

Consultation Paper 373: Proposed changes to the Banking Code of Practice

AFCA submission

January 2024

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1 Overview and background

AFCA¹ welcomes the opportunity to provide feedback in response to ASIC's Consultation Paper 373 (CP 373), *Proposed changes to the Banking Code of Practice* (the Code).

AFCA has provided substantial input to work by the Australian Banking Association (ABA) to update the Code following its independent review in 2021 (Code Review). In consultations conducted by the ABA, we have also expressed serious concerns about changes to the Code that we believe would reduce consumer protection.

These concerns have not been addressed adequately in the proposed Code in Attachment 2 to CP 373 (Proposed Code). While we appreciate that the ABA has made some amendments to what was proposed in its initial consultation process, we remain concerned that the remaining changes will have an adverse impact on both AFCA's decision making and consumer outcomes more broadly.

We believe there needs to be a greater balance between the ABA's stated objectives of simplification and removal of duplication, and ensuring consumer protections are not reduced.

AFCA's role with industry codes

AFCA has a dual role in relation to financial sector codes of practice:

- having regard to relevant code standards in the resolution of individual disputes in accordance with AFCA's Complaint Resolution Scheme Rules (Rules)²; and
- in our role as administrator for several codes including the Banking Code of Practice.

The Code administration team supports independent Code Committees including the Banking Code Compliance Committee (BCCC) to monitor compliance with codes of practice to achieve service standards people can trust. It is a separately operated and funded business unit of AFCA.

As Code administrator, AFCA is committed to ensuring codes remain a progressive conduct model, extending above the minimum standards required by the law. This is consistent with the ASIC Regulatory Guide 183 *Approval of financial services sector codes* (RG 183) which states that an effective code should elaborate on legislation to deliver additional benefits to consumers. The BCCC has undertaken targeted reviews of compliance with the Code³ which have identified areas of potential consumer harm

¹ The Appendix provides a brief overview of AFCA. For comprehensive information about AFCA, see our website www.afca.org.au.

² In assessing and determining complaints, an AFCA decision maker must do what they consider is fair in all the circumstances, having regard to: a) legal principles b) applicable industry codes or guidance c) previous relevant determinations of AFCA of predecessor schemes.

³ These include in relation to guarantees (2021 and follow up 2023), deceased estates (2023), Bank@Post (2023), cancellation of direct debits (2021).

and conduct improvement. This work, where it changes behaviour, can reduce or prevent future complaints and downstream costs and reputational damage for member banks.

Executive summary

General comments

AFCA strongly believes in the enduring importance of financial sector codes of practice. Given the breadth of banking offers available to Australians and the continued evolution of products, technology and platforms through which banking is delivered, the need for flexible and targeted commitments to consumers is needed even more today than when the Code was introduced 30 years ago.

In 2022/2023, AFCA received 36,493 complaints against banks. This represented 39.2% of all complaints received by AFCA that year. This data reflects the central role that banks play in the Australian retail financial system and the critical importance that an effective consumer-centric Code can play in ensuring fair outcomes in everyday banking transactions including lending decisions.

We applaud the ABA for obtaining and continuing to seek ASIC approval of the Code. The ABA is the only industry association that has sought approval of a broad-based financial sector code and in this way is leading the financial sector in demonstrating a public commitment to the highest Code standards.

The ABA has said that its response to the 116 recommendations of the 2021 Code Review was based on the following overarching principles:

- 1 The Code should aim to express important consumer protections that operate *in addition* to the law, therefore, the Code should minimise restatement of existing consumer rights under the law and/or other regulatory obligations;
- 2 The Code should be expressed as simply as possible to avoid unnecessary length or complexity;
- 3 Recommendations that already reflect banks' existing practice should not require amendments to the Code; and
- 4 Recommendations that address areas that are subject to ongoing consultation such as proposed changes to the law, regulatory obligations, or other Codes will be considered once those consultations are resolved.

We urge caution about the potential for the pursuit of 'simplification' and 'avoiding duplication' to result in changes that could lead to a diminution in protection for consumers. AFCA and predecessor schemes have been interpreting and having regard to the Code in its various forms for decades. It has operated well alongside legislative requirements, including responsible lending obligations since 2009. It has

served both banks and Australian consumers in driving fair outcomes in complaints handling. We urge ASIC to carefully consider all the proposed changes that have removed or amended content from the Code on the understanding that these changes could:

- remove consumer contractual entitlements and express scope for AFCA to determine complaints relating to that subject matter,
- influence bank culture, if there is a perception that it is acceptable to step away from specific commitments and obligations to consumers, and/or
- limit the ability of the BCCC to explore systemic and thematic risks to identify and address issues early, uplift practice and minimise harm to consumers.

AFCA believes the Code should contain, where practicable, the key commitments made by banks. It can add great value by describing these commitments in plain English – for consumers but also importantly for bank staff, whose conduct the Code is intended to influence most directly. We therefore agree in principle with the observations of the Code reviewer that *'while the Code should be accessible to as broad an audience as possible, the primary audience should be the banks and bank staff. It is the rule book for the banks⁴.*

This submission outlines AFCA's most substantive concerns about the Proposed Code. It also includes comments on the proposed Charter and Customer Guide in Attachments 3 and 4 to CP 373.

Diligent and prudent banker obligation

The diligent and prudent banker obligation stated in paragraph 49 of the current Code should continue to apply to lending regulated by the credit legislation. This obligation operates in addition to the law and sets a higher and broader standard of behaviour.

If duplication of law is considered to be a material issue in practice, then a simple solution could be for the revised Code to retain the current paragraph 49 whilst removing the current paragraph 50 (which was only added in 2019 and arguably establishes/overstates the overlap).

We believe that the diligent and prudent commitment is, in language and in form, consistent with general community expectations about how banks will treat their customers. Removal of this longstanding obligation sends a potentially negative message to bankers about what is an acceptable level of professional conduct and changes the nature and tone of the Code. In our view it would be a significant backward step from the good work done by banks over recent years to rebuild trust and improve practice in dispute resolution.

⁴ Final Report of Code Review, November 2021 p.9

Protection for guarantors

Diligent and prudent banker obligation

If the ABA's proposal to amend the current paragraph 49 proceeds, guarantors of affected loans would lose the protection afforded by the diligent and prudent banker obligation. As guarantors do not have the affordability assessment protection provided to individual borrowers by the credit legislation, they rely on the protection provided through the Code. This protection must be maintained.

Recommendations made by Code Review

The Code Review's Recommendations 73 to 79 would strengthen the Code's guarantee provisions – particularly to protect vulnerable guarantors. AFCA believes the Proposed Code should be altered to adopt these recommendations.

Vulnerability

AFCA considers the Code should adopt a broader and more proactive approach of defining and identifying vulnerability. We suggest other changes to raise service standards by improving processes to identify vulnerability and ensure care is provided to vulnerable customers and guarantors.

Basic accounts

AFCA believes the Code should include commitments for banks to proactively identify customers who may be eligible for basic accounts and help eligible customers transfer to those accounts.

Complaints

The complaint provisions have largely been excised from the Proposed Code with the loss of commitments that are not reflected in regulatory guidance. These should be retained.

Definition of 'small business'

The definition of small business affects the Code's coverage. In AFCA's view it is essential to ensure the definition, when amended, would not be in any respect narrower than the revised definition recommended by the Pottinger review.

Independent reviews

AFCA is concerned that the proposed timeframe for independent reviews is too long. We have suggested some approaches below that could be taken to ensure review requirements are fit for purpose.

Industry guidelines

The Code Review outlined an approach that would enable the industry guidelines to provide a flexible mechanism to set standards. The Proposed Code does not adopt

this approach or otherwise clarify the value or role of the guidelines. If the guidelines do not set standards effectively, some of their contents may need to be included in the Code itself.

BCCC Charter

ASIC's regulatory guidance acknowledges that the success of any code in protecting customers and raising standards depends on ensuring that subscribers comply with the provisions of that code. The BCCC Charter is therefore an important document that should preserve the effective and independent operation of the Committee. We are concerned that some changes to the Charter have reduced the Committee's oversight role.

2 Diligent and prudent banker obligation

Responsible lending laws under the *National Consumer Credit Protection Act 2009* (NCCP Act) apply to consumer lending. The Code has, since its inception, included a broad obligation on bankers to act diligently and prudently and AFCA currently assesses whether banks have met this standard as part of our assessment of whether banks acted reasonably, as required by the responsible lending laws.

The ABA notes that the Code refers to both compliance with law and to a diligent and prudent banker obligation. It has argued that it believes this causes confusion for consumers. The ABA also says the diligent and prudent banker test may be a lower standard than the standard of conduct required under the NCCP Act.

The ABA is now proposing to remove the diligent and prudent banker obligation in paragraph 49 of the Code for consumer lending, and to retain it for unregulated lending (including small business lending) for which no other legal standard applies. (Although we note that the ABA had originally proposed also removing the obligation for unregulated lending, and this was re-instated following strong representations made by AFCA and other external stakeholders.)

We disagree with the ABA's assessment. Although the responsible lending obligations are broad and principles-based, the obligation in paragraph 49 of the Code creates a higher standard for banks within the spectrum of reasonable conduct. When the diligent and prudent banker requirement is overlaid, it can indicate additional or more specific steps that the bank should have taken which effectively creates a higher standard for banks than what generally applies to credit providers under the NCCP Act.

For example, we may consider the diligent and prudent requirement creates a higher standard of conduct in assessing whether a loan is unsuitable where:

- a borrower applies for a loan to purchase a property in which they will not have a legal interest (such as a property to be purchased by an adult child)

- a borrower seeks a loan to purchase a property to construct a dwelling and there is debate about whether the bank ought to have considered the repayments on a future construction loan when assessing the earlier purchase loan
- a bank has internal policies about verifying genuine savings or acceptable forms of income in credit assessments (eg excluding certain unreliable income sources) and AFCA is considering whether related conduct is a breach of the Code and
- a broker provides information about a proposed loan that appears on its face to be unreliable.

We can also consider subscribing banks' compliance with their own policies as part of our consideration of whether they acted diligently and prudently when assessing a loan application. AFCA relies upon the diligent and prudent banker obligation in its work in resolving individual complaints. We consider it an important consumer protection and because of its inclusion in the Code it forms part of the contract between the bank and the consumer.

The diligent and prudent banker obligation stated in paragraph 49 is an overarching principle, governing lending conduct. These easily accessible and well-understood terms characterise the relationship and articulate the commitments banks make to their customers, in simple terms. Indeed, this concept could be described as the 'heart' underpinning the commitments in the Code to Australian borrowers.

The standard in the Code has existed alongside the responsible lending obligations since they were enacted in 2009 and we do not believe there is evidence of confusion or duplication to warrant its removal. The current proposed solution, which applies the test for some but not all lending, also fails the stated objective of simplification in the Code.

Paragraphs 49 and 50 of the Code read as follows:

49. If we are considering providing you with a new loan, or an increase in a loan limit, we will exercise the care and skill of a diligent and prudent banker.

50. If you are an individual customer, that is not a business, we will do this by complying with the law.

Paragraph 50 was added when the Code was amended in 2019. Before that amendment, the Code did not include any equivalent of paragraph 50 and the equivalent of paragraph 49 - paragraph 27 of the 2013 Code - stated:

Before we offer, give you or increase an existing, credit facility, we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay the credit facility.

As noted, the ABA now argues that the diligent and prudent banker obligation duplicates the law. It is AFCA's view that the addition of paragraph 50 in 2019 articulated a sense of duplication that is not consistent with practice and we note that the Code reviewer observed that '*As currently drafted, Clause 50 is not informative and is not consistent with the Code in representing a clear and readily understandable outline of the obligations banks make to their customers*'.⁵

For the reasons explained above, the obligation stated in paragraph 49 sets an important standard bearer for the banker/borrower relationship that AFCA believes must be preserved. A simple way to resolve any duplication issue would be to retain paragraph 49 in its current form and remove paragraph 50. AFCA would support such a change.

3 Protection for guarantors

3.1 Complaints relating to guarantees

In the two calendar years 2022 and 2023, AFCA received more than 800 complaints which were categorised either by the product category 'guarantees' or where guarantors were referenced in the complaint summary. The five issues most commonly raised in these complaints were: liability disputed; failure to follow instructions/agreements; appropriate lending; firm failure to respond to request for assistance and default listing. Banks will individually be dealing with a higher number of complaints about guarantees or by guarantors through their internal dispute resolution (IDR) processes.

3.2 Diligent and prudent banker obligation

In the Victorian Supreme Court of Appeal decision of *Doggett v CBA*, the Court found the diligent and prudent banker obligation stated in paragraph 49 of the Code is incorporated into Code subscribers' guarantee contracts. This means guarantors also benefit from the protection in current paragraph 49.

Guarantors do not have the affordability assessment protection provided to individual borrowers by the responsible lending obligations, so are even more reliant on the protections in the Code. It is paragraphs 49 and 50 of the Code (and their incorporation into guaranteed contracts under paragraph 2 of the Code) that effectively extend the responsible lending and diligent and prudent obligations to cover guarantors.

If the ABA's proposal to remove the statement of the obligation in relation to regulated loans proceeds, guarantors of these loans will also lose the protection afforded by the obligation. As explained above, AFCA believes statements of the diligent and prudent

⁵ Final Report, November 2021 p.109

banker obligation in the current Code should continue to be stated in the revised Code. The amendments would substantially lower protections for guarantors.

AFCA has regard to Code provisions including paragraph 49 when considering complaints. If a bank does not act diligently and prudently when assessing a borrower's capacity to repay a guaranteed loan, the guarantor may be released from liability where AFCA finds the bank's error led it to provide a loan it otherwise would not have provided. To provide an example, we refer to the case study on pages 71 and 72 of our latest [Annual Review](#).

3.3 Recommendations made by Code Review

The Code Review made a suite of recommendations to strengthen the Code's guarantee provisions, particularly to protect vulnerable guarantors.

Code Review recommendations

73. Consistent with Recommendation 8, banks should commit to periodically audit the effectiveness of their processes and systems to support compliance with the guarantee provisions under the Code.

74. Banks should commit to proactively identify guarantors who may require additional support to understand the guarantee information provided to them.

75. Banks should commit to tailoring their approach to provide the information required to be given to the guarantor in a meaningful and accessible way to suit the needs of the guarantor, including where the guarantor's first language is not English.

76. Banks should commit to maintain records of any indicators that a guarantor may be vulnerable.

77. Banks should commit, unless impractical to do so, to meet face-to-face, video conference or other means with the guarantor before accepting the guarantee, and particularly where the guarantor has not sought independent legal or financial advice. Banks should meet with the guarantor without the borrower being present.

78. Banks should commit to conducting a pre-enforcement review of a guarantee to ensure that it has been obtained in accordance with the Code before commencing enforcement action.

79. Banks should commit to explore all alternative options with a guarantor before a guarantor is forced to sell their principal place of residence.

AFCA supports the recommendations above. They would help to address common issues observed through complaint resolution.

We are concerned that the ABA has rejected most of these important recommendations. The ABA's response to the recommendations⁶ was:

- Recommendations 73 to 76 and 78 were not supported
- Recommendation 77 was 'supported in principle'

⁶ [ABA Response](#) to Code Review published on ABA website.

- Recommendation 79 was ‘supported in part’.

AFCA believes the assessment of the Proposed Code should include consideration of whether and how the recommended changes should be made.

Recommendation 77 is reflected in paragraphs 106 to 108 of the Proposed Code. However, the new provisions, which require banks to ‘take reasonable steps’, are less exacting than the recommended approach to require action unless it would be impractical. Recommendation 79 – described by the ABA as ‘supported in part’ - resulted only in minor changes to wording.

AFCA believes that Recommendations 78 and 79 should be fully implemented. They would provide practical process improvements during the invariably difficult time when a guarantee is being enforced (or is proposed to be enforced). We are particularly disappointed that the ABA did not adopt Recommendation 78 – which would commit banks to checking, before enforcing a guarantee, that it was obtained in accordance with the Code. This checking is necessary in our view – and we note would also be consistent with a diligent and prudent standard of behaviour.

The failure to adopt Recommendations 75 and 76 to address issues with guarantor understanding and comprehension is also disappointing. Vulnerability, English proficiency and family pressure to agree to guarantees continue to be major issues in our casework. These recommendations would have provided some protection and required banks to have some processes to increase the chances they will obtain informed consent free from unfair pressure or undue influence.

Recently, the BCCC conducted an inquiry into compliance with the Code’s guarantee obligations. Its [report](#) on the inquiry was published on 11 August 2021.⁷ Recommendations in that report were echoed in the Code Review’s recommendations listed above.

By following the BCCC inquiry’s recommendations, the Code Review decided not to recommend more sweeping Code amendments advocated by consumer groups. Even though the Code Review recommended relatively modest amendments supported by the BCCC inquiry, the ABA decided not to incorporate most of them in the Proposed Code.

4 Vulnerability

4.1 Defining vulnerability

Paragraph 49 of the Proposed Code creates, in effect, a definition of vulnerability by setting out a non-exhaustive list of factors that may increase a customer’s risk of experiencing vulnerability. AFCA believes the approach taken in paragraph 49 should

⁷ See discussion of the inquiry’s report in section 16 of the Code Review’s [Final Report](#).

be changed. We have expressed this view when providing input in recent ABA consultations for the development of Code amendments and draft vulnerability guidelines.

While there is not a single definition of vulnerability that applies across financial or other retail markets, there is general acceptance for a broad approach which makes clear that:

- anyone can become vulnerable at any time
- experiencing vulnerability is a personal situation that requires extra care and often a tailored response
- there is no set list of prescriptive factors that amount to vulnerability.

This type of approach also acknowledges that the conduct of firms (in this context, banks) can of itself amplify consumer vulnerability. This may result, for example, from complex product design, hidden or opaque pricing or hard-to-navigate processes.

We are therefore concerned that the reliance on a list of factors in paragraph 49 could result in banks focussing on checking off this list – without fully considering a particular customer’s situation and the circumstances in which they are contacting or engaging with their bank.

In formulating vulnerability provisions for the revised Code, the approach taken by the UK Financial Conduct Authority (FCA) could serve as a model. We agree with the Code Review’s Recommendation 35, which is to adopt the FCA’s definition of ‘vulnerable customer’:

‘someone who, due to their personal circumstances, is especially susceptible to harm – particularly when a firm is not acting with appropriate levels of care’.

If the approach of listing factors is maintained, AFCA considers these changes should, at a minimum, be made:

- Remove the current reference to Aboriginal or Torres Strait Islander customers from the list and focus on identifying indicia or evidence of vulnerability which can be prevalent across this and other communities.
- Expand the list by:
 - > including extra factors that may lead to vulnerability, for example:
 - incarceration
 - housing insecurity
 - financial crimes such as scams
 - > referring to regional, as well as remote, locations.

4.2 Identifying vulnerability and providing extra care

As noted in CP 373.78, the Code Review made several recommendations designed to increase identification of vulnerability and improve the care provided to vulnerable customers and guarantors. AFCA supports measures to achieve these results.

Based on our complaint resolution experience, we believe service standards should be improved by the Code requiring banks (through effective training and systems) to take more proactive steps to identify vulnerability and, when it is identified, to appropriately record relevant information. These standards should support better outcomes for vulnerable consumers as well as minimising the incidence of consumers having to unnecessarily repeat information relating to their vulnerability – particularly when dealing with different bank staff.

Consumer advocates consistently tell us that the burden of 're-telling' amplifies trauma and can lead to consumers dropping out of important conversations and processes (including hardship and IDR).

5 Basic accounts

In its Recommendation 39, the Code Review stated banks should commit to pro-actively identifying customers who may be eligible for basic accounts. The Proposed Code does not include this commitment.

AFCA's view is that, given the findings of ASIC's *Better Banking for Indigenous Consumers Project*⁸, the revised Code should include commitments for banks to:

- pro-actively identify eligible customers as recommended by the Code Review; and
- when an eligible customer is identified, offer to transfer the customer to a basic account and explain how that transfer would affect them.

We note that the final report of the Retail Deposits Inquiry conducted by the Australian Competition and Consumer Commission⁹ found that it is difficult for consumers to obtain an objective view of the best (deposit) products available due to lack of consistency between banks and conflicted arrangements with comparison websites. It also found relatively few consumers switch to better products including because of significant impediments and barriers to switching.

Both of these regulator reports show that consumer outcomes need to be improved in relation to deposit products generally. The proposed Code does not respond to this need.

⁸ See [23-183MR](#), published on 5 July 2023, which outlined the project's findings.

⁹Retail deposits inquiry, Final Report December 2023

6 Proposed Customer Guide

The 'Proposed Customer Guide' in Attachment 4 to CP 373 has been developed in part to support the removal of some content from the proposed Code.

The table of Australian law in Attachment 4 contains high-level information that at best might act as a general starting point for customers who are motivated and able to undertake further research relevant to their specific circumstances. It is presented without navigation guides and cannot be said to effectively identify rights that customers can exercise.

In our view the Proposed Customer Guide is therefore not the type of document needed to satisfy the Code Review's Recommendation 4. That recommendation requires banks to produce a consumer-friendly document that highlights the rights consumers have when dealing with banks.

We acknowledge that Attachment 4 sets out some information about complaint resolution that banks should provide to their customer, however AFCA considers this should be contained in provisions of the revised Code. This is necessary to make the commitments about informing consumers of their rights contractually enforceable and ensure the BCCC's role in monitoring and enforcement is not diminished.

7 Complaints

The changes to the complaints provisions in the Proposed Code have reduced consumer protections and clarity for bank staff and consumers.

Several commitments relating to complaints stated in Chapters 47 and 48 of the current Code have been moved to the unenforceable Introduction to the Proposed Code. Other complaint-related provisions of the current Code – including simple statements of fundamental commitments - have been completely removed. Examples of provisions of the current Code removed from, and not replicated in any way in, the Proposed Code include:

- paragraph 200 – 'We will ensure our process for handling your complaint is fair and reasonable.'
- paragraph 201 – 'We will keep you informed of the progress of your complaint.'
- paragraph 202 – 'We will give you the name of a contact person who is handling your complaint and a way to contact them.'

New paragraph 181 states that banks will comply with RG 271.

7.1 Recommendations made by Code Review

CP 373.90 and 91 refer to two of the general recommendations made by the Code Review that are relevant to complaint handling:

- Recommendation 3, which specifies the level of detail that the Code or related documents should include. The objective in this context is to make it easier for bank staff to implement commitments and for consumer representatives to help customers to pursue their rights.
- Recommendation 4, which indicates the Code should require banks to provide a document about customers' rights that is easy to access and read. The Code should commit banks to giving this document to any customer who makes a complaint.

The Code Review also made recommendations¹⁰ to address complaint issues more specifically, including:

- Recommendation 97 – to expand the Code to include some of the important requirements in ASIC guidelines (such as RG 271). This recommendation notes particular points to be covered in the Code, such as -
 - > IDR processes should be easy for anyone to understand including people with a disability and language difficulties
 - > bank staff should have the knowledge, skills and attributes to effectively and efficiently deal with complaints
- Recommendation 100 – to require a bank, when it receives a complaint, to give the complainant simple, easily understandable information about their rights.

These specific recommendations reflected the view that it was not sufficient for the Code to merely say banks will comply with RG 271. The Code Review considered the current Code - which states key commitments about complaint handling - and found further detail should be added to these commitments. The Proposed Code takes the opposite approach of removing the existing statement of commitments and reducing the scope of oversight by the BCCC.

7.2 Suggested amendments

AFCA considers the revised Code should:

- outline key commitments in regard to complaint handling, including timeframes (as Chapters 47 and 48 of the current Code do)
- describe action banks will take to meet important requirements in RG 271
- state the obligations of banks to give complainants information about complaint resolution processes.

The brief statements of commitments in Chapters 47 and 48 of the current Code assist bank staff and consumer representatives by succinctly stating key commitments relating to complaint resolution processes. The Proposed Code would

¹⁰ See section 19 of the Code Review's [Final Report](#).

not provide the same level of assistance. RG 271 is a lengthy, technical document that may not enable readers to identify the most important obligations on banks and rights of customers. As explained above, we believe Attachment 4 to CP 373 will not operate effectively as a customer guide.

We note that comparable industry codes include simply expressed provisions to explain rights and obligations in IDR and EDR. Examples are Part 11 of the General Insurance Code of Practice and Section 9 of the Insurance Brokers Code of Practice. These provisions indicate current standards.

8 Definition of ‘small business’

When approving the Code in 2018, ASIC imposed a condition requiring an independent review of the definition of small business. The Pottinger review, commissioned to satisfy that condition, recommended changes to the definition in its [report](#) dated 26 October 2020.

The definition of small business is an important provision that affects the Code’s coverage. Before approving the Proposed Code, it may be appropriate to require the ABA to demonstrate the definition is not in any respect narrower than the revised definition recommended by the Pottinger review.

9 Independent reviews

The Introduction to the Proposed Code states:

‘We will arrange for the Code to be independently reviewed at intervals of no more than five years after completion of the previous review.’

This does not purport to establish a strict five-year timeframe for reviews. The five-year time limit specified would run between **completing** one review and **arranging** the next review.

The Code Review found that the existing requirement for the Code to be reviewed every three years remained appropriate. It made recommendations to maintain the three-year timeframe and also provide for consideration of Code amendments between the triennial reviews.¹¹ ASIC’s regulatory guidance states that an approved industry code should be reviewed at intervals of no more than three years¹².

Whilst acknowledging the effort and intensity of conducting regular comprehensive reviews, AFCA is concerned about this proposal to extend the timeframe. Banking is a dynamic industry which has seen considerable change brought about by technology, new products and disruption. To ensure that the Code remains fit for

¹¹ See Recommendations 115 and 116 in the Code Review’s [Final Report](#).

¹² Paragraph 183.82

purpose and provides adequate consumer protection, frequent reviews are necessary. We also note that in this current review, important consumer issues have been deferred pending the outcome of current Government reform processes including about privacy, buy now pay later regulatory reform and scams.

We encourage ASIC to consider options for ensuring that the independent review cycle is both efficient and ensures the Code remains up to date. These could include conditions which: set clear timeframes about the actual start and end date for reviews based on actual experience; provide for interim or targeted reviews of specific issues that may arise during the review interval (for example these could be conducted by an independent reviewer or by the BCCC); and setting expectations about how and when Code review recommendations about deferred reforms should be responded to.

10 Industry guidelines

The Proposed Code states that the industry guidelines do not form part of the Code and are not enforceable contractually. It does not follow the Code Review's Recommendation 10, which includes this series of suggestions:

- The industry guidelines should be considered Code-related documents (as opposed to voluntary documents outside the Code).
- When banks assess whether they are complying with Code commitments, they should take into account the industry guidelines.
- If banks are not following the best practice outlined in the industry guidelines, they will have to demonstrate they are following comparable processes in meeting Code commitments.
- The Code should refer to the industry guidelines and make their role more transparent.

AFCA considers that, if the approach outlined in Recommendation 10 above is taken, the industry guidelines will provide a flexible mechanism to set standards. The guidelines could, for example, be used to provide more detail than the Code. AFCA has regard to the industry guidelines in resolving complaints, where they assist a decision maker in understanding and applying what is good industry practice.

If compliance is entirely voluntary, however, the value of the industry guidelines will be unclear. Matters that could have been covered in Code-related documents may need to be included in the Code itself to provide adequate consumer protection.

11 Proposed BCCC Charter

11.1 Best practice standards

In the current Code, paragraph 211 describes the BCCC's role to *drive improvements in Code compliance to achieve best practice*. The proposed Charter uses more limited terms where it refers to achieving best practice Code compliance (in clause 3f) and a statement under the table of contents) and to achieving best practice Code implementation (in clause 1.2). Use of that wording could have the unintended consequence of narrowing the BCCC's remit by referring to best practice in compliance or implementation instead of best practice for banks broadly.

To address this issue, AFCA suggests that the references to best practice in the proposed Charter should be reviewed. The BCCC's role should continue to include driving improvements to achieve best practice broadly, without new limitations.

11.2 Collection of breach data

The Charter's provision for data collection, clause 4.2, is being altered to introduce a materiality threshold. At present, clause 4.2b) requires Code subscribers to provide breach reporting data in a form approved by the BCCC every two years following consultation with the subscribers. The BCCC has a discretion to approve the form of the data.

In the Proposed Charter in Attachment 3 to CP 373, clause 4.2 would not give the BCCC the same discretion. It would require the form of the breach reporting data to be **agreed** with the ABA and Code subscribers.¹³ The new provision to introduce the materiality threshold – clause 4.2c) – would also reduce the BCCC's autonomy by requiring aspects of the reporting arrangements to be **agreed** with the ABA.

The wording of clause 4.2 is important because it determines the information supplied to the BCCC for compliance monitoring. AFCA believes the BCCC's ability to monitor Code compliance should not be reduced and the BCCC should therefore retain its existing discretion to approve the form of breach data to be provided by subscribers. Moreover, the introduction of the materiality threshold should not reduce the BCCC's powers.

To continue to operate effectively, the BCCC must maintain independence, in both perception and practice. In this context, we refer to the criteria for code approval referred to in RG 183. Paragraph 183.78(a) states that the code administrator should be responsible for establishing appropriate data reporting and collection procedures. The guide emphasises that the administrator must be independent.

¹³ We note that committees monitoring comparable industry codes are not required to agree the form of breach reporting data.

Appendix – About AFCA

AFCA is the independent EDR scheme for the financial sector. It replaced the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

AFCA provides fair, independent and effective solutions for financial complaints. It does this not only by providing complaint resolution services free to consumers, but also by working with its members to improve their processes and drive up industry standards of service, thereby minimising complaints.

More broadly, AFCA plays a key role in restoring trust in the financial services sector. In addition to providing solutions for financial complaints, AFCA has responsibilities¹⁴ to identify, resolve and report on systemic issues and to notify ASIC, and other regulators, of serious contraventions of the law. A separately operated and funded team within AFCA provides services to support independent committees that monitor compliance with several financial services industry codes.

AFCA's service is offered as an alternative to tribunals and courts to resolve complaints about financial firms made by individual and small business consumers. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation.

AFCA's role is to assist consumers to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent.

If a complaint does not resolve between the parties, we will decide an appropriate outcome, including awarding compensation for losses suffered or substituting the trustee's decision in the case of a superannuation complaint.

¹⁴ See [ASIC's Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*.