible to as broad an audience as possible, the primary audience should be the banks and bank staff. It is the rule book for the banks. It should be drafted with sufficient detail, either in the Code or related industry guidelines, to facilitate the implementation of the commitments by bank staff and allow consumer representatives help customers pursue their rights.
- 4) There should be a separate consumer friendly and readily accessible document that highlights consumers have rights in their dealings with banks, along with indicating that the detail of their rights is in the Code as well as advising who can assist them in any dispute with their banks. This should be a standard document across all ABA member banks. There should be a commitment in the Code that this document will be given to consumers when they make a complaint to their bank. 'Easy Read' versions of this document should be available. The Code would remain the document that contains the rights of consumers, the commitments made by banks, the reference for the BCCC in monitoring bank compliance with those commitments, and for AFCA when considering complaints.

Enforceable code provision regime

- 5) The factors to consider in the process of identifying provisions to be designated under the enforceable code regime should include:
 - The extent to which a provision can be legally enforceable
 - The extent to which a breach is likely to result in significant detriment to a consumer

- Existing enforceability of provisions under contract law and legislation, such as the Corporations Act and Credit Act, and
- The extent to which designating the provision as enforceable will support the role, operation, and enforceability of the Code as self-regulation.

In balancing these factors, provisions which are already enforceable under contract or existing law should not be designated under the enforceable code provision regime.

- 6) The designation of enforceable provisions should support the overall enforceability of the Code. It should not create confusion that there are enforceable and non-enforceable provisions. To avoid such confusion, the Code should specifically refer to how all the provisions can be enforced. The 'layers' of enforceability include contract law, Code obligations being considered by the Australian Financial Complaints Authority (AFCA) in resolving customer disputes, and the breaches of some provision resulting in a penalty under legislation.
- 7) The wording of Clause 10 should be aligned with the similarly worded obligation banks must meet under section 912A of the Corporation Act. If it is aligned, the Code should state that the obligation on banks to act efficiently, honestly and fairly is enforceable under the Corporations Act. If Clause 10 is not aligned with Section 912A, then Clause 10 would be suitable for designation as an enforceable code provision.
- 8) A new commitment should be added to the Code for banks to take all reasonable steps to have in place the appropriate systems, processes, and programs to support an integrated approach to compliance. Banks should commit to a program of periodically reviewing the effectiveness of their compliance framework through their internal and external audit arrangements and to reporting the detail of the outcomes of these audits to the BCCC. A summary of the audits should be included in each banks published annual reports. This commitment would be suitable for designation as enforceable under the enforceable code provision regime.

Structure of the Code

- 9) The Code should begin with a clear statement of the Code's overall objective. Then each part of the Code should start with the outcome sought for customers from that part, and the provisions flow from and are consistent with achieving that outcome.
- 10) The industry guidelines should be considered as Code related documents, and not as outside the Code and voluntary. Banks should take into account industry guidelines in assessing whether they are complying with Code commitments. If they are not following the best practice outlined in the guidelines, banks will have to demonstrate they are following comparable processes in meeting the commitments. There should be greater transparency in the Code over the role of industry guidelines. They should be specifically referenced in the Code.
- 11) References in the Code which simply refer to complying with the law, legislation, or a regulation, should be expanded to provide some clarity as to what this means for consumers in their relationship with their bank. Issues around the complexity and

burden on banks responding to multiple monitoring arrangements should be addressed through rationalising and streamlining banks' reporting obligation to the BCCC.

- 12) The Code should target areas where there are current problems for customers and key aspects of the relationship with their bank where customers are likely to be exposed to loss or distress.

Implications for the Code from recent regulatory reforms

Mandatory Credit Reporting

- 13) The ABA should assess the extent to which the Code may need to be changed in response to the introduction of the Mandatory Credit Reporting regime after completion of the Credit Reporting Code. This should include amending Clause 178(c) to make it clear that banks will tell customers what the impact on their credit report will be when they accept or refuse a hardship or collections arrangement. The ABA should clarify Clause 179.
- 14) It should be made clear that the references in the ABA guidelines that banks should not enter negative credit information if a customer is affected by family and domestic violence, so far as the bank is able to avoid doing so under the law, are part of the Code.

Open Banking/Consumer Data Right

- 15) Chapter 35 of the Code should reference that a customer has the right to remove a joint account from the Consumer Data Right and banks will be proactive identifying vulnerable customers and alerting them to this right.

Design and Distribution Obligations

- 16) In order to clarify the rights of customers, the Code should include the statement that if a customer suffers loss or damage because a bank contravenes the Design and Distribution Obligations, the customer may recover the loss or damage from the bank.

Buy Now Pay Later

- 17) The Code should include a commitment that Buy Now Pay Later (BNPL) products issued by banks will be subject to credit checks and eligibility requirements to ensure the products are suitable for consumers.
- 18) The Code should include a commitment that banks commit only to partner with BNPL providers that are members of ACFA and agree to meet ASIC guidance on dispute resolution.

Developments in technology

- 19) References in Clause 28(b) to 'special clearance' processes for cheques is obsolete and Clause 28(b) should be removed.
- 20) The definition of 'devices' should be aligned with the definition in ASIC's ePayments Code.
- 21) The acronym 'BSB' should be moved from the 'Acronym' section to the 'Definition' section and be defined as 'a digital address that identifies a financial institution and its particular administration centre, processing centre, branch or office'.
- 22) Where possible, the Code should be technology neutral. When changes are made to the Code, the opportunity should be taken to ensure the terminology in the Code is up to date.

ePayments Code

- 23) ABA banks should commit to subscribing to the ePayments Code and complying with the consumer protections in the ePayments Code.

Part 1 of the Code: 'How the Code works'

- 24) Part 1 should start with a succinct statement as to the objective of the Code, along the lines that it sets out the commitment by ABA member banks to deliver the high standard of banking services expected by customers and the Australian community.
- 25) Part 1 should state that the banks commitments in the Code are enforceable, and outline how they can be enforced, consistent with Recommendation 6.
- 26) Part 1 should outline that industry guidelines are Code-related documents consistent with Recommendation 10.
- 27) Consistent with Recommendation 4, Part 1 should include a commitment to give customers a simple, easily understandable document that advises them:
 - they have rights in their dealings with their banks
 - how they can access what are these rights under the Code
 - where they can get assistance if they have a problem with their bank, and
 - how they can make a complaint to their bank.

An easy read version of the document should be available.

Part 2 of the Code: 'Your banking relationship'

- 28) The commitment for banks to engage with customers in a fair reasonable and ethical manner (or if aligned with the Corporations Act – efficiently, honestly and fairly) underpins all Code commitments and should be prominently positioned in the Code. The Code should state the commitment is enforceable under the law (the

Corporations Act if aligned, if not, Clause 10 is a suitable candidate to be designated under the enforceable code regime).

- 29) The commitment that banks will comply with their obligations under the Code should be strengthened. Consistent with Recommendation 8, Part 2 of the Code should include a commitment that banks will have in place appropriate frameworks and systems to support compliance with the Code, and the effectiveness of the components of their frameworks will be subject to a rolling audit program using internal and external audit arrangements. This is an appropriate candidate to be designated under the enforceable code regime.
- 30) It should be made clear that the commitment to have trained and competent staff that understand the Code and how to comply with it, covers staff at all levels, including management. The banks should develop industry wide standards for competency and conduct for bank staff. The Code should also state that staff will be supported by appropriate systems and technology to support compliance with the Code.
- 31) The ABA protocol on branch closures needs to be updated and strengthened. It should apply whenever a branch closure takes place. Banks should reinforce their commitment to consult with communities where branches will be closed, and where they have already been closed, to develop ways to facilitate access to banking services. This should include banks being innovative in how they can deliver banking services in the absence of branches, such as using technology for identification purposes rather than a customer being required to visit a branch.

Part 3 of the Code: 'Opening an account and using our banking services'

- 32) The Code should reflect that it is the customers perspective that will determine whether information provided by the bank is clear and useful. Clause 17 should say that the customer will receive information that is 'clear and useful to you'.
- 33) Banks should specifically offer to respond to customers' queries about the terms and conditions of the banks' products and services, including if appropriate, suggesting the customer seek independent advice.
- 34) To deal with customer concerns over delays when banks send information by post, banks should commit to send any communication by post also electronically, where appropriate having regard to security and privacy considerations.

Part 4 of the Code: 'Inclusive and accessible banking'

- 35) The Code should adopt the UK Financial Conduct Authority's definition of a vulnerable customer – 'someone who, due to their personal circumstances, is especially susceptible to harm – particularly when a firm is not acting with appropriate levels of care'. While some customers may be more likely to be vulnerable, it is important for banks to be alert to the circumstances of each- and- every customer, in identifying vulnerability.

- 36) The specific circumstances of customers who may be vulnerable listed in Clause 38, and the groups of customers listed in Clause 32, as a focus for inclusive banking services, should specifically state that the list 'includes but not limited to'.
- 37) The examples of groups of vulnerable customers in the Code should include people in prison (and those in transition) to bring attention to a group currently under-recognised.
- 38) The commitment in Clause 32 to provide banking services which are inclusive of all people, should be extended to provide that the vulnerabilities of both individuals and small businesses should be taken into account.
- 39) The wording in Clause 38 that the bank 'may only become aware of your circumstances if you tell us' should be removed and replaced with wording along the lines of Clause 93 in the 2020 General Insurance Code. Similarly, the wording in Clause 43 that the bank 'may become aware if you are a low-income earner only if you tell us about it' should be amended. While customers should be encouraged to tell their bank if they are a low-income earner, banks should commit to proactively identify customers who may be eligible for basic accounts.
- 40) Following on from Recommendation 8, banks should commit to periodically auditing the effectiveness of staff training and systems for identifying vulnerable customers.
- 41) Banks should have public-facing family violence policies on their web sites, including an easy-to-understand outline of their commitment to help.
- 42) Clause 40 should be amended to include that if a vulnerable customer tells their bank about their personal or financial circumstances, subject to the customers agreement, the bank will record this information so as to minimise the number of times the customer has to provide this information.
- 43) The commitment in Clause 41 should be 'to make it easier' for a vulnerable customer to communicate with their bank, rather than 'to try and make it easier'.
- 44) There should be a commitment that the bank will keep a vulnerable customers information secure and confidential.
- 45) The definitions at the end of Clause 47 should say 'low income includes no income'. Eligibility for basic accounts should be available to customers with no income, as well as low-income earners.
- 46) Banks should commit to helping to protect customers from abusive transactions.
- 47) As part of the extra care banks provide to vulnerable customers, they should commit to facilitating and minimising delays in the authorisation of a third party, such as Legal Aid lawyer or financial counsellor, to act on behalf of the customer, where the customer has provided appropriate consent.
- 48) Where requested by the customer or bank staff consider it will assist the customer, the bank should commit to making interpreter services available, where practicable, and free of charge. This should include, as required and where reasonably available, interpreters for Aboriginal and Torres Strait Islander customers. To help achieve consistency across banks, an industry guideline on helping people of non-English background should be prepared.

- 49) Banks should offer to communicate with customers with hearing difficulties through the National Relay Service, and for those customers who use it, Auslan interpreters.
- 50) The Code should refer to the ABA Accessibility Principles along with a commitment that banks will make banking services accessible to customers with a disability in line with the Principles.
- 51) The commitments in Clauses 35 to 37 should not be limited to customers who tell the bank that they are of Aboriginal and Torres Strait Island heritage. At a minimum, the fact that there is tailored assistance available for Aboriginal and Torres Strait Islander people should be advertised, and preferably, bank staff should ask customers whether they have Aboriginal and Torres Strait Islander heritage.
- 52) The Code should recognise that Aboriginal and Torres Strait Islander peoples can have challenges in accessing banking services wherever they live, it is not just those living in remote areas.
- 53) The commitment in Clause 35c should be clarified such that for Aboriginal and Torres Strait Islander customers who cannot meet the standard identification requirements, banks will help them with the AUSTRAC guidance for an alternative identification approach for Aboriginal and Torres Strait Islander peoples.
- 54) The update of the ABA Indigenous Statement of Commitment should be referenced in the Code, along with a commitment that it will be followed.
- 55) Cultural awareness training should be generally available and not limited to bank staff regularly assisting Aboriginal and Torres Strait Islander customers in remote locations.
- 56) A tailored range of measures to assist prisoners (and those in transition) should be included in an industry guideline.
- 57) An industry guideline should cover the vulnerabilities facing LGBTQIA+ customers, along with measures to assist access to banking services. Bank forms should be updated to provide for customers with non-binary gender and/or gender dysphoria.
- 58) A customer should not be denied a banking service, or have an account closed, without the bank raising it with the customer and giving the customer an opportunity to respond, where consistent with AUSTRAC guidance. If the service is denied, or account closed, the bank should give a reason, where appropriate. Such decisions should be on a case-by-case basis. The BCCC should consider undertaking an inquiry into banks' performance in accordance with these commitments.

Part 5 of the Code: 'When you apply for a loan'

- 59) Irrespective of whether announced changes to the National Consumer Credit Protection Act 2009 eventuate, the principle of responsible lending (the 'care and skill of a diligent and prudent banker'), should be set out in the Code. This should incorporate, consistent with the law, that the commitment for responsible lending for individuals is that banks will undertake reasonable inquiries to assess a borrower's capacity to repay the loan without substantial financial hardship and in

doing so to consider the borrowers income, debt and expenses and the purpose for which the borrower is seeking the loan.

- 60) Banks should commit to assess all the information they have as to whether a co-borrower is receiving a substantial benefit under the loan.
- 61) The protections in the Code in Clauses 64 to 66 with respect to consumer credit insurance should be applied to all sales of credit insurance and not just limited to those sold via digital channels.
- 62) Banks should commit not to sell consumer credit insurance with low claim to premium ratios.
- 63) The ABA's Lender Mortgage Insurance – Guiding Principles should be referenced in the Code.

Part 6 of the Code: 'Lending to small business'

- 64) Part 6 should be extended from referring to 'lending to small business' to cover 'providing banking services to small business'. The first commitment in this part should be for banks to assist small businesses with their banking services that are suitable to their circumstances.
- 65) While it will take time to incorporate the Pottinger Review recommended changes to the definition of small business in a revised Code following the triennial review, ABA banks should commit to introduce the changes as soon as possible.
- 66) To help clarify what parts of the Code apply to small business, and to recognise there is a difference in the requirements for lending to small business and lending to individuals, the references to small business lending in Part 5 should be shifted to Part 6 of the Code.
- 67) The Code should specify that future earning capacity is taken into account when assessing a small business's capacity to repay a loan.
- 68) The Code should clarify that a bank's approval of a small business loan will not be dependent on a third party (such as the small business's accountant) certifying the capacity of the small business to repay the loan.
- 69) Banks should advise a small business if there is likely to be a delay in the initial indication of how long it would take for a decision, the reason for the delay, and give a revised estimate when a decision is likely.
- 70) Banks should commit that if they require additional information when considering a loan application, they will endeavour to ensure that this does not delay the time it will take for the bank to make a decision.
- 71) Banks should commit to tell small business the reason, if appropriate, as to why a loan was declined, along with what would be needed for the application to be reconsidered.
- 72) Given the Payments System Board's recent review of Retail Payments Regulation which covers the issue of least cost routing, there does not appear to be a need for this issue to be covered in the Code.

Part 7 of the Code: 'Guaranteeing a loan'

- 73) Consistent with Recommendation 8, banks should commit to periodically audit the effectiveness of their processes and systems to support compliance with the guarantee provisions under the Code.
- 74) Banks should commit to proactively identifying guarantors who may require additional support to understand the guarantee information provided to them.
- 75) Banks should commit to tailoring their approach to provide the information required to be given to the guarantor in a meaningful and accessible way to suit the needs of the guarantor, including where the guarantor's first language is not English.
- 76) Banks should commit to maintain records of any indicators that a guarantor may be vulnerable.
- 77) Banks should commit, unless impractical to do so, to meet either face-to-face, video conference or other means with the guarantor before accepting the guarantee, and particularly where the guarantor has not sought independent legal or financial advice. Banks should meet with the guarantor without the borrower being present.
- 78) Banks should commit to conducting a pre-enforcement review of a guarantee to ensure that it has been obtained in accordance with the Code, before commencing enforcement action.
- 79) Banks should commit to explore all alternative options with a guarantor before a guarantor is forced to sell their principal place of residence.

Part 8 of the Code: 'Managing your account'

- 80) Banks should commit to providing clear, simple advice to customers on their websites and in person, as to how to cancel direct debits and recurring payments.
- 81) Clause 144 should be extended to state that if a bank is going to cancel a credit card it will offer to discuss this with the customer, and if appropriate, give the customer the general reason for doing so.
- 82) The Code should state that loan default fees and late payments fees will be reasonable having regard to all costs to the bank associated with customers not meeting their repayments on time.

Part 9 of the Code: 'When things go wrong'

- 83) The ABA Guidelines on 'Sale of unsecured debt' and 'Promoting understanding about banks financial hardship programs' should be considered as Code related documents and are considered by banks in assessing whether they are complying with their commitments under the Code. They should be referenced in Part 9.
- 84) Chapter 43 should be extended to include the following commitments:
 - 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 collection activities.

- Where a debt buyer believes that commencing bankruptcy proceedings is necessary to recover an unsecured debt, banks should require the debt buyer to consult 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 there is no reasonable prospect of the debt being recovered, then the bank should not sell that debt to a third party.
- 85) Banks should commit to provide readily accessible information and guidance about how to access hardship assistance that is appropriate to Aboriginal and Torres Strait Islander peoples, people where English is not their first language, and people with low levels of financial literacy.
 - 86) Banks should commit to provide more guidance to customers on the information they will need to give their bank when seeking hardship assistance along with what the bank will consider in deciding whether to assist a customer. There should be consistency in the use of the term 'financial hardship' with the National Credit Act.
 - 87) Clause 168 should be amended to making 'suitable, accessible and comprehensive information on financial hardship assistance prominent and easily identifiable on banks websites, in branches and periodically on account statements'
 - 88) Clause 176 should be amended to say that in all situations banks will advise customers what independent help they can access when facing financial difficulty, e.g. financial counselling organisations.
 - 89) Banks should commit to having robust identification and communication systems to assist customers in, or likely to be facing, financial hardship. The Code should be expanded to cover customers who anticipate they will soon be unable to meet their financial commitments – they do not have to wait until they miss repayments.
 - 90) The reference to 'unsecured personal loan or credit card' should be removed from Clause 172 so as not to exclude other forms of debt.
 - 91) The Code should be amended so that it is clear that small businesses are covered under the hardship assistance arrangements in Part 9.
 - 92) Customers should be advised where they can access their rights under the Code and National Credit Code with respect to financial hardship assistance when they approach their bank seeking assistance. The Code should also stipulate the loan types that come under the hardship provisions of the National Credit Code.
 - 93) The BCCC should publish data on the percentage of requests for financial assistance granted by banks.
 - 94) The Code should include a commitment by banks that they will support customers facing financial hardship in emergencies or special circumstances, such as significant financial shocks, droughts, fires, flood, and earthquakes.
 - 95) Chapter 45 should be amended to incorporate the Law Council's proposals to clarify the provisions dealing with deceased estates. The detail could be included in an industry guideline, which is referenced in the Code.

Part 10 of the Code: 'Resolving your complaint'

- 96) Rather than saying banks 'will comply with ASIC guidelines' on internal dispute resolution processes, the Code should reference that the ASIC regulatory guides impose enforceable requirements regarding the promotion, accessibility, timeframes, and processes for handling customer complaints.
- 97) The Code should be expanded to include some of the important requirements in ASIC regulatory guides. Specifically, that banks will:
- treat complaints involving hardship notices or requests to postpone enforcement proceedings as urgent matters
 - the internal dispute resolution processes will be easy to understand, including by people with a disability and language difficulties
 - the dispute resolution processes will be free to customers
 - staff will have the knowledge, skills and attributes to effectively, and efficiently, deal with complaints
 - conduct regular compliance audits to identify and address non-conformity with regulatory guides and internal requirements for complaints handling.
- 98) Banks should commit to assisting, without seeking to influence, vulnerable customers with their complaints through both internal and external dispute resolution processes. For example, this could include offering to explain, as required, how the dispute resolution process operates.
- 99) The definition of complaint in the Code should be aligned with the definition in ASIC Regulatory Guide 271.
- 100) Consistent with Recommendation 4, there should be a commitment in the Code that when a customer makes a complaint to their bank, the bank will give the customer a simple, easily understandable document that advises them they have rights in their dealings with their bank which are outlined in the Code along with how they can access the Code.
- 101) To clarify what are customers' rights, the Code should include the statement that banks are bound to cooperate with AFCA in dealing with a customer's complaint and are bound by any determination by AFCA.
- 102) Given the role of the Customer Advocate as an avenue for escalating a complaint in the bank will be curtailed with the reduced timeframe for concluding the internal dispute resolution process, the reference to Customer Advocates should be removed from Part 10 of the Code.
- 103) The broader role of the Customer Advocate in representing the customers perspective in shaping remediation programs, influencing product development and distribution processes, should be included in Part 1 'How the Code works'.

Banking Code Compliance Committee (BCCC)

- 104) The BCCC should maintain its role overseeing compliance with a Code based on self-regulation and promoting best practice in helping banks achieve good outcomes for their customers. The BCCC is not a regulator enforcing compliance with the law.
- 105) The BCCC should review its information requests from banks in the context of ASIC's new breach reporting arrangements and outline why it requires the information, how it is used, and whether it is necessary for the BCCC to fulfil its role. The BCCC should explain to banks why it requires the information.
- 106) A materiality threshold for banks' breach reporting to the BCCC should be introduced to reduce the reporting burden on banks and to better focus the activities of the BCCC. The nature of the threshold of materiality – whether based on number of customers affected, dollar impact of the breach, importance of the provision, whether the breach is wilful as opposed to inadvertent- could be settled in consultation with the banks.
- 107) Proposals to reduce banks compliance reports to the BCCC to provisions in the Code which are largely prescriptive or transactional should be rejected.
- 108) Consistent with Recommendation 8, there should be an enforceable provision that banks commit to take all reasonable steps to have the appropriate framework, processes and procedures in place to support an integrated approach to Code compliance. The effectiveness of the components of this framework should be periodically audited through the banks internal and external audit arrangements, with the results provided to the BCCC. A summary of each bank's audit reports should be included in their published annual report. There should be an exchange of information agreement with ASIC for the BCCC to report to ASIC if there are serious or systemic deficiencies in a bank's compliance framework.
- 109) The BCCC's sanction powers should be consistent with its role and the Code's status of self-regulation. Giving the BCCC the power to impose a financial penalty has the danger of blurring the line between the BCCC and ASIC.
- 110) The BCCC should have the power to require a bank to publish on the bank's web site that it had breached the Code and include the corrective action the bank is taking.
- 111) The BCCC charter should be part of the Code. It should be referenced in the Code and be annexed to the Code.
- 112) The provisions in the Code covering the BCCC should be moved from the part of the Code 'Resolving your complaint' to a separate part of the Code dealing with 'Compliance with the Code'.

Scams

- 113) Banks should commit to training staff on the indicators of suspicious transactions that may constitute scams, particularly with respect to vulnerable customers.

- 114) Banks should commit to having information on their websites and apps that tell customers what to do if they believe they have been scammed. They should include a dedicated scam/fraud telephone line. This information should also be in languages other than English.

Code review frequency

- 115) The requirement in the Code for it to be independently reviewed every three years remains appropriate.
- 116) The ABA Consumer Outcomes Group should be used to provide input to the ABA as to whether amendments to the Code are required between triennial reviews, or whether the issue can wait to be considered at the next review.

1. Introduction

1.1 Background

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

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

The Code is a set of undertakings by ABA member banks as to their conduct when dealing with individuals and small business customers, as well as specifying commitments for banking services.

Clause 6 of the Code says that the ABA will arrange for the Code to be independently reviewed every three years from the date the Code comes into effect.

This is the first independent review of the Code since it was approved by ASIC. The Code is the first comprehensive broad-based industry code ASIC has approved under its relevant powers.

The previous independent review of the Code, undertaken by Phil Khoury, was completed in January 2017.

The terms of reference for this review are at Attachment A.

1.2 Review's approach

Consistent with the approach for independent reviews of financial services sector codes of conduct outlined in ASIC's Regulatory Guide 183, the review consulted all relevant identified stakeholders – consumers, community and consumer groups, industry participants and their peak bodies, relevant regulators, and government departments.

The review issued a Consultation Note on 30 June 2021, which outlined the range of issues to be covered, and posed several questions around these issues. Submissions were invited from interested parties on the issues raised in the Consultation Note. It also invited submissions on other matters regarding the Code that could be considered relevant to the review.

The list of stakeholders who provided a submission is at Attachment B. The submissions were made public on the review's website.⁹ The review held more than 60 consultation meetings with interested parties. The list of organisations consulted is at Attachment C.

On 6 September 2021, the review released an Interim Report. Drawing on the submissions and consultation meetings, the Interim Report outlined some overarching themes and issues surrounding the review, along with some preliminary observations. Comments were invited on the Interim Report, and nine written responses were received. The review continued consultation meetings with stakeholders following the release of the Interim Report.

The review was assisted by a Customer Advisory Panel. Members of the panel were:

⁹ The Banking Code Review webpage - <https://bankingcodereview.com.au/>

- Tom Abourizk – Consumer Action Law Centre
- Drew MacRae – Financial Rights Legal Centre, and
- Alexi Boyd – Council of Small Business Organisations Australia.

The Customer Advisory Panel was consulted on the contents of the Consultation Note, and Interim Report. The members provided input to the review's consideration on a range of issues, as well as suggesting organisations the review should consult.

On 1 November 2021, copies of the draft final report were provided to the ABA, members of the Customer Advisory Panel, ASIC and BCCC to identify any factual errors.

The review would like to thank all the people and organisations it consulted, along with members of the Customer Advisory Panel for their cooperation and assistance.

1.3 Report's structure

The report is divided into the following three chapters:

Part A – overarching themes and issues

Part B – an assessment of each part of the Code

Part C – other issues related to the Code

PART A- OVERARCHING THEMES AND ISSUES

2. Role of the Code as self-regulation

2.1 Issue

An overarching consideration in reviewing the Code is whether there is clarity over its intended role as self-regulation and whether it is fulfilling this role.

2.2 Stakeholder's views

The ABA states that the Code provides protections for consumers which may not have been reached, or reached much more slowly, without the input of self-regulation¹⁰.

Drawing on work by Nicola Howell¹¹, Senior Lecturer and Member of the Commercial and Property Law Research Centre, Faculty of Law, Queensland University of Technology, the ABA notes that the way the Code can influence consumer protection standards is by:

- Providing consumer rights in areas not currently covered by legislation, including where legislation might be an inappropriate response to an identified problem such as measures for customers experiencing vulnerability.
- Providing important protections for areas not covered by legislation – this is particularly important for small business customers, as the protections in the National Consumer Credit Protection Act 2009 do not extend to small business.
- Expanding on the general obligations contained in the legislation, e.g., the procedural protections afforded to third party guarantors.
- Setting standards that influence the development of legislation and vice-versa.
- Influencing the standards of other parts of the financial services industry and standards considered to be good industry practice by the Australian Financial Complaints Authority (ACFA).

Legal Aid Queensland stated that the Code remains a relevant and integral part of the regulatory landscape and helps to clarify and promote the standards of service and behaviour the community can expect when dealing with banks¹².

The Financial Services Institute of Australasia (FINSIA) commented that the review of the Code is an opportunity to enhance trust and create an enduring customer focused culture by making the Code operate as a powerful influence on culture, rather than a compliance document¹³.

¹⁰ Pg.1, ABA, *ABA Submission 2021 Banking Code Triennial Review*, published 6 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/09/ABA-Submission-to-Triennial-Banking-Code-Review.pdf>

¹¹ UNSW Law Journal, Nicola J Howell, *Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?*, published 2015 - <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLJ/2015/19.html>

¹² Pg.2, Legal Aid Queensland – *Independent Review Code of Banking Practice Submission by Legal Aid Queensland*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Legal-Aid-QLD.pdf>

¹³ Pg.1, FINSIA, *FINSIA Submission to the Independent Banking Code Review*, published 7 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-FINSIA.pdf>

The other submissions did not directly comment on the role of the Code, focusing instead on proposed changes to the Code. For example, the joint submission by the consumer organisations urged that the review should focus on the primary goal of making banking services more accessible and fairer, particularly for people who are, or have been, experiencing some form of vulnerability or financial hardship¹⁴.

2.3 Discussion

The paper by Nicola Howell¹⁵ quoted in the ABA submission was written in 2015 and examined how, since the introduction of the first Code in 1993, there has been a significant expansion of legislation into areas that were once covered by the Code. Howell noted that with much of the Code effectively superseded by legislative developments, there were suggestions the Code may not be needed in the future.

Another reason cited for dispensing with the Code at the time was because it was considered by many to be a toothless tiger in influencing bank behaviour. In response, Howell argued that the Code continued to have a role in the ways quoted in the ABA submission.

In a submission to the previous independent review of the Code in 2017, Howell emphasised that the review should be cognisant of the different roles that the Code can, and should play in financial services regulation, and ensure that any recommendations from the review enhance, or at least, not detract from these roles.¹⁶ Emphasis was placed on the role of the Code in the continuous improvement of banking services beyond that contained in the legislation.

The feature of the Code that allows it to improve and lead on the level of consumer benefits, compared with legislation, is the fact that it is self-regulation. As noted in section 7 on enforceable provisions, recent developments have the potential to move the Code away from its status as self-regulation.

In Regulatory Guide 183, which covers the approval of financial services sector codes of conduct, ASIC says that it believes codes sit at the apex of industry self-regulatory initiatives. ASIC states that where they enjoy the support and commitment of the sponsoring industries, codes can deliver real benefits to both consumers and those ‘who are bound by and must comply with the provisions of the code to which they subscribe’.¹⁷ Codes should therefore improve consumer confidence in a particular industry or industries.

Much has been written about the pros and cons of self-regulation. In terms of the benefits of self-regulation, the report by the Taskforce on Industry Self-Regulation stated:

‘Self-regulatory schemes tend to promote good practice and target specific problems within industries, impose lower compliance costs on business, and offer quick, low-cost dispute resolution procedures. Effective self-regulation can also avoid the often overly prescriptive nature of regulation and allow industry the flexibility to provide

¹⁴ Pg.5, Joint Consumer Organisations, 2021 Review of the Australian Banking Association Code of Practice, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

¹⁵ UNSW Law Journal, Nicola J Howell, *Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?*, published 2015 - <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLJ/2015/19.html>

¹⁶ Pg.2, QUT, *Submission to review of the Code of Banking Practice and Code Compliance Monitoring Committee*, published 16 September 2016 - <https://eprints.qut.edu.au/106595/1/25-N-Howell-Submission-Review-of-Code-of-Banking-Practice-CCMC.pdf>

¹⁷ Pg. 4, ASIC Regulatory Guide 183 <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rq-183-approval-of-financial-services-sector-codes-of-conduct/>, published March 2013

greater choice for consumers and to be more responsive to changing consumer expectations¹⁸

While there were earlier doubts about the relevance of industry codes in the financial sector, codes were endorsed by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Commissioner Hayne rejected a proposal by Treasury to essentially replace the role of codes by giving ASIC rule-making powers similar to those under the Competition and Consumer Act 2010¹⁹. He said harnessing the views and collective will of relevant participants was essential to the creation of an industry code.

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 Banking Code and which have been developed and applied within significant parts of the banking sector for many years.

The main benefit lost by replacing the Code with ASIC rule-making powers would be the incentive for banks to provide consumer benefits that go beyond those rules.

2.4 Finding

Maintaining the Code's status as self-regulation is necessary if it is going to continue to provide bank customers with benefits beyond that in legislation.

But understanding the role of the Code involves more than just seeing it as a way to provide consumers with rights in areas not covered by the law. There is the issue as to why banks voluntarily commit to self-regulation and provide consumers benefits beyond the law. Their motivation will effectively determine the effectiveness of the Code.

A theme covered in this report is how banks perceive the role of the Code will influence the extent to which they will commit through self-regulation to provide customers with benefits beyond the law, along with their approach to complying with those commitments.

Section 5 of the report canvases the significance of the importance each bank places on the Code. In particular whether they see the Code as contributing to the bank's success as a customer- focused organisation.

Section 8, which covers the structure of the Code, highlights that clarity over the objective of the Code in delivering the right outcome for customers, will be central to determining its effectiveness as self-regulation.

¹⁸ Pg.1, Treasury, *Industry Self-Regulation in Consumer Markets – Report prepared by the Taskforce on Industry Self-regulation*, published August 2000 - https://treasury.gov.au/sites/default/files/2019-03/final_report.pdf

¹⁹ Pg.107, Treasury, *Final Report – Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Volume 1*, published 1 February 2019 - <https://treasury.gov.au/sites/default/files/2019-03/fsrc-volume1.pdf>

3. Developments since the last review

3.1 Issue

Changes to banking, regulatory and economic environment will have implications for the Code. One of the objectives for the review as outlined in its terms of reference is to ensure that the Code continues to respond appropriately to the contemporary environment.

3.2 Stakeholder views

The developments identified by stakeholders in consultations and the environment that have implications for the Code included:

- The Royal Commission.
- Re-write of the Code into plain-English and extension of benefits for individuals and small businesses.
- The COVID-19 pandemic.
- Increase in extreme weather events impacting consumers.
- Technological changes, including use of artificial intelligence.
- Removing physical branch services and ATM's.
- The reduction in the use of cash.
- An increasing shift to digital banking.
- The approval of the Code by ASIC.
- New legislation and regulations, including:
 - mandatory credit reporting/comprehensive credit reporting
 - open banking/consumer data right, and
 - design and distribution obligations.
- The proposed removal of responsible lending obligations from the Credit Act.
- Changes in breach reporting to ASIC for Australian financial services licensees and Australian credit licensees.
- The introduction of the enforceable Code provision regime.
- Changes in required internal and external dispute resolution regimes.
- The establishment of the Australian Financial Complaints Authority (AFCA).
- Increased prevalence of cyber scams.
- Growth in Buy Now Pay Later (BNPL) products.
- The commencement of the BCCC.
- Increased sensitivity to inclusiveness and accessibility to banking services.

The joint submission by consumer organisations noted that while the above developments raised new issues for the Code, most of their recommendations for changes to the Code relate to concerns they have had for years²⁰.

3.3 Discussion

The implications of many of these developments for the Code are discussed in detail in subsequent sections of the report. For example, the implication of new legislation is discussed in Section 9.

Following is an overview of broader implications of some of the recent developments for the Code.

3.3.1 Royal Commission

A major development impacting on the banking industry was the Royal Commission. Commissioner Hayne delivered his final report in February 2019.

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 these recommendations. Among the changes were:

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

In addition, and as a result of the Royal Commission's focus on the enforceability of code provisions, the enforceable code provision regime was introduced.

Apart from specific recommendations to change the Code, the Royal Commission appears to have had a major impact on subscribing banks attitudes towards the Code, particularly when monitoring compliance.

The Royal Commission may have also played a role in raising public awareness of what constitutes unacceptable and inappropriate standards of services and behaviour from banks.²¹

These influences are discussed in section 4 of this report.

3.3.2 Rewrite of the Code

A substantial plain-English re-write of the Code was released in 2019. It introduced guiding principles to underpin the Code, along with the introduction of a range of new measures that lifted and clarified standards of good banking practice when dealing with individual and small business customers.

²⁰ Pg.2, Joint Consumer Organisations, *2021 Review of the Australian Banking Association Code of Practice*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

²¹ Pg.2, Legal Aid Queensland – *Independent Review Code of Banking Practice Submission by Legal Aid Queensland*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Legal-Aid-QLD.pdf>

The re-write of the Code was welcomed by most consumer organisations, although with the proviso that further changes were required. There is a difference of view, however, between the ABA and consumer bodies as to the extent of issues from the last independent review that were not incorporated in the 2019 Code.

The re-write of the Code into plain- English has raised the question as to the intended audience for the Code. A similar issue was raised in the 2017 review. In its response to the previous review, the ABA clearly signalled that the intended audience for the 2019 Code was the bank customer. It said 'It is important that our customers find the Code easy to read and navigate, and easy to understand their banking rights and responsibilities'²². It is questionable, however, whether the 2019 Code achieves this aim.

Moreover, there are multiple audiences for the Code, particularly if it is to serve as the 'rule-book' for achieving a customer-focus within the bank. Other uses of the Code are consumer advocates, lawyers, financial counsellors and ACFA. The Code's audience is covered in Section 6 of the report and discusses whether the one document is seeking to serve too many audiences.

3.3.3 COVID-19 pandemic

The COVID-19 pandemic is having a significant impact on the Australian economy and on bank customers. The pandemic temporarily closed or reduced hours for branches and many bank 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 during the pandemic.

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 was extended to 1 September 2021. The Special Note described how the effects of COVID-19 may impact banks' ability to fully comply with the timing requirements for notices and communications under the Code.

The BCCC compliance report for June-December 2020, notes that nine banks reported 4,651 incidents which may have been constituted as breaches of the Code, if not for the exemption provided by the Special Note²³.

Consumer bodies commended ABA member banks for the valuable support they provided to people facing financial hardship due to the COVID-19 pandemic. However, they express concern regarding the treatment of people who were already in financial hardship; as well as the treatment of some customers when the COVID-19 hardship arrangement came to an end. COVID-19 has brought into focus the effectiveness of the hardship provisions in the Code and is discussed in Section 22 of the report.

The pandemic has also intensified concerns over the accessibility of bank services, particularly with the closure of bank branches and the accelerating shift to digital banking. This has significantly impacted some vulnerable customers, including customers in remote areas, Aboriginal and Torres Strait Islander people and the elderly. These issues are discussed in various sections of the report, particularly: Section 13 dealing with the clauses

²² ABA, *ABA responds to Code of Banking Practice review*, published 28 March 2017 - <https://www.ausbanking.org.au/aba-responds-to-code-of-banking-practice-review/>

²³ Pg.4, BCCC, *BCCC Report: Bank's compliance with the Banking Code of Practice – July to December 2020*, published 27 August 2021 - <https://bankingcode.org.au/app/uploads/2021/08/BCCC-Report-Banks-compliance-with-the-Banking-Code-of-Practice-July-to-December-2020.pdf>

in the Code covering inclusive and accessible banking; Section 18 dealing with hardship assistance; and Section 11 which covers branch closures.

3.3.4 Approval of Code 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 Act²⁴. 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.
- 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'²⁵.

One consequence of the Code being approved by ASIC is that the process of making changes may take longer than was previously the case. Any amendments must now be formally approved by ASIC through a legislative instrument.

When making such changes, ASIC will consult closely with stakeholders and Code subscribers. This consultation can sometimes be a lengthy process, depending on the volume, complexity and novelty of the changes. As legislative instruments, ASIC approvals are subject to scrutiny by Parliament, which can potentially disallow the instrument.

Potential delays in amending the Code reinforce the need for the Code to be flexible and able to accommodate future developments. This is discussed in Section 8 that deals with the structure of the Code.

3.3.5 Establishment of BCCC

Along with the commencement of the 'new' Code in 2019, the previous Code Compliance Monitoring Committee (CCMC) was replaced with the BCCC. Compared with the CCMC, the BCCC has additional powers and an enhanced mandate.

The BCCC has increased the frequency of compliance reporting by banks, regularly engages with banks to encourage improved compliance, and has undertaken several investigations into aspects of the operation of the Code.

The joint submission by the consumer groups highlights that the monitoring role and powers of the BCCC are extremely important in ensuring the overall impact of the Code. As noted above, before approving a code, a key consideration by ASIC is whether there is an effective compliance mechanism.

²⁴ ASIC, 19-358MR ASIC approves an updated Banking Code of Practice, published 17 December 2019 - <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-358mr-asic-approves-an-updated-banking-code-of-practice/>

²⁵ RG 183.3, ASIC, RG 183 Approval of financial services sector codes of conduct, Issued 1 March 2013 - <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

A particular aspect of the overlap between the Code and the law is the duplication in reporting breaches under the Corporations Act or financial service laws to ASIC and reporting breaches of the Code to BCCC. Implications of this for the monitoring of the Code is covered in section 20.

3.3.6 Establishment of Australian Financial Complaints Authority

The Australian Financial Complaints Authority (ACFA) was established in November 2018 and replaced the bank funded Financial Ombudsman Service Limited. ACFA is a one-stop-shop external dispute resolution framework for dealing with complaints about financial institutions.

Banks, along with all Australian financial service licensees and credit licensees, are required under the Corporations Act to have internal dispute resolution procedures and be a member of AFCA, which is the external dispute resolution mechanism.

The bulk of the disputes customers have with their banks which are not satisfactory resolved through internal dispute resolution processes, are referred to AFCA. For the six months to December 2020, AFCA received 12,746 complaints against banks. This covers all banks, not just ABA members who are signatories to the Code.

AFCA is not a regulator, nor does it determine the legal or contractual rights of either party in a dispute. It seeks to determine what is fair in the circumstances and in doing so takes into account the law along with the Code and industry guidelines.

The weight AFCA gives to Code related industry guidelines influences the structure of the Code, and in particular the role of industry guidelines. This is discussed in Section 8 of the report.

3.4 Finding

Changes to the banking, regulatory, technological and economic environment have had significant implications for the Code. Many of these are elaborated in subsequent sections of the Code.

4. Impact of the Royal Commission

4.1 Issue

The review is to consider the effect of new legal obligations arising from implementation of the recommendations of the Royal Commission and other government reforms, including any changes to responsible lending obligations. The implications of possible changes to responsible lending obligations are considered in section 14.

As noted in the review's interim report, however, there is the broader issue of the impact of the Royal Commission on attitudes towards the Code, both by banks and consumers.

4.2 Stakeholder views

Many stakeholders welcomed the changes made to the Code in 2019, including those incorporated in response to the Royal Commission. They commended the banking sector for its commitment to assisting consumers in hardship, particularly given the experiences from the COVID-19 pandemic.

Some stakeholders proposed that the triennial review of the Code should be used to reaffirm the commitment of the banks to respond to the lessons from the Royal Commission. Consumer bodies noted that trust in the sincerity in the commitments by the banks and the ABA took a big hit when banks supported the proposed repeal of responsible lending obligations by the Government.

Stakeholders saw the review of the Code as an opportunity to advance continuing reforms in the banking sector. For example, the joint submission by consumer organisations stated:

*'Despite the lessons of the Financial Services Royal Commission, there still appears to be systemic and cultural problems within banks that are not being recognised as such.'*²⁶

The submission went on to state:

'We urge the Code Reviewer and the ABA to approach this review with the goal of identifying (and) addressing problems at their source, to improve the overall approach to Code compliance.'

Legal Aid Queensland observed:

*'Customers are more aware of their rights and the obligations of banks. The Banking Royal Commission has played a pivotal role in raising public awareness of what constitutes unacceptable and inappropriate standards of service and behaviour from banks. It is important as part of this review the Code is amended and updated to reflect emerging and changing community expectations and the implemented recommendations of the Banking Royal Commission.'*²⁷

²⁶ Pg.2, Joint Consumer Organisations, *2021 Review of the Australian Banking Association Code of Practice*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

²⁷ Pg. 2, Legal Aid Queensland – *Independent Review Code of Banking Practice Submission by Legal Aid Queensland*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Legal-Aid-QLD.pdf>

The ABA noted in its submission that:

*'This is the first comprehensive financial industry code in Australia's history to be approved by ASIC, and the ABA believes this review is an opportunity to strengthen and enhance the Code.'*²⁸

4.3 Discussion

The Royal Commission was a major development since the last review of the Code and had a significant impact on the community's trust in the banking sector and the reputation of banks.

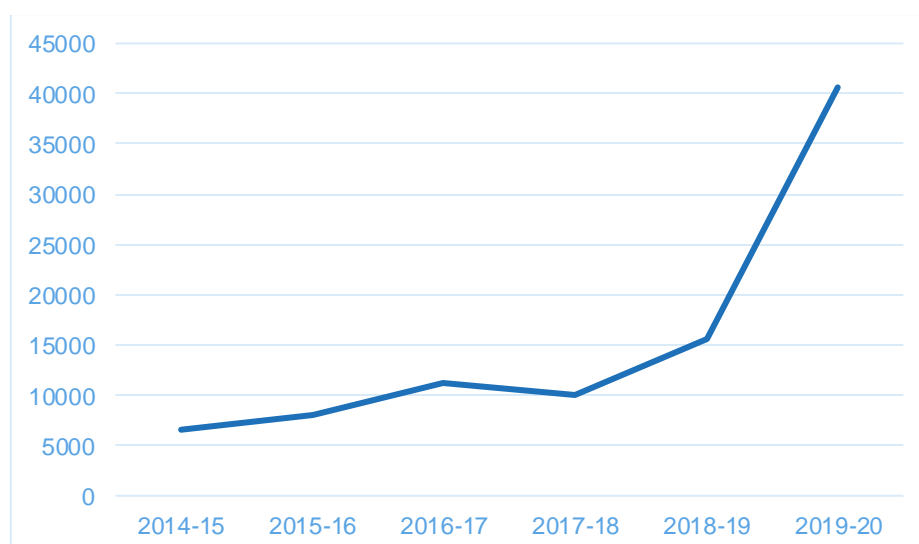
The review's Interim Report observed that against the background of the misconduct exposed by the Royal Commission, banks became more focused on meeting their obligations in the Code to restore how they were perceived in the community.

The preamble to 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.'

A significant development post Royal Commission was a substantial increase in reported breaches of the Code by the banks. Figure 1 outlines Code breaches from 2014-15 to 2019-20.

Figure1: Total number of Code breaches 2014-15 to 2019-20



Source: Banks compliance with the Banking Code of Practice. January-June 2020. BCCC April 2021

While care is required in comparing reported breaches over time because of an increase in the number of subscriber banks, 2019-20 represents a step change.²⁹ The substantial increase in reported breaches continued in the period July to December 2020. The BCCC's

²⁸ Pg. i, ABA, ABA Submission 2021 Banking Code Triennial Review, published 6 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/09/ABA-Submission-to-Triennial-Banking-Code-Review.pdf>

²⁹ Between 2014-15 to 2019-20 there were 13 subscribers to the 2013 Code. The 2019-20 data includes 19 bank subscribers of the 2019 Code. The six new subscribers account for 2 % of the breaches in 2019-20

compliance report for this period shows a 13% increase in breaches over the previous six months.³⁰

Among the reasons provided by banks to the BCCC for the significant increase in reported breaches in 2019-20, which has continued in the six months from July to December 2020, are:

- Better detection and identification of potential Code breaches as a result of an improved risk culture, employee training and awareness, and increased monitoring activity.
- The addition of new breach obligations in the Code and an increased focus on identifying breaches of the 'fair, reasonable and ethical behaviour' obligations.
- Increased focus on identifying more than one Code breach per incident.
- Greater diligence and additional resources to ensure breaches are identified, recorded and appropriately reported to BCCC.

If the significant increase in Code breaches reported by the banks in 2019-20 reflects better awareness and monitoring of compliance, the corollary is that it was previously deficient.

It appears the interim and final reports of the Royal Commission, along with the Australian Prudential Regulation Authority (APRA) Prudential Inquiry into the CBA and the NAB self-assessment, were influential in changing the attitude of banks toward the Code. In its response to the review's Interim Report, the ABA agreed that the Royal Commission had a substantial impact on the Code – both in customer outcomes but also in the cultural focus on the importance of the Code and on compliance across the banking sector.³¹

During the review's consultations many banks, but not all, agreed that the Royal Commission significantly contributed to improvements in their implementation and monitoring of Code obligations, as well as encouraging a greater focus on doing the 'right thing' by their customers. They frequently referred to the change from asking 'Can we?' to 'Should we?'

However, it is not evident whether the change in attitude towards monitoring compliance with the Code is uniform across all banks and will be sustained.

The BCCC has encouragingly observed that the increase in breach reporting is a positive development and suggests that Code compliance is:

'... more and more becoming a central part of bank's overall compliance and risk management systems, as well as becoming embedded in staff communication and training'³².

The BCCC points out that, along with the broader community, it will expect banks at some point to gain sufficient insight from their breach data to prevent compliance incidents from happening in the first place.

³⁰ BCCC, *BCCC Inquiry Report: Banks' compliance with the Banking Code's guarantee obligations*, published 11 August 2021 - <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

³¹ Pg.2, ABA, *ABA Submission to Interim Report of Code Review*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

³² BCCC, *BCCC Report: Bank's compliance with the Banking Code of Practice – January to June 2020*, published 20 April 2021 - <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

However, there is significant variation in the increase in breach reporting across banks. For example, from July to December 2020, ten banks reported increases in breaches, eight reported decreases and one major bank reported the same number of breaches as the last period. One major bank accounted for more than 45% of all breaches.

The BCCC has identified shortcomings in the consistency of breach reporting by banks, and care needs to be taken in making comparisons. It may be that not all banks have embraced the change in attitude toward Code compliance and monitoring as others. The consumer bodies were of the view that the discrepancies in the recent breach reporting data provided to the BCCC, demonstrates that not all its members are on the same page with Code compliance.

During the consultations, one bank representative noted that banks were going through a change in culture, which will take time and will need to be reinforced.

The joint submission by consumer organisations noted that it is more important for banks to rectify problems with bank cultures, processes and systems that do not prioritise customer outcomes, than improving consumer protections in the Code.

A priority for this review has been to identify measures that will help maintain the momentum of change in banks' attitude towards the Code initiated by the Royal Commission. This is a theme running through this report and its recommendations.

4.4 Finding

While it is important that the Code adequately reflects the standards of service and behaviours customers and the community expect from their banks, whether the words are put into action will depend on the banks' attitude towards the Code. The Code has been in existence for more than two decades, but it appears to have gained greater prominence with the banks in 2019-20, with increased awareness and monitoring of Code compliance. This improvement needs to be reinforced.

4.5 Recommendation

- 1. The ABA should use this triennial review to maintain the momentum coming from the Royal Commission in terms of improving Code awareness and compliance. The Code does not need a complete overhaul, but to maintain momentum there should be no preconceived view to keep change to a minimum. The objective of the Code and enforceability of commitments needs to be clear. Consumer benefits and protections need to be strengthened and clarified, and the commitment to compliance made more tangible.**

5. Importance of the Code

5.1 Issue

The review's Interim Report highlighted that banks should see the Code as central to promoting the customer focus that is important for their overall success, rather than as a regulatory obligation imposed on them.

5.2 Stakeholder views

There was little mention in the submissions as to the importance banks place on the Code. The ABA submission states:

*'The Code is a rule book for ABA member banks that sets out a set of rights for customers and a set of rules and standards for banks. The Code is a critical component of the broader regulatory landscape which also includes legislation, regulatory guidance, and other forms of self-regulation like industry guidelines.'*³³

In its response to the review's Interim Report, the ABA acknowledged that there is a range of ways to view the Code, from considering it as a set of specific obligations to be complied with, to viewing it as central to creating a customer- focussed and successful organisation. The ABA also acknowledged that there is likely to be a range of views among bank staff across this spectrum but noted that senior leaders across all banks see the Code as a critical part of putting the customer at the centre of banking³⁴.

Consumer representatives consider the Code is important in outlining how banks should deal with their customers. There were many calls for changes to the Code to strengthen consumer protections and extend them to customers in a wider variety of circumstances.

5.3 Discussion

The BCCC's report 'Building Organisational Capability', provides guidance as to how the banks can enhance organisational processes to improve compliance with the Code. The report emphasised that among the first steps for building organisational capability on how to improve compliance with the Code is for senior leadership in each of the banks having a clear communication and training strategy for staff centred around the importance of the Code.

The Interim Report outlined that as part of the consultations with bank representatives, they were asked to summarise how they would advise staff on the importance of the Code. The responses fell broadly within two camps.

1. One group focused largely on the importance their organisation placed on monitoring compliance with the Code and outlined the steps taken to strengthen compliance.

³³ Pg.1, ABA, *ABA Submission 2021 Banking Code Triennial Review*, published 6 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/09/ABA-Submission-to-Triennial-Banking-Code-Review.pdf>

³⁴ Pg.3, ABA, *ABA Submission to Interim Report of Code Review*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

2. The other group said the Code was important because it aligned with their ethos to be a successful customer centric organisation. This group highlighted that the Code outlines the level of customer service required for banks to be successful.

While all banks should comply with their obligations, the importance a bank places on the Code will likely influence their approach to complying with a voluntary set of commitments.

Banks are more likely to establish a culture of delivering on the commitments outlined in the Code if they see that this is in their commercial interests, rather than being a regulatory burden that restricts their activities. In such a situation, they are more likely to comply with the spirit of the Code and not just the letter of the Code.

However, as was evident during the consultation for the review, the focus can often be on compliance per se, without recognising why it is in the interest of the banks to deliver the level of services to their customers and the community in line with the commitments in the Code.

The incentive for a bank complying with the Code should not be to do the minimum necessary to avoid the penalties associated with non-compliance, but because it is in the long-term commercial interests of the bank. As one bank representative noted, there is a clear alignment between customer outcomes and shareholder value.

This should also be the incentive for the banks to look for opportunities to extend the benefits for customers in the Code, beyond what is in the legislation. Moreover, the point was made during the consultations, that the banks should see the level of customer service and benefits outlined in the Code as a minimum. Banks should be seeking to distinguish themselves by offering a level of service beyond the Code.

As noted in the BCCC report on building organisational capacity to support compliance, much will depend on the right messages coming from the senior leadership in the banks on the importance of the Code to the bank. The ABA acknowledges that while there is likely to be a spectrum of views among bank staff as to the importance of the Code, all bank leaders clearly see the Code as contributing to the customer focus necessary for a successful organisation.³⁵ The onus is on the bank leaders to ensure this message is delivered to all bank staff, particularly those dealing directly with customers. There appears to be a way to go with this task.

The message can be reinforced by removing perceptions that there is a distinction between taking a customer perspective on a topic and commercial considerations.

During the consultations, a Customer Advocate in one bank noted that an important part of the role was to ensure that the customer perspective was always present in the banks internal decision making. This would not only help promote compliance with the Code but would be sound commercial practice.

5.4 Finding

Clear messaging from bank leadership around the importance of the Code to the bank will help promote a culture of compliance.

³⁵ Pg.3, ABA, *ABA Submission to Interim Report of Code Review*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

Section 8 of the report notes that the role of the Code in supporting a customer- focused culture in a bank can be reinforced if the objective for the Code was clearly stated, one focused on achieving good outcomes for customers and doing the 'right thing' for customers.

5.5 Recommendation

- 2. Banks should view the Code as important in outlining the customer focus that is central to the overall long-term success of their organisation, rather than a regulatory burden. Senior leadership in the banks should send a clear message to staff as to the importance of the Code for the bank.**

6. The Code's audience

6.1 Issue

The structure and drafting of the Code will be influenced by the intended audience.

6.2 Stakeholder views

The ABA noted that the last triennial review sought to make the Code more consumer friendly through using more accessible language, although it acknowledged that consumer lawyers, advocates and bank staff are part of the Code's audience. The ABA said it is a continuing process of adjustment to get the balance right for these differing audiences.

The ABA stated in its response to the review's Interim Report that while most customers have limited awareness of the Code, and in many cases are unlikely to read it, banks consider customers (and their representatives) and bank staff as equal primary audiences for the Code³⁶.

The joint submission from consumer organisations said the primary audience for the Code should be Code signatories. Secondary audiences would be AFCA, BCCC, and ASIC, who help enforce the Code as necessary. The consumer bodies said the Code is going to be more valuable to customers where it provides substantive commitments, even if it results in a longer and more complex Code.

The consumer organisations noted that to help accessibility, the idea of developing an 'easy read' version of the Code to sit alongside the full version, raised in the review's interim report, is worth exploring.

6.3 Discussion

In drafting any document, it is important to be clear of the intended audience. In this instance, there are multiple audiences for the Code, all with different requirements.

The Khoury review concluded that the 2013 version of the Code was complex, excessively legalistic and the intended audience was not clear.

In 2019 the Code was re-written in plain English and the ABA clearly considered that consumers were the principal audience. The ABA response to the Khoury review 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 banks is supported by best practices in banking.....It is important our customers find the Code easy to read and navigate, and easy to understand their banking rights and responsibilities'*³⁷.

³⁶ Pg.5, ABA, *ABA Submission to Interim Report of Code Review*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

³⁷ ABA, *Code of Banking Practice Response by Australia's Banker's Association to the Review Final Recommendations*, published 28 March 2017 - <https://www.ausbanking.org.au/wp-content/uploads/2019/05/Banking-Industry-response-to-Khoury-Review.pdf>

Consumer awareness of the Code

While all stakeholders welcomed the plain English re-write of the Code, it appears that very few customers are aware of the Code unless it is brought to their attention, by a financial counsellor for instance, when a customer has a dispute with their bank.

In a consumer survey conducted by the ABA in May-June 2021 on attitudes to Australian banks, only 15% were aware of the 2019 Code of Banking Practice³⁸. This was despite the ABA running a significant advertising and media campaign following the introduction of the 2019 Code.

When consumers were advised the Code represented a rule book for the banks, 49% of consumers put the implementation of the revised Code in their top three changes being made by Australian banks. The others were, paying money back to people who were incorrectly charged, and banks having standardised basic accounts with no account fees.

In contrast, an informal poll conducted during the review's consultations with about 80 members of the Institute of Certified Bookkeepers showed significant awareness of the Code among bookkeepers.

In its submission, the ABA acknowledged that it would only expect customers to access the Code when they have a problem with their bank. It considered the more pertinent question in this situation is whether customers and their representatives find the Code easy to understand. The ABA says that feedback suggests this is generally the case.

While consumers should be aware of their rights when in a dispute with their bank, it appears they only become aware of the Code if someone tells them about it. Financial counsellors and consumer lawyers indicated that one of the main benefits they can provide in such circumstances is to advise customers of their rights under both legislation and the Code. In the absence of this intervention, customers may not be aware of their rights.

The submission from the consumer bodies notes that consumers seeking their help are largely unaware of the existence of the Code, let alone how bank conduct may be a breach of it. But the resources of consumer representatives are limited, and many customers may not be aware or able to access their services.

The effectiveness of the obligation on banks to promote the benefits of the Code is discussed in Section 14 of the report.

Is the Code easy to understand and navigate?

The consumer bodies agree that the plain English rewrite makes the 2019 Code easier to navigate and understand, even for lawyers, financial counsellors, and others with financial services experience. Banks also indicated their staff do not have legal training and found the 2019 Code easier to understand, particularly compared with legislation.

However, there were comments that the layout and numbering in the Code is not easy to navigate. Also, determining whether some provisions apply to small businesses as well as individuals was unclear.

In addition, notwithstanding the plain English rewrite, the financial counsellors consulted suggested that without assistance, most of their clients would have difficulty understanding much of the Code, particularly given the levels of financial literacy in the community. In

³⁸ Not published.

addition, there is the issue of the accessibility of the Code to customers where English is not their first language. This also applies to those with a disability. This is discussed in Section 12.

Dealing with multiple audiences for the Code

While the 2019 version of the Code was redrafted into plain English with the consumer in mind as the main audience, the Khoury review pointed out that the Code needed specific precision for banks to set policy and business rules, as well as design systems and train day-to-day decision makers.

The Code provisions also need to be drafted in such a way that they can be enforced. This may be either through the courts under contract law, as part of the new enforceable provision regime, or as a guide to ACFA in its role as the external dispute resolution mechanism. In addition, the provisions in the Code must have sufficient clarity so that compliance can be monitored by the BCCC.

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 to their customers, and industry guidelines.

A concern of the consumer bodies is that the banks do not treat the industry guidelines as part of the Code and enforceable. Many of the guidelines explicitly state that they are voluntary and not binding on ABA members. It is for this reason that consumer representatives recommend that much of the content in the industry guidelines should be incorporated in the Code, even though this will add to the length and complexity of the Code. There are also issues around awareness and the accessibility of all the industry guidelines, along with transparency over changes to the guidelines.

The role of the industry guidelines is covered in Section 10 of this report dealing with the enforceability regime and the use of the guidelines is also discussed in Section 12 covering the structure of the Code.

6.4 Finding

Against this background, the priority of the Code's audiences needs to be clarified, along with how this will influence the structure and drafting of the Code. This should be the first issue to resolve when the ABA members meet to amend the Code following this triennial review.

Although this should not diminish the aim for the Code to be drafted in plain English and be as easy to understand and navigate as possible. This should also include clear referencing to all material relevant to interpreting and implementing the Code, e.g., industry guidelines.

The position of the consumer representatives that the bank signatories are the main audience for the Code is logical.

It is a 'Banking Code of Practice' and consistent with its title, outlines a commitment by bank signatories to a certain code of behaviour. As the 'rule book' for the banks, the priority is for the rules to be clear such that they will be implemented by the banks in a consistent manner.

It is essential that the Code commitments are understood by bank staff. This should be the main priority of ABA members in drafting the Code, for if they are successful and the commitments are met, consumers will not need to be aware of the specific 'rules.' They will be benefitting from the level of service they represent.

However, things do go wrong, and consumers will have disputes with their banks. Consumers should be aware that they do have rights with respect to their dealings with their bank, even if they are not across the details of the Code. They should be able to ask what their rights are in a given situation, and get assistance if needed.

Consumer representatives and lawyers, along with AFCA, will need to have a good understanding of the specific bank commitments covered in the Code to assist customers if they have problems with their bank.

At present, the one document is seeking to meet the needs of too many audiences.

The detail necessary to assist banks implement their commitments and help consumers' representatives assist customers in pursuing the rights of consumers, should be in the Code or related documents, even if this adds detail and makes it less accessible and easy to understand for consumers.

It would be preferable to have a separate document which provided a consumer friendly and readily accessible overview highlighting to consumers that they have rights in their dealings with their banks, along with how they can access the detail of these rights (the Code), and who can assist them in pursuing their rights.

This document could be given to customers when they make a complaint to their bank.

6.5 Recommendations

3. **While the Code should be accessible to as broad an audience as possible, the primary audience should be the banks and bank staff. It is the rule book for the banks. It should be drafted with sufficient detail, either in the Code or related industry guidelines, to facilitate the implementation of the commitments by bank staff and allow consumer representatives help customers pursue their rights.**
4. **There should be a separate consumer friendly and readily accessible document that highlights consumers have rights in their dealings with banks, along with indicating that the detail of their rights is in the Code as well as advising who can assist them in a dispute with their banks. This should be a standard document across all ABA member banks. There should be a commitment in the Code that the document will be given to consumers when they make a complaint to their bank. 'Easy Read' versions of this document should be available. The Code would remain the document that contains the rights of consumers, the commitments made by banks, the reference for the BCCC in monitoring bank compliance with those commitments, and for AFCA when considering complaints.**

7. Enforceable code provisions regime

7.1 Issue

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

7.2 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 provisions.³⁹ A breach of an enforceable provision may attract civil penalties (including pecuniary penalties) and/or other administrative enforcement action from ASIC.

As outlined in the legislation, ASIC may identify a provision as an enforceable code provision if ASIC considers that:

- The provision represents a commitment to a person by a subscriber to the code relating to transactions or dealings performed for, on behalf or in relation to the person.
- A breach of the provision is likely to result in a significant and direct detriment to the person.
- Additional criteria prescribed by regulation.

ASIC has indicated that it intends to provide guidance on the question of enforceable provisions during FY 2021/2022.

The Explanatory Memorandum for the legislation says examples of provisions which could be designated as enforceable include⁴⁰:

- cooling off periods
- providing information to consumers
- fees and charges.

7.3 Stakeholder views

The ABA's view is that the application of the enforceable code regime should be confined to a small number of Code provisions. The reasons are:

- The provisions of the Code are enforceable in a number of ways and the case has not been made that they are inadequate.
- In recommending the enforceable provision regime, Commissioner Hayne did not seek to interfere with the self-regulating process in a substantial way.

³⁹ Section 1101A, *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* - <https://www.legislation.gov.au/Details/C2020A00135>

⁴⁰ Pg.26, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020, Corporation (Fees) Amendment (Hayne Royal Commission Response) Bill 2020 Explanatory Memorandum* - https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6630_ems_4c5698fa-a114-4687-9843-595e795a64cf/upload_pdf/JC000444.pdf;fileType=application%2Fpdf

- Designating many provisions as enforceable under the new regime would change the status of the Code from self-regulation to delegated legislation.
- ASIC would become the primary Code monitoring body, rendering the BCCC superfluous.

The joint submission from consumer groups expressed concern with the overall enforceable code regime. It said it is poorly designed and could make the status of the Code confusing to the public with part enforceable and part not, with enforceable provisions being prioritised for compliance and banks being disinclined to extend protections beyond the law.

While noting these concerns, the consumer group submission recommends that all Code clauses that make a commitment above the existing law, that offer material protection to customers and are reasonably specific, should be made enforceable. In addition, they propose any clause where there had been repeated non-compliance should be enforceable under the new regime.

The Law Council proposed that enforceable provisions should be process based (rather than behaviourally based), fit with existing law, and that any breach would cause significant detrimental harm to a customer, as well as improving the relationship between banks and their customers⁴¹.

The BCCC expressed concern that enforceable regime may lead to a reduction in focus on, and subsequent compliance with, non-enforceable provisions⁴².

7.4 Discussion

The review has not been asked to recommend the provisions to be designated as enforceable under the new regime, but to advise on the kind of provisions that the ABA and ASIC should consider.

The application of the enforceable code regime poses significant implications for the Code. These should be taken into account when considering provisions to be designated as enforceable under the new regime.

Perceptions of enforceable and non-enforceable provisions

Confusion that there are enforceable and non-enforceable provisions should be avoided. It is important that both consumers, and banks, perceive all commitments in the Code as enforceable. The new enforceable provision regime should support this perception and reinforce the overall operation of the Code, rather than undermining it.

However, this should not suggest that all or most provisions be designated as enforceable under the new regime. The concerns raised by the ABA are relevant. To include all or most provisions within the enforceable code regime would change the status of the Code from self-regulation to more like delegated legislation. As such, it would be a disincentive for subscribing banks to offer consumers protection and benefits that go beyond the existing law. As highlighted in Section 4, this is a key benefit of self-regulation.

⁴¹ Pg.20, Law Council of Australia, *2021 Independent Review of Banking Code of Practice*, published 16 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Law-Council-of-Australia.pdf>

⁴² Pg.28, BCCC, *Banking Code Compliance Committee submission: 2021 Independent Review of Banking Code of Practice*, published 20 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-BCCC.pdf>

It would be ironic if the introduction of the enforceable provision regime resulted in a disincentive for banks to go beyond the law. The Explanatory Memorandum for the legislation says that enforceable provision should not be those that re-state the law but should create new or extended obligations on what is already in the law.

Towards addressing some of these concerns, the ABA proposes the following considerations in selecting provisions to be designated as part of the new regime:

- Existing enforceability of the provision- for example, whether it is incorporated in the customers contract with their bank.
- Whether a breach of the provision is already subject to statutory enforcement.
- The extent to which the provision is subject to enforcement by another agency, other than ASIC.

The joint consumer submission agrees that if an obligation already ‘wholly’ exists at law, there is no need for a clause to be made an enforceable Code provision. But the consumer bodies say that if a provision goes partly beyond the existing law, it should be part of the enforceable provision’s regime.

This raises whether the extent to which the provision goes beyond the existing law is relevant in determining whether it should be designated as an enforceable provision. It also raises the prospect of different parts of a provision being subject to separate compliance and penalty regimes, with one part covered by the law, and the other by the enforceable code provision regime.

The consumer groups disagree with the ABA’s proposal that an enforceable provision should only cover obligations that come within the jurisdiction of ASIC. Such a requirement may preclude the provisions in the Code covering bank lending to small businesses from being designated as enforceable provisions since this is largely beyond the jurisdiction of ASIC. Yet it is the protections provided to small businesses that go beyond the existing law.

It is possible for ASIC to approve a code which has commitments that are outside the jurisdiction of ASIC. The Code is an example. It would be inconsistent to say that only the provisions in a code that come within ASIC’s jurisdiction can be designated as enforceable provisions. Moreover, there is often overlap between the jurisdiction of regulators and this is resolved through consultation and cooperation between them.

Clarifying the enforcement of all provisions

One reason Commissioner Hayne recommended the introduction of enforceable provisions was to overcome a concern that ‘the range and diversity of code obligations, and some developments in common law, may have contributed to uncertainty as to which provisions may be relied on’.⁴³

Commissioner Hayne said developments in common law may have contributed to uncertainty as to which provisions in a code can be relied upon. This was referring to the contractual status of provisions in the Banking Code.

Clause 2 of the Code states that the ‘written terms and conditions of all bank services and guarantees to which the Code applies will include a statement to the effect that the relevant

⁴³ Pg.311, Treasury, *Final Report – Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Volume 1*, published 1 February 2019 - <https://treasury.gov.au/sites/default/files/2019-03/fsr-volume1.pdf>

provisions of the Code apply to the banking service or guarantee'. The latest court decisions make it clear that the provisions of the Code can be incorporated into the contract between the bank and its customer⁴⁴.

In addition, consumers can refer disputes with their bank to AFCA and this is an opportunity for them to enforce their rights under the Code.

All the avenues available to enforce consumers rights under the Code should be considered in determining which provisions should be designated as enforceable under the new regime. This would avoid the perception that the introduction of the new regime means some provisions are enforceable and some are not.

The Code is currently oblique in references to the enforceability of Code provisions. The ABA Chief Executive Officer's covering letter to the Code says the standards of behaviour and service set out in the Code 'are enforceable rights for customers'. There is no explanation in the Code how they can be enforced.

Clause 2 refers to provisions being included in banks' terms and conditions of services but does not elaborate on what this means for the customer. Part 10 says customers can access dispute resolution processes and covers the role of the BCCC in monitoring bank compliance with the Code.

To overcome misconceptions that there are enforceable and non-enforceable provisions with the introduction of the new enforceable provision regime, the Code should have a specific reference as to how all the provisions in the Code can be enforced. This would highlight that there are reinforcing 'layers' of enforceability.

The layers would refer to the various ways that the commitments in the Code can be enforced, for example outlining that:

- The provisions in the Code form part of the banks contract with the customer and can be enforced under contract law.
- The obligations in the Code, along with the industry guidelines, will be taken into account when a customer refers a dispute with their bank to AFCA.
- A breach of some provisions in the Code may result in a penalty under law (either under the enforceable provision regime or legislation – such as the Corporations Act or Credit Act) and other enforcement action by the regulators.

Factors ABA should consider in identifying enforceable provisions

The Explanatory Memorandum for the legislation notes that as codes of conduct are a form of industry self-regulation, in the first instance it would be expected that the applicant (in this case the ABA) will identify and discuss with ASIC which provisions may be considered enforceable code provisions.⁴⁵ It points out that this is consistent with the sentiment Commissioner Hayne expressed in the Royal Commission.

⁴⁴ Commbar Matters, Brian Kennedy and Andrew Kirby, Court of Appeal confirms Banking Code obligation to exercise care skill and diligence, *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351, published 25 February 2016 - <https://commbarmatters.com.au/2016/02/25/court-of-appeal-confirms-banking-code-obligation-to-exercise-care-skill-and-diligence/>

⁴⁵ *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020, Corporation (Fees) Amendment (Hayne Royal Commission Response) Bill 2020 Explanatory Memorandum-* <https://www.legislation.gov.au/Details/C2020B00161/Explanatory%20Memorandum/Text>

As provided in the legislation, ASIC and the ABA will have to agree on each enforceable code provision.

Drawing on the previous discussion, it is proposed that the ABA should consider the following factors in identifying provisions to propose to ASIC:

- The extent to which a provision can be legally enforced.
- The extent to which a breach is likely to result in significant detriment to a consumer.
- Existing enforceability of provisions under contract law and legislation, such as Corporations Act and Credit Act.
- The extent to which designating the provision as enforceable will support the role, operation, and enforceability of the Code as self-regulation.

These considerations would likely lead to a limited number of provisions being designated as enforceable.

Stakeholder suggestions as to enforceable provisions

Stakeholders suggested several clauses, both existing and new, should be designated as enforceable provisions. They include:

- A new commitment that bank staff remuneration structures and performance assessments will not be solely or directly based on sales performance.
- A new commitment to use plain language in all terms and conditions.
- Clause 10 – the commitment to act fairly, honestly and ethically.
- Part 5 – covering the commitments ‘When you apply for a loan’.
- Part 6 – covering the commitments when ‘Lending to small business’.
- Part 7 – covering commitments when ‘Guaranteeing a loan’.
- Any clause where there has been substantial or repeated non-compliance.

Having regard to the factors previously outlined to consider when identifying enforceable provisions, it is debatable whether some of these suggestions would be appropriate candidates for the new regime. For example, the responsible lending obligations under Part 5 of the Code are already enforceable under the Credit Act.

Regarding the protections for guarantors under Part 7 of the Code, this may have been a suitable candidate when the protections were not covered in the law. However, many have since been introduced as legal requirements in the Credit Act. The BCCC did suggest that the guarantee obligations relating to disclosure and waiting periods for acceptance may be candidates to be designated as enforceable. However, singling out part of the provisions involving guarantees as being enforceable by law may bring into question in the minds of consumers the enforceability of other aspects of the Code dealing with guarantees.

In contrast, the provisions in the Code covering lending to small business are largely not covered by legislation, unlike those applying to individuals. Although the Australian

Consumer Law has been extended to protect small businesses from unfair contract terms in standard form financial products.

The provisions in the Code covering lending for small business may be suitable candidates to be designated as enforceable.

The consumer organisations have suggested that there should be an enforceable Code commitment that bank staff remuneration structures and performance assessments will not be solely or directly based on sales performance. This stems from the recommendations from the Retail Banking Remuneration Review which was commissioned by the ABA and undertaken by Stephen Sedgwick⁴⁶.

The Sedgwick Review was conducted over three years, with the ABA stating that the review's report in 2021 indicated that the industry's remuneration policies had changed in line with the review's earlier recommendation. The consumer organisations note that the Financial Services Union questions whether this assessment is accurate. It called on the Code review to seek further information from the Financial Service Union or bank staff directly to determine whether further action is required to fully implement the recommendations from the Sedgwick Review. This is beyond the scope, resources and timeline for this review.

If there are concerns over the findings in the final report of the Sedgwick Review, these should be investigated before adding an enforceable Code commitment regarding banks' remuneration arrangements. Such a commitment would not be directly related to a bank's dealings with its customers. The next review of bank remuneration practices will take place in 2023.

Commissioner Hayne suggested that Clause 10 should be designated as an enforceable provision. As outlined in Section 8 of the report, the commitment by banks to engage with their customers in a fair, reasonable, and efficient manner is a core commitment that underpins the Code. The BCCC considers Clause 10 to be one of the most important clauses in the Code. The consumer bodies also support designating Clause 10 as an enforceable provision.

It may be questionable whether Clause 10 can be enforced under contract law. The Law Council notes that a bank's relationship with its customer is generally that of debtor/creditor. Contract law does not require one party to consider the interest of the other party as each party is expected to look after their own interests⁴⁷.

Designating Clause 10 as enforceable under the enforceable code regime would contribute to the overall operation and enforceability of the Code given that it underpins all commitments.

However, a breach of a very similar provision in the Corporations Act (section 912A in the Corporations Act – efficient, honest, and fair)⁴⁸ 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 units.

⁴⁶ ABA, Stephen Sedgwick AO, *Retail Banking Remuneration Review Final Report*, published May 2021 - <https://www.ausbanking.org.au/wp-content/uploads/2021/06/Retail-Banking-Remuneration-Review-Final-Report-2021.pdf>

⁴⁷ Pg.7-8, Law Council of Australia, *2021 Independent Review of Banking Code of Practice*, published 16 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Law-Council-of-Australia.pdf>

⁴⁸ Section 912A, Australian Government, *Corporations Act 2001*, Registered 27 September 2021 - https://www.legislation.gov.au/Details/C2021C00380/Html/Volume_4#_Toc83391497

The ABA noted in their submission to the review that the enforcement of provisions of broad and general application, such as Clause 10, can present challenges greater than what can be expected of provisions that are precise. For this reason, they contend that Clause 10 is not a good candidate for designated as an enforceable provision.

However, a very similar provision to Clause 10 is already enforceable by ASIC and banks have to report significant breaches of this provision to ASIC. Commissioner Hayne said this clause underpinned the principles for the conduct of financial firms and the concepts are ‘well-established, widely accepted, and easily understood’.

The review’s Interim Report noted 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. The Interim Report noted feedback from stakeholders that if Clause 10 is one of the most important clauses, it is currently not signalled as being such. In its response to the Interim Report, the ABA stated that Australian banks are committed to conducting business with their customers consistent with obligations under the Code (fairly, reasonably, and ethically) and licensing conditions under the Corporations Act and Credit Act (efficiently, honestly and fairly). The ABA agreed that Clause 10 should be a prominently placed within the Code.

The relevant consideration is not whether there may be difficulty enforcing Clause 10 or the similarly worded section 912A in the Corporations Act, but whether it may be confusing to have two different penalty regimes for very similar provisions.

The consumer organisations argue that there may be situations where there could be a breach of a requirement to act in a ‘fair, reasonable and ethical’ manner which would not be a breach of an undertaking to be ‘efficient, honest and fair.’

Circumstances where a bank’s actions would meet the ‘fair, reasonable and honest’ test, but not the ‘efficient, honest and fair’ test, or vice versa, would likely be unique, if not rare. Providing for such circumstances would not seem to justify having two penalty regimes for a very similar provision. While the Code should be seeking to provide customers with benefits that go beyond the law, any additional protections customers gain under Clause 10 of the Code compared with section 912A of the Corporations Act are likely to be very limited.

The preferred approach would be to align the commitment to be ‘fair’ under the Corporations Act and the Code. The statement of ‘underlying principles’ at the beginning of the Code could continue to refer to fair, reasonable and ethical behaviour by the banks. But Clause 10 could be changed to a commitment to engage with customers in an ‘efficient, honest and fair’ manner. In addition, it should be stated in the Code that this commitment is enforceable under the Corporations Act.

If Clause 10 is not aligned with section 912A of the Corporations Act, and the conduct to meet these requirements is assessed separately, then Clause 10 would be an appropriate candidate to be designated as an enforceable provision.

An obligation to have the framework in place to support compliance

The BCCC recommended a commitment should be introduced in the Code for banks to have appropriate infrastructure in place to support an integrated approach to compliance with

the Code.⁴⁹ This is based on the view that effective employee communication strategies, learning and development programs, systems, processes, and technology all play a role ensuring Code compliance and good customer outcomes.

The BCCC suggests such a commitment could be an enforceable provision.

A commitment that banks have the structures and processes to ensure compliance with the Code would support all the commitments in the Code along with all aspects of how banks deal with their customers.

Rather than conveying a perception that there are enforceable and non-enforceable provisions, an enforceable commitment to have the infrastructure in place to support compliance would reinforce the enforceability of all provisions. The BCCC has found that the failure of banks to build strong compliance structures has led to numerous systemic and serious breaches of the Code, which resulted in significant detriment to all customers.

The ABA says Clause 8 is a general commitment that banks will comply with the obligations in the Code which implies that banks will put systems in place for compliance.

The consumer bodies have noted that some Code clauses set out commitments that customers have difficulty alleging breaches based on their experience, such as the commitments in Clause 9 and 37 involving staff training. They suggest such commitments should be enforceable.

The Financial Services Institute of Australasia observes that given the nature of breaches of the Code which have taken place, 'the emphasis on systems, controls, education and monitoring by the banks is self-evidently not sufficient'⁵⁰.

Rather than just saying banks will honour their commitments in the Code, as in Clause 8, the commitment should be extended to an enforceable commitment to have the appropriate systems, controls, training and monitoring in place to ensure they honour their undertakings in the Code.

The ABA points out, if there was such a condition, it should be clear that a single breach of the Code would not represent a breach of such a provision. Rather, a breach should involve circumstances where there are serious inadequacies in compliance systems. The ABA suggest that a way to address this might be to require 'reasonable steps' be taken to have a compliance system in place.

Such a provision requiring banks to have compliance systems in place could be strengthened further if banks also commit to a rolling, periodic review program of the appropriateness and effectiveness of their compliance systems and processes. This should include education and training programs. The rolling review program could involve an audit of the appropriateness of separate aspects of the compliance framework each year – for example, a forward multi-year program where the effectiveness of the bank's framework for compliance with each part of the Code is audited. This could be performed by banks'

⁴⁹ Pg.2, BCCC, *Banking Code Compliance Committee submission: 2021 Independent Review of Banking Code of Practice*, published 20 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-BCCC.pdf>

⁵⁰ Pg.4, FINSIA, *FINSIA Submission to the Independent Banking Code Review*, published 7 August 2021 <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-FINSIA.pdf>

internal and external audit systems, similar to the APRA requirement that banks regularly review the effectiveness of their risk management frameworks⁵¹.

This requirement would extend and formalise the approach taken by the BCCC in its inquiry into banks' compliance with the Code's guarantee obligations.⁵² As part of that inquiry the BCCC required four banks to conduct a performance audit to assess their operational compliance with the Code's guarantee obligations. Three banks used their internal audit teams while one bank used an external auditor.

In addition, ASIC Regulatory Guide 271, which covers internal dispute resolution, says firms should conduct regular compliance audits to identify and address issues of non-conformity with the regulatory guide and internal requirements⁵³.

The detailed results of these audits should be provided to the BCCC. In addition, it would be appropriate that each bank include a summary of these audit reports on its compliance framework in its published annual report.

7.5 Finding

The kind of provisions to be designated under the enforceable code regime should strengthen the overall operation of the Code and avoid confusion or create the wrong incentives.

Perceptions that there are enforceable and non-enforceable provisions must be avoided. As should incentives or perceptions that banks will prioritise compliance with designated enforceable provisions. The Code needs to explain that there are 'layers' of enforceability of all provisions. The layers should be reinforcing and not duplicative. The extent to which provisions are already enforceable needs to be considered.

The Code should remain self-regulation. Designating many provisions as enforceable will result in the Code increasingly adopting the status of delegated legislation, with ASIC becoming the main body responsible for monitoring compliance. It would also reduce the incentive for banks to set standards that go above the law.

7.6 Recommendations

5. **The factors to be considered in the process of identifying provisions to be designated under the enforceable code regime should include:**
 - **The extent to which a provision can be legally enforceable.**
 - **The extent to which a breach is likely to result in significant detriment to a consumer.**
 - **Existing enforceability of provisions under contract law and legislation, such as the Corporations Act and Credit Act.**

⁵¹ Paragraph 27-31, Australian Government, *Superannuation (prudential standard) determination No.3 of 2019 Prudential Standard SPS 220 Risk Management Superannuation Industry (Supervision) Act 1993*, published 4 December 2019 - <https://www.legislation.gov.au/Details/F2019L01578>

⁵² Pg.5, BCCC, *BCCC Inquiry Report: Banks' compliance with the Banking Code's guarantee obligations*, published 11 August 2021 - <https://bankingcode.org.au/resources/bccc-inquiry-report-banks-compliance-with-the-banking-codes-guarantee-obligations/>

⁵³ RG 271.189, ASIC, *RG 271 Internal Dispute Resolution*, Issued 2 September 2021 - <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-271-internal-dispute-resolution/>

- The extent to which designating the provision as enforceable will support the role, operation, and enforceability of the Code as self-regulation.

In balancing these factors, provisions which are already enforceable under contract or existing law should not be designated under the enforceable code provision regime.

6. The designation of enforceable provisions should support the overall enforceability of the Code. It should not create confusion that there are enforceable and non-enforceable provisions. To avoid such confusion, the Code should specifically refer to how all the provisions can be enforced. The 'layers' of enforceability include contract law, Code obligations being considered by the Australian Financial Complaints Authority (AFCA) in resolving customer disputes, and the breaches of some provision resulting in a penalty under legislation.
7. The wording of Clause 10 should be aligned with the similarly worded obligation banks must meet under section 912A of the Corporation Act. If it is aligned, the Code should state that the obligation on banks to act efficiently, honestly, and fairly is enforceable under the Corporations Act. If Clause 10 is not aligned with Section 912A, then Clause 10 would be suitable for designation as an enforceable code provision.
8. A new commitment should be added in the Code for banks to take all reasonable steps to have in place the appropriate systems, processes, and programs to support an integrated approach to compliance. Banks should commit to a program of periodically reviewing the effectiveness of their compliance framework through their internal and external audit arrangements and to reporting the detail of the outcomes of these audits to the BCCC. A summary of the audits should be included in each banks published annual reports. This commitment would be suitable for designation as enforceable under the enforceable code provision regime.

8. Structure of the Code

8.1 Issue

To assess whether the structure of the Code is effective.

8.2 Stakeholder views

The joint submission from the consumer organisations noted the plain English re-draft of the Code was an improvement but recommended that making substantial commitments to improve customer outcomes is most important, even if it means adding complexity and lengthens the Code.

Consumer organisations said that where industry guidelines are used to expand Code commitments, the guidelines should be enforceable, or the most important parts of the guidelines incorporated in the Code.

The ABA said there is a difference of opinion among its members as to whether the Code would be improved through more detailed guidance to interpreting provisions. It also supported continuing with a system whereby the Code and industry guidelines are separate.

8.3 Discussion

The Code structure proposed by 2017 review

The Khoury Review suggested the Code be restructured. Key aspects of the restructuring included the following⁵⁴:

a) Principles driven

The Code should build up from principles and every provision should flow from the objective or outcomes that are sought.

b) Accessible language

The Code should be written in a way that makes it as accessible as possible.

c) Avoid duplication

The Code should avoid duplicating legislation, however, to meet the goal of clarity, some explanatory text and signposting to legislation can be appropriate so that the Code provisions can be understood in the context of the applicable legislation.

d) Implementation detail in industry guidelines

Detail of how obligations will be met should, to the extent practicable, be set out in supporting guidelines rather than the Code.

⁵⁴ CRKhoury, Phil Khoury, *Independent Review, Code of Banking Practice*, published 31 January 2017 - <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>

e) Room for flexibility in implementation

The Code should allow banks to choose how they achieve (or exceed) the good industry practice set out in the Code.

f) Cost awareness

The Code should not mandate measures that carry substantial costs for the banking system, unless the measures are likely to achieve well-defined and targeted benefits.

g) Target obligations

To the extent practical and appropriate, new protections should be targeted to areas where there is evidence of current problems, rather than trying to apply to all theoretically possible scenarios.

h) Maintain customer choice

The Code should not limit customer choice

i) Encourage innovation and continuous improvement

The Code should encourage banks to innovate and develop services and processes that encourage innovation.

Consistency of Code structure with 2017 proposals

The Code structure proposed by the Khoury Review is sound. The re-write of the 2019 Code involved an emphasis on plain English, and some of the proposals from the 2017 review were incorporated in the structure of the Code. The Code commitments are preceded by a preamble and statement of guiding principles, although they are outside the Code. Many industry guidelines have been produced, but their relationship with the Code is vague. The ABA says they are voluntary, non-binding and separate to the Code. In many respects the Code has parted from the structure proposed in the 2017 review.

Outcome based drafting

The Code ranges from more broadly drafted clauses to very prescriptive provisions that outline the procedural steps for banks to follow in their dealings with customers. An example of prescriptive provisions is Part 7 that deals with guaranteeing a loan while an example of a more broadly drafted provision is Clause 10, which is a commitment for banks to engage with customers in a fair, reasonable and ethical manner.

The thrust of the comments from consumer organisations is that the Code should include more prescriptive commitments by the banks. Moreover, they proposed that unless the ABA industry guidelines are stated as being enforceable, key elements in the guidelines should be in the Code.

A substantial amount of the extra material the consumer organisations want included in the Code is in the ABA guidelines. In addition, the consumer bodies are advocating for extra detail about aspects of banks' relationships with their customers. This detail is largely procedural.

If the Code is amended in line with the recommendations from consumer bodies, it would be longer, more complex, and more prescriptive.

The consumer representatives noted that prescriptive provisions are easier to monitor for compliance and customers, along with their advocates, can more effectively pursue a complaint with their bank if they can point to a specific action the bank failed to undertake.

The alternative to a prescriptive approach to drafting the Code is often described as a more principle-based approach. This was the expression used in the review's Interim Report. Based on consultations, however, it appears that what constitutes a more principled-based approach is often mis-understood, including that it is either a case of one or the other – prescriptive or principled-based drafting.

Furthermore, there appears to be a concern, shared by some banks, that principled based drafting involves vague statements that are open to subjective interpretation that will result in inconsistency between banks in terms of self-monitoring compliance.

Rather than referring to principle-based drafting, it would be preferable to refer to a more 'outcome' based approach to drafting the Code. The Khoury Review proposed that the Code should be structured such that it builds up from principles where every provision should flow from the objective or outcome sought.

The focus should always be on whether the actions taken by the banks are contributing to achieving the outcomes sought by their customers. These outcomes or objectives need to be clearly expressed in the Code, not just the procedural steps that banks should follow.

Among the reasons cited in support of a more outcome-based (principled-based) approach to the Code is that it provides for greater flexibility, particularly in dealing with regulatory and technological developments.

Perhaps more importantly, a prescriptive approach can never anticipate every circumstance and an over-reliance on compliance to rigidly prescribed rules can result in poor outcomes for consumers. As the Financial Services Institute of Australasia's submission noted: 'Very frequently the cause of customer harm and dissatisfaction is the application of rigid policies when the application of professional judgement is needed'.⁵⁵ The review heard examples from financial councillors of banks taking a very rigid interpretation of bank policies resulting in poor outcomes for consumers.

An outcome-based approach to drafting the Code, where the purpose or objective of the provision is stated, does not mean that specific measures to achieve those outcomes should not be in the Code. But it would give meaning to those procedural steps, and if the outcomes sought for customers were clearly identified, it would help ensure that the focus is not just compliance with the processes. Furthermore, as proposed by the Khoury Review, implementation details can be in industry guidelines. But as discussed further below, to adopt such an approach those guidelines must be considered as Code-related documents, and not separate to the Code.

Prescriptive clauses that outline specific steps that banks have to follow, are easier to comply with and monitor. The BCCC notes in its compliance reports that there can be a wide variance between banks in terms of the quality and consistency of data they provide in their breach reporting⁵⁶. In response, the ABA engaged consultants to analyse the current state of breach reporting to identify a more consistent approach across banks. In the course of this

⁵⁵ Pg.1, FINSIA, *FINSIA Submission to the Independent Banking Code Review*, published 7 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-FINSIA.pdf>

⁵⁶ Pg.5, BCCC, *BCCC Report: Bank's compliance with the Banking Code of Practice – January to June 2020*, published 20 April 2021 <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

analysis, some banks stated that some clauses were too broad, requiring subjectivity which is a source of inconsistency in breach reporting. Among the examples given were Clause 10 ('fair reasonable and ethical manner' and Clause 8 ('Providing you with clear information').

To improve consistency, one option raised by some banks is that they should no longer report on compliance with what they consider are broadly drafted provisions that require subjectivity. Instead, the suggestion is that banks should focus on reporting compliance with prescriptive or transactional clauses as this would drive more consistent reporting across banks. This would be a significant retrograde step.

The focus of the Code should be on achieving outcomes – good outcomes – for customers, rather than just bank procedural steps.

Assessing whether the bank is achieving the outcomes that customers and the community expect from the banks will require an element of judgement by the banks. But in making that judgement, it is important that the Code clearly outlines the objective – the customer outcome – being sought. The banks will then have to assess whether their actions are consistent with achieving that outcome.

As outlined in Section 7, the BCCC has identified Clause 10 as among the most important provisions in the Code, because it goes to the culture of the way banks should behave with customers.⁵⁷ But the ABA states in its submission that there are challenges in enforcing such a broad commitment in any single instance and there will be inconsistency in interpretation across the industry.

Every bank should have a view whether it is treating its customers fairly, reasonably and ethically. A bank cannot say that what constitutes fair and reasonable behaviour is too imprecise, such that it cannot make an assessment as to whether its interactions with its customers are consistent with this standard. Others may have a different interpretation as to whether a customer has been treated fairly. And 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 referred to AFCA.

Clause 10 is not too vague, too broad, and open to subjective interpretation such that it cannot be monitored. The important consideration is whether each bank is comfortable with its interpretation as to whether its treatment of customers meets the standard set by Clause 10 and can defend its position if challenged.

Similarly, the requirement in Clause 15 for banks to give customers clear information is not too vague to be effectively monitored. It would be if that was the extent of the commitment. But the objective of Clause 15 is for banks to provide customers information about their products and services such that the customer can make an informed decision as to which product or service is suitable for them. To make an informed decision, the information has to be both relevant to, and understood by, the customer.

The Code should start with a clear statement as to what is the objective of the Code. It is suggested that it could be along the following lines:

'The Code sets out the commitments by ABA member banks to deliver the high standard of banking service expected by customers and the Australian community'.

⁵⁷ Pg.3, BCCC, Guidance note No.2: Clause 10– fair, reasonable and ethical behaviour, published 26 November 2019 - <https://bankingcode.org.au/resources/guidance-note-no-2-clause-10-fair-reasonable-and-ethical-behavior/>

Such a statement should be in Part 1 'How the Code works'. In addition, the Code should be structured such that the outcomes being sought for customers from each part of the Code are stated at the start of that part, with the provisions flowing from and consistent with achieving that outcome.

Role of industry guidelines

The 2017 review proposed that the implementation details of Code commitments could, where practicable, be covered in industry guidelines.

The ABA has issued many guidelines, protocols and guiding principles, along with a statement of commitment, which are relevant to the Code. These include:

- Industry Guideline: Preventing and responding to financial abuse.
- Industry Guideline: Sale of Unsecured Debt.
- Industry Guideline: Banks' financial difficulty programs.
- Industry Guideline: Responding to requests from a power of attorney or court-appointed administrator.
- Industry Guideline: Preventing and responding to family violence and domestic violence.
- Industry Protocol: Branch closures.
- Guiding Principles: Debt management firms.
- Guiding Principle: Accessible Authentication.
- Guiding Principles: Customer Advocate.
- Guiding Principles: Lenders Mortgage Insurance.
- Accessibility Principles for Banking Services.
- Statement: ABA Indigenous Statement of Commitment.

The guidelines state that they complement the Code and reflect good industry practice in implementing Code commitments. Some of the guidelines state that they contain consumer protections in addition to those in the Code. The ABA says it encourages members to use the guidelines. But many of the guidelines state that they are voluntary and non-binding.

Only a few of the guidelines are referenced in the Code – the ABA Industry Protocol on Branch Closure and the ABA Guiding Principles on Customer Advocates. There is only an express commitment in the Code to comply with one ABA Industry Guideline, the ABA Branch Closure Protocol. There are, in addition, commitments to comply with the ASIC/ACCC Debt collection guidelines for collectors and creditors, and the Code of Operation managed by Services Australia.

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

The ABA sees the guidelines as separate to the Code. However, the ABA often responds to suggestions as to whether the Code should be expanded in a particular way, by saying the issue is already, or will be, covered in an industry guideline. For example, in response to questions proposed by the review as to whether the Code should provide more guidance as

to when banks decide to assist a customer facing financial hardship, the ABA replied that this will be included in the ABA's revised industry guideline on financial difficulty.

If the structure of the Code is going to focus on objective based provisions, with implementation details covered in guidelines, then the guidelines cannot be considered as separate or outside the Code. Nor can they be considered voluntary.

Among the reasons the ABA supports separating industry guidelines from the Code include:

- Less onerous approval process for guidelines.
- They cover detail and operational advice that should not be in the Code.
- They allow 'stretch' targets which may take some banks longer to comply with than others.

Both the consumer groups and ABA consider the industry guidelines are not enforceable. Clause 2 of the Code says that the Code forms part of the terms and conditions of banks products and services. As such, the Code can be enforced through contract law.

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

AFCA does not determine the legal or contractual rights of either party to a complaint. 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 to⁵⁸:

- legal principles
- applicable industry codes or guides
- good industry practice
- previous relevant determinations by AFCA or predecessors.

Consequently, irrespective of whether the ABA considers industry guidelines to be separate to the Code, or that the guidelines are only voluntary and not binding, they are taken into account when a customer's complaint is referred to AFCA. And while the ABA considers guidelines to be 'stretch targets' because not all banks will have the same capacity to meet them, AFCA says it may come to the view that banks should exceed the standards outlined in an industry code or guideline.

ASIC Regulatory Guidance 183, which covers ASIC's 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.⁵⁹ 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's requirements for code approval.

In the ABA's response to the review's Interim Report, the ABA agrees that the existence of the industry guidelines should be referenced in the Code, and that there should be a

⁵⁸ AFCA, *AFCA Operational Guidelines*, published 5 October 2021 - <https://www.afca.org.au/about-afca/rules-and-guidelines/afcas-operational-guidelines>

⁵⁹ RG 183.132, ASIC, *RG 183 Approval of financial services sector codes of conduct*, Issued 1 March 2013 - <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

statement that sets out the nature and purpose of the guidelines generally.⁶⁰ While acknowledging that the guidelines can be considered by AFCA or any other tribunal, the ABA claims that a divergence from the guidelines does not ordinarily, of itself, give rise to a breach of the Code.

For the Code to operate along the structure proposed in the 2017 review, the industry guidelines cannot be considered to be voluntary and separate to the Code. The guidelines are, and should be presented, as Code related material. They should not, as is currently the case for some of the guidelines, contain statements that they are ‘voluntary and non-binding’. This diminishes the status of the guidelines and gives the wrong impression as to their role.

As noted, the Code and the ABA guidelines are considered by AFCA in determining what is fair in the circumstances of a complaint with a bank. AFCA does not determine whether there has been a breach of the Code. But banks should take into account the guidelines in determining whether they are meeting their commitments under the Code, as should the BCCC. If a bank is not following industry best practice for meeting Code commitments as outlined in the guideline, it will need to demonstrate that it is following a comparable approach in meeting its Code commitments. Moreover, any ABA member bank should be concerned if it is not operating at industry best practice. Its aim should be to lift its procedures accordingly.

The industry guidelines applicable to specific clauses should be referenced in the Code and include a hyperlink in the online versions.

Avoiding duplication with the law

ASIC’s Regulatory Guide 183 says that ‘While a code must do more than restate the law (and indeed should offer consumers benefits that exist beyond the protection afforded by law), it must not be inconsistent with the Corporations Act or other relevant Commonwealth law for which ASIC is responsible.’⁶¹

As noted in the review’s interim report, an issue raised during consultations was the growing overlap between consumer protections in the law and provisions in the Code and the implications this has for the Code and monitoring compliance with the Code.

While there is sizeable overlap between the Code and the law, the Code does provide significant benefits to customers beyond that covered in the law.

A particular aspect of the growing overlap between the Code and the law was the concern by the banks of duplication in reporting breaches under the Corporations Act or financial services laws and reporting breaches to the BCCC. This concern has been heightened with the introduction from 1 October 2021 of ASIC’s enhanced breach reporting regime. This issue is discussed in Section 20 of the review’s report.

Towards rationalising breach reporting by the banks, the ABA suggested in its submission that provisions in the Code, that simply refer to legislation or committing to comply with 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

⁶⁰ Pg.6, ABA, *ABA Submission to Interim Report of Code Review*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

⁶¹ RG 183.30, ASIC, *RG 183 Approval of financial services sector codes of conduct*, Issued 1 March 2013 - <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

other bodies. The ABA's proposed approach would see the following clauses removed from the Code:

- Clause 11 – 'we will meet our general duties under law to protect confidentiality'.
- Clause 51 – 'If you are an individual customer, that is not a business, we will do this [exercise the care and skill of a diligent and prudent banker] by complying with the law'.
- Clause 180 – 'we will comply with the ACCC's and ASIC's Debt Collection Guideline: for Collectors and Creditors'.
- Clause 181 – 'we will comply with the Code of Operation: Recovery of Debts from Department of Human Services Income Support Payments or Department of Veterans' Affairs Payments'.

The structure for the Code proposed in the 2017 review said that while the Code should avoid duplicating legislation, for the sake of clarity some explanation of the legislation can be appropriate so that the Code provisions can be understood in the context of the applicable legislation.

If the Code is the 'rule book' that sets out a consumer's rights in terms of their dealings with banks, consumers (and the banks) will be interested in knowing what all their relevant rights are, both those covered by legislation along with the undertakings in the Code.

In keeping with the structure proposed in the 2017 review, the references in the Code which simply refer to other legislation or regulations, should be expanded to provide some clarity as to what they mean for customers. An example is discussed in Section 14 of the report, where it suggests that instead of clause 50 simply saying that banks will comply with the law, it should set out the principle (or objective) of the protection in the legislation. Specifically, it should outline that lenders are required to make reasonable inquiries as to the purpose of the loan and the borrower's capacity to repay the loan without substantial hardship.

In addition, rather than limiting references to legislation in the Code, the banks should always be alert to identifying areas where they can extend the protections consumers receive under the law.

In its response to the review's Interim Report, the ABA noted that the Code could include reference to other legislation where appropriate and necessary to inform customers of their rights under the law, but it should be in such a way as to avoid creating parallel regimes within the Code.⁶² This is preferable than removing references to other relevant legislation in the Code. Issues around the complexity and burden on banks responding to multiple monitoring arrangements should be addressed through rationalising and streamlining the banks' reporting obligation to the BCCC. This is discussed in Section 20.

⁶² Pg.6, ABA, *ABA Submission to Interim Report of Code Review*, published 5 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/ABA-submission-Interim-Report-of-Code-Review.pdf>

Targeting obligations

The 2017 review proposed that new protections in the Code should be to areas where there is evidence of current problems, rather than applying to possible scenarios. This is a sound approach and should be applied in considering amendments to the Code following the triennial review.

There is a related issue regarding the detail around the bank- customer relationship that should be included in the Code as commitments. For example, there are proposals for this review that the banks should include a commitment in the Code that they will advise customers how interest rates are calculated and how statements sent electronically can be printed.

Consistent with the Code targeting areas where there are current problems, it should target key aspects of the relationship between banks and their customers where customers are likely to be exposed to loss or distress.

8.4 Finding

The 2017 review proposed a sound basis for the structure of the Code, in particular, with provisions flowing from the objective or outcomes sought and the detail as to how obligations should be set out, to the extent practicable, in supporting guidelines rather than the Code.

The 2019 Code has been partly structured along the approach proposed in 2017. Some of the proposals raised in submissions in this review, and views expressed by the banks, would see the structure of the Code further depart from that proposed in the 2017 review. It would be appropriate if the Code was brought more in line with the structure outlined in the last review. In particular, the outcome or objective being sought from provisions should be expressed in the Code and it needs to be clarified that industry guidelines are Code related documents and not outside the Code.

8.5 Recommendations

9. **The Code should begin with a clear statement of the Code's overall objective. Then each part of the Code should start with the outcome sought for customers from that part, and the provisions flow from and are consistent with achieving that outcome.**
10. **The industry guidelines should be considered as Code related documents and not as outside the Code and voluntary. Banks should take into account industry guidelines in assessing whether they are complying with Code commitments. If they are not following the best practice outlined in the guidelines, banks will have to demonstrate they are following comparable processes in meeting the commitments. There should be greater transparency in the Code over the role of industry guidelines. They should be specifically referenced in the Code.**
11. **References in the Code which simply refer to complying with the law, legislation or a regulation should be expanded to provide some clarity as to what they mean for consumers in their relationship with their bank. Issues around the complexity and burden on banks responding to multiple monitoring arrangements should be**

addressed through rationalising and streamlining banks' reporting obligation to the BCCC.

- 12. The Code should target areas where there are current problems for customers and key aspects of the relationship with their bank where they are exposed to loss or distress.**

PART B - REVIEW OF CODE PROVISIONS

9. Implications for the Code from recent reforms to laws and regulations

9.1 Issue

To assess the extent to which the Code remains appropriate having regard to recent reforms to laws and regulations covering banking services to individual and small business.

The reforms stakeholders raised were:

- Proposed changes to responsible lending obligations.
- Mandatory credit reporting.
- Consumer data right and open banking.
- Point of sale reform.
- Design and distribution obligation.
- Buy now, pay later products.

More generally, stakeholders noted that there are a range of technological and related developments that have implications for the Code.

The implications of the proposed changes to the responsible lending obligations are covered in Section 14 of the report which deals with Part 5 of the Code – ‘When you apply for a loan’. The other developments are discussed in this section.

9.2 Mandatory Credit Reporting

The National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021 was passed on 5 February 2021.⁶³ 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.

9.2.1 Stakeholder views

Consumer organisations expressed concern that hardship arrangements recorded on credit reports might deter borrowers from seeking hardship assistance. In addition, people might be concerned if Financial Hardship Information that is recorded will reduce their options for obtaining credit.

The BCCC also notes concerns have been raised about the potential for Mandatory Credit Reporting to discourage people accessing financial assistance.

The Australian Retail Credit Association does not consider it necessary or appropriate for the Code to cover how banks will operationalise the Mandatory Credit Reporting regime. The Office of the Australian Information Commissioner is currently consulting on required

⁶³ Australian Government, *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021*, Assented 16 February 2021 - <https://www.legislation.gov.au/Details/C2021A00005>

changes to the Credit Reporting Code which will establish rules for when Financial Hardship Information must be reported, and what the credit provider must disclose to a customer.

The ABA also notes that the changes to the Credit Reporting Code for the Mandatory Credit Reporting regime are not yet finalised. Although it points out that the Credit Reporting Code is a technical document aimed at industry participants. But it does recognise it might be useful for the Code to be updated so that customers have an easy reference point for understanding their rights.

In its response to the review's Interim Report, the ABA referred to research by the RBA that found 77% of people in the community thought banks had a responsibility to educate consumers about Comprehensive Credit Reporting and 70% of people wanted banks to tell them how to avoid adverse credit information.

9.2.2 Discussion

The Credit Reporting Code administered by the Australian Retail Credit Association is the vehicle for operationalising the Mandatory Credit Reporting regime. It provides protections for consumers.⁶⁴

The review of the Credit Reporting Code in response to the introduction of Mandatory Credit Reporting is underway and is expected to be completed before changes to the Code are made following the triennial review. The finalisation of the Credit Reporting Code will determine whether changes may need to be made to the Code.

Informing consumers about the implications of Mandatory Credit Reporting

The Australian Retail Credit Association emphasise that there should be consistency in the application of the Mandatory Credit Reporting regime across all credit providers – both bank and non-bank.

People do, however, appear to be concerned about how the credit reporting and hardship information will be used. This may discourage them from seeking hardship assistance when needed. Moreover, as the ABA noted, the Credit Reporting Code is a very technical document and not designed for informing consumers.

WEstjustice recommended that the Code should require banks to advise customers of all the ways in which their repayment history and hardship arrangements are reported in their credit report.

It would be appropriate for the Code to include provisions for banks to explain to customers the implications of the Mandatory Credit Reporting regime, including when they accept or refuse hardship arrangements. Clause 178 (-c-) should be amended accordingly. The banks are currently supporting a campaign managed by the Australian Retail Credit Association to provide consumers education around the Mandatory Credit Reporting regime.

The consumer bodies proposed that banks should commit not to use Financial Hardship Information as the sole reason to make adverse credit decisions. This would be very difficult to monitor and enforce.

⁶⁴ OAIC, *Privacy (Credit Reporting) Code 2014 (Version 2.1)*, registered 14 February 2020 - <https://www.oaic.gov.au/privacy/privacy-registers/privacy-codes-register/cr-code>

Credit reporting in cases of domestic and family violence

The consumer organisations called for banks to commit to not recording Repayment History Information or Financial Hardship Information where a default is related to family violence or financial abuse, when this is within the law.

The ABA Industry Guideline Preventing and responding to family and domestic violence,⁶⁵ states that banks ‘should not enter negative credit information if a customer is affected by family and domestic violence, so far as the bank is able to avoid doing so under the law’.

As noted in Section 8, the industry guidelines should not be considered to be outside the Code, but as ‘Code-related’ documents that provide detail on the implementation of Code commitments. The references in the guideline regarding not reporting negative credit information if a customer is affected by family and domestic violence, if able to do so under the law, should be considered as part of implementing the commitments under the Code.

The Australian Retail Credit Association has indicated that it is looking at developing an industry-wide approach to reporting default information in cases of domestic violence.

Clarifying clause 179 of the Code

Clause 179 of the Code says banks will tell a customer if they report any payment default under a loan to a credit reporting body. The Australian Retail Credit Reporting Association says it is unclear if this requires banks to provide another notification to customers in addition to the notification regime in the Credit Reporting Code, and whether notification is required for every payment that is more than 14 days overdue and for every month thereafter if the account remains overdue.

The ABA should clarify Clause 179.

9.2.3 Finding

The completion of the review of the Credit Reporting Code will determine if any changes are required to the Code. However, consumers need to be informed about the implications of the introduction of Mandatory Credit Reporting, including when they accept or reject hardship arrangements.

9.2.4 Recommendations

- 13. The ABA should assess the extent to which the Code may need to be changed in response to the introduction of the Mandatory Credit Reporting regime after completion of the Credit Reporting Code. This should include amending Clause 178(c) to make it clear that banks will tell customers what the impact on their credit report will be when they accept or refuse a hardship or collections arrangement. The ABA should clarify Clause 179.**
- 14. It should be made clear that the references in the ABA guidelines that banks should not enter negative credit information if a customer is affected by family and domestic violence, so far as the bank is able to avoid doing so under the law, are part of the Code.**

⁶⁵ Pg.11, ABA, *Industry Guideline, Preventing and responding to family and domestic violence*, published 1 April 2021 - <https://www.ausbanking.org.au/wp-content/uploads/2021/05/ABA-Family-Domestic-Violence-Industry-Guideline.pdf>

9.3 Open Banking/Consumer Data Right

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).⁶⁶ The Consumer Data Right (CDR) aims to give consumers greater access to and control over their data. It will improve consumers' ability to compare and switch between products and services. Businesses that have been accredited by ACCC can provide services under the CDR and must comply with privacy safeguards to protect consumer privacy.

9.3.1 Stakeholder views

The combined consumer organisation submission said there were holes in the CDR regime which meant that it did not mandate the confidentiality of, and informed consent to share, consumer data as top priorities.

The consumer bodies called on banks to commit that when they seek the consent of a consumer to use, record or disclose their personal information, the consent is voluntary, expressed, informed, specific, time limited, unbundled and easily withdrawn. They also call on banks to commit not to make consent a precondition to obtain a banking service, to ensure the customer understands how their data will be used, and to rely on positive affirmation.

The consumer bodies said banks should include prominent and easy to identify pathways for joint account holders experiencing economic abuse or family violence to alert them of the protections in the CDR. In addition, the consumer organisations said the banks should provide a CDR-based tool for customers, that lists all direct debits and recurring payments.

Legal Aid Queensland said the Code needs to include references to Open Banking.⁶⁷

The ABA notes there are explicit protections for customers in the CDR legislation through the Privacy Safeguards. The draft Rules 3.0 include explicit rules for joint accounts, which allow banks to hide those accounts. The ABA says the while the rules for open banking are still evolving, for the benefits of consumer understanding, the Code could include a reference to the customer's right to request removal of a joint account from CDR.

The Australian Payments Network says the implications on the Code from Open Banking are yet to fully emerge, and it would be premature to amend the Code.

9.3.2 Discussion

The rules for open banking are still evolving and the Consumer Data Right does contain explicit protection for consumers. They may also be impacted by the outcome of the Government's current review of the Privacy Act 1988.⁶⁸ Understandably, consumer organisations are concerned whether the protections are sufficient to ensure that customers' personal information will be protected, particularly for those experiencing economic abuse or family violence.

The Consumer Data Right rules include explicit provisions to allow data holders to refuse to disclose data if they consider it necessary to prevent physical or financial harm. In its

⁶⁶ ACCC, *Consumer data right (CDR)* - <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0>

⁶⁷ Pg.3, Legal Aid Queensland – *Independent Review Code of Banking Practice Submission by Legal Aid Queensland*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Legal-Aid-QLD.pdf>

⁶⁸ Australian Government, *Review of the Privacy Act 1988*, published 30 October 2020 - <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>

submission, the ABA signalled that it may be useful to reference a customer's right to request removal of a joint account from the Consumer Data Right in Chapter 35 of the Code (covering joint accounts). However, the joint consumer submission notes that without proactive efforts by banks to inform customers of this right, vulnerable people will remain unaware of it.

This issue is related to Section 13 of the report which discusses how banks should support customers experiencing vulnerability, including those experiencing domestic violence and financial abuse. Recommendations in Section 13 include the need for banks to be increasingly proactive in identifying vulnerable customers, including having public-facing family violence policies, and easy to understand guides on how they can help.

In addition, if a customer tells a bank about their personal circumstances, and the customer agrees, the bank should record this information so as to minimise the customer having to repeat it. This will also ensure that the bank is alert as to how it can help the customer – including refusing to disclose data under the Consumer Data Right.

It would be appropriate for Chapter 35 to not only reference a customer's right to request removal of a joint account from the Consumer Data Right, but that banks will be proactive in identifying vulnerable customers and alert them of this right.

The consumer bodies also suggest that banks should provide further guarantees around how customer consent to use their data will be sought. For example, it should not be a pre-condition for accessing a bank's product or service.

The Consumer Data Right does have rigorous consent requirements. It is not evident at this stage what extra requirements are needed in determining what constitutes consent. However, there is an issue being covered in the Government's review of the Privacy Act 1988.⁶⁹

9.3.3 Finding

The rules for open banking are still evolving, although they do have specific protections. The concern over how the rules will apply to vulnerable customers, particularly to joint accounts in situations of family violence and financial abuse. Chapter 35 of the Code should reflect this concern.

9.3.4 Recommendation

- 15. Chapter 35 of the Code should reference that a customer has the right to remove a joint account from the Consumer Data Right and banks will be proactive in identifying vulnerable customers and alerting them to this right.**

9.4 Point of Sale Exemptions

The point-of-sale exemption in the National Consumer Credit Act 2009 allows car dealerships and retailers to provide consumers with loans and credit without having a credit licence. The Royal Commission recommended abolition of the point-of-sale exemption.

⁶⁹ Australian Government, *Privacy Act Review Discussion Paper*, published October 2021 - https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper/user_uploads/privacy-act-review--discussion-paper.pdf

9.4.1 Stakeholder views

The joint consumer submission noted that point of sale lending constitutes a significant portion of irresponsible lending seen by consumer representatives. The Government endorsed the Royal Commission recommendation but is yet to remove the exemption. The consumer bodies called on the ABA to include a commitment in the Code not to rely on the point-of-sale exemption to help motivate the Government to remove the exemption.

9.4.2 Discussion

It appears that subscriber banks do not rely on the point-of-sale exemption, hence a commitment that they will not rely on the exemption would be largely symbolic. New protections should be targeted to areas where there is evidence of current problems.

9.4.3 Finding

A commitment in the Code for banks not to rely on the point-of-sale exemption would not appear to have a direct bearing on the bank- customer relationship. If none of the ABA banks rely on the exemption, which appears to be the case, then adding a commitment in the Code would largely be symbolic and the Code would not be targeting areas where there are current problems.

9.5 Design and Distribution Obligations

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 introduced targeted and principle-based design and distribution obligations in relation to financial products to ensure products are targeted at the right people.⁷⁰ The obligations came into effect on 5 October 2021.

Under the Design and Distribution Obligations, products should be consistent with the likely objectives, financial situation and needs of the target market. Issuers and distributors need to take reasonable steps to ensure the distribution of products is consistent with the relevant target market determination, which must be published.

9.5.1 Stakeholder views

The consumer bodies indicated that the target market determination is likely to be complex and not designed for consumers. They propose that banks commit in the Code to publish a plain English version. They also propose banks provide redress to customers who are sold a product where they are not in the target market.

The consumer bodies also call on banks not to market products direct to children through school programs or other means. And not to include children in target market determination for any product that charges monthly fees or fees for own-bank ATM transactions, default fees, EFTPOS transactions or BPAY transactions.

The ABA does not support replicating the Design and Distribution Obligations regime in the Code, as it is not clear what customer benefit would arise from this potential overlap or duplication.

⁷⁰ Australian Government, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*, Assented 5 April 2019 - <https://www.legislation.gov.au/Details/C2019A00050>

9.5.2 Discussion

The Design and Distribution Obligation regime is in response to limitations of consumer protection in financial services based on the disclosure of information to consumers. The obligations are placed on issuers and distributors to design and distribute products that are likely to be consistent with the objectives, financial situation and needs of consumers in a target market.

The target market determination is not designed or intended to be a financial disclosure document for consumers. It is detailed and outlines the steps and governance arrangements required by issuers and distributors to meet their obligations under the regime.

ASIC Regulatory Guide 274 states that an entity is not taken to have breached their obligations merely because a consumer who is not in the target market for a financial product, received the product.⁷¹ To be liable, the bank would have to breach the various requirements under the Design and Distribution Obligations, such as not having a Target Market Determination.

ASIC states that where a consumer suffered loss or damage as a result of an entity's breach of the Design and Distribution Obligations, it expects the entity to remediate the consumer. However, the consumer organisations note that it may be difficult for a consumer to obtain the evidence to prove deficient compliance by the bank. If there is no compensation provided, a complaint can be taken to AFCA, who will consider what is a fair outcome in the circumstances. This would appear to be the more appropriate course of action, as opposed to introducing a Code commitment that the bank is always liable for any loss to a consumer from the sale of a product if the consumer is not in the target market, even when the bank has not breached the Design and Distribution Obligations.

As regards to the marketing of financial products to children, it would appear to be inappropriate to prohibit all school banking programs, for this can be important to develop financial literacy. However, it would not be appropriate for banks to market products with significant fees. However, it is not evident that this is a current problem that needs to be covered in the Code.

ASIC Regulatory Guide 274 says that it is expected that banks would remediate customers suffering a loss as a result of a bank breaching the Design and Distribution Obligations. However, the application of section 994M of the Corporations Act would provide that if a customer suffered loss or damage because a bank contravened key Design and Distribution Obligations, the customer may recover the amount of loss or damage by action against the bank.⁷²

9.5.3 Finding

The Design and Distribution Obligations are designed to overcome limitations with consumer protection based on the provision of information to consumers. The target market determinations are not designed for consumers, and there appears little additional benefit to consumers for the determinations to be reproduced in plain English.

In order to clarify what are the rights of consumers, it would be appropriate for the Code to include the statement that if a customer suffers loss or damage because a bank contravened

⁷¹ RG 274.245, ASIC, *RG 274 Product design and distribution obligations*, Issued 11 December 2020 - <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rq-274-product-design-and-distribution-obligations/>

⁷² Corporations Act 2001 section 994B, http://www8.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s994b.html

the Design and Distribution Obligations, the customer may recover the loss or damage from the bank.

9.5.4 Recommendation

16. **In order to clarify the rights of customers, the Code should include the statement that if a customer suffers loss or damage because a bank contravened the Design and Distribution Obligations, the customer may recover the loss or damage from the bank.**

9.6 Buy Now Pay Later

The Buy Now Pay Later (BNPL) sector is growing rapidly. BNPL products allow consumers to purchase goods and services by paying part of their purchase price at the time of the transaction and the remainder to the BNPL provider in a series of instalments.

The range of BNPL services is growing, including the issue of virtual cards through mobile apps.

The emergence of BNPL is an example of how the consumer payment landscape is rapidly changing, facilitated by technological developments and innovation.

The growth of BNPL has raised several regulatory issues. There is debate whether BNPL services should be covered by the National Consumer Credit Protection Act. There are also issues over merchant fees for offering BNPL services and whether they should be passed on to consumers. The Australian Finance Industry Association (AFIA) has introduced a voluntary Buy Now Pay Later Code of Practice for BNPL providers.

9.6.1 Stakeholder views

The joint consumer submission notes that some ABA members are offering BNPL services and/or establishing partnerships with BNPL providers. They propose that the Code include a commitment that BNPL products issued by banks be treated as if they were covered by the National Consumer Credit Protection Act. They also propose that banks commit only to partner with BNPL providers that are members of ACFA and agree to meet ASIC guidance on dispute resolution.

Legal Aid Queensland supports BNPL being covered in the Code.

The ABA says relatively few BNPL products are offered by ABA members and regulators are closely monitoring the sector. It suggests reconsidering the issue at the next Code review when the regulatory and business landscape may have changed, but they are open to considering a demonstrated need for an addition to the Code.

The Australian Payments Network notes that with respect to BNPL there is further scope for the regulatory landscape to change, such as the introduction of an electronic money licence, which would provide clarity around requirements, consumer protections and access rights. It proposes that the Code articulate principles rather than address specific technology and regulation, and it would be premature to amend the Code specifically for BNPL developments.

9.6.2 Discussion

The BNPL sector has expanded rapidly. The value of BNPL transactions has grown strongly through the COVID-19 pandemic as the shift to electronic payment methods and online shopping accelerated. ABA members banks are increasingly becoming involved in the BNPL market.

The Commonwealth Bank of Australia launched a BNPL product in August 2021 and this has resulted in speculation this could 'herald a new wave of highly credentialled retail banks starting to compete across the buy now, pay later sector'.⁷³ The Commonwealth Bank has said that it will conduct credit checks to ensure its BNPL product is suitable for consumers.

Eligibility for the Commonwealth Bank BNPL product – StepPay – is limited to: existing customers; those who receive an invitation; those who have an existing Commonwealth Bank everyday account; customers who have regular products going into their account, such as salary or regular transfers; and customers with no default or late payment history. These steps would help ensure that the product is suitable for the customer.

Suncorp Bank announced a BNPL product will be available to its customers from November 2021.⁷⁴ Suncorp has entered the BNPL in partnership with Visa.

The BNPL provider, Afterpay, has a partnership with Westpac, which has been described as allowing Westpac the opportunity to 'piggy-back onto Afterpay's innovation, while the BNPL service will be able to take advantage of Westpac's infrastructure'.⁷⁵

ANZ has announced a deal with Visa, where instalment repayment options are offered to existing credit card holders already approved under responsible lending laws.⁷⁶

The BNPL sector is likely to continue to rapidly grow and innovate. Also, the increasing involvement of banks in the BNPL that has taken place over the past few years, is likely to continue. This may well result in changes to the way the sector is regulated.

In terms of dispute resolution, the Australian Finance Industry Association's Buy Now Pay Later Code of Practice for BNPL provides that complaint resolution procedures will comply with the same ASIC standards and requirements of Australian Financial Service Licensees.⁷⁷

The ABA is right to point out that the consumer credit and payments industry has undergone significant growth and change in recent years. This has thrown up issues that involve payment providers in addition to banks and the response to these issues may be more appropriately covered in ASIC's ePayments Code or the Australian Payments Network industry standards.

However, given the pace of developments, and the likely growing involvement by banks, it may not be appropriate to wait until the next Code review to see if the regulatory landscape has responded and whether any change to the Code is required.

⁷³ AFR, Tom Richardson, *CBA to fire up competition in buy now, pay later*, published 12 July 2021 - <https://www.afr.com/markets/equity-markets/cba-to-fire-up-competition-in-buy-now-pay-later-20210712-p588ve>

⁷⁴ Sydney Morning Herald, Clancy Yeates, *Suncorp sees 'big shift' in how younger shoppers access credit*, published 6 September 2021 - <https://www.smh.com.au/business/banking-and-finance/suncorp-joins-the-rush-into-buy-now-pay-later-20210906-p58p40.html>

⁷⁵ OIYO, Angelica Silva, *Buy Now Pay Later Giant, Afterpay, Announces Partnership with Westpac*, published 26 March 2021 - <https://www.ooyo.com.au/news-room/afterpay-partnership-westpac/>

⁷⁶ Banking Day, Ian Rogers, *ANZ on BNPL quest*, published 8 October 2021 - <https://www.bankingday.com/article/anz-on-bnpl-quest#:~:text=ANZ%20has%20reached%20a%20deal%20with%20Visa%2C%20to.either%20initiated%20buy%20now%2C%20pay%20later%20credit%20offers.>

⁷⁷ AFIA, *Media Release: AFIA's Buy Now Pay Later Code of Practice Comes Into Effect*, published 1 March 2021 - <https://afia.asn.au/post/175/Media-Release-AFIA-s-Buy-Now-Pay-Later-Code-of-Practice-Comes-Into-Effect>

9.6.3 Finding

The BNPL sector is likely to continue to grow rapidly, along with increasing involvement by ABA banks. It would be appropriate for ABA banks to signal in the Code that their involvement in the BNPL sector will be consistent with the principles that underpin the Code, such as responsible lending and dispute resolution. The eligibility requirements along the lines of that for the Commonwealth Bank's StepPay will help ensure that BNPL products are suitable for the customer.

9.6.4 Recommendations

- 17. The Code should include a commitment that BNPL products issued by banks will be subject to credit checks and eligibility requirements to ensure the products are suitable for consumers.**
- 18. The Code should include a commitment that banks commit only to partner with BNPL providers that are members of ACFA and agree to meet ASIC guidance on dispute resolution.**

9.7 Developments in Technology

Technological changes have resulted in some references in the Code becoming obsolete. As outlined in the discussion of BNPL, there is a challenge for the Code to keep pace with developments.

9.7.1 Stakeholder views

The Australian Payments Network emphasised that a principles-based, technology neutral approach to the Code should be adopted, rather than 'point in time' methods and mechanisms which can be superseded. It identified some areas where the wording in the Code needs to be updated.

9.7.2 Discussion

Some of the wording in the Code has been overtaken, or is likely to be overtaken, by developments – particularly as a result of technological developments. This may well increase. Some of the clauses where changes may be required are outlined below:

- a. Clause 28(b): The reference to 'special clearance' for processing cheques in Clause 28(b) is now obsolete under rules for cheque clearing between members of AusPayNet's Australian Paper Clearing System framework.
- b. Chapter 30: The outcome of ASIC's ePayments Code review may have implications for the Code, such as the references in Chapter 30 regarding the safeguarding of devices.
- c. Chapter 34: New methods for regular payments, such as the New Payments Platform's planned 'PayTo' service, may have an impact on Chapter 34, including the terminology used.

- d. Chapter 44B (e) (Basic Accounts): Regulatory developments by the Reserve Bank may have an impact on references in this chapter, particularly the requirement that banks offer consumers with basic accounts ‘a choice of a debit card (such as EFTPOS) or a scheme debit card.... such as Visa Debit or Mastercard Debit’.
- e. Definition of ‘device’: ‘Device’ is defined as ‘a device given by us to you...’. Increasingly, payments are being transacted through devices not supplied by a bank, such as mobile wallets and mobile phones. ASIC ‘s review of the ePayments Code includes reviewing the definition of ‘device’.
- f. Acronym ‘BSB’: Referring to BSB as an acronym is no longer accurate. It is a digital address identifying the financial institution’s branch or office.

9.7.3 Finding

The Code needs to be updated to reflect developments, particularly changes in technology. Where possible, the Code should be technology neutral. When changes are made to the Code, the opportunity should be taken to ensure that the terminology is consistent with developments.

9.7.4 Recommendations

- 19. **References in Clause 28(b) to ‘special clearance ‘processes for cheques is obsolete and Clause 28(b) should be removed.**
- 20. **The definition of ‘devices’ should be aligned with the definition in ASIC’s ePayments Code.**
- 21. **The acronym ‘BSB’ be moved from the ‘Acronym’ section to the ‘Definition” section and be defined as ‘a digital address that identifies a financial institution and its particular administration centre, processing centre, branch or office’.**
- 22. **Where possible, the Code should be technology neutral. When changes are made to the Code, the opportunity should be taken to ensure the terminology in the Code is up to date.**

9.8 ePayments Code

The ePayments Code applies to consumer electronic payment transactions, including ATMs, EFTPOS and credit card transactions, online payments, internet and mobile banking and BPAY. ASIC administers the ePayments Code, including compliance.

The ePayments Code is voluntary. Most banks, credit unions and building societies subscribe to the ePayments Code.

9.8.1 Stakeholder views

The consumer bodies proposed the Code include a commitment that subscriber banks will also subscribe to the ePayments Code.

9.8.2 Discussion

The ePayments Code provides consumer protection for electronic payment facilities. Given the increasing use of electronic facilities, it would be appropriate for the Code to reference the consumer protections in the ePayments Code, and for ABA banks to commit to subscribing to the ePayments Code.

9.8.3 Finding

ABA banks should subscribe to the ePayments code.

9.8.4 Recommendation

23. **ABA banks should commit to subscribing to the ePayments Code and complying with the consumer protections in the ePayments Code.**

10. Part 1 of the Code: ‘How the Code works’

10.1 Issue

To assess the extent to which Part 1 provides an appropriate introduction to the Code and how it works. The review has also been asked to assess the effectiveness of the banks’ commitment to make customers aware of the existence and benefits of the Code.

10.2 Code provisions

Part 1 consists of the following chapters:

- Chapter 1. Definition table.
- Chapter 2. The Code forms part of the terms and conditions for all banking services. The Code is to be promoted and made available to customers, including through hard copies and electronically.

10.3 Stakeholder views

The BCCC suggests that the introductory sections of the Code should include content that highlights that the ABA, AFCA, the BCCC, and other relevant bodies may publish additional guidance to explain the application of, or approach to some of the obligations in the Code.

Stakeholders generally acknowledged that customers are only aware of the Code if it is brought to their attention by a third party when they have a dispute with their bank.

The joint submission from the consumer organisations proposed that where industry guidelines are used to expand on Code commitments, the guidelines should be made enforceable in interpreting those provisions of the Code. And that the most important commitments in guidelines should be put in the Code.

10.4 Discussion

How the Code works in delivering its objectives

Part 1 is perfunctory in outlining how the Code works. It could be significantly more informative. It would benefit from the inclusion of a succinct statement of the Code’s objective. Currently there are two cover pages. In one, under the heading ‘Our role in society’, it states that the Code is one-way Australian banks seek to fulfill their responsibilities. In the other, under the heading ‘What is the banking Code?’, it states that the Code sets out the standards of practice and service in the Australian banking industry. These cover pages are outside the Code.

These statements are a description of what the Code is, not what it is seeking to achieve. Part 1 should outline the overall objective of the Code along the lines that it sets out the commitment by ABA member banks to deliver the high standard of banking services expected by customers and the Australian community. It should be made very clear that the aim of the Code is to achieve good outcomes for customers, or as often expressed, doing the ‘right thing’ by the customer.

By way of background, the UK's Financial Conduct Authority is proposing introducing a 'duty of care' requirement for financial firms.⁷⁸ An existing Consumer Principle for financial firms in the UK is to 'pay due regard to the interest of its customers and treat them fairly'. The Financial Conduct Authority has issued a consultation paper proposing two options to set a higher 'duty of care' standard:

- Option 1: 'A firm must act to deliver good outcomes for retail clients'
- Option 2: 'A firm must act in the best interests of retail clients'

The outline of how the Code works would also be improved if Part 1 included a statement that the commitments in the Code can be enforced. And in keeping with the discussion in Section 7, outline the ways they can be enforced. The reference to the Code forming part of the terms and conditions of the contract for banking services is important, but the current reference in the Code may be somewhat oblique in emphasising the enforceability of commitments. Commissioner Haynes stated in the Royal Commission that consumers needed greater certainty as to the enforceability of code provisions.⁷⁹

Part 1 should also refer to the relationship between the Code and industry guidelines, along the lines canvassed in Section 8 of the report.

Promoting the Code

Banks have an obligation in Chapter 2 to promote the Code and ensure it is available and accessible to customers.

Chapter 16 states that banks will raise awareness of affordable banking products and services such as basic, low or no fee accounts. The effectiveness of this obligation is discussed in Section 13.

As noted in Section 6 of this report, it appears very few customers are aware of the Code unless it is brought to their attention by a third party, such as a financial counsellor or consumer lawyer when they have a dispute with their bank.

While banks have a commitment to make hard copies of the Code available through their branches, it is unlikely that consumers would request a copy of the Code. Moreover, the number of branches is declining

Banks also have a commitment to make copies of the Code available electronically. A review of bank websites indicates a mixed performance in terms of accessibility. Some have a link to the Code on their home page, but with no further explanation or information.

For some other banks, the Code can be found under a tab on their home page, although for some it is not obvious that the tab will lead to the Code. In a few cases, the Code can only be found on the bank's website by specifically searching for it.

The most effective bank websites for promoting the Code are those that have it clearly evident on their home page, along with links to other pages that are relevant to the

⁷⁸ FCA, CP21/13: *A new Consumer Duty*, published on 14 May 2021 - <https://www.fca.org.uk/publications/consultation-papers/cp21-13-new-consumer-duty>

⁷⁹ Chapter 6, Treasury, *Final Report – Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Volume 1*, published 1 February 2019 - <https://treasury.gov.au/sites/default/files/2019-03/fsrc-volume1.pdf>

commitments in the Code, such as financial hardship, domestic violence, making a complaint etc.

It is not surprising that consumers are not seeking out the Code unless they have a reason to do so. A 35-page document may be a bit overwhelming for many consumers. The title 'Banking Code of Practice' may not be self-evident as to its content and relevance to the consumer. Moreover, as noted in Section 6, notwithstanding the plain English re-write in 2019, it may still not be particularly consumer friendly, especially given the level of financial literacy in the community.

Consumers should be aware that they have rights under the Code, even if they do not need to know the detail of their rights until they have a problem with their bank.

For this reason, in addition to the Code, there may be a need for a simple, consumer friendly document that advises consumers that they have rights in their dealings with their banks. It should advise how they can access their rights under the Code, where they can get assistance if they have a problem with their bank, and how they can make a complaint. Such a document could be proactively promoted with customers. This should include not only a link on a bank's website, but also through the bank's interaction with their customers, such as through their inter-net banking service, in their bank statements, when opening an account, and when taking a loan.

ASIC Regulatory Guide 271 says firms should provide details as to how a complainant can access AFCA in a range of disclosure documents. These include financial services guides, product disclosure statements, credit guides, periodic statements, and forms and notices issued under the National Credit Code. There should a similar requirement for banks to proactively inform their customers that they have rights in their relationship with their bank.

More generally, banks should commit to promote and raise awareness of the benefits to consumers of the provisions in the Code, rather than just promoting the Code itself. Customers are more likely to be receptive to a particular aspect of their relationship with their bank, rather than to the Code itself. In particular, the most relevant time a bank should 'promote' consumer awareness of the Code is when a consumer makes a complaint. This is discussed in Section 19.

10.5 Finding

Part 1 of the Code should be improved. It should have a succinct statement as to the objective of the Code (along the lines of the UK Financial Conduct Authority's proposed 'duty of care' for financial firms) and specify how the Code works achieve this objective. This should include an outline as to how the commitments in the Code are enforceable. The outline as to how the Code works should refer to the status of Industry Guidelines.

10.6 Recommendations

- 24. Part 1 should start with a succinct statement as to the objective of the Code, along the lines that it sets out the commitment by ABA member banks to deliver the high standard of banking services expected by customers and the Australian community.**

25. Part 1 should state that the banks commitments in the Code are enforceable, and outline how they can be enforced, consistent with Recommendation 6.
26. Part 1 should outline that industry guidelines are Code-related documents, consistent with Recommendation 10.
27. Consistent with Recommendation 4, Part 1 should include a commitment to give customers a simple, easily understandable document that advises them:
- they have rights in their dealings with their banks
 - how they can access what are these rights under the Code
 - where they can get assistance if they have a problem with their bank,
 - how they can make a complaint to their bank.

An easy read version of the document should be available.

11. Part 2 of the Code: ‘Your banking relationship’

11.1 Issue

To assess the effectiveness of the provisions in Part 2 and whether they meet customer and community expectations. The review has been asked to review the effectiveness of the provision for banks to act in a ‘fair, reasonable and ethical manner’.

11.2 Code Provision

Part 2 consists of the following chapters:

- Chapter 3. Commitment to comply with the Code.
- Chapter 4. Staff will be trained and competent; staff will engage in a fair, reasonable and ethical manner (Clause 10).
- Chapter 5. Protecting confidentiality.
- Chapter 6. Comply with the Code unless doing so is a breach of the law.
- Chapter 7. Comply with ABA protocol when closing a branch.

11.3 Stakeholder views

Stakeholders largely commented on:

- Clause 10. Engaging in a fair, reasonable and ethical manner.
- Clause 8. Complying with the Code.
- Clause 9. Trained staff.
- Clause 14. Commitments when closing a branch.

Clause 10: Engaging in a fair, reasonable and ethical manner

The consumer organisations said Clause 10 should be a core provision and should be designated as enforceable under the enforceable code provision regime.

The BCCC noted that Clause 10 is a central obligation and should apply not only to staff interactions with customers, but also the design of products, services, marketing, and all aspects of banks’ engagement with customers.

The ABA said member banks recognise the central importance, at a fundamental level, for staff to engage with customers in a fair, reasonable and ethical manner. It noted that Clause 10 is not the sole general standard of this principle to which banks are subject. Banks are also required to provide financial services ‘efficiently, honestly and fairly’ under the licencing conditions under the Corporations Act.

The Australian Payments Network supports Clause 10 as one of the most important clauses in the Code, but said it is not signalled as such in its location in the Code.

Commitment to comply with the Code

The BCCC recommended a Code obligation requiring banks to have appropriate infrastructure in place to support compliance with the Code.

The ABA says the general commitment that banks will comply with the Code implies they will have the necessary systems in place to comply with the Code obligations.

Trained and competent staff

The Financial Services Institute of Australasia (FINSIA) noted that Clause 9 says staff will be trained so that they can competently do their work and comply with the Code. But it does not specify what standards or competency needs to be achieved and gives the impression that it primarily refers to front-line staff.⁸⁰

The BCCC notes that staff training alone is not sufficient to ensure compliance, it has to be supported by appropriate systems and technology.

Branch closures

Consumer representatives report that the closure of bank branches has caused significant concerns for some consumers, particularly for Aboriginal and Torres Strait Islander peoples in remote areas, and older customers.

11.4 Discussion

Engaging in a fair, reasonable and ethical manner

As discussed in Section 7 of the report, Clause 10 is regarded as a central provision in the Code given that it underpins all commitments. It was also discussed that it would be preferable for the wording in Clause 10 to be aligned with a similar provision in the Corporations Act that applies to banks. And that it be specifically stated in the Code that this provision is enforceable under law. If it is not aligned, then Clause 10 would be suitable to be designated as an enforceable provision under the enforceable code provision regime.

Since Clause 10 is a core commitment that underpins all aspects of a customer's banking relationship, it should be prominent in Part 2 and not under the heading 'Trained and competent staff'. The commitment in Clause 10 should be the first commitment in Part 2.

Commitment to comply with the Code

It was also discussed in section 7 that there should be a commitment in the Code for banks to have in place the appropriate framework and systems to support an integrated approach to complying with the Code. The effectiveness of the components of this framework should be subject to a rolling audit program. It is not sufficient to say, as the ABA does, that having the appropriate mechanism for compliance is implied in the existing commitment that banks will comply with their obligations under the Code.

The BCCC has identified that the failure of banks to build strong compliance systems has led to systemic and serious breaches of the Code which affected many customers.

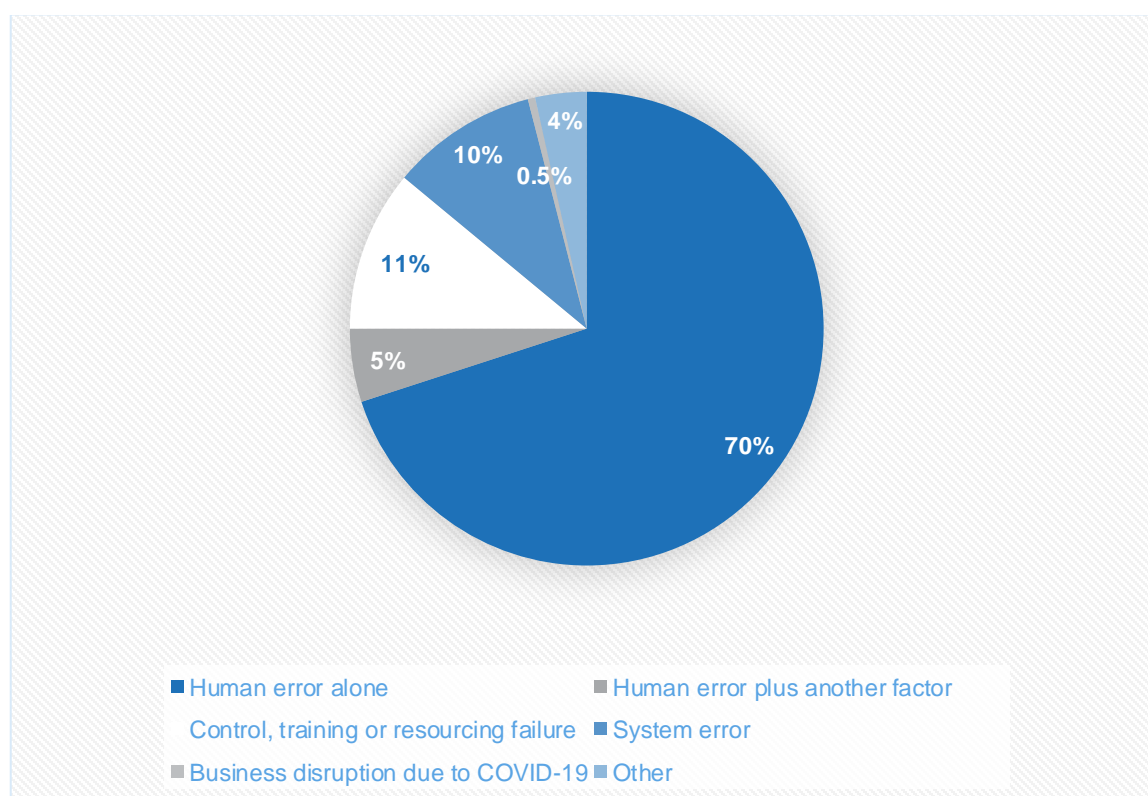
⁸⁰ Pg.3, FINSIA, *FINSIA Submission to the Independent Banking Code Review*, published 7 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-FINSIA.pdf>

Trained and competent staff

Staff training is a central component for effective and consistent Code commitments. But as the BCCC has emphasised, staff training should not be considered in isolation.

Banks overwhelmingly identify human error as the main cause of a breach of the Code. In January-June 2020, it was attributed as the main cause for 75% of all breaches (see Figure 2).⁸¹ Banks usually say that they will respond to the breaches through staff training. However, staff training needs to be supported by appropriate systems, technology and incentives – including culture – to support compliance.

Figure 2: Total Incidents reported to BCCC for January to June 2020



Source: BCCC Banks' compliance with the Banking Code of Practice January – June 2020

For example, staff cannot be expected to remember how the Code and the law applies to every situation they may encounter with customers. But staff should have the systems – such as information on their computers – where they can readily access what are the customer's rights in a particular situation.

The Financial Services Institute of Australasia advocates that some standards are required to ensure that staff are trained such that they can competently do their work. It suggests that banks should commit to adopt industry wide professional standards for competency and conduct.

The Commercial & Asset Finance Brokers Association of Australia noted that it was important that those providing commercial finance have the required skills to adequately

⁸¹ Pg.11, BCCC, *BCCC Report: Bank's compliance with the Banking Code of Practice – January to June 2020*, published 20 April 2021 - <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

assess a small business loan and that there is a minimum education standard to belong to that association.⁸²

There would be value in introducing a degree of rigour in the commitment in Clause 9 if there were standards that reflected the level of training staff required to be able to competently do their work.

The commitment in the Code should refer to both trained and competent staff and that staff will be supported by appropriate systems and technology to ensure that the bank's commitments to its customers are met. In addition, there should not be an impression that the commitment only applies to front-line staff. It should apply to management and staff at all levels.

Branch closures

Consumer representatives report that branch closures have caused significant concerns for some consumers, particularly for Aboriginal and Torres Strait Islanders. They say that the commitment in Clause 14 that banks will comply with the ABA protocol when closing a branch has not been consistently followed and that the protocol itself is not sufficient.

The concerns that Aboriginal and Torres Strait Islander peoples have from branch closures compounds a range of other concerns they have with accessing bank services, including identification, inconsistent interpretation of the AUSTRAC guidance, cultural issues, and financial abuse.

Consumer representatives who have visited remote communities say they have been told by residents that banks have made promises that services will be provided to their community, but that they have not eventuated. Examples were given where customers were told that they would have to go to their branch to sort out an issue when the closest branch was several hundred kilometres away.

While support can be given to customers on the use of online banking, consumer representatives noted that alternatives to face-to-face banking need to take into account difficulties with internet and phone access in remote areas.

Several stakeholders pointed out that the protocol was developed in 2015 and while it says that it will be reviewed when the Code is reviewed, this has not occurred to date. Moreover, rather than just the process steps outlined in the protocol, some stakeholders said banks should make a principled commitment to 'genuine' community consultation prior to closing a branch. This commitment should include finding ways to meaningfully continue to support access to banking services, including face-to-face banking when required. There were calls for a commitment to providing mobile banking, a fee-free ATM in every community, and preserving access to cash.

Commitments in the Code involving the provision of banking services to customers in remote areas has to recognise that not all subscriber banks operate in such locations.

In addition, a number of proposals to maintain banking services when a branch closes are not commercially viable. For example, proposals by some stakeholders that the banks commit to provide face-to-face banking in all locations, would not be practical nor viable.

⁸² Pg.5, CAFBA, *Banking Code Review 2021*, published 30 September 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/CAFBA-Interim-Submission.pdf>

Nor would calls for banks to commit to provide fee-free ATMs in ‘every’ regional and outback community, regardless of size.

The ABA protocol says that a bank closing a branch will ensure that ongoing face-to-face access is locally available ‘where it is commercially viable to do so’. Where not commercially viable to maintain access to face-to-face banking, the bank should undertake to identify other options.

The BCCC points out that the ABA protocol adopts a high threshold. It only applies to the closure of branches in the Inner regional, Outer regional, Remote, Very remote and Migratory classes and only if there is not another branch of the same brand within 20 kilometres by road. The impact of a branch closure can have an impact on all communities, even when there is another branch of the bank within 20 kilometres.

The pace of branch closures has accelerated since the ABA protocol was developed in 2015. At a minimum, it needs to be updated. Moreover, it should apply whenever a branch closes. The commitment by banks to consult with the community and seek to ensure that bank services can be provided, should be strengthened and go beyond statements in the current protocol that banks will ‘actively engage with customers and the community and formally respond to queries and concerns about the closure of the branch’. There should be a purpose for such engagement.

The ABA protocol on branch closures cannot be largely limited to waiving fees and charges associated with transferring accounts to another institution and/or offering education to customers to help them adjust to changes in the way they access ‘their alternative banking products and services’. Banks should also be looking at what changes they may need to make to their procedures and processes. For example, customers should not be told by their bank that they will have to visit their branch when their nearest branch is several hundred kilometres away. Banks will have to be more innovative in responding to the implications of rapidly declining number of branches.

The ABA Consumer Outcomes Group has been considering access of banking services to remote locations and the outcomes from this work could feed into an update of the ABA’s protocol on branch closures.

11.5 Finding

Part 2 of the Code should be strengthened. It covers fundamental aspects of the relationship between customers and their banks.

The commitment for banks to act in a fair, reasonable and ethical manner (or if aligned with section 912A of the Corporations Act – to act efficiently, honestly and fairly) should be presented as underpinning all aspects of customers’ relationships with their bank, and as such, all commitments in the Code. It should be stated in the Code that this is enforceable under the law.

The commitment that banks will honour their obligations should be strengthened with the commitment that banks will have in place the framework and systems to ensure all commitments will be implemented.

An important part of this framework is staff training. The commitment to trained staff would be strengthened if there were a standard for the level of training staff are required to achieve to competently do their work.

The majority of breaches cannot simply be attributed to human error and covered by the response to provide more training. Staff must be supported by appropriate systems and technology. The training needs to cover staff across all levels, including management.

Branch closures are accelerating. It is impractical for the Code to attempt to be prescriptive as to how banking services can be maintained when branches are closed. But the presumption should not be that it is just customers who have to adjust to branch closures. Banks also need to adjust and be more innovative in dealing with customers in the absence of branches.

11.6 Recommendations

- 28. The commitment for banks to engage with customers in a fair, reasonable and ethical manner (or if aligned with the Corporations Act – efficiently, honestly and fairly) underpins all Code commitments and should be prominently positioned in the Code. The Code should state the commitment is enforceable under the law (the Corporations Act if aligned, if not, Clause 10 is a suitable candidate to be designated under the enforceable code regime).**
- 29. The commitment that banks will comply with their obligations under the Code should be strengthened. Consistent with Recommendation 8, Part 2 of the Code should include a commitment that banks will have in place appropriate frameworks and systems to support compliance with the Code, and the effectiveness of the components of their frameworks will be subject to a rolling audit program using internal and external audit arrangements. This is an appropriate candidate to be designated under the enforceable code regime.**
- 30. It should be made clear that the commitment to have trained and competent staff that understand the Code and how to comply with it, covers staff at all levels, including management. The banks should develop industry wide standards for competency and conduct for bank staff. The Code should also state that staff will be supported by appropriate systems and technology to support compliance with the Code.**
- 31. The ABA protocol on branch closures needs to be updated and strengthened. It should apply whenever a branch closure takes place. Banks should reinforce their commitment to consult with communities where branches will be closed, and where they have already been closed, to develop ways to facilitate access to banking services. This should include banks being innovative in how they can deliver banking services in the absence of branches, such as using technology for identification purposes rather than a customer being required to visit a branch.**

12. Part 3 of the Code: ‘Opening an account and using our banking services’

12.1 Issue

To assess whether the Code provisions regarding opening an account and using banking services are in line with customer and consumer expectations.

12.2 Code Provisions

Part 3 consists of the following parts:

- Chapter 8. Providing customers with clear information about products and services.
- Chapter 9. How banks will communicate with customers.
- Chapter 10. Responding to customers’ requests for information.
- Chapter 11. Providing information on terms and conditions, fees and charges.
- Chapter 12. Customer agreement required if banks charge a fee for a new service.

12.3 Stakeholder views

The joint submission from consumer organisations called for a number of additional commitments regarding information given to customers, including:

- The use of plain language in all terms and condition documents and provision of a summary of terms and conditions when the full version is long.
- Documents should address any unusual or unexpected terms and conditions.
- The use of standard terms and conditions which strike a fair balance between the customer’s legitimate interest, and the bank’s legitimate interest.

The Small Business and Family Enterprise Ombudsman proposed all communication to customers be sent by post, by default but also be sent electronically.

Customer Advocates raised during consultations that banks should commit to providing customers with information that is clear, timely and comprehensible.

There were several comments about the need to provide interpreter services for customers where English is not their first language and making information more accessible to customers with a disability. These issues are covered in Section 13 of the report.

The issues raised by stakeholders can be divided into two groups:

1. Clarity of information given to customers.
2. Delays in sending information to customers.

12.4 Discussion

Clarity of information

The thrust of many of the comments from consumer representatives focused on whether the information going to consumers is comprehensible. A comment raised during the consultations was that what banks think is clear and useful information, may not be viewed the same way by the consumer. Whether the information is useful and clear will depend on the consumers ability to comprehend the information.

The intent of what information is to be given to the customer is outlined in Clause 15, namely, information that will allow the customer to make an informed decision about which product or service is suitable for the customer. To make an informed decision, the customer has to understand the information.

Consumer groups have called for the reintroduction of clause 3.1(d) from the 2013 version of the Code which said that banks will provide information in 'plain language'. They note that in Part 6 of the current Code, there is a commitment to provide a 'plain English' document of terms and conditions to small businesses applying for a loan.

While using plain language should always be encouraged, it is problematic that this alone would result in a simplification of the terms and conditions of bank products and services. Notwithstanding the commitment in the Code for banks to provide small businesses applying for a loan with a 'plain English' document, the feedback from small business was that the loan documentation was far from being written in 'plain language'. What constitutes 'plain language' is clearly in the eye of the beholder.

The proposal to introduce a simplified summary of terms and condition documents, particularly where they are long or in different documents, also has limitations. As the Khoury Review noted when considering the same proposal from consumer bodies, summaries can have the perverse effect of lengthening the terms and condition documents. Moreover, if the intention is that the summary provides the information that the consumer will rely on, it brings into question the relevance of the main document.

Clause 17 of the Code should reflect that it is the customer's perspective that is important in determining whether the information provided by the bank is clear and useful. To do so, the clause could be extended to say that a customer will be given information that is clear and useful 'to you'.

Of course, banks cannot guarantee that the customer understood the information. However, banks should be expected to take into account the customer's circumstances, to the extent this is known, and assess whether it is reasonable to expect that the customer understands the information provided. Banks should offer to help customers understand the information provided, and/or suggest customers seek independent advice.

Chapter 10 already refers to banks responding to requests by customers for information, including referring the customer to someone else, such as a lawyer, accountant or financial counsellor. However, this 'general' commitment would be more customer- focused if the banks recognised that terms and conditions for bank products can be complex and difficult to understand, and banks offered to assist customers understand these documents, or at least assess whether the customer needs assistance.

Some of the banks Customer Advocates proposed that banks should commit to advising customers of terms and conditions which they may not expect. The joint consumer submission also said that banks should commit to draw consumers' attention to any unusual or unexpected terms.

The difficulty with such a provision is in determining what unexpected and unusual provisions are from the customers perspective. The more practical approach may be for banks to offer to explain to customers the terms and conditions of their products and services.

The joint consumer submission called for the inclusion of a commitment to use terms and conditions which strike a reasonable balance between the customer's legitimate interest, and the bank's legitimate interest. The consumer bodies say that such a clause will be in the revised Customer Owned Banking Association code of practice. However, monitoring compliance with such a provision would be problematic, particularly for the BCCC, and would appear to be already covered by the unfair contract provisions in Australian Contract Law.

How banks communicate with customers

A common issue raised in the consultations was the delay in consumers receiving correspondence from their bank. This was mainly when banks send written communication by post.

To overcome delays, one suggestion was that the Code should provide that a bank send written communication to customers by the customer's preferred means – post or electronically. Many banks offer account holders the option of receiving paper statements or using paperless, electronic ones, delivered by email.

The Small Business and Family Enterprise Ombudsman proposed all written communication from a bank also be sent electronically.

The most direct approach to dealing with consumer concerns that using the post can result in delays in communications with their bank would be for the banks to commit to send any communication by post also electronically, where appropriate having regard to security and privacy considerations.

12.5 Finding

While the Code includes provisions for banks to provide customers with information that is clear and useful, what constitutes clear and useful information should be viewed from the customers perspective. It would be appropriate for banks to offer to explain to customers the terms and conditions for bank products and services.

The Code should respond to customer concerns that there can be a delay in communicating with their bank when the bank communicates via post.

12.6 Recommendations

- 32. The Code should reflect that it is the customers perspective that will determine whether information provided by the bank is clear and useful. Clause 17 should say that the customer will receive information that is 'clear and useful to you'.**

- 33. Banks should specifically offer to respond to customers' queries about the terms and conditions of their products and services, including if appropriate, suggesting the customer seek independent advice.**
- 34. To deal with customer concerns over delays when banks send information by post, banks should commit to send any communication by post also electronically, where appropriate having regard to security and privacy considerations.**

13. Part 4 of the Code: ‘Inclusive and accessible banking’

13.1 Issue

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 disabilities, customers in remote and regional areas, older customers, and those 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. In addition, the review is to assess the effectiveness of the provisions to make customers aware of the existence of, and their eligibility, for basic, low and no fee accounts.

These issues are covered in several parts of the Code, namely: Part 4 ‘Inclusive and accessible banking’, Part 5 ‘When you apply for a loan’, and Part 7 ‘Guaranteeing a loan’.

13.2 Code Provisions

Part 4 consists of the following chapters:

- Chapter 13. Commitments to provide banking services which are inclusive and accessible, to train staff, make banking services available to indigenous customers, and provide banking services to remote customers.
- Chapter 14. Take extra care with customers experiencing vulnerability.
- Chapter 15. When providing transaction banking services to low-income earners, provide information about basic, low or no fee accounts.
- Chapter 16. Attributes of basic, low and no fee accounts and raise awareness of basic accounts. Defines eligible customers for basic accounts, and train staff about customers eligible for basic accounts.

Relevant ABA Guidelines are:

- Preventing and responding to financial abuse and preventing and responding to family and domestic violence.
- Preventing and responding to financial abuse (including elder abuse).
- Responding to requests from a power of attorney or court-appointed administrator.

Part 5, the relevant chapter is:

- Chapter 17. Not approving a new loan, or an increase in a new loan, where the borrower does not receive a substantial benefit unless the bank has taken reasonable steps to ensure borrowers understand the risk, why they want the loan, and are not experiencing financial abuse.

Part 7, the relevant chapters are:

- Chapters 25-27. Provides protections for prospective guarantors including requiring the prospective guarantor to sign the guarantee independently from the borrower and requiring three days for guarantors to consider their objections.

The provisions covering the closure of banks is discussed in Section 11 of the report, the provisions dealing with guarantors are discussed in Section 16, and those dealing with co-borrowers is covered in Section 16.

13.3 Stakeholder views

Stakeholders raised a wide range of views. The issues can be broadly grouped as follows:

- Identifying vulnerability
- Communicating with customers experiencing vulnerability
- Extra care for vulnerable customers
- Supporting inclusive and assessable banking
- Banking services for Aboriginal and Torres Strait Islander peoples
- Basic accounts.

Identifying vulnerability

The ABA proposed the review develop a definition of a 'customer experiencing vulnerability'.

The joint submission from consumer groups, WEstjustice and the ABA said the reference in the Code that banks will only be aware of a customer's vulnerability if the customer tells them, should be changed. The ABA acknowledged that the Code needs to appropriately reflect the balance of responsibility between banks and customers, while still encouraging customers to share their circumstances with their bank.

Consumer bodies and WEstjustice called for an expansion of types of people who may be vulnerable, include a commitment for staff to be trained in identifying vulnerable customers along with using digital technology.

WEstjustice, the BCCC and Women's Legal Service proposed a requirement for all banks to have a public-facing family violence policy statement published on their websites.

The BCCC noted that a customer having a power of attorney can be an indication that a customer may be vulnerable.

Women's Legal Service called for an obligation on banks to identify and respond to abusive comments in online transactions.

Communicating with customers experiencing vulnerability

The consumer bodies said banks should have systems in place to record any customer who has been identified as vulnerable if the customer agrees. Also, the banks should commit to work with customers to establish safe ways to communicate.

Extra care for vulnerable customers

The ABA is very reluctant to change the wording as to what constitutes ‘extra care’ for vulnerable customers but supports further clarity of the definition.

The BCCC noted that there are inconsistencies between banks in accepting a customer’s authority for a Legal Aid lawyer or financial counsellor to act on a customer’s behalf.

Supporting inclusive and accessible banking

The ABA said its Accessibility Principles, developed in consultation with accessibility advocates, will be reviewed in late 2021.

Accessibility advocacy groups referred to inconsistency in application of the accessibility principles. Vision Australia noted in its response to the review’s Interim Report that the Banking Accessibility Principles are not specifically referred to in the Code and this encourages a downplaying of their importance in delivering accessible banking products and services.⁸³ Vision Australia states that if new technologies are not implemented with accessibility front-of-mind, they can have a catastrophic impact on people with a disability, citing the widespread introduction of touchscreen interfaces as an example.

The consumer groups called for a commitment for banks to offer to communicate with customers with hearing difficulties through the National Relay Service, as well as provide Auslan interpreters on request.

The ABA said they propose to include a clause that banks will have an interpreter made available, where reasonably practicable. Consumer organisations and the BCCC also called for the Code to have additional requirements supporting non-English speaking customers.

The BCCC, consumer organisations, and the Indigenous Consumer Assistance Network, called for recognition in the Code and support for prisoners (including those in transition). In addition, there were calls to introduce a commitment that banks would recognise identification issued by government correction facilities.

The Queensland Adult Business Association, Working Man Assembly, and Eros and Sex Work law Reform Victoria noted there was discrimination by banks to all forms of sex workers and the sex industry.

The National Shooting Council and Shooting Industry Foundation Australia said that licensed firearm dealers have been declined banking services, often as a result of banks making ill-informed assumptions or philosophical objections about the firearms industry.

The Victorian Pride Lobby said the interests of LGBTIQ+ consumers should be reflected in the Code. In particular, the Code should recognise the vulnerability of LGBTIQ+ customers and they should be appropriately supported.

Banking services for Aboriginal and Torres Strait Islander Peoples

The joint submission by consumer bodies called for a commitment that banks have cultural competency programs and staff training so that they are aware of the banking needs of Aboriginal and Torres Strait Islander peoples, as well as making interpreter services available

⁸³ Pg.4, Vision Australia, Comments on the Interim Report of the Independent Review of the Banking Code of Practice, published 7 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/Vision-Australia-Interim-Submission.pdf>

for common Aboriginal and Torres Strait Islander peoples' languages, and guidance on processes for alternative identification requirements.

Basic accounts

The consumer groups called on the banks to commit to proactively review whether customers who receive government support payments are eligible for basic accounts and use an opt-out model for excluding customers identified as eligible.

The ABA notes the industry has recently obtained the assistance of the government to identify customers eligible for basic accounts and is in the process of identifying eligible customers.

13.4 Discussion

The provisions in the Code dealing with inclusive and accessible banking and supporting vulnerable customers, represent significant benefits to customers that go beyond the law. On the whole, consumer bodies commended the banks for progress in this area, although they did note a number of shortcomings.

The BCCC said that based on information it collected for its inquiry into Part 4 of the Code (soon to be released), there has been a positive shift and greater focus by banks on their commitment to inclusive and accessible banking. Examples of how banks have demonstrated this include:

- Proactive surveillance and reviews for fraud and scams of customers at heightened risk.
- Increased education to assist older peoples access digital banking.
- Implementing organisation wide accessibility and inclusivity plans.
- Incorporating accessibility in design principles.
- Partnering with Australia Post to support customers where branches are closed.
- Entering into fee-free ATM arrangements.
- Providing documents to customers via email and post.
- Providing translation and interpreter services.
- Providing customer documentation and messages in languages other than English.

As with the consumer groups, the BCCC said there was room for improvement.

A main complaint from consumer bodies, which is a theme throughout the review, was inconsistency within and between banks in implementing the commitments in the Code. For example, financial councillors noted that the level of support a vulnerable customer receives often depends on who they speak to in the bank.

In response to concerns over inconsistent implementation of Code commitments, consumer groups are seeking more prescriptive provisions as to, who are vulnerable customers and the extra care they should receive.

The ABA guidelines that support Clause 4 are comprehensive and capture much of the material that the consumer bodies are seeking to be incorporated in the Code. For example, the joint submission by consumer groups called for part 4.3 of the Domestic Violence Guideline (which covers what banks should do to protect a customer's confidentiality and safety) be included in the Code.⁸⁴

As noted in Section 8 of the report, the ABA guidelines should be considered as part of the Code and the appropriate venue for the operational detail on the implementation of Code commitments. The extra detail that the consumer bodies are currently seeking be incorporated in the Code would more appropriately be included in the guidelines. As outlined in Section 8, the guidelines cannot be considered to be voluntary. Banks should take them into account in assessing whether they are complying with Code commitments. If the bank is not following the implementation details in the guidelines, it will have to demonstrate that it is following comparable processes consistent with meeting their obligations.

However, identifying vulnerable customers and promoting inclusive and accessible banking, are topics that do not lend themselves to prescriptive procedures. The circumstances of customers varies widely, as does their vulnerability risk, and the extra support they may require.

The consumer bodies have requested adding additional categories of the types of customers who may be vulnerable to the Code. But as noted in the Customer Owned Banking Association Report Spotlight on customer vulnerability, 'anyone can become vulnerable, and vulnerability often appears in surprising places'.⁸⁵

Vulnerability involves a spectrum of risks, and it is appropriate to identify customers who may be more likely than others to be vulnerable because of their circumstances. But the priority of banks should always be on identifying vulnerable customers, regardless of their circumstances.

The BCCC points out that the positive response by banks in support of customers experiencing vulnerability indicated the flexibility of principle-based obligations and has empowered banks to innovate and develop bespoke initiatives to support customers experiencing vulnerability.

Identifying vulnerability

The ABA has proposed that the review develop a description of 'customers experiencing vulnerability'.

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'.⁸⁶

⁸⁴ ABA, Industry Guideline: Financial abuse and family and domestic violence policies, published November 2016 - <https://www.ausbanking.org.au/wp-content/uploads/2021/05/ABA-Family-Domestic-Violence-Industry-Guideline.pdf>

⁸⁵ Pg.9, Customer Owned Banking Association, *COBA Report Spotlight on Customer Vulnerability*, published 7 December 2020 - <https://www.customerownedbanking.asn.au/news-and-resources/reports/spotlight-on-customer-vulnerability>

⁸⁶ Pg.7, FCA, *Occasional Paper No 8m Customer Vulnerability*, published February 2015 - <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8-exec-summary.pdf>

This definition is widely quoted. For example, it has been adopted by the South African Ombudsman.⁸⁷

The definition by the UK Financial Conduct Authority is not prescriptive and may not be seen as providing specific guidance in identifying vulnerable customers. However, its strength is that it focuses on assessing the circumstances of each customer in determining vulnerability.

It is proposed that the Code adopt this definition of vulnerable customer. In addition, it should be highlighted that while the specific circumstances of customers outlined in clause 38 – age, cognitive ability, elder abuse, family or domestic violence, financial abuse, and mental illness – may be possible indicators of vulnerability, banks should always be alert to signs of vulnerability regardless of the customer’s categorisation.

A similar approach should be adopted to interpreting Clause 32. It currently states that the groups of customers identified for receiving inclusive banking services are – older customers, people with a disability, indigenous Australians, and people with limited English.

There were calls to add to the list of groups of people in Clause 32 and 38. It is not practical to list all people who should be a focus for receiving banking services or may be in vulnerable circumstances. This is detail that can be expanded in supporting guidelines. However, it would be appropriate to include ‘people in prison and those transitioning’, so as to bring attention to a group that is currently under recognised. In both Clause 32 and Clause 38, it should be specifically stated that each list ‘includes but is not limited to.’

Obligation on customer to identify that they are vulnerable

The wording in Clause 38 should be changed. It says that banks ‘may only become aware of your circumstances only if you tell us about them.’ Financial counsellors noted that they often tell their clients facing financial difficulty to use the word ‘hardship’ when they approach their bank, because many bank staff will not respond unless the customer explicitly says they are experiencing hardship.

The onus should not be on the customer to self-identify as being vulnerable and banks should use all the information, they have about customers to identify vulnerability. As the joint submission by the consumer groups noted, people will generally not refer to themselves as ‘vulnerable’. But banks may find out about a person’s circumstances in many other ways, and should be proactive in identifying customers who may be experiencing vulnerability, including using data analysis techniques. How banks should go about identifying vulnerable customers, and the techniques they could use, should be covered in guidelines.

In the ABA’s response to the review’s Interim Report, it suggested replacing Clause 38 with wording used in the General Insurance Code, namely ‘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.’⁸⁸ This would be an appropriate change to the Code.

⁸⁷ Ombudsman for Banking Services South Africa, *Vulnerable Consumers* - <https://www.obssa.co.za/vulnerable-consumers/>

⁸⁸ Pg.31, General Insurance Code Governance Committee, *The 2020 General Insurance Code of Practice* (5 October 2021 version), published 5 October 2021 - <https://insurancecode.org.au/resources/general-insurance-code-of-practice-2020/>

Training staff to recognise vulnerable customers

Several submissions emphasised the importance of staff training to deal with diverse and vulnerable customers, along with a commitment for banks to have public-facing family violence policy published on their web sites.

Clause 33 says banks will ‘train our staff to treat our diverse and vulnerable customers with sensitivity, respect and compassion’, and Clause 39 says banks will ‘train our staff to act with sensitivity, respect and compassion if you appear to be in a vulnerable situation’. The industry guidelines provide further detail on the nature of training that staff should receive, and how staff can recognise customers in a vulnerable situation.

The guidelines should be regularly reviewed to capture industry best practices in terms of staff training and other techniques to identify vulnerable customers. This is a difficult issue that must be handled sensitively.

However, banks should also regularly review their training programs and systems for identifying and assisting vulnerable customers. This would be captured under the recommendation outlined in Section 7 of the report that banks should commit to have in place the appropriate systems, processes, and programs (including training programs) to support an integrated approach to compliance and to periodically audit the effectiveness of their compliance framework by their internal and external audit arrangements.

Consistent with the recommendation in Section 7, banks should specifically commit in Part 4 of the Code to regularly audit the effectiveness of their staff training and other systems and processes for identifying and assisting vulnerable customers.

There is merit in the proposal that banks should have public-facing family violence policies on their web sites. This would help bring attention to a significant and growing social problem. Such a statement should provide an easy- to- understand outline of banks’ commitment to help customers in such a situation. The statement should be consistent with the ABA guidelines on responding to financial abuse and preventing and responding to family and domestic violence.

Communicating with customers experiencing vulnerability

The consumer bodies have called on banks to have systems that record a customer’s vulnerability, so that customers only have to explain their circumstances once and to ensure that their vulnerability is always recognised by the bank. The customer should consent to having their details recorded. In addition, the consumer groups say banks should commit to work with such customers, particularly those facing family or domestic violence, to establish safe ways to communicate.

The industry guidelines on financial abuse and family and domestic violence do cover the importance of protecting customers confidentiality and safety and making it easier for customers to communicate with the bank. In both cases, a range of examples of how this can be done are provided.

Clause 41 of the Code says that when providing a service to a vulnerable customer, banks will ‘a) be respectful of your need for confidentiality, b) try and make it easier for you to communicate.’ This wording is rather passive and should be strengthened.

For example, rather than just being respectful of the persons privacy, there should be a commitment to ensure a customer's contact details and information will be kept secure and confidential. In addition, rather than just saying the bank will 'try' to make it easier for a vulnerable customer to communicate, the Code could say 'we will make it easy for you to communicate'.

As regards the consumer organisations call for the banks to record a customer's vulnerability so as to minimise the number of times they have to explain their circumstances, this is already covered in the guidelines. Given the importance of this point, Clause 40 could be amended to include a commitment that if a customer tells their bank about their personal or financial circumstances, subject to the customer's agreement, the bank will record this information so as to minimise the number of times the customer has to disclose the same information.

Extra care for vulnerable customers

The Code outlines some of the extra care banks will take for vulnerable customers, and these are further elaborated in industry guidelines.

Flexibility is required in identifying the extra care vulnerable customers may require, because it has to be tailored to the circumstances of the customer. What the Code should cover is the objective of banks' engagement with vulnerable customers, with the detail of the extra care that may be required to achieve that objective outlined in industry guidelines.

In its submission, the ABA noted some additional examples of extra care that could be provided to vulnerable customers, including:

- Enabling frontline staff to depart from standard customer service provisions where necessary.
- Considering the needs of vulnerable customers when designing and distributing products and services and through the product life cycle.
- Assisting customers to set up new accounts and/or change their access codes in circumstances of financial abuse.

These steps should be included in industry guidelines. And the Code should specifically reference that the ways banks can assist vulnerable customers are outlined in the relevant guideline.

One of the extra steps the ABA notes in its submission, is to 'verify and check the Enduring Powers of Attorney of a third party's authorisation and/or documentation to act on behalf of the customer'. The feedback from the consultations, however, is that there can be a problem in banks recognising that a third party can act on the behalf of a customer. For example, the BCCC noted in its inquiry into vulnerability that there was inconsistency between banks in their procedures for accepting a customer's authority for a Legal Aid lawyer, or financial counsellor to act on a customer's behalf.

Financial counsellors say this causes delays and inconvenience for vulnerable customers. They have proposed that banks subscribe to the financial counsellors' portal to help verify the status of financial counsellors.

Rather than just saying banks will verify and check the authorisation of a third party to act on behalf of customers, the Code should say that banks will facilitate and avoid delays in the authorisation of a third party to act on the behalf of a vulnerable customer.

Supporting inclusive and accessible banking

A common theme in the consultations was that banks should commit to providing interpreter services to help non-English speaking customers. The Community Owned Banks Association's code of practice has such a commitment.⁸⁹ The ABA has indicated that it will include a commitment to make interpreter services available, where reasonably practicable, free of charge when requested by a customer or the bank considers it is appropriate.

In addition to introducing such a commitment, it would also be appropriate to adopt the proposal by the BCCC that a guideline be prepared on how banks can help people of non-English speaking backgrounds.

This would help promote consistency across banks. The guideline could cover the circumstances when banks should engage an independent interpreter to translate important documents and conversations, and not rely on family members or bank staff. The ABA Customer Outcomes Group has been working on developing a way to classify the risk of particular conversations. Drawing on this work, the guideline could list those documents and conversations that would not require an independent interpreter.

The consumer bodies also noted that the Code should include a commitment by the banks to offer to communicate with customers having hearing difficulties through the National Relay Service if requested, or if bank staff consider it would assist the customer. In addition, it would be appropriate for banks to provide Auslan interpreters, on request, for customers who use these interpreters.

Disability advocates indicated that there is inconsistency in banks approach to making services available to customers with a disability. The ABA response is to point to its Accessibility Principles that were developed with accessibility advocates.

Vision Australia noted in its response to the review's Interim Report that it has recently been contacted by several banks that have developed products that do not meet the accessibility expectations and the contact has been too late to influence the design of the product. This emphasises that the Accessibility Principles are of little value if they are ignored.⁹⁰ The Code should specifically refer to these Accessibility Principles and contain a commitment that banks will not only continue to improve the principles, but they will also improve accessibility of banking services in line with the Principles.

Banking services for Aboriginal and Torres Strait Islander peoples

Priority must be given to recognising and responding to the many issues confronting access to banking services for Aboriginal and Torres Strait Islander peoples. This was highlighted by many stakeholders. Furthermore, the response should not be limited to dealing with the issues confronting Aboriginal and Torres Strait Islander peoples in remote areas. And it is

⁸⁹ Pg.8, COBA, *Customer Owned Banking Code of Practice*, published 23 November 2020 - <https://www.customerownedbanking.asn.au/how-it-works/code-of-practice> COBA article | [Customer Owned Banking Code of Practice](https://www.customerownedbanking.asn.au/how-it-works/code-of-practice)

⁹⁰ Pg.3, Vision Australia, Comments on the Interim Report of the Independent Review of the Banking Code of Practice, published 7 October 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/Vision-Australia-Interim-Submission.pdf>

not just the needs of individuals that should be recognised. Businesses run by Aboriginal and Torres Strait Islander peoples face their own unique challenges.

Some banks have been proactive and increased efforts to provide banking services to Aboriginal and Torres Strait Islander peoples, such as introducing dedicated Indigenous customer service and assistance phone lines. The concern, however, is that some of these initiatives are not adequately resourced to meet the demand. And that there are inconsistencies in the services offered.

Clauses 35 to 37 of the Code cover the provision of banking services to Indigenous customers. If a customer tells the bank that they are Indigenous, the bank will take reasonable steps to make banking services available, including:

- Telling customers about any accounts and services that are relevant to them.
- Telling customers about eligibility for no or low standard fees.
- Helping customers meet any identification requirements following AUSTRAC's guide on identification and verification of persons of Aboriginal and Torres Strait Islander heritage.
- Assisting customers who reside in remote areas.
- Providing cultural awareness training to staff who regularly assist customers in remote Indigenous communities.

Except for assisting with AUSTRAC's identification requirements and cultural training for staff in remote locations, these commitments are largely the same as those for any customer. There is little by way of recognition of the special challenges facing Aboriginal and Torres Strait Islander peoples in accessing banking services.

Consumer representatives note that the commitments require the customer to advise the bank that they are Aboriginal and Torres Strait Islander heritage. The initiative should not be solely on the customer. At a minimum, the fact that there is tailored assistance available for Aboriginal and Torres Strait Islander people should be advertised, and preferably, bank staff should ask customers whether they have Aboriginal and Torres Strait Islander heritage.

As regards the reference in the Code for banks assisting customers with identification requirements following AUSTRAC guidance on identification for Aboriginal and Torres Strait Islander peoples, financial councillors report banks adopting a very limited interpretation of this clause. The AUSTRAC guidance is for an alternative approach for customers who cannot rely on conventional identification requirements. Some banks have adopted the approach that every customer of Aboriginal and Torres Strait Islander people must meet the alternative arrangements, even when the customer can meet the conventional identification requirements.

Some of the challenges facing Aboriginal and Torres Strait Islander customers accessing banking services that were raised with the review include:

- The availability of fee-free ATMs reducing as more bank owned ATMs are phased out.
- Inconsistencies within and between banks over identification requirements.

- Lists of community elders who can identify individuals being out of date.
- Banks not accepting financial councillors identifying their client.
- Low levels of financial literacy and exposure to financial and elder abuse.
- Banks not accepting government-issued cards for identification purposes.
- Difficulty in communicating where the customer has a non-English speaking background.

The ABA Indigenous Statement of Commitment covers some of the concerns raised in the consultations. For example, it refers to:

- Banks having financial inclusion and literacy programs for Aboriginal and Torres Strait Islander peoples.
- Developing a cohesive policy approach across banks for customers who may not have access to proof of identity documentation.
- Developing new ways of ensuring greater access to banking services, recognising improvements in infrastructure.
- Piloting enhanced cross-bank access and money management and counselling support.
- Reviewing the current ATM fee-free initiative to see if it should be extended or whether alternative policies are necessary to assist access to cash in remote communities.

The update of the Indigenous Statement of Commitment, which is currently underway, should clarify the identification requirements for Aboriginal and Torres Strait Islander peoples. But most importantly, it should be consistently implemented. It is, after all, a statement of 'commitment'.

Clauses 35-37 should be strengthened such that they incorporate the banks response to the challenges facing Aboriginal and Torres Strait Islander peoples in accessing bank services, both in and outside remote regions. There should be specific reference to the Indigenous Statement of Commitment in the Code, and cultural awareness training should not be limited to staff regularly assisting Aboriginal and Torres Strait Islander peoples in remote areas.

Prisoners (including those in transition)

Several submissions highlighted the difficulties prisoners (including those in transition) face in accessing banking services. To address some of these difficulties, the Indigenous Consumer Assistance Network proposed the following changes to the Code:

- Specify that prisoners (and those in transition) are a group of people experiencing vulnerability.
- Introduce a commitment outlining tailored procedures to ensure people in prison can manage their banking services.

- Introduce a commitment that banks accept Corrective Services identification as satisfying the 100 points of ID required.
- Amend the reference to people eligible for basic accounts to include those with no income.
- Introduce a commitment to transparent policies regarding when and why a bank closes a person's bank account.

The Code should recognise prisoners (and those in transition) as a group of people experiencing vulnerability. The outline of tailored procedures to help prisoners maintain their banking services, including meeting identification requirements, would best be included in guidelines.

As regards to banks advising customers the reason for closing an account, this is discussed subsequently.

Banking services for LGBTIQA+ customers

The submission from the Victorian Pride Lobby points out that the Code has not contributed to banking services being inclusive and accessible to LGBTIQA+ customers, because there is no specific mention of them in the Code. But they are vulnerable consumers.

It would be appropriate for a relevant industry guideline to include reference to the vulnerabilities facing LGBTIQA+ customers, along with how banks can respond to assisting these customers. This should be prepared in consultation with LGBTIQA+ representatives.

A point raised in the consultations, and noted in the BCCC submission, is that bank forms need to be updated to provide for customers with non-binary gender and/or gender dysphoria. This should be included in an industry guideline covering the requirements for banking services from LGBTIQA+ customers.

Customers denied banking services

Several stakeholders noted that they were denied banking services, or had accounts closed, without an explanation from the bank. These included sex workers, the sex industry, gun retailers, and family of prisoners.

In October 2021, AUSTRAC published a statement about the issue of de-banking.⁹¹ AUSTRAC notes that the issue of de-banking is a complex global problem, and that over the past decade the range of businesses impacted by a loss or limitation of access to banking services has expanded.

Banks can decide who they want as customers. However, it should be expected that if they deny, or cancel services to someone, they will give an explanation as to why. The reason may be creditworthiness, the customer does not meet the risk exposure of the bank, or it may be concerns over the bank's reputation, or the bank does not support a particular industry or activity. Some stakeholders observed, however, that in many cases the bank provides no reason for denying or withdrawing services and would not respond to requests from the customer for the reasons.

⁹¹ AUSTRAC, *AUSTRAC statement 2021: de-banking*, 29 October 2021, <https://www.austrac.gov.au/news-and-media/media-release/austrac-statement-2021-de-banking>

The difficulty with introducing a commitment that banks should always advise a customer of the reasons it declines banking services is that this may clash with the tipping-off provisions under the Anti-Money Laundering and Counter Terrorism Financing Act 2006.⁹² If a bank submits, or is required to submit, a suspicious matter report about a customer, it must not disclose any information about the report to the customer, except in certain limited circumstances. This is a 'tipping-off' offence and is prohibited.

It appears that banks consider certain customers are in industries that may bring into play the Anti Money Laundering provisions. And they do not want to advise a customer of the reason they are not providing banking services because they may be caught by the tipping-off prohibition.

However, this risk aversion by the banks may mean they are denying legally operating customers with banking services, without adequately investigating if there are any reasonable grounds, they may be required to submit a suspicious matter report about the customer. AUSTRAC notes that the effect of de-banking of legitimate and lawful businesses can increase the risk of money laundering.

The guidance by AUSTRAC states that conducting reasonable inquiries into a customer's activity that may be unusual is not itself tipping-off. If the judgement is to end the business relationship, the customer cannot be told or be given any indication that a suspicious matter report is to be lodged.

Moreover, it appears that banks are denying banking services without understanding the nature of the industry in which the customer operates. The submission from the Shooting Industry Foundation Australia notes:

*'It concerns SIFA that a banks General Manager, Government, Industry and Sustainability can openly and unashamedly admit to us that they had no understanding of whether the firearm industry was regulated at all, let alone the rigor of that regulation, whilst vigorously defending that banks decision to decline service.'*⁹³

The submission from Sex Work Law Reform Victoria Inc noted that ABA member banks deny financial services to sex workers and sex industry businesses, on the basis of heightened risk of money laundering and sex slavery/human trafficking in the sex industry.⁹⁴ The submission points out, however, that there is little evidence that supports this claim from either Australian Federal Police statistics and reports from the Australian Institute of Criminology.

The submission from the Queensland Government Prostitution Licensing Authority noted that under the Queensland Prostitution Act 1999, licensed brothels in Queensland are subject to multiple audits and inspections, and compliance officers are vigilant for indicators of human trafficking or the involvement of organised crime. The Prostitution Licensing Authority says Queensland licensed brothels have been successfully quarantined from criminal activities and proposes that the Code should provide that banks only refuse services to customers on an individual assessment of the risk of the customer.

⁹² Section 123, Australian Government, *Anti Money Laundering and Counter-Terrorism Financing Act 2006*, registered 30 June 2021 - <https://www.legislation.gov.au/Details/C2021C00243>

⁹³ Pg.4, Shooting Industry Foundation Australia, *Banking Code of Practice Independent Review 2021*, published 9 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Shooting-Industry-Foundation-Australia-SIFA.pdf>

⁹⁴ Pg.10, Sex Work Law Reform Victoria Inc, *2021 Code Review – A perspective from a sex worker organisation*, published 6 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Sex-Work-Law-Reform-Victoria.pdf>

In its 'Statement 2021: de-banking', AUSTRAC has stated that it discourages the indiscriminate and widespread closure of accounts across entire financial services sectors.

Banks should not have a 'blanket' denial of banking services on the basis that they are concerned that the Anti Money Laundering provisions may come into play. But this cannot be incorporated in the Code, because it might imply that if a bank denies banking services, it is because it has undertaken inquiries and will be submitting a suspicious matter report.

This is a major issue for legal businesses denied banking services. The Code should include a provision that a customer will not be denied banking services, or have an account closed, without the bank first raising it with the customer and giving the customer an opportunity to respond. As the submissions from organisations representing customers who have been denied banking services have highlighted, banks can take a position based on incorrect information and an understanding of the customer. AUSTRAC has stated that it expects banks to adopt a case-by-case approach to managing risks associated with the Anti Money laundering provisions.⁹⁵ If the banking service is denied, the bank should provide an explanation, where appropriate.

The submission from the Sex Work Law Reform Victoria Inc. proposes that the Code should provide that if a small business makes a complaint to a bank claiming anti-discrimination, the bank should provide information about state/territory anti-discrimination dispute resolution services. It would not appear appropriate to require banks to have information on other legal avenues a customer can pursue, other than AFCA, if the customer has a complaint.

The BCCC should consider undertaking an inquiry into the bank's approach to denying or withdrawing banking services, to assess whether decisions are based on an informed assessment of the circumstances of the customer.

Basic accounts

Banks have to 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. A condition of the ACCC's authorisation of the changes to the Code in 2019, was that banks were to be proactive in identifying eligible customers for basic accounts. The banks have to provide written reports to the ACCC on the action they have taken along with the number of basic accounts opened.

The BCCC noted that from its inquiry into vulnerability, all banks indicated that they include detail of their basic accounts and eligibility requirements on their website, either as part of the bank's general product links or as part of a special link on their home page. However, apart from online information, the extent to which banks promote basic accounts varied. Two major banks train staff to actively promote basic accounts in face-to-face interactions with customers. One major bank has a public marketing effort, and another includes information on basic accounts in its standard correspondence with customers.

The consumer organisations proposed deleting the reference in Clause 43 that says banks may become aware if a customer is a low- income earner only if the customer tells the bank. An amendment to Clause 43 would be appropriate, for while customers should be

⁹⁵ AUSTRAC, *AUSTRAC statement 2021: de-banking*, 29 October 2021, <https://www.austrac.gov.au/news-and-media/media-release/austrac-statement-2021-de-banking>

encouraged to tell their bank if they are a low- income earner, the banks also need to be proactive in identifying customers who may be eligible for basic accounts. This should be incorporated in the Code.

Clause 48 says banks will train staff to help them recognise a customer, or potential customer who may qualify for a basic account. The commitment should be stronger. Namely that banks will use a variety of approaches to proactively identify customers eligible for basic accounts. Many banks are doing this, as noted in the BCCC submission. In addition, the ABA notes that only recently have banks been able to obtain the assistance of the Government to identify payment codes for various types of government benefits which will help identify customers eligible for basic accounts.

The eligibility for basic accounts should include customers on no income, as well as low- income earners.

13.5 Finding

The Code has led to banks placing a greater focus on ensuring banking services are inclusive and accessible. As with other parts of the Code, one of the main issues raised by consumer groups, is inconsistency within and across banks in terms of the implementation of Code commitments.

Many of the additional measures consumer bodies are seeking to be included in the Code are currently in ABA industry guidelines. As noted previously in the report, it needs to be clarified that these guidelines are Code related materials and should be specifically referred to in the Code.

Part 4 can be strengthened and many of the clauses clarified. In particular, the onus should not be on the customer identifying whether they are vulnerable, having difficulty in accessing banking services, or are of Aboriginal and Torres Strait Islander peoples, before the banks will assist them. Banks should use all the information available to them to proactively identify customers needing assistance and tailor their approach and support to the circumstances relevant to the customer.

13.6 Recommendations

- 35. The Code should adopt the UK Financial Conduct Authority's definition of a vulnerable customer – 'someone who, due to their personal circumstances, is especially susceptible to harm- particularly when a firm is not acting with appropriate levels of care'. While some customers may be more likely to be vulnerable, it is important for banks to be alert to the circumstances of each- and- every customer in identifying vulnerability.**
- 36. The specific circumstances of customers who may be vulnerable listed in Clause 38, and the groups of customers listed in Clause 32, as a focus for inclusive banking services, should specifically state that the list 'includes but not limited to'.**

- 37. The examples of groups of vulnerable customers in the Code should include people in prison (and those in transition) to bring attention to a group currently under recognised.**
- 38. The commitment in Clause 32 to provide banking services which are inclusive of all people, should be extended to provide that the vulnerabilities of both individuals and small businesses should be taken into account.**
- 39. The wording in Clause 38 that the bank ‘may only become aware of your circumstances if you tell us’ should be removed and replaced with wording along the lines of Clause 93 in the 2020 General Insurance Code. Similarly, the wording in Clause 43 that the bank ‘may become aware if you are a low- income earner only if you tell us about it’ should be amended. While customers should be encouraged to tell their bank if they are a low-income earner, banks should commit to proactively identify if customers may be eligible for basic accounts.**
- 40. Following on from recommendation 8, banks should commit to periodically auditing the effectiveness of staff training and systems for identifying vulnerable customers.**
- 41. Banks should have public-facing family violence policies on their web sites and in branches, including an easy- to- understand outline of their commitment to help.**
- 42. Clause 40 should be amended to include that if a vulnerable customer tells their bank about their personal or financial circumstances, subject to the customers agreement, the bank will record this information so as to minimise the number of times the customer has to provide this information.**
- 43. The commitment in Clause 41 should be ‘to make it easier’ for a vulnerable customer to communicate with their bank, rather than ‘to try and make it easier’.**
- 44. There should be a commitment that the bank will keep a vulnerable customers information secure and confidential.**
- 45. The definitions at the end of Clause 47 should say ‘low income includes no income’. Eligibility for basic accounts should be available to customers with no income, as well as low-income earners.**

46. Banks should commit to helping to protect customers from abusive transactions.
47. As part of the extra care banks provide vulnerable customer, they should commit to facilitating and minimising delays in the authorisation of a third party, such as Legal Aid lawyer or financial counsellor, to act on behalf of the customer, where the customer has provided appropriate consent.
48. Where requested by a customer or bank staff consider it will assist a customer, the bank should commit to making interpreter services available, where practicable, free of charge. This should include, as required and reasonably available, interpreters for Aboriginal and Torres Strait Islander customers. To help achieve consistency across banks, an industry guideline on helping people of non-English background should be prepared.
49. Banks should offer to communicate with customers having hearing difficulties through the National Relay Service, and for those customers who use it, Auslan interpreters.
50. The Code should refer to the ABA Accessibility Principles along with a commitment that banks will make banking services accessible to customers with a disability in line with the Principles.
51. The commitments in Clauses 35 to 37 should not be limited to customers who tell the bank that they are of Aboriginal and Torres Strait Island heritage. At a minimum, the fact that there is tailored assistance available for Aboriginal and Torres Strait Islander people should be advertised, and preferably, bank staff should ask customers whether they have Aboriginal and Torres Strait Islander heritage.
52. The Code should recognise that Aboriginal and Torres Strait Islander peoples can have challenges in accessing banking services wherever they live, it is not just those living in remote areas.
53. The commitment in Clause 35c should be clarified such that for customers who cannot meet the standard identification requirements, banks will help them with the AUSTRAC guidance for an alternative identification approach for Aboriginal and Torres Strait Islander peoples.

- 54. The update of the ABA Indigenous Statement of Commitment should be , referenced in the Code, along with a commitment that it will be followed.**
- 55. Cultural awareness training should be generally available and not limited to bank staff regularly assisting Aboriginal and Torres Strait Islander customers in remote locations.**
- 56. A tailored range of measures to assist prisoners (and those in transition) should be included in an industry guideline.**
- 57. An industry guideline should cover the vulnerabilities facing LGBTIQ+ customers, along with measures to assist access to banking services. Bank forms should be updated to provide for customers with non-binary gender and/or gender dysphoria.**
- 58. A customer should not be denied a banking service, or have an account closed, without the bank raising it with the customer and giving the customer an opportunity to respond, where consistent with AUSTRAC guidance. If the service is denied, or account closed, the bank should give a reason, where appropriate. Such decisions should be on a case-by-case basis. The BCCC should consider undertaking an inquiry into banks' performance in accordance with these commitments.**

14. Part 5 of the Code: 'When you apply for a loan'

14.1 Issue

To assess the effectiveness of the provisions covering when a customer applies for a loan and whether they are in line with customer and community expectations. The review has been asked to consider the effect of the Government's proposed removal of the responsible lending obligations in the National Consumer Credit Protection Act 2009.

14.2 Code provisions

Part 5 consists of the following chapters:

- Chapter 17. Outline of responsible approach to lending for individuals and small businesses. Banks will not approve a loan as co-borrower if the co-borrower does not receive a substantial benefit from the loan, with exemptions. Banks will assess a customer's ability to repay a credit card within a three-year period.
- Chapter 18. Covers a bank's approach to selling consumer credit insurance.
- Chapter 19. Outlines the approach where a borrower is asked to pay for lenders mortgage insurance.

14.3 Stakeholder views

Stakeholder views can be grouped as follows:

- Responsible lending obligations
- Lending to co-borrowers
- Consumer credit insurance, and
- Lenders mortgage insurance.

Responsible lending obligations

The ABA says it is not clear that any change is required to the Code if responsible lending obligations are removed from the National Consumer Credit Protection Act 2009. Banks will still have to exercise the care and skill of a diligent and prudent banker. Which in the case for lending to individuals, requires banks to comply with the 'law'. The ABA notes there would be other existing and newly commencing laws.

The joint submission from the consumer organisations proposed that the Code should retain all existing commitments relating to responsible lending to individuals.

The Law Council said that the Government's proposed changes to responsible lending obligations will not require changes to the Code. There remains the commitment to exercise the care and skill of a diligent and prudent banker.

The BCCC noted that the Code does not define or elaborate on the care and skill of a diligent and prudent banker except by reference to complying with the 'law'. The BCCC said that a change in current law would require a change in the wording of the Code.

Lending to co-borrowers

The consumer bodies indicated that banks should consider all information when assessing whether a co-borrower will receive a substantial benefit under the loan, and the exceptions in the Code should only apply to loans for real property.

The consumer organisations also called for a commitment that if banks should have reasonably known a co-borrower was not receiving a substantial benefit, the co-borrower should be released from liability for the loan. In addition, the liability of a co-borrower should be reduced to the amount of the benefit received.

Consumer credit insurance

The consumer bodies propose expanding the operation of Clauses 64 - 66 to all sales of consumer credit insurance, and not just when sales are in digital channels. They also propose the Code include a commitment that banks will not sell consumer credit insurance with low claim to premium ratios. And to provide a refund to any consumer sold consumer credit insurance if they are largely ineligible to claim under the terms of the product.

Lenders mortgage insurance

The consumer bodies propose a commitment be introduced for banks to explain to consumers that the lender benefits from lender mortgage insurance and where there is shortfall debt, the bank will work with the customer.

14.4 Discussion

Part 5 of the Code refers to lending to individuals and small business. As outlined in Section 15 of the report, the review recommends that the provisions dealing with responsible lending to small business be shifted to Part 6 of the Code. This will help reinforce that there are differences in lending to individuals and to small businesses.

Responsible lending obligations

The review has been asked to assess the consequences for the Code from the Government's proposal to remove the responsible lending obligations from the National Consumer Credit Protection Act 2009.⁹⁶ Irrespective of whether the proposed changes are enacted, the responsible lending provisions in the Code need to be clarified.

As the BCCC notes, there is no explanation as to what constitutes the care and skill of a diligent and prudent banker, except to say that banks will comply with the law. The heading of Chapter 17 is 'a responsible approach to lending', and the implication is that the 'law' referred to in Clause 50 is the responsible lending obligation in the National Consumer Credit Protection Act 2009.

As noted in the ABA submission, however, if the responsible lending obligations in the National Consumer Credit Protection Act 2009 are removed, the reference to the 'law' could refer to many other pieces of existing or new legislation, such as APRA standards, general conduct obligations in the National Consumer Credit Protection Act 2009, and ASIC's powers to regulate credit.

⁹⁶ Australian Government, *National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020 Explanatory Memorandum*, registered 1 October 2020 - <https://www.legislation.gov.au/Details/F2020L01277/Explanatory%20Statement/Text>

As currently drafted, Clause 50 is not informative and is not consistent with the Code in representing a clear and readily understandable outline of the obligations banks make to their customers.

The BCCC noted that regardless of whether the responsible lending law are replaced or amended, Clause 50 should set out the principle of the protection in the legislation. In particular, a requirement for lenders to make reasonable inquiries as to the purpose of the loan, and the borrower's capacity to repay the loan without substantial hardship, to ensure that credit contracts entered into are not unsuitable.

As noted, the ABA proposed that if the responsible lending obligations in the Credit Act are removed, the reference to the 'law' in Clause 50 could be relevant APRA standards, which are legislative instruments. The applicable standard in this case – APRA Prudential Standard: Credit Risk Management (APS220). APRA has indicated that if the announced changes to the credit laws eventuate, it would add the requirement to APS220 for banks to assess an individual's capacity to repay a loan without substantial hardship and consider an individual's income, debt and expenses, and the purpose for which the borrower is seeking the loan.⁹⁷

This proposed standard provides a succinct outline of the care and skill of a diligent and prudent banker, and this should be incorporated in the Code, irrespective of whether the responsible lending obligations in the Credit Code are removed.

Lending to co-borrowers

Clause 54 provides that banks will not approve a co-borrower to a loan if in the bank's assessment, the co-borrower would not obtain a substantial benefit under the loan.

A recommendation from the Khoury Review in 2017 was that banks should make reasonable enquires about whether the co-borrower will receive a substantial benefit from the loan. In response, the ABA raised concerns with the prospect of undertaking reasonable enquiries.

What constitutes 'reasonable enquires' may be problematic. However, the current provision where banks only consider information provided in the loan application, is too limited. The protection for co-borrowers is linked with the banks commitments to assist vulnerable customers, particularly those exposed to family violence and financial abuse. As outlined in Section 13, banks should proactively seek to identify vulnerable customers from all the information available to them, and, subject to the customers approval, recoding information so to avoid the customer having to repeat providing this information on other occasions.

It would be appropriate for the bank to assess all information available to the bank in assessing whether the co-borrower is receiving a substantial benefit from the loan, and not just the information provided in the loan application.

The consumer bodies also propose that where banks should have reasonably known a co-borrower was not receiving a substantial benefit from the loan, they should be released from liability for the loan. Determining what a bank should have reasonably known would generally require an objective assessment. This would occur if a complaint was taken to AFCA.

⁹⁷ APRA, *Prudential Standard APS 220 Credit Risk Management*, published January 2021
<https://www.apra.gov.au/sites/default/files/Prudential%20Standard%20APS%20220%20Credit%20Risk%20Management.pdf>

Should a co-borrower be in financial hardship, the bank would be subject to the obligations under Part 9 of the Code.

Another proposal from the consumer organisations was that the exemptions, as to when to proceed with a loan when a co-borrower is not receiving a substantial benefit, should be limited to loans for real property. Such a restriction may be an unnecessary restraint on co-borrowers who understood the risk, who are not experiencing financial abuse, and have sound reasons to be a co-borrower.

Similarly, the consumer organisations proposal that the liability to repay a loan should be reduced to the amount of the benefit the co-borrower receives, runs counter to the fundamental basis of co-borrowing. The focus should be on ensuring co-borrowers are not under duress and understand the consequences of being joint and severally liable for a loan.

Consumer credit insurance

Chapter 18 of the Code contains the range of information banks should provide to customers when offering credit insurance.

The consumer bodies note that the clauses in the Code will likely need to be amended in line with new anti-hawking of financial product laws and deferred sales model for add-on insurance.

The consumer organisations state that the protections in Clause 64 to 66 should be applied to all sales of consumer credit insurance, not just those sold via digital channels. The rationale of limiting these clauses to digital channels is not evident.

The Royal Commission identified that consumer credit insurance can often be of poor value to the consumer. The proposal that banks commit not to sell consumer credit insurance with low claim- to- premium ratios, would help guard against low value products.

Lender mortgage insurance

The consumer bodies propose a commitment be included in the Code for banks to explain to customers that lender mortgage insurance is for the benefit of the lender and not the borrower and to work with the borrower if there is a debt shortfall. This is largely covered in the ABA's 'Lenders Mortgage Insurance-Guiding Principles.' There should be a reference to these principles in the Code.

14.5 Finding

The references in the Code to responsible lending should be clarified whether or not the Government's proposed changes to the responsible lending obligations are enacted. What constitutes the care and skill of a 'diligent and prudent banker' should be explained.

The protections in the Code dealing with co-borrowers and the sale of consumer credit insurance should be strengthened. The ABA's guiding principles for lenders mortgage insurance should be referenced in the Code.

14.6 Recommendations

- 59. Irrespective of whether announced changes to the National Consumer Credit Protection Act 2009 eventuate, the principles of responsible lending (the 'care and skill of a diligent and prudent banker'), should be set out in the Code. This should**

incorporate, consistent with the law, that the commitment for responsible lending for individuals is that banks will undertake reasonable inquiries to assess a borrower's capacity to repay the loan without substantial financial hardship and in doing so to consider the borrowers income, debt and expenses and the purpose for which the borrower is seeking the loan.

- 60. Banks should commit to assess all the information they have as to whether a co-borrower is receiving a substantial benefit under the loan.**
- 61. The protections in the Code in Clauses 64 to 66 with respect to consumer credit insurance should be applied to all sales of credit insurance and not just limited to those sold via digital channels.**
- 62. Banks should commit not to sell consumer credit insurance with low claim- to-premium ratios.**
- 63. The ABA's Lender Mortgage Insurance – Guiding Principles should be referenced in the Code.**

15. Part 6 of the Code: ‘Lending to Small Business’

15.1 Issue

The review has been asked to consider the extent to which the Code contributes to banking services being inclusive and affordable to small businesses.

15.2 Code provisions

The provisions dealing with small business are covered in various parts of the Code, with Part 6, the only part specifically applying to small business. The relevant provisions are as follows.

Part 1: How the Code Works:

- Chapter 1. States that the Code applies to individuals and small business and defines small business.

Part 5: When You Apply for a Loan:

- Chapter 17. When lending to a small business, what banks will consider in assessing whether a small business can repay.

Part 6: Lending to Small Business:

- Chapter 20. What banks tell a small business when they apply for a loan.
- Chapter 21. When banks will not enforce a loan against a small business.
- Chapter 22. Special conditions about non-monetary defaults.
- Chapter 23. When banks decide not to extend a loan.
- Chapter 24. When banks appoint external property valuers, investigative accounts and insolvency practitioners.

15.3 Stakeholder views

The Small Business and Family Enterprise Ombudsman proposed a range of additions to the Code, including:

- Commit to discharging registrations on the Personal Property Securities Register after the repayment of a loan
- Advise small businesses of the reasons a loan is not approved unless it would contravene the law to do so
- Adopt a revised definition of small business as soon as possible
- Remove the disconnect between the Chapter dedicated to small business and other parts of the Code
- Recognise the needs of small businesses may not align with those of individuals
- Regularly test automated systems for compliance with the Code

- Provide prescriptive guidance to staff to exclude small business from consumer lending obligations
- Ensure communication via post is also sent electronically by default
- Extend the commitment to not charging default interest to farmers impacted by drought to small business, and
- Offer small businesses payment facilities where 'least cost routing' is the default, unless the merchant chooses an alternative.

The NSW Business Commissioner encouraged further consideration of commitments to ensure consistent treatment of small businesses experiencing financial distress.

Consumer organisations called for a commitment that the earning capacity and viability of small businesses be considered in loan applications. To support the roll-out of 'least cost routing', the consumer bodies recommend a Code commitment that all ABA members will only issue dual network cards.

CPA Australia proposed amendments to the Code to stop banks requesting accountants to certify the ability of businesses to repay a loan. They also drew attention to delays in deciding on loan applications.

15.4 Discussion

The issues raised by stakeholders can be broadly grouped as follows:

- Clarity of application of the Code to small businesses.
- Definition of a small business.
- Approach to small business lending.
- Least cost routing.

Clarity of application of the Code to small businesses

The Code does provide small businesses with significant protections that go beyond that available in the law.

One theme that came through in the submissions and consultations was that there is a lack of clarity about which parts of the Code apply to small businesses. One comment raised in the consultations was that small business appears to be an 'afterthought' in the Code.

Part of the reason for this lack of clarity is that the dedicated part of the Code for small business – Part 6 – refers only to bank lending to small business.

In addition, while the definition section of the Code says it applies to individuals, their guarantors and small business, the thrust of the other parts of the Code appear to be mainly directed at individuals. The use of 'you' to describe the customer throughout the Code personalises it, but it may be forgotten that 'you' includes small businesses.

The discussion of Part 9 in Section 18 of the report notes that the difference in the coverage of small business in the National Consumer Credit Protection Act (which does not apply to small business lending) and the Code (which covers lending to small businesses) adds to the

confusion as to what parts of the Code apply to small businesses. As noted in Section 18, the Code needs to clarify that the hardship provisions apply to small businesses.

One stakeholder said it had written to AFCA asking for clarification on this point.

More generally, a 'reminder' could be incorporated throughout the Code that 'you' covers individuals, their guarantors and small business. For example, if each part of the Code commenced with an outline of the objective for the part (the principle), it could refer to the fact that it applies to small business as well as individuals and their guarantors.

The lack of clarity around the coverage of small business in the Code may reinforce a perception raised during the consultations that banks do not understand small business. For example, a survey conducted during consultations with around 80 members of the Institute of Certified Bookkeepers indicated that 61% of participants believed banks did not understand small business, and 18% were not sure whether they did.

The Small Business and Family Enterprise Ombudsman warned against grouping the needs of individuals and small businesses, for they may not align.

As part of recognising that the needs of small business may differ from individuals, it would be appropriate to extend Part 6 from just referring to 'lending to small business,' to cover 'providing banking services to small business'.

Such a change would recognise that a small business relationship with its bank extends beyond obtaining a loan. A small business needs a transaction account which is automated with their accounting software, merchant facilities for payment, as well as credit.

Part 6 could be renamed 'Providing Banking Services to Small Business,' and begin with a commitment that banks will help small businesses with their banking services, rather than being restricted to lending to small business. The commitment should be to assist small business with the banking services suitable for their circumstances.

Definition of small business

There were numerous calls for a change in the definition of small business. For example, the joint submission from the consumer organisations recommended that the Code's definition of small business remove the \$10 million restriction on annual turnover, and expand the total debt limit to \$5 million, rather than the existing \$3 million.

The ABA has accepted the change to the definition of small business as recommended in the Pottinger Review of the definition of small business, completed in October 2020.⁹⁸ The Pottinger Review recommended that the turnover threshold remain at \$10 million, and the credit threshold be raised from \$3 million to \$5 million.⁹⁹

An outstanding recommendation from the Pottinger Review was to amend the definition of 'related entities.' The review recommended that a refined definition should explicitly recognise unincorporated legal entities such as joint ventures, partnerships and trust structures, and treat all businesses under common control as a single group. However, Pottinger noted that legal advice was beyond its scope and would be required to reach a definitive recommendation.

⁹⁸ ABA, *ABA Response to Pottinger Review*, published 13 November 2020 - <https://www.ausbanking.org.au/wp-content/uploads/2020/11/ABA-response-to-Pottinger-Review.pdf>

⁹⁹ Pottinger, *Pottinger's Independent Review of the definition of Small Business*, <https://www.pottinger.com/sbr.html>

While the terms of reference for this review of the Code includes considering appropriate amendments to the definition of related entities, this aspect is being undertaken separately by legal experts engaged by the ABA.

In responding to the Pottinger Review, the ABA proposed to implement the main changes following the triennial review of the Code. The ABA has indicated that changes to the Code as a result of the triennial review, including the changes from the Pottinger Review, will take effect from 1 January 2023 or 6 months after ASIC approves the Code, whichever is later.

The Small Business and Family Enterprise Ombudsman proposed the changes to the definition of small business should be implemented as a priority, so that the existing small business protections in the Code can be extended to as many small businesses as possible.

While banks need time to incorporate the changes into their systems, and it will take time for a new Code to be agreed and receive ASIC approval, this should not stop ABA members introducing the changes in the definition of small business as soon as they can.

Responsible lending

Small business is concerned that the consumer protection lending provisions in the National Consumer Protection Act, have been applied by the banks to small business lending.

The responsible lending rules do not apply to lending which is predominantly for small business purposes. To fall within this exemption, a lender must undertake due diligence to confirm that the loan meets this test.

The Commercial & Asset Finance Brokers Association of Australia note that the distinction of a small business has not been clearly applied with consumer lending obligations being morphed into business lending.¹⁰⁰ They note that banks have not given sufficient attention to the purpose of the loan. For example, if a loan is for personal or lifestyle purposes, then it is a 'consumer loan'. If the loan is to be used to earn assessable capital gain or income, then it is a 'business loan'.

In response to the pandemic, the Government announced in March 2020 an exemption from responsible lending obligations for small business for six months in relation to credit extended to small business customers, provided there is an existing borrowing relationship, and some proportion of the credit is used for business purposes. This exemption has been extended. The extension no longer requires an existing borrowing relationship, but the purpose of the loan has to genuinely be for small business.¹⁰¹

The Government's Consumer Credit Reforms remove the obligation on lenders to ensure that loans issued to individuals are suitable for their customers, with the exception of small amount credit contracts. The implications of this proposed change for the Code are discussed in Section 14 of the report. While small business was not meant to be covered by the consumer protections in the National Consumer Protection Act, it appears that banks had tended to apply the same responsible lending approach to small business and individuals. While this should not be the same concern if the Government's Consumer Credit reforms are introduced, there is the possibility that banks will continue to apply the same approach to assessing lending to small businesses as they do to individuals.

¹⁰⁰ Pg.3, CAFBA, *Banking Code Review 2021*, published 30 September 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/CAFBA-Interim-Submission.pdf>

¹⁰¹ Reg 28RB, Australian Government, *National Consumer Credit Protection Regulations 2010*, registered 178 October 2021 - <https://www.legislation.gov.au/Details/F2021C01024>

As discussed in Section 14 of the report, the references to a ‘responsible approach to lending’ need to be clarified whether or not the proposed reforms are implemented. To help clarify what parts of the Code apply to small business, and to recognise there is a difference in the requirements for lending to individuals and small business, the references to small business lending in Part 5, should be shifted to Part 6 of the Code.

The submission from the Commercial & Asset Finance Brokers Association of Australia highlights the difference between personal lending and small business lending.¹⁰² A consumer loan looks backwards at history and earning, while in many respects, a business loan looks forward, with future cash flow, key contracts and other considerations being important. In addition, small business loans are more complex than mortgage and other consumer loans, they need a more customised approach and require more ongoing attention than consumer loans.

The joint submission by the consumer organisations recommended the Code specify that earning capacity and viability of a small business will be considered in loan affordability assessments.

Clause 51 says a bank’s assessment of the capacity of a small business to repay a loan, will include what is reasonably known about the financial position of the business, account conduct and the bank can rely on the resources of third parties that have a connection with the business.

There is a concern among small businesses that banks are reluctant to extend credit without real estate as collateral. CPA Australia reports that a survey of its members indicates that the experience of accessing credit over the pandemic has been mixed.¹⁰³ Some report banks have been more likely to provide unsecured finance, while others say it has been more difficult to obtain bank finance and if they do borrow, it has to be secured. Feedback also points to banks being more willing to lend if the business has a good trading history and asset backing.

Clause 49 of the Code states that when making a loan, banks have to ‘exercise the care and skill of a prudent banker’. A key aspect of exercising ‘the care and skill of a prudent banker’ is assessing whether the borrower can repay the loan. In considering the financial position of a small business and capacity to repay the loan, the bank should take into account the future forecast earnings of the business, perhaps more so than is the case for consumer lending which comes under the National Consumer Protection Act.

In further recognition that there is a difference in lending to small business and to individuals, Clause 51 should include that the bank will take into account a small business future earning potential when assessing the business’s capacity to repay.

CPA Australia expressed concern about a growing trend that banks are requesting a ‘capacity to repay certificate’ from accountants to small businesses. Relying on a third-party certification of the capacity of a small business to repay a loan would not appear to be in line with the care and skill of a prudent banker. The bank should make that assessment.

¹⁰² Pg.4, CAFBA, *Banking Code Review 2021*, published 30 September 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/10/CAFBA-Interim-Submission.pdf>

¹⁰³ Pg.2, Chartered Professional Accountants Australia, *CPA Australia submission in response to the Banking Code Review*, published 18 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-CPA-Australia.pdf>

It would be appropriate for the Code to say that while a bank may take into account the resources of a third party, a bank's approval of a loan will not depend on receiving a third party certifying the capacity of the small business to repay the loan.

Time taken to decide on loan application

Concern was raised during the consultations that it is taking longer for loans to be assessed by banks. This is also raised in the CPA submission. It notes that there are frequent last-minute requests that further delay the loan process.

Clause 72 of the Code says that in telling a small business how to apply for a loan, they will need to include the information the bank requires. And that 'after we have received the information we have requested, how long before we are likely to make a decision'.

CPA Australia suggests that consideration be given to improving this commitment by including in the Code the following:

- Banks will tell small business what their full information requirements are before the initial loan application.
- If additional information is required, the bank will make the request within 10 days of the loan application.
- A time limit for when a bank will decide on a loan.

It would not be practical to incorporate strict time limits in the Code for a decision on a loan application. The circumstances of applicants will vary and there will likely be occasions when additional information will be sought.

The preferred course would be to include in the Code a commitment that banks will advise the customer if there is likely to be a delay in the initial indication of how long it would take for the bank to take a decision, the reason for the delay, and give a revised estimate of when a decision will likely be made. The Code could also provide that if further information is required, the bank will endeavour to ensure that this will not delay the time it will take to make a decision.

Advising reason for not approving a loan

The Small Business and Family Enterprise Ombudsman has proposed that if a bank decides not to make a loan to a small business, it will clearly advise the business of the reason, unless it would contravene the law to do so.

The current wording in the Code says that the bank will tell the small business the general reason why a loan was declined 'unless it is reasonable for us not to do so'.

This is related to the issue that certain borrowers are declined banking services and is discussed in Section 13 of the report.

A problem with the Small Business Ombudsman's proposal is that if a bank did not advise the reasons why a loan was declined, it would be because it was contrary to the law to do so. As noted previously, this could lead to the bank breaching the 'tipping-off' provisions of the Anti-Money Laundering and Counter Terrorism Financing Act.

The concern was raised during the consultations that banks provide a very generic reason why a loan was declined - such as saying it was because of 'creditworthiness'.

The 'spirit' of the provision is to provide some guidance to the small business as what may be needed for the bank to reconsider the application. This is specifically included in the Canadian Banking Association small business code¹⁰⁴.

Clause 20 could be amended to say that banks will tell the small business the reason why the loan was declined, if appropriate, along with an indication of what would be needed for the application to be reconsidered.

Least cost routing

When a customer makes a contactless transaction with a merchant using a dual-network card, the payment can be routed via the least expensive option. This is 'least cost routing'.

Least cost routing allows merchants to save on fees when a customer makes an eligible tap-and-go payment.

The Payments System Board has recently completed a review of Retail Payments Regulation which covered the issue of least cost routing. The Conclusion Paper from the review was released on 22 October 2021.¹⁰⁵ In May 2021 the Payments Systems Board released a consultation paper, noting that a growing number of small and medium sized card issuers are choosing single-network cards rather than dual-network cards.¹⁰⁶ The Board was concerned that a significant reduction in dual-network cards would reduce the option of least cost routing for many merchants with an increase in the fees they have to pay.

In its consultation paper, the Payment System Board outlined proposed responses to support the continued availability of dual-network cards. It did not favour a formal regulation requiring the major banks and medium sized banks to issue dual-network cards. Its preferred approach was to set an explicit expectation of dual-network cards for the major banks. The Board was considering the merits of extending this expectation to medium sized (and possibly smaller) issuers. The issue was whether the economy-wide benefits from such a requirement on medium or smaller issuers would outweigh the costs that would be imposed on these issuers.

The Payments System Board decided on several policy actions dealing with dual-network debit cards and least-cost routing of debit transactions. A number of the measures are aimed at reducing the cost to small and medium-sized merchants of accepting card payments. One of the new policy measures is that all debit card issuers with more than 1% of the total value of debit transactions will be expected to continue issuing dual-network cards. Based on 2020 data, this would extend the initial position that this requirement would apply to the major banks and would include eight banks which together account for around 90 per cent of all debit card transactions.

¹⁰⁴ Canadian Bankers Association, *Model Code of Conduct for Bank Relations with Small and Medium-Sized Businesses*, published 11 February 2021 - <https://cba.ca/small-business-banking-code-of-conduct>

¹⁰⁵ Reserve Bank of Australia, *Review of Retail Payments Regulation*, published 22 October 2021 - <https://www.rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/conclusions-paper-202110/index.html>

¹⁰⁶ Pg. 1, Reserve Bank of Australia, *Review of Retail Payments Regulation Consultation Paper May 2021* - <https://www.rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/consultation-paper-202105/pdf/review-of-retail-payments-regulation-consultation-paper-202105.pdf>

15.5 Finding

Given the Payments System Board's recent review of Retail Payments Regulation which covers the issue of least cost routing, there does not appear to be a need for this issue to be covered in the Code

The Code provides small businesses with protections that go beyond the law. But greater clarity is needed about which provisions in the Code apply to small business, as well as the Code recognising that the banking needs of small businesses do differ from those for individuals. The failure to do so adds to perceptions that banks do not understand small business.

15.6 Recommendations

64. **Part 6 should be extended from referring to 'lending to small business' to cover 'providing banking services to small business'. The first commitment in this part should be for banks to assist small businesses with their banking services that are suitable to their circumstances.**
65. **While it will take time to incorporate the Pottinger Review recommended changes to the definition of small business in a revised Code following the triennial review, ABA banks should commit to introduce the changes as soon as possible.**
66. **To help clarify what parts of the Code apply to small business, and to recognise there is a difference in the requirements for lending to small business and lending to individuals, the references to small business lending in Part 5 should be shifted to Part 6 of the Code.**
67. **The Code should specify that future earning capacity is taken into account when assessing a small business's capacity to repay a loan.**
68. **The Code should clarify that a bank's approval of a small business loan will not be dependent on a third party (such as the small business's accountant) certifying the capacity of the small business to repay the loan.**
69. **Banks should advise a small business if there is likely to be a delay in the initial indication of how long it would take for a decision, the reason for the delay, and give a revised estimate when a decision is likely.**
70. **Banks should commit that if they require additional information when considering a loan application, they will endeavour to ensure that this does not delay the time it will take for the bank to make a decision.**

- 71. Banks should commit to tell small business the reason, if appropriate, as to why a loan was declined, along with what would be needed for the application to be reconsidered.**
- 72. Given the Payments System Board's recent review of Retail Payments Regulation which covers the issue of least cost routing, there does not appear to be a need for this issue to be covered in the Code.**

16. Part 7 of the Code: 'Guaranteeing a loan'

16.1 Issue

To assess the effectiveness of the provisions relating to the protections for guarantors and whether they meet consumer and community expectations.

16.2 Code Provisions

Part 7 consists of the following chapters:

- Chapter 25. Limitation of liability before a guarantee is accepted and during the guarantee.
- Chapter 26. Outlines what information and documentation that is provided to the guarantor by banks before the guarantee and during the guarantee. Also outlines the circumstances for extending a guarantee.
- Chapter 27. Explains how a bank will accept a guarantee and circumstances of execution of the guarantee documentation.
- Chapter 28. Covers guarantors' rights to withdraw or end a guarantee.
- Chapter 29. Details the banks response when required to enforce a guarantee.

16.3 Stakeholder views

The issues raised by stakeholders can be broadly grouped into:

- Protecting vulnerable guarantors.
- Information provided to guarantors.

Protecting vulnerable guarantors

The combined submission from consumer groups focused on the risk for vulnerable people who act as guarantors. They proposed a number of additional protections for guarantors, particularly aimed at avoiding financial abuse of guarantors, and the enforcement of the guarantee causing financial hardship. Some of the protections included:

- Introduce a requirement for a suitability assessment before a bank accepts a guarantee.
- Banks take reasonable steps to be satisfied the guarantor is not exposed to financial abuse.
- A commitment that banks will not force a guarantor to sell their principal place of residence to repay a loan, and instead allow the guarantor to retain an interest in the property or repay with an interest free loan.
- Remove the exemptions for sole director and trustee guarantors if they have a personal relationship or are family members of the borrower.

WEstjustice proposed that a provision be introduced that the bank will not approve a loan if it becomes apparent that the person is being forced or coerced to sign a guarantee. It also called for banks to do a suitability assessment and notify the guarantor that had they been applying for the loan in their own right that their application would have been rejected.

Dentons law firm requested guidance on the intended meaning of some clauses in Part 7.

Information provided to guarantors

The BCCC recently published a report on its inquiry into bank compliance with Part 7.¹⁰⁷ The inquiry found that, largely based on the four banks audited, banks failed to consistently provide full disclosure of key information to guarantors and had poor record keeping. The BCCC's report contains 23 recommendations covering best practice for banks to comply with the Code and improve the provision of information to guarantors.

The BCCC recommended that banks should make prospective guarantors aware the transaction is covered by the Code. It also proposed that the information given to guarantors should be tailored to better suit the needs of some people, such as non-English speakers.

The consumer groups proposed that during the guarantee approval process, banks should obtain all necessary consent from the principal borrower and all the information the bank has on the borrower, including the responsibility suitability assessment. They also propose that banks should tell prospective guarantors the potential impact that acting as a guarantor may have on Centrelink payments and health and aged- care choices.

16.4 Discussion

The BCCC report on Part 7 of the Code identified that the value of credit supported by guarantees has been over \$500 billion a year since 2016-17. The value of consumer credit supported by guarantees was over \$400 billion per year. The provision of guarantees is significant in supporting the flow of credit, and as such is an important aspect of the Australian economy.

The BCCC also noted in their report, however, that the Royal Commission heard submissions from individuals and consumer groups about significant financial and non-financial harm experienced by guarantors. There were cases where guarantors were not told by the bank about extensions of business facilities for which they were providing security. There were also instances where guarantees were taken from guarantors who claimed not to have understood the effect of the guarantee or their waiver of independent legal advice.

The consumer groups note that guarantees are the banking arrangements that pose the greatest risk for vulnerable people acting as guarantors. They say that due to responsible lending obligations, guarantees are effectively the only situation where a person can legally commit to a loan that may force them to sell their principal place of residence, even if there is no material change in their own circumstances. They also note that financial counsellors regularly see guarantors who did not have a true understanding of the financial risk they were assuming. In addition, they point to a link between guarantees and elder financial abuse.

¹⁰⁷ BCCC, *BCCC Inquiry Report: Banks' compliance with the Banking Code's guarantee obligations*, published 11 August 2021 - <https://bankingcode.org.au/resources/bccc-inquiry-report-banks-compliance-with-the-banking-codes-guarantee-obligations/>

The approach taken in the Code to protect guarantors, which goes beyond the protections in the National Consumer Credit Act, is essentially based on the provision of information before, and during the guarantee. The objective is to alert the prospective guarantor of the financial risks, including advising the prospective guarantor to seek independent legal and financial advice. Information provided by the bank to the prospective guarantor includes any notice of demands on the borrower, any related credit report, and relevant financial accounts the borrower has given the bank.

During the guarantee, the Code commits the bank to provide information to the guarantor about a borrower's deteriorating financial position as it relates to the loan. The bank will not accept the guarantee until three days after the guarantor has been given the information outlined in the Code, except in certain circumstances.

The consumer bodies highlight that the BCCC's recent report indicated a concerning lack of compliance by banks in terms of their commitments with respect to guarantees in the Code. As noted, they are particularly concerned about vulnerable people and those not having a true understanding of the risks of becoming a guarantor and losing their home.

The operation of the Code needs to be strengthened, particularly with respect to vulnerable people, and making prospective guarantors aware of the risks involved in providing a guarantee.

The approach advocated by the consumer groups focuses on the banks assessing the suitability of the prospective guarantor in terms of capacity to pay the loan if the guarantee is enforced and a commitment by the banks that they will not force any guarantor to sell their principal place of residence.

An alternative approach to boosting the protection for guarantors is to improve the information given to guarantors and bank's compliance with the Code, along the lines of the recommendations in the recent BCCC Inquiry Report on guarantees.

Protecting vulnerable guarantors

The consumer bodies propose a requirement of a suitability assessment – along the lines of the responsible lending obligations – and a commitment by the banks that a guarantee should not be accepted if repayment of the loan by the guarantor would cause them financial hardship. A guarantor takes on a contingent liability, and the obligation to pay the loan depending on whether there is a default by the borrower.

The hardship that concerns the consumer bodies is that the guarantor may be required to sell their principal place of residence. This is concerning if the guarantor is a victim of financial abuse and has not knowingly or willingly entered the guarantee. However, the guarantor may well understand the risks involved, including that if the guarantee is enforced, it may require the sale of the principal residence, but for a variety of reasons this is a risk the guarantor willingly takes.

To protect vulnerable customers, the consumer groups also call for a commitment that banks will not force any guarantor to sell their principal place of residence to pay a loan. Instead, banks should either allow the guarantor to retain a life interest in their principal place of residence or allow them to repay the loan interest-free. This protection is for any guarantor, not just those deemed vulnerable.

The downside of this approach is that it may significantly deter banks from accepting guarantees in support of a loan and in turn deter the provision of credit. For example, in the current housing market there is likely to have been an increase in parents guaranteeing loans for their children to buy their first home. Parents may willingly provide the guarantee, knowing the risks involved. If there are constraints on a bank's ability to enforce guarantees, this could have a detrimental effect on borrowers and the economy more generally.

Some of the other proposals by the consumer groups, such as removing the exemptions for sole director and trustee guarantors if they have a personal relationship, or are family members of the borrower, are designed to prevent financial abuse, particularly from family members. However, this may capture situations where there is no coercion. A balanced approach is required.

The consumer bodies called for the removal of the exemption for a three-day gap between the provision of the information covered in the Code and the acceptance of the guarantee where the guarantor obtains independent legal advice. This would delay transactions where the guarantor is fully aware of the risks associated with the guarantee. Moreover, the comment was raised that some guarantors are frustrated with the delay resulting in having to wait three days before the guarantee can be accepted.

Providing information to guarantors

As noted, an alternative approach to protecting guarantors is to strengthen the information requirements under the Code and improve bank compliance.

The BCCC has proposed several recommendations to improve bank compliance with the Code, particularly the requirement to provide key disclosure information to prospective guarantors. This includes improved staff training and improved systems to ensure that the Code obligations have been met. For example, it suggests banks build the information requirements in Clauses 97 and 99 into the design of their processes and systems to help staff comply.

The BCCC also says banks should audit compliance with the Code's guarantee obligations. This is consistent with the review's recommendation that banks should commit to have the systems and process in place to support compliance with the Code and periodically audit the effectiveness of these systems.

To protect vulnerable guarantors, the banks could enhance their efforts to identify such people, particularly situations of financial abuse, consistent with the recommendations for improving Part 4 of the Code outlined in Section 13 of the report. This is consistent with the recommendation in the BCCC Inquiry report that banks' processes, systems, and technology should enhance staff capability to:

- 'Identify vulnerable guarantors who may require additional support to understand the guarantee information provided.
- Tailor their approach to disclosing the matters contained in clause 96 of the Code in meaningful and accessible way to suit the individual.

- Keep contemporaneous records about any indicators identified and any additional care taken to give the pre-contractual disclosures.’¹⁰⁸

The BCCC also note that where possible, banks should meet face-to-face with the prospective guarantor. This would provide the opportunity to explain the information that has been provided to the prospective guarantor, and to assess whether the risks involved are understood. It would be particularly appropriate for the bank to meet with the prospective guarantor if they have not sought independent legal or financial advice.

The banks’ processes for the enforcement of a guarantee can also be improved. As the BCCC suggested, banks should conduct pre-enforcement reviews of a guarantee to ensure that it has been obtained in accordance with the Code, before commencing enforcement action. As the BCCC has noted, banks are at risk if they fail to comply with the Code. AFCA can consider complaints from guarantors and may decide that the bank cannot rely on the guarantee if it finds it did not meet its Code obligations to the guarantor.

WEjustice proposed that the Code should specify that a guarantor cannot be enforced unless the bank complied with the pre-execution or post-execution requirements. This would be extreme if only a very minor aspect of requirements was not followed.

The BCCC also emphasised that the banks have to strengthen their data capability by collecting guarantor outcome data, such as enforcement and complaints data. This is to gain insights into guarantee trends, compliance risks, and customer outcomes for continuous improvement across the guarantee process.

The BCCC recommended that banks should negotiate alternative debt recovery options with the primary borrower before enforcing a guarantee, in order to embed a culture where enforcement is a last resort. This could be extended that if the guarantee is enforced, the bank should explore all alternative options before a guarantor is forced to sell their principal place of residence.

Clause 60 of the Code states that guarantors facing financial difficulty, should contact the bank as soon as possible to discuss options. As the BCCC submission notes, there is no reference to options open to the guarantor. It would be appropriate for the Code to indicate the options that may be available, such as refinancing the loan in the guarantor’s name

16.5 Finding

The guarantee provisions should be strengthened, particularly to protect vulnerable guarantors. But a balance has to be achieved between protecting vulnerable guarantors and not impeding the important role of guarantees in supporting the flow of credit. Measures aimed at supporting vulnerable guarantors by impeding the ability of banks to enforce all guarantees, including those where the guarantor has knowingly and willingly entered the guarantee, may deter banks from lending with the support of a guarantee. This would have a detrimental impact on the borrowers and on the economy.

The preferred approach is to improve the information flows to prospective guarantors, enhance efforts at identifying vulnerable guarantors and improve banks compliance with their obligations under the Code.

¹⁰⁸ Pg.7, BCCC, *BCCC Inquiry Report: Banks’ compliance with the Banking Code’s guarantee obligations*, published 11 August 2021 - <https://bankingcode.org.au/resources/bccc-inquiry-report-banks-compliance-with-the-banking-codes-guarantee-obligations/>

16.6 Recommendations

- 73. Consistent with Recommendation 8, banks should commit to periodically audit the effectiveness of their processes and systems to support compliance with the guarantee provisions under the Code.**
- 74. Banks should commit to proactively identify guarantors who may require additional support to understand the guarantee information provided to them.**
- 75. Banks should commit to tailoring their approach to provide the information required to be given to the guarantor in a meaningful and accessible way to suit the needs of the guarantor, including where the guarantor's first language is not English.**
- 76. Banks should commit to maintain records of any indicators that a guarantor may be vulnerable.**
- 77. Banks should commit, unless impractical to do so, to meet face-to-face, video conference or other means with the guarantor before accepting the guarantee, and particularly where the guarantor has not sought independent legal or financial advice. Banks should meet with the guarantor without the borrower being present.**
- 78. Banks should commit to conducting a pre-enforcement review of a guarantee to ensure that it has been obtained in accordance with the Code before commencing enforcement action.**
- 79. Banks should commit to explore all alternative options with a guarantor before a guarantor is forced to sell their principal place of residence.**

17. Part 8 of the Code: ‘Managing your account’

17.1 Issue

To assess the effectiveness of the provisions in the Code dealing with managing a bank account and whether they are in line with customer and community expectations.

17.2 Code provisions

Part 8 consists of the following chapters:

- Chapter 30. What a customer should do to keep accounts safe and secure.
- Chapter 31. Statements banks will give customers.
- Chapter 32. What banks will tell customers about the cost of transaction service fees.
- Chapter 33. Managing a credit card or debit card.
- Chapter 34. Cancelling direct debits and recurring payments.
- Chapter 35. How to use a joint account.
- Chapter 36. Closing banks services.
- Chapter 37. Customers rights for certain documents.
- Chapter 38. What banks will tell customers when they change their banking services.

17.3 Stakeholder views

The main issue raised was with respect to the cancellation of direct debits and recurring payments. In addition, issues were raised around cancelling credit cards, bank fees, and account statements.

Cancelling direct debits and recurring payments

The joint submission from the consumer bodies called for the recommendations from the 2017 review of the Code regarding cancelling direct debits and recurring payments be implemented.

Cancelling credit cards

Consumer bodies said Clause 144 should be amended such that where a credit card is cancelled by the bank, there should be a commitment to tell the customer why, unless it is prevented by law.

Bank fees

The consumer groups called on the ABA to include in the Code the commitments in the Customer Owned Banking Association Code, including:

- Regularly reviewing fees and charges.

- Ensuring fixed loan break fees are reasonable.
- Making interest rates and fees publicly available.
- Explaining how interest rates are calculated, as requested.

The consumer organisations called for a commitment to set loan default fees that are reasonable having regard to the loss incurred.

Account statements

The consumer bodies called for the ABA to include the same commitments as in the Customer Owned Banking code regarding the information given in bank accounts.

17.4 Discussion

Cancelling direct debits and recurring payments

The joint submission from the consumer organisations says the ABA failed to deliver on the 2017 review recommendations to build functionality and processes to enable banks to carry out customer requests to cancel credit card recurring payments. They noted that being unable to cancel direct debits can have a significant impact on the financial wellbeing of individuals.

The consumer bodies recommended that the Code include commitments in the recent update of the Customer Owned Banking Code Association's code for banks to provide clear, simple guidance on their websites about the difference between direct debits and credit card recurring payments, as well as how to cancel both.

The ABA noted in its submission that while banks and credit card scheme companies have streamlined the process for cancelling payments, further changes will require banks and card schemes to make significant and expensive changes to technology and payments processing. The ABA's understanding is that some of the proposed changes to assist companies will be facilitated by new technologies, such as the mandated payments service on the New Payments Platform.

The BCCC released a report in September 2021 on the banks' compliance with the commitments in the Code regarding the cancellation of direct debits (see Figure 3).¹⁰⁹ The BCCC undertook mystery shopping exercises to assess bank compliance and reported a significant improvement on its previous mystery shopping exercises.

In the latest exercise, 71% of banks complied with the commitments compared with a compliance rate of 44% in November 2018. The most common reason for non-compliance was bank staff telling customers that the direct debit should be cancelled with the merchant.

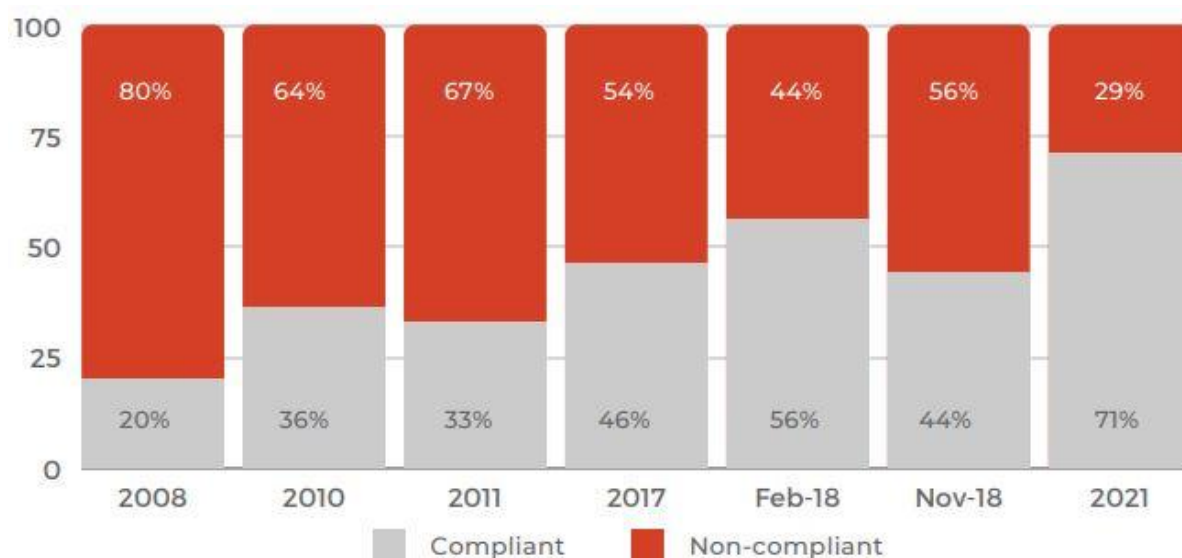
While improving, a compliance rate of 71% is still too low.

As the consumer organisations highlight, the inability of customers to readily cancel a direct debit can cause them significant distress. In the case of direct debits, improving compliance with the Code commitments is in the hands of the banks. As noted, the main reason for non-

¹⁰⁹ Pg.6, BCCC, *BCCC compliance update: Cancellation of Direct debits*, published September 2021 - <https://bankingcode.org.au/app/uploads/2021/09/BCCC-compliance-update-cancellation-of-direct-debits-September-2021.pdf>

compliance is bank staff giving customers the wrong information. The BCCC report has a series of recommendations about what banks can do to improve compliance.

Figure 3: Industry compliance rates 2008-2021



Source: BCCC compliance update: Cancellation of direct debits September 2021

When it comes to cancelling credit card recurring payments, there are technological and system limitations, which the ABA highlights are difficult and expensive to overcome. The consumer bodies are not impressed with the response that it will be expensive for the banks to introduce arrangements to cancel credit card recurring payments at the customer's direction. They point out that it is unreasonable for banks to earn interchange fees from these payments but are not prepared to fund the investment to switch them off.

The ABA acknowledges that this issue continues to cause frustration for customers. But it is evident from its submission that it is looking for technological solutions, such as the mandated payments service on the New Payments Platform that has been launched by the RBA to help resolve this issue. A recommendation from this review that repeats one from the 2017 review will not change things.

One thing the banks should do is give customers clear guidance as to how they can cancel a direct debit and a recurring payment. A disturbing aspect of the BCCC's recent report on direct debits is that some bank staff did not know the difference between direct debits and recurring payments.

A recommendation from a 2017 review of banks' performance of cancelling direct debits by the CCMC, was that banks should have clear, simple customer guidance on direct debit cancellation on their websites.

The BCCC's review of information available on websites shows that it varies in quality, with some having no or little information. The National Australia Bank was singled out as having useful information, including an explanation of the difference between a direct debit and a recurring payment.

The usefulness of the information on the website could be extended if it also advised that to cancel a recurring credit card payment the customer should advise the firm involved, check their statements to make sure the payment is cancelled, and if not, advise their bank that it is a disputed credit card transaction. This should be included on all bank websites and bank staff should be able to give advice to customers as to how to cancel both direct debits and recurring card payments.

Cancelling credit cards

The consumer bodies refer to a recommendation from the 2017 review that banks should explain the reason for cancelling credit cards and should not enforce credit facilities against individuals or small businesses borrowers for non-monetary defaults, with limited exceptions.

Clause 144 says that if a bank cancels a customer's credit card it will tell the customer and, if appropriate, give the customer the general reasons for doing so. As noted in section 13, some people are concerned that they are inappropriately refused banking services or have their banking services cancelled. The proviso that banks will tell the reason for cancelling a credit card 'if appropriate' is to allow for such situations where a customer is suspected of engaging in money laundering and banks have a legislative obligation not to 'tip off' the customer. However, a concern raised with the review is that banks are making assumptions without appreciating the circumstances of the borrower.

As noted in Section 13, a customer should not be denied banking services, or have an account closed, without the bank raising it with the customer and giving the customer an opportunity to respond. This should also apply to the cancellation of credit cards.

Consumer groups called for the provisions in the Code regarding non-monetary defaults for small businesses be extended to individuals. Little justification was provided as to why this was necessary.

Bank fees

The consumer groups said they would like to see the provisions in the Customer Owned Banking Association code regarding fees matched in the Code. These provisions refer to regularly reviewing fees, ensuring fixed rate loan break fees are reasonable, making interest rates and fees for products publicly available, and on request, explaining how interest rates are calculated.

These matters are straightforward and should not be an issue for the banks. But as noted in Section 8, there is an issue of how much detail goes into the Code or whether it should focus on more significant aspects of the relationship between banks and their customer.

The consumer organisations also called for a commitment by Code subscribers to set loan default fees that are reasonable having regard to the loss incurred. This is an area which could have a significant detrimental impact on customers and as the consumer groups note, banks should not be profiting from default fees.

The 2017 review contained a recommendation that banks should set reasonable default fees' Although the ABA response was that it needed further time to consider the recommendation, particularly with respect to competition laws and any potential regulatory approval that may be required. The consumer organisations noted that the updated

Customer Owned Banking Association code has an equivalent clause, hence the regulatory issues raised by the ABA's initial response were not a barrier.

It may not be straight forward, however, specifying what constitutes a 'reasonable default fee having regard to the loss incurred'.

A 2015 High Court decision, *Paciocco v Australia and New Zealand Banking Group Limited*, affirmed that late fees for credit card payments were not a penalty and were enforceable in accordance with their terms.¹¹⁰ The case specifically involved whether the bank's late fees could be higher than the bank's costs incurred as a result of customers' late payments. The court endorsed that late fees can be imposed as incentive for customers to perform their contractual obligations. Most electricity, water and gas utilities charge fees for late payment of invoices in order to encourage payment on time.

The High Court identified that the commercial interests of the bank in receiving payment on time, covered costs that would be too remote to be recoverable as damages. However, it said that these costs ought to be taken into account to determine whether the late payment fee could be said to be 'out of all proportion' to the legitimate commercial interest the bank has in ensuring that its customers made their payments on time. It would be appropriate for the Code to advise customers that default or late payment fees will be 'reasonable'. Saying that the fee may be reasonable 'having regard to the loss incurred', may suggest that the default fee has to be commensurate to what can be recoverable as damages. The wording should recognise that banks have a commercial interest in encouraging payments on time, one that goes beyond losses recoverable as damages.

It is suggested that the Code state that bank late payment fees will be reasonable having regard to all costs associated with customers not meeting their payments on time. The costs to the bank of late payment would include recovery of collection costs, along with increased operational costs, the need for loss provisioning and increases in regulatory capital costs. This is an area that would be difficult to monitor, but AFCA may be called upon to consider whether a late payment fee was 'fair' or 'reasonable' in the circumstances.

Account statements

The consumer bodies have called on the ABA to include in the Code the same provisions regarding account statements that are in the Customer Owned Banking Association Code regarding the information given in account statements. These include:

- Ensuring statements show unbundled fee amounts, as well as indicating the impact of any free limits or rebate schemes.
- Commit to free and simple methods of accessing account balances.
- Clearly disclosing when account statements will only be available electronically.
- Ensuring that customers can save or print information provided to them electronically.

The consumer bodies note that while these are not ground-breaking commitments, they are easy for the banks to meet and important for transparency. As noted previously, there is

¹¹⁰ *Paciocco v Australia and New Zealand Banking Group Limited*. 8 April 2015. https://www.hcourt.gov.au/cases/case_m219-2015

an issue about the level of detail to include in the Code and whether it should focus on the significant aspects of the bank-customer relationship.

17.5 Finding

Banks are improving in meeting their commitments regarding the cancellation of direct debits. But they need to continue to improve. This is an area the BCCC will need to closely monitor. Banks are clearly relying on technological improvements to resolve customer frustrations over difficulties in cancelling recurring payments. But what they can do now is provide clear and simple guidance to customers on their websites and in person on what they need to do to cancel recurring payments.

17.6 Recommendations

- 80. Banks should commit to provide clear, simple advice to customers, both on their websites and in person, as to how to cancel direct debits and recurring payments.**
- 81. Clause 144 should be extended to state that if a bank is going to cancel a credit card it will offer to discuss this with the customer, and if appropriate, give the customer the general reason for doing so.**
- 82. The Code should state that loan default fees and late payments fees will be reasonable having regard to all costs to the bank associated with customers not meeting their repayments on time.**

18. Part 9 of the Code: 'When things go wrong'

18.1 Issue

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

The review has also been asked to assess the effectiveness of the provisions for banks to support customers during crises such as the COVID 19 pandemic (drawing lessons learned from any consequent impact on banks' ability to comply with the Code and having regard to the utility of the COVID 19 Special Note).

18.2 Code provisions

Part 9 consists of the following chapters:

- Chapter 39. Defines financial difficulties and encourages customers to contact their bank if experiencing financial difficulty.
- Chapter 40. Banks may contact customers if they think they are experiencing financial difficulty.
- Chapter 41. Banks will work with customers to help them respond to financial difficulty, and what they will consider when deciding on assistance options.
- Chapter 42. Banks will tell customers if they report default activity to credit reporting agency; they will not charge farmers default interest during drought or natural disaster.
- Chapter 43. What banks will do when recovering a debt.
- Chapter 44. Banks will inform customers if they combine or set-off customer's accounts'.
- Chapter 45. Dealing with deceased estates.

18.3 Stakeholder views

The issues raised by stakeholders can be broadly grouped as follows:

- Inconsistency of the banks in implementing hardship provisions of the Code.
- Communication with customers.
- Response to the COVID-19 pandemic by the banks.
- Collection and sale of debt.
- Terminology.
- Deceased estates.

Inconsistency of the banks in implementing hardship provisions of the Code

The consumer groups noted the Code contains some strong commitments to provide consumers with hardship assistance, but there are differences within and between banks in the way assistance is offered and provided.¹¹¹ This can be a result of systems and procedures, as well as internal bank staff being inadequately trained to identify and resolve customer issues relating to financial hardship queries.

The consumer bodies said good outcomes for consumers appear to be based in part, on chance – particularly for customers who are not assisted by financial counsellors or lawyers.

The BCCC said its recent compliance report found banks' monitoring frameworks were well structured with banks employing a range of methods to identify instances of non-compliance with the Code obligations dealing with financial hardship.

The ABA observed it frequently receives feedback from consumer advocates that they would like other industries to offer the same level of financial difficulty assistance that the banking industry offers.

Communication with Customers

Groups representing Aboriginal and Torres Strait Islander people highlighted that there is often a gap in cultural awareness for Aboriginal and Torres Strait Islander people in accessing banking services, especially in remote and regional areas. These communities were described as less likely to interact with their bank when experiencing financial hardship, especially where they lived in locations with limited access to a bank branch.

Financial counsellors have reported that people do not often understand the full and real impact of the assistance that is provided to them.¹¹² Additionally, there is a view that banks should be more transparent about the circumstances they will consider when providing financial assistance, and should commit to publishing this information on their websites.

Consumer Groups supported making more hardship information readily available and proposed that the commitment in Clause 168 be amended to making: 'suitable, accessible and comprehensive information on financial hardship assistance prominent and easily identifiable on banks websites, in branches and periodically on account statements'.¹¹³

The ABA said the industry believes the available information is easily identifiable, accessible and comprehensive, however it recognised that improvements can be made to marginalised groups, such as customers with lower financial literacy and customers with limited English. The ABA supported the Code be expanded to cover customers who believe they will soon be unable to meet their financial commitments.

The consumer bodies called for an expansion of the table in Chapter 41 of the Code that provides examples of how banks may help people in financial hardship. They proposed including:

- waiving fees

¹¹¹ Pg.31, Joint Consumer Organisations, 2021 *Review of the Australian Banking Association Code of Practice*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

¹¹² Pg.33, Joint Consumer Organisations, 2021 *Review of the Australian Banking Association Code of Practice*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

¹¹³ Pg.33, Joint Consumer Organisations, 2021 *Review of the Australian Banking Association Code of Practice*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

- reducing interest rates
- capitalising interest owned, and
- entering a payment arrangement with a savings buffer.

The ABA said the table in Chapter 41 is clear and comprehensive and that prescribing further protections would limit a bank's ability to be flexible with each customer.

The consumer bodies noted that there were temporary branch closures during the pandemic and that banks should commit to identifying customers who rely on in-person banking and contact them to resolve any pressing issues. They should also show leniency with contractual obligations for those who rely on in-person banking.

Response to the COVID-19 pandemic by the banks

The joint submission by consumer organisations acknowledged that banks in the early stages of the COVID-19 pandemic were proactive in sharing the message that assistance was available if required. They also noted there was a substantial effort by the banks to provide relief for mortgagees and other borrowers. However, the consumer representatives said financial counsellors are receiving complaints from customers who have been informed by their banks that the financial relief is no longer available and that they would be required to pay all deferred loan repayments upfront.

The ABA reported that as a result of COVID-19, it developed the 'financial assistance hub' that allowed banks to better communicate to retail, small business and agribusiness customers on what options are available to them when they can't make repayments.¹¹⁴

WEstjustice proposed that the Code directly recognise the impact on hardship of natural disasters, pandemics, and emergencies.

Collection and sale of debt

The consumer organisations said debt collection practices continue to cause significant harm to people facing financial hardship. They acknowledged the ABA has, in consultation with consumer advocates, developed the 'Sale of Debt Guideline'¹¹⁵, but its impact is limited because it is voluntary.

The consumer bodies recommended that banks commit not to sell unsecured debts of vulnerable customers or where the customer meets the criteria laid out in page 3 of the Sale of Debt Guideline.¹¹⁶ If unsecured debts are sold, it is recommended that they only be sold to firms who are members of AFCA, and provide training to all collection staff on how to deal with customers who are experiencing vulnerability. The consumer bodies also called for a Code commitment to inform customers of their key rights, and restrictions that apply to debt collection, under relevant guidelines and laws.

In addition, the consumer groups say banks should commit to monitor the impact of the conduct of debt collectors, based on the ABA Sale of Debt Guideline.

¹¹⁴ ABA, *Get assistance now Financial Assistance Hub* - <https://www.ausbanking.org.au/assistance/>

¹¹⁵ ABA, *Industry Guideline: Sale of unsecured debt*, commences 1 March 2020 - <https://www.ausbanking.org.au/wp-content/uploads/2019/11/Industry-Guideline-on-the-Sale-of-Unsecured-Debt-November-2019.pdf>

¹¹⁶ '...Elderly, suffering from a form of financial abuse, homeless, terminally ill or has a serious disability or mental illness.'

They also call on banks to make a term of all contracts for the sale of debt under \$20,000 that the debt buyer will not commence bankruptcy proceedings to recover the debt, and will require debt buyers to consult with the bank before commencing bankruptcy proceedings.

In response to proposals that the additional safeguards for consumers contained in the ABA Industry Guideline: The Sale of Unsecured Debt, the ABA supports maintaining the distinction between the Code and industry guidelines. However, it acknowledges that there are components where industry guidelines can be incorporated into the Code.

Terminology

The consumer bodies noted that the terms ‘financial difficulty’ and ‘financial hardship’ are interchanged throughout the Code. They say this may cause confusion. They recommend the Code consistently refer to ‘financial hardship’, unless there is a good reason otherwise.

The Australian Collectors and Debt Buyers Association submission said there is no uniform definition of ‘hardship’ across industry so there are often disagreements around the technical elements of the debt. This includes the ability to meet requirements, the percentage of household income that is disposable, and the difference between long- and short-term hardship.

Deceased Estates

The Law Council identified several potential gaps in Chapter 45 with respect to dealings with deceased estates. It proposes several pages of detailed drafting to correct these gaps.

The ABA acknowledges there is scope to consider introducing greater clarity on the deceased estate process, including where the deceased estate has operated a business.

The BCCC states in its 2021-22 Business Plan that it will be undertaking a targeted inquiry into the Code provisions dealing with deceased estates.¹¹⁷

18.4 Discussion

Inconsistency of the banks in implementing hardship provisions of the Code

Consumer advocates claim that through their involvement, they are often able to achieve better outcomes for customers facing financial hardship. Banks question this claim, however if it is true, it indicates that there will be differences between customers in terms of their access to hardship assistance.

This is not surprising, given the asymmetry of knowledge about what assistance is available and how to access it between customers and financial counsellors and consumer lawyers.

One approach to dealing with this is to improve consumers access to information about hardship assistance. This is appropriate, but banks should also be proactive in advising customers who can help them. Clause 176 says if a customer asks, the bank will refer them to a financial counselling organisation that may be able to help.

It goes on to say that banks may recommend on their own initiative that a customer seek independent help. Rather than leaving the initiative to the customer or the bank to seek

¹¹⁷ Page 2 BCCC 2021-22 Business Plan, 28 June 2021 <https://bankingcode.org.au/app/uploads/2021/06/BCCC-2021-22-Business-Plan.pdf>.

independent help, it would be appropriate if in all situations the bank advised the customer that independent help is available.

Improvements in banks' systems and staff training around the provision of hardship assistance would also contribute to greater consistency in a banks approach to the implementation of the provisions in the Code. The recommendation in Section 7 of the report, that there should be a provision in the Code for banks to have in place an appropriate framework for implementing Code commitments which is regularly audited, would contribute to greater consistency in consumer access to hardship assistance within banks.

Communication with customers

The ABA noted the extensive public campaigns that it, and the banks, have launched to advise people of the assistance available to customers facing financial difficulty. However, the consumer bodies note that a greater focus should be on ensuring that the forms of hardship assistance are better explained to customers. Financial counsellors report people don't often understand the full impact of the hardship options, such that the capitalisation of interest under a loan deferral will increase the overall cost of the loan.

Customers would also likely be in a better position when approaching their bank seeking financial assistance if they had some understanding of the types of information banks may consider when deciding whether to help someone in financial hardship. But such guidance should not be exhaustive.

There is also a broader issue that banks need to improve their communication to various groups, such as Aboriginal and Torres Strait Islander peoples, those with limited English and low financial literacy.

As discussed in other parts of this report, banks need to be more proactive in cultural awareness training to better understand the circumstances of particular groups, facilitate access to interpreters, provide information translated into other languages, along with simpler versions of information, such as the use of Easy English versions. There is also the issue, as discussed in Section 11 of the report, of supporting customers who relied on face-to-face banking when branches close.

The ABA agreed that there may be some confusion as to whether small businesses are covered under Part 9, particularly because of differences in coverage between the National Credit Code and the Code. Small businesses are not covered by the National Credit Code.

Adding to the confusion may be that Part 9 appears directed at individuals while lending to small business and the circumstances when banks will not enforce a loan is covered in Part 6. The ABA agrees that the language in the Code needs to be updated to ensure customers understand who is covered by Part 9.

It would also be appropriate for customers to be aware of their rights when seeking hardship assistance. This could involve telling them that they have rights, and that these are in the Code. The ABA response is that customers should be advised of their rights with respect to financial hardship under the National Credit Code.

Recognising that customers' capacity to absorb information at a stressful time may be limited, this may best be achieved by advising customers where they can get this

information, such as online or by the bank sending the information to the customer, or by contacting a financial counsellor.

The recommendation in Section 6 is relevant in this regard, that separate to the Code, there should be a consumer friendly and readily accessible document highlighting that consumers have rights in their dealings with banks. It should also indicate that the detail of their rights is in the Code

WEstjustice proposes two amendments to the assistance that banks can provide, which appear appropriate. Clause 172 says banks may reduce or waive a customer's debt 'if it is an unsecured personal loan or credit card'. It proposes removing the reference to a personal loan or credit card, on the basis that other forms of debt, such as a mortgage shortfall after sale and mortgage arrears, interest and fees are not included.

In Clause 172 c), it proposes including the words 'such as financial abuse', after 'whether the hardship is genuine and being caused by factors outside your control'.

Response to the COVID-19 pandemic by the banks

Banks were receptive and proactive in dealing with customers' financial hardship in the onset of the pandemic and were able to provide a range of financial assistance to both individual customers and to small business.

Banks will have to carefully manage the impact of the ending of COVID-19 hardship assistance and will need to be proactive in identifying whether customers may be facing ongoing financial hardship.

The BCCC reported that the pandemic did have an impact on banks' compliance with the Code. For the period June to December 2020, nine banks reported 4,651 incidents which may have constituted breaches, if not for the exemptions in the COVID-19 Special Note which provided exemptions from strict timing requirements. There is no information on whether the delay in meeting the Code's timing requirements was because of the pandemic.

There was support to include a commitment in the Code that banks will support customers facing financial hardship as a result of emergencies or special circumstances, such as significant economic shocks, fire, drought, floods and earthquakes. The ABA noted, however, that such a commitment would need sufficient flexibility to ensure the assistance be appropriate to the circumstances, including those of the customer and any differences in the level of assistance individual banks can provide.

Collection and sale of debt

Many of the requests by the consumer groups for the inclusion in the Code of additional consumer protections around the sale of debt are already in the ABA Guideline: The Sale of Unsecured Debt. Moreover, the ABA agree that several parts of this guideline could be included in the Code.

However, as noted in Section 8, all ABA industry guidelines should be considered as Code related documents, and should be considered by the banks in implementing their commitments in the Code. The ABA has indicated, nevertheless, that it proposes to include in the Code some of the provisions in the guideline on the Sale of Unsecured Debt. Including these provisions in the Code will highlight some important protections for consumers, but this should not be seen as undermining the status of the rest of the guideline.

The BCCC should also publish the information on the number of hardship requests received, as well as the outcome of these requests. The ABA says it is not satisfied that there is a clear benefit in publishing such information, although is agreeable if it does not place an additional reporting burden on banks. The BCCC previously published the data on the number of requests for hardship assistance and the outcome of these requests, but recently has only published the number received. Data on both the number of requests received and the outcome provides a more comprehensive indication of the performance of banks, as well as providing relevant information on the level of financial stress in the community.

Terminology

The use of different terminology in legislation, industry guidelines and industry codes can add to confusion. There would be merit in consistency in the use of the term ‘financial hardship’ in the Code and the National Credit Act.

Deceased Estates

The Law Council has identified several changes to the provisions dealing with deceased estates to deal with potential gaps or to improve clarity. These changes are detailed and could be incorporated in a guideline.

18.5 Finding

The provisions in the Code covering financial hardship provide substantial benefits to consumers. These benefits are extended in the ABA guidelines, ‘Sale of unsecured debt’ and ‘Promoting understanding about banks financial hardship programs’.

Consumer bodies point to several areas where the Code should be strengthened. Many of these measures are included in the guidelines. This highlights that the guidelines should be seen as Code related material and should be considered by banks in assessing whether they are complying with commitments in the Code.

More attention needs to be given in providing information to consumers about how banks can help them if they are facing financial difficulty, notwithstanding the information campaigns by the ABA and the banks. In particular, greater attention needs to be given to providing accessible information to Aboriginal and Torres Strait Islander peoples, customers where English is not their first language, and people with low levels of financial literacy.

A major concern of consumer bodies is bank inconsistency in the implementing the provisions in the Code. Ensuring banks have appropriate frameworks for compliance is important in ensuring greater consistency in implementing hardship assistance.

18.6 Recommendations

- 83. The ABA Guidelines on ‘Sale of unsecured debt’ and ‘Promoting understanding about banks financial hardship programs’ should be considered as Code related documents and are considered by banks in assessing whether they are complying with their commitments under the Code. They should be referenced in Part 9.**

- 84. Chapter 43 should be extended to include the following commitments:**
- **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 collection activities.**
 - **Where a debt buyer believes that commencing bankruptcy proceedings is necessary to recover an unsecured debt, banks should require 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 there is no reasonable prospect of the debt being recovered, then the bank should not sell that debt to a third party.**
- 85. Banks should commit to provide readily accessible information and guidance about how to access hardship assistance that is appropriate to Aboriginal and Torres Strait Islander peoples, people where English is not their first language, and people with low levels of financial literacy.**
- 86. Banks should commit to provide more guidance to customers on the information customers will need to give their banks when seeking hardship assistance along with what the banks will consider in deciding whether to assist a customer. There should be consistency in the use of the term ‘financial hardship’ with the National Credit Act.**
- 87. Clause 168 should be amended to making ‘suitable, accessible and comprehensive information on financial hardship assistance prominent and easily identifiable on banks websites, in branches and periodically on account statements’.**
- 88. Clause 176 should be amended such that in all situations banks will advise customers what independent help they can access when facing financial difficulty, e.g. financial counselling organisations.**
- 89. Banks should commit to having robust identification and communication systems to assist customers in, or likely to be facing, financial hardship. The Code should be expanded to cover customers who anticipate they will soon be unable to meet their financial commitments – they do not have to wait until they miss repayments.**
- 90. The reference to ‘unsecured personal loan or credit card’ should be removed from Clause 172 so as not to exclude other forms of debt.**

- 91. The Code should be amended so that it is clear that small businesses are covered under the hardship assistance arrangements in Part 9.**
- 92. Customers should be advised where they can access their rights under the Code and National Credit Code with respect to financial hardship assistance when they approach their bank seeking assistance. The Code should also stipulate the loan types that come under the hardship provisions of the National Credit Code.**
- 93. The BCCC should publish data on the percentage of requests for financial assistance granted by banks.**
- 94. The Code should include a commitment by banks that they will support customers facing financial hardship in emergencies or special circumstances, such as significant financial shocks, droughts, fires, flood and earthquakes.**
- 95. Chapter 45 should be amended to incorporate the Law Council's proposals to clarify the provisions dealing with deceased estates. The detail could be included in an industry guideline, referenced in the Code.**

19. Part 10 of the Code: 'Resolving your complaint'

19.1 Issue

To assess the extent the Code meets customer and community expectations in relation to dealing with customer complaints through internal and external dispute resolution arrangements.

19.2 Code provisions

Part 10 consists of the following chapters:

- Chapter 46. Customer Advocates, who will facilitate fair customer outcomes, will be available at every member bank.
- Chapter 47. Banks will provide customers with access to external and internal dispute resolution processes. Customers will be given information on how to make a complaint to AFCA. Banks will publicise the availability of internal and external dispute resolution processes.
- Chapter 48. Banks will process a customer's complaint to ensure that it is fair and reasonable and will provide timelines for responding to a complaint.

Chapter 49 also covers the establishment of the BCCC and its role and powers. This is discussed in Section 20 of the report. It is recommended in Section 20 that the provisions dealing with the BCCC be shifted from the part of the code dealing with customer complaints, to a separate part dealing with Code compliance. This would help distinguish the BCCC's role in monitoring compliance with the Code from arrangements to deal with customer complaints with their bank.

19.3 Stakeholder views

Stakeholder views can be broadly grouped as follows:

- Internal dispute resolution processes.
- Disputes in AFCA.
- Customer Advocates

Internal dispute resolution processes

The joint submission by consumer groups outlined that there have been various amendments to the regulatory and legal environment relating to dispute resolution. Most notably changes to ASIC Regulatory Guide 271.¹¹⁸ In particular, the time frame for handling complaints is reduced to 30 days. The consumer groups noted that the Code will need to be amended accordingly, pointing out that this timeframe includes Customer Advocates reviews.

¹¹⁸ ASIC, RG 271 Internal Dispute Resolution, Issued 2 September 2021 - <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-271-internal-dispute-resolution/>

Consumer bodies supported the Code being expanded to outline the most important key obligations on banks in Regulatory Guide 271, rather than just saying that banks will ‘comply with ASIC guidelines.’

Consumer organisations also noted that there is often difficulty for financial counsellors and lawyers assisting customers obtaining documents relevant to a customer’s dispute. They called for a commitment on banks to report to the BCCC on their compliance with the timing requirements under the National Credit Code for the provision of documents to customers. In addition, the consumer bodies propose a commitment to seek to identify why a customer has withdrawn a complaint.

The ABA noted that banks are implementing the new timelines for handling complaints as required in Regulatory Guide 271. The ABA did not support the Code having more information on benefits for consumers contained in ASIC regulatory guides, saying that they are technical and legal documents, and it would be better to refer customers to AFCA websites.

The BCCC supported the inclusion of more information in the Code about the new ASIC Regulatory Guide 271, and proposed that the Code should include a hyperlink to the new regulatory guide.

Disputes in AFCA

The consumer groups note that while the AFCA resolution process is generally effective, banks have made the process more difficult than it should be by either taking an unreasonable stance to a dispute or by ongoing delays. The consumer bodies proposed that the banks should design their complaint handling processes, including referrals to external dispute resolution, in line with ASIC requirements; and the banks should aspire to meet the equivalent of the Government’s model litigant obligation. The consumer bodies also call on the banks to proactively assist customers who are experiencing vulnerability in navigating AFCA processes.

The BCCC notes that the Code does not include requirements for banks’ conduct during the external dispute resolutions process. It proposes that the Code include a commitment by banks to comply with the processes and guidelines of the external dispute resolution provider.

Customer Advocates

The BCCC noted that its intelligence indicates that the role of bank’s Customer Advocates may not be well known within the community. The different models of the operation of the Customer Advocate across banks, is also likely to be confusing customers. The Customer Advocates themselves noted that awareness of their role was limited.

The ABA observed that as a result of the shortened timeframe for providing an internal dispute resolution response to a standard complaint under Regulatory Guide 271 (30 calendar days, down from 45 calendar days), many of the banks have transitioned from offering customers the option of escalating a dispute to the Customer Advocate, to a model where the Advocate helps facilitate better decision-making in the complaint handling process and helping to enhance products, processes and systems in the bank. As such, the ABA proposes removing the Customer Advocate role from the complaints part of the Code and updating the ABA Guiding Principles for Customer Advocates.

The consumer groups also noted that the timeframes in Regulatory Guidance 271 will have an impact on the role of the Customer Advocate.

19.4 Discussion

Overall, the banks record in resolving customers complaints is good. As noted in the ABA submission, as part of ASIC's review of its regulatory framework for complaints handling, ABA provided feedback to ASIC that more than 98% of ABA members' consumer complaints are successfully resolved at the internal dispute resolution level.

Banks' performance in handling complaints will become more visible. As part of new internal dispute resolution requirements that commenced on 5 October 2021, ASIC requires banks to report on complaints in their annual reports.

In addition, ASIC is piloting a new internal dispute resolution data reporting framework where financial firms will have to report each complaint to ASIC. It is currently proposed that 16 data elements will be reported for each complaint. ASIC has indicated that it intends eventually to publish data at the firm specific level.

Internal dispute resolution

ASIC has already approved updating the provisions in the Code dealing with the timeframes for providing a response to complaints by the internal dispute resolution process in line with Regulatory Guide 271. This will be included in the amendments to the Code following the triennial review.

Regulatory Guide 271 contains more requirements for the operation of the dispute resolution process than outlined in the Code.

Clause 198 of the Code says that the banks dispute resolution processes 'will comply with ASIC guidelines.' The review's Consultation Note suggested that 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 the consumers rights in the Code under the relevant ASIC regulatory guidelines.¹¹⁹ In response, the ABA stated in its submission:

'The ABA submits that it would be potentially confusing for the Code to incorporate the ASIC regulatory guidance given that it is a technical and legal document. Rather, our view is that it would be more appropriate for the Code to refer customers to the AFCA website'.¹²⁰

It would not be appropriate, or practical, to incorporate all the provisions of Regulatory Guide 271 in the Code. Nor was this the suggestion in the Consultation Note. However, as noted, the Regulatory Guide does provide obligations on the banks and benefits for consumers that go beyond what is in the Code. These should be referenced in the Code.

Moreover, rather than merely saying that banks 'will comply with ASIC guidelines', at a minimum the Code should reference that the dispute handling processes will be in line with ASIC's regulatory guide which imposes enforceable requirements on banks regarding the

¹¹⁹ Pg.22, Banking Code Review, 2021 Independent Review of Banking Code of Practice Consultation Note July 2021, published July 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/06/Code-of-Banking-Review-2021-Consultation-Note.pdf>

¹²⁰ Pg.23, ABA, ABA Submission 2021 Banking Code Triennial Review, published 6 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/09/ABA-Submission-to-Triennial-Banking-Code-Review.pdf>

promotion, accessibility, timeframes and processes for handling customer complaints through their internal dispute handling processes.

In addition, the Code should be expanded to note some of the important requirements contained in Regulatory Guide 271, including:

- Treat complaints involving hardship notices or requests to postpone enforcement proceedings as urgent matters (RG 271.92).
- The internal dispute resolution processes will be easy to understand, including by people with a disability and language difficulties (RG 271.134).
- The dispute resolution processes will be free to customers (RG271.141).
- Staff will have the knowledge, skills and attributes to effectively and efficiently deal with complaints (RG271.148).
- Conduct regular compliance audits to identify and address non-conformity with regulatory guides and internal requirements for complaints handling (RG 271.189).

It would also be appropriate for banks to commit to assist vulnerable customers with their complaints through both internal and external dispute resolution processes.

The BCCC has also raised the issue of the definition of complaints that is proposed in RG 271 in comparison with the definition of complaint raised in the Code.

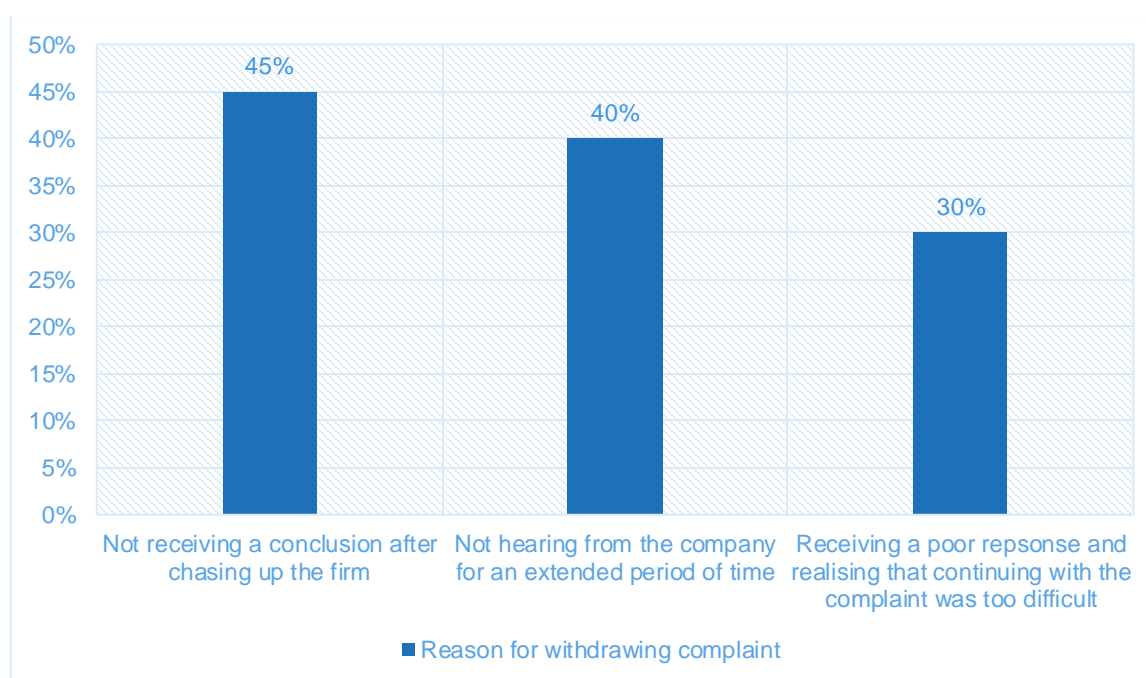
Code definition of 'complaint'	RG 271 definition of 'complaint'
An expression of dissatisfaction made to us in relation to a banking service, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.	An expression of dissatisfaction made to or about an organisation—related to its products, services, staff or the handling of a complaint—where a response or resolution is explicitly or implicitly expected or legally required.

The key difference in these definitions is that RG 271 also covers staff conduct. Aligning these definitions will allow the Code to be more consistent with the community expectations and standards set out in the ASIC Regulatory Guide.

The consumer groups proposed that a commitment be introduced to seek to identify why a customer has withdrawn a complaint when this occurs, and report to the BCCC on the number of complaints that are withdrawn before a formal decision is made from the dispute resolution process. The consumer bodies referred to a study conducted by ASIC¹²¹ in 2018 that indicated that 18% of complainants withdrew their complaint before reaching a conclusion, with the qualitative research suggesting the withdrawals were due to frustrations with the process which was especially prevalent in younger demographics (see Figure 4).

¹²¹ Pg.5, ASIC, *Report 603 The consumer journey through the Internal Dispute Resolution process of financial service providers*, published December 2018 - <https://asic.gov.au/media/4959291/rep603-published-10-december-2018.pdf>

Figure 4: Reason for withdrawing complaint



Source: ASIC Report 603 The consumer journey through the Internal Dispute Resolution process for financial service providers December 2018

As noted, ASIC Regulatory Guide 271 imposes substantial data reporting requirements involving complaints, including banks recording the withdrawal of complaints. It would be appropriate to see how this progresses before imposing additional requirements on the banks to provide information to AFCA.

The consumer groups have also proposed that banks report to the BCCC on compliance with Section 185 of the National Credit Code and publish cases where customers or their representatives claim that requested documents were not provided in full. Rather than extending data reporting requirements to the BCCC, it would be appropriate for the banks to review their compliance with Section 185 of the National Credit Code as part of the audits they are required to undertake under ASIC Regulatory Guide 271.

Consistent with the recommendations in Section 10 of the report, when a customer makes a complaint with their bank, they should be given a simple, easily understandable document that advises them they have rights in their dealings with their bank which are outlined in the Code. Customers should also be advised as to how they can access the Code.

Disputes in AFCA

The BCCC notes that the inclusion of provisions in the Code that banks would comply with processes and guidelines of the external dispute resolution provider (AFCA), would assist providing assurance to customers that the commitments made in the Code regarding banks' conduct with respect to internal dispute resolution processes will extend to external dispute resolution processes. In accordance with Treasury Laws Amendment (AFCA Cooperation) Regulation 2019, banks are required to cooperate with AFCA.¹²² This includes giving reasonable assistance to AFCA to identify, locate and provide documents and information to

¹²² [Treasury Laws Amendment \(AFCA Cooperation\) Regulations 2019\(legislation.gov.au\)](https://www.legislation.gov.au/Details/2019/0050/2019-0050/2019-0050)

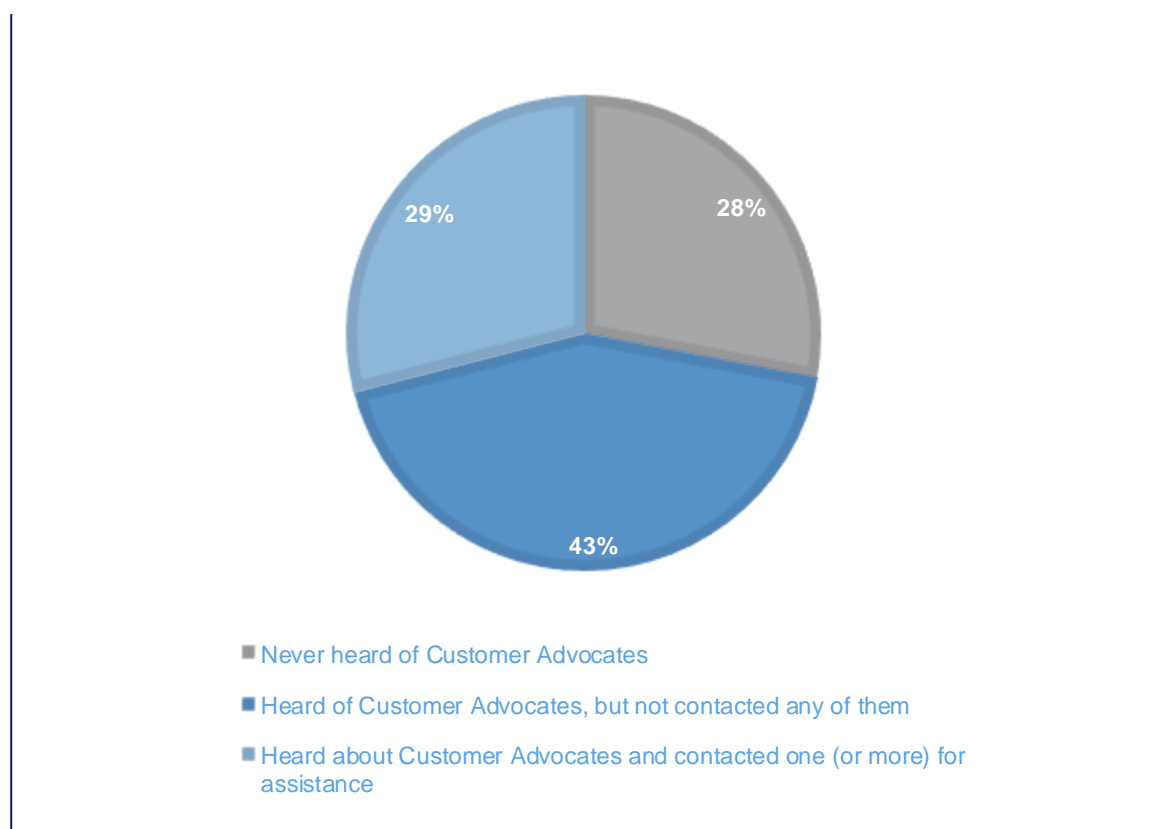
AFCA, and to give effect to any determination by AFCA. To clarify what are the rights of customers, it would be appropriate for the Code to state that banks are obliged to cooperate with AFCA in dealing with a customer's complaint and are bound by any determination by AFCA.

Customer Advocates

The reduction in the timeline for handling complaints through internal dispute resolution processes has effectively curtailed the role of Customer Advocates as being another avenue for a customer to escalate their complaint. This is because if a complainant chooses to escalate their complaint to the customer advocate, the total time dealing with the complaint must not exceed the maximum time set out in ASIC Regulatory Guide 271. The total time includes both the internal dispute process and the customer advocate review.

The role of the Customer Advocate is not well understood by customers, their representatives and by some bank staff. The BCCC submission refers to the results of a survey of 278 financial counsellors in 2019. The results are summarised in Figure 5.

Figure 5: BCCC Survey of Financial Counsellors in 2019



Source: Financial Counselling Australia Rank of Banks Report July 2020 pg16

While the Customer Advocate role in providing an avenue for escalating a complaint in the bank may not have been well understood, it appears they performed a useful function. Consumer legal centres confirmed that engaging the banks' Customer Advocates resulted in more positive customer outcomes. During the review's consultations, some bank Customer Advocates said they overturned the decision taken in the bank's internal dispute processes in around 60-70 % of complaints they reviewed.

With Customer Advocates largely no longer providing an avenue for escalating a complaint in the bank, this reduces concerns that customers were not aware of this opportunity. However, Customer Advocates still perform an important role. The ABA said that Customer Advocates will focus on:

- a. Helping to drive fairer dispute resolution outcomes, with a particular focus on sensitive and complex cases. For example, banks may consider how the Customer Advocate can enhance the complaints handling process for customers experiencing vulnerability.
- b. Reviewing key customer themes to identify thematic opportunities to enhance products, services, systems and processes within the bank. This may involve shaping or overseeing remediation programs, influencing product development and distribution processes, or engaging in preventive risk management initiatives.
- c. Helping to facilitate better decision-making and fairer outcomes for customers through the use of insights and perspectives, including those sought from the community. This may involve assisting the bank to better understand customers' diverse perspectives, and the impact of decisions on customers.”¹²³

During the review's meetings with Customer Advocates, they noted that they have direct access to bank boards and the executive team, and can drive better results for customers. As noted in Section 4 of the report, the Customer Advocate can ensure that the customer perspective is always present in the banks internal decision-making process.

While it would be appropriate to remove references to the Customer Advocate role from Part 10 of the Code, it is an important role that should be included in the Code.

Some Customer Advocates suggested that the outline of their role should be shifted to Chapter 14 'Taking extra care with customers who are experiencing vulnerability'.

While there is merit in referring to the role Customer Advocates can play in enhancing the complaints handling process for customers experiencing vulnerability, it would also be appropriate for the Code to outline the broader role of the Customer Advocate in representing the customers perspective in shaping or overseeing remediation programs, influencing product developments and distribution processes. This could be included in Part 1 'How the Code works', in line with the recommendation in Section 10 of the report that this part be expanded, including a statement that the objective of the Code is to deliver the high standard of banking services in line with the expectations of consumers and the community.

19.5 Finding

Overall, banks' handling of customer complaints in line with the Code is good. However, the Code should be strengthened.

The new ASIC regulatory guide on internal dispute resolution processes reduces the timeframe for concluding the internal dispute resolution process and adds extra protections for consumers. Some of these protections should be included in the Code.

¹²³ Pg.24, ABA, *Guiding Principles, Customer Advocate Guiding Principles*, published July 2021 - <https://www.ausbanking.org.au/wp-content/uploads/2021/09/ABA-Customer-Advocates-Guiding-Principles-July-2021.pdf>

The reduced timeframe for handling complaints through internal dispute resolution processes removes the scope for Customer Advocates to be an avenue for escalating complaints within the bank. This is unfortunate, for they have played a positive role.

Given the reduction in the scope for Customer Advocates to be a point of review in internal dispute resolution cases, this places added weight on banks to ensure they conform with all regulatory requirements for their internal dispute resolution processes. In this regard, banks should commit to conducting regular compliance audits of their complaints handling processes.

19.6 Recommendations

- 96. Rather than saying banks ‘will comply with ASIC guidelines’ on internal dispute resolution processes, the Code should reference that the ASIC regulatory guides impose enforceable requirements regarding the promotion, accessibility, timeframes, and processes for handling customer complaints.**
- 97. The Code should be expanded to include some of the important requirements in ASIC regulatory guides. Specifically, that banks will:**
 - **treat complaints involving hardship notices or requests to postpone enforcement proceedings as urgent matters**
 - **the internal dispute resolution processes will be easy to understand, including by people with a disability and language difficulties**
 - **the dispute resolution processes will be free to customers**
 - **staff will have the knowledge, skills and attributes to effectively and efficiently deal with complaints, and**
 - **conduct regular compliance audits to identify and address non-conformity with regulatory guides and internal requirements for complaints handling.**
- 98. Banks should commit to assisting, without seeking to influence, vulnerable customers with their complaints through both internal and external dispute resolution processes. For example, this could include offering to explain, as required, how the dispute resolution process operates.**
- 99. The definition of complaint in the Code should be aligned with the definition in ASIC Regulatory Guide 271.**
- 100. Consistent with Recommendation 4, there should be a commitment in the Code that when a customer makes a complaint to their bank, the bank will give the customer a simple, easily understandable document that advises them they have rights in their dealings with their bank which are outlined in the Code along with how they can access the Code.**

- 101. To help clarify what are customers' rights, the Code should include the statement that banks are obliged to cooperate with AFCA in dealing with a customer's complaint and are bound by any determination by AFCA.**
- 102. Given the role of the Customer Advocate as an avenue for escalating a complaint in the bank will be curtailed with the reduced timeframe for concluding the internal dispute resolution process, the reference to Customer Advocates should be removed from Part 10 of the Code.**
- 103. The broader role of the Customer Advocate in representing the customers perspective in shaping remediation programs, influencing product development and distribution processes, should be included in Part 1 'How the Code works'.**

20. Banking Code Compliance Committee

20.1 Issue

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

20.2 Independent review of BCCC

After the ABA announced on 6 July 2021 that it had commissioned the independent review of the Code, which includes the BCCC in its terms of reference, the BCCC announced on 2 August 2021 it had commissioned an independent review of the BCCC.¹²⁴ This review is being undertaken by Phil Khoury of cameron.ralph.khoury.¹²⁵

The BCCC charter requires a periodic independent review of the BCCC's activities, coinciding with the periodic review of the Code.¹²⁶ The terms of reference for the review of the BCCC are on its website.¹²⁷

The review commissioned by the BCCC involves a detailed assessment of the powers and roles of the BCCC, its performance, and the extent to which its external relationships are appropriate. On 24 September 2021, the BCCC review released an interim report.¹²⁸

Given the separate detailed review of the BCCC, this review of the Code has focused on more high-level observations on the role of the BCCC and how its activities are influenced by the content of the Code. The Code review has liaised with the BCCC review team to avoid duplication. The Code review's recommendations regarding the BCCC are offered as a complement to the outcomes from the separate review of the BCCC.

20.3 Code provisions

The Code provisions covering the BCCC are in Part 10 'Resolving your complaint':

- Chapter 49. The BCCC is established as an independent compliance monitoring body under the Code, the membership is outlined along with its powers and roles and the sanctions it can apply to banks for a breach of the Code.

The detail of the terms that govern the powers and operations of the BCCC are outlined in its Charter, which is on the BCCC's website along with its Operating Procedures.

20.4 Stakeholder views

The issues raised by stakeholders can be broadly grouped as follows:

- Compliance reporting burden and ASIC's new breach reporting requirements.

¹²⁴ BCCC, *Independent review of the Banking Code Compliance Committee commences*, published 2 August 2021 - <https://bankingcode.org.au/independent-review-of-the-banking-code-compliance-committee-commences/>

¹²⁵ cameron.ralph.khoury webpage - <https://crkhoury.com.au/>

¹²⁶ Pg. 14, BCCC, *BCCC Charter*, published 1 July 2019 - <https://bankingcode.org.au/resources/bccc-charter/>

¹²⁷ BCCC, *2021 Review of the Banking Code Compliance Committee Terms of Reference*, published 21 July 2021 - <http://bcccreview.crkhoury.com.au/wp-content/uploads/sites/7/2021/08/BCCC-Review-Terms-of-Reference-July-2021.pdf>

¹²⁸ Cameron.ralph.khoury, Phil Khoury, *Review of Banking Code Compliance Committee Interim Report*, published September 2021 - <http://bcccreview.crkhoury.com.au/wp-content/uploads/sites/7/2021/09/R1-CRK-BCCC-Interim-Report-24.01.21.pdf>

- Interpreting BCCC compliance reports.
- BCCC's inquiries and contribution to improving compliance.
- Sanctions
- BCCC charter.

Compliance reporting burden

Banks expressed concern over the significant administrative burden associated with BCCC breach reporting, particularly with the introduction of ASIC's new breach reporting requirements.

The BCCC noted that under ASIC's breach reporting reforms, there is likely to be a substantial increase in the volume of matters being reported to ASIC by banks. The BCCC also noted that the introduction of the new enforceable code provision regime, where provision in a code can be designated as enforceable and subject to civil penalties and other ASIC enforcement action, may require a delineation of Code breaches between the BCCC and ASIC.

The ABA said that unlike ASIC breach reporting, there is no materiality test for breach reporting to the BCCC. It believes bank resources would be better focused on identifying and reporting serious and systemic breaches. The ABA also proposed removing the provisions from the Code where banks have to report to another regulator.

Smaller banks said that the information requests from the BCCC needed to be better tailored to the administrative capacity of each bank.

Interpreting compliance reports

The joint submission by consumer organisations noted that the monitoring role and powers of the BCCC are extremely important in ensuring the overall impact of the Code. And that the BCCC is a valuable information source.

The ABA said it was difficult for banks to derive insights on their compliance performance when the BCCC compares them to unweighted industry averages.

BCCC inquires and contribution to improving compliance

Some banks expressed concern that the BCCC may become 'another regulator', with reduced emphasis on promoting best practice in terms of compliance with Code obligations.

Most banks indicated that the BCCC's inquiries into specific Code provisions were valuable, particularly in identifying best practice, but noted the lengthy time taken to complete the inquiries. Banks also pointed to the additional requests they received for information related to an inquiry. This was on top of the regular reporting requirements to the BCCC.

Consumer bodies also said that they valued the BCCC's own motion investigations into key issues. The consumer bodies noted the significant time between inquiries being announced and their execution, and suggested that this may demonstrate the need for greater resourcing for the BCCC.

The BCCC said it determines its resource needs and the ABA has been supportive to ensure it has sufficient funding. It did note, however, that there are few entities with which to

benchmark itself in terms of resourcing and welcomed the views of other parties on the sufficiency or otherwise of its resources.

The BCCC noted that in some of its inquiries it required some banks to undertake performance or investigatory audits. It noted that these were useful in highlighting issues that were not evident in bank self-reported data.

In its submission, the BCCC raised several proposed changes to its charter.

BCCC sanctions

The joint submission by consumer bodies said the BCCC's powers were weak compared with other code monitoring bodies. It called for an extension of the BCCC's power to order a compliance review and to remove the requirement that serious or systemic non-compliance with the Code must be ongoing before the BCCC may report it to ASIC. The consumer groups called for an extension of the BCCC's sanctions to include:

- Power to order corrective advertising.
- Power to identify banks in all its publications.
- Power to order a bank to compensate an individual.
- Power to suspend or expel a bank from the ABA.
- Ability to impose financial penalties.

The BCCC said its current sanction power could be strengthened if a bank had to publish any corrective action it had taken to prevent future breaches. And that with a view to increasing the effectiveness of the naming sanction, the sanction imposed should also be considered for inclusion on the ABA's or the relevant bank's website and apps.

WEstjustice called for the BCCC to be allowed to impose monetary penalties and consider creative and proactive compliance measures.

FINSIA proposed that the BCCC be given the power to include an express sanction requiring a bank to have its executive, middle management and line staff undertake appropriate education and professional development.

The Law Council said the BCCC's sanction power is not particularly robust and since banks are regulated by APRA, the ability for the BCCC to advise APRA would be a more influential sanction.

BCCC charter

The Law Council said a charter would generally be the appropriate instrument in which to record the BCCC's duties and powers.

The BCCC observed there is currently duplication between the outline of the BCCC's powers in the Code and in its Charter. It called for the Code to be the single source of authority for the BCCC. The BCCC also noted that with the Charter outside the Code, the BCCC functions are not directly governed through an ASIC approved document.

20.5 Discussion

Many of the comments in the submissions called for enhancements in the BCCC's approach to monitoring the Code. It was clear from discussions with stakeholders, however, that the BCCC is well regarded and has a professional approach. Banks and consumer bodies have a good relationship with the BCCC and valued its activities.

The BCCC's role

As discussed in other parts of the report, such developments as the increasing overlap between the Code and the law, the introduction of the enforceable code provision regime, and the new breach reporting requirements, have the potential to change the status of the Code away from self-regulation. These same developments have the potential to change the role of the BCCC.

A concern raised by the banks was that the increasing overlap between the Code and the law may lead to the BCCC increasingly being seen as just 'another regulatory body' enforcing compliance with the law, diminishing its role in identifying best practice for banks in providing benefits for customers above that in the law.

As noted in Section 7 of the report, if many Code provisions are designated under the enforceable code provision regime, the status of the Code would move from self-regulation to be more like delegated legislation with ASIC becoming the primary Code monitoring body. In addition, the incentive for the banks to provide benefits beyond the law would likely be diminished.

The role of the BCCC will crucially depend on the ongoing status of the Code as self-regulation. The BCCC is established under the Code to monitor and oversee compliance with the obligations banks voluntarily make in signing the Code, as well as driving improvements in compliance with best practice. The BCCC should not be seen as just 'another regulator', and as noted in the interim report of the BCCC review, it must maintain a balance between overseeing and 'enforcing' compliance and promoting best practice. In this latter role, the BCCC is promoting best practice in achieving good outcomes for consumers.

The role of the BCCC will also be influenced by the importance banks place on the Code. As noted in Section 5 of the report, some banks viewed the Code as the level of customer service required for their bank to be successful. Others, however, appear to see the Code as another regulatory burden on the bank.

The incentive should not be for banks to do the minimum amount in complying with the Code to avoid penalties, but because it is in their long-term commercial interest to meet, if not exceed, their obligations in the Code. The extent to which banks have the latter approach will not only mean they are more focused on meeting their commitments, but it will also mean they are more receptive to the BCCC identifying best practice for Code compliance.

The BCCC's role, along with its powers, should be targeted at promoting the Code as self-regulation. In particular, the BCCC role is distinct to that of ASIC.

Compliance burden reporting

The BCCC's reporting requirements on banks are substantial, and banks are not convinced they are appropriately targeted such that the benefits gained justify the costs involved. A comment raised during the consultations was that the BCCC spreads its resources too thinly and needed to focus on the areas and issues where it will have the biggest impact.

Ernst and Young was engaged by the ABA to analyse the state of breach reporting data and noted that the value of the data requested by the BCCC was not clear to the banks.¹²⁹ It would be an informative exercise for both the BCCC and the banks, if the BCCC reviewed the information demands from the banks and outlined why it wanted the information and how it was being used. The outcome may well see some rationalisation of the BCCC's data requests as well as better targeting the BCCC's activities.

The independent review of the BCCC is examining the issue of streamlining the breach reporting data the BCCC requires from the banks and outlined some options in its interim report.

Among the options is to introduce a materiality threshold for breach reporting to the BCCC. The ASIC breach reporting under the Corporations Act has a materiality threshold. It is an approach advocated by the ABA and has merit. The ABA noted in its submission:

'We consider there is little customer benefit in assessing and reporting on isolated, low-impact incidents that were quickly resolved to customer satisfaction months before the compliance statement is prepared; and likely little to be gained by the BCCC in the way of trends, areas for monitoring focus, or other industry insights'.¹³⁰

Currently banks are required to report to the BCCC every identified breach of the Code. The banks must provide further details if the breach:

- Was considered to be significant, systemic or serious by the bank or any other forum.
- Had an impact on more than one customer.
- Had a financial impact of more than \$1,000 on a customer.
- The nature, cause and outcome of more than one breach are the same.

In addition, banks report details for a random sample of 5% of the remaining breaches.

For the period June-December 2020, further details based on the above requirements were required for 34% of total breaches identified.¹³¹

A materiality threshold would remove some of the reporting burden on banks, but perhaps more importantly, better focus the activities of the BCCC.

In an effort to reduce the reporting burden on the banks, it is important that the approach pursued is not directed at identifying areas of the Code which are 'easier' for the banks to

¹²⁹ Not published.

¹³⁰ Pg.29, ABA, *ABA Submission 2021 Banking Code Triennial Review*, published 6 August 2021 -

<https://bankingcodereview.com.au/wp-content/uploads/2021/09/ABA-Submission-to-Triennial-Banking-Code-Review.pdf>

¹³¹ BCCC, *BCCC Report: Bank's compliance with the Banking Code of Practice – January to June 2020*, published 20 April 2021 - <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

monitor compliance. The same proviso applies to efforts to achieve greater consistency in bank breach reporting.

This was raised in Section 8 of the report which covers the structure and content of the Code. During the review's consultations there were proposals that banks should not report on broadly defined provisions which require an element of subjectivity. Examples cited were Clause 10 engaging in a 'fair, reasonable and ethical' manner and Clause 8 'Providing you with clear information'.

Instead, the proposal was that banks should only report on compliance with more prescriptive clauses. This approach is covered in the options raised in the interim report of the review of the BCCC¹³².

As noted in Section 8, this approach would be a serious retrograde step.

The focus of the Code, and monitoring compliance, should be on achieving 'good' outcomes for customers, not just monitoring procedural steps by banks. Assessing whether banks are achieving the outcomes expected by customers and the community, will always involve an element of judgement by the banks. The banks have to judge that their treatment of each customer is fair and reasonable in the circumstances.

It is paradoxical for the BCCC to identify Clause 10 as among the most important clauses in the Code, because it underpins all other commitments (a view shared by Commissioner Hayne), and then for the banks to propose that they should not report on compliance with Clause 10, because it requires a judgement as to whether they are treating their customers in a 'fair reasonable and ethical manner'.

The reporting task may be better focused if the recommendation in Section 8 was adopted, namely, that the Code be structured such that the objective or outcome sought for customers is clearly stated, and the provisions flow from the objective or outcome. To the extent that the banks' breach reporting focused on whether the outcomes for customers were being achieved, this would be a complement to a materiality threshold, it would help reduce the reporting burden, and ensure BCCC compliance monitoring was supporting the overall objectives of the Code.

As noted in Section 8, in an effort to rationalise breach reporting the ABA has proposed removing provisions in the Code that simply refer to legislation, or involve a commitment to comply 'with the law'. Such an approach would, for example, remove the responsible approach to lending to individuals in Clause 50, because it currently says banks will do this by 'complying with the law'.

If the Code is the rule book for banks in terms of the level of service customers expect, such clauses cannot be removed from the Code to streamline the reporting requirements on banks. What is required is for the Code to include some explanation as to what the references to complying with legislation or the law means for customers. Moreover, the banks should always be alert to identifying areas where they can extend benefits to customers beyond the law.

¹³² Pg.21-22, cameron.ralph.khoury, Phil Khoury, *Review of Banking Code Compliance Committee Interim Report*, published September 2021 - <http://bcccreview.crkhoury.com.au/wp-content/uploads/sites/7/2021/09/R1-CRK-BCCC-Interim-Report-24.01.21.pdf>

There will need to be a re-think of BCCC breach reporting with the introduction of ASIC's new breach reporting obligations under the Corporations Act and other financial services laws.

While this is a catalyst for reducing the current reporting requirement to the BCCC, the full implications will depend on the level of reporting required under the new arrangements. This will also include whether to maintain the current requirement for banks to report to the BCCC any non-compliance with the Code that is reported to ASIC. This is an issue that will need to be closely monitored over the coming reporting periods.

Appropriately, the BCCC has indicated that it is considering changes in its reporting requirement given the likely impact on current resourcing arrangements, as well as duplication in reporting to ASIC.

In its submission, the BCCC specifically raised that the review consider the impact of the enforceable code provision regime on the BCCC's and ASIC's oversight of industry along with any formal exchange of information between the BCCC and ASIC.

It is important that the distinct roles of the BCCC and ASIC are maintained.

As outlined in Section 7 on the enforceable code provision regime, it is proposed that the designation of enforceable provisions should support the overall enforceability of the Code, and not create confusion that there are enforceable and non-enforceable provisions.

The recommendation in Section 7 is that a new commitment should be added for banks to take all reasonable steps to have in place the appropriate systems, processes, and programs to support an integrated approach to compliance. The banks should also commit to periodically auditing the effectiveness of their compliance framework through their internal and external audit arrangements, and report the outcome of these audits to the BCCC. It is also recommended that a summary of these audit reports be included in each bank's published annual report. These commitments could be designated as enforceable under the enforceable code provision regime.

If the commitment was designated as an enforceable provision, there should be an exchange of information agreement with ASIC that the BCCC will report to ASIC if there are serious or systemic deficiencies in a bank's compliance arrangements.

A commitment for banks to have the framework in place to support an integrated approach to compliance, along with aspects of this framework being periodically audited by the banks, would provide important information to the BCCC and allow it to better target its compliance activities. As the BCCC noted in its submission, inquiries where it required some banks to undertake performance or investigative audits highlighted issues not evident in banks' self-reporting.

Interpreting compliance reports

The ABA noted that it was difficult for banks to derive insights on their compliance performance when compared with an unweighted industry average.

A significant problem in interpreting the BCCC's compliance reports is the wide variation in breach reports across banks, particularly where one or a few banks are responsible for the bulk of breaches, while other banks have few breaches.

In each compliance report, the BCCC notes that it has raised concerns about the consistency and quality of the data provided by banks in their compliance statements and that the ABA is working with member banks to review the way they classify and report breaches

As noted previously, it would be inappropriate if efforts to achieve greater consistency resulted in banks only reporting on prescriptive provisions in the Code, and removing the requirement to report on any provision that involves a subjective judgement as to whether the bank is complying with its undertakings.

It could be that the inconsistency in reporting is not a result of some banks unsure as to their reporting requirements, but that some do not have the same commitment to compliance as others.

The proposal to introduce a commitment that banks have a framework in place to support an integrated approach to compliance, and the effectiveness of components of this framework are regularly audited, would assist in ensuring that all banks have the same commitment to compliance with the Code.

The BCCC should also continue to provide guidance to banks on how to improve their compliance structures, such as they have through the Building Organisational Capability Report.¹³³

BCCC sanctions

Consumer organisations, along with the BCCC, are seeking an expansion in the BCCC's sanction powers.

The BCCC's sanction powers should be consistent with its role, and consistent with the Code's status as self-regulation. The BCCC is not a regulator, and its role is distinct from that of ASIC. The proposal that the BCCC should have the power to impose a financial penalty on banks that breach the Code has the danger of blurring the line between ASIC and the BCCC. ASIC already has the power to impose financial penalties on breaches of the Corporations Act and any breach of an enforceable provision.

To be meaningful, any financial penalty (or community benefit payment) would have to be substantial, given the financial resources of the banks. A financial penalty/community benefit payment, similar to that in the General Insurance Code would likely diminish the significance of a breach.

Giving the BCCC the power to order compensation for customers who suffer a loss as a result of a bank breaching the Code, also has the danger of blurring the role of the BCCC and AFCA. Rather than the BCCC having the power to order that a customer be compensated, it would be more in keeping with the nature of a self-regulatory Code if there were a provision that a bank would compensate a customer for any loss it suffers as a result of a bank breaching its commitment under the Code.

It would, however, be consistent with the self-regulation status of the Code if the BCCC had the power to require a bank to publish on its website that it had breached the Code and the corrective action the bank is taking.

¹³³ BCCC, *Building Organisational Capability: How banks can improve compliance with the Banking Code of Practice and deliver better customer outcomes*, published 20 February 2021 - <https://bankingcode.org.au/app/uploads/2021/02/BCCC-Report-%E2%80%93-Building-Organisational-Capability.pdf>

This would complement the review's recommendation that banks publish a summary of their audits of the effectiveness of the components of their framework for complying with the Code.

The distinction between the roles of the BCCC and AFCA also needs to be maintained. Clause 209 says that: 'if you want to report a 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 resolution provider.

While the BCCC receives a relatively small number of complaints from individuals, the references to the BCCC in the part of the Code dealing with 'Resolving your complaint', adds to the confusion as to the role of the BCCC. It would be preferable if there was a separate part of the Code dealing with monitoring compliance.

The consumer organisations have advocated that the BCCC should name banks for either strong compliance or non-compliance in all its publications. The argument is that this would act as an incentive for compliance. However, given the BCCC's concerns about the consistency and quality of data provided by the banks, it is premature for the BCCC to begin identifying banks in their compliance reports.

The significant variation in breaches across banks may reflect differences in the way breaches are collected and reported by banks, as much as differences in their compliance with the Code. Until greater consistency of approach to breach reporting is achieved, the BCCC publicly identifying a banks compliance record may result in a change in its approach to reporting breaches rather than its compliance with the Code. A suggested first step towards such an outcome would be the review's recommendation that banks publish in their annual report a summary of the audits undertaken to assess the effectiveness of their compliance frameworks.

BCCC's charter

The main issue raised by the BCCC is that its charter should be included in the Code, rather than being outside the Code. As the BCCC notes, there is currently duplication between references in the Code to the duties and powers of the BCCC, and those outlined in its charter. However, this does not appear to be a significant source of any confusion. It appears that the BCCC is seeking its Charter to be included in the Code, so that it is part of an ASIC approved document.

The Charter for the CCMC, the predecessor of the BCCC, was part of the 2013 version of the Code. It added to the length of the Code, and presumably this was the reason it was removed from the 2019 version of the Code.

There would be merit in the BCCC's Charter being part of the Code, and as such, having the status of an ASIC approved document. Concerns over adding to the length of the Code can be resolved if the Charter is referenced in the Code, and forms an appendix to the Code. The charter can be a hyperlink in electronic versions of the Code.

The BCCC suggested several changes to its charter be considered or clarified. This is best pursued through the independent review of the BCCC. By way of an observation on some of its proposals, it would appear appropriate that BCCC be given the discretion to investigate allegations based on severity/complexity of the matter, regardless of any time limits. In

addition, it would be appropriate for the BCCC to be able to investigate matters that have been excluded by other bodies or where breaches of the Code have occurred but have not been investigated.

The consumer groups raised the issue whether the resourcing of the BCCC is appropriate. The BCCC is in the best position to determine what resources it needs to fulfill its role. Its position is unique, and it is doubtful much will be gained in seeking to identify broadly comparable bodies to assess whether its resources are adequate. The BCCC notes that the ABA has been supportive to ensure it has sufficient funding.

The BCCC will need to continue to ensure that it has sufficient resources such that it can efficiently and effectively do its job and that the ABA has to continue to be supportive to ensure it is appropriately staffed.

20.6 Finding

The BCCC is well regarded by all stakeholders and plays an important role in promoting compliance with the Code. There will, however, need to be a re-think of BCCC breach reporting with the introduction of ASIC's new breach reporting obligations under the Corporations Act and other financial services laws.

ASIC's new breach reporting requirements, along with the new enforceable code provision regime and the growing overlap between the law and the Code, have the potential to bring into question the role of the BCCC.

It is important that the BCCC not be perceived by banks as another regulator enforcing compliance with the law. It has a distinct role compared with ASIC. The BCCC's powers, activities and sanctions must be consistent with its role of overseeing compliance with a Code that is based on self-regulation, and promoting best practice in helping banks achieve the objective of the Code – namely, good outcomes for customers.

Reducing BCCC compliance reports to matters that are more convenient for banks to monitor and report – such as the prescriptive or transactional provisions in the Code – would undermine the role of the BCCC and the status of the Code.

A materiality threshold for BCCC compliance reports would reduce the reporting burden on the banks, but more importantly, better focus the activities of the BCCC.

20.7 Recommendations

- 104. The BCCC should maintain its role overseeing compliance with a Code based on self-regulation and promoting best practice in helping banks achieve good outcomes for their customers. The BCCC is not a regulator enforcing compliance with the law.**
- 105. The BCCC should review its information requests from banks in the context of ASIC's new breach reporting arrangements and outline why it requires the information, how it is used, and whether it is necessary for the BCCC to fulfil its role. The BCCC should explain to banks why it requires the information.**

- 106. A materiality threshold for banks' breach reporting to the BCCC should be introduced to reduce the reporting burden on banks and to better focus the activities of the BCCC. The nature of the threshold of materiality – whether based on number of customers affected, dollar impact of the breach, importance of provision, whether the breach was wilful as opposed to inadvertent – could be settled in consultation with the banks.**
- 107. Proposals to reduce banks compliance reports to the BCCC to provisions in the Code which are largely prescriptive or transactional should be rejected.**
- 108. Consistent with Recommendation 8, there should be an enforceable provision that banks commit to take all reasonable steps to have the appropriate framework, processes and procedures in place to support an integrated approach to Code compliance. The effectiveness of the components of this framework should be periodically audited through the banks internal and external audit arrangements, with the results provided to the BCCC. A summary of each bank's audit reports should be included in their published annual report. There should be an exchange of information agreement with ASIC for the BCCC to report to ASIC if there are serious or systemic deficiencies in a bank's compliance framework.**
- 109. The BCCC's sanction powers should be consistent with its role and the Code's status of self-regulation. Giving the BCCC the power to impose a financial penalty has the danger of blurring the line between the BCCC and ASIC.**
- 110. The BCCC should have the power to require a bank to publish on the bank's web site that it had breached the Code and include the corrective action the bank is taking.**
- 111. The BCCC charter should be part of the Code. It should be referenced in the Code and be annexed to the Code.**
- 112. The provisions in the Code covering the BCCC should be moved from the part of the Code 'Resolving your complaint' to a separate part of the Code dealing with 'Compliance with the Code'.**

PART C – OTHER ISSUES

21. Scams

21.1 Issue

How the Code should deal with scams.

21.2 Code provision

There is no provision directly dealing with scams. Chapter 37 does provide for the circumstances when a customer can dispute a transaction on their credit or debit card.

21.3 Stakeholder views

The joint submission from consumer organisations expressed concern over the lack of consumer protection with respect to scams. It noted that ASIC's review of its ePayments Code has proposed to exclude the oversight of scams from the ePayments code.

The consumer organisations called for a Code commitment for banks to have systems in place to identify potential or likely scams and if the bank is suspicious, prevent the transaction and have a specialist staff member contact the customer. They also call for the bank to compensate the customer for any loss if it fails to take reasonable steps to flag and stop a scam transaction.

The consumer bodies also propose banks have information available on their websites and bank apps, on what a customer should do if they are scammed.

WEstjustice called for a commitment that banks investigate scam activity as reasonably practicable, and customers be provided with a dedicated scam/fraud telephone line (with interpreters) to enable scams to be reported.

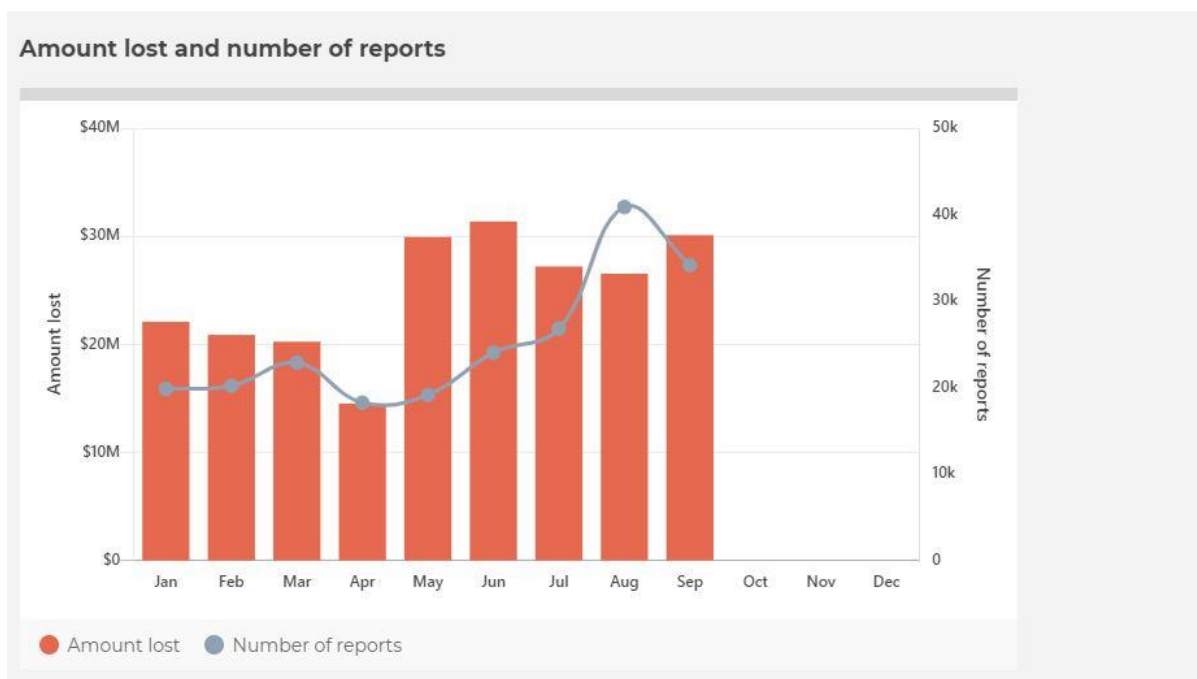
21.4 Discussion

Scams are a rapidly growing problem. In the period January to September 2021, there were 22,107 reported scams, with 8.5% reporting financial loss that amounted to \$222 million (see Figure 6).¹³⁴ Financial scams can take a variety of forms, including credit card scams, loan scams, phishing scams, and phone scams.

¹³⁴ ACCC, Scamwatch statistics webpage - <https://www.scamwatch.gov.au/scam-statistics>

Figure 6: All Scam Types as reported by Scamwatch (as at 21 October 2021)

Amount lost	Number of reports	Reports with financial losses
\$222 810 200	226 107	8.5%



Source: ACCC Scamwatch Scam Statistics webpage

ASIC's ePayments Code contains a range of protections for consumers¹³⁵. The protections include customers not being liable for unauthorised transactions involving their accounts provided they have taken reasonable steps to protect their accounts, and processes for banks to follow when assisting customers who are looking to recover their money, if they have inadvertently transferred funds to the wrong recipient.

ASIC is reviewing the ePayments Code and has proposed that the definition of 'mistaken internet transaction' only cover actual mistakes inputting the account identifier, and does not extend to payments made as a result of scams.¹³⁶

ASIC acknowledged that scams are a significant and increasing problem, but it does not believe the ePayment Code is an ideal place to set rules for preventing and responding to scams. ASIC has indicated, however, that it is exploring ways to facilitate enhanced cross-stakeholder collaboration and information sharing on scams, and firmer and more timely industry commitments to addressing causes of the problem. This collaboration involves regulators, industry, and consumer representatives.

Most of the ABA banks have information on their websites advising customers of the latest scams and frauds, how customers can protect themselves and how to report a scam. Some banks have 'scam' phone numbers for reporting a scam.

¹³⁵ ASIC, *ePayments Code*, published 20 September 2011 - <https://asic.gov.au/regulatory-resources/financial-services/epayments-code/>

¹³⁶ Pg.20, ASIC, *CP 341 Review of the ePayments Code: Further consultation*, published 21 May 2012 - <https://download.asic.gov.au/media/eh2fceff/cp341-published-21-may-2021.pdf>

ASIC has noted that ‘Consistent feedback from some stakeholders’ that consumers should not suffer losses through mistaken internet payments and scams as a result of deficiencies in the way the industry has designed the payment instruction and processing systems. We support this view’.¹³⁷ The difficulty is identifying when a scam is the result of the way the system is designed.

As noted in the joint consumer organisation submission, banks do contact customers to confirm transactions. The criticism from consumer bodies is that the banks do not tell customers that they suspect a fraud. The consumer groups are looking for a commitment that if a bank suspects a fraud, it should prevent the transaction and if it fails to do so, the bank should compensate the customer for any losses.

A very large number of transactions could come within the ambit of possibly being suspicious, with a wide range of degrees of suspicion. A bank blocking a transaction because it is suspicious could cause disruption to a substantial number of consumers who are not being scammed.

The BCCC outlined in its recent compliance report incidents when a scam or fraud was involved and an obligation under the Code may have been breached. These included:¹³⁸

- Customers experiencing vulnerability being scammed but not receiving extra care and security by staff.
- A vulnerable customer being a victim of fraud by family member.
- Staff not completing identification ‘know your customer’ processes correctly, resulting in fraudulent transactions.
- Staff not acting on a customer’s concerns about fraudulent transactions.
- Unusually large withdrawals/transfers from accounts.

To help protect customers, the BCCC has encouraged banks to ensure that systems and processes are as robust as possible, including employee awareness of fraud and scam issues.

WEstjustice raised concerns over non-English speaking customers, many who are experiencing vulnerabilities, being subject to a scam and having difficulty navigating English-only automated phone systems or unable to overcome language barriers.

The issues raised in the BCCC compliance report and in the WEstjustice submission highlights that bank staff should be alert to vulnerable customers being more susceptible to scams. And part of the extra care that banks say they will give to these customers should include attention to the possibility of scams.

There are two measures that could appropriately be included in the Code with respect to scams.

1. First, banks could commit to training staff on the indicators of suspicious transactions that may constitute scams, particularly with respect to vulnerable customers.

¹³⁷ Pg.21, *Review of the e Payments Code: Further consultation*, published May 2021 - <https://download.asic.gov.au/media/eh2fcaff/cp341-published-21-may-2021.pdf>

¹³⁸ BCCC, *BCCC Report: Bank’s compliance with the Banking Code of Practice – January to June 2020*, published 20 April 2021 - <https://bankingcode.org.au/resources/bccc-report-banks-compliance-with-the-banking-code-of-practice-january-to-june-2020/>

2. Second, banks have information on their websites and apps telling customers what to do if they believe they are subject to a scam and provide a dedicated scam/fraud telephone line. This information should be in additional languages to English. The ABA's educational material on what customers should do if they think they have been scammed is in a variety of languages.

21.5 Finding

It is difficult to specify at what point a bank should be sufficiently suspicious that a transaction is a scam, such that it should be responsible for any loss a customer experiences. A broad effort by regulators and industry participants is required to better protect consumers from scams. The effective detection of scams should be a priority for the banking industry, law enforcement, and regulators.

However, banks could commit to staff awareness training over suspicious activities, particularly those involving vulnerable customers. In addition, banks should give clear and accessible guidance as to what customers should do if they have been scammed.

21.6 Recommendations

113. **Banks should commit to training staff on the indicators of suspicious transactions that may constitute scams, particularly with respect to vulnerable customers.**
114. **Banks should commit to having information on their websites and apps telling customers what to do if they believe they have been scammed. They should include a dedicated scam/fraud telephone line. This information should be in languages other than English.**

22. Code review frequency

22.1 Issue

The review has been asked to assess the frequency with which the Code should be reviewed.

22.2 Code provision

Clause 6 provides that the ABA will arrange for the Code to be independently reviewed at least every three years from the date the Code comes into effect.

22.3 Stakeholder views

The joint submission from consumer groups supports the existing process for the Code to be independently reviewed every three years. However, they suggested changes to strengthen the Code should be made between the three-yearly reviews¹³⁹. The consumer bodies are concerned that the industry guidelines are being used instead of changing the Code.

22.4 Discussion

ASIC Regulatory Guide 183, Approval of financial sector codes of conduct, states that a condition of ASIC approval of a code is that it must be independently reviewed at intervals of no more than a three-year cycle.¹⁴⁰ However, the legislation introducing the enforceable code provision regime provides that *'The applicant, in relation to an approved code of conduct, must ensure that, every 5 years, an independent review is undertaken of the operation of the approved code of conduct'*.¹⁴¹

While the Code continues to be approved by ASIC, there would appear to be no option but to have it independently reviewed at least every five years.

The last independent review of the Code commenced in 2016 and the final report was presented in January 2017. The amended version of the Code which incorporated many of the recommendations from the review took effect in May 2019. Any significant redrafting of the Code involves a lengthy period of negotiation between ABA member banks along with consultation with community organisations. The current version of the Code also incorporates recommendations from the Royal Commission.

Any changes to the Code now must be formally approved by ASIC, which will also involve further consultation between the ABA and stakeholders. This may be a lengthy process, depending on the volume and complexity of the changes. In addition, there is also the possibility that the legislative instrument giving ASIC's approval for the Code can be disallowed by Parliament.

The experience of this review suggests that a three cycle for an independent review of the Code is relevant. Much has changed to the legislative, regulatory, and economic

¹³⁹ Pg.58, Joint Consumer Organisations, 2021 *Review of the Australian Banking Association Code of Practice*, published 5 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

¹⁴⁰ RG 183.82, ASIC, *RG 183 Approval of financial services sector codes of conduct*, Issued 1 March 2013 - <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>

¹⁴¹ Section 1101AB, *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*, Assented 17 December 2020 - <https://www.legislation.gov.au/Details/C2020A00135>

environment since the last independent review, and it was timely to assess the impact of these developments on the Code.

The review has also provided the opportunity to step back and make a more holistic assessment of the Code's operation, and whether the level of services being delivered by ABA banks is in line with community expectations. The review was an opportunity to gather learnings from the operation of the Code in recent years and identify areas where it can be strengthened.

The Code inevitably involves different perspectives between banks and stakeholders, particularly consumer organisations, over the level of consumer protection provided in the Code. Some stakeholders consulted during the consultations expressed frustration that banks were not listening to their concerns and hoped the review would be more successful in elevating their issues. A periodic independent review provides for an objective input on where the balance may lie between the different perspectives of the banks and the consumers.

While a periodic independent review of the Code is worthwhile and provides an opportunity for a sizeable revamping of the Code, important changes to the Code should not have to wait until the next triennial review. As the submission from the consumer organisations notes, the Code should be treated as a living document, and amendments to strengthen the Code should be made, when required, between review cycles.

The ABA noted in its submission that:

... 'each revised version of the Code requires implementation processes and training programs by banks, hard and soft copy edition preparation, and distribution to and comprehension by, customers, their advisers and counsellors, and bodies such as AFCA. For the reasons outlined above, it is not feasible to make amendments to the Code in an ad hoc, reactionary way.'¹⁴²

This attitude appears to be somewhat narrow, in that it is putting the emphasis on the inconvenience to the banks in changing the Code between triennial reviews. This should not be a major factor in considering changes to the Code. The ABA submission does, however, go on to note that interim changes can be made where appropriate, such as to implement the recommendations of the Royal Commission, or if urgent amendments are required.

The consumer bodies observed, however, that what the ABA considers to be urgent depends on whether it benefits the banks rather than the consumers.

The example they give was the amendment to the Code in June 2020 which introduced the COVID-19 Special Note, and described how the effects of COVID-19 may mean banks are unable to comply with timing requirements in the Code. The consumer organisations also note that over the past four years, they consider the ABA has developed industry guidelines rather than making required changes to the Code.

There would be advantages in having a more structured process for considering changes to the Code between triennial reviews. This could involve the ABA's Consumer Outcomes

¹⁴² Pg.2, ABA, *ABA Submission 2021 Banking Code Triennial Review*, published 6 August 2021 - <https://bankingcodereview.com.au/wp-content/uploads/2021/09/ABA-Submission-to-Triennial-Banking-Code-Review.pdf>

Group, which is ‘the ABA’s forum for consumer groups to raise and discuss existing and emerging issues.’¹⁴³

The Consumer Outcomes Group has been involved in the development of ABA industry guidelines, a recent example being the ABA guideline Preventing and responding to financial abuse (including elder financial abuse)¹⁴⁴. The terms of reference for the Consumer Outcomes Group could be extended such as to provide input to the ABA as to whether amendments to the Code are required between triennial reviews, or whether the issue can wait to be considered at the next review.

22.5 Finding

The requirement for the Code to be independently reviewed every three years remains appropriate, however, there would be merit in a more structured approach for stakeholder input on the need for changes between reviews. This could involve the ABA Consumer Outcome Group.

22.6 Recommendations

- 115. The requirement in the Code for it to be independently reviewed every three years remains appropriate.**
- 116. The ABA Consumer Outcomes Group should be used to provide input to the ABA as to whether amendments to the Code are required between triennial reviews, or whether the issue can wait to be considered at the next review.**

¹⁴³ ABA, *Consumer Outcomes Group webpage* - <https://www.ausbanking.org.au/priorities/consumer-outcomes-group/>

¹⁴⁴ ABA, *Industry Guideline Preventing and responding to financial abuse (including elder financial abuse)*, published March 2021 - <https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Financial-Abuse-Industry-Guideline.pdf>

Attachment A – Terms of Reference

Attached at end of Report.

Attachment B – Submissions Received

- Assembly Four
- AusPay Net
- Australian Banking Association
- Australian Retail Credit Association
- Banking Code Compliance Committee
- Chris Baulch
- Corey Purdy
- CPA Australia
- Dale Lynch
- Deam Lim
- Dentons
- Eros
- FINSIA
- Hailey Somerville
- Ican
- Joint Consumer Group:
 - Australian Privacy Foundation
 - Barwon Community Legal Service
 - Care ACT
 - Consumer Action Law Centre
 - Consumer Credit Legal Service (WA) Inc
 - Consumers' Federation of Australia
 - COTA Australia
 - Financial Counselling Australia
 - Financial Counsellors' Association of Western Australia
 - Financial Rights Legal Centre
 - Hume Riverina Community Legal Service
 - Indigenous Consumer Assistance Network
 - South East Community Links
 - Uniting Communities Consumer Credit Law Centre SA
 - Victorian Aboriginal Legal Service
- Ken Myers

- Law Council of Australia
- Legal Aid NSW
- Legal Aid Queensland
- Mike Shegog
- National Shooting Council
- Norton Rose Fulbright
- QLD Prostitution Licensing Authority
- Queensland Adult Business Association
- Queensland Human Rights Commission
- Queensland Law Society
- Ross and Robyn Smith
- Sex Work Law Reform
- Shooting Industry Foundation Australia
- Small Business Commissioner
- Tasmanian Small Business and Family Enterprise Ombudsman
- Victorian Prode Lobby
- WEstjustice
- Working Men

Interim Report:

- Australian Banking Association
- Banking Code Compliance Committee
- CAFBA
- COSBOA
- FINSIA
- Joint Consumer Groups
 - Australian Privacy Foundation
 - Barwon Community Legal Service
 - Care ACT
 - Consumer Action Law Centre
 - Consumer Credit Legal Service (WA) Inc
 - Consumers' Federation of Australia
 - COTA Australia

- Financial Counselling Australia
- Financial Counsellors' Association of Western Australia
- Financial Rights Legal Centre
- Hume Riverina Community Legal Service
- Indigenous Consumer Assistance Network
- South East Community Links
- Uniting Communities Consumer Credit Law Centre SA
- Victorian Aboriginal Legal Service
- National Shooting Council
- Sex Work Law Reform
- Tasmanian Small Business Council
- Vision Australia

Attachment C – 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



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 customers¹.

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 a number of 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.

¹ 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 Review², 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 Review³, 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
 - 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).

² https://www.pottinger.com/uploads/1/9/5/1/19512909/pottinger_-_independent_review_of_the_definition_of_small_business_-_26_october_2020.pdf

³ www.ausbanking.org.au/submission/aba-response-to-pottinger-review/



- d. Resolve complaints and disputes between banks and their individual and small business customers
 - e. Support customers experiencing vulnerability
 - 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 Group⁴ 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.

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

⁴ 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.

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.

Timeline

Establish substantive review (appoint Reviewer (and Consumer and Small Business panel) and set Terms of Reference	30 June 2021
Review commences	1 July 2021
Complete review process	31 October 2021
Deliver final report to the ABA	30 November 2021
ABA consults with members and responds to substantive review outlining proposed changes to Code.	December 2021 - March 2022
Application to ASIC for approval lodged.	31 March 2022
Provisional date for ASIC approval	30 June 2022
New code takes effect (including Pottinger Review changes)	1 January 2023 or 6 months after ASIC notifies its approval of the Code (whichever is the later)

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.