

15 January 2024

[REDACTED]
Banking Code Consultation Team
Regulation & Supervision
Australian Securities and Investments Commission

Via email: BankingCode@asic.gov.au

Cc: [REDACTED]

Dear [REDACTED]

Banking Code Compliance Committee submission: CP 373 Proposed changes to the Banking Code of Practice

The Banking Code Compliance Committee (BCCC) welcomes the opportunity to make a submission to the Australian Securities and Investment Commission (ASIC) consultation paper 373 (the Consultation Paper) on proposed changes to the Banking Code of Practice (the Code).

The Code plays an important role in setting a consistent standard of good practice that should protect the interests of customers and strengthen community confidence in the industry. We recognise the Australian Banking Association's (ABA) role in determining these standards to ensure the Code is effective, remains contemporary of current and emerging issues, and meets community expectations.

In the current economic climate, amidst rapidly evolving technology and banking services, the Code commitments to customers are more important than ever.

As the independent monitoring body responsible for monitoring compliance with the Code, we have unique insights into current and emerging issues, which have informed this submission.

We have taken an issues-based approach to this submission and an overview of our recommendations is set out in a table in [Appendix 1](#).

We provided a comprehensive submission to the ABA's consultation on the proposed changes to the Code, the BCCC Charter and Customer Guide. We were pleased to see that the documents shared in the Consultation Paper incorporated many changes consistent with our feedback to the ABA. However, we consider more needs to be done to address key issues.

It is essential that the new Code retains important customer protections that are clear for bank staff, customers and their representatives. Furthermore, it is vital that the BCCC retains

the powers and resourcing that enable us to operate independently and effectively in monitoring Code compliance and driving better practices in the industry. Our submission covers a range of opportunities to retain or improve important customer protections. However, the most important priority from our perspective is addressing the gaps in customer protections created with the removal of certain provisions on the grounds of perceived 'simplification' and 'avoiding duplication'. Removing these crucial protections, such as the obligation for banks to exercise the care and skill of a diligent and prudent banker, will result in a concerning reduction in customer protections.

Removing these obligations signals to banks and consumers that such commitments are dispensable. This a significant backward step in the industry's efforts to improve practices and rebuild customer trust following the Hayne Royal Commission.

We strongly believe there must be a greater balance between the ABA's stated objectives of simplification and removal of duplication and that of ensuring consumer protections are retained.

If you have any questions or would like to discuss this submission, please contact CEO of the BCCC, [REDACTED], by email [REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]

Independent Chairperson
Banking Code Compliance Committee

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Submission

Obligations removed due to perceived duplication or simplification

1. We do not support the removal of the following Code obligations:
 - a. existing paragraphs 49 and 50 – diligent and prudent banker for individuals
 - b. existing paragraph 138 – making customers aware of how to use joint accounts
 - c. existing paragraphs 201, 202 and 206(b)-(c) – obligations for complaints handling

These obligations should be retained because they provide important protections that are not otherwise available in law.

2. We are concerned that the proposed removal of some obligations, on the basis of simplification or perceived legislative duplication, has created gaps in important customer protections. Additionally, this has reduced transparency and accessibility of important protections for customers.
3. The proposed drafting is based on too narrow an interpretation of [ASIC Regulatory Guide 183 Approval of financial services sector codes of conduct](#) (Regulatory Guide 183). We highlight Regulatory Guide 183.5(b) and (c), which acknowledges the important role that codes can play to clarify and elaborate on existing legislation to deliver additional benefits to consumers. This clarification and elaboration of existing legislation within the Code can make it easier for customers, consumer advocates and bank staff to understand the conduct expected.
4. While acknowledging the ABA's concerns, raised in [its submission](#) to the 2021 Independent Review of the Code (the Code Review), that replicating legislation may create complexity and duplicate regulatory regimes for enforcement and processing, we consider that there are other ways to address these drivers for removing perceived legislative duplication. In particular, the BCCC Charter addresses the risk of duplicating compliance action, and we are working with stakeholders to streamline reporting.
5. Details of our concerns with the removal of these obligations are set out below.

Diligent and prudent banker for individuals (existing paragraph 49)

6. It is crucial that the Code retains the obligation at paragraph 49 to exercise the care and skill of a diligent and prudent banker for individual customers. This clearly and simply articulates the standard of conduct that customers can reasonably expect from banks. It is an important point of reference for bank staff regarding expected conduct for decisions in relation to responsible lending.
7. The ABA removed this obligation because it considers it a duplication of responsible lending obligations in Chapter 3 of the National Consumer Credit Protection Act 2009 (NCCP Act). In its response to our submission to the ABA draft Code consultation, the ABA noted concerns that Code obligations that are separate to legislation, but repetitive, may cause confusion.

8. However, we consider the diligent and prudent banker obligation adds value alongside legislative obligations because it clearly explains the responsible lending principles. The phrase to 'exercise the care and skill of a diligent and prudent banker' is widely understood and has meaning for customers and customer representatives. This obligation has co-existed with the responsible lending obligations in legislation for some time and we have not observed evidence of it causing confusion.
9. We consider that, for an individual borrower, the diligent and prudent banker obligation has further reach than what is set out in law.
10. This obligation ensures the following additional benefits to customers:
 - a. When assessing a borrower's capacity to repay, the diligent and prudent banker obligation extends to guarantors, who do not have the same legislative protections as individuals under responsible lending obligations. Moreover, guarantors may have recourse in the case of a breach of contract. Removing this obligation creates a significant gap in the existing protections for guarantors in the Code and must be addressed.
 - b. It is useful to inform what may be fair circumstances when assessing the suitability of a responsible lending contract. The Australian Financial Complaints Authority's (AFCA) [approach document on Responsible Lending](#) refers to this obligation as a consideration when assessing fair circumstances in a responsible lending complaint.
 - c. It provides customers with an additional claim for breach of contract and an alternative option for remediation from a bank when other options do not provide adequate compensation for the bank's failure to uphold minimum standards of care and skill in lending.
11. We also note the ABA's concern, that elements of paragraph 49 appear to be of a lower standard than the NCCP Act. In its response to our submission to the ABA draft Code consultation, the ABA referenced case law that considers previous versions of the Code; namely the [Modified Code of Banking Practice 2004](#), which states at clause 25.1:

'Before **we** offer or give **you** a credit facility (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 it.' (emphasis in original)
12. However, we consider that the existing obligation in paragraph 49 is not comparable to clause 25.1, which was considered by the case law. The wording considered in the case law does not appear in the existing Code and should not be relied on.
13. In the context of high interest rates, cost of living pressures and a competitive market, maintaining focus on prudent lending practices in the Code is important to address current and emerging customer issues.

14. Data from our bi-annual Compliance Statement¹ shows that Chapter 17 of the Code (A responsible approach to lending), which includes the diligent and prudent banker obligations in paragraphs 49 and 50, has always been one of the top three most breached chapters.
15. In our [Compliance Statement report for January to June 2023](#), over 16% of total reported breaches related to Chapter 17 obligations (1,727 breaches). In many instances, these breaches were accompanied by breaches of other important obligations of the Code, such as Chapter 14 (Taking extra care with customers who are experiencing vulnerability) and Chapter 4 (Trained and competent staff).
16. In its [2022-23 complaints snapshot](#), AFCA also reported an increase in complaints related to home loans. It noted that home loan and credit card complaints were higher in the final months of the year.
17. This shows that compliance with responsible lending obligations continues to be a major concern in the industry and among customers. It is important that the Code retains the diligent and prudent banker obligation to address this concern and maintain existing customer protections.
18. We expect this standard of conduct to be embedded in bank practices. Paragraph 49 of the Code confirms commitment to the conduct.
19. We note AFCA's submission to CP373, which suggested the removal of paragraph 50 as a simple solution to resolving duplication concerns raised by the ABA. We endorse this as an alternative: retain existing paragraph 49 and remove existing paragraph 50. It is a balanced approach to reducing any perceived duplication by the ABA while retaining important customer protections in the Code.

Making customers aware of how to use joint accounts (existing paragraph 138)

20. Paragraph 138, which requires banks to inform a customer how to use a joint account if they have one, should be retained. Removing it reduces customer protection.
21. While some obligations that address certain circumstances, such as protections for joint accounts with deceased customers, have been retained in paragraphs 132, 133 and 135 of the proposed Code, the obligation in paragraph 138 of the current Code provides a broader commitment to proactively offer information to joint account holders.
22. Owning a joint account comes with risks that customers must understand. For example, a joint account holder will have joint ownership of both assets and debt, and both account

¹ We collect data from the banks in a Compliance Statement on the total number of breaches and details for a sample of incidents that meet certain criteria, every six months. We use the data collected to evaluate industry-wide issues and trends and publish a report on this on a bi-annual basis.

holders may have the ability to change associated contact details on an account. This can increase the risk of financial abuse for customers in vulnerable circumstances, such as a people with a disability, elderly people, incarcerated people, or customers in financial difficulty.

23. The ABA, in response to concerns we raised about the removal of the obligation in paragraph 138, advised that banks already have an obligation to provide information that is useful and clear, and the Terms and Conditions of joint accounts include information on their use.
24. Given the risks, we consider it important to retain the proactive obligation to inform customers on how to use joint accounts, rather than rely on the Terms and Conditions to ensure they understand the implications of these accounts.

Obligations for complaints handling (existing paragraphs 201, 202 and 206(b)-(c))

25. The obligations set out in existing Chapters 47 and 48 should be retained in full.
26. Combining existing Chapters 47 and 48 into a single paragraph (proposed Paragraph 181) raises two key issues. First, it creates gaps in customer protections where the obligations are not covered in ASIC's [Regulatory Guide 271 Internal Dispute Resolution](#) (Regulatory Guide 271). In particular, we are concerned about removing protections that ensure customers have access to a dedicated point of contact and receive timely updates. Second, it removes important clarity for customers and bank staff on the key commitments for handling complaints. It reduces the effectiveness of the complaint handling obligations in the Code because it fails to provide adequate detail managing complaints and helping customers pursue their rights.
27. Details of our concerns are set out in the section on [Handling complaints](#).

Implications for reporting and BCCC oversight

28. Removing these obligations would have significant implications for our oversight because banks would no longer report breaches of these obligations to us.
29. In particular, removing the obligations for complaints handling and to be a diligent and prudent banker will limit our oversight and ability to identify issues early, work with industry to improve practices, and deliver better outcomes for customers.
30. Obligations in the Code often interconnect and we take a holistic approach to addressing issues. Therefore, removing these obligations will ultimately hinder our ability to monitor and assess key issues that affect customers.
31. The diligent and prudent banker obligation allows us to detect risks in responsible lending, often a lead indicator of non-compliance with other crucial obligations such as

financial difficulty, debt collection, vulnerability, and guarantees enforcement.

32. In our [Compliance Statement report for July to December 2022](#), we highlighted a 14% increase in breaches of Chapter 17 (A responsible approach to lending). We noted the significant impact of these breaches and how banks attributed 91% of them to human error. We linked these types of breaches to risks of exacerbating financial hardship and emphasised the urgent need for banks to improve.
33. Our data indicates issues relating to banks' compliance with responsible lending and complaints handling obligations continue to be an issue of concern. Breaches of Chapter 17 (A responsible approach to lending) and Chapter 48 (How we handle your complaint) have always been in the top five Chapter breaches reported by banks.
34. It is crucial that banks continue to uphold commitments to improve practices in these key areas. We must retain the ability to support this through our monitoring of the Code compliance.

Obligations moved to the introduction

35. The following obligations in the existing Code should be retained in standalone paragraphs:
 - a. paragraphs 4 and 5 (How the Code is to be publicised and made available)
 - b. paragraph 212 (BCCC resources)
 - c. paragraph 213 (We will comply with requests of the BCCC)
36. Existing paragraphs 212 and 213 have been relocated to the Introduction (page 4 of the proposed Code), which does not form part of the Code. Existing paragraphs 4 and 5 have been moved to the explanatory page (page 5 of the proposed Code).
37. Removing these as obligations in standalone paragraphs in the Code creates ambiguity for banks identifying, recording and reporting breaches. This will limit our oversight and ability to monitor trends, provide feedback to the industry and improve practices.
38. It also restricts us from being able to enforce and act on serious or systemic non-compliance with these obligations.

Promotion of the Code (existing paragraphs 4 and 5)

39. The promotion of the Code (existing paragraph 4) is a key commitment for raising awareness of protections. It is especially important for customers who are experiencing vulnerability or in regional or remote communities. Existing paragraph 5 clarifies expectations of how a bank must make the Code readily available and accessible to everyone.
40. The changes to these paragraphs risk devaluing the purpose of the obligations: to ensure banks actively promote the Code and the protections it offers in their interactions with customers.

41. Increasing branch closures and banks moving services to alternative banking channels, such as digital banking and Bank@Post, may compound the risk. The obligations in the Code extend to banking services provided through Bank@Post and it is important that banks uphold this commitment to promote and raise awareness of the Code among both Australia Post staff and customers. Less direct interaction with their bank means customers may be unaware of the important protections in the Code.
42. The Code is only effective if customers are aware of it and use it to understand their rights. Promotion of the Code is key to ensuring it has its intended impact on conduct and is critical to its success as a self-regulatory model.

Code monitoring (existing paragraphs 212 and 213)

43. We support reducing duplication in the Code and the BCCC Charter. However, paragraphs 212 and 213 of the existing Code serve an important function in setting out clear and transparent commitments by banks to ensure the effective operation of our independent monitoring.
44. Existing paragraph 212 requires the ABA to ensure that we have sufficient resources and funding to carry out our functions. We consider it appropriate to retain this as a compulsory Code obligation and transparent commitment by the ABA and banks. This will ensure we remain adequately resourced to support effective compliance monitoring arrangements, consistent with the criteria set out in Regulatory Guide 183.43 (d).
45. Existing paragraph 213 requires banks to co-operate and comply with all our reasonable requests for our monitoring and investigation activities. Removing this paragraph as a compulsory Code obligation would diminish our effectiveness in monitoring compliance with the Code, a key consideration in the general statutory criteria for approval of an industry code under S1101A(3)(c)(ii) of the Corporations Act.
46. Removing existing paragraph 213 is inconsistent with the proposed Charter, which states in draft clause 7.1 (e): “that the BCCC has the power to apply sanctions to a code-subscriber for a breach of the Code where a finding has been made that the code-subscriber has not co-operated and complied with reasonable requests of the BCCC”.
47. The existing paragraph 213 must be retained as a compulsory Code obligation in the Code for us to identify breaches and impose sanctions. The ability to sanction is a critical element of maintaining transparency and accountability in the industry.
48. These commitments go beyond simply restating the BCCC Charter, a document intended to set out the role, function and powers of the BCCC, and should be retained within the Code.

Guiding principles

49. The Guiding Principles should remain part of the Code because they commit banks to ensuring practices satisfy the overarching objectives of the Code.
50. The Guiding Principles serve a critical purpose for setting and clarifying the overarching intent and objectives of the obligations in the Code. They underpin the Code and provide a lens through which bank staff make decisions.
51. Removing these principles from the Code obligations would create uncertainty about the overarching objectives and unnecessarily detract from its readability and interpretation.
52. The effectiveness of principles in driving behaviour depends on them being enforceable. The benefits of Guiding Principles include:
 - a. holistic guidance, rather than a focus on specific obligations that may result in a narrow, rigid approach and potentially missing broader context
 - b. flexibility to address unforeseen challenges by providing a framework to make decisions
 - c. contribution to public trust and maintaining the reputation of the industry
 - d. direction through a strong connection between the obligations and the overarching intent of the Code.
53. The Guiding Principles form an important consideration when we assess compliance with obligations.
54. Our [investigation CX6933](#) into Members Equity Bank Limited (ME Bank) and its decision to adjust amounts on some legacy home loan accounts in 2020 offers an example. Concluded in April 2021, our investigation found that communications from ME Bank to its customers in April 2020 about changes to its redraw amounts were poor and ineffective. Considering the impact of this change on customers, our investigation highlighted ME Bank's failure to meet community standards and expectations. We found that it failed to be accountable, transparent and retain the trust of its customers and the community – all of which are Guiding Principles.
55. As the processes through which banks comply with the Code can shift over time, maintaining the Guiding Principles as part of the Code ensures a strong focus that can form an important part of our assessments of Code compliance.

Customer Guide

56. The Customer Guide needs further work to ensure it meets its intended purpose to provide clear and accessible information to help customers understand their rights.
57. The ABA should consult extensively with consumer law organisations and specialists on the content of the Customer Guide and test it with customers to ensure it meets its objectives.
58. In particular, we believe the Customer Guide should:

- a. contain enough detail for a customer to understand their legislative protections
 - b. be written in plain English
 - c. meaningfully replicate obligations that are removed from the new Code
 - d. explain the channels a customer has to raise concerns better
 - e. encourage customers to raise concerns with their bank first and explain when and how to raise a concern with a regulator
59. Details of our response and feedback to the ABA on the Customer Guide is at **Attachment 1**.
60. We reiterate our view that the proposed Customer Guide is not an adequate substitute for removing certain obligations in the Code. The Code should remain the primary document that contains the rights of customers, drafted in sufficient detail to facilitate its implementation by banks and allow consumer representatives to help customers understand and pursue their rights.
61. Proposed changes to the Code remove key information for customers on their rights, particularly regarding a bank's obligations for responsible lending, hardship protections and credit cards for individuals.
62. Although many of these obligations are set out in legislation, it is through a complex framework that includes the NCCP Act, National Credit Code (NCC) and National Consumer Credit Protection Regulations. As the NCCP Act comprises two volumes and the Corporations Act six volumes, each approximately 700 pages long in technical language, it is not reasonable to expect a customer to identify and interpret the provisions and protections relevant to their circumstances.
63. Most customers, customer representatives and bank staff will have difficulty identifying specific information or interpreting relevant legislation or regulatory guidance.
64. The impact of the change will mean customers will have to refer to multiple documents to find information about their rights, leading to unnecessary complexity and confusion for customers and bank staff.
65. The obligations set out in the section '[Obligations removed due to perceived duplication or simplification](#)' should be reinstated in the Code. Other obligations removed from the Code should be meaningfully replicated in the Customer Guide.

Independent reviews of the Code

66. We consider the proposal to review the Code only every five years instead of every three years to be a significant change and the Code needs to make the practical implementation of this clearer.
67. A new Code is typically released two years after publication of an independent review report. For instance, the current Code was released on 1 July 2019 (came into effect on 1 March 2020), over two years after publication of the independent review report on 31

January 2017. As of the date of this submission, it has been over two years since the release of the 2021 Code review report on 26 November 2021.

68. An independent review provides a holistic assessment of the Code and is vital to learn where the Code can be strengthened. A new Code addressing recommendations from an independent review should be implemented promptly after robust consultation, so the practices of banks are in line with emerging needs and community expectations.
69. To support this change to a review every five years, we believe the Code needs to be clearer on the details. Specifically, we recommend that:
 - a. the five-year cycle should begin from the date the new Code is implemented
 - b. the five-year cycle should include the conduct and reporting of the independent review, consideration of the review outcomes with ABA, banks and other stakeholders, and the ASIC consultation and implementation process of a new Code
 - c. the ABA commits to targeted reviews of the Code, outside the five-year cycle, to respond to emerging needs. As the Code reviewer stated, 'important changes to the Code should not have to wait until the next triennial review'.

Areas of potential consumer harm

70. Scams continue to be one of, if not the most, critical issue for customers, and a key area of focus for government and industry.
71. While recognising the ongoing work by the government and industry to address this, we view that the Code has a role in addressing any residual concerns and supporting protections for customers that are susceptible to scams or victims of scams. We recommend that the Code should be reviewed out of cycle, following the outcome of Treasury's consultation on mandatory industry codes, to consider whether it needs enhanced protections for customers or to address potential gaps.
72. While the Code does not have commitments directly addressing the management of scams, the risk and impacts of scams intersect with other key obligations under the Code. For example, the obligations under existing Chapter 14 to take extra care with customers who may be experiencing vulnerability (which in turn may include customers more at risk of scams).
73. The Code Review identified gaps and recommended banks commit to training staff on suspicious transaction indicators that may constitute scams. It also recommended banks have information on their websites and apps to inform customers on what to do if they believe they have been scammed (Recommendation 113 and 114).
74. The ABA did not make any changes to the Code in response to this recommendation.
75. We welcome the new Scam Safe Accord announced by the ABA and the Customer Owned Banking Association (COBA) to improve how the banks disrupt, detect and respond to scams, as well as the National Anti-Scams Centre (NASC) and Treasury's recently commenced consultation on the development of mandatory industry codes.

76. We see both initiatives as crucial steps towards greater protections and assurances to customers.
77. However, given the significance of the issue, customers should be afforded appropriate protections in a timely manner.

Improving clarity and robustness

78. We consider that many obligations in the proposed Code would benefit from further clarity to facilitate compliance and support a consistent approach. For example, the Code should be less equivocal in its phrasing, such as using 'We will' instead of 'We may' and provide guidance when using qualifying phrases such as 'if appropriate', 'where possible', 'where appropriate', and 'in certain circumstances'.
79. As priority, the following obligations in the proposed Code should be clarified:
 - a. paragraph 40(a) – detailing when it is appropriate for banks to close an account without notice of closure
 - b. paragraph 40(b) – detailing specific circumstances that banks will rely on to withhold credit balance available in accounts after closure
 - c. paragraph 45 – detailing when it is not appropriate for banks to organise or refer customers to external support such as interpreter services, AUSLAN, National Relay Services or accessible documentation
 - d. paragraph 51(c) – detailing when it is not possible and not appropriate for banks to allow appointment of third-party representatives
 - e. paragraph 78 – detailing when banks will not provide reasons for not approving a loan
 - f. paragraph 147 - detailing when banks will not provide reasons for credit card cancellation
 - g. paragraph 169 – detailing when it is not appropriate for banks to refer customers to financial counselling organisations.
80. While we recognise it is important that banks can respond appropriately in different circumstances, we are concerned that the current ambiguous language used in the proposed Code could present issues. We believe that it:
 - a. creates ambiguity for banks, leading to an inconsistent approach to obligations across banks and risk that bank staff may not comply with certain obligations based on personal judgement.
 - b. does not provide customers with a clear understanding of what they can expect from banks
 - c. is not easily enforceable.
81. Clear and unambiguous obligations are essential for supporting practices that comply with the Code. Better clarity promotes trust, ensures customers understand what to expect from banks, and facilitates informed decision making. Whereas ambiguities may lead to more customer complaints, eroding customer confidence and diminishing the effectiveness of the Code.

The Code as a tool to assist consumers to enforce rights

82. Paragraph 4 of the proposed Code states 'If the Code imposes an obligation on us that is in addition to obligations applying under a relevant law, then we will comply with the Code unless doing so would lead us to breach the law, or relevant regulatory obligation or guidance'. It should be amended to remove 'regulatory obligation or guidance'.
83. Referring to regulatory guidance in the Code in this context creates ambiguity on enforcing Code obligations.
84. This ambiguity may result in inconsistent application of the Code, potentially undermining customer protection and complicating our role in monitoring compliance.
85. Furthermore, regulatory guides may evolve and change over time, which can create challenges in maintaining comprehensive awareness of how they may interact with the Code.
86. The Code provides important customer protections and is enforceable through contract, whereas regulatory guides are used to explain regulatory approaches and are not necessarily strict requirements of the law or enforceable.
87. We view precedence should be given to the Code which sets out enforceable customer rights.

Supporting an approach to Code compliance

88. We strongly support Recommendation 8 of the Code Review, to include a new commitment requiring banks to support an integrated approach to Code compliance. Accordingly, we recommend that the proposed Code should introduce a new commitment as below:

'We will take all reasonable steps to ensure we have in place the appropriate systems, processes, and programs to support an integrated approach to compliance with the Code. We will audit these arrangements periodically to ensure their effectiveness to support compliance with obligations under the Code.'
89. Noting the Code reviewer's Recommendation 8 to make this commitment an enforceable Code provision, we believe all provisions of the Code are contractually enforceable and our focus is on ensuring banks uphold their commitments to customers and driving best practices. As such, it critical that the Code commits banks to having a strong Code compliance framework.
90. We know that when we shine a light on areas of the Code that provide critical protections to customers, we find non-compliance that is sometimes serious and/or systemic. This highlights the need for banks to focus on more effective compliance frameworks to support appropriate oversight, mitigate risks and help banks to self-identify problems early.

91. As highlighted in our [Building Organisational Capability Report](#), systems, processes and technology are just as important as staff training and form an essential part of a bank's compliance framework. Our report highlighted that banks need a robust compliance framework to support employees achieving the right outcomes.
92. Our recent inquiry into compliance with deceased estates obligations under Chapter 45 of the existing Code, [Deceased Estates Report](#), highlighted serious and systemic non-compliance with key obligations.
93. We found that some banks lacked sufficient systems, processes and controls to meet these obligations. For example, we found issues with reporting capability, inadequate monitoring, inadequate information-sharing, and disparate processes across teams.
94. In some cases, banks were unaware of the nature, scale and impact of breaches of the Code until this was revealed through audits we requested for the inquiry. A commitment to systems, processes and programs to support an end-to-end, integrated approach to compliance, with periodic auditing of effectiveness, would likely have mitigated this.
95. The Code offers customers, guarantors and small businesses protections that are often above the law, as well as the guarantee obligations that do not exist in law.
96. Our recent follow-up inquiry into banks' compliance with guarantee obligations, [Guarantee Follow-Up Report](#), found while there was generally good progress in addressing our recommendations in our [2021 Guarantees Report](#), there remains ongoing crucial areas for improvement that speak to the importance of having appropriate systems, processes and programs in place. For example, banks should:
 - a. achieve consistency in improvements and controls across business units and subsidiaries
 - b. demonstrate appropriate governance over third parties, such as solicitors or brokers.
97. Furthermore, we found that some banks still had not audited their compliance with the Code's obligations in line with Recommendation 12 of our 2021 Guarantees Report.
98. We are disappointed that a recommendation made in the Code Review to periodically audit compliance with the guarantee obligations in the Code (Recommendation 73) was not supported by the ABA. This should be addressed by adopting the Code reviewer's Recommendation 8 in full.

Bi-annual Compliance Data Reports

99. In our most recent [Compliance Statement report for January to June 2023](#), we found:
 - a. banks attributed 4,970 breaches (81%) to human error in the breach sample - this has consistently been the top reported root cause over the last eight reporting periods
 - b. possible underreporting of breaches – some banks consistently reported no breaches or very few breaches over the last eight reporting periods.
100. When a breach occurs due to 'human error', the staff conduct may have been influenced or constrained by internal systems, processes, technology or training.

101. Underreporting breaches may signal risks with inadequate processes and systems to identify and report breaches, or a lack of commitment to Code obligations. This undermines a bank's ability to identify and correct issues and improve customer outcomes, which challenges the efficacy and benefits of the self-regulatory model.
102. A new Code commitment as set out in the Code reviewer's Recommendation 8 would provide an enhanced focus and accountability to an integrated approach to compliance.

Clarifying the role of industry guidelines

103. Industry guidelines are welcomed and play an important role with respect to responding to new and emerging issues that pose a risk to customers. In light of the ABA's proposal to extend the Code review period to five years, industry guidelines provide an important way to ensure industry's practices are contemporary and responsive to new and emerging issues.
104. It is crucial that the industry guidelines are readily accessible to bank staff, customers, and their representatives, to enable transparent and consistent understanding of contemporary practices, and that banks can be held to account for upholding these practices.
105. We recommend:
 - a. The proposed Code should clearly explain the role and how industry guidelines are used in its introduction. It should link to an indexed webpage where industry guidelines can be easily accessed. The webpage should clearly list and explain the purpose of each industry guideline, including whether the guideline sets out minimum compliance expectations or best practices. [The ABA's current webpage for this](#) can be improved to meet this purpose.
 - b. The proposed Code should identify which guidelines set out the expectations for meeting certain Code obligations. The ABA should review and identify which of these guidelines provides necessary information for bank staff to support compliance with relevant Code obligations, and ensure that these Code provisions clearly link to the relevant guidelines in the Code. An example of this is the approach taken in proposed paragraph 7 (Customer Advocate).
106. To assist with this, we note the Code reviewer provided a list of guidelines considered relevant to the Code on page 57 of the Final Report as follows:
 - a. Industry Guideline: Preventing and responding to financial abuse
 - b. Industry Guideline: Sale of Unsecured Debt
 - c. Industry Guideline: Banks' financial difficulty programs
 - d. Industry Guideline: Responding to requests from a power of attorney or court-appointed administrator
 - e. Industry Guideline: Preventing and responding to family violence and domestic violence
 - f. Industry Protocol: Branch closures
 - g. Guiding Principles: Debt management firms
 - h. Guiding Principle: Accessible Authentication

- i. Guiding Principles: Customer Advocate
- j. Guiding Principles: Lenders Mortgage Insurance
- k. Accessibility Principles for Banking Services
- l. Statement: ABA Indigenous Statement of Commitment.

107. Our recommendations are consistent with the Code reviewer's recommendation to the extent that banks should consider industry guidelines in assessing their compliance with the Code commitments, and if not, they should demonstrate they are using comparable processes. This also addresses the Code reviewer's recommendation that there should be greater transparency in the Code on the role of industry guidelines and they should be referenced.
108. We consider this is a balanced approach that makes it clear that we will consider the industry guidelines when assessing compliance with the Code. That is, the guidelines that the ABA identifies as setting out the expectations for meeting certain Code obligations, while not classifying as 'Code-related documents' that sit within the Code and are subject to breach data reporting.
109. This provides transparency on the role of industry guidelines, how they interact with the Code, and that we will consider practices set out in relevant industry guidelines in our compliance monitoring activities, including thematic inquiries and investigations, to inform the measures we expect banks to take to meet particular Code obligations. It also provides assurance on whether these practices are being implemented consistently and whether they are effective in addressing particular issues or customer harm.
110. It is important to note the exception to our recommended approach is where industry guidelines specifically form part of a Code obligation that sits within the Code, such as the Branch Closure Support Protocol. This exception also applies where specific regulatory guidelines form part of an obligation.
111. We consider this approach provides sufficient flexibility given that industry guidelines may:
- a. vary in nature – with some guidance relating to expectations for meeting a certain obligation, while others are intended to share best practices
 - b. be updated from time to time. to respond agilely to industry trends and evolving industry practices, regulatory changes, or new or emerging threats of customer harm.

Enhancing guarantor protections

112. The requirement to comply with proposed paragraphs 106 and 107, to take reasonable steps to meet with prospective guarantors in the absence of the borrower, should extend to Director and Trustee Guarantors if they have a personal or familial relationship with the borrower.
113. The obligations in these paragraphs should be extended to provide important protections for Director and Trustee Guarantors, particularly where they:

- a. are family members who become company directors shortly before the loan application
 - b. are directors with no involvement in the transaction or the business
 - c. are directors who appear to receive no substantial benefit from the business
 - d. are more susceptible to financial abuse. For example, customers with potential vulnerabilities, such as advanced age, low levels of literacy, or low fluency in English.
114. The ABA agreed to a new commitment that banks would take reasonable steps to meet with guarantors in the absence of the borrower present (set out in proposed paragraphs 106 and 107) but there are exemptions for certain guarantor structures as set out in proposed paragraph 108, including for Director and Trustee Guarantors.
115. We consider that prospective guarantors with personal or family connections to the borrower may be at increased particular risk of financial abuse. They may be coerced into signing a guarantee against their will or may sign a guarantee without fully understanding the risks. We know that this scenario is common, and this protection should extend to these guarantors to take into account the risk of sham, or coerced directorships linked to family violence or financial abuse.
116. Meeting with prospective guarantors in the absence of the borrower allows bank staff to explain the risks involved in signing a guarantee and identify signs of potential vulnerability.
117. The pressure to act as a guarantor for a loan for family or friends is specifically identified by the [Australian Human Rights Commission](#) as a form of financial abuse.
118. We highlight the importance of meeting guarantors in the absence of the borrower to identify potential vulnerability in our [Guarantees Follow-Up Report](#). In one case study, a bank failed to identify a vulnerable guarantor experiencing domestic violence. The guarantor felt that signing the guarantee was their only safe option but did not understand the specifics of the guarantee. The guarantor was not given the opportunity to speak to a bank representative separately from the borrower, seek independent legal advice, or sign the guarantee in the absence of the borrower. The bank had no processes in place to identify this individual as vulnerable. The matter was subsequently brought before AFCA, which determined that the guarantee was unenforceable and that the bank should pay the guarantor a sum as non-financial compensation.
119. This highlights the importance of meeting guarantors independently of borrowers and having processes and training in place for staff to identify and support vulnerable individuals.
120. We recognise the need to balance increased customer protections without impeding the role of guarantees in supporting the flow of credit. We consider that the benefit of protections afforded to mitigate risks for prospective Director Guarantors or Trustee Guarantors, where they have a personal or familial relationship with the borrower, outweighs any additional impost for banks in determining the provision of credit.

Inclusive and accessible banking and customers experiencing vulnerability

Proactive identification of vulnerable customers

121. The proposed Code should include an obligation in Part B2 to require banks to use their data capability and develop systems and processes to proactively identify customers at risk of experiencing vulnerability, consistent with Recommendation 35 and 39 of the Code Review.
122. We believe the lack of onus on banks to proactively identify customers who may be experiencing vulnerability and offer support presents a significant gap in the proposed Code, particularly in the context of branch closures and a shift to online banking. The proposed Code should go further to embed good industry practice to improve customer outcomes.
123. The ABA accepted 'in part' the Code reviewer's Recommendation 39 to improve the vulnerability protections in the Code, by removing the wording in existing paragraph 38 that a bank 'may only become aware of your circumstances if you tell us' in respect to customers experiencing vulnerability and committed to develop an enhanced vulnerability definition.
124. The updated obligation in proposed paragraph 49 does not meet the intent of Recommendation 39 because it continues to put the onus on the individual customer to disclose their circumstances. It states:

'We encourage you to tell us about your circumstances so that we can work with you in relation to your Banking Service, otherwise we may not find out about your circumstances'.
125. The proposed paragraph 49 would be improved with a focus on proactive identification of people who may be at risk of experiencing vulnerability and the responsibility of banks to provide support and prevent harm.
126. This recognises that customers may not disclose their vulnerability to the bank for various reasons, such as lack of awareness of assistance that can be offered by banks, not personally identifying with the word 'vulnerable', narrowed assumption of characteristics of vulnerability limited to those listed in the Code, or feelings of shame or fear of discrimination or safety. In addition, there are many reasons why people experiencing vulnerability and/or hardship may not engage with their bank. Financial counsellors tell us that customers will often look to cut costs elsewhere to make repayments or turn to unregulated lenders before reaching out for assistance to their bank. Early engagement and support are key to facilitating a better outcome for such customers.
127. Banks are increasingly well equipped to identify signs of vulnerability with the data they collect and hold. They have sophisticated systems to identify risk indicators of possible AML/CTF issues and possible fraud. We know that many banks already use their

available data to proactively identify customers who may be at risk of experiencing vulnerability and need extra care, and offer support. This is good practice and consistent with the role of codes as a progressive model of conduct, we consider that proactive identification should be embedded in the Code.

128. Our recommendation is consistent with our report on [Banks' compliance with Part 4 of the Banking Code: inclusivity, accessibility and vulnerability](#), where we highlighted industry should develop an agreed approach to using data to proactively identify customers who require extra care. We also recommended that banks explore ways to proactively detect financial abuse (Recommendation 18) and customers at risk of experiencing financial difficulty (Recommendation 21).
129. A bank's role in helping customers who require extra care should not be limited to when customers disclose their circumstances. Bank staff should proactively tell customers about the support available and offer to help when they recognise signs of vulnerability. This in turn may encourage customers to disclose their circumstances to the bank. As many banks already implement proactive measures to support vulnerable customers, this should be embedded in the Code to clarify and improve industry standards more broadly.

Incarceration as a characteristic of vulnerability

130. The proposed Code should include 'incarceration' as a characteristic of customers who may be at risk of experiencing vulnerability in paragraph 49 of the proposed Code, consistent with Recommendation 37 of the Code Review.
131. We know that incarcerated individuals face a number of challenges and barriers, and we highlighted these in our report on [Banks' compliance with Part 4 of the Banking Code: inclusivity, accessibility and vulnerability](#). In this report, we encouraged banks to consider a range of actions to improve outcomes for these customers.
132. Financial counsellors also share with us the challenges incarcerated individuals face in accessing basic banking services and meeting identification requirements. Similar concerns were raised in the [Legal Aid Queensland](#) and [Legal Aid NSW](#) submissions to the Code Review.
133. The ABA accepted 'in part' the Code reviewer's Recommendation 37 and commented that existing paragraph 38 is broad enough to cover all vulnerable customers without the need to specify particular groups, such as prisoners.
134. Our understanding is that the ABA's work on improving outcomes for prisoners that it referenced in its response to the Code Review recommendations, published in December 2022, remains ongoing and initiatives have not been settled or implemented to date.
135. We consider the addition of 'incarceration' as a characteristic of customers who may be at risk of experiencing vulnerability is a simple step banks should take to raise awareness of this group.

Cultural awareness training to all staff

136. The proposed paragraph 47 on cultural awareness training for staff should be expanded to cover all banking staff.
137. A customer's experience with their bank and banking services is impacted by cultural change across the organisation and is not confined to interactions with front-line staff.
138. The ABA stated it accepted the Code reviewer's Recommendation 55 that cultural awareness training should be generally available and not limited to bank staff regularly assisting Aboriginal and Torres Strait Islander customers in remote locations.
139. However, the proposed Code limits training to staff who regularly assist these customers and does not support the aim of enhancing the overall customer experiences of Aboriginal and Torres Strait Islander customers.
140. There are many areas within a bank where decisions made could have significant cultural implications on Aboriginal and Torres Strait Islander customers. For instance, website content, product design, change management, the strategic approach for managing customer communications are all areas where the needs of customers require consideration at the development and design stage.
141. Providing cultural awareness to all staff would ensure a top-down approach within the organisation and help inform culturally aware decisions.

Proactive identification of customers eligible for basic accounts

142. To improve the effectiveness of the basic bank account obligations in ensuring banking products and services are inclusive, we recommend that:
 - a. paragraphs 52, 53, 54 and 59 of the proposed Code should be amended to require banks to proactively identify existing and new customers who may be eligible for basic accounts, rather than rely on customers to disclose their circumstances, consistent with Recommendation 39 of the Code Review.
 - b. Part B3 incorporates the following obligation: *We will provide information on our websites about our Basic Bank accounts.*
143. The recommended amendment (a) above should also provide protection for existing customers who may, after opening an account, become eligible for basic accounts. This would include customers who started receiving government support payments or had changes in circumstances that reduced their income, such as loss of employment, incarceration or impact from a natural disaster.
144. We made similar recommendations in our report on [Banks' compliance with Part 4 of the Banking Code: inclusivity, accessibility and vulnerability](#):
 - a. Banks should use available data to identify existing customers who are eligible for a basic account and conduct targeted outreach to support customers to product switch. Banks should not rely solely on a customer disclosing a low income (Recommendation 16).

- b. Banks should raise awareness of basic bank accounts during customer onboarding processes and other customer interactions, such as financial difficulty and collections processes (Recommendation 17).
- 145. We are aware that information about basic accounts can be hard for customers to find, and customers may not be aware that of their eligibility for one. Enhancing customer awareness of the availability and content of basic accounts is vital.
- 146. The ABA once had a website that listed all the basic bank accounts from member banks which allowed customers to check their eligibility. Because this website is longer available, we consider our recommended amendment (b) above will promote basic accounts by placing obligations on banks to put procedures in place that will increase customer awareness.
- 147. The ABA did not accept the Code reviewer's recommendation that banks should commit to proactively identify customers who may be eligible for basic accounts (Recommendation 39), on the basis it would create duplication with ACCC Authorisation AA1000441-1.
- 148. However, the condition in ACCC Authorisation AA1000441-1 does not appear to address Recommendation 39. Condition 5.8(c) of the Authorisation is limited to requiring banks to proactively identify customers eligible under existing paragraph 47 of the existing Code (i.e. individuals who hold a current government concession card listed in paragraph 44.). This does not extend to low- or no-income earners referred to under existing paragraphs 42 and 43 of the existing Code.
- 149. Furthermore, despite steps taken by banks to comply with the ACCC's condition, as outlined in the [banks' first report to the ACCC](#), covering the period 1 September 2020 to 31 August 2021, [ASIC's Better Banking for Indigenous Consumers Project](#), which covered the period after the first report, indicated 'current processes to transfer eligible customers to low-fee accounts are overwhelmingly ineffective'.
- 150. We highlight that the ACCC Authorisation is an instrument that provides statutory protection to businesses against certain conduct which may otherwise contravene competition laws. In contrast, the Code is a set of commitments banks make to customers, small businesses and their guarantors to deliver service standards that are enforceable through contract. They serve different purposes and do not offer the same protections or recourse for customers.
- 151. We consider our recommended amendments will offer the following benefits:
 - a. Greater confidence and certainty in the protections afforded to customers as the ACCC Authorisation is only effective until 12 December 2024, and an extension delay or change to the Authorisation conditions may lead to loss of protections.
 - b. It will enable us to consider banks' compliance with the obligation and impose the available sanctions, such as requiring a bank to rectify an identified breach. In contrast, failure to comply with the ACCC's conditions may result in revocation of the Authorisation as outlined at 9.13 of the [ACCC's Guidelines for Authorisation of Conduct \(non-merger\)](#) but does not address risks to customers.

Handling complaints

152. Obligations in the existing Chapters 47 (If you have a complaint with us) and 48 (How we handle your complaint) should be retained in the proposed Code. They provide important customer protections and ensure the Code is effective in providing guidance and clarity on how a bank should handle complaints and customer rights when dealing with a dispute.
153. Our monitoring work shows banks' handling of complaints remains a key issue impacting customers.
154. In our most [recent Compliance Statement report for January to June 2023](#) we found that:
- a. Chapter 48 is one of the top five Code chapters with the most breaches (1,292 breaches, up 10% from the previous period). Moreover, we observed a general upward trend in the number of breaches reported in this Chapter since January to June 2020, with a notable spike reported during the July to December 2021 reporting period. Banks attributed this spike to the introduction of Regulatory Guide 271, which updated how banks are required to deal with complaints under their internal dispute resolution (IDR) procedure.
 - b. Part 10 (Resolving your complaint) is one of the top five Code parts with the most breaches (1,401 breaches).
155. The changes in the proposed Code, which cover the obligations in existing Chapters 47 and 48 in a single paragraph 181, simply stating the bank will comply with Regulatory Guide 271, presents two key risks, as set out below.

Reduced consumer protections

156. There are obligations unique to Chapters 47 and 48 of the existing Code that have been removed and are not replicated in regulation or legislation.
157. At a minimum, the following obligations under the existing Code should be reinstated as they afford important protections that do not otherwise exist. Specifically, the:
- a. obligation to ensure the process for handling a complaint is fair and reasonable (paragraph 200)
 - b. obligation to keep a customer informed on the progress of their complaint (existing paragraph 201)
 - c. obligation to provide the name of a contact person handling the complaint (existing paragraph 202)
 - d. obligation where a bank sends a delay notification, to provide the customer an expected timeframe for a response (existing paragraph 206(b)), and the obligation to provide monthly updates (existing paragraph 206 (c)).
158. These commitments provide important protections that are above and beyond regulatory or legislative requirements, ensuring customers have access to a dedicated point of contact and receive timely updates. These additional benefits may be especially vital to some customers, in particular, customers experiencing vulnerability.

159. Removing these obligations would be a backward step and inconsistent with the ABA's commitment to not reduce existing customer protections.

Insufficient detail or information

160. The proposed Code and proposed Customer Guide do not assist bank staff or customers in understanding the complaint handling obligations and their rights.
161. Codes of conduct play an important role in clarifying what needs to be done to comply with legislation. This is consistent with the expectations set out in Regulatory Guide 183.5 (c). In Chapters 47 and 48 of the existing Code, expectations of how a customer can access internal and external dispute resolution processes and how a bank deals with a customer during this process, is clearly explained in an accessible and transparent manner.
162. Replacing these commitments with a single paragraph referring to Regulatory Guide 271 is a backward step and adversely affects the effectiveness of the Code. It is also inconsistent with the intention of recommendations made in the Code Review, in particular:
- a. Recommendation 3 (supported by the ABA) which states that the Code be drafted with sufficient detail for bank staff to implement and consumer representatives to help customers pursue their rights.
 - b. Recommendation 97 (not supported by the ABA on the basis that restating this requirement is considered unnecessary duplication) which states the Code should be expanded to include some of the important requirements in ASIC regulatory guides, including key complaint handling requirements set out in Regulatory Guide 271.
163. Understanding the complaints process is a critical element in holding banks accountable for their commitments in the Code, identifying and addressing issues and improving practices.
164. It is unreasonable and unrealistic to expect all bank staff, consumer representatives and customers to read and interpret Regulatory Guide 271, a 57-page document written for financial firms on setting up IDR systems.
165. We strongly believe that these commitments should remain within the Code. However, if they are to be removed, as a minimum, they should be explained in the Customer Guide clearly in accessible language.
166. In its current drafting, the proposed Customer Guide fails to meaningfully explain a customer's rights, including what a customer can expect when engaging with their bank on a complaint. For example, some key obligations that were set out in the existing Code and are also set out in Regulatory Guide 271, have not been referenced in the proposed Customer Guide, including:
- a. a customer's right to a written response if their complaint is not resolved within five days (existing paragraph 203)
 - b. the customer's right to request a written response, even if provided within five days (existing paragraph 204).

BCCC Charter and resources

Functions and powers

167. Our powers in paragraph 211 of the existing Code have been removed in the proposed Code, and now appear in clause 2.1(b) of the proposed Charter.
168. While we support removing duplication, it is critical that all our existing powers in the existing Code are contained in the Charter.
169. Therefore, the following powers in existing paragraph 211 of the Code must be added to clause 2.1 of the proposed Charter:
- i) drive improvements in compliance with the Code to achieve best practice
 - ii) promote awareness of the Code and the role of the BCCC through engagement with key stakeholders.
170. We consider the loss or omission of the above-mentioned powers carries significant risk.
171. The responsibility to drive improvements in compliance to achieve best practice is fundamental to our role, as set out in clause 1.2 of the proposed Charter, to monitor Code compliance and promote best practice Code implementation. We do this through activities such as issuing guidance notes and making recommendations and sharing best practices.
172. Our focus on driving improvements in compliance to achieve best practice, empowers us to proactively contribute to industry improvement, offer valuable insights and recommendations, and work to identify and address compliance issues across the industry early. This in turn minimises harm and improves outcomes for customers impacted by compliance failures.
173. The responsibility to promote awareness of the Code and the BCCC is also fundamental to our role. As the independent monitoring body of the Code, we consider we should have a role in ensuring customers are aware that they have rights under the Code.
174. In the final report of the Code Review, the Code reviewer commented that very few customers are aware of the Code unless until it is brought to their attention by a third party, such as a financial counsellor or consumer lawyer when they have a dispute with their bank.
175. This reinforces the need for us to have a clear mandate to promote awareness of the Code and our role to improve awareness among customers and key stakeholders, and complement the commitment made by banks to promote awareness of the Code.

Data collection

176. We also recommend that clauses 4.2 (c) and (d) be amended as below:

Proposed BCCC Charter	BCCC's recommendation
<p>4.2 (c) The breach data will be based on a materiality threshold consisting of two (2) components developed by the ABA and agreed with the BCCC as follows:</p> <ul style="list-style-type: none"> i) a set of mandatory reportable Code paragraphs; and ii) a materiality threshold metric applying to the remaining non mandatory reportable Code paragraphs. 	<p>4.2 (c) The breach data will consist of two (2) components:</p> <ul style="list-style-type: none"> i) all breaches of mandatory reportable Code obligations; and ii) breaches of non-mandatory reportable Code obligations that meet the materiality threshold metrics.
<p>4.2 (d) The breach data will be in a consistent form that is approved by the BCCC every two years, following consultation and agreement with the ABA and Code Subscribers.</p>	<p>4.2 (d) The breach data will be in a consistent form that is approved by the BCCC every two years, following consultation with the ABA and Code Subscribers.</p>

177. We worked closely with the ABA in 2023 to settle the introduction of revised breach reporting requirements, which consist of more granular reporting at a paragraph level on Code obligations. This is made up of two components: mandatory reporting of all breaches of specific Code obligations and reporting of all other breaches based on materiality thresholds using customer and financial impact metrics.
178. These revised reporting requirements will be enacted through this update to the Charter. However, we have serious concerns with how this is currently drafted in the proposed Charter. It restricts our discretion to determine our own reporting requirements, which is not currently the case in the existing Charter.
179. The changes we have proposed about the revised reporting requirements are critical to maintain our independence in determining the data we require to effectively monitor compliance with the Code.
180. Our independence is paramount to holding banks accountable and retaining trust and confidence in our role as the independent monitoring body. Consequently, we must retain ultimate discretion to determine whether sufficient breach data has been collected to perform our compliance monitoring functions and the breach data collected remains relevant to our monitoring role. However, it is appropriate that we are obliged to consult with the ABA and the banks prior to making any changes.
181. This aligns with Regulatory Guide 183.78 (a) which states that a Code administrator should be responsible for establishing appropriate data reporting and collection procedures.
182. We also consider our recommended changes to clause 4.2(c) more accurately reflect the reporting arrangements settled in consultation with the ABA.

Adequate resourcing

183. It is critical for our independence that we set our own budget and business plan to deliver our priorities and functions within reasonable limits.
184. The funding process is set out in clause 13.4 of the proposed Charter as follows:
- a. The ABA will ensure that the BCCC has sufficient resources and funding to carry out its functions.
 - b. Each year, no less than eight weeks before the end of the Financial Year, the BCCC will provide the ABA with a business plan and budget for the following Financial Year.
 - c. The ABA, after considering the business plan and budget will ensure the BCCC has sufficient resources to carry out its functions.
 - d. The business plan and budget for each Financial Year must be acknowledged by the ABA, no less than one month before the end of the previous Financial Year.
185. In its submission to the Code review, the ABA considered that it does not have power to veto our budget and that we effectively set our own budget:

'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.'

186. However, this does not reflect reality. In practice, our proposed budget goes to the ABA Council for consideration and approval. For the 2022-23 financial year, we forecasted a total expenditure of \$2,485,058 and applied \$200,000 of our surplus reserves, reducing the revenue required from the ABA to \$2,285,058. The ABA Council did not approve the forecasted budget in full, leaving a shortfall of \$70,727, leading to further drawdown from our surplus. The ABA Council commented in its budget approval letter that:

'Further, it is the view of the ABA Council that any future year increases be kept in line with CPI or less.

The ABA notes the requirement to ensure that the BCCC has sufficient resources and funding to carry out its functions, pursuant to clause 13.4(a) of the Charter.

It is accepted that this decision may prompt a revision of the proposed business plan and/or utilisation of reserves.'

187. We wish to emphasise the need for autonomy in decisions on our budget and business plans to ensure we are adequately resourced to support effective compliance monitoring, consistent with the criteria set out in Regulatory Guide 183.43 (d).

Appendix 1

Overview of BCCC's response to the Consultation Paper

Consultation Paper Section	C	Question	Our response	Relevant section(s)	Our recommendation(s)
Addressing consumer harm	1	Do you think the proposed Code contains an appropriate range of commitments by the banks to prevent consumer harm that go beyond what is required by the law?	No	Obligations removed due to perceived duplication or simplification	Please refer to recommendations for C5 below.
	2	Are there other areas of potential consumer harm that the Code should address?	Yes	Areas of potential consumer harm	We recommend that the Code should be reviewed out of cycle, following the outcome of Treasury's consultation on mandatory industry codes for scams, to consider whether it needs enhanced protections for customers or to address potential gaps. Please also refer to recommendations for C4 below.
	3	Do you think any of the consumer protections in the current Code intended to prevent harm have been reduced in the proposed Code?	Yes	Obligations removed due to perceived duplication or simplification	Please refer to recommendations for C5 below.
	4	Are there any commitments in the proposed Code relating to the prevention of consumer harm that would benefit from further clarity or robustness to facilitate their enforceability?	Yes	Improving clarity and robustness	The Code should be less equivocal in its phrasing, such as using 'We will' instead of 'We may' and provide guidance when using qualifying phrases such as 'if appropriate', 'where possible', 'where appropriate', and 'in certain circumstances'. As a priority, the following obligations should be clarified – paragraphs 40(a) - (b), 45, 51(c), 78, 147 and 169.

Code provisions removed as restatements of the law	5	Are there areas of the proposed Code that, if removed, would result in the withdrawal of protections that are not otherwise contained in the legislation? If yes, please provide examples.	Yes	Obligations removed due to perceived duplication or simplification	<p>We do not support the removal of the following Code obligations:</p> <ul style="list-style-type: none"> a. existing paragraphs 49 and 50 – diligent and prudent banker for individuals b. existing paragraph 138 – making customers aware of how to use joint accounts c. existing paragraphs 201, 202 and 206(b)-(c) – obligations for complaints handling <p>These obligations should be retained because they provide important protections that are not otherwise available in law.</p>
	6	Do you have any concerns with Code commitments being subject to the qualification of consistency with regulatory guidance? Does this qualification raise uncertainty about whether Code commitments are actually capable of being enforced?	Yes	The Code as a tool to assist consumers to enforce rights	Paragraph 4 should be amended to remove 'regulatory obligation or guidance'.
	7	Do you have any concerns about the removal of provisions limiting the BCCC compliance reporting? If so, please explain your concerns.	Yes	Obligations removed due to perceived duplication or simplification Obligations moved to the introduction	<p>Please refer to recommendations for C5 above.</p> <p>We also recommend for the following obligations in the existing Code to be retained as standalone paragraphs:</p> <ul style="list-style-type: none"> a. paragraphs 4 and 5 (How the Code is to be publicised and made available) b. paragraph 212 (BCCC resources) c. paragraph 213 (We will comply with requests of the BCCC)
	8	In your view how would the proposed removal of provisions from the Code affect its utility and readability?		Guiding principles Customer Guide	<p>We recommend that the Guiding Principles be retained as part of the Code.</p> <p>Please also refer to recommendations for C9 below.</p>

	9	Is the proposed Customer Guide likely to be useful in assisting customers to understand their rights? Why or why not?	No – not in its current form	Customer Guide	<p>We recommend the ABA should consult extensively with consumer law organisations and specialists on the content of the Customer Guide and test it with customers to ensure it meets its objectives. We have provided feedback on improvements for the Customer Guide.</p> <p>We emphasise that the proposed Customer Guide is not an adequate substitute for removing certain obligations in the Code.</p> <p>The Code should remain the primary document that contains the rights of customers, drafted in sufficient detail to facilitate its implementation by banks and allow consumer representatives to help customers understand and pursue their rights.</p>
Supporting an approach to Code compliance	10	Do you think a commitment to take all reasonable steps to have in place appropriate systems, processes and programs to support an integrated approach to compliance would result in meaningfully improved customer protections? Why or why not?	Yes	Supporting an approach to Code compliance	We recommend that the proposed Code should introduce a new commitment requiring banks to support an integrated approach to Code compliance.
	11	Would the removal of any provisions from the current Code reduce the scope of the BCCC's oversight of key areas of banking that are higher standards than those set under existing laws?	Yes	Obligations removed due to perceived duplication or simplification	Please refer to recommendations for C5 above.
	12	Would a reduction in the level of provisions that are subject to the BCCC's oversight reduce the operational benefits that are	Yes	Obligations removed due to perceived	Please refer to recommendations for C5 above.

		likely to arise through the Compliance Statement reporting process to the BCCC (as noted in Chapter 6 of the BCCC Review)?		duplication or simplification	
13		Based on the proposed Charter, does the BCCC have the right powers and responsibilities and is it adequately resourced to achieve the objective prescribed in the legislation—that is, effective administration systems for monitoring compliance with the Code and making information obtained as a result of monitoring publicly available?	No	BCCC Charter and resources	<p>We recommend following amendments to the proposed BCCC Charter:</p> <ul style="list-style-type: none"> a. incorporate the following powers to clause 2.1 <ul style="list-style-type: none"> i) drive improvements in compliance with the Code to achieve best practice ii) promote awareness of the Code and the role of the BCCC through engagement with key stakeholders. b. amend clause 4.2(c) and 4.2(d) as below: <ul style="list-style-type: none"> 4.2 (c) <i>The breach data will consist of two (2) components:</i> <ul style="list-style-type: none"> i) <i>all breaches of mandatory reportable Code obligations; and</i> ii) <i>breaches of non-mandatory reportable Code obligations that meet the materiality threshold metrics.</i> 4.2 (d) <i>The breach data will be in a consistent form that is approved by the BCCC every two years, following consultation with the ABA and Code Subscribers.</i> <p>We emphasise the need for autonomy in decisions on our budget and business plans to ensure we are adequately resourced to support effective compliance monitoring, consistent with the criteria set out in Regulatory Guide 183.43 (d).</p>

	14	Do you have any other feedback on the ABA's response to the recommendations relating to enforceable code provisions?	Yes	Supporting an approach to Code compliance	<p>We strongly support Recommendation 8 of the Code Review, to include a new commitment requiring banks to support an integrated approach to Code compliance.</p> <p>We believe all provisions of the Code are contractually enforceable and our focus is on ensuring banks uphold their commitments to customers and driving best practices.</p> <p>As such, it critical that the Code commits banks to having a strong and robust Code compliance framework.</p>
Clarifying the role of industry guidelines	15	How accessible and well known are the Industry Guidelines? Should anything be done to make the Industry Guidelines more accessible?	Yes	Clarifying the role of industry guideline	<p>The proposed Code should clearly explain the role and how industry guidelines are used in its introduction and should link to an indexed webpage where industry guidelines can be easily accessed.</p> <p>This webpage should clearly list and explain the purpose of each industry guideline, including whether the guideline sets out minimum compliance expectations or best practices.</p> <p>The ABA should review and identify which of these guidelines provides necessary information for bank staff to support compliance with relevant Code obligations, and ensure that these Code provisions clearly link to the relevant guidelines in the Code.</p>
	16	Are there any parts of the Industry Guidelines that would be best placed in the Code? Or is simply including a reference sufficient? Please explain which parts of the Industry Guidelines and the rationale for this.	Yes		
	17	Should any of the Industry Guidelines be treated as Code-related documents? Please explain which Industry Guidelines and the rationale for this.	Yes		
Enhancing guarantor protections	18	Does Part B6 of the proposed Code provide an appropriate balance between protecting vulnerable guarantors and not	No	Enhancing guarantor protections	<p>The requirement to comply with proposed paragraphs 106 and 107, to take reasonable steps to meet with prospective guarantors in the absence of the borrower, should extend to Director and Trustee Guarantors if they have a personal or</p>

		impeding the role of guarantees in supporting the flow of credit?			familial relationship with the borrower. Please also refer to recommendations for C10 above.
	19	If you consider that an appropriate balance has not been achieved in the proposed Code, how could a better balance be achieved?			
Inclusive and accessible banking and customers experiencing vulnerability	20	Do you have any concerns with how the ABA has addressed any of the Code reviewer's recommendations as they relate to customers who are experiencing vulnerability?	Yes	Inclusive and accessible banking and customers experiencing vulnerability	We recommend the proposed Code: i) include an obligation in Part B2 to require banks to use their data capability, and develop systems and processes to proactively identify customers at risk of experiencing vulnerability ii) include 'incarceration' as a characteristic of customers who may be at risk of experiencing vulnerability in paragraph 49 of the proposed Code iii) expanding paragraph 47 of the proposed Code on cultural awareness training for staff to cover all banking staff
	21	Do you have any concerns with how the ABA has addressed any of the Code reviewer's recommendations as they relate to inclusive and accessible banking services?	Yes		
	22	Do you think it provides an appropriate balance for the ABA to rely on reporting required to be provided to the ACCC (in relation to making eligible customers aware of basic accounts) when addressing recommendation 39?	No	Proactive identification of customers eligible for basic accounts	We recommend that: i. paragraphs 52, 53, 54 and 59 of the proposed Code should be amended to require banks to proactively identify existing and new customers who may be eligible for basic accounts, rather than rely on customers to disclose their circumstances ii. incorporate an obligation for banks to provide information on their websites about their Basic Bank accounts.
	23	What are the benefits and limitations of subscribing banks proactively identifying and transitioning eligible customers to basic bank accounts?			

Handling complaints	24	Does the proposed Code provide sufficient detail for bank staff to understand their complaints handling obligations?	No	Handling complaints	<p>Obligations in the existing Chapters 47 (If you have a complaint with us) and 48 (How we handle your complaint) should be retained in the proposed Code.</p> <p>They provide important customer protections and ensure the Code is effective in providing guidance and clarity on how a bank should handle complaints and customer rights when dealing with a dispute.</p> <p>Please also refer to recommendation for C5 above.</p>
	25	Do the proposed Code and proposed Customer Guide provide sufficient information that is clear and accessible to all banking customers to understand their rights if they are unsatisfied with a bank or its service?	No	Handling complaints	<p>Please refer to recommendation for C24 above.</p>

3 October 2023

[REDACTED]
Head of Customer Policy
Australian Banking Association

Via email only: [REDACTED]
Cc: [REDACTED]
[REDACTED]

Dear [REDACTED]

BCCC Response to the ABA's proposed Customer Guide

Thank you for providing the Banking Code Compliance Committee (**BCCC**) an opportunity to provide feedback on your proposed Customer Guide (the **Customer Guide**).

We welcome the Australian Banking Association (**ABA**)'s work to help customers understand their key rights and protections.

We acknowledge the significant task the ABA has taken on to summarise these protections in an accessible, customer-friendly document. Particularly in the context of the complex legal and regulatory framework these protections sit within.

It is important for customers to understand the principles and practical applications of consumer protections, including dispute, legal or regulatory recourses available to them.

In our view, the Customer Guide, in its current form, needs further work to meet its objective to provide accessible and clear information to customers on key rights and protections.

We provide the following recommendations for your consideration:

- The Customer Guide should contain sufficient detail for a customer to understand and navigate to the legislative protections afforded to them.
- It should be written in plain English to support customer accessibility.
- If certain obligations are removed from the new Code, they should be meaningfully replicated in the Guide.
- The Customer Guide should better explain the channels a customer has to raise concerns. It should encourage customers to raise any concerns with their bank in the first instance and explain when and how a customer should raise a concern with a regulator.
- The ABA should undertake extensive consultation with consumer law organisations and specialists, and test the guidance with customers to assure itself that it meets its objectives.

1. Comprehensive overview of key protections for customers

The Customer Guide should contain sufficient detail for a customer to understand the protections the legislation affords them.

It should also be written in plain English and provide useful links to relevant sections of the law to support customer accessibility.

In the table setting out key protections within the Customer Guide, the content in each row provides a few thematic obligations a bank may have under various pieces of legislation. There is little explanation of how these obligations relate to customer protections or rights. Further, key protections are missing.

For example, under Responsible Lending Conduct, the Customer Guide only explains the requirement for banks to assess whether the credit is not unsuitable for the customer. It does not explain a customer's right to request a copy of the bank's assessment of whether a loan is 'not unsuitable' for the customer. This is an important right, particularly for customers who may be having difficulty repaying a loan and want further information, for example to inform recourse.

Under the section for Consumer Credit Protections, the Customer Guide broadly lists protections a customer has under the National Credit Code, including disclosure requirements, mortgage and guarantees rules, hardship and unjust transactions rights, and default and enforcement rules. However, this section does not go on to explain what the specific protections are under each of these very broad legislative requirements.

In addition to listing a bank's obligation to a customer, we urge the ABA to provide a more detailed explanation in the Customer Guide, written in plain English, explaining how these obligations relate to protections and rights a customers may have.

The ABA should consider how the Customer Guide can meaningfully help a customer navigate to relevant sections of the law that sets out key protections. The Customer Guide should provide specific references or links to relevant provisions alongside an adequate explanation of these protections. These protections are often embedded in a complex framework of legislation and regulation that is not always accessible to all customers.

For example, linking to the relevant Act is not useful for a customer to identify or interpret what provisions or protections are relevant to their circumstances. The National Consumer Credit Protection Act contains two volumes and the Corporations Act contains six volumes, with each Act approximately 700 pages. In addition to the quantity of information, the law is complex. It uses technical language that may not be straightforward or accessible to a wide range of customers.

2. Supporting transparency and accessibility for customers

If certain obligations are removed from the new Code due to regulatory duplication, this should be meaningfully replicated in the Customer Guide.

One of the key concerns the BCCC has raised with the ABA is that removing regulatory duplication from the Code decreases transparency and accessibility for customers in understanding their key rights and protections.

While the ABA proposed the Customer Guide as a way of responding to these concerns, the contents of the table have not meaningfully addressed provisions removed from the Code.

For example, the section on credit cards states that banks have obligations relating to how payments are applied and how card limits can be increased or cancelled by customers. However, it fails to provide information currently in the Code, including obligations under:

- Paragraph 125 – applying payment to amounts of the highest interest rate
- Paragraph 128 – a customer’s right to request a credit limit reduction
- Paragraph 129 – prohibition for banks to offer limit increases

The ABA should carefully review obligations it has cited as regulatory duplication and removed from the Code and ensure these obligations are included in the Customer Guide.

3. Providing clear information for customers to raise a concern

The Customer Guide should better explain the channels a customer has to raise concerns.

The Customer Guide should encourage customers to raise any complaint with their bank in the first instance and make them aware of their right to contact the Australian Financial Complaints Authority (AFCA) for external complaints resolution. It should also provide key information regarding the internal dispute resolution (IDR) and external dispute resolution (EDR) process.

For example, the Customer Guide should also explain a bank’s obligation to ensure objectivity and fairness in managing a complaint and a customer’s right to a written response if their complaint is not resolved within five days, or the customer’s right to request a written response where one is not provided. It should also inform a customer of relevant considerations for making a complaint to AFCA, such as that time limits may apply.

In addition to channels through which a customer may seek individual recourse, the Customer Guide should clearly explain the role of each regulator, including their role in monitoring and enforcing compliance with the relevant law and regulation. The Customer Guide should clearly explain when and how a customer can report a possible breach to each regulator.

4. Consultation with consumer law organisations and specialists

The ABA should undertake extensive consultation with consumers and consumer law specialists.

The ABA advised that the purpose of the Customer Guide is to help individual and small business customers and their guarantors understand their rights and protections under Australian law. To develop clear, effective and useful guidance, it is vital that the ABA

obtains perspectives from relevant groups, including advocacy groups for First Nations people, who understand and advocate for consumers' legal interests.

We urge the ABA to consult extensively with these stakeholders on how best to approach the development of this guidance for customers. Many of these groups may also have access to consumer education specialists, who are experts in providing financial law guidance to consumers and may be able to share their valuable experience with the ABA.

Finally, we recommend that the ABA consumer test the guide to obtain valuable feedback from customers on the effectiveness of the Customer Guide in achieving its objective.

Thank you again for this opportunity to provide feedback in response to your proposed Customer Guide. We look forward to engaging further with the ABA on this, and seeing further consultation on developing an accessible and customer-friendly Customer Guide that effectively helps bank customers to understand their rights and protections under law.

If you have any questions or would like to discuss this matter further, please contact [REDACTED] at [REDACTED].

Yours sincerely

[REDACTED]

[REDACTED]
Chief Executive Officer
On behalf of the Banking Code Compliance Committee