



Australian Banking
Association



ASIC Consultation Paper 373 – Proposed changes to the Banking Code of Practice

15 January 2024

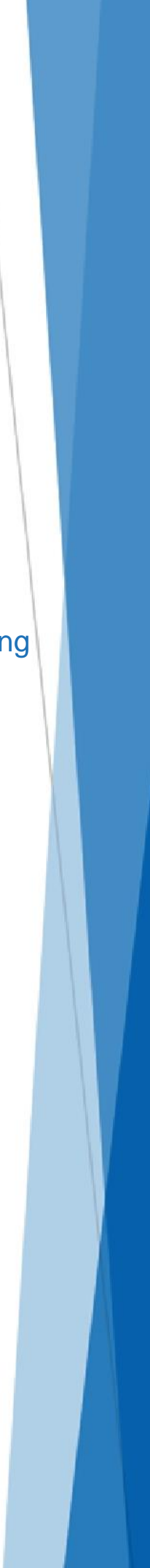




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About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Executive summary: ABA submission to ASIC Consultation Paper 373

The ABA welcomes ASIC's consideration of the ABA's proposed Banking Code and provide this submission to explain the rationale for changes to the Banking Code. The following summary points are expanded upon in this submission:

Customer focus

- The ABA is proud to have in place a Banking Code that since 1993 has included important protections for individuals and small business customers. The proposed Banking Code maintains its focus on consumer protections. Consistent with many of the recommendations from the Independent Review of the Banking Code of Practice 2021 (**Independent Review**), the proposed Banking Code maintains and strengthens consumer protections in several areas.

Independent Review

The Independent Review was conducted in accordance with requirements under RG 183 and s1101AB(3) of the Corporations Act resulting in 116 recommendations. The ABA and its members adopted 72% of the recommendation in full, part or in principle. The ABA has maintained the following principles in preparing the new draft Banking Code:

- the Banking Code should aim to express important customer protections that are not set out in the law, therefore, the Banking Code should minimise restatement of existing consumer rights under the law and/or regulatory obligations without resulting in a reduction in customer protections;
- the Banking Code should be expressed as simply as possible to avoid unnecessary length or complexity;
- recommendations that already reflect the banks' existing practice should not require amendments to the Banking Code; and
- recommendations that address areas that are subject to ongoing Government or Regulator consultation such as proposed changes to the law, regulatory obligations, or other codes will be considered once those consultations are resolved.

The approach to the amended Banking Code has maintained these principles.

Simplification

- The proposed Banking Code seeks to simplify the Banking Code and minimise the potential for confusion and legislative / regulatory duplication. The ABA considers that simplification of the Banking Code is critical to the Banking Code achieving its role in providing safeguards and protections not set out in law in a way that is accessible to bank customers.
- The ABA's simplification objective is informed by the criteria for approving a code of conduct set out in s1101A of the Corporations Act 2001 (Cth) (**Corporations Act**) and the criteria set out in ASIC's Regulatory Guide 183 Approval of financial services sector codes of conduct (**RG 183**). Relevantly, each make clear the importance of the Banking Code in setting standards that are not covered by legislation but elaborate on, exceed or clarify the law.¹ Section 1101A(3)(a) of the Corporations Act states:

“ASIC must not approve a code of conduct unless it is satisfied that, to the extent the code is inconsistent with [the Corporations Act] or any other law of the Commonwealth under which ASIC has regulatory responsibilities the code imposes an obligation on a subscriber that is more onerous than that imposed by [that Act] or any other law of the Commonwealth under which ASIC has regulatory responsibilities....”

¹ See for example, RG 183.4, RG 183.5, RG 183.22, RG 183.30, RG 183.32.



Consistent with this, in developing the Banking Code, the ABA has only proposed to remove an obligation from the Banking Code, where an equal or higher protection exists in law or regulation.

- The ABA considers that simplification of the Banking Code has a consumer and subscriber benefit by:
 - reducing unnecessary length and complexity;
 - helping avoid the potential for confusion and inconsistency in application between Banking Code commitments and other legislation or regulation; and
 - better supporting compliance with Banking Code obligations.

RG 183 and statutory criteria for approval

- The ABA considers the proposed Banking Code satisfies the threshold criteria for Banking Code approval as set out in RG 183 and under s1101A of the Corporations Act, including demonstrating an appropriate process for developing the Banking Code.

Industry Guidelines

- As Industry Guidelines are not contractually enforceable (except for the Branch Closure Support Protocol), the ABA does not consider them to form part of the Banking Code or form Code-related documents. Rather, they are guides to best practice which can be easily updated and changed as operating environments and technology change.

Enforceable code provisions

- The Independent Review identified two possible provisions for consideration as enforceable provisions. After careful consideration of the Independent Review recommendations, the ABA implemented recommendation 7 of Independent Review by aligning with s912A of the Corporations Act. The ABA however decided not to adopt recommendation 8 as the obligation for banks to maintain appropriate systems, processes and programs is adequately covered by existing law and regulated by ASIC and APRA.

Consultation

- The process of developing the proposed Banking Code involved the Independent Review, stakeholder submissions, stakeholder engagement and consultation. The ABA welcomes the opportunity to continue this dialogue through ASIC's current public consultation.

We make the following comments on the relevant topics raised in ASIC's consultation below.

1. Strengthening the Banking Code of Practice (C1 and C3)

The Independent Review proposed a number of enhancements in consumer protections which have been incorporated. We highlight the following enhancements to the Banking Code.

1.1. Updated vulnerability definition

In response to recommendations 35 and 39 of the Independent Review the vulnerability definition has been enhanced by:

- (a) recognising that a customer may be vulnerable at any point in time;
- (b) including characteristics that may contribute to customer vulnerability;
- (c) clarifying that the list of examples is a non-exhaustive list; and
- (d) amending the language to encourage customers to tell banks about their circumstances, in line with the 2020 General Insurance Code.

The ABA and its members did not adopt the UK Financial Conduct Authority's (**FCA**) definition of a vulnerable customer, as recommended by the Independent Reviewer. This decision was made after careful consideration of the UK FCA's definition which was drafted for the UK's context and its implementation as a formal regulatory measure rather than a voluntary code of conduct measure.² We also note that implementation of this definition in the UK is supported by a fifty-seven (57) page regulatory guidance document.

We consider that the proposed Banking Code incorporates a definition that is more fit for purpose in an Australian context.

1.2. Updated inclusive and accessible banking section

In response to recommendation 57 of the Independent Review, the ABA has introduced new language to address the representation of persons identifying as LGBTQIA+. The language proposed in paragraph 44(e) has been drafted with the assistance of Victorian Pride Centre, Equality Australia, consumer groups and LGBTQIA+ networks within ABA member banks. Like the approach to the vulnerability definition, we also have clarified in this paragraph that the examples noted are not exhaustive.

1.3. New inclusivity and accessibility commitment

In response to recommendations 48 and 49 of the Independent Review, the Banking Code has also been uplifted to include a new commitment to organise or refer customers to support services (where appropriate and practicable), free of charge. These include:

- (a) interpreter/translation services;
- (b) AUSLAN;
- (c) National Relay Services; or
- (d) accessible documentation.

1.4. Updated small business definition

Consistent with recommendation 65 of the Independent Review and the Pottinger Independent Review, the definition of 'small business', the proposed new Banking Code has been amended to both expand and simplify the small business definition by:

² <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>



- (a) increasing the aggregate borrowings limit from A\$3m to A\$5m, which is expected to provide approximately 10,000 more business customers access to the protections of the Banking Code;³ and
- (b) clarifying the definition of small business and removing the reference to the definition of “related entities” in s9 of the Corporations Act. The definition now clarifies the meaning of business group and control of an entity within the Banking Code itself.

1.5. Uplifted guarantor provisions

In response to recommendation 77 of the Independent Review, the Banking Code includes new obligations which require that reasonable steps be taken to ensure a meeting is held with a guarantor before they sign their guarantee in the absence of the borrower (see proposed paragraphs 106-108). The inclusion of these paragraphs adds an additional layer of protection for potential guarantors to understand the risks associated with being a guarantor.

1.6. Efficiently, honestly, and fairly standard

Consistent with recommendation 7 of the Independent Review the ABA has amended the existing paragraph 10 conduct standard from “fair, reasonable and ethical” to “efficiently, honestly and fairly”. The amendment supports greater clarity for customers, bank staff and industry stakeholders.

1.7. Clarified the definition of financial difficulty

In response to recommendation 89 of the Independent Review, the financial difficulty definition has been enhanced and expanded to include customers who expect to be unable to meet upcoming repayments. It also includes more examples of potential financial difficulty causes (e.g., such as illness or injury, loss of employment etc) to provide a more practical explanation for customers and bank staff.

1.8. Clarification of protections for unregulated lending products and their guarantors

The ABA has introduced paragraphs 64 and 65 which clarify that the diligent and prudent banker obligation applies to lending products such as “buy now pay later products” that are not regulated by the National Credit Code (**NCC**).

2. Simplifying the Banking Code

The ABA has redrafted the Banking Code to remove restatements of existing consumer rights under the law and/or other regulatory obligations. Consistent with the test for approving a code of conduct set out in s1101A(3) Corporations Act and the tests set out in ASIC’s RG 183, the Banking Code focuses on consumer protections not set out in the law or other regulatory frameworks.

The ABA believes there are other important benefits in support of simplifying the Banking Code including:

2.1. Separate, but repetitive, Banking Code obligations may confuse customers and bank staff

The Banking Code continues to provide safeguards and protections not set out in the law. This is expressly stated on page 4 of the current Banking Code. Including a corresponding legal obligation in the Banking Code gives that obligation an independent legal existence as a Banking Code obligation incorporated as a term of the customer contract. By paraphrasing other statutory legal

³ Pottinger Independent Review, ‘The definition of ‘small business’’, 26 October 2020, page 10.



rights in the Banking Code, the ABA would be creating new contractual obligations that overlap with the statutory rights. This leads to uncertainty regarding whether the statutory or contractual protection is a higher standard, how the duty is discharged, and whether affected customers are better off overall pursuing statutory or contractual remedies. The ABA's position is that the Banking Code should not attempt to replicate statutory legal rights.

The risks of creating a parallel contractual regime is demonstrated by the diligent and prudent banker provisions (**DAP**) for individuals with regulated loans and guarantors of regulated loans. The ABA's view is that the law offers stronger customer protections and remedies than the DAP obligation. Consequently, this provision has been removed for individuals and guarantors of regulated loans, noting the following:

- in relation to consumer credit contracts existing paragraph 49 is not a stand-alone obligation. The obligation is qualified by existing paragraph 50 which states “we will do this by complying with the law”. This means in compliance with Chapter 3 of the NCCP Act and ASIC's Regulatory Guide 209: Responsible lending conduct – that is, paragraph 49 is entirely confined to the provisions of the NCCP Act and ASIC's RG 209 and provides nothing additional to customers;
- the National Consumer Credit Protection Act 2009 (Cth) (**NCCP Act**) offers specific and detailed protections for individuals with regulated loans. As the DAP obligation in the Banking Code offers no additional protection than the law, the ABA considers it appropriate to remove the DAP obligation from the Banking Code;
- small business borrowers and guarantors of small businesses will still be afforded the protections under current Banking Code paragraphs 51 and 52 by way of a contractual remedy (note there is no equivalent protection for small business in law);
- protections to borrowers and guarantors of non-NCCP Act regulated loans to individuals have also been added to the Banking Code;
- guarantors of NCCP Act regulated loans to individuals continue to have access to remedies available under the NCCP Act including injunctions (s177), compensation orders (s178) or other orders to compensate for loss or damage under s179 including declaring the contract as void;
- consistent with the ABA's approach to the removal of legislative duplication in paragraphs 49 and 50, our view is that guarantors of loans to individuals will have equivalent or higher statutory remedies available to them;
- whilst the removal of the DAP obligation under paragraphs 49 and 50 will also result in the removal of a contractual remedy, customers are able to rely on the NCCP Act for access to statutory remedies to resolve their complaint. Contractual remedies are relatively narrow, and most commonly take the form of damages. A contractual damages claim may require applicants to establish loss, causation, and appropriate mitigation. In contrast, the NCCP Act statutory remedies referred to above are broader and more flexible and give courts more ability to fashion appropriate remedies. These statutory remedies are available to both individual borrowers and their guarantors for breaches of responsible lending obligations regardless of any diligent and prudent banker obligation. While the source of the NCCP Act remedies is not contractual, the NCCP Act remedies allow for same or better substantive outcomes for customers than purely contractual remedies;
- during the ABA's consultation with AFCA, AFCA did not identify any examples of case determinations that were made based on the DAP obligation for individuals with regulated loans, which could not have otherwise been concluded by referring to the legislation;⁴ and

⁴ In one case (674533) the AFCA determination mentions the DAP obligation in passing on one occasion compared to the responsible lending obligations (under Chapter 3 of the NCCP Act) referred to on twenty-five occasions. In the second case (538242) the loan in question was a small business loan. There is no proposal by the ABA to remove the diligent and prudent banker obligation for small business loans.



- the preference for statutory protections and remedies under the NCCP Act over the DAP obligation appears consistent with “The AFCA Approach to Responsible Lending” issued in December 2023.⁵

The DAP obligation remains in the Banking Code for small business loans and individual loans which are not regulated by the NCC/NCCP Act.

2.2. Provisions that are regulated by a government regulator (C7, C11 and C12)

Provisions have only been removed where there is an equal or higher provision that exists at law/regulation. This approach avoids confusion and satisfies the requirements of s1101A of the Corporations Act and the objective of RG 183. Where other regulators already have oversight of those legislative obligations, the ABA considers it is not necessary for the Banking Code Compliance Committee (**BCCC**) to do the same.

We make the following points in support of this position:

- ASIC, the OAIC and the ACCC already regulate matters related to existing Banking Code provisions that have been removed from the proposed Banking Code. AFCA also takes these matters into account in its determinations and has its own systemic issues jurisdiction. It is unnecessary for the BCCC to also independently oversee these matters. For example:
 - regarding the removal of the DAP obligation for NCC-regulated loans for individuals described above, ASIC already regulates ABA members for compliance with the responsible lending obligations under Chapter 3 of the NCCP Act. It would be unnecessary for the BCCC to replicate ASIC’s regulatory role in this regard; and
 - members are subject to ASIC’s reportable situations regime and must comply with Chapter 3 of the NCCP Act. As mentioned, a provision has only been removed from the Banking Code where there is an equal or higher provision that exists at law/regulation. To replicate an existing reporting regime for the BCCC is not productive.
- The ABA continues to support a level playing field among industry participants which allows proportionate investment in regulations that improve customer outcomes. The impact of an increased compliance burden via duplication of regulatory obligations and reporting obligations is especially pronounced on smaller banks.
- Oversight and enforcement of the law and or regulatory guidance in relation to systemic or thematic risks is vested in the relevant regulator and is accompanied by obligations on banks such as breach reporting. We do not consider duplication by other bodies in these areas to be necessary.
- Further, with this clearer distinction we see a benefit in the BCCC’s ability to focus its efforts on exploring the Banking Code related issues, rather than duplicating the role of other regulators. This is a position consistent with recommendation 106 of the Independent Review which recommended the introduction of a materiality threshold for breach reporting to better focus the activities of the BCCC.

2.3. The Banking Code’s role is not to be the central repository for consumer protections

The Banking Code is not and is not intended to be the sole place or ‘one stop shop’ where customers have their rights comprehensively explained to them. It is not appropriate to be a restatement of all legal rights applying to consumers, including coverage of the additional 1,175

⁵ The AFCA Approach to Responsible Lending makes one hundred and thirty-eight (138) references to ‘responsible lending’, sixteen (16) references to the ‘National Credit Act’ and only one (1) reference to the “diligent and prudent banker” test.

pages of new legislation and guidance introduced since the Banking Code was last updated in 2019.

From our own consultation conducted in mid-2023, we note that some stakeholders consider that the Banking Code is the key source of commitments and information for customers and their representatives. However, this disregards a significant number of other existing rights and obligations under the law which have never been reflected in the Banking Code. For example, the current Banking Code does not refer to the:

- a. various obligations under the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**), including prohibitions against misleading and deceptive conduct, the obligation to act with due care and skill and prohibitions on unconscionable conduct, and unfair contract terms in standard form consumer or small business contracts;
- b. specific requirements when undertaking a responsible lending assessment under the NCCP Act;
- c. obligation for NCC regulated consumer credit contracts to be provided in the manner and form required under the NCC. These obligations are extensive and detailed. For example, banks must comply with the font size and contract content requirements, restrictions on fees and charges, content requirements for statements of account and the prescribed forms in the National Consumer Credit Protection Regulations 2010 (Cth);
- d. various procedures that must be followed when an individual customer defaults on an NCC-regulated credit contract;
- e. various obligations in the NCCP Act and the ASIC Act relating to credit cards;
- f. linked credit provider liability under the NCC and the Australian Consumer Law;
- g. various obligations regarding client money for financial services under the Corporations Act;
- h. various obligations regarding the manner and form of documents under the Corporations Act, such as product disclosure statements and financial services guides;
- i. various restrictions and requirements regarding advertising of financial products and services in the ASIC Act, NCCP Act, Corporations Act and ASIC Regulatory Guide 234: Advertising financial products and services (including credit): Good practice guidance;
- j. anti-hawking provisions in the Corporations Act;
- k. conflicted remuneration provisions in the NCCP Act and the Corporations Act;
- l. best interests duties for mortgage brokers in the NCCP Act and for financial advisors in the Corporations Act, where banks provide those services;
- m. various procedures that must be followed by banks in relation to the design and distribution obligations, including issuing a target market determination and ensuring that products are distributed in accordance with those determinations;
- n. privacy rights under Australian Privacy Principles; and
- o. rights relating to unsolicited communications under the Privacy Act 1988 (Cth), Spam Act 2003 (Cth) and Do Not Call Register Act 2006 (Cth).

2.4. Restructured Banking Code

In addition to the removal of duplication, the opportunity was also taken to redraft and restructure the Banking Code for the benefit of both customer and bank staff readability. For example:

- restructuring the Banking Code from 10 sections (or parts) to 5 sections (or parts);
- amending the order of sections to reflect the customer journey (e.g., Part B6 Guarantors has been rearranged to reflect the lifecycle of a guarantee);

- aligning with contractual conventions by capitalising defined terms and updating the index of definitions to ensure effective signposting for ease of reference; and
- to the extent possible, drafting in plain English.

3. Compliance with ASIC RG 183 and statutory criteria

The ABA considers the draft Banking Code satisfies ASIC’s “threshold criteria” as follows:

- (a) the provisions contained in the Banking Code are binding on (and enforceable against) subscribers through contractual arrangements;
- (b) as noted below at section 3.1 (ABA consultation with stakeholders), an extensive consultation process has been conducted in a transparent manner; and
- (c) the Banking Code will retain its existing administrative and compliance mechanisms through the BCCC.⁶

Further, the draft Banking Code satisfies the statutory criteria in s1101A(3) of the Corporations as follows:

- (d) the provisions of the Banking Code are not inconsistent with the law and the removal of legislative/regulatory duplication further minimises this risk that compliance with a code provision would make it impossible to comply with a law;⁷
- (e) the ABA notes that:
 - (i) the obligations of the Banking Code are capable of being enforced through internal dispute resolution, external dispute resolution (through AFCA) and through the courts;
 - (ii) through the BCCC, the ABA has an effective administration system for monitoring compliance with the Banking Code and making information obtained as a result of monitoring publicly available; and
 - (iii) the ABA maintains a public record of subscribers to the Banking Code.

3.1. ABA consultation with stakeholders

The ABA has been in consultation with stakeholders regarding the proposed new Banking Code for more than twelve (12) months. This has included informal and formal consultations at various points including:

3.1.1. A “principles based” Banking Code

In considering our response to the Independent Review of the Banking Code the ABA evaluated the merits of a principles-based Banking Code. A study of the New Zealand Banking Association’s Code of Banking Practice was completed and input from stakeholders was sought during September and October 2022 on the relative merits of a principles vs prescriptive (current Banking Code) approach. Stakeholders consulted on the proposed models included ASIC, AFCA, the BCCC, consumer stakeholders (CEOs of Financial Counselling Australia, Financial Rights Legal Centre, and Consumer Action Law Centre) and small business groups (Australian Small Business and Family Enterprise Ombudsman and Council of Small Business Australia).

⁶ RG 183.20

⁷ RG 183.30

After careful consideration the ABA decided to retain a prescriptive based, contractually enforceable Code, albeit with appropriate simplification amendments.

3.1.2. Targeted consultation on a draft Banking Code

The ABA commenced formal consultation on a draft new Banking Code on 12 April 2023 with 17 stakeholders.

As part of the consultation period, the ABA provided a draft Code along with a comprehensive mapping document in conjunction with consultation briefings where the context for changes were outlined.

Organisations consulted included:

- Consumer Action Law Centre;
- BCCC;
- Australian Financial Complaints Authority;
- Consumer Federation of Australia;
- Legal Aid;
- Finance Brokers Association of Australia;
- Independent Reviewer – Mike Callaghan;
- Council of Small Business of Australia;
- Australian Small Business and Family Enterprise Ombudsman;
- Mortgage and Finance Association of Australia;
- Financial Counselling Australia;
- Financial Rights Legal Centre;
- FCA Small Business Debt Helpline;
- CPA Australia;
- Chartered Accountants Australia and New Zealand;
- Institute of Public Accountants;
- EROS Adults Only Association; and
- Victorian Pride Centre.

As required, the ABA also held further meetings with stakeholders to further assist with stakeholder understanding and assessment.

Further to the 72% of the Independent Review's recommendations adopted, the ABA reviewed all written submissions received and accepted in full or part approximately 65% of the recommended changes.

4. Enforceable Code Provisions (C10 and C14)

ASIC is seeking feedback on:

- a. whether 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; and
- b. the ABA's response to recommendations relating to enforceable code provisions.

We make the following comments in relation to these matters.

4.1. Recommendations 8 and 29 of the Independent Review

In response to the Independent Review recommendations 8 and 29 (which suggested the commitment referenced above be added to the Banking Code and further, suggested such a commitment be designated as an enforceable code provision), the ABA noted that:

- banks already have existing obligations to maintain adequate systems, processes and programs under various Australian Prudential Regulatory Authority's (**APRA**) prudential standards, including Prudential Standard CPS 230 which requires that APRA-regulated entities must:⁸
 - identify, assess and manage its operational risks, with effective internal controls, monitoring and remediation;
 - be able to continue to deliver its critical operations within tolerance levels through severe disruptions, with a credible business continuity plan; and
 - effectively manage the risks associated with service providers, with a comprehensive service provider management policy, formal agreements and robust monitoring.
- ABA members are required to report on their compliance with the Banking Code every six months to the BCCC.
- the Corporations Act also makes clear the importance of enforceable code provisions being legally effective and capable of being enforced (s1101A(3)(b)(ii) and s1101A(3)(c)(i)). The ABA is concerned that the proposed commitment '*to have in place all reasonable steps to have in place appropriate systems, processes and programs to support an integrated approach to compliance*' is vague, unclear and likely to increase uncertainty and so also fails to meet this requirement.

For example, it is unclear what is meant by '*programs to support an integrated approach to compliance*'. Introducing an additional obligation in an already heavily regulated space also creates duplication, uncertainty and the potential for double penalties for the same conduct;

- in addition to those referred to above, other laws also impose system and process obligations on banks;⁹

For example, the Financial Accountability Regime will impose a strengthened responsibility and accountability framework for entities in the banking industry and is targeted at risk and governance cultures of financial institutions; and

- to include such a provision would be inconsistent with the objective of simplifying the Banking Code. As noted above, the ABA's simplification objective is informed by the tests set out in RG 183, and the test for approving a code of conduct set out in s1101A of the Corporations Act.

⁸ APRA Prudential Standard CPS 230, page 1.

⁹ For example, CPS220, the General Conduct obligations in the Corporations, NCCP and ASIC Acts and the upcoming commencement of the Financial Accountability Regime.

Therefore, the ABA considers including this as an enforceable code provision would introduce unnecessary duplication and overlap with existing legislation and so does not consider this an appropriate candidate to be designated as an enforceable code provision.

4.2. Enforceable code provisions generally

Throughout the ABA's consultation process, and preparation of the proposed Banking Code, the ABA did not identify any appropriate provisions for designation as an enforceable code provision (noting, per paragraph 58 of ASIC's consultation paper that designating paragraph 10 as an enforceable code provision is no longer an issue as the ABA has changed the wording of this paragraph to align with s912A of the Corporations Act and s47(1)(a) of the NCCP Act).

If any other Banking Code provisions were to be considered for enforceable code status the ABA would seek ASIC's clarification on a number of issues, including the following:

- the scope of the enforceable code provision regime's application to a Banking Code provision in circumstances where the Banking Code's definition of banking services is arguably broader than the banking services that are subject to ASIC regulation;
- the potential to create a double penalties regime and the potential for regulatory overlap; and
- the policy basis on which ASIC will require civil penalty consequences for conduct where Parliament has chosen not to apply legislative civil penalties for the same conduct.

5. Industry Guidelines (C17)

Consistent with our response to recommendation 10 of the 2021 Independent Review, with the exception of the Branch Closure Protocol, which is not an Industry Guideline, the ABA continues to regard that Industry Guidelines do not form part of the Banking Code as contractually enforceable provisions or form Code-related documents. This has historically been the position in the Banking Code and is intended to remain so for the following reasons:

- Industry Guidelines are intentionally drafted to assist members to understand emerging issues and provide best practice guidance. The guidelines assist banks to institute good practice and trial new approaches to support customers. Industry guidelines have not been drafted with the detail or certainty required for contractually binding commitments;
- some of the initiatives included in Industry Guidelines are aspirational in nature with members at varying levels of maturity in meeting such guidance rather than a common set of contractually enforceable set commitments contained in the Banking Code;
- Industry Guidelines also serve as a useful and flexible tool for the ABA and its members to respond to emerging concerns quickly, whether by drafting a new Industry Guideline or amending an existing Industry Guideline. It is imperative that the ABA maintain this flexibility towards Industry Guidelines. Including Industry Guidelines within the Banking Code could reduce flexibility and delay updates due to the formal processes required to amend by the ABA, including ASIC review and approval;
- ASIC has suggested, in the alternative, that the Industry Guidelines could be considered to be 'code related documents'. For the reasons outlined above, we do not consider that ABA Industry Guidelines have a sufficient nexus with the Banking Code to be classified as 'code related documents'; and
- we note that the Industry Guidelines are already considered by AFCA when resolving complaints.¹⁰

¹⁰ AFCA Submission to Consultation Paper 373: Proposed changes to the Banking Code of Practice, January 2024, page 17.

6. Other consultation topics

6.1. Policy areas under Government initiated reviews:

6.1.1. Consumer harm – Scams (C2)

As the Consultation Paper notes, the Independent Review did identify scams as an area of significant consumer harm. At the time of the response the Government had indicated its intent to proceed with reforms to address scams. Since that time:

- The Government has established the National Anti-Scam Centre to coordinate government, law enforcement and the private sector to combat scams.
- On 30 November 2023 Treasury and the Department of Infrastructure, Transport, Regional Development, Communications and the Arts released a consultation on a mandatory industry code regime that outlines the responsibilities of relevant parts of the private sector in relation to scam activity. This will be inclusive of banks, along with digital communications platforms and telecommunications providers.
- The ABA and Customer Owned Banking Association launched the new Scam-Safe Accord to deliver a high standard of protection for customers.¹¹

Consistent with the principles guiding the ABA's response to the Independent Review, the ABA considers it prudent to await the finalisation of the Government's mandatory code work prior to considering whether amendments to the Banking Code, if any, are appropriate.

The Government is consulting on proposed mandatory industry codes on scams for banks, telecommunications and digital platforms sectors. The ABA understands Treasury will work on the content of the industry codes in 2024, concurrently with developing legislation for the scams code framework.

6.2. Protecting customers and vulnerability (C20 – C23)

6.2.1. Recording customer circumstances

Paragraphs 78(a) and (c) of ASIC's consultation paper discuss recording of customer circumstances when they are experiencing vulnerability. In response, the ABA notes that banks must comply with the Privacy Act 1988 (Cth) (**Privacy Act**), including obligations regarding the collection, use and maintenance of "sensitive" (including health) information.

As the Consultation paper notes, the ABA has engaged with the Attorney General's review of the Privacy Act and, is advocating for changes that would make adoption of this recommendation permissible under the Privacy Act. The ABA had previously briefed ASIC on this matter. Should the privacy laws be changed, the ABA will revisit this recommendation.

Further to this, paragraph 78(b) discusses banks recording information about customers with Aboriginal and Torres Strait Islander heritage. Under Australian Privacy Principle 3.3, banks are prohibited from collecting sensitive information (including a person's racial or ethnic origin) unless the information is reasonably necessary for one or more of the entity's functions or activities and (except in extremely limited circumstances) must have a customer's express consent to do so.

The ABA considers that it is not appropriate to have an obligation in the Banking Code to record this information when existing legislation would limit the circumstances where it is appropriate to do so.

¹¹ See further: [Australian banks have joined forces to launch a new Scam-Safe Accord to deliver a higher standard of protection for customers and put scammers out of business in Australia.](#)

The ABA will not knowingly support the inclusion of Banking Code commitments that could lead to a breach of legislation. This position is supported by RG 183.30 which notes that:

“While a code must do more than restate the law (and indeed should offer consumers benefits that exist beyond the protection afforded by law), it must not be inconsistent with the Corporations Act or other relevant Commonwealth law for which ASIC is responsible. For example, if compliance with a code provision would make it impossible to comply with the law, we will generally take the view that the code provision is inconsistent with the law.”

6.2.2. Family violence or financial abuse

ABA members support in principle the recommendation to not enter negative credit information if a customer is affected by family and domestic violence (Independent Review recommendation 14). The legislated comprehensive credit reporting framework currently requires banks to enter this information. The ABA has advocated for this to be changed in the legislation. While the industry continues to wait for the change to be legislated, a no-action letter issued by ASIC on this issue in July 2022 will continue to be relied on. The ABA understands it is ASIC's intention to keep the 'no action' position in effect for the foreseeable future, until the legislation is amended.

6.3. Handling complaints (C24 and C25)

Consistent with its simplification objective, the ABA does not believe it is necessary to duplicate the contents of ASIC Regulatory Guide 271 (**RG 271**) in the Banking Code. However, an obligation (currently in paragraph 196 of the Banking Code) for banks to comply with RG 271 remains in the Banking Code. The Banking Code clarifies that RG 271 continues to apply to all customers covered by the Banking Code.

Where banks have not complied with RG 271, complaints can be made to the BCCC by consumers, and will continue to be reported by banks to the BCCC. As per the requirement of RG 271, consumers are also alerted to their entitlement to make a complaint to AFCA where their complaint is not resolved by the bank.

Finally, for the benefit of customer awareness a summary of the key RG 271 commitments has been included in the proposed Customer Guide, such as response times for common complaint types. This Guide also includes how customers can enforce their rights under both the Banking Code and Australian law via internal and external dispute resolution or, through court action.

The ABA believes this approach is both transparent and consistent for customers and their representatives.