

02 August 2017

Mr Kevin Zhang
ASIC Enforcement Review
Financial System Division
The Treasury
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Dear Mr Zhang

ASIC enforcement review - Position and Consultation Paper 4 Industry Codes in the Financial Sector

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide comments to the Treasury *Consultation Paper: ASIC enforcement review – Position and consultation paper 4 Industry Codes in the Financial Sector (Consultation Paper)*.

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Introductory remarks

The ABA recognises the importance of self-regulation through industry codes and other mechanisms to supplement the regulatory framework. Self-regulation has a number of advantages:

- It is responsive – enabling changes to practice which keep pace with changing consumer expectations and preferences as well as technological change
- It is not a cost burden on government
- It provides a mechanism for industry to engage with key stakeholders (including consumer advocates and regulators) to understand emerging issues and establish and promote good practice
- It allows for continuous improvement, and
- It provides another avenue for industry buy-in and engagement.

The Consultation Paper poses the question of whether self-regulatory initiatives such as industry codes are achieving their potential, and whether that potential could better be achieved by the introduction of a co-regulatory model.¹

The ABA, and our Code signatory banks, broadly support the concept of a co-regulatory model for industry codes and support the Taskforce's view that there is room to strengthen the code regime while preserving the participatory role for industry – without resorting to legislating code content.

¹ Treasury, Consultation Paper *ASIC enforcement review - Position and Consultation Paper 4 Industry Codes in the Financial Sector*, 2017, p 1.



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Code of Banking Practice

The Code of Banking Practice (**Banking Code**), first introduced in 1993, is the banking industry's customer charter on good banking practice. The Banking Code has evolved over time to continue to improve standards and practices within banks, which has led to better outcomes for bank customers and prompted improved practices across the financial services industry.

A key benefit of the Banking Code for consumers is that it is incorporated by reference in the terms and conditions of banking services contracts with customers.²

The Banking Code is currently being revised following an independent review in 2016.³ The review, conducted by Mr Phil Khoury, involved an extensive consultation process and resulted in a comprehensive report with 99 recommendations.

The review was part of a comprehensive package of initiatives to protect consumer interests, increase transparency and accountability and build trust and confidence in banks.⁴

The industry is making significant changes to the Banking Code and is committed to finalising the new Code by the end of 2017. The redraft of the new Banking Code timetable is ambitious, but it is recognised that our stakeholders, customers and the wider community expect the banks to make these changes as soon as possible. This involves the following activities:

- Re-designing the Banking Code to create a customer-centric Banking Code, including to redraft the relevant existing content and assessing the 99 Khoury recommendations and other recommendations to determine what clauses will be added to the new Code
- Engaging with stakeholders on the new Banking Code
- Consumer testing the new Banking Code
- Working with the Code Compliance Monitoring Committee (**CCMC**) and engaging with stakeholders on the CCMC role and mandate with a view to strengthening the governance of the Banking Code, and
- Seeking ASIC approval of the new Banking Code under section 1101A of the Corporations Act and RG 183 and preparation of our application and supporting documentation.

Specific comments

This submission addresses the five preliminary positions set out in the Consultation Paper.

Position 1:

The content of and governance arrangements for relevant codes (those that cover activities specified by ASIC as requiring code coverage) should be subject to approval by ASIC.

The ABA supports the Banking Code being approved by ASIC.

The ABA will be submitting the revised Banking Code to ASIC for its approval and is currently consulting with ASIC. We recognise that where approval by ASIC is sought and obtained, it is a signal that consumers can have confidence in the Code and trust the Code is one that responds to identified and emerging consumer issues and delivers substantial benefits to consumers.⁵

² The Code of Banking Practice is binding on ABA member banks who are signatories. It applies to individual and small business customers and their guarantors.

³ Under the terms of the Banking Code, it must be reviewed every 5 years. [Clause 6]

⁴ <https://www.betterbanking.net.au/>

⁵ <http://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>



Position 2:

Entities engaging in activities covered by an approved code should be required to subscribe to that code (by a condition on their AFSL or some similar mechanism).

Position 2 proposes that entities which engage in activities covered by an approved code (as per the proposal above) should be required to subscribe to that code (by a condition on their AFSL or some similar mechanism).

The ABA supports this position in principle.

However, we note that there are some practical impediments to this proposal that would require further consultation. At present, industry associations manage their codes and the content is formulated by their signatory members, subject to periodic independent review and recommendations arising from those reviews.

It is important that future consideration be given to the following:

- Would this apply to all entities irrespective of whether they would otherwise only have a small proportion of their business potentially subject to a Code's jurisdiction?
- If non-members or 'compelled subscribers' are mandated to sign up to an industry code, how would their views be captured in formulating the content?
- How could non-members or 'compelled subscribers' be required to contribute to the cost of updating and managing codes as well as the costs involved in compliance governance bodies?

In addition, the Consultation Paper states that "the specification of *activities* that should be covered by approved codes would be best left to ASIC". 'Activities' is not defined and we query whether this would involve mandating codes for other 'activities' in financial services (or other sectors) which are not currently subject to a code.

Currently the ABA does not mandate that member banks subscribe to the Banking Code because it would:

- Require seeking regulatory approval from the Australian Competition and Consumer Commission (**ACCC**)⁶, and
- The ABA Constitution permits membership to a broader category of banks than those providing banking services captured by the Banking Code.

Single approved code

The Consultation Paper also notes that there should ideally be a single approved code covering an activity or sector, rather than a "proliferation of alternative codes"⁷.

In principle, we support a high standards industry code applying to industry participants. Should a single approved code remain an option for active consideration we would request detailed consultation to understand how this would work in practice.

The banking industry continues to invest time and resources to ensure the Banking Code remains best practice and to improve outcomes for bank customers.

Position 3:

Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.

The ABA supports this position. In relation to the Banking Code, banks that adopt the Code are considered to be contractually bound by their obligations under the Code – as it is incorporated by

⁶ <https://www.accc.gov.au/business/industry-codes>

⁷ *Ibid*, p 2.



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reference within the terms and conditions of banking contracts. This is with the exception of high level principles and values which are currently not enforceable.⁸ We consider having best practice principles and values upfront allows a Code to promote behaviour that should not be codified, as these are too subjective to apply and monitor.

Position 4:

An individual customer should be able to seek appropriate redress through the subscriber's internal and external dispute resolution arrangements for non-compliance with an applicable approved code.

The ABA supports this position which reflects the system currently in place for individual consumers under the Banking Code who allege a breach of the Code.

At present, the CCMC independently monitors compliance with the Code of Banking Practice and can make a determination as to whether a breach of the Code has occurred. While the CCMC can apply sanctions to code subscribers where a breach has occurred, it is not the role of the CCMC to provide bank customers with redress. This is a matter for internal dispute resolution (**IDR**) teams and external dispute resolution (**EDR**) schemes, and a customer can seek redress through these avenues.

Position 5:

The code monitoring body, comprising a mix of industry, consumer and expert members, should monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters.

The ABA supports this position. At present the CCMC is comprised of three representatives, including a consumer representative, an industry representative, and an independent chair. It will also have access to another independent small business expert on an as needs basis. It is supported by a secretariat which also supports other industry code monitoring bodies.

Concluding remarks

Thank you for the opportunity to provide input into this Consultation Paper. We look forward to the opportunity for further discussion on the issues raised.

Yours sincerely

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⁸ Ibid, p 9, and cl 36(b)(iii) of the Banking Code 2013. The CCMC's compliance monitoring, investigation and reporting powers do not extend to alleged contraventions of cl 3 and 4, unless there is also an alleged contravention of another clause of the Code.