



# Banking Code of Practice Independent Review 2021 Terms of Reference

The Banking Code of Practice (the Code) is the instrument through which the industry sets standards of good banking practice. The Code applies to individuals and small businesses, and their guarantors.

## Regulatory Framework

The Code is the first substantive industry code to be approved by ASIC (in 2018) under the Corporations Act, and the Australian Banking Association (ABA) has sought and obtained approval for all subsequent changes to the Code.

The Code is enforceable, with its provisions forming part of banks' agreements with their customers<sup>1</sup>.

The 2021 review will be the first major review of the Code since the report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was finalised. The Royal Commission made a number of recommendations to amend the Code (which have been implemented or are underway), and a series of recommendations that substantially alter the regulatory framework for financial services in Australia.

In particular, as a result of the Royal Commission recommendations, the regime for industry codes in the financial sector was strengthened, and now includes provision for 'enforceable code provisions' – adding another (statutory) layer to code enforceability.

In addition, the Government has proposed significant changes to the regulatory framework for consumer credit. The effect of this new regulatory environment and how the Code interacts with it are key matters for the review.

## Objectives

The banking industry is committed to earning back trust and creating an enduring, customer focussed culture. The Code is a key instrument through which this general cultural commitment, together with a range of specific commitments, is expressed and operationalised.

Consistent with the law and regulatory guidance, the Code provides for its review at a minimum of three year intervals. The objectives of the review are to ensure that:

1. The Code continues to respond appropriately to the contemporary environment, and to benefit customers and subscribers.
2. Banks and consumers are clear about their rights and responsibilities and that the Code articulates the standards of behaviour expected of banks, including promotion of the Code.
3. Consumers of banking services, regulators and other key stakeholders play a part in the ongoing development of the Code.

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<sup>1</sup> As in the Code, the use of the term customer(s), where relevant, includes individuals, small businesses and guarantors.



## Scope

The review will make recommendations on how the banking industry can strengthen the operation of the Code and promote informed and effective relationships between banks and their individual and small business customers.

The Code reviewer will have regard to the fact that the code underwent substantial modifications following the last review (which reported in 2017), and has been subject to further modifications, including those made to implement recommendations of the Royal Commission. It is not anticipated that the review will reconsider the rationale for these changes. However, the review may accept submissions on the operation of the changes and consider whether any adjustments are required to ensure they achieve their intended effect.

The review will also note, in relation to the definition of 'small business' in the code, the report of the independent Pottinger Review<sup>2</sup>, commissioned by the ABA in 2020 and the industry's response to that review (which accepts all recommendations), and will not be required to consider the issues raised, or recommendations made therein, unless there is a compelling reason to do so. However, as noted in the ABA response to the Pottinger Review<sup>3</sup>, the review will consider developing appropriate amendments to implement Recommendation 6 which relates to refinement of the definition of Related Entities. This aspect of the review will be undertaken by external legal experts engaged by the ABA.

The changes to the Code as a result of Recommendations of the Pottinger Review will be included in the updated Code following this review.

The review will give specific attention to assessing and considering:

1. The extent to which the Code remains appropriate having regard to the recent reforms to the laws and regulations covering banking services to individual and small business customers, and in particular:
  - a. The effect of new legal obligations arising from implementation of the recommendations of the Royal Commission and other government reforms [including in respect of any changes to responsible lending obligations]
  - b. Whether these new obligations require any further amendment to the Code.
2. The 'enforceable code provisions' regime introduced following the Royal Commission and the kind of provisions that the ABA and ASIC should consider in their process of identifying any provisions that should be designated under the regime (having regard to the Act, regulations and any relevant ASIC guidance).
3. The extent to which the Code contributes to banking services being inclusive, affordable and accessible for all customers, including: small business customers, Indigenous customers, customers with a disability, customers in remote, rural and regional areas, older customers and customers with limited English.
4. The effectiveness of the provisions of the Code and whether these provisions meet consumer and community expectations for banks to:
  - a. Act in a fair, reasonable and ethical manner.
  - b. Provide hardship assistance to individual and small business customers experiencing financial difficulties
  - c. Support customers during crises such as the COVID19 pandemic (drawing on lessons learned from any consequent impact on banks' ability to comply with the code, and having regard to the utility of the COVID19 Special Note).

<sup>2</sup> [https://www.pottinger.com/uploads/1/9/5/1/19512909/pottinger\\_-\\_independent\\_review\\_of\\_the\\_definition\\_of\\_small\\_business\\_-\\_26\\_october\\_2020.pdf](https://www.pottinger.com/uploads/1/9/5/1/19512909/pottinger_-_independent_review_of_the_definition_of_small_business_-_26_october_2020.pdf)

<sup>3</sup> [www.ausbanking.org.au/submission/aba-response-to-pottinger-review/](http://www.ausbanking.org.au/submission/aba-response-to-pottinger-review/)



## Australian Banking Association

- d. Resolve complaints and disputes between banks and their individual and small business customers
  - e. Support customers experiencing vulnerability
  - f. Make customers aware of the existence and benefits of the Code, including the existence of and their eligibility for basic, low fee and no fee bank accounts.
5. The role of the Banking Code Compliance Committee (BCCC), and whether there is a need for adjustment to its duties and powers, including:
    - a. whether the sanctions available to the BCCC remain appropriate and
    - b. whether The Charter is the appropriate instrument to record these duties and powers.
  6. Particular matters of concern raised by stakeholders and considered by the reviewer to be important to address.
  7. The frequency with which the Code should be reviewed.
  8. Any other matters required to be considered under ASIC's Regulatory Guide RG183.

### Independent Reviewer

The ABA has appointed Mike Callaghan, an independent person with relevant qualifications and experience to conduct this review.

The reviewer will be assisted by a Customer Advisory Panel who will be consulted at the reviewer's discretion. The panel will include two consumer representatives and one small business representative. The ABA will seek the input of the Consumer Federation of Australia (CFA) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to appoint the members of this panel.

### Consultation

In commissioning this Code review and identifying the Terms of Reference, the ABA has sought the views of the ABA's Consumer Outcomes Group<sup>4</sup> and a number of other stakeholders.

The Code reviewer will conduct the review publicly and ensure effective consultation with:

- the banking industry including the ABA and its members
- the Australian Securities and Investment Commission (ASIC)
- consumer and small business organisations including the ASBFEO, COSBOA, and the member organisations of the CFA
- organisation(s) representing Australia's First Nations People
- organisation(s) representing people with disability
- relevant regulatory bodies including the Council of Financial Regulators, and the BCCC, and
- other interested stakeholders, including AFCA.

Consultation will include a public submissions process.

### Final report

The Code reviewer will assess submissions received on the Terms of Reference and feedback provided and prepare a draft report to facilitate further consultation.

A final report will be published with findings and options about changes to improve the operation and performance of the Code. The findings and options presented by the report will take into account the

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<sup>4</sup> The Consumer Outcomes Group includes representatives from Financial Rights Legal Service, Financial Counselling Australia, Council on the Ageing, Legal Aid Australia, South-East Community Links and Consumer Action Law Centre.



submissions of all interested parties but will be determined and framed according to the independent judgement of the Code reviewer.

The findings and options will be those of the Code reviewer. The ABA and its member banks will need to consider the report and determine their response and any next steps.

## Timeline

Establish substantive review (appoint Reviewer (and Consumer and Small Business panel) and set Terms of Reference	30 June 2021
Review commences	1 July 2021
Complete review process	31 October 2021
Deliver final report to the ABA	30 November 2021
ABA consults with members and responds to substantive review outlining proposed changes to Code.	December 2021 - March 2022
Application to ASIC for approval lodged.	31 March 2022
Provisional date for ASIC approval	30 June 2022
New code takes effect (including Pottinger Review changes)	1 January 2023 or 6 months after ASIC notifies its approval of the Code (whichever is the later)

The banks are committed to meaningful change that is supported by independent advice and a transparent and public process, and they will have regard to the findings and options identified by the report in determining and implementing appropriate changes to the Code, consistent with their obligations including under the competition law.

## Timing

The independent review is to be conducted in a timely, transparent and accountable manner. As outlined in the table above, a final report will be published by the end of November 2021.

The implementation of the final report's recommendations will require assessment by the banking industry and changes to be determined. Commencement and transitional arrangements for the new Code will reflect the nature of the changes made.

The banking industry is committed to ensuring that the time taken in responding to the recommendations, making any changes to the Code, and implementing the changes is completed in as timely a fashion as possible.

## Independence

The ABA will appoint the Code reviewer. While the banking industry will fund the review, the banking industry will not have any influence over the findings and options identified by the Code reviewer beyond our input as a participant in the review, and the Code reviewer and secretariat will act independently and not in the interests of, or on behalf of, the ABA or its members.