



19 January 2024

Banking Code Consultation Team

Regulation & Supervision

Australian Securities and Investments Commission

GPO Box 9827 Brisbane QLD 4001

via email: [BankingCode@asic.gov.au](mailto:BankingCode@asic.gov.au)

Dear Sir/Madam,

### **Proposed changes to the Banking Code of Practice should clarify and reinforce protections above compliance**

The Australian Small Business and Family Enterprise Ombudsman (the ASBFEO) welcomes the opportunity to comment publicly on the Australian Banking Association's (ABA) proposed changes to its Banking Code of Practice (the Code), which aims to set a consistent standard of good industry practice that customers and small businesses can expect subscribing banks to uphold.

Competitive access to finance has been a longstanding challenge for small and family businesses. Policy incentives need to strike the right balance between managing risk and supporting entrepreneurship, including by ensuring small businesses have reasonable and reliable access to banking services.

We acknowledge that the proposed changes to the Code include incorporating a recommendation of the Pottinger Review's regarding the definition of small business, by increasing the value used in the aggregate borrowing criterion from \$3 million to \$5 million.<sup>1</sup> The ABA estimates that this change will extend the protections of the Code to an additional 10,000 small business.<sup>2</sup>

Noting the significant asymmetry of resources and market power between banks and small business borrowers, we provide the following recommendations for consideration by the Australian Securities and Investments Commission (ASIC).

#### **1. The introduction to the Code, including the guiding principles, should form part of the Code, and industry guidelines and protocols should be enforceable under the Code.**

The Code is underpinned by four guiding principles: trust and confidence; integrity; service; and transparency and accountability. These principles are shared by all member banks and are intended to inform decision-making. The ASBFEO considers that these principles are central to the robustness of the code and should be enforceable under it.

Conversely, excluding the guiding principles from the Code proper obscures its purpose as a comprehensive and consolidated set of expected industry practices that complements and exceeds legal compliance. The Code should be viewed as the 'floor,' not the ambition. Including enforceable guiding principles will both assist and improve the conduct and decisions of staff,

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<sup>1</sup> Pottinger, *The definition of 'small business': Independent Review*, 26 October 2020.

<sup>2</sup> Australian Banking Association (ABA), *Small business definition to be expanded*, ABA website, 2023, accessed 21 December 2023.



clearly inform customers of all the protections that apply to them and provide an enabling framework for the development of better and exemplar industry practices.

**2. The proposed Code should retain existing provisions protections regarding complaints handling rather than referring customers to ASIC Regulatory Guide RG 271.**

The proposed Code reduces the content of Chapter 47: *If you have a complaint about us*, and omits six paragraphs from Chapter 48: *How we handle your complaint*. These changes remove existing explicit commitments by ABA members to conducting a fair and reasonable process, as well as providing information on progress, a contact person, a written response, and an explanation and monthly updates regarding delayed responses.

The proposed Code replaces these crucial obligations with a statement affirming member-banks' compliance with comply with ASIC Regulatory Guide RG 271: Internal dispute resolution. It also indicates options for entering internal dispute resolution, lodging a complaint with the Australian Financial Complaints Authority and taking court action.

The ASBFEO considers that the perceived benefit of streamlining complaints-handling provisions in the Code (namely reducing regulatory burden for member banks) would be significantly offset by the detriment to consumers and small businesses. It is not reasonable to expect busy and resource-constrained small businesses to read and understand regulator guidance for financial firms, and then to decipher and be clear on how to exercise rights afforded to them.

Removing accessible and actionable provisions on complaints handling – a critical component of any industry code of practice – would undermine the intent and effectiveness of the Banking Code.

**3. To better reflect the Proposed Code's commitment to promote awareness and make sure that copies of the Code are available and accessible under Part A:**

- a. the Code should be provided to each customer in conjunction with any product disclosure documents when offering a banking service and**
- b. the Code should be promoted to professional service providers which act as small business' trusted advisers.**

Small business owners may be unaware of the code and are unlikely to have the time to seek it out. This increases the risk that small business owners are not fully aware of either their rights or member-bank obligations under the relevant version of the code.

Customer awareness of the code could be improved by using existing points of contact to promote the code's purpose. The code should clearly state 'the Banking Code will be provided to each customer in conjunction with any product disclosure documents when offering a banking service'. Given the expertise and time required to identify and interpret legislation underpinning the code, it should also be promoted to professional service providers who act as trusted advisers to small businesses.

Trusted advisers often support small business clients to gain access to financial products. Banks and small business customers would benefit from these service providers having a full and up-to-date understanding of their clients' rights under the code, as well as how banks use industry guidelines and protocols to meet their commitments.



**4. Obligations under the Proposed Code should apply to all customer dealings from the date the code takes effect, and improvements to provisions relevant to small business customers should be applied to existing arrangements to the fullest possible extent.**

The Proposed Code stipulates that the terms and conditions of previous versions of the Code will apply to all banking services and guarantees entered into before the transition date, even where those terms and conditions are inconsistent with the current version of the Code. The proposal to fully grandfather all previous versions of the Code would unduly exclude existing customers from the benefits and protections of the current version, as well as create confusion for bank staff and small business customers when navigating which obligations are relevant to the customer's circumstances.

While the banking environment is continually evolving, rising best-practice standards and expectations should be captured in each new version of the code. While some elements of code updates might not be readily applicable to certain established arrangements, the benefits of expanded commitments captured in updates to the code should apply to both current and prospective small business customers.

If you require any further information, please contact [advocacy@asbfeo.gov.au](mailto:advocacy@asbfeo.gov.au).

Yours sincerely

**The Hon Bruce Billson**

Australian Small Business and Family Enterprise Ombudsman