Australian Banking Association

ABA Submission

2021 Banking Code Triennial Review

Australian Banking Association

Mr Mike Callaghan
Independent Reviewer

Email address: submissions@bankingcodereview.com.au

Dear Mr Callaghan,

The Australian Banking Association (**ABA**) welcomes the opportunity to make a submission to this review of the Banking Code of Practice (**the Code**).

Since 1993, the Banking Code of Practice has set the standards for banks in the provision of services to customers and small businesses in Australia. The provisions in the Code either complement or go over and above the law and define, for example, how banks help customers experiencing financial difficulty.

The Code is enforceable at law and used as a key reference by the Australian Financial Complaints Authority when it considers customer complaints against banks.

More recent versions of the Code incorporate changes recommended by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. These include ceasing default interest on agricultural loans for farms impacted by drought, ensuring services are accessible to people with limited English, removing overdraft and dishonour fees on basic accounts, and an industry initiative for guaranteed features for basic accounts.

The ABA is also planning to strengthen the small business section in this version of the Code by expanding the definition and increasing the number of small businesses able to access covenant light contracts from their bank.

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 further strengthen and enhance the Code. Our recommendations for the Independent Reviewer's consideration include:

- strengthen the financial difficulty section to ensure customers understand that the earlier they approach their bank when they start to experience difficulties, the more likely it will be that their bank can support them to a full recovery;
- create a reference point so customers understand their rights in relation to Comprehensive Credit Reporting legislation and how their credit history will be impacted when a hardship arrangement is refused or accepted;
- include in the Code a general commitment on providing assistance to customers facing difficulty as a result of disasters;
- strengthen the commitments in the Code for how banks support customers experiencing vulnerability; and
- incorporate a commitment for banks to offer an interpreter to customers who need one, wherever practical.
- define greater clarity in the Code on the process banks utilise when dealing with deceased estates
- Incorporate sections from the Sale of Unsecured Debt guideline in the Code to demonstrate that these are clear commitments

Importantly, the version of the Code that is developed following this review will be the first industry code subject to the enforceable code provisions regime, under the oversight of ASIC.

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

Yours sincerely,

Anna Bligh AC
CEO, Australian Banking Association

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Introduction

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. The Code encompasses a set of industry behaviours and norms which sit above the minimum legal standards and serve to set a higher standard for all subscribers.

The ABA and its members note that the Code was subject to a significant rewrite following the last triennial review and another set of substantial changes following the Royal Commission. This review, while less extensive, is no less significant and the ABA and its members note the importance of this and future reviews to ensure that the Code continues to meet consumer and community expectations and customer needs in a rapidly changing world.

As APRA Chair Wayne Byres noted in 2019, "Good self-regulation – in the broadest sense of the term, capturing self-discipline and restraint – is essential to providing the community with a well-regulated, efficient and value-adding financial services sector. It is not optional."[1]

Several of the questions posed by the Consultation Note seek to define the purpose and audience of the Code, as well as the place the Code does and should hold in the hierarchy of banking legislation and regulation.

It is clear to the industry that the Code does , and continues improve outcomes for customers, improvements which may not have been reached, or reached much more slowly, without the input of self-regulation.

Nicola J Howell, Lecturer and Member of the Commercial and Property Law Research Centre, Faculty of Law, Queensland University of Technology ('QUT'), has written at length on banking regulation and self-regulation in financial services and notes "that there are at least five ways in which the Banking Code does, and can continue to, influence the development of consumer protection standards in the banking sector, and in the financial services sector more widely."[2] Those five ways are:

- 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;
- by providing important protections for areas that are 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 businesses
- expanding on the general obligations contained in the legislation for example the procedural protections afforded to third party guarantors
- setting standards that influence the development of legislation and vice-versa, and
- 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 (**AFCA**).

Finally, the ABA notes there have been questions about the audience of the Code. While the last triennial review sought to make the Code more consumer friendly with a rewrite using more accessible language, consumer lawyers and advocates and bank staff also form a key part of the Code's audience. There is likely to be a continuing process of adjustment to seek the best balance between accessible language and a level of specificity that makes implementation and enforcement as easy as possible. It is the view of the ABA and its members that there is no perfect balance of these factors but we are very open to recommendations from the Independent Reviewer where we may be able to achieve a better balance.

Keeping the Code up to date

The ABA strives to keep the Code up to date and relevant. This can be seen from the history of amendments the ABA has made to the Code over the last few years since the last review. The ABA notes that this process needs to be conducted in an orderly way. Any amendments to the Code must now be formally approved by ASIC by means of legislative instrument. When making such changes, ASIC and the ABA consult closely with stakeholders and

[1] https://www.apra.gov.au/self-regulation-dead
[2] http://www.austlii.edu.au/au/journals/UNSWLJ/2015/19.html

Code subscribers in sometimes lengthy processes. As legislative instruments, ASIC approvals are also subject to scrutiny (as well as potential disallowance) by Parliament.

In addition, 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. The triennial review process provides a regular opportunity for substantial revision of the Code (if that is warranted), and interim changes can be made where appropriate, such as to implement the recommendations of the Hayne Royal Commission, or if urgent amendments are required. In the ordinary course, however, the ABA would expect amendments to be developed through an orderly process where all stakeholder views can be taken account of. That process will ordinarily be the triennial review.

References in the Code to other laws

As the Code evolves and adjusts to a new era of 'co-regulation' through the overlay of an 'enforceable code provisions regim', it is apt to return to basic principles that have underpinned industry codes in the past. One such principle is that codes are not instruments in which to restate the law. This is recognised in ASIC key document on industry codes, Regulatory Guide RG 183:

> "While a code must do more than restate the law (and indeed should offer consumers benefits that exist beyond the protection afforded by law) they set standards that elaborate on, exceed or clarify the law.."[3]

While the Code has on occasion incorporated reference to legislation, this practice may require revision in light of the focus on strict enforceability required by the enforceable codes legislation. Replicating legislation as enforceable provisions of codes only serves to create duplication and complexity. It also makes code monitoring needlessly complex by effectively making bodies such as the Banking Code Compliance Committee (**BCCC**) replicate the responsibility of regulatory agencies like ASIC or the Office of the Australian Information Commissioner.

For the reasons outlined above, in the ABA's view, provisions in the Code that simply replicate or commit to compliance with other regimes (an example is clause 11) should be removed.

The above principles in our view should guide the Independent Reviewer in his deliberations. The specific answers to the questions are detailed below.

[3] RG 183.30

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Response to Questions

Question	Response
Extent to which the Code meets community expectations	
1) Overall, does the Code adequately articulate the standards of service and behaviour currently expected by individual and small business customers?	The banking sector regards the Code as a living document which requires regular reviews to ensure it continues to meet the standards of service and behaviour expected by customers. Overall, the ABA believes the Code does a good job of articulating the standards of service and behaviour expected by customers, and in some respects goes above and beyond those expectations. The current version of the Code includes the outcome of a very significant review as well as the recommendations made by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. In this context, it is the ABA's view that to update the Code to currently expected standards, only relatively minor changes are required. The ABA notes there have been ongoing concerns from small business customers about the definition of a small business in the Code. The ABA will address those concerns in this version of the Code and take action on the recommendation from the Pottinger Review to expand the definition to businesses with total credit exposure (**TCE**) of up to $5million. Those changes mean the protections in the Code will now cover an additional ten thousand businesses.
2) Does the Code remain relevant given changes to legislation and regulations affecting banking services? In particular, does the Code need to be amended in the light of such developments as: Mandatory Credit Reporting; Open Banking; Design and Distribution	As noted above, the Code is a living document that is periodically updated to align with the expectations of customers and the community. The financial services regulatory landscape has seen substantial change in recent years and the Banking Code has also undergone a series of changes. In 2018, following the Khoury Review, a wholly revised Code was for the first time approved by ASIC, only to be altered again before it came into effect, to deal with a further series of changes arising from the Hayne Royal Commission, and to implement other industry initiatives in response to stakeholder representations. As the history outlined above demonstrates, the ABA monitors and responds to developments by amending the Code in a timely fashion where appropriate, to ensure the continued relevance of the Code. Banks also have robust regulatory change practices in place to identify, assess and implement changes in the regulatory environment, to ensure that the required changes to systems, process and training are made in real time. To retain the relevance of the Code, the ABA considers it important that technology remains neutral, to allow for the changing way banking services are provided. The ABA also highlights that matters relating to payments (including Buy Now Pay Later (**BNPL**) and Open Banking) increasingly need solutions that involve a range of stakeholders in the evolving payments ecosystem and not just banks, as such the Code may not be the most appropriate place to address these issues. Since the last review of the Code, the industry has undergone significant and rapid change with new entrants, technological advances and government policy driving the digitisation of financial services. This shift has been further accelerated by COVID-19. A payments system whose participants were predominantly financial institutions has evolved into a more complex payments ecosystem with many non-bank entities; consumers preferences of how to pay have also evolved rapidly. Although this question specifically identifies BNPL and Open Banking, there has been significant growth in contactless card and mobile wallet payments. In this environment, the solutions to many

Obligations; and, Buy Now Pay Later.	payments issues involve a number of payment providers not just banks, and are more appropriately addressed by the ASIC ePayments Code, the Australian Finance Industry Association BNPL Code or Australian Payments Network industry standards that apply to a broader range of participants in the payment system – affording customers equal protection no matter how they choose to pay. The Treasury Review of the Australian Payments System is expected to provide further clarity on these issues. Further, the ABA notes that all of the issues referred to in this question are largely still in the implementation stage. In particular, the rules of Open Banking are still under development, and the product design and distribution regime has yet to commence. While remaining open to the possibility that the advent of these regimes may ultimately require adjustments to the Code, it is not clear that this is the case at this stage. Lastly, in general, Code provisions should be directed at commitments that add to the law, rather than replicate them, or, where necessary, to expand on the operation of the law. Reference to any of these new regimes should be required only if one of those circumstances apply. **Mandatory Credit Reporting / Comprehensive Credit Reporting (CCR)** – The industry has worked with the Australian Retail Credit Association (**ARCA**) to update the Privacy (Credit Reporting) Code to give effect to the comprehensive credit reporting regime legislated in early 2021. This process continues and includes close consultation with consumer groups. The Credit Reporting Code (**CRC**) outlines how credit providers should report information about customers, including hardship information. The CRC has not yet been finalised and the banking sector is influencing its current direction to strike the right balance between protecting customers and providing more detailed repayment information to creditors improving information asymmetry between lenders and customers. The CRC is an enforceable Code under the Privacy Act and is operated by the Office of the Australian Information Commissioner (**OAIC**). It comes with significant protections for customers and strong penalties for any breaches. However, given it is a highly technical document, designed for industry rather than consumers, it may be useful to update the Banking Code so that customers have an easy reference point for understanding their rights. For example Clause 178(c) could be updated to make it clear that banks will tell the customer what the impact on their credit history will be when they accept or refuse a hardship or collections arrangement (i.e., how their repayment history information (**RHI**) will be impacted and whether they will have a hardship flag on their credit report). The ABA expects the CRC to be finalised prior to the updated Banking Code so at that time, the industry would propose considering whether there is anything else in the CRC which should be translated for customers and included in the Banking Code. **Open Banking / Consumer Data Right (CDR)** – Explicit protections for customers are provided in the CDR legislation through the Privacy Safeguards. The CDR rules and standards are to be designed by the Treasury to operate within the guardrails of the CDR. The draft Rules 3.0 include explicit rules for joint accounts, which allow banks to hide those accounts at any time. While the rules for open banking are continuing to evolve, the industry proposes that for the benefits of transparency and customer understanding, it may be useful to reference a customer's right to request removal of a joint account from CDR in chapter 35 of the Code. The industry believes that generally protections in the Code for customers experiencing vulnerability or family and domestic violence (**FDV**) and privacy protections should be broad and apply to all a customer's dealings with their bank, not be specific to Open Banking. **DDO** – The product design and distribution obligations (**DDO**) regime commences in October 2021. The DDO requires issuers and distributors of products to take reasonable steps so that products are appropriately targeted and distributed to customers whose needs and objectives they are likely to meet. The ABA doesn't support replicating the DDO regime in the Code as it is not clear to banks what customer benefit would arise from this potential overlap or duplication.

	Buy Now Pay Later (BNPL) - Relatively few of the BNPL products in the market are offered by ABA members. In addition, regulators are closely monitoring the sector. The ABA suggests reconsidering this issue at the next Code review when the regulatory and business landscape may have changed, but remains open to considering any demonstrated need for an addition to the Code.
3) Do the changes to the Code sufficiently respond to the findings from the Royal Commission, particularly in meeting community expectations that banks will have in place the systems to ensure that the commitments in the Code will be honoured by all member banks?	Although some potential improvements were identified, the Royal Commission and the relevant regulators ultimately endorsed the Banking Code and self-regulation. There were several recommendations made by the Commissioner relating to the Code and these were almost all implemented in the updates of the Code in 2019 and 2020 and ASIC's designated enforceable code provision regime addressed the outstanding recommendation. While breaches of the Code are unavoidable especially given the breadth of the requirements, the size of the institutions, and the volume of customer interactions that occur every day, the industry has made very significant progress ensuring that banks comply with the Code both in letter and in spirit. The industry believes there has been a measurable shift in the culture of banking and in particular the focus of employees to ensuring all commitments of the Code are honoured.
4) Have the changes to the Code and the bank's performance in meeting their obligations improved the relationship between banks and their customers?	The changes to the Code that resulted from the Royal Commission – including those related to low income customers and farmers subject to drought and other natural disasters, have made a considerable impact to addressing some of the issues raised in the commission report regarding the charging of fees to customers of these types. In addition, and in parallel with the Royal Commission changes, the ABA, of its own initiative, obtained approval to 'codify' a minimum set of product features for basic banks accounts. These are set out in Clause 44B: a) no account keeping fees; b) free periodic statements (you can choose monthly or longer intervals); c) no minimum deposits (except that, if your government benefit is paid into a bank account of yours, you may be required to have it paid into this account); d) free direct debit facilities; e) access to your choice of a debit card (such as eftpos), or a scheme debit card offered by us (such as Visa Debit or Mastercard Debit) at no extra cost; and

	f) free and unlimited Australian domestic transactions*. Staff training implemented since the previous Code review has entrenched a culture of putting customers first and ensured banks have a clear focus on their relationship with their customer over and above other concerns. The ABA is confident that these changes have improved the relationship between Code subscribing banks and their customers.
5) Are individual and small business customers confident that banks will deliver on their commitments under the Code?	The Code is enforceable through both contracts and decisions made by the Australian Financial Complaints Ombudsman (**AFCA**) so the industry would expect that gives additional comfort to individual and small business customers that banks will deliver on their commitments and if they do not, there will be appropriate recourse. The ABA does note that there has been some confusion from small business customers and representatives about which provisions of the Code apply to them and would be happy to use this review to clarify those issues.
6) Are there outstanding issues from the last independent review of the Code**?**	The vast majority of recommendations from the previous review have been implemented. To our knowledge there are three outstanding recommendations: ○ **Recommendation 19 - The Code should be amended to include protections for reverse mortgage customers that match those set out in clause 8 of the Customer Owned Banking Code of Practice.** This recommendation has not been implemented because none of the members of the ABA offer a reverse mortgage product. ○ **Recommendation 5(b) - The provisions of the Code that relate to credit should apply to a small business credit facility only if it is below $5 million.** Following the recommendations of the Pottinger Review, the ABA has agreed to increase the current threshold for total credit outstanding to $5 million. The Pottinger Review recommended that the existing threshold – effectively 'total credit outstanding – be retained, rather than a 'per facility' approach as recommended by Khoury. This measure will be implemented as part of the upcoming rewrite of the Code following the outcomes of this review. ○ **Recommendation 60 - Signatory banks should work with card scheme companies to build functionality and processes to enable signatory banks to carry out customer requests to cancel card recurring payment arrangements. The aim should be to put this in place within two years. The CCMC should be kept appraised of progress in relation to this and should report about this in its Annual Reports. Once the required functionality and processes are in place, signatory banks should undertake to carry out their customers' recurring payment arrangements cancellation requests free of charge.** Banks have been very closely involved in the process (lead by the Australian Payments Network) to improve customer experience when cancelling recurring payments and direct debits. Banks and card schemes have streamlined the process for cancelling recurring payments, and card schemes have improved the customer's ability to identify such payments. Further changes to the process for cancelling recurring credit card payments require banks and card schemes to make significant and expensive changes to technology and payments processing. In addition, they will require card schemes as well as banks to review and amend the terms and conditions on which payments processing facilities are offered to merchants that accept or require recurring payments. The ABA understands that some of proposed changes to assist customers will be facilitated by new technologies, such as the mandated payments service on the New Payments Platform. The ABA acknowledges that this issue continues to cause frustration for customers and consumer representatives, but note

	that in their recent report the BCCC has acknowledged a significant improvement in bank performance on this issue. Banks continue to work on this recommendation through their involvement with the Australian Payments Networks, with card schemes and other relevant industry participants, to provide a fulsome technological solution that delivers the customer benefits sought by recommendation 60.
The Code's audience	
1) Has the customer friendly re-write of the Code resulted in more customers accessing and relying on the Code?	The ABA does not have an evidence base of the number of customers accessing and relying on the previous versions of the Code. AFCA may be able to provide some information on the number of decisions which relate to the current Code. Anecdotally, awareness of the Code among industry participants and customer advocates seems to have increased. Generally, we would only expect customers to access the Code when they have a problem or complaint with their bank, so we wouldn't necessarily consider the number of customers accessing and relying on the Code as a useful metric to assess the success of the rewrite of the Code. More pertinent in our opinion would be whether customers and their representatives find the Code easy to understand and useful when they are experiencing an issue with their bank. Feedback indicates that this is generally the case.
2) Has an appropriate balance been achieved between making the Code easy to read and navigate for the customer, while giving the banks enough guidance to implement the Code?	The current version of the Code is easier to read for customers than previous versions, nonetheless parts of the Code are broad and remain open to interpretation. The ABA notes that there is a difference of opinion among our members as to whether the Code would be improved through more detailed guidance. In the experience of the ABA there are pros and cons to more detail and it can be difficult to identify the appropriate balance for banks and customers. It is the view of the ABA and its members that there is no perfect balance of these factors but we are very open to recommendations from the Independent Reviewer where we may be able to achieve a better balance. More information on best practice can be provided to both banks and customers through industry guidelines.
Does the Code have sufficient detail such that key provisions can be enforced, including by being	Clarity and precision in meaning have always been among the ABA's aims in drafting the Code. The potential to give statutory effect to code provisions under the new enforceable codes regime highlights the importance of these characteristics. In preparing revisions to the Code to address the recommendations of this review, the ABA will pay close attention to the need for precision in meaning.

designated as enforceable provisions under the law?	
3) While the Code says that relevant provisions apply to its terms and conditions for all banking services and guarantees, do they have sufficient clarity such that a court or external dispute resolution mechanism can treat a breach of a provision as a breach of contract?	The question of contractual enforceability of the Code has been the subject of consideration by courts. It appears clear that the provisions of the code are generally of sufficient clarity to be incorporated into contracts. In Doggett v CBA[4] the Supreme Court of Victoria found that the Code of Banking Practice (previous version) was incorporated into the terms of the banks' guarantee and bill facility. In Williams v CBA[5] the bank accepted that the Code (also previous version) formed part of the contract. National Australia Bank v Rose[6] also was decided on the basis that Code provisions on guarantees formed part of the contract. As noted above and elsewhere in this submission, it may be that some parts of the Code are expressed in more general or aspirational terms. It could be that such provisions require redrafting if they are to be considered as 'enforceable provisions' under the new regime. Alternatively, it might be accepted that statements of broad intent are occasionally included in the Code to give general direction and guidance and aren't intended to be enforceable in the strict sense. This could be said, for example, of the 'Statement of Guiding Principles' in the Code. The ABA also notes that AFCA treats the Code as forming part of the contract (as noted on their website (AFCA Approaches))[7].
4) Should the Code include a commitment by the banks that they will put in place the systems and mechanisms to ensure that all provisions in the	The general statement in clause 8 of the Code - "We will honour the commitments we make to you in the Code" – makes a broad commitment to compliance which implies an obligation to take necessary steps to put systems for compliance in place. A separate commitment of this nature could be included, but there is a question as to its necessity. Another consideration is that broad commitments like this can give rise to difficulty in interpretation. It is clear, for example, that single breaches of the Code are unlikely to result in breaches of such a provision. As with any business operating in contemporary society, compliance systems are not infallible. Questions arise therefore, as to the 'threshold' for a breach. If such a provision were to be adopted it should be made clear, in our view, that breaches would only occur when there are found to be serious and systemic inadequacies in compliance systems. An appropriate way to address this might be to require 'reasonable steps' to put

[4] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2015/351.html
[5] http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2013/335.html
[6] https://jade.io/article/484939
[7] file:///C:/Users/Eliza.Twaddell/Downloads/the_2013_code_of_banking_practice.pdf

Code will be implemented?	in place the systems necessary for compliance. This kind of approach has been adopted in other regimes such as the Financial Accountability Regime (**FAR**) and the DDO.
Acting in a fair, reasonable and ethical manner	
1) Is the commitment for banks to act in a fair, reasonable and ethical manner (Clause 10) one of the most important clauses in the Code?	The ABA and its member banks recognise the central importance of committing, at a fundamental level, to fair, reasonable and ethical engagement with customers. The ABA notes, that the conduct expected of a bank to meet this Code obligation is likely to be required separately by the licencing conditions in the Corporations and Credit Acts that require banks to provide financial services "efficiently, honestly and fairly". In recognition of the importance of commitment to these principles and standards of conduct, recent reforms to the financial sector penalties framework resulted in the licensing conditions being categorised as civil penalty provisions. Breaches of these provisions can attract penalties of up to 2.5 million penalty units (currently $555 million) per breach. In light of the above, clause 10 is certainly important but is not the sole general standard of this sort to which banks are subject.
2) Does Clause 10 underpin the other commitments in the Code as well as every other aspect of a bank's dealings with its customers?	The Statement of Guiding Principles that precedes other text in the Code is expressed to "Provide an ethical, customer-oriented and sustainable framework". The principles "guide us in our decision-making when performing our work and serving our customers." Clause 10 underpins the commitments in the Code in a similar, broad sense.
3) Is Clause 10 currently enforceable under the law?	Clause 10 is certainly effectively enforceable by AFCA. To the extent that a court could read it as applicable in individual cases, then clause 10 would also be taken to be incorporated into banks' contracts with customers. Clause 10 compliance is also closely monitored by the BCCC. It should be noted, however, that there are challenges associated with treating broad statements such as this as enforceable in any single instance. The Australian Law Reform Commission recently observed that the concept of fairness (or unfairness) is becoming increasingly common in financial services legislation but is problematic as it means different things to different people. Concepts of 'reasonableness' and ethics similarly can, be open to differing interpretations.[8] This difficulty of interpretation also presents significant problems in terms of Code monitoring, as banks and the BCCC struggle to find its boundaries. This results in inconsistency in the manner in which these provisions are interpreted and applied across the industry and for

[8] ALRC, Background Paper FSL1 – Legislative Framework for Corporations and Financial Services Regulation – Initial Stakeholder Views (June 2021)

	this reason, comparing breach numbers across banks does not necessarily render a fair comparison, as interpretations may vary when breaches are identified and reported. Notwithstanding the suggestion of the Royal Commission, attempts to make this clause more prescriptively enforceable may be misguided. Egregious breaches of these broad principles outlined in the licensing obligations would remain enforceable by civil proceedings being taken by ASIC and, as outlined above, can result in high pecuniary penalties. Obvious breaches would also be enforceable under existing mechanisms.
Customers experiencing financial difficulties	
1) Is the Code in line with customer and community expectations regarding the assistance banks should provide individual and small business customers facing financial difficulties?	As discussed earlier in this submission, there are a spectrum of views held across the community about this and other areas in the Code. On balance, however, the ABA believes the Code does reflect community expectations in this area and has, in fact, lifted the standard of providing financial hardship assistance across the sector. The ABA 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. Banks acknowledge there is still room for improvement, and support the proposal that this section of the Code should be expanded to cover customers who believe they will soon be unable to meet their financial commitments. The earlier customers approach their bank when they start to experience difficulties, the more likely that their bank will be able to support them to a full recovery and the faster that recovery is likely to be. For this reason we want to make it very clear to customers that they should approach their bank as soon as they believe they may be in trouble, not wait until they miss payments on their credit products. The ABA also supports inclusion of a reference to disaster relief, noting the importance of drafting this reference to ensure there is no reduction in the flexibility banks need to respond to customers' immediate needs. Another positive addition would be a reference to the recent legislative changes requiring banks to confirm that some customer representatives have an ACL. *What would be the effect of this?*
2) Do banks assist customers facing financially difficulties in line with the commitments in the Code?	Banking sector assistance during COVID-19 is clear evidence banks assist customers facing financial difficulty in line with (and beyond) Code commitments. During the 2020 COVID-19 pandemic, ABA member banks deferred over 900,000 home loan and small business loans for up to six months assisting customers, many of whom for the first time in their lives were experiencing financial difficulty through no fault of their own. Complaints with respect to financial difficulty assistance have been low throughout 2020. AFCA data demonstrates financial difficulty complaints in 2020 were 10% of total complaints reducing to 7% in 2021. As part of the COVID-19 support for customers, banks developed an industry-wide, consistent approach to financial difficulty and a new online tool to help customers navigate financial difficulty. The 'financial assistance hub' includes bespoke information for retail, small business and agribusiness customers. Its purpose is to help customers know what options are available to them when they can't make their repayments. The hub has been made available to banks as a white labelled product for use and customisation by individual banks.
3) Does the Code provide	The table on page 47 of the Code does outline, at a high level clear and comprehensive information about how a bank will assist a customer experiencing financial difficulty. The industry does not believe it is appropriate to go beyond this level of detail because there are

clear and comprehensive information on whether and how their bank will assist them if they are in financial difficulties? Should there be more guidance as to what banks will consider in deciding whether and how to assist customers in financial difficulties?	very significant nuances to each individual situation and there is a risk that by seeking to prescribe the type of support a bank will provide will limit the flexibility of a bank to consider the individual scenarios each customer is facing. There is also a risk that customers may seek a form of relief that is not suitable for their circumstances (or discourage those who have self-assessed themselves outside the parameters of detailed guidance). For banks, there are also the prudential requirements to consider which have a considerable bearing on the type of hardship assistance that can be offered. Banks were provided with prudential relief by APRA to offer the COVID relief packages to customers in 2020 and in the recently announced relief packages. In general, the ABA considers the role of the Code to be as defining the support available. Even with two customers in a very similar financial situation, the best solution may be different depending on the circumstances and/or vulnerabilities of the specific customer. In assessing a financial hardship application banks will typically consider: • the customer's financial position, including income, expenses and equity position (banks will consider any assets and their value and any liabilities and outstanding debts); • the customer's ability to meet the commitments under the hardship arrangement and future repayments under the contract; and • the customer's ability to rehabilitate their circumstances (based on whether the hardship assistance will offer genuine relief and whether the customer can restore their financial situation). Under the National Credit Code (**NCC**), banks do not have to change their customer's credit contract. For example, where a customer does not provide a reasonable explanation for why they cannot meet their contractual debt obligations, or if the bank reasonably believes their customer couldn't meet their repayment terms even if the credit contract was changed. Other reasons a bank may not change the credit contract following a hardship notice by the customer: • hardship assistance was previously given to the customer but did not improve their financial situation; • hardship assistance would be detrimental to the customer, for example, it could put the customer in a negative equity position with their property;[9] • the customer would be unable to meet their financial obligations in the future; or • based on the information provided the customer can afford the loan and does not appear to be in hardship. With respect to small business, banks follow a similar approach to offering financial difficulty assistance as when they assess a request for assistance from an individual, however, the information the bank may need will be different and may be more extensive. Banks may also have additional options available to assist a small business, for example a small business customer may be able to access a temporary increase in an overdraft facility limit, deferment of scheduled repayments, and consolidation or restructure of facilities. The aim of any assistance is, where possible, to allow the small business to be able to operate in the long term. Assistance offered to small business is therefore more bespoke and doesn't lend itself well to providing extensive guidance in the Code on how banks will assist and what they will consider when offering that assistance. Retaining maximum flexibility is particularly important in an agri-lending context when a borrower may only have an annual income event. This means support needs to be provided until the next season at least, and this necessitates extra funding to be provided to maintain operations and securities, fund the coming season's program, and cover general living expenses. This sometimes runs in conflict with the

	"prudent & diligent" obligations, where the customer cannot currently meet their immediate obligations, but with prolonged support may be able to recover, or at least re-structure or downsize. Banks will endeavour to help any customer if they are in need and banks want to ensure customers are aware of this. The ABA and member banks are currently reviewing and updating the ABA Industry Guideline: Financial Difficulty programs which will provide additional guidance for banks in assisting customers in financial difficulty. The Industry Guideline will be released before the end of 2021.
4) How active are the banks in identifying customers who may be facing financial difficulties and contacting them to discuss their situation and offer assistance**?**	Banking sector frontline staff are trained to recognise explicit or implicit financial difficulty triggers and to acknowledge and respond to these. Staff are trained to identify customers impacted by a list of triggers and where this affects a customer's ability to meet their repayments, to refer the customer to the relevant financial assistance team. The use of more complex data analysis to proactively identify customers facing financial difficulties is an emerging area and banks are making inroads into this, however, are mindful that customers are concerned about their privacy and may be uncomfortable with banks proactively contacting them in these types of situations. Proactive identification of financial difficulties can be done at a portfolio level via stress-testing of certain economic conditions which may cause certain customers to be more vulnerable to financial difficulty. Some banks have applied this process to agri-lending by stress-testing against live-scenarios of drought, or industry-disruption which could result in reduced outputs/returns (for example, live export ban, or dairy prices for example) and then proactively contacted those customers to see if they need support. During COVID-19 banks have been more proactive in contacting customers, especially small businesses. This includes taking other proactive measures to offer widespread support to customers who could be experiencing financial difficulty. As previously mentioned, the ABA Industry Guideline: Financial Difficulty programs is being reviewed and updated. The guideline promotes best practice across the banking industry including identifying customers who may be in financial difficulty so banks can start discussing the customer's situation and available options as early as possible. As noted elsewhere in this submission, banks have worked to secure better access to payment coding information used by Service Australia and the Department of Veterans Affairs. This work is ongoing and will improve banks' ability to identify customer who may be eligible for assistance.
5) Is it clear as to what customers are covered under Part 9 of the Code?	Part 9 of the Banking Code *When things go wrong*, outlines a bank's obligations when an individual or small business customer is experiencing financial difficulty with their credit facility. It applies to all individual customers, their guarantors and small business (as defined in the Code) customers. This is above and beyond the provisions of the National Credit Code which apply to the provision of credit to individuals and their guarantors (but do not apply to credit obtained for commercial or business purposes). The industry notes that this is an area of potential confusion, particularly because of the differences in coverage between the NCC and the Code. The ABA proposes the language in the Code be updated to ensure customers understand who is covered by Part 9. The ABA notes that the upcoming Financial Difficulty Industry Guideline will also provide further clarity on the support available to customers experiencing financial difficulties.
6) Do the banks actively promote	The ABA actively promotes how banks can help customers in financial difficulty and individual members invest resources in their own promotion.

how they can help customers in financial difficulty? Is the publicly available information easily identifiable, accessible, and comprehensive?	The figures below are for ABA Industry wide campaigns, and do not reflect the extensive and wider range of offering provided by Banks that in many cases dwarf the ABA's efforts. **'Don't Tough it Out on Your Own'** • ABA Floods, Fire and Drought Campaigns 2019, 2020 • ABA Financial Difficulty landing page – 2019 onwards https://www.ausbanking.org.au/for-customers/financial-difficulty/ • COVID-19 Assistance Campaign 2020, 2021 https://www.ausbanking.org.au/covid-19/ 'We're Open' – **18 million views** • ABA Financial Assistance Hub 2021 https://www.ausbanking.org.au/assistance/ a step-by-step guide for bank customers in financial difficulty. Campaigns: Regional and National – millions of readers and listeners Since 2019, the ABA has run industry-wide campaigns across radio, print and digital media reaching out to customers impacted by natural disaster and COVID-19. The scope and reach of these campaigns across radio, print and digital are in the millions of views/listens/engagements and continue to grow as lockdowns return in July 2021. **Regional** Campaigns have been regionally targeted to specific events such as the Queensland floods and Tasmanian bushfires in 2019, the droughts of 2020, and the 'Black Summer' bushfires in January 2021. Targeting has sometimes been acute: every council across Australia impacted by the 2020 bushfires was sent printed collateral to increase awareness amongst the local community about help available from banks. The collateral outlined the financial assistance available and helplines to contact. **National** In 2020, the ABA began a campaign across digital, print and radio to inform bank customers impacted by COVID-19 about home loan and business loan deferral relief. Full page ads in major metropolitan newspapers were followed up with radio and digital advertisements. The digital and radio campaign had 18 million views/listens. **Website: 1.1 million views in 2020** The ABA's website had more than 1.1 million views during 2020, reflecting the vast increase in traffic driven by its financial assistance campaigns. New website sections and digital and print collateral were created and distributed to help the full spectrum of customers: individuals, small business, large businesses and not-for-profits. **Social Media: 13.6 million impressions** The ABA's combined social media campaigns, providing information to bank customers, and overwhelmingly to those impacted by COVID-19, had over 13.6 million social media impressions across Twitter, Facebook and LinkedIn in 2020.

	The industry believes that the available information is easily identifiable, accessible, and comprehensive however, understands that we can always improve, especially how we communicate to marginalised groups, customers with lower financial literacy and customers with limited English. In addition to the information made available by the ABA, particularly on the Financial Difficulty Hub, our member banks also have their own information available including some examples of information provided in Easy English versions and/or translated into other languages. Easy English versions are useful to customers with limited English, lower financial or reading literacy and customers with cognitive impairments. One example is the Commonwealth Bank: Easy English Guide to Financial Difficulty[10].
7) Should the Code include a provision that banks will advise customers of all their rights under the Code with respect to financial hardship assistance when a customer approaches a bank seeking information on dealing with financial difficulties?	The ABA does not conceptually object to advising customers of their rights under the Code, although arguably if they were to do so it would also make sense for them to advise customers of their rights with respect to financial hardship assistance under the National Credit Code**.** The ABA also notes that in the experience of banks this can be an exceptionally stressful time for customers and many of them don't have significant bandwidth to absorb additional information, especially over the phone. If this was to be included in the Code, the ABA would suggest that it allows for banks to provide customers with a link to information on their rights which is available online or to post the customer written material on their rights.
8) Should the additional safeguards for consumers contained in the ABA Industry Guideline: The Sale of Unsecured debt,	The ABA considers industry guidelines have several benefits and as a principle supports continuing with a system of self-regulation which includes the Code and industry guidelines as separate. Benefits of industry guidelines include: • allowing the industry to innovate and add additional consumer protections on a shorter timeline and with a less onerous approval process; • allowing additional detail and operational advice for banks which is not appropriate in the Code; and • allowing the industry to develop "stretch targets" which some banks may take longer to reach than others, without the necessity for industry level compliance to be reached simultaneously.

[10] https://www.commbank.com.au/content/dam/commbank-assets/support/docs/Financial-difficulty-easy-English-accessible.pdf

be included in the Code?	In addition, in most cases, industry guidelines are written with banks as the primary audience and deal directly with banks' internal practices whereas the Code is a consumer facing document. However, the ABA considers there is precedent for components of industry guidelines to be incorporated into the Code. The ABA would draw the Independent Reviewer's attention to the recent additions to Chapter 39 which were drawn from the ABA's Guideline Principles on Debt Management Firms. With that in mind, the ABA proposes that several parts of the Sale of Unsecured Debt could usefully be referenced in the next version of the Code as follows, noting that the wording would need to be amended for inclusion in the Code: • "When contracting with debt buyers for the sale of unsecured debt, banks should have processes in place to monitor how debt buyers are undertaking their collections activities." • "Banks recognise that initiating bankruptcy proceedings, especially in relation to unsecured debt, is a serious step that has significant repercussions for their customers. Where a debt buyer believes that commencing bankruptcy proceedings is necessary to recover an unsecured debt, banks will require that the debt buyer consults with them prior to commencing these proceedings." • "If a debt relates to a customer experiencing vulnerability and the bank is of the view that the vulnerability is likely to be ongoing and that there is no reasonable prospect of the debt being recovered, then the bank should not sell that debt to a third party."
9) Should the Code outline what constitutes 'meaningful and sustainable' debt repayments in circumstances of financial hardship?	The ABA notes that the term 'meaningful and sustainable' with respect to debt repayments is drawn from the ACCC Debt Collection Guideline: For collectors and creditors[11], rather than the Code itself. The Code refers to a "sustainable" solution to a customer's financial difficulty. The industry proposes that rather than define what constitutes 'meaningful and sustainable' it may be more useful to outline the approach to setting debt payments and/or the factors a bank should consider when setting a sustainable debt repayment. These include: • the size of the household / number of dependents; • the level of debt; • the amount of time the customer requires to sustainably repay the debt; • the amount of discretionary spend; and Banks note that if a definition for 'meaningful and sustainable' is included in the Code it would be important to ensure that it allows banks to offer customers flexible options depending on their circumstances. For example, banks may have a situation where a customer may be expecting a lump sum payment (which could be from the sale of the asset, or from some other personal circumstance) and so a very small or zero regular payment may be appropriate until they receive the lump sum. A small payment of this type would not necessarily meet most definitions of meaningful or sustainable but would be a better outcome for the customer than higher short term payments. There is a concern from banks that any additional prescription on financial difficulty assistance could restrict the options available to some customers and prevent staff from developing creative solutions to assist customers. What is sustainable for one customer may not be for another. The ABA believes that flexibility and case by case consideration is critical to supporting customers as effectively as possible.

[11] https://www.accc.gov.au/system/files/Debt%20collection%20guideline%20for%20collectors%20and%20creditors%20-%20April%202021.pdf

10) Should the BCCC regularly publish data on the percentage of requests for financial difficulty assistance granted by banks, along with the nature of the assistance provided?	The BCCC currently collects data on the number of requests for financial difficulty assistance from individual and small business customers that were: • Received; • Granted; • Declined; and • Withdrawn. Banks also provide the BCCC with a breakdown of the types of financial difficulty assistance provided by the bank during the reporting period to both individual and small business customers. The ABA is not satisfied that there is a clear benefit to publishing this data, high rates of approval could indicate compliance with the Code and the NCC or it could indicate that the bank in question has less stringent lending practices, leading to a greater proportion of customers requiring assistance. However, insofar as this does not require banks to collect any additional data, which could require systems changes, the ABA has no objection to the BCCC regularly publishing this data. The industry notes that for this information to be comparable it would be best presented as a percentage of the customer base of each bank.
11) Is the Code appropriate with respect to dealings with deceased estates? Are there potential gaps, and/or could the coverage of the undertakings be clarified?	Chapter 45 on Deceased estates, a new section introduced to the Code following the last review, was the first dedicated section covering these issues. Since the advent of Chapter 45, stakeholders have raised some issues regained in the content of the chapter and suggestions on how it might be improved. The ABA has facilitated some communication between key stakeholders and banks to promote dialogue on these issues. In our view, there is scope to consider some improvements through the review process. In particular, it seems from stakeholder feedback that greater clarity on the deceased estate process – including where the deceased has operated a business, for example.
Hardship assistance during COVID-19	
1) Was the support offered to customers during the COVID-19 pandemic in line with expectations of	The banking sector deferred nearly one million home and business loans during 2020 for customers impacted by COVID-19. The support offered to customers during the pandemic met with positive feedback from customers as well as other stakeholders including consumer representatives. There have been some concerns raised that assistance offered on unsecured debt has not been as generous as that offered on mortgages. Consumer representatives have raised concerns about customers who applied for additional credit and did not receive it, however, the industry would note that it was still important, and in customers' best interests that banks did not supply credit which customers could not repay.

customers and the community? Were there any gaps in the assistance provided during COVID-19?	During 2020 banks made clear choices to prioritise the immediate needs of customers and reduced or cancelled dividend payments to shareholders. The ABA acknowledges that there may have been times when it was difficult for customers to contact their banks, however, banks invested significant resources to increase the availability of call centres as quickly as possible to meet customer needs. Banks continue to offer very significant support packages to individual and small business customers and expect to continue to do so as the pandemic continues and during the subsequent economic recovery.
2) Should the Code specifically include a commitment that banks will support customers facing financial difficulties in emergencies or special circumstances, such as a significant economic shock, fire, drought, flood, and earthquake?	While the Banking Code does not specifically deal with emergency events or natural disasters, during these events banks recognise the importance of offering immediate assistance to help customers and their communities. This includes (but is not limited to) in floods, bushfires, cyclones, earthquakes, and pandemics. Banks recognise that customers may not have access to their homes and/or financial records at these times and if this is the case, banks do not require customers to complete standard financial difficulty processes under the Banking Code or hardship assessment processes under the NCC, such as providing information or supporting documentation to obtain assistance. This gives customers the time to come to terms with their situation without the pressures associated with their debts and financial obligations. Banks will then determine a suitable arrangement when the immediate event has passed, and recovery has commenced. Banks may also choose to offer wider emergency relief packages (such as food or accommodation services in certain circumstances) to provide emergency assistance for customers, as well as broader assistance to help communities recover. Banks will work with governments and authorities to make sure banking infrastructure is restored as quickly as possible. In relation to including a specific commitment in the Code, banks would recommend a general inclusion to ensure sufficient flexibility is retained enabling banks to offer assistance that is appropriate to the situation, but also to the circumstances of the customer and the bank. Importantly, larger and smaller banks will differ in the level of assistance they are able to provide. Emergencies and natural disasters come in all shapes and sizes and flexibility to respond to the unique circumstances allow banks to target support where it is most useful. Banks continue to look at new approaches to support customers and improve practices for customers experiencing financial difficulty. As referenced above, the ABA is in the process of updating the Industry Guideline on Banks' Financial Difficulty Programs to outline how consumer credit laws and relevant provisions within Banking Code apply to banks' financial difficulty programs.
3) Were customers impacted by the COVID-19 Special Note to the Code?	Data on the effect of the Special Note is being collected by the BCCC. This is not available at the time of writing but the ABA understands that the BCCC's next compliance report will include this data. In a similar way to regulatory relief granted at the time by APRA and ASIC, the Special Note provided some relief from strict timing requirements of a small number of provisions of the Code, as well as including a statement that recognised the unique difficulties in making decisions about lending to small business during the economic uncertainty caused by the pandemic. The ABA also notes that some banks opted out of the Special Note's protections on timing clauses meaning they remained subject to the timing provisions as usual during the pandemic.

4) Could breaches of the Code be considered more serious if they occurred while customers were navigating the COVID-19 pandemic which contributed to extreme stress among some customers?	If Code breaches were to be rated by severity, in the industry's opinion, the measure should be the severity of customer impact rather than the external environment. While the pandemic did contribute to extreme stress for some customers, in other cases the effects were much more muted and many customers requested assistance out of an abundance of caution but may not have necessarily required it. The industry acknowledges the benefits that the security of this support offered to customers, even those who ultimately didn't necessarily require it. The level of stress or other damage suffered by customers is a matter that can be taken into account and addressed by AFCA. For example, AFCA can award compensation for non-financial loss where: 1. There has been an unusual amount of: • physical inconvenience; • time taken to resolve a situation; • interference with the complainant's expectation of enjoyment or peace of mind; or • In a privacy complaint, the complainant has suffered humiliation or injured feelings.[12]
Inclusive and accessible services and supporting vulnerable customers	
1) Has the Code contributed to banking services being inclusive, affordable, and accessible to all customers?	The specific inclusion of clauses in the Code which relate to banking services being inclusive, affordable and accessible have sharpened the focus of banks on these areas. For example, changes to the Code that came into effect in March 2020 mandated minimum features of basic bank accounts ensuring the availability of inclusive and affordable bank accounts for eligible low-income customers. This caused several banks to change the terms and conditions of one or more of their accounts or to offer a new account specifically for eligible low-income customers. The ABA notes that the BCCC has commenced an inquiry into how banks consider customer vulnerability, inclusivity and accessibility with an end-to-end focus. The inquiry will provide a valuable benchmark of the industry's policies, standards and practices. The ABA awaits the outcomes of the inquiry.
2) Does the Code meet consumer and community standards for banks to support customers	Best practice support for customers experiencing vulnerability is a rapidly evolving area of consumer and community expectations. Banks have been leaders in pioneering support for many customers in vulnerable circumstances including customers experiencing family and domestic violence, and financial abuse. The Code is deliberately broad to allow banks considerable latitude to develop programs and processes which support customers experiencing vulnerability with as much innovation and flexibility as possible. In this context, the ABA proposes that there are some important areas in which the Code could be enhanced to reflect improved practices in this area. The ABA proposes the Independent Reviewer consider recommending that the industry develop a definition of "customers experiencing vulnerability" in consultation with consumer representatives and which is mindful of the challenges of operationalising the definition. The ABA's preference would be for a definition that is adopted across industry including by regulators. For example, the UK Financial Conduct

[12] See The AFCA Approach to non-financial loss claims
https://www.afca.org.au › media › download

experiencing vulnerability?	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."[13] The ABA is aware that the current wording in paragraph 38 *"We may become aware of your circumstances only if you tell us about them."* does not meet with the expectations of many consumer representatives or current best practice. The ABA references Clause 93 of the General Insurance Code as a reference point "*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.*"
3) Could the Code be strengthened in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported? Should the Code include more specific undertakings regarding the steps that banks will implement so that services are inclusive and accessible to all customers?	There are several sections from the new General Insurance Code which the ABA believes would be useful additions to the Banking Code and have the effect of strengthening the support offered to customers experiencing vulnerability. Finally, given that many of our members are also signatories to the General Insurance Code (**GIC**), there could be merit in considering where it is possible to align our Code with the requirements in the GIC with respect to vulnerability and accessibility. The relevant clauses have been identified in the question pertaining to the insurance code. In addition, banks propose including a clause that ensures that banks will have an interpreter made available to customers (where reasonably practicable) free of charge, when the customer requests one, or bank staff assess that a customer may require one. With respect to the existing undertakings, banks have expended significant resources defining what "extra care" means to their bank and the industry would be very reluctant to change this wording or make the requirement more specific, which we believe would risk a narrower interpretation, however, some examples of what 'extra care' can entail may be useful. These could include: • having processes and/or systems in place to minimise the number of times a customer needs to explain their circumstances; • enable frontline staff to depart from standard customer service provision where necessary and appropriate; • targeted training should be provided to frontline staff to help them navigate potentially complex scenarios; • consider the needs of vulnerable customers when designing and distributing products and services and throughout the product life cycle; • assist customers to set up new accounts and/or change their access codes in circumstances of financial abuse (i.e. Personal Identification Number, passwords as well as change their contact details); or • verify and check the Enduring Powers of Attorney or third party's authorisation documentation to act on behalf of the customer. The ABA supports further clarity of the definition of "extra care" without impacting how banks have to date, operationalised the clause. It may for example, be useful to include an acknowledgement that a customer's vulnerabilities can give rise to unique needs and that those needs can change over time.
4) Do banks take a broad	The banking industry has taken steps to ensure their banking channels meet legal[14] and customer expectations and banking products and services are, and continue to be, accessible to all people. To assist banks the ABA Accessibility Principles were developed and released in

[13] FCA 2021 p.3
[14] *Disability Discrimination Act 1992* (Cth)

approach to ensuring their products and services are sufficiently inclusive or accessible, or is it largely focused on physical aspects of accessibility, such as branch set up?	2018. The Accessibility Principles provide guidance to banks to ensure the design and provision of products and services considers accessibility requirements while allowing sufficient flexibility to accommodate different products, channels and to maintain currency as technology changes. This goes well beyond physical aspects of accessibility and include accessing bank ATMs, point of sale (**POS**) devices, digital banking and apps, authentication and security, future technology and AI and that bank staff receive appropriate training. The Accessibility Principles were developed in consultation with accessibility advocacy. The Accessibility Principles will be reviewed in late 2021. Many banks have in place action plans on a range of issues including accessibility, financial inclusion and reconciliation to better understand, address and resolve accessibility issues.
5) Have the banks been proactive in identifying existing customers who are, or may, be eligible for basic accounts?	When a customer opens a retail deposit account, banks train staff to check with that customer whether they may be eligible for a basic bank account and explain the potential benefits. With respect to existing customers, the industry has relatively recently been able to obtain the assistance of the government to identify payment codes for various types of government benefits which has for the first time allowed systematic identification of customers who are eligible for a basic bank account (this process is ongoing). Identifying these customers and contacting them is a significant exercise and banks will all be reporting on their progress towards this goal as part the ABA's ACCC authorisation. The first round of this reporting will be finalised prior to the completion of this review and the industry would be happy to share this data with the Independent Reviewer. The industry would like to assure the Independent Reviewer that it has been very proactive in identifying customers who are eligible for a basic bank account. Banks have commenced the process of looking across their entire customer base to assess who is eligible and contact them. Most banks have begun (or made significant progress towards) giving all eligible customers information on the features and benefits of a basic bank account and the option of moving to a basic bank account on either an opt in or an opt out basis. It is also worth noting that for several of our members, all of their transaction accounts qualify as basic bank accounts, so in the case of those banks they have no need to identify or migrate customers.
6) Is Part 6 sufficient in outlining how banks will help small business obtain finance?	Part 6 of the Code outlines with respect to small business loans: • what banks will tell a customer when they apply for a loan; • when banks will not enforce a loan against a small business; • information about non-monetary defaults; • the amount of notice a bank will give you it if decides not to extend a loan; • information about when banks will appoint external property valuers, investigative accountants and insolvency practitioners; and • information about guarantees and for guarantors.

	The industry regards this section of the Code as intended to outline what small business customers can expect from their bank rather than outline how banks will help small businesses obtain finance. How a bank helps small business customers to obtain finance is a matter for each individual bank. Banks already have a strong commercial incentive to make it as easy as possible for small businesses to apply for finance. If a lender does not meet the lending criteria then it isn't appropriate for banks to provide additional assistance beyond explaining why the finance wasn't approved which is already required under Clause 74. To do otherwise would potentially contravene banks' commitment to exercise the care and skill of a diligent and prudent banker when making decisions about small business lending (clause 49). The ABA notes that the industry, through the ABA, has established a website designed to help small businesses through the process of applying for and obtaining finance[15].
7) Should the Code incorporate some of the provisions in other codes of conduct (such as the 2020 General Insurance Code) that cover dealings with vulnerable customers?	The industry acknowledges the work put into developing the new GIC and several of the ABA member banks are also subscribers to the insurance code. There are several provisions from GIC which the industry believes could be appropriate for inclusion in the banking Code. These are as follows: • the list of possible factors contributing to vulnerability which is more comprehensive than the list included in the Banking Code; • the wording of paragraph 93. "We encourage you to tell us about your vulnerability so that we can work with you to arrange support — otherwise, there is a risk that we may not find out about it." The ABA believes this wording, or some variant of it could be more in keeping with the expectations of stakeholders than the current wording on our Code which notes that "we may only know if you tell us"; • inclusion of the commitment in Par. 98 which provides for a support person including a friend to speak to the insurance company on the customer's behalf; and • inclusion of the some of the commitments with respect to interpreters contained in Pars. 101 – 103.
Promoting the existence and benefits of the Code	
1) Are the provisions in the Code requiring banks to promote the Code effective?	The ABA believes these provisions are effective. As noted elsewhere in the submission, on behalf of the industry, the ABA undertook a significant advertising and media campaign, following the last Code review, at the time of the launch of the new Code. This campaign was funded by banks and supported by them (for example through display of the advertising materials in branches). The ABA also completed several mailout campaigns to ensure that consumer advocates, members of Parliament, Department officials and a range of stakeholders were made aware of the new Code and its increased standards and consumer protections. Banks make hard copies of the Code available in branches and soft copies are available on bank websites as well as the ABA's website. Banks will also provide a copy of the Code to a customer upon request via their preferred method.

[15] https://www.financingyoursmallbusiness.com.au/

	Banks have also undertaken significant internal education campaigns and provided compulsory training to all staff on the Code which assists both in ensuring that every person who works for a bank has an understanding of the existence of the Code and its contents and that frontline staff are equipped to inform customers of their rights when appropriate.
2) What constitutes promoting the benefits of the Code? Does it involve referring to the Code on bank web sites and having copies of the Code available in bank branches? Should it include bank staff advising customers in their dealings with the bank that their rights and obligations are covered in the Code – for example by referring to the Code when a customer logs onto their internet banking?	The ABA promotes the Code as outlined above. Many banks promote the Banking Code on their websites and in relevant customer facing documents, including loan contracts and terms and conditions documents. Some banks promote specific relevant aspects of the Code at specific important triggers (where immediate awareness of the Code provision is important), so that the obligation is clearly defined and can be discharged in practice. The ABA would not support any changes to the Code that place an undertaking or requirement on a bank to 'promote the Code' during specific customer interactions (e.g. when logging into internet banking, hardship conversations). It should be at the discretion of banks to determine "how" best to serve and meet customer needs and deliver on our obligations under the Code.
3) Do banks effectively promote the availability of basic and low or	The Code requires banks to offer eligible customers a basic account, or a low or no fee account. In addition, a condition imposed by the ACCC on its authorisation of the implementation of the measures recommended by the Royal Commission, was that the ABA provide a series of reports on matters including banks efforts to make customers aware of the availability of these accounts.

no fee accounts, including outlining eligibility for these accounts?	The ABA is collecting data on this that will be provided to the ACCC in October, and we would be happy to provide this to the review once provided to the ACCC.
Resolving complaints and disputes	
1) How effective are the provisions in the Code requiring banks to first refer customers to their internal dispute resolution processes and if the complaint cannot be resolved successfully, referring the customer to AFCA?	ASIC guidance RG 271 sets clear standards for the requirements of financial firms in relation to internal dispute resolution (**IDR**) and the Code complements this guidance effectively. When a consumer or small business is unhappy with a bank product or service, ABA member banks offer a free and transparent IDR process and also inform the customer of when and how they can access AFCA services. This is in line with enforceable ASIC requirements that govern how financial firms should design their complaint handling procedures, including referrals to internal and external dispute resolution. In 2019-20, ASIC conducted a review of its regulatory framework for complaints handling which resulted in it issuing a new regulatory guide, *RG 271: Internal dispute resolution* (**RG 271**). As part of this review, the ABA provided feedback to ASIC that over 98 percent of ABA members' consumer complaints are successfully resolved at the IDR level. RG 271 takes effect from 5 October 2021 and enshrines stronger consumer protections into financial firms' complaint handling processes, including by requiring firms to resolve most complaints within 30 days. The ABA is supportive of these reforms and note that our member banks are in the process of implementing the new requirements which take effect on 5 October.
2) Should the Code have more information on the relevant ASIC regulatory guidelines for handling customer disputes?	As outlined on ASIC's website, its guidance on complaints handling is written for financial firms to have regard to their regulatory requirements (rather than for the benefit public). 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. The AFCA website has been designed as a consumer-facing portal and includes accessible information for customers about the complaints process.
3) Do customers understand the role of the	There is currently confusion among customers and community groups about the role of the banks' Customer Advocates. Due to the shortened resolution timeframes contained in RG271, many of the banks' Advocates have already transitioned from offering customers the

Customer Advocate? Are customers using the Customer Advocate?	option of an internal review of their complaint (bank Customer Advocates started this transition in 2020) and are instead focusing on the following priorities: 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. As such, references to the Customer Advocates being a part of the dispute resolution process should be removed from the Code (including taking the Customer Advocate role out of the complaints section of the Code) and the purpose of the Advocates should be aligned with the updated ABA Guiding Principles for Customer Advocates[16].
Proposed changes to responsible lending obligations	
1) What are the implications for the Code of the Government's proposed changes to the responsible lending obligations in the Credit Act?	It is not clear that the proposed changes to the Credit Act will necessitate any changes to the Code. A range of laws, set out below, will continue to provide important consumer protections in relation to responsible lending. Where these laws are not met, we believe the Code will provide customers with a direct right of action under contract law.
2) If the current responsible lending obligations are removed from the Credit Act, should the Code be amended such that the	Should the NCCP Act changes proposed by the Government be implemented, the Code's provisions concerning responsible lending and individuals will continue to have content and operation. Clauses 49 and 50 commit banks to diligence and prudence in lending to individuals by following the law. While Part 3-2 of the NCCP Act would no longer be law, there would be other existing and newly commencing laws that could inform the content of the term 'law' in clause 50. If a bank does not follow the 'law' that is referenced by clause 50, then consumers may have contractual recourse against the bank. The applicable 'law' would include any APRA standards on lending applicable to ADIs. APRA standards are generally legislative instruments by virtue of s11AF(7B) of the Banking Act 1959 (Cth) (the exception relates to standards that apply to specific banks).

[16] https://www.ausbanking.org.au/wp-content/uploads/2021/07/ABA-Guiding-Principles-Customer-Advocates-July-2021.pdf

commitment to exercise the care and skill of a diligent banker be the same for individuals and small businesses?	If the Government's reforms are enacted, then the primary APRA standard would be APRA Prudential Standard: Credit Risk Management (APS220). This will apply from 1 January 2022. This standard will require banks to assess an individual's capacity to repay a loan without substantial hardship and consider an individual's income, debts and expenses and, the purpose for which the consumer is seeking the loan. APS 220 is supplemented by guidance from APRA on how banks should comply with the standards APS 220 imposes: • an updated APRA Prudential Guide: Credit Risk Management (APG 220); and • an updated APRA Prudential Guide: Residential Mortgage Lending (APG 223). In addition, there are other consumer protection laws that could inform the content of the 'law' referred to in clause 50. These include: • the general conduct obligations of the NCCP Act (which are retained by the proposed reforms) which require banks to take all steps necessary to ensure that the credit activities authorised by the licence are engaged in "efficiently, honestly and fairly"; • specific provisions of the NCCP Act regarding credit cards and reverse mortgages, and small amount credit contracts (**SACCs**), which are to be retained by the proposed reforms; • section 76 of the National Credit Code which allows a court to reopen an unjust transaction on application of the debtor / mortgagor (or ASIC) in the public interest and taking into account all the circumstances of the case. A court may consider various factors including '…whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship' (see section 76(2)(l)); • ASIC Act requirements which set out specific prohibitions for unfair contracts, unconscionable conduct, and misleading and deceptive conduct in financial services; • ASIC's powers to regulate provision of credit by banks through the general conduct obligations, strict licensing requirements and disclosure obligations; • the design and distribution obligations on consumer credit products which require lenders and brokers to have a consumer-centric approach to the design and distribution of credit products and for lenders to review products to ensure their customers are receiving credit that is likely to be consistent with their objectives, financial situation and needs; and • the product intervention power which allows ASIC to intervene when a financial product or a credit product has resulted, will result or is likely to result in significant customer detriment. This includes the power to ban financial products and credit products.
Enforceable provisions	
1) What are the features of provisions in the Code that could	The regime for enforceable code provisions as set out in the Corporations Act itself specifies some considerations for ASIC in determining enforceable provisions: **Identifying enforceable code provisions**

be considered by ASIC and the ABA in deciding which provisions should be designated as enforceable?	In the approval, ASIC may identify a provision of the code of conduct as an enforceable code provision if ASIC considers that: (a) the provision represents a commitment to a person by a subscriber to the code relating to transactions or dealings performed for, on behalf of, or in relation to the person; (b) a breach of the provision is likely to result in significant and direct detriment to the person; (c) additional criteria prescribed by the regulations for the purposes of this paragraph (if any) are satisfied; and (d) it is appropriate to identify the provision of the code as an enforceable code provision, having regard to the matters prescribed by the regulations for the purposes of this paragraph (if any).[17] To date, no additional matters have been prescribed by regulation. The Act also requires that ASIC must not approve a code unless satisfied that: a) each enforceable code provision: (i) has been agreed with the applicant; and (ii) is legally effective; (b) it is appropriate to approve the code, having regard to the following matters: (i) whether the obligations of subscribers to the code are capable of being enforced; (ii) whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available; (iii) whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code.[18] In our view, the following criteria should also be considered in this context: a) the existing enforceability of the provision in question –including, for example, whether the provision is incorporated into code subscribers' contracts with customers, and whether impediments to contractual enforcement of the provisions have been demonstrated in the past; b) the extent to which conduct that would be in breach of the provision is already subject to a statutory enforcement regime (for example, under the National Consumer Credit Act); and c) The extent to which the relevant code provision deals with matters that are the subject of another regime enforced by a regulator other than ASIC (such as matters within the jurisdiction of APRA, AUSTRAC, or the Office of the Australian Information Commissioner). In addition, the ABA understands that ASIC intends to update its Regulatory Guide on Approval of industry codes (RG 183) later this year, and that the revised edition will include guidance on the question of enforceable provisions.

[17] Section 1101A
[18] Section 1101A

2) What are the provisions which represent specific commitments and where a breach is likely to cause significant detrimental harm to a customer**?**	While representing one criterion for selecting enforceable code provisions, this should not be looked at in isolation. Rather, it should be considered in light of the other criteria set out above. Ultimately, the application of the enforceable codes regime should, in the ABA's view, be confined to a small number of code provisions. As we've outlined in other contexts, the provisions of the code are enforceable by customers in a number of ways and no case has been convincingly made for the view that these are inadequate. In addition, the Hayne Royal Commission made abundantly clear that it did not seek, by its recommendations, to interfere with the existing self-regulatory process in any substantial way. If a large number of provisions of the Code were designated as 'enforceable under the new regime, then: • the code would essentially acquire the status of delegated legislation, and lose that of self-regulation; and • ASIC would become the primary Code monitoring body, rendering the BCCC superfluous.
3) To what extent would a provision have to go beyond the existing law to be considered as a possible candidate for being designated as an enforceable provision?	Provisions designated as enforceable should impose a clear and distinct obligation, in precise and unambiguous language, on banks that is not in form or substance imposed upon them by another law.
4) If some provisions are designated as enforceable, how can consumers be assured that they can rely on all provisions in the Code?	The provisions of the Code are enforceable both through incorporation into contracts with customers and, more relevantly for most consumers, can be taken into account under AFCA's general jurisdiction when making determinations. This has been the case for many years. The introduction of the 'enforceable code provisions' regime, in line with the recommendation of the Royal Commission, simply allows for an additional layer of enforceability (i.e. statutory enforceability) to be applied if that is deemed necessary for any given provision. If the new regime is applied to a provision, it will mean that ASIC has a role in enforcement and can seek a pecuniary penalty in respect of a breach of that provision. From a practical perspective, it is unlikely to affect enforcement from the perspective of the customer, as that already exists via the mechanisms outlined above.

5) Should a factor to take into account when considering which provisions to designate as enforceable be the extent that the provision underpins the overall implementation of the Code and, in doing so, would help reassure consumers that they can rely on the enforceability of all provisions in the Code?	As discussed above, interpretation, and consequently enforcement of, provisions of broad and general application (for example clause 10 of the Code) can present challenges greater than what can be expected in respect of provisions that are precise and confined in their meaning. For this reason, provisions that are broad and general in nature are not good candidates for designating as enforceable provisions in our view. If the suggestion here is that statutory enforceability should, in effect, span all the provisions of the Code, this would, in our view, be to effectively designate the entire Code as enforceable. This would, for the reasons outlined above, undermine the intent of Commissioner Hayne (ie to preserve the concept and benefits of self-regulation) and to give the Code the status of delegated legislation, and ASIC the status of Code monitor.
BCCC	
1) Is the BCCC's monitoring of compliance with the Code, investigation of potential breaches, and guidance provided to banks contributing to improved	**BCCC feedback to banks**: The current format of the BCCC's feedback makes it difficult to determine if the key objectives of the code are being met, to what degree each clause is being complied with and how the bank has improved in the BCCC's view across reporting periods. The BCCC's feedback on banks' compliance statements is generally based on comparing banks' reporting to the industry average, based on percentages. It can be challenging to derive insights from these comparisons. It's implicit that the industry average is the right level, and banks should aspire to meet it, without much analysis supporting this. We understand the comparisons are based on percentages which are unweighted, meaning a small bank's effect on the industry average is the same as a big bank's, despite breach numbers per bank per reporting period ranging from 3 to over 8,000. **Breach reporting feedback timing:** The BCCC's feedback on banks' compliance statements is usually released about six months after the compliance statements are submitted, when the next compliance statement is nearly due (Part A at least). While the feedback is appreciated and taken seriously, banks' ability to respond to it is effectively deferred to the next compliance statement, which is submitted

compliance with the Code?	12 months after the period to which the feedback relates. Remediation of any systemic issues is usually well underway by the time the BCCC provides feedback. **BCCC findings:** banks analyse BCCC findings in detail and assess whether the issues raised are present and if so, how they can be addressed. Findings from targeted investigations can be a richer source of guidance and awareness of Code issues. **BCCC inquiry reports**: Banks have provided extensive information to the BCCC in response to its inquiries, including the recent *Inquiry into banks' compliance with the Banking Code's inclusivity, accessibility and vulnerability obligations*. We understand the BCCC intends to issue a report soon, highlighting good practice across the industry. We think such reports are a good way to promote improved compliance.
2) Is the Charter the appropriate instrument to record BCCC's duties and powers in monitoring compliance with the Code?	In the 2013 code the "CCMC mandate" was annexed to the Code. The Mandate was removed from the Code in the interests of conciseness and brevity. Renamed as the Charter, it is referred to in clauses 211 & 212 of the Code and is published on the BCCC website. It was drafted in consultation with the BCCC and ASIC. The industry is open to reviewing the question of whether the Charter should be annexed to the Code.
3) Is self-reporting of breaches by banks an effective approach to assessing their compliance with the Code?	The BCCC's reporting requirements are extensive and constitute a significant burden on subscribing banks' resources. The impact of this is felt all the more acutely in the context of the radical reforms to the breach reporting framework under the Corporations Act, and the introduction of a parallel reporting regime under the Credit Act, which will take effect from October 2021. These changes will greatly increase the overall burden of reporting required of banks. In this context, it is apt that this review considers whether large scale breach data reporting (by banks) and analysis thereof (by the BCCC) is an efficient process for monitoring Code compliance. It should also be noted that, unlike the regimes under the Corporations and Credit Acts, the reporting requirements set by the BCCC are not filtered by any materiality threshold. This has the result that banks are required to capture, identify and report *any* breach, regardless of significance. The absence of a materiality threshold for reporting Code breaches means that the costs of the exercise may exceed its benefits for customers, banks, and the BCCC. The exercise requires extensive attention and input from bank staff who, in many cases, could otherwise be more focused on remediation and uplift efforts. 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. The ABA acknowledges there are thresholds in place for providing further details of breaches in the "Q2" sheet of compliance statement Part A – these comments relate to identifying and reporting breaches for the "Q1" sheet as well. The ABA considers banks' resources would be better focused on identifying and reporting serious or systemic breaches, which serve as better indicators of areas for focus or compliance uplift. In our view it would be appropriate to set out in the BCCC Charter, that breach reporting should be subject to a materiality threshold. In addition, where the code contains reference to other regimes, for example that of privacy law, the risk arises that banks will be required to report breaches to the BCCC even where reports have been made to other regulators such as the OAIC. This raises a broader issue of

	whether provisions such as clause 11 – which commits banks to meeting their confidentiality obligations under law – have a place in the Code. Finally, breaches of any provisions designated as enforceable under the new regime will become reportable to ASIC under the Corporations Act reporting regime. Having a parallel requirement to report these breaches to the BCCC would be superfluous.
4) Are the range of sanctions available to BCCC appropriate, particularly in responding to serious and systemic breaches of the Code?	In our view, the BCCC has power to impose an adequate set of sanctions. The sanctions available to the BCCC were substantially enhanced in the version of the Code first approved by ASIC in 2018 and in the new BCCC Charter, in line with the recommendations of the Khoury Review. They now include: 215. The BCCC may impose one or more sanctions after considering the seriousness of the breach. Sanctions available to the BCCC are: a) requiring the bank to rectify or take corrective action on the breach identified; b) requiring a bank to undertake a compliance review of our remediation actions; c) formally warning a bank; d) requiring a bank to undertake a staff training program on the Code; e) naming a bank in the BCCC annual report or website; and f) reporting serious or systemic ongoing instances where a bank has been non-compliant to ASIC. The power to report serious and systemic breaches of the Code to ASIC is significant, as the regulator could potentially consider this a breach of licensing obligations under the Corporations and Credit Acts. Such breaches attract high penalties outlined above.
5) Does the experience to date of the two banks being publicly named for breaches indicate that the sanctions are effective in influencing the banks to improve their systems to prevent further breaches? Should consideration be given to	The naming sanction is relatively new and its use on two occasions is difficult to assess. However, in our view this sanction serves as a significant deterrent effect, which also serve as a push / incentive for all other banks to re-examine their compliance with the Code. As the ABA has noted above, systemic breaches of the Code may be treated as breaches of licensing obligations and so potentially attract very high penalties. In addition, breaches of provisions designated as 'enforceable' by ASIC will attract civil penalties under the Corporations Act (though limited to 300 penalty units per breach, this could involve large penalties as systemic breaches may involve multiple breaches, each subject to the 300 unit cap. In light of the above, in our view there is not a case for giving the BCCC the power to Impose financial sanctions.

imposing financial sanctions for systemic breaches?	
6) Does the BCCC have sufficient financial resources to carry out its functions?	The BCCC determines its budget each year and advises the ABA. The ABA does not have veto power. As far as we are aware, the BCCC has not made any suggestion that its resources are unduly constrained. The last two years have seen significant increases in budget for the BCCC.

Australian Banking Association

About the ABA

With the active participation of 23 member banks in Australia, the Australian Banking Association provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.

The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.