REVISITING THE AUSTRALIAN CODE OF BANKING PRACTICE: IS SELF-REGULATION STILL RELEVANT FOR IMPROVING CONSUMER PROTECTION STANDARDS?

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I INTRODUCTION

In December 2014, the Financial System Inquiry ('FSI'), headed by Mr David Murray, released its final report.[1] The FSI was to 'lay out a "blueprint" for the financial system over the next decade',[2] and the terms of reference were wide-ranging. Among other things, the FSI was charged with refreshing the 'philosophy, principles and objectives underpinning the development of a well-functioning financial system, including … assessing the effectiveness and need for financial regulation'.[3] There was no specific mention of self-regulation in the FSI's terms of reference, however, there has been a high level of self-regulation and co-regulation in the financial system for some years. Self-regulation and co-regulation are also explicitly incorporated into the consumer protection regulatory framework for financial services. Given this, the *FSI Final Report* appropriately canvassed, albeit in broad terms, the role of self-regulation for financial services.[4]

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1 Financial System Inquiry, Treasury (Cth), *Financial System Inquiry Final Report* (28 November 2014) ('*FSI Final Report*').

2 Financial System Inquiry, Treasury (Cth), *Financial System Inquiry* (2015) <http://www.fsi.gov.au>.

3 *FSI Final Report*, above n 1, viii.

4 Ibid; see discussion of the *FSI Final Report* in Part II(D) below.

Coincidentally, around the same time as the terms of reference for the FSI were released, the most recent version of the Australian Code of Banking Practice ('Banking Code') came into effect. This document, comprised of the *Code of Banking Practice*[5] and the *Code Compliance Monitoring Committee Mandate*,[6] is the third major incarnation of the Banking Code. The first version of the Banking Code was released in 1993 as the *Code of Banking Practice*,[7] following a recommendation from a parliamentary committee,[8] and it was one of the first industry-based consumer protection codes in the financial services sector.

The Banking Code is described by the Australian Bankers' Association ('ABA') as 'the banking industry's customer charter on best banking practice standards'.[9] The two previous major incarnations of the Banking Code represented large advances on the consumer protections available at the time, with the result that customers of subscribers to the Banking Code were afforded greater protections than customers of financial institutions that were required only to comply with the legislation.[10] The third major incarnation of the Banking Code was developed following a 2007–08 independent review, but ultimately many of the recommendations of the review became superseded by legislative change. Given the now extensive legislative coverage of consumer protection issues in financial services, one commentator has suggested that the Banking Code may not be needed in the future.[11] The Banking Code has also been recently criticised as a 'toothless tiger', particularly in regards to its enforcement infrastructure.[12]

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5 Australian Bankers' Association, *Code of Banking Practice* (at 1 February 2014) ('*2013 Code*').

6 Australian Bankers' Association, *Code Compliance Monitoring Committee Mandate* (at 1 February 2014) ('*CCMC Mandate*'). The *2013 Code* and the *CCMC Mandate* were published as a single document.

7 Australian Bankers' Association, *Code of Banking Practice* (at 3 November 1993) ('*1993 Code*').

8 The 1991 Martin Committee on Banking and Deregulation recommended that 'a code of banking practice, contractually enforceable by bank customers and subject to ongoing monitoring by the Trade Practices Commission, be developed as a result of a process of consultation between the banking industry, consumer organisations, Commonwealth regulatory agencies and relevant State government authorities': House of Representatives Standing Committee on Finance and Public Administration, Parliament of Australia, *A Pocket Full of Change: Banking and Deregulation* (1991) 391 [20.51]. For a history of the development of the *1993 Code*, see Wickrema Weerasooria and Nerida Wallace, *Banker–Customer: Resolving Banking Disputes* (Longman Professional, 1994) ch 19.

9 Australian Bankers' Association, *Code of Banking Practice* (2011) <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice>.

10 Note that credit unions and building societies have also established a detailed code of practice: Customer Owned Banking Association, *Customer Owned Banking Code of Practice* (at 1 January 2014) ('*Customer Owned Banking Code*').

11 Prudence Weaver, 'Code of Banking Practice 2013' in Allan L Tyree and John Sheahan (eds) 'Banking Law and Banking Practice' (2014) 25 *Journal of Banking and Finance Law and Practice* 43, 47.

12 Andrew Wilkie, 'Improving Consumer Protection for Bank Customers' (Press Release, 10 September 2012) <http://www.andrewwilkie.org/content/index.php/awmp/press_extended/improving_consumer_protection_for_bank_customers>.

Despite the existence of a proliferation of voluntary codes,[13] the role of industry codes, and specifically the Banking Code, has been the subject of only limited academic analysis.[14] The review of the sector by the FSI therefore provides an opportune time to re-examine the role of codes in the regulatory framework for financial services. This article focuses on the Banking Code and the extent to which it influences consumer protection standards in a sector that is characterised by complex and extensive government regulation.

In Part II, this article provides an overview of self-regulation and co-regulation generally, and in the Australian financial services sector. The overview includes a description of the ways in which self-regulation and co-regulation are explicitly incorporated into the Australian regulatory framework for financial services. It also provides a brief introduction to the scope and coverage of the Banking Code, and to the discussion of self-regulation in the FSI.

Part III of this article then describes and analyses some key clauses in the Banking Code, and the relationship between the development of these standards in the Banking Code and the parallel development of consumer protection legislation in financial services. It finds that, for a number of important consumer policy issues, including disclosure, responsible lending, and dispute resolution, the Banking Code provisions have largely been superseded by legislation in recent years, through the changes introduced by the *Financial Services Reform Act 2001* (Cth) ('*FSRA*'), amending the *Corporations Act 2001* (Cth) ('*Corporations Act*'), and the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCPA*'), including the *National Credit Code* ('*NCC*').[15]

This expansion of legislation into policy areas that were once covered primarily by the Banking Code might be grounds for arguing that the Banking Code now has limited relevance as a consumer protection instrument.[16] However,

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13 Some of the major industry-based codes include the *Customer Owned Banking Code*; Insurance Council of Australia, *General Insurance Code of Practice* (at 1 July 2014) ('*General Insurance Code*'); National Insurance Brokers Association, *Insurance Brokers Code of Practice* (at 1 January 2014); Mortgage and Finance Association of Australia, *Code of Practice* (at 13 April 2014); Financial Planning Association of Australia, *Code of Professional Practice* (at 1 July 2013). There is also a functional code, the *ePayments Code* (formerly the Electronic Funds Transfer Code of Conduct): Australian Securities and Investments Commission, *ePayments Code* (at 1 July 2012) ('*ePayments Code*').

14 For some recent articles, see Nicholas Mirzai, 'The 2013 Code of Banking Practice: Effect, Effectiveness and Comment' (2013) 28 *Australian Banking & Finance Law Bulletin* 139; Gail Pearson, 'Business Self-regulation' (2012) 20 *Australian Journal of Administrative Law* 34; Nicholas Mirzai, 'A Compulsory Banking Code of Conduct: Better Practice or Misguided Effort?' (2012) 28 *Australian Banking & Finance Law Bulletin* 50; Gail Pearson, 'The Place of Codes of Conduct in Regulating Financial Services' (2006) 15 *Griffith Law Review* 333; Christine Godfrey, 'The Revised Code of Banking Practice: Is It Made of Straw, or Does It Have Enough Bricks To Provide Effective Consumer Protection?' (2006) 14 *Competition & Consumer Law Journal* 146.

15 *NCCPA* sch 1.

16 Prudence Weaver, for example, suggests that '[i]t is worth considering, however, whether there will be any need for a new Code given the increasing amount of regulation that now applies to banking practice': Weaver, above n 11, 47.

this article refutes that argument by showing that there are at least five ways in which the Banking Code does, and can continue to, influence the development of consumer protection standards in the banking sector, and in the financial services sector more widely.

First, the Banking Code provides consumer rights in areas not currently covered by legislation, including where legislation might be an inappropriate response to an identified problem. This includes rights in relation to account combination, independent rights in relation to compliance with other agreements and guidelines, specific measures for vulnerable groups, and the imposition of aspirational standards on banks.

Secondly, the Banking Code provides coverage for some customers and products that are not afforded coverage in the relevant legislation. This is particularly important for small business customers, as the protections in the *NCCPA* do not extend to small business loans.

Thirdly, the Banking Code provides body to the general obligations contained in the legislation. The procedural protections afforded to third party guarantors are one example here. Fourthly, the standards in the Banking Code influence the standards in the legislation, and vice versa, in what I have called a 'regulatory dance'.

Finally, the Banking Code influences the standards imposed upon, and expected of, other members of the financial services industry, through a regulatory dance between industry codes, and through the reference to good industry practice in the decision-making of the external dispute resolution schemes.

Together, these five examples illustrate the various ways in which the Banking Code can and does contribute to the raising of standards for banks, non-banks and the financial services sector generally, despite the encroachment of the legislation in some key policy areas. These examples demonstrate the continued relevance of the Banking Code.

This article then briefly considers some shortcomings in the Banking Code, and a suggestion for changing the regulatory incentives so that the 'free rider' effect is minimised and the industry is given greater encouragement to address the identified shortcomings.

This article concludes by reflecting that, despite the shortcomings in the Banking Code as a consumer protection tool and the potential for its standards to sometimes be rendered redundant by legislative developments, the Banking Code's influence on raising standards should be acknowledged. Any changes to the regulatory framework following the FSI should accommodate a continued role for self-regulation in consumer protection and encourage greater regulatory incentives for improvements in these arrangements.

II SELF-REGULATION AND CO-REGUALTION IN THE AUSTRALIAN FINANCIAL SERVICES SECTOR

A Defining Self-Regulation and Co-Regulation

The terms self-regulation and co-regulation are popularly used by governments and policy agencies in the context of the financial services sector, but the precise scope of these terms is not always clear. Indeed, the terms are sometimes used interchangeably.[17]

Self-regulation in Australia (as elsewhere) has taken a variety of forms with mixed success. Writing in 2000, an Australian Taskforce on Industry Self-Regulation found that there was a 'broad and diverse range of self-regulation at the national level affecting consumers', with there being 'no single model for industry self-regulation as it depends on what is trying to be achieved'.[18] This Taskforce also suggested that self-regulation can move along a spectrum of intervention. At one end of this spectrum might be voluntary standards for information disclosure. In the middle of the spectrum might be more interventionist initiatives, such as customer charters or industry codes that are not monitored or enforced. Finally, industry codes that mirror regulation, with mechanisms to monitor compliance and facilitation of consumer redress following a lack of compliance, are regarded as being at the most interventionist end of this spectrum.[19]

Others have referred to self-regulation as part of the decentred approach to regulation, which in turn has been described as 'hybrid (combining governmental and non-governmental actors), multi-faceted (using a number of different strategies simultaneously or sequentially), and … indirect'.[20] Further, self-regulation in this context includes the harnessing of 'internal corporate bureaucracies to achieve public policy goals'.[21] In the Australian financial services sector, it has also been suggested that self-regulation involves a risk transfer:

> Self- or co-regulation shifts some risks of regulation from regulatory agencies to industry. This process of industry responsibilisation engages the reputation of the

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17 Ann Wardrop, 'Co-regulation, Responsive Regulation and the Reform of Australia's Retail Electronic Payment Systems' (2014) 30 *Law in Context* 197, 203.

18 Taskforce on Industry Self-regulation, Treasury (Cth), *Industry Self-regulation in Consumer Markets* (2000) 24 ('*Industry Self-regulation Report*').

19 Ibid 20.

20 Julia Black, 'Critical Reflections on Regulation' (Discussion Paper No 4, Economic and Social Research Council Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, January 2002) 6.

21 Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing, 2nd ed, 2007) 114, citing Christine Parker, 'Meta-regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability* (Cambridge University Press, 2007) 207.

> whole industry by industry bodies making their own rules for self-regulation and through industry-based resolution of complaints or disputes with consumers.[22]

The benefits of self-regulation when compared to government regulation are said to include:

- a reduction in costs of information, rule-making, and enforcement for business and government;
- the ability to fine-tune statutory rules to a particular industry;
- the likelihood of greater levels of voluntary commitment and compliance because of industry involvement setting the rules;
- the ability to bring industry expertise to determine appropriate standards;
- the ability to facilitate industry flexibility to provide greater consumer choice and be more responsive to changing consumer expectations; and
- the ability to respond quickly to technological and other changes.[23]

As identified above, industry codes of conduct can be seen as towards the more interventionist end of the self-regulatory spectrum. Indeed, the regulator, the Australian Securities and Investments Commission ('ASIC'), describes codes as sitting 'at the apex of industry self-regulatory initiatives'.[24] ASIC's approach to code approval is therefore designed to ensure that the term 'code' is reserved for self-regulatory instruments with the features of having binding and enforceable rules, transparent processes for developing and reviewing the rules (including consultation with consumer representatives), and effective monitoring and compliance arrangements.[25] According to ASIC, such codes can deliver improved consumer confidence in a particular industry or industries,[26] raise standards and complement legislative requirements,[27] and result in measurable consumer benefits.[28]

Others have also suggested broader roles for self-regulation and industry codes. For example, Webb has referred to industry codes as being able to act 'as innovative voicing mechanisms for NGOs, industry associations and hybrid multistakeholder groups'.[29] Webb has also suggested that codes

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22 Gail Pearson, *Financial Services Law and Compliance in Australia* (Cambridge University Press, 2009) 15.

23 See, eg, *Industry Self-regulation Report*, above n 18, 20–1; Ramsay, above n 21, 116; Pearson, 'Business Self-regulation', above n 14, 36.

24 Australian Securities and Investments Commission, *Regulatory Guide 183 – Approval of Financial Services Sector Codes of Conduct* (at 1 March 2013) [RG 183.2] ('*ASIC RG183*').

25 *ASIC RG183* [RG 183.20], [RG 183.23].

26 *ASIC RG183* [RG 183.2].

27 *ASIC RG183* [RG 183.4].

28 *ASIC RG183* [RG 183.19].

29 Kernaghan Webb, 'Understanding the Voluntary Codes Phenomenon' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, 2004) 3, 16.

> can act as incubators for new legal approaches by testing out what does and does not work, refining and enhancing legal approaches, addressing activities not easily controlled through legislative techniques, helping define what constitutes legally acceptable conduct, assisting in addressing some of the weaknesses of laws, being incorporated into the terms of legal instruments, extending the reach of legislative techniques, stimulating 'beyond legislative compliance' behaviour, and enhancing the enforcement capabilities of governments.[30]

Some of these roles suggested by Webb can be observed in the development and implementation of the Banking Code, discussed later in this article.

As with self-regulation, co-regulation does not necessarily have a fixed meaning. Ayres and Braithwaite suggest that co-regulation is 'usually taken to mean industry-association self-regulation with some oversight and/or ratification by government'.[31] They also suggest that co-regulation should involve public interest groups (eg, consumer groups).[32] Others, however, suggest that government oversight of self-regulatory schemes is a form of self-regulation, rather than a form of co-regulation.[33]

Ideas of co-regulation can also be traced along a continuum, from very formal arrangements, where there are specific regulatory goals to be achieved by industry with significant state oversight and involvement, to less formal arrangements, where the role of the state is to provide input into the development of the rules and then to provide for periodic review.[34]

The 1996–97 Financial System Inquiry considered various approaches to regulation in this sector, including a statutory approach, a co-regulatory approach and a self-regulatory approach. The final report of this inquiry described a co-regulatory approach as being one 'where "framework legislation" sets out general principles for market conduct and consumer protection and the specific regulation of transactions is provided through codes in particular industries'.[35] In contrast, in a self-regulatory approach, schemes administered by industry groups have no specific legislative backing.[36]

In this article, the term self-regulation is confined to industry and firm schemes or arrangements that do not exist as a result of a legislative compulsion, and where government does not have a formal role in monitoring, enforcing or reviewing the schemes or arrangements. Industry alone is responsible for deciding upon the rules and the mechanisms for reviewing, monitoring, and enforcing those rules, and the role of government is limited to providing input into the development of the arrangements. However, once the state is given a

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30 Ibid.

31 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 102, cited in Wardrop, above n 17, 202–3.

32 Ayres and Braithwaite, above n 31, 102.

33 Wardrop, above n 17, 203.

34 Ibid 204.

35 Financial System Inquiry, Treasury (Cth), *Financial System Inquiry Final Report* (1997) 258.

36 Ibid.

more formal role, the scheme is more clearly described as a co-regulatory one. Thus, it is possible for an initially self-regulatory scheme or arrangement to morph into a co-regulatory arrangement as a result of increasing state involvement.

B The Integration of Self-Regulation and Co-Regulation in the Australian Financial Services Sector

In the Australian financial services sector, self-regulation and co-regulation have been part of the regulatory landscape for consumer protection for some time. Co-regulation is specifically provided for, as since 2001 ASIC has had a power to approve industry codes and industry dispute resolution schemes in the financial services sector,[37] and it has had a similar power in relation to the consumer credit sector since 2009.[38] To support the exercise of its powers in this area, ASIC has released extensive guidance to parties seeking approval of a dispute resolution scheme[39] or code of practice.[40]

There are also some explicit regulatory requirements or benefits attributable to industry members that participate in co-regulatory arrangements. For example, holders of an Australian financial services licence must belong to an ASIC-approved industry-based external dispute resolution ('EDR') scheme if providing services to retail clients.[41] Similarly, holders of an Australian credit licence must belong to an ASIC-approved industry EDR scheme.[42] Failure to belong to, and maintain membership of, an approved EDR scheme will amount to a breach of a licence condition, exposing the financial services provider or credit business to the risk of having their license suspended or cancelled,[43] and/or of being subject to a banning order.[44]

In relation to codes, the Future of Financial Advice ('FoFA') changes to the *Corporations Act* in 2012 exempted financial services providers from certain fee disclosure obligations (the 'opt-in disclosure requirement') if they belonged to an ASIC-approved code (meeting specific requirements).[45] Perhaps in part due to

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37 For industry codes, see *Corporations Act* ss 962CA, 1101A; *Australian Securities and Investments Commission Act 2001* (Cth) s 12A(3) ('*ASIC Act*'). For dispute resolution schemes, see *Corporations Act* s 912A; *Corporations Regulations 2001* (Cth) regs 7.6.02(3)–(4).

38 For codes, see *NCCPA* s 241; *ASIC Act* s 12A(3). For dispute resolution schemes, see *NCCPA* s 47; *National Consumer Credit Protection Regulations 2010* (Cth) regs 10(3)–(4).

39 Australian Securities and Investments Commission, *Regulatory Guide 139 – Approval and Oversight of External Dispute Resolution Schemes* (at 13 June 2013) ('*ASIC RG139*').

40 *ASIC RG183*. See also Pearson, *Financial Services Law and Compliance in Australia*, above n 22, 48–53 for a detailed discussion of how ASIC exercises its codes approval power.

41 *Corporations Act* ss 912A(1)(g), 912A(2)(b)(i). The term 'retail client' is defined at ss 761G–761GA.

42 *NCCPA* s 47(1)(i).

43 *Corporations Act* s 915C(1).

44 *Corporations Act* s 920A(1).

45 *Corporations Act* s 962CA provides an exemption from the obligations in s 962K.

some uncertainty about the retention of this requirement,[46] no codes have been approved by ASIC for the purposes of the exemption.

Interestingly, in contrast to the requirement to belong to an approved EDR scheme, there is no legislative obligation for financial services providers or credit businesses to belong to an ASIC-approved code, or indeed to belong to any code at all. In 2001, the then Deputy Chair of ASIC suggested that this 'reflects the desire to allow appropriate flexibility in the ways in which industry players meet their obligations under FSR [Financial Services Reform]'.[47] Further, apart from the FoFA requirement discussed above, there is no explicit regulatory benefit attaching to membership of an approved code.[48] This absence of an explicit regulatory requirement or regulatory benefit may be part of the reason that there does not appear to have been any industry codes submitted for ASIC approval outside the FoFA context.[49]

Despite the lack of a legislative obligation to belong to a code, it is clear that self-regulation through codes is strongly established in the Australian regulatory framework for financial services. Further, it is arguable that, at least in this sector, self-regulation initiatives are no longer generally seen as defensive mechanisms, designed to forestall government regulation. Instead, they have become more forward-looking initiatives, focusing on improving standards and providing genuine consumer protection.[50]

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46 Regulations to amend some of the FoFA requirements, including the opt-in disclosure requirement, were made in 2014 (see *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (Cth), reg 7.7A.7), but these regulations were subsequently disallowed by the Senate. A Bill to make similar amendments is currently before the Parliament; if passed, it would repeal both the opt-in fee disclosure obligation and the exemption: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth) sch 1, items 17, 21.

47 Jillian Segal, 'Institutional Self-regulation: What Should Be the Role of the Regulator?' (Speech delivered at the National Institute for Governance Twilight Seminar, Canberra, 8 November 2001) 10 <http://download.asic.gov.au/media/1341128/NIGConf_081101.pdf>. More recently, ASIC has put forward the view that there is no need for a mandatory codes approval power in the *Corporations Act*: Australian Securities and Investments Commission, Submission to Financial System Inquiry, Treasury (Cth), April 2014, 116 [456].

48 ASIC has itself acknowledged that there are limited incentives to encourage businesses to seek ASIC approval of codes: Australian Securities and Investments Commission, Submission to Financial System Inquiry, Treasury (Cth), April 2014, 116 [457].

49 ASIC has noted that it had received only one code approval application, however, the work has not substantially progressed due to the changes to the FoFA legislation: ibid 115 [452]. The Insurance Council of Australia had indicated that it intended to seek ASIC approval of its code: see Ian Enright, *General Insurance Code of Practice Independent Review 2012–2013* (Final Report, May 2013) 21 [4.1]. However, ASIC's reference only to one code approval application, and that being made in the context of the FoFA obligations, suggests that, as at April 2014, an application for approval had not been made.

50 Pearson also suggests that there has been a change in emphasis in ASIC's codes approval policy from the idea of codes as a gap filler and elaborator to one of codes as setting higher standards: Pearson, *Financial Services Law and Compliance in Australia*, above n 22, 50.

C An Example of Self-Regulation in Detail: The Code of Banking Practice

The Banking Code is published by the ABA and it applies to consumer and small business customers and their guarantors, and, where relevant, to potential consumer and small business customers and guarantors.[51] It applies to all of a subscribing bank's 'banking services', including services supplied through an intermediary.[52] The *2013 Code* includes general principles (such as a principle to treat customers fairly and to comply with the laws), as well as detailed rules setting out the obligations of subscriber banks in areas such as:

- disclosure of fees, charges, and terms and conditions;
- notification of changes to fees, charges, and terms and conditions;
- disclosure of general information about banking services;
- privacy and confidentiality;
- statements of account;
- direct debit and chargebacks;
- credit assessment;
- financial hardship;
- debt collection;
- complaint handling;
- guarantors and co-borrowers; and
- specific provisions for older people, people with a disability, and people in remote Indigenous communities.

In contrast to some other financial services codes,[53] compliance with the Banking Code is incorporated into the terms and conditions of banking products, thus becoming part of the contract between a customer and a subscribing bank.[54] Non-compliance with the Banking Code may then amount to a breach of contract, which could be pursued through the court system.[55]

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51 *2013 Code* cl 42 (definition of 'you').

52 *2013 Code* cl 42 (definition of 'banking service').

53 See, eg, the benchmarking table in Enright, above n 49, 37, showing that the General Insurance and National Insurance Brokers Association codes do not have legal status, while the Banking Code and Mutual Banking Code (now *Customer Owned Banking Code*) are terms of the contract.

54 *2013 Code* cl 12.3.

55 The ABA has explained that '[t]he Code of Banking Practice is a contract between customers and subscribing banks which means courts can review compliance with the code': Australian Bankers' Association, 'Code of Banking Practice Works Well for Bank Customers – ABA Responds to Mr Wilkie Independent MP' (Media Release, 21 August 2012) <http://www.bankers.asn.au/Media/Media-Releases/Media-Release-2012/Code-of-Banking-Practice-works-well-for-bank-customers>. Note, however, that, as discussed below, the courts have not always taken a consistent approach to this argument about the enforceability of the Code.

Compliance with the Banking Code is monitored by the independent Code Compliance Monitoring Committee ('CCMC'), which consists of an Independent Chairperson, a consumer and small business representative, and an industry representative.[56] The CCMC's functions include investigating and determining allegations of non-compliance and monitoring compliance with the Banking Code, including by conducting own motion inquiries.[57] In certain circumstances, the CCMC is empowered to name a bank for non-compliance,[58] but the CCMC has no powers to award compensation or redress to a customer if it has been found that the Banking Code has been breached. In contrast, the Financial Ombudsman Service ('FOS')[59] can award compensation or other redress to bank customers.[60] However, the role of FOS is to resolve particular disputes, and most disputes are resolved without FOS needing to make a decision setting out its views on the matter.[61]

Subscription to the Banking Code is open to all banks with a retail presence in Australia (whether or not they are also a member of the ABA), and as at the date of writing, 13 banking groups (representing 18 bank brands) are covered by the *2013 Code*, including the four major banks,[62] and most (but not all) of the banks providing retail financial services in Australia.[63]

The early history of the Banking Code reflects an industry concern to determine the applicable standards itself, rather than support the draft code developed by a government taskforce.[64] Perhaps partly as a consequence, consumer advocates were highly critical of the *1993 Code*, with one group suggesting in 2000 that the *1993 Code* 'fails banking consumers'.[65]

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56 *2013 Code* cl 36(a).

57 *2013 Code* cl 36(b). See also Code Compliance Monitoring Committee, *What We Do* (2015) <http://www.ccmc.org.au/what-we-do/> for details of its activities.

58 *2013 Code* cl 36(j).

59 FOS is the ASIC-approved dispute resolution scheme to which all Banking Code members belong.

60 Financial Ombudsman Service, *Terms of Reference* (at 1 January 2015) cl 9.1 ('*FOS Terms*').

61 In 2013–14, only 9 per cent of disputes were resolved by FOS decision: Financial Ombudsman Service, *Annual Review 2013–14* (2014) 48. For a discussion of the different roles of compliance monitoring and dispute resolution, see Code Compliance Monitoring Committee, *Submission to the Review of the Code of Banking Practice* (Submission Annexure C, 11 March 2008) 7–10.

62 The four major banks are the Australia and New Zealand Banking Group, Commonwealth Bank, National Australia Bank and Westpac Banking Corporation.

63 See Code Compliance Monitoring Committee, *Code Subscribers* (2015) <http://www.ccmc.org.au/the-code/code-subscribers/>. Of the 26 ABA members, 18 are members of the Code of Banking Practice; two are members of the *Customer Owned Banking Code*. Arab Bank Australia, Defence Bank, and Members Equity Bank are some of the ABA members that offer retail financial services, but have not subscribed to the *2013 Code*. Nor have these institutions subscribed to the *Customer Owned Banking Code*.

64 See Richard Viney, 'Review of The Code of Banking Practice' (Issues Paper, RTV Consulting, 5 March 2001) 1 <http://www.reviewbankcode.com> ('*Viney Review Issues Paper*'). See also Weerasooria and Wallace, above n 8, 138–9.

65 Australian Consumers' Association, *Code of Banking Practice Review – ACA Submission* (Submission, July 2000) 3, quoted in *Viney Review Issues Paper*, above n 64, 8.

This first review of the Banking Code was conducted by Mr Richard Viney, and took place between 2000 and 2001 ('Viney Review').[66] The reviewer agreed with many of the criticisms of the *1993 Code*, and made significant recommendations for change. Most of these recommendations were accepted by the industry, and the result was the *2003 Code*.[67] This was later subject to some modifications, resulting in a May 2004 version.[68] The changes following from the Viney Review, including the implementation of a new regime for monitoring compliance, were welcomed by stakeholders including consumer advocates. For example, in a submission to the second review of the Banking Code, consumer advocates expressed a view that 'the Code, as published in 2004, was a significant advance on the previous Code, and has provided significant benefits to consumers'.[69]

This second review was conducted by Ms Jan McClelland, and took place between 2007 and 2008 ('McClelland Review').[70] As with the Viney Review, many of the recommendations of the McClelland Review were accepted by the ABA, and were implemented through the *2013 Code*, which had a commencement date of 1 February 2014.[71] The maturing of the Banking Code over its life, including through establishing an independent compliance monitoring body and setting standards that exceed those found in law, has resulted in the Banking Code now being generally supported by consumer advocates.[72] Consumer advocates, however, do remain critical of some aspects of the Banking Code; some of these criticisms are discussed further below.

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66 Richard Viney, 'Review of the Code of Banking Practice' (Final Report, RTV Consulting, October 2001) <http://www.reviewbankcode.com> ('*Viney Review Final Report*').

67 Australian Bankers' Association, *Code of Banking Practice* (at August 2003) ('*2003 Code*').

68 Australian Bankers' Association, *Code of Banking Practice* (at May 2004) ('*2004 Modified Code'*).

69 Nicola Howell, *Joint Consumer Submission to the Review of the Code of Banking Practice and the Review Issues Paper* (Submission, 31 July 2008) 8 ('*Joint Consumer Submission*').

70 Jan McClelland, 'Review of the Code of Banking Practice' (Final Report, Jan McClelland and Associates, December 2008) <http://www.reviewbankcode2.com.au> ('*McClelland Review Final Report*').

71 For the current and earlier versions of the Banking Code, see Australian Bankers' Association, *Code of Banking Practice*, above n 7.

72 See, eg, National Information Centre on Retirement Investments, 'Revised Code of Banking Practice Brings Improved Rights for Consumers' (Media Release, 5 May 2013) <http://www.nicri.org.au/nicri/news/revised-code-of-banking-practice-brings-improved-rights-for-consumers-2/>; Consumer Action Law Centre, 'Revised Code of Banking Practice' (Media Release, 31 January 2013) <http://consumeraction.org.au/revised-code-of-banking-practice>; Financial Counselling Australia, 'Banking Code Welcomed by Financial Counsellors' (Media Release, 31 January 2013) <http://www.financialcounsellingaustralia.org.au/Corporate/News/Banking-Code-Welcomed-by-Financial-Counsellors/>.

D The Financial System Inquiry's View of Self-Regulation and Co-Regulation

As noted above, the terms of reference for the FSI did not specifically reference self-regulation or co-regulation, and this form of regulation was given limited attention in the FSI's interim report, released in July 2014.[73] Instead, the *FSI Interim Report* sought comments on the role that industry self-regulation could play in improving customer outcomes generally.[74]

However, the *FSI Final Report* explicitly acknowledged the relevance of self-regulation in the financial services sector, noting in its overview that both regulatory and self-regulatory changes were needed to strengthen firm accountability, particularly in the areas of disclosure and financial advice.[75]

In terms of the scope of the role for self-regulation, the FSI suggested that self-regulation was 'more successful in setting governance, customer service or technical standards that supplement the law, than in addressing sector-wide conduct issues'.[76] Consistent with this view, the FSI explicitly rejected a suggestion that self-regulation alone could be an appropriate mechanism for improving the design and distribution of products for consumers.[77] In particular, the FSI noted that existing industry-led standards had not been sufficient to address serious conduct issues in the financial advice sector.[78] However, the FSI suggested that self-regulation could play an important role in some areas, including as a mechanism for facilitating innovative and improved disclosure (particularly disclosure of risks and fees),[79] improved guidance and disclosure for general insurance,[80] and for raising industry standards generally.[81] The FSI focused on the role of self-regulation at a high level; with one or two exemptions, the FSI declined to make specific suggestions for change to existing self-regulatory or co-regulatory arrangements[82] or to the legislative accommodation of self-regulation and co-regulation.[83]

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73 Financial System Inquiry, Treasury (Cth), *Financial System Inquiry Interim Report* (15 July 2014) ('*FSI Interim Report*').

74 Ibid 3–87.

75 *FSI Final Report*, above n 1, xx.

76 Ibid 194.

77 Ibid 204. Instead, the FSI recommended amending the law to introduce a principles-based product design and distribution obligation: ibid 198 recommendation 21.

78 Ibid 204.

79 Ibid 215–6.

80 Ibid 194, 230.

81 Ibid 220.

82 Exceptions include recommendations that the *ePayments Code* be made mandatory: ibid 161 recommendation 16; and that industry should be encouraged to 'develop standards on the use of non-monetary default covenants': at 264 recommendation 34. On this latter recommendation, the text of the report specifically referred to the need for adjustments to the *Code of Banking Practice* and *Customer Owned Banking Code*: at 264.

83 The FSI explained that it 'has not suggested changes to current arrangements that are generally working well, such as alternative dispute resolution systems': ibid 193–4.

III ANALYSING THE CODE OF BANKING PRACTICE

The preceding discussion provided a brief overview of the integration of self-regulation in general, and industry codes in particular, into the Australian regulatory framework for financial services, as well as an overview of the scope and operation of the Banking Code. In the main Part of this article, some of the policy issues covered by the Banking Code, and any parallel developments with legislation, are analysed. This illustrates the different ways in which self-regulation can contribute to the development of consumer protection standards for members of a particular self-regulatory instrument, and to the industry more broadly. In particular, this Part focuses on various gaps and overlaps between the Banking Code and legislation; these are summarised in Table 1 below.

Table 1: Some Gaps and Overlaps between the Banking Code and Legislation

Policy issue	Addressed in the Banking Code?	Addressed in legislation?	Location of the higher or more detailed standard
Disclosure of fees, charges, and terms and conditions	Yes	Yes	Legislation
Access to internal and external dispute resolution	Yes	Yes	Legislation
Responsible lending	Yes	Yes	Legislation
Reverse mortgages	No	Yes	Legislation
Unfair contract terms	No	Yes	Legislation
Account switching	No	No	ePayments Code
Account combination, accepting co-debtors, and liability for subsidiary cards	Yes	No	Banking Code
Agreements and guidelines otherwise unenforceable by consumers	Yes	No	Banking Code
Specific obligations for low income and Indigenous customers	Yes	No	Banking Code
Aspirational standards	Yes	No	Banking Code
Protection for small business borrowers	Yes	No	Banking Code
Protection for third party guarantors	Yes	Yes	Banking Code
Financial hardship	Yes	Yes	Banking Code

A Banking Code Obligations Now Superseded by Legislation

As indicated above, there are a number of key clauses in the *2013 Code* that have now largely been superseded by legislation. These clauses were originally at the vanguard of consumer protection for deposit-taking and consumer credit services, and the policy issues they cover include disclosure of the terms of the service, dispute resolution, and credit assessment (or responsible lending). In these areas, the original and later iterations of the Banking Code imposed standards on its subscribers that exceeded those imposed by law. Similarly, higher standards were imposed on credit unions, building societies, and mutual banks by the 1996 *Credit Union Code of Practice* and *Building Society Code of Practice,*[84] which have now both been replaced by the *Customer Owned Banking Code*. However, with considerable legislative change over the recent past, the relevant provisions in the legislation now mirror or exceed the standards in the Banking Code.

1 Disclosure of Terms and Conditions, Fees and Charges, and Other Matters

A large part of the *1993 Code* focused on disclosure obligations, including disclosure obligations at point of sale, at the time of contract, and during the life of the contract.[85] Such obligations seem quite unexceptional now, particularly given the rise of disclosure as a consumer protection tool.[86] However, as noted in the Viney Review, in 1993 'there were no Federal or State laws requiring detailed disclosure of non-credit banking products or services'.[87] Disclosure obligations were not completely absent. There were disclosure obligations contained in the voluntary Recommended Procedures To Govern the Relationship between the Users and Providers of EFT Systems,[88] but these did not cover all banking services. There was also some regulation of disclosure (and other matters) in relation to consumer credit products in some of the states and territories; however it was not consistent. Jeremy Mitchell has suggested that the Banking Code in the United Kingdom (first published in 1992) was 'a public codification of banking practice'; consumers were no longer in ignorance of normal banking practice.[89] In Australia, however, the *1993 Code* did more than publicly codify existing practice. By introducing explicit disclosure obligations for customers and potential customers of Banking Code subscribers, the *1993*

84 Unfortunately, the original *Credit Union Code of Practice* and *Building Society Code of Practice* do not seem to be available online. However, data presented in the annual (to 2003) monitoring reports of these codes suggests that these codes were similar in content to the *1993 Code*: see, eg, Australian Securities and Investments Commission, 'Compliance with the Payments System Codes of Practice and the EFT Code of Conduct (April 2002 to March 2003)' (Report No 27, December 2003) <http://download.asic.gov.au/media/1327292/Code_Monitoring_Report_02_03.pdf>.

85 See *1993 Code* pt A.

86 *Contra* recent criticisms about the effectiveness of disclosure as a regulatory tool: Productivity Commission, 'Review of Australia's Consumer Policy Framework' (Inquiry Report No 45, 30 April 2008) vol 2, 260–2; *FSI Interim Report*, above n 73, 3-56–3-58.

87 *Viney Review Issues Paper*, above n 64, 42.

88 Subsequently replaced by the Electronic Funds Transfer Code of Conduct, and then the *ePayments Code*.

89 Jeremy Mitchell, 'Policy and Practice in the United Kingdom' (1999) 23 *Journal of Consumer Studies and Home Economics* 129, 135.

Code brought significant improvements in the consumer protection standards in banking.

However, following the 1996–97 Financial System Inquiry, more expansive point of sale and continuing product disclosure obligations were imposed upon all financial institutions offering deposit products through the *FSRA*.[90] Further, soon after the *1993 Code* came into effect, nationally consistent disclosure obligations for consumer credit products were imposed through the *Uniform Consumer Credit Code* ('*UCCC*'),[91] and since 2010, through the *NCCPA*.[92]

Thus, the disclosure obligations in the Banking Code have largely been superseded by legislative developments, with the standards applicable to all relevant financial services providers, whether or not they subscribe to the Banking Code. These developments were explicitly recognised in the two independent reviews of the Banking Code,[93] and the Viney Review in particular included a detailed discussion of ways to minimise duplication and reduce inconsistencies between disclosure obligations in the Banking Code and those in the legislation.[94]

2 Access to Internal and External Dispute Resolution Processes

The *1993 Code* introduced an obligation for subscribing banks to provide access (at no charge) to internal complaints handling and external dispute resolution processes.[95] At the time this was not an issue covered by legislation. The then Australian Banking Industry Ombudsman ('ABIO') – now FOS – had been established three years earlier, as one of the banking sector's early forays into self-regulation. The close connection between self-regulation expressed through the dispute resolution scheme, and self-regulation expressed through the Banking Code, was later mirrored in other parts of the financial services sector[96] and continues to this day.[97]

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90 Now in *Corporations Act* pt 7.9.

91 Template legislation was enacted in Queensland and mirrored in all states and territories: *Consumer Credit (Queensland) Act 1994* (Qld). This legislation was subsequently repealed by *Credit (Commonwealth Powers) Act 2010* (Qld) s 11.

92 Point of sale and ongoing disclosure obligations have also been included in the functional *ePayments Code* (replacing the former Electronic Funds Transfer Code of Conduct), which is administered by ASIC.

93 *Viney Review Issues Paper*, above n 64, 42–3; Jan McClelland, 'Review of Code of Banking Practice' (Issues Paper, Jan McClelland and Associates, May 2008) 16, 18 <http://www.reviewbankcode2.com.au> ('*McClelland Review Issues Paper*').

94 *Viney Review Issues Paper,* above n 64, 42–61.

95 *1993 Code* cl 20.

96 See, eg, *General Insurance Code* cl 10, which requires insurers to provide access to internal and external dispute resolution processes. The Insurance Enquiries and Complaints Ltd (later merged with other schemes to form FOS) was established in 1993 to administer the General Insurance Enquiries and Complaints Scheme which had commenced in 1991: see Alison Maynard, 'General Insurance Enquiries and Complaints Scheme' (1999) 1(8) *ADR Bulletin* 107.

97 *2013 Code* cl 38.

The introduction of both formal processes within banks, and independent EDR schemes, have greatly improved the ability of consumers (and small businesses) to have their complaints considered and resolved in a cost-effective, relatively consumer friendly way, without needing to access the court system. For example, in 2012–13, FOS received 32 307 disputes from consumers and small businesses,[98] including 11 469 accepted disputes about banks.[99] In contrast, in 2012–13, there were 70 consumer law applications filed in the Federal Circuit Court,[100] and 187 consumer law matters filed in the Federal Court.[101] However, these are not disaggregated by respondent type, and it is possible that only a small percentage of these matters involve banks. As Griffiths and Mitchell have noted, '[t]here is little doubt that FOS represents a significant privatisation of dispute resolution which would otherwise proceed through the court system'.[102]

As discussed above, the EDR schemes are formally recognised in the regulatory framework, and membership of an approved scheme has been made compulsory for Banking Code subscribers and non-subscribers alike. The standards and approval criteria set out in the regulations[103] and ASIC Regulatory Guides[104] mirror or exceed the standards set in the Banking Code, making the legislation (and supporting ASIC guidance) now the primary vehicle for setting the standards for complaints handling and dispute resolution.

3 Responsible Lending

At the time of the *1993 Code*, there was no law imposing a positive obligation on banks or other lenders to lend responsibly. The *1993 Code* imposed a credit assessment obligation on banks for the first time, although the form of the obligation was strongly criticised by consumer advocates in the Viney Review. They argued that the provision did not

> set any specific standards at all. (As currently worded, the language of the clause is more or less wholly discretionary. At best, it can be said to require that some

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98 Financial Ombudsmen Service, *2012–13 Annual Review* (2013) 47.

99 Ibid 54.

100 Federal Circuit Court of Australia, *Federal Circuit Court of Australia Annual Report 2012–13* (2013) 4.

101 Federal Court of Australia, *Federal Court of Australia Annual Report 2012–13* (2013) 150. Note that there were 3849 matters filed in the Federal Court of Australia in relation to the *Corporations Act* and *ASIC Act* (which includes consumer and investor protection): at 149. However, there is no disaggregation of the applications further, such as between the investor or consumer protection matters and other *Corporations Act* matters. The summary of the work in this jurisdiction makes no reference to the parts of the *Corporations Act* and *ASIC Act* relevant to investor protection (with the exception of fundraising) or consumer protection, suggesting that they do not play a large role in the Court's jurisdiction here: at 21.

102 Tim Griffiths and Jacqui Mitchell, 'Financial Ombudsman Service: Dr Jekyll or Mr Hyde?' (2012) 27(9) *Australian Insurance Law Bulletin* 130, 131.

103 See *Corporations Regulations 2001* (Cth) regs 7.6.02(1) (internal dispute resolution), (3) (external dispute resolution); *National Consumer Credit Protection Regulations 2010* (Cth) reg 10(4).

104 *ASIC RG139*; Australian Securities and Investments Commission, *Regulatory Guide 165 – Licensing: Internal and External Dispute Resolution* (at 13 June 2013).

> form of assessment be undertaken before credit is provided; however, the form of assessment is left entirely to the Subscriber.)[105]

After the release of the *1993 Code*, there were some other developments in relation to responsible lending. The then Australian Banking Industry Ombudsman published a number of guidelines on maladministration in lending, initially focusing on housing, investment and small business loans,[106] but later publications also covered maladministration in credit card limits.[107] In 1996, the *UCCC* came into force, and it allowed for courts or tribunals to 'reopen' unjust transactions.[108] One of the factors that could be considered in determining whether a transaction was unjust was 'whether … the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship'.[109] However, this was only one of a number of factors that could be taken into account by a court or tribunal,[110] and its existence did not necessarily act as a brake on all instances of irresponsible lending.[111] The *2003 Code* and *2004 Modified Code* included a strengthened credit assessment obligation,[112] and further detailed improvements were recommended in the McClelland Review.[113] However, in the end, only minor changes were made, so that there is little significant difference between the relevant provisions in the *2013 Code*, and the *2003 Code* and *2004 Modified Code*.[114]

The fact that there were only limited changes made following the McClelland Review is likely to have been due to the imposition of responsible lending

105 Consumer Credit Legal Centre (NSW) et al, *Joint Consumer Submission to the Banking Code of Practice Review* (Submission, September 2000) 29, quoted in *Viney Review Issues Paper,* above n 64, 71.

106 *Viney Review Issues Paper*, above n 64, 72.

107 Banking and Financial Services Ombudsman, 'Credit Card Limits and Maladministration' (Bulletin No 45, March 2005) <www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_45.pdf>.

108 *UCCC* s 70.

109 *UCCC* s 70(2)(l). A similar provision is now found in the *NCC* s 76(2)(l).

110 There were 15 separate factors listed in *UCCC* s 70(2).

111 One example of where the provision did not assist is discussed in Nicola Howell, 'Preventing Consumer Credit Over-commitment and Irresponsible Lending in Australia' in Geraint Howells et al (eds), *Yearbook of Consumer Law 2007* (Ashgate Publishing, 2007) 387, 388. See also Jessica Tuffin 'Responsible Lending Laws: Essential Development or Overreaction?' (2009) 9 *QUT Law & Justice Journal* 280, 289–93 for a criticism of the *UCCC* provisions and other statutory and equitable principles that have been considered in relation to cases of irresponsible lending.

112 *2003 Code* cl 25.1; *2004 Modified Code* cl 25.1.

113 *McClelland Review Final Report*, above n 70, 12–13.

114 Cf *2013 Code* cl 27.

obligations in the *NCCPA*.[115] The *NCCPA* requires credit providers and credit assistance providers to make an assessment that a particular credit proposal is not unsuitable for a particular consumer,[116] and the provisions are much more expansive than what is contained in the *2013 Code*. For example, under the *NCCPA*, credit businesses are required to make certain inquiries and take reasonable steps to verify information before making a suitability assessment.[117] The *NCCPA* also sets out the circumstances in which a credit contract is presumed to be unsuitable.[118] Further, the responsible lending obligations apply to all licensed credit providers and credit assistance providers, whether or not the licensee is also a subscriber to the Banking Code or another industry code. Finally, there are also specific responsible lending assumptions and obligations for small amount credit contracts,[119] reverse mortgages,[120] and credit cards.[121]

The standards that are set in the legislation are far more extensive than those found in the Banking Code, and it is the legislation, rather than the Banking Code, that now primarily sets the standards for responsible lending.[122]

4 Other Policy Issues

The McClelland Review also made a number of recommendations for provisions in the Banking Code to deal with new policy issues, but these were never implemented because similar or more expansive provisions were introduced through other regulatory instruments before the *2013 Code* was finalised. Examples of this include:

- recommendations for new provisions in the Banking Code to address concerns with reverse mortgages and unsolicited credit card limit offers[123] were instead addressed in the 2011 amendments to the *NCCPA*;[124]

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115 In its response to the McClelland Review recommendations, the ABA noted that there needed to be consistency between the Banking Code and the then proposed legislative requirements for responsible lending, and that '[t]he final wording of changes to clause 25.1 for consumer lending will be developed in line with the final consumer credit legislation': Australian Bankers' Association, *Review of the Code of Banking Practice – Response by the Australian Bankers' Association to Review Final Recommendations* (September 2009) <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice/Review-of-the-Code-of-Banking-Practice-Response-by-Australian-Bankers--Association-to--Review-Final-Recommendations> ('*Response to McClelland Review*').

116 *NCCPA* ss 128, 152.

117 See, eg, *NCCPA* s 130.

118 See, eg, *NCCPA* s 131.

119 *NCCPA* pt 3-2C.

120 *NCCPA* pt 3-2D.

121 *NCCPA* pt 3-2B.

122 Another important area where legislative change has resulted in practical redundancy of the Banking Code is in relation to privacy protections: cf *2013 Code* cl 24 with the extensive privacy obligations imposed on private sector businesses, including banks, under the *Privacy Act 1988* (Cth).

123 *McClelland Review Final Report*, above n 70, 13 (credit cards), 17 (reverse mortgages).

124 *NCCPA* pt 3-2D (reverse mortgages), pt 3-2B div 4 (credit cards).

- a recommendation that the issue of including unfair contract terms protections in the Banking Code be considered in the context of the proposed national regulation of consumer credit[125] was rendered obsolete by the introduction of a prohibition against unfair terms in consumer contracts in part 2-3 of the *Australian Consumer Law*[126] and corresponding provisions in the *ASIC Act*;[127] and
- a recommendation to include in the Banking Code provisions on account switching[128] was ultimately addressed in the functionally based (rather than industry-based) *ePayments Code*.[129]

This summary demonstrates that in the key policy issues of disclosure, access to dispute resolution services, and responsible lending, among others, the provisions in the Banking Code preceded legislation. However, the Banking Code provisions have now largely been rendered redundant. It is now the legislation (supported by regulations and relevant ASIC Regulatory Guides) that sets the highest and generally most comprehensive standards.

From a consumer perspective, this is welcome, as it makes standards uniformly applicable to financial services businesses, and increases the potential consequences for non-compliance.[130] However, it might also be argued that this means that the Banking Code no longer has a key role in setting and improving banking standards. The remainder of the Part will refute this suggestion with reference to a number of areas that demonstrate the Banking Code's continued relevance.

B Some Examples of Continued Relevance of the Banking Code

Despite some key clauses in the Banking Code having become largely redundant, there are a number of reasons to be confident about the continued relevance of the Banking Code in setting and improving banking standards. These are discussed below.

1 Providing Consumer Rights in Areas Not Covered by Legislation

First, the Banking Code covers important policy issues that are not addressed by legislation, and/or where legislation is unlikely to play a role.

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125 *McClelland Review Final Report,* above n 70, 95 recommendation 72.
126 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').
127 *ASIC Act* pt 2 div 2 sub-div BA.
128 *McClelland Review Final Report*, above n 70, 77 recommendations 28–30.
129 *ePayments Code* cl 35.
130 Compare the (only) sanction for non-compliance with the Code that can be imposed by the CCMC (a naming sanction, see *2013 Code* cl 36(j)) with the enforcement options, sanctions and remedies available to ASIC and affected consumers in the event of non-compliance with the obligations in the *ASIC Act* (eg, pt 2 div 2 sub-divs G, GB, GC), *NCCPA* (eg, pts 2-4, 4-1, 4-2), or *Corporations Act* (eg, pt 7.6 div 8; pt 7.9 div 7; pt 7.10 div 2).

For some policy issues, the *2013 Code* provides specific protections, where no similar protections are found in legislation. For example, the *2013 Code* includes rules on when banks can combine accounts,[131] the circumstances in which banks will accept customers as co-debtors,[132] and liability for subsidiary cards[133] that are not provided elsewhere in the legislative framework.

Another area in which legislation does not play a role is in relation to various agreements, arrangements and guidelines that affect, or have the potential to affect, the banker–customer relationship, but where customers are not able to directly enforce the document and/or where the document is not easily accessible to customers. The role of the Banking Code here is to increase the enforceability and visibility of these agreements and arrangements for consumers and small businesses, and provide a direct avenue for complaint in the event that the relevant Code provisions are not complied with.

For example, the *2013 Code* includes rules on chargebacks[134] which reflect aspects of contracts between banks and card issuers (Visa and MasterCard). These contracts are not publicly available. Even if they were publicly available, bank customers are not party to these contracts, and would not be able to directly enforce the contracts.[135] The *2013 Code* also includes rules on direct debits, which reflect the Bulk Electronic Clearing System Rules ('BECS Rules').[136] Although the BECS Rules are publicly available through the website of the Australian Payments Clearing Association ('APCA'), they are very technical and are not written in a consumer friendly language or structure.[137] Nor do bank customers have any direct rights under the BECS Rules in the event of non-compliance.

Similarly, the *2013 Code* provides enforceability for guidelines and other documents that are not otherwise binding on banks. For example, the *2013 Code* includes clauses that require subscribing banks to comply with the ACCC/ASIC Debt Collection Guideline,[138] and the ABA's protocol on branch closures.[139] In addition, the *2013 Code* obliges individual subscribing banks to develop their

131 *2013 Code* cl 19.

132 *2013 Code* cl 29.

133 *2013 Code* cl 30.

134 See, eg, *2013 Code* cl 22.

135 See Australian Banking Industry Ombudsman, *Submission of the Australian Banking Industry Ombudsman to the Review of the Code of Banking Practice* (Submission, July 2000) 3–6, quoted in *Viney Review Issues Paper*, above n 64, 83–5.

136 See Australian Payment Clearing Association, *Procedures for Bulk Electronic Clearing System Framework (CS2)* (at 1 July 2014) pt 7.

137 Note that APCA does include some fact sheets and guidelines on its website about the direct entry system for payments, however, they are provided to 'help businesses with establishing and processing direct debits', rather than to provide consumers with information on their rights: Australian Payments Clearing Association, *Direct Entry* (2002) <http://www.apca.com.au/payment-systems/direct-entry>.

138 *2013 Code* cl 32. Note the Code also requires subscribing banks to only sell debts to third parties that agree to comply with these guidelines: *2013 Code* cl 32.2.

139 *2013 Code* cl 34.

own guidelines for dealing with assets and debts being considered in family law proceedings, and to publish and comply with those guidelines.[140] Here, there is not a consistency of standards required, but simply a requirement to develop and publish guidelines against which performance can be measured and compliance monitored. The Banking Code then imposes an obligation on banks to comply with guidelines developed either outside the industry or from within the industry.[141] Again, this gives bank customers direct rights in the event of non-compliance with those guidelines.

The *2013 Code* also addresses important policy questions that may be difficult to formulate as legal obligations, in the light of the attendant enforcement and regulatory consequences of contravening legislative obligations. This may be the case for some obligations that may have social justice and/or welfare considerations as their main driver, and where codes may be a more appropriate vehicle than legislation.[142] For example, in the Banking Code context, it is perhaps more difficult to see how the obligations in relation to low income customers[143] and Indigenous customers in remote communities[144] might be effectively incorporated into a legislative instrument which requires certainty of definitions and non-discrimination.

Finally, the *2013 Code* imposes aspirational standards upon industry members. These aspirational standards are important, particularly if the Code has (or hopes to have) an impact on reputation, and provides (or hopes to provide) customers with a reason to do business with Banking Code members in preference to businesses that are not members.[145] However, such standards can perhaps be of a nature or type that may make them either less amenable to imposition through legislation, or inappropriate for imposition through legislation, for example, because the standards may not be easily defined, and

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140 *2013 Code* cl 40.

141 More recently, the ABA has released guidelines on 'Protecting Vulnerable Consumers from Potential Financial Abuse' and 'Promoting Understanding about Banks' Financial Hardship programs': Australian Bankers' Association, *Protecting Vulnerable Consumers from Potential Financial Abuse* (Industry Guideline, June 2013); Australian Bankers' Association, *Promoting Understanding about Banks' Financial Hardship Programs* (Industry Guideline, May 2013). See generally Australian Bankers' Association, *Industry Standards* (2011) <http://www.bankers.asn.au/Consumers/Industry-Standards>. These guidelines have not been incorporated into the Banking Code, but perhaps a future iteration of the Code will see such inclusion.

142 Here, I am not arguing that it will always or even usually be inappropriate to address social justice or welfare considerations through consumer protection regulation. In contrast, the Productivity Commission has suggested that retail price regulation in competitive markets is not the best way to respond to the need of low income customers for assistance to pay for utility services: Productivity Commission, above n 86, vol 2, 114–15.

143 *2013 Code* cl 16.

144 *2013 Code* cl 8.

145 This is purported to be one of the incentives for subscribing to an industry code, although in practice, it is not clear that Code membership is heavily promoted by banks, or even promoted by consumer organisations and/or regulators as a criteria to consider when choosing a bank or bank product/service.

may be highly subjective and context dependent. In the Banking Code context, this arguably includes commitments to 'provid[e] effective disclosure of information',[146] 'provide information to you in plain language',[147] 'communicate with you and/or your representatives in a timely and responsible manner',[148] and 'act fairly and reasonably towards you in a consistent and ethical manner'.[149]

The inclusion of more aspirational standards in a voluntary code does, however, introduce a considerable tension in relation to enforceability. To what extent can, or should, Code members be held to such aspirational standards given the fact that there may not be widespread agreement on what the standard requires, either overall, or in the context of a particular dispute with a particular customer? For example, something that is 'effective disclosure of information' for one customer or group of customers may be considerably less effective for another customer or group of customers.[150]

In the Banking Code, this tension between the value of aspirational status and the importance of enforceability has arisen in the context of the 'fairness' commitment.[151] In its submission to the McClelland Review, the ABA argued that the key commitments, including the fairness commitment, 'do [not] necessarily lend themselves to narrow legalistic interpretation as the terms of a contract are interpreted', and that they are 'difficult to measure and therefore uncertain'.[152] The ABA supported inclusion of the key commitments in the revised Code, but as 'theme principles that are separate from the stricter, enforceable provisions of the Code'.[153] The reviewer agreed, and also noted that the need for the 'fairness' clause as a type of fallback position would be lessened if recommendations for more detailed provisions on financial hardship and other matters were introduced into the Banking Code.[154] The McClelland Review therefore recommended retention of the key commitments, but with the proviso that the CCMC's compliance monitoring, investigation, and reporting

146 *2013 Code* cl 3.1(b)(i).
147 *2013 Code* cl 3.1(d).
148 *2013 Code* cl 3.1(e).
149 *2013 Code* cl 3.2.
150 See, eg, the discussion of the 'fairness' standard in the United Kingdom's 'Treating Customers Fairly' initiative: David T Llewellyn, 'Trust and Confidence in Financial Services: A Strategic Challenge' (2005) 13 *Journal of Financial Regulation and Compliance* 333, 334–5.
151 *2013 Code* cl 3.2. It has also been considered in the context of the 'compliance with the laws' commitment: cl 4, however, the issue there is not so much that the standard is aspirational, and thus not amenable to precise definition, but that enforcing compliance with such a standard would require the CCMC to have detailed knowledge of, report on, and investigate compliance with, the vast range of laws that are imposed upon banks: see *McClelland Review Issues Paper*, above n 93, 73; Code Compliance Monitoring Committee, *Submission to the Review of the Code of Banking Practice* (Submission Annexure D, 11 March 2008) 5.
152 Australian Bankers' Association, *Review of Code of Banking Practice* (Submission Letter, 30 April 2008) 3.
153 Ibid 4.
154 *McClelland Review Final Report*, above n 70, 83.

functions would only extend to these key commitments if there was also a breach of another provision of the Banking Code.[155] This recommendation has been implemented in the *2013 Code*.[156]

However, in this context, it is worth noting that a standard of 'fairness' is not necessarily so uncertain. Fairness as a procedural standard is well established. For example, in making decisions, FOS will do 'what in its opinion is fair in all the circumstances'.[157] Fairness as a substantive standard has been introduced into consumer law in Australia in recent times, for example, through the introduction of national unfair contract terms legislation in the *Australian Consumer Law*.[158] It is also present in other jurisdictions, for example, in the United Kingdom, where the high level and enforceable principles for financial services businesses include principle 6: 'A firm must pay due regard to the interests of its customers and treat them fairly'.[159] Thus, there is a strong argument that banks should be held accountable on the fairness commitment, as they are for the other commitments and rules in the Banking Code. While such an approach might require the CCMC to provide guidance as to how it will interpret the fairness commitment, the CCMC has commenced providing guidance on other aspects of its jurisdiction.[160]

155 Ibid 84.

156 *2013 Code* cl 36(b)(iii). Another issue that is not specifically resolved by the final wording chosen in the Code is that, while the CCMC may be restricted from reporting, monitoring, or investigating the key commitments, this may not preclude a court providing a remedy for a breach of a key commitment, as a breach of contract.

157 *FOS Terms* cl 8.2. See also discussion in Australian Bankers' Association, *Review of the Banking Code of Practice – Submission in Response to Interim Recommendations and Other Issues* (Submission, 6 August 2008) 29.

158 *Australian Consumer Law* pt 2-3; see also *ASIC Act* pt 2 div 2 sub-div BA.

159 Financial Conduct Authority (UK), *Handbook* (at 1 April 2013), PRIN 2.1.1 principle 6. This principle requires attention to both substantive (eg, product design) and procedural (eg, marketing) matters: see, eg, the six 'Treating Customers Fairly' consumer outcomes as set out in Financial Services Authority (UK), *Treating Customers Fairly – Towards Fair Outcomes for Consumers* (Publication, July 2006) 3 <http://www.fca.org.uk/static/fca/documents/fsa-tcf-towards.pdf>. These six outcomes remain relevant to the Financial Conduct Authority's work: see, eg, Financial Conduct Authority (UK), *Treating Customers Fairly* (3 March 2015) <http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers>.

160 The CCMC has released guidance notes on, among other things, its discretion to investigate a matter: Code Compliance Monitoring Committee, 'CCMC Compliance Investigations – Discretion (*Mandate* Clause 6.3)' (Guidance Note No 2, August 2013); and its approach to the 12 month rule: Code Compliance Monitoring Committee, 'CCMC Compliance Investigations – The 12 Month Rule (*Mandate* Clause 6.2)' (Guidance Note No 3, August 2013). Copies of all CCMC Guidance Notes are available at Code Compliance Monitoring Committee, *CCMC Guidance Notes* (2015) <http://www.ccmc.org.au/what-we-do/ccmc-guidance-notes/>.

There are also examples of guidance on fairness in other settings[161] and in other jurisdictions.[162]

2 Covering the Gaps in Applicability of Legislative Rules

Secondly, on some policy issues, the Banking Code compensates (at least in part) for gaps in the applicability of legislative rules, and thus provides some protection in relation to a particular policy area for customer groups and/or products to whom the legislative protection does not extend. This role is particularly important for small business customers accessing finance, as the protections in the *NCCPA* and *NCC* apply only when the debtor is a natural person (or strata corporation), and where the credit is provided, or intended to be provided, wholly or predominantly for personal, domestic or household purposes or for residential investment purposes.[163] As a result, small business customers do not receive the protections under the *NCC* and *NCCPA*. In addition, individuals who provide a guarantee or a mortgage to secure a small business loan are not protected under the *NCCPA* or *NCC*, even where the individual may be providing the guarantee to a family member or friend.[164] A proposal to amend the *NCCPA* to, among other things, extend limited responsible lending obligations to small businesses was released for consultation in late 2012,[165] but no legislation on this point has been tabled in Parliament. At the time of writing, the current Australian government is consulting on a proposal to extend unfair contract terms protection to small businesses,[166] but it has not announced any proposals to extend responsible lending obligations to small businesses.

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161 ASIC has released guidance on whether a contract term imposing an early termination fee for residential loans would be considered an unfair term under the prohibition against unfair terms in the *ASIC Act*: Australian Securities and Investments Commission, *Regulatory Guide 220 – Early Termination Fees for Residential Loans: Unconscionable Fees and Unfair Contract Terms* (at 31 August 2011).

162 See, eg, the various guidance documents produced by the former Financial Services Authority in the UK in relation to the 'Treating Customers Fairly' initiative, including: Financial Services Authority (UK), *Treating Customers Fairly – Towards Fair Outcomes for Consumers*, above n 159; Financial Services Authority (UK), *Treating Customers Fairly – Culture* (Publication, July 2007) <http://www.fca.org.uk/static/fca/documents/fsa-tcf-culture.pdf>; Financial Services Authority (UK), *Treating Customers Fairly – Guide to Management Information* (Publication, July 2007) <http://www.fca.org.uk/static/documents/fca-tcf-mi-july2007.pdf>.

163 *NCC* s 5(1). Also, a charge must be made for providing the credit, and the credit provider must provide the credit in the course of carrying on a business in Australia. A similar criterion was used in the *NCC*'s predecessor, the *UCCC*: see *UCCC* s 6(1).

164 See discussion in relation to coverage under the *UCCC*: New South Wales Law Reform Commission, *Guaranteeing Someone Else's Debts*, Report No 107 (2006) 28–30. The same principle applies in relation to the *NCC*.

165 See the exposure draft of the National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012 (Cth) sch 2.

166 Consumer Affairs Australia and New Zealand (CAANZ), 'Extending Unfair Contract Term Protections to Small Businesses' (Consultation Paper, Treasury (Cth), May 2014) <http://www.treasury.gov.au/ConsultationsandReviews/Consultations>.

In contrast, the Banking Code has applied to small business customers since 2003.[167] As a result, small businesses (and guarantors of small business loans) are protected by the Banking Code provisions that deal with disclosure (in relation to both credit products and deposit products), financial hardship, credit assessment, and third party guarantors and mortgagors, even when they are not protected by the legislative provisions on the same topic. While there has been a gradual move towards legislative recognition that small business customers face many of the same challenges as, and deserve similar protections to, consumers,[168] the Banking Code has been able to provide protection to small businesses on issues where the legislation does not (or does not yet) provide coverage.

Similarly, the obligations imposed by legislation do not necessarily apply to all products offered by banks. For example, some of the disclosure obligations and best interests duty in chapter 7 of the *Corporations Act* do not apply to, or are modified in their application to, 'basic deposit products' and other simpler banking products.[169] However, the *2013 Code* is not so restricted, and extends to all of the products and services provided by banks to consumers and small businesses.[170]

3 Giving Body to General Legislative Obligations

Thirdly, the Banking Code can play a role in providing body or detail for consumer protection obligations that are framed in broad terms. The potential for this role was discussed in the context of disclosure and the implementation of the financial services reform ('FSR') proposals.[171] However, in the Viney Review, the reviewer took the view that '[t]he Code is not the appropriate medium for fleshing out the necessary detail of PDS [product disclosure statements] for the

167 A small business is defined as a business with less than 100 full time equivalent people (if it is a manufacturing business), or less than 20 full-time equivalent people (in the case of other businesses): *2013 Code* cl 42 (definition of 'small business'); *2003 Code* cl 40 (definition of 'small business').

168 See, eg, the introduction of a statutory prohibition against unconscionable conduct directed at small businesses in the (former) *Trade Practices Act 1974* (Cth) s 51AC. In a further development of this trend, the unconscionability provisions in the *Australian Consumer Law* ss 21–2 no longer distinguish between consumer and business unconscionability.

169 For the exemption from the Product Disclosure Statement obligations, see *Corporations Regulations 2001* (Cth) reg 7.9.07FA, inserting sub-s (7A) into *Corporations Act* s 1012D. Note, however, that some basic information about costs, amounts payable, and, if relevant, the financial claims scheme, must be provided. Similarly, the obligations in relation to Financial Services Guides, Statements of Advice, and the best interests obligation are not applicable or are reduced where the transaction involves, or refers to, only a basic deposit product or another specified product: see, eg, *Corporations Act* ss 941C(6), 946B(5), 961B(3).

170 The Code obligations apply in relation to 'banking services', defined as 'any financial service or product provided by us in Australia to you': *2013 Code* cl 42 (definition of 'banking services').

171 See Segal, above n 47, 10. See also Australian Securities and Investments Commission, *Submission to the Review of the Code of Banking Practice* (Submission, September 2000) 12–13 <http://www.reviewbankcode.com/pdfs/4.pdf>.

purposes of FSR'.[172] Subsequently, ASIC Regulatory Guides have been used to provide further detail for the FSR disclosure obligations.[173]

However, the Banking Code does give body to other general consumer protections enshrined in legislation, including the prohibition against unconscionable conduct in the context of third party guarantors.

The *NCC* includes specific protection for third party guarantors that mirror protections found in the former *UCCC*. These include obligations for pre-contractual disclosure of the terms and conditions of the guarantee,[174] limits on liability,[175] notification of changes to terms and conditions,[176] and requirements that must be met before a guarantee can be enforced.[177] However, as explained above, these and other provisions in the *NCCPA* and *NCC* apply only to guarantees that secure consumer loans. Further, the protections in the *NCC* do not specifically address some of the procedural problems that are frequently noted in litigation and research on third party guarantees.[178]

Given these limitations, third party guarantors have often relied upon the broader equitable and statutory prohibitions of unconscionable conduct or unjust contracts to obtain a remedy.[179] In many cases involving third party guarantors, a decision about whether the conduct is unconscionable, or the contract is unjust, has considered procedural matters, such as whether the lender left the borrower with the responsibility of explaining the transaction, and gaining the guarantor's agreement.[180]

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172 *Viney Review Final Report*, above n 66, 39. See also discussion of the reasons why in *Viney Review Issues Paper*, above n 64, 46–8.

173 See, eg, Australian Securities and Investments Commission, *Regulatory Guide 168 – Disclosure: Product Disclosure Statements (and Other Disclosure Obligations)* (at 28 October 2011).

174 *NCC* s 56.

175 *NCC* ss 60–1.

176 *NCC* pt 4 div 1.

177 *NCC* s 90.

178 For a discussion of some of the common issues arising in third party guarantees in the context of findings from empirical research, see Jenny Lovric and Jenni Millbank, 'Darling, Please Sign This Form: A Report on the Practice of Third Party Guarantees in New South Wales' (Research Report No 11, New South Wales Law Reform Commission, October 2003) 146–52.

179 See, eg, *ASIC Act* s12BB (unconscionability); unconscionability as discussed in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Contracts Review Act 1980* (NSW) s 7 (unjust contracts). The prohibition against unjust transactions in the *NCC* s 76 suffers the same limitation as the specific guarantor provisions, in that it does not apply where a guarantee is provided for a business loan. For a detailed discussion of the general law and statutory provisions that may be available to provide some relief for third party guarantors, see New South Wales Law Reform Commission, above n 164, 10–28. For a discussion the applicability of these general consumer protections in some more recent matters seeking to challenge a third party guarantee, see Denise McGill and Nicola Howell, 'Improving the Ability of Guarantors To Make a Real Choice: Lenders' Practices in Taking Third Party Guarantees' (2013) 24 *Journal and Banking and Finance Law and Practice* 182, 186–95.

180 See, eg, *Wenczel v Commonwealth Bank of Australia* [2006] VSC 324, discussed in McGill and Howell, above n 179, 186.

The Banking Code operates to provide more detail for these broad prohibitions specifically in the context of third party guarantees. For example, the *2013 Code* gives guarantors explicit rights to disclosure of information about the borrower and proposed credit facility,[181] and an overnight cooling off period.[182] It also provides additional safeguards such as not permitting the lender to give the debtor the guarantee to arrange for the signing, and, if the bank is present at the signing, requiring that the guarantee is signed in the absence of the debtor.[183] These protections reflect factors that have been important in court determinations about whether a particular contract is unconscionable or unjust under the common law or statutory provisions, so that compliance with the relevant clauses in the Banking Code would be likely to reduce the risk of the lender engaging in prohibited conduct.[184]

In 2006, the New South Wales Law Reform Commission described the Banking Code as having been 'in the vanguard of developing protections for guarantors over the past decade'.[185] An analysis of recent cases involving third party guarantors in superior courts found that the majority of those involved financial institutions that did not subscribe to the Banking Code or indeed the Mutual Banking Code of Practice ('Mutual Banking Code'), now the *Customer Owned Banking Code*, which has some similar protections.[186] This highlights the importance of the Banking Code protections for guarantors.

The role of the Banking Code in providing more detail to support broad legislative obligations is also highlighted by the specific reference to the requirements of relevant industry codes as a matter that can be considered for the purpose of determining statutory unconscionability.[187] In addition, cases have suggested that the Banking Code could be relevant as evidence of industry practice for the purpose of implying a term into a contract (on the grounds of

181 *2013 Code* cl 31.4(b).

182 *2013 Code* cl 31.5(b).

183 *2013 Code* cl 31.6.

184 See discussion in New South Wales Law Reform Commission, above n 164, 66–8: 'It is no doubt true that important court decisions … have influenced legislation and industry practice to adopt measures which promote procedural fairness when financial institutions enter into contracts with guarantors'.

185 Ibid 78.

186 McGill and Howell, above n 179, 197.

187 *ASIC Act* ss 12CC(1)(g)–(h). In *Commonwealth Bank of Australia v Starrs* [2012] SASC 222, [117] – [118], Peek J suggested that significant breaches of the Banking Code could be relevant to establishing unconscionability. For an example of a case where unconscionability was argued, unsuccessfully, on the basis of non-compliance with an applicable industry code (under the former *Trade Practices Act 1974* (Cth)), see *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR ¶41-703.

business efficacy),[188] or as relevant for establishing a claim based on equitable principles.[189]

4 Regulatory Dance: The Changing Relationship between the Banking Code and Legislation

A fourth example illustrates a more complex relationship between the Banking Code and legislation. In this example, a particular policy issue is addressed in both regulatory instruments, but over time, the higher standards swap between legislation and the Banking Code.

This can be seen in the setting of standards in relation to financial hardship. The *1993 Code* did not include any reference to the banks' obligations in the event of a customer experiencing financial difficulties with credit contracts. In the period between the release of the *1993 Code* and the Viney Review, the *UCCC* came into force, and section 66 of the *UCCC* allowed consumers to seek a variation (of a specified type) of their credit contract on the grounds of hardship.[190] However, the provisions in the *UCCC* were limited in their scope and operation. In particular, hardship applications could only be made if the hardship was caused by specified grounds,[191] and the amount of credit was below a maximum threshold,[192] and there were only three types of variations that could be made to the contract.[193]

The way in which banks responded to customers in financial difficulty was also criticised by consumer advocates in their submissions to the Viney Review.[194] As a result, the *2003 Code* and the *2004 Modified Code* included new obligations for members when dealing with financial difficulty. Unlike the *UCCC* provisions, these obligations did not limit the options available for addressing the financial difficulties; nor was there any monetary threshold applicable to the obligations.[195] These obligations extended also to small businesses, where the *UCCC* did not.[196]

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188 See the suggestion in *ING Bank (Australia) Ltd v Stafford* [2010] QSC 289, [32] (Daubney J). Note that this point was not specifically addressed in the Court of Appeal decision.

189 See, eg, *Commonwealth Bank of Australia v Starrs* [2012] SASC 222, [118], where Peek J suggested that 'establishing that significant breaches of the Code occurred may be very important if they are relevant to a defined cause of action such as *Amadio* or *Garcia* unconscionability'. The reference here was to the cases of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

190 *UCCC* s 66, now *NCC* s 72.

191 The specified grounds were 'illness, unemployment or other reasonable cause': *UCCC* s 66(1).

192 *UCCC* s 66(3).

193 *UCCC* s 66(2).

194 *Viney Review Issues Paper*, above n 64, 63–5.

195 *2004 Modified Code* cl 25.2.

196 *UCCC* s 6(1).

The McClelland Review recommended further changes to the financial difficulty clause in the Banking Code.[197] However, before the *2013 Code* was finalised, the *NCCPA*, including the *NCC,* came into force. The *NCC*, as first implemented, included a financial hardship provision in section 72 that was in similar terms to section 66 of the *UCCC*. However, in 2012, section 72 of the *NCC* was amended,[198] and there is now no monetary threshold for a hardship application under section 72 of the *NCC*; nor is there any specification of the permitted grounds for acceding to a hardship request, or limitation as to the types of variations that can be agreed.[199] Further, the amendments introduced for the first time a time frame within which credit providers must respond to the hardship request.[200]

Then, a short time after the *NCC* changes came into effect, the *2013 Code* was released, and this imposed further obligations on Banking Code subscribers in relation to financial hardship, including more positive obligations in relation to trying to help customers overcome their financial difficulties, dealing with an authorised financial counsellor on request, and initiating contact with customers who appear to be experiencing financial difficulties.[201] These financial difficulty obligations apply whether or not the credit is also governed by the hardship provisions in the *NCC,* and thus they apply to small business customers that are experiencing financial difficulty.

The Banking Code provisions therefore build on the legislative obligation, and the relationship between the Banking Code provisions and the legislation might be described as a regulatory dance, with first one, then the other, leading the dance.

Recently, the banks have gone even further, supplementing the Banking Code provisions with additional initiatives to support customers in financial difficulty, including an industry guideline on financial difficulty, a commitment to visible disclosure in branches and websites about the availability of hardship assistance, standardised forms for use by financial counsellors in representing customers, and a commitment to a minimum standard of training about bank hardship

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197 *McClelland Review Final Report*, above n 70, 46–7 recommendation 3.

198 *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) sch 1 pt 1.

199 However, the *NCC* does include the following note to s 72(3):

> The credit provider need not agree to change the credit contract, especially if the credit provider:
>
> (a) does not believe there is a reasonable cause (such as illness or unemployment) for the debtor's inability to meet his or her obligations; or
>
> (b) reasonably believes the debtor would not be able to meet his or her obligations under the contract even if it were changed.

200 *NCC* ss 72(4)–(5).

201 *2013 Code* cl 28.

obligations.[202] Perhaps the future will also see some of these more recent commitments given further prominence and enforceability by incorporation into the next iteration of the Banking Code and/or in further amendments to the *NCCPA*.

This example suggests that the gradual improvement in standards may have occurred in part because the policy issue is dealt with in both the Banking Code and the legislation. This is consistent with Webb's idea of codes and self-regulation as providing a space for incubation of regulatory ideas, which, when tested and found relevant and practicable through codes, can be implemented through legislation, thus giving greater coverage and enforceability.[203] Subsequent to this, codes can continue to develop and test new and improved standards, such that they can perhaps be incorporated into legislation in the future, thus continuing the regulatory dance.

IV RELATIONSHIP BETWEEN THE BANKING CODE AND OTHER SELF-REGULATORY OR CO-REGULATORY INITIATIVES

The above discussion has highlighted the various relationships between the Banking Code and consumer protection legislation in Australia. However, to gain a full appreciation of the potential for the Banking Code to influence standards in the financial services sector, it is also necessary to consider how the Banking Code relates to other forms of self-regulation or co-regulation in the sector. Here, it can be seen that the relationships also resemble a form of regulatory dance, at least as *between* industry codes. There is also the potential for the imposition of Code standards upon non-Code members through decision-making in the EDR schemes.

A Regulatory Dance with Other Industry Codes

As well as a regulatory dance between the Banking Code and legislation, there is a potential for regulatory dances to occur between industry codes. Here, the development of, and continuous improvement in, a single industry code is influenced by the standards in other relevant industry codes (including codes in other jurisdictions). This potential has been recognised and exploited by consumer advocates in their submissions to the various code reviews in the financial sector; in a submission to the recent review of the Mutual Banking

202 See Australian Bankers' Association, 'Doing It Tough? Banking Industry Package to Help Those Experiencing Financial Difficulty' (Media Release, 4 June 2013) <http://www.bankers.asn.au/Media/Media-Releases/Media-Release-2013/Doing-It-Tough-ABA-supports-National-Cyber-Security-Awareness-Week>.

203 Webb, above n 29, 16.

Code, two of the key consumer organisations in this sector stated '[w]e are also eager to see a strong Mutuals Code because it will put pressure on banks and the Banking Code to continually improve'.[204]

It seems clear that the *2004 Modified Code* had a significant influence on the transition from the Credit Union Code of Practice (which was in similar terms to the *1993 Code*) to the Mutual Banking Code, which was released in July 2009.[205] In fact the Mutual Banking Code did more than replicate standards in the *2004 Modified Code*; it extended and built upon a number of those standards. For example, the Mutual Banking Code included a series of 10 'key promises',[206] which are similar to, and also expand upon, the 'key commitments' in the *2004 Modified Code*. The Mutual Banking Code also included specific provisions on responsible lending, credit limit increase offers, and reverse mortgages, which went further than the credit assessment provision in the *2004 Modified Code*,[207] and detailed protections for third party guarantors that were similar to those in the *2004 Modified Code*.[208]

Consumer advocates have also argued for the adoption of some of the standards of the *2013 Code* in the recent review of the Mutual Banking Code. For example, consumer advocates argued that the Mutual Banking Code should include recognition of customers with special needs, as in the *2013 Code*. The reviewer agreed that it would be appropriate to recognise in the key promises that some customers have special needs.[209] The resulting instrument, the *Customer Owned Banking Code*, now includes reference to appropriate tailoring of service standards where customers have special needs.[210]

Standards in codes from other jurisdictions are also highlighted for inclusion in the Banking Code. For example, in the Viney Review, consumer advocates expressed support of the key commitments in the then United Kingdom Code of Banking Practice,[211] and the *2003 Code* and *2004 Modified Code* ultimately included some key commitments similar to those in the United Kingdom Code.[212] The introduction of a fairness commitment in the Banking Code was also based on the existence of fairness clauses in the United Kingdom Banking Code and the New Zealand Banking Code.[213]

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204 Consumer Credit Legal Centre NSW and Consumer Action Law Centre, *Mutual Banking Code of Practice Review – CCLC and Consumer Action Comments* (Submission, April 2013) 1.

205 Pearson, 'Business Self-regulation', above n 14, 42.

206 Abacus – Australian Mutuals, *Mutual Banking Code of Practice* (at January 2010) pt C ('*2009 Mutuals Code*').

207 *2009 Mutuals Code* pt D cls 6–8.

208 *2009 Mutuals Code* cl 12.

209 Phil Khoury, *Mutual Banking Code of Practice Independent Review – Recommended Revisions to Code* (Final Report, Cameronralph Navigator, June 2013) 11.

210 See *Customer Owned Banking Code* pt C promise 2.

211 Discussed in *Viney Review Issues Paper*, above n 64, 9–10.

212 *2003 Code* cl 2; *2004 Modified Code* cl 2.

213 *Viney Review Issues Paper*, above n 64, 16–18; *Viney Review Final Report*, above n 66, 24–5.

Of course, the efforts by consumer advocates, and independent reviewers, to argue for increased standards in one code based on the standards in other codes are not always successful. For example, in the McClelland Review, consumer advocates urged the adoption of a new responsible lending obligation that was based, in part, on more explicit standards proposed for the then draft Mutual Banking Code.[214] The reviewer agreed with the underlying concern, and recommended that a new key commitment be added to the Banking Code that incorporated the suggestion of consumer advocates.[215] This recommendation was initially accepted partially by the industry,[216] but was ultimately not included in the *2013 Code* in either the form recommended by the reviewer, or in the form suggested by the industry.[217]

Consumer advocates also argued for some of the standards in the Banking Code to be adopted in the General Insurance Code of Practice. In particular, consumer advocates argued that, as was the case with the Banking Code, compliance with the General Insurance Code of Practice should be made a term of the contract.[218] Again, this suggestion was adopted in part by the reviewer, who recommended that compliance with a subset of the Code be made a term of the contract.[219] However, this recommendation was only partially implemented in the revised General Insurance Code of Practice, with the Code simply providing that subscribers 'must comply' with obligations in relation to time frames for claims.[220]

While not all efforts to increase the standards in one code by reference to standards in other codes are successful, the successful examples above do demonstrate the potential for the Banking Code and other financial sector codes to increase standards *across* codes in a regulatory dance that, over time, facilitates continuous improvement in industry standards.

B Setting the Standards for 'Good Industry Practice' for Use by Dispute Resolution Bodies

The Banking Code can also influence community and legal understandings of what is good industry practice, even for non-subscribers. For example, the standards imposed in the Banking Code (and other industry codes) can be considered by both FOS and the Credit and Investments Ombudsman ('CIO') in their dispute resolution activities, even when they are dealing with a dispute

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214 Howell, *Joint Consumer Submission*, above n 69, 15.

215 *McClelland Review Final Report*, above n 70, 40–1.

216 Australian Bankers' Association, *Response to McClelland Review*, above n 115.

217 Neither the key commitments in cl 3, nor cl 27 dealing with the provision of credit, include a responsible lending commitment.

218 See, eg, Enright, above n 49, 80.

219 Ibid 82, 103–4.

220 *General Insurance Code* cl 7.21. This appears considerably narrower than the recommendation made by the independent reviewer.

about an industry member that is not a subscriber to a particular code.[221] For example, in its rules, CIO notes that when considering what is good practice in the financial services industry CIO may

> have regard to an applicable code of practice or industry or regulatory guideline or protocol which has application in the industry in which the financial services provider operates and which the scheme reasonably considers reflects good industry practice, *even if the financial services provider has not subscribed to that code of practice* or industry or regulatory guideline or protocol.[222]

In its operational guidelines, FOS goes further and notes that it 'will not necessarily be bound by the minimum standard that may be set in a particular industry code', but may expect higher standards.[223] Thus, an individual industry code, such as the Banking Code, has the potential to influence standards in the financial sector more generally, including the standards that are required (by other codes) or expected (through the EDR schemes) of financial service providers that do not subscribe to the Banking Code.

V THE FUTURE OF THE BANKING CODE

This review of the provisions of the Banking Code and relevant consumer protection legislation illustrates a sometimes complicated relationship between self-regulation and government regulation, where both contribute to a process of continuous improvement in standards in the financial services sector. On some policy issues, legislation provides the most comprehensive standards, and the role of the Banking Code is limited. Despite this, the Banking Code retains an important role through:

- providing protections in areas that are not covered by legislation, including where legislation may not be an appropriate policy response;
- providing coverage for some customers and products that are not covered by equivalent legislative protections;
- providing body or detail for broadly framed consumer protections;
- engaging in a regulatory dance with relevant legislation, where, over time, the highest standards swap between the Banking Code and the legislation; and

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221 The terms of reference of both schemes require them have regard to 'good industry practice' (FOS) or 'good practice in the financial services industry' (CIO) when deciding disputes: *FOS Terms* cl 8.2(c); Credit and Investments Ombudsman, *Credit and Investments Ombudsman Rules* (at 5 May 2014) r 12.1(c) ('*CIO Rules*').

222 *CIO Rules* r 12.3(c) (emphasis added).

223 Financial Ombudsman Service, *Operational Guidelines to the Terms of Reference* (Operational Guideline, 8 May 2014) 76.

- influencing the standards imposed upon, and expected of, other members of the financial services sector.

Therefore, despite the fact that, on some key policy issues, the Banking Code rules have now largely been superseded by legislative rules, the above analysis points to the continuing relevance of the Banking Code in particular, and self-regulation in general, in the regulatory mix for consumer protection in financial services.

However, the Banking Code is not without its critics. In 2012, Andrew Wilkie MP presented a private member's bill to the Commonwealth Parliament: the Banking Amendment (Banking Code of Conduct) Bill 2012 (Cth).[224] The Bill provided for a mandatory Banking Code of Conduct (based on the then current Banking Code) to be made by the relevant Minister, and to be enforced by the Australian Prudential Regulatory Authority, which would have the power to impose civil penalties for 'particularly grievous breaches of the code'.[225] In explaining the impetus for the Bill, Mr Wilkie argued that: '[t]here is clear evidence that the current voluntary Code of Banking Practice – set up by the banks, run by the banks, overseen by the banks – does not work and is a toothless tiger'.[226] Mr Wilkie also indicated that he was prompted to act by concerns about the Banking Code expressed by the Tasmanian Small Business Council.[227]

Concerns about the conduct of banks towards small businesses were also raised in a 2012 Senate Committee report on the post-GFC banking sector.[228] In this context, the Committee referred to the Banking Code as providing some safeguards for small businesses,[229] and also noted the non-applicability of the consumer credit legislation to small businesses.[230] However, rather than recommending a legislative response, or an expansion of the Banking Code provisions, the Committee recommended that the banking industry establish a separate code of conduct for small business lending.[231] This suggests that the provisions of the Banking Code in relation to credit assessment and hardship have not necessarily worked to allay all concerns from small businesses about banking practices.

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224 This Bill was tabled in Parliament, but was removed from the House of Representatives Notice Paper on 18 June 2013: see Parliament of Australia, *Banking Amendment (Banking Code of Conduct) Bill 2012* (2013) <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4875>.

225 Wilkie, above n 12.

226 Ibid.

227 Ibid.

228 Senate Economics References Committee, Parliament of Australia, *The Post-GFC Banking Sector* (2012). See, eg, chs 7–8 for specific allegations in relation to Bankwest, and a summary of the concerns and the Committee's recommended responses in ch 9.

229 Ibid 164.

230 Ibid.

231 Ibid 166.

Concerns about the effectiveness of the Banking Code are not limited to small business representatives. Consumer advocates generally supported the scope and provisions of the *2013 Code* on its release.[232] However, in their submission to the McClelland Review, consumer advocates were strongly supportive of the need for a broader range of sanctions for Banking Code breaches,[233] and raised concerns about, among other things, the level of compliance in relation to some provisions,[234] the lack of universal Code membership,[235] and the proposals to reduce the applicability of some protections on the grounds of competitive neutrality.[236] No changes were made to the Banking Code to address these concerns following the McClelland Review.

One example which highlights consumer concerns about the effectiveness of the compliance and enforcement mechanisms is the evidence of non-compliance with the Banking Code's provisions on direct debits.[237] Despite few instances making their way as complaints to FOS or the CCMC,[238] small 'shadow shop' surveys by the CCMC and by the consumer group CHOICE have found a high proportion of enquiries made to banks about direct debit rights resulted in information or advice that was inconsistent with the Banking Code obligations.[239] In this context, one commentator has suggested that 'the bank industry's inability to address breaches of a code that's been in place for almost 10 years indicates that self-regulation isn't working'.[240]

Other criticisms that can be made of the scope and operation of the Banking Code include the failure of the Banking Code to deal with financial exclusion in consumer credit, despite financial exclusion being significant and growing in

232 National Information Centre on Retirement Investments, 'Revised Code of Banking Practice Brings Improved Rights for Consumers' (Media Release, 5 May 2013) <http://www.nicri.org.au/nicri/news/revised-code-of-banking-practice-brings-improved-rights-for-consumers-2/>; Consumer Action Law Centre, *Revised Code of Banking Practice* (31 January 2013) <http://consumeraction.org.au/revised-code-of-banking-practice/>; Financial Counselling Australia, *Banking Code Welcomed by Financial Counsellors* (31 January 2013) <http://www.financialcounsellingaustralia.org.au/Corporate/News/Banking-Code-Welcomed-by-Financial-Counsellors>.

233 Howell, *Joint Consumer Submission*, above n 69, 37.

234 Ibid 51–2.

235 Ibid 6.

236 Ibid 10, 24.

237 Ibid 41.

238 See Code Compliance Monitoring Committee, *Direct Debits: A Review into the Operation of Clause 19 of the Code of Banking Practice* (Inquiry Report, June 2009) 7 <http://www.ccmc.org.au/cms/wp-content/uploads/2013/11/CCMC-Inquiry-Report-Direct-Debits-June-2009.pdf>.

239 Code Compliance Monitoring Committee, *Direct Debits Inquiry Follow Up Report* (Inquiry Report, May 2012) 5 <http://www.ccmc.org.au/cms/wp-content/uploads/2013/11/CCMC-Inquiry-Report-Direct-Debits-follow-up-May-2012.pdf>; Uta Mihm, *Banking Code Exposed* (18 August 2014) CHOICE <https://www.choice.com.au/money/banking/everyday-banking/articles/banking-code-exposed>.

240 Mihm, above n 239.

Australia;[241] the long delays with implementing the accepted recommendations from the McClelland Review;[242] and the provision for an extended time between reviews. On this last point, it is worth noting that the *2004 Modified Code* was to be reviewed after three years of operation, but with the long implementation time frame of the McClelland Review, this Code had an effective life of almost 10 years. In the *2013 Code*, a review is now required after five years of operation, after February 2019.[243] If the previous implementation timetable were to be repeated (two years for the review, five years for implementation), this could see the *2013 Code* operate from 2014 to perhaps 2026. Although it is true that the Banking Code is now a mature code, strongly established in the banking sector, the financial services sector remains a complex and fast-changing one. Given that industry codes are promoted as being flexible and responsive to changes in the relevant sector and regulatory environment, the prospect of the Banking Code having such a long life is incongruous.

To date, there appears to have been limited acknowledgment of the validity of these and other criticisms of the Banking Code by the industry. In a media release, the Chief Executive of the ABA rejected the suggestion of Mr Wilkie that the Banking Code was a toothless tiger, and explained the enforcement options in the event of a breach of the Banking Code in the following way:

> The Code of Banking Practice is a contract between customers and subscribing banks which means courts can review compliance with the code. Banks' small business customers and individual customers have a number of avenues they can take a complaint if they believe that a bank has breached the Code of Banking Practice. They can go to the Financial Ombudsman Service (FOS), the Code Compliance Monitoring Committee (CCMC) and the Australian Securities and Investments Commission (ASIC).[244]

However, relying on these three bodies or the courts (and tribunals) for enforcement of the Banking Code is not entirely satisfactory. Each suffers from limitations in their ability to provide redress and/or make findings about Code breaches.

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241 Chris Connolly, 'Measuring Financial Exclusion in Australia' (Research Report, Centre for Social Impact for National Australia Bank, June 2013) 7. Therese Wilson also referred to the possibility of using the Banking Code to address the issue of financial exclusion: Therese Wilson, 'Values Driven Innovation or Inadequate Self-regulation? The Effective Regulation of Australian Banks as Service Providers to Low Income Consumers' (2008) 21 *Australian Journal of Corporate Law* 258, 269–70.

242 The *McClelland Review Final Report* was released in December 2008. The ABA's response was published in September 2009. The revised Code was released in January 2013, and subscribing banks were required to implement the *2013 Code* from 1 February 2014. There has therefore been a five year period between the release of the Final Report, and the implementation of the Code as revised following that report.

243 *2013 Code* cl 6.1.

244 Australian Bankers' Association, 'Code of Banking Practice Works Well for Bank Customers', above n 55.

First, as mentioned above, most disputes made to FOS are resolved without the need for a FOS decision.[245] Even where a FOS decision is required, FOS does not necessarily always identify Banking Code breaches.[246] As a result, a disputant may be awarded a remedy, but may not receive a definitive statement from FOS as to whether or not a bank has breached the Banking Code.[247]

Secondly, while the CCMC can make a finding about a Code breach, it receives relatively small numbers of complaints,[248] has only one sanction available to it in the event of identifying a breach,[249] and has had the scope of its jurisdiction curtailed somewhat in the *2013 Code* (and accompanying *CCMC Mandate*).[250]

Thirdly, ASIC has no independent power to investigate an allegation of non-compliance with the Banking Code unless the conduct also involves a potential contravention of the *ASIC Act* or *Corporations Act* (or another piece of legislation for which ASIC has enforcement responsibilities).[251]

Finally, some customers have sought to argue a breach of the Banking Code in litigation, as part of a claim or series of claims against a Code-subscribing

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245 See, eg, Financial Ombudsman Service, *Annual Review 2013–14* (2014) 48.

246 The CCMC's submission to the 2007–08 McClelland Review showed, over a six month period, only 31 disputes where the Banking Code was considered by the Banking and Financial Ombudsman Service (a predecessor to FOS), and in the majority of these matters, the Code issue was not determinative in determining the merits of the matter or in resolving the dispute: Code Compliance Monitoring Committee, *Submission to the Review of the Code of Banking Practice* (Submission Annexure F, 11 March 2008) 3. See also discussion in Howell, *Joint Consumer Submission*, above n 69, 29 in relation to the role of FOS in identifying code breaches. In 2012–13, FOS had made a decision on Code breaches in only 3.4 per cent of cases closed by the CCMC: Code Compliance Monitoring Committee, *Annual Report: 1 April 2012 – 30 June 2013* (2013) 31. Further, the data on significant breaches shows that one significant breach was identified by FOS, and that one significant breach was identified after a referral from FOS: at 17.

247 Of course, many disputants will be satisfied with just a remedy.

248 In 2012–13, the CCMC received 46 new cases, involving allegations of 84 Code breaches: Code Compliance Monitoring Committee, *Annual Report 2012 –2013*, above n 246, 29.

249 The CCMC can publicly name a bank where it has (i) been guilty of serious or systematic non-compliance; (ii) ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time; (iii) breached an undertaking given to the CCMC; or (iv) not taken steps to prevent a breach reoccurring after having been warned that the bank might be named: *2013 Code* cl 36(j).

250 The CCMC's compliance monitoring, investigation and reporting powers no longer extend to alleged contraventions of cll 3 and 4, unless there is also an alleged contravention of another clause of the Code: *2013 Code* cl 36(b)(iii); and the CCMC cannot investigate matters that are referred to the CCMC more than 12 months after the complainant became aware of the relevant events, or should have become aware of the relevant events: *CCMC Mandate* cl 6.2(a)(vi).

251 ASIC's powers in relation to industry codes extend only to approving codes: *Corporations Act* ss 962CA, 1101A; *NCCPA* s 241, and to promoting the adoption of approved industry standards and codes of practice: *ASIC Act* s 12A(3)(a). It is arguable that a breach of the Banking Code by a Code-subscribing bank may also amount to a misrepresentation that the banking services are of a particular standard: see *ASIC Act* s 12DB(1)(a), or a misrepresentation concerning the existence of any right or remedy: see *ASIC Act* s 12DB(1)(i). In such case, ASIC would have jurisdiction to take enforcement action for the contravention. However, at the time of publication, I am not aware of any matters where this point has been successfully argued.

bank. Despite the suggestion by the ABA that the courts will be able to review compliance with the Code, and other support for the proposition that Code-subscribing banks are contractually bound by the code,[252] there has not been a consistent approach by the courts to the status and enforceability of the Banking Code.

For example, in *Commonwealth Bank of Australia v Starrs*, Peek J expressed the view that 'the Code is largely a collection of "dos and don'ts" of bankers' conduct',[253] although he thought that significant breaches of the Banking Code could be relevant to establishing unconscionability.[254] In *Bank of Western Australia Ltd v Abdul*, Croft J expressed the view that 'the Code of Banking Practice does not, in the present circumstances, have any contractual force'.[255] In *ING Bank (Australia) Ltd v Leagrove Pty Ltd*, the Court considered, and rejected, an argument that there was an implied term in the contract that the guarantees would be Banking Code compliant.[256]

On the other hand, in *Brighton v Australia and New Zealand Banking Group Ltd*, the New South Wales Court of Appeal appeared to accept that the Banking Code was incorporated into the guarantee contract by reference;[257] however, the parties were unable to obtain the remedy of terminating the contract. The Court found that the term in question was not a condition, and even if the term was an intermediate term, there was not a sufficiently serious breach of the term that would give rise to the right to terminate the contract.[258] Similarly, in *Williams v Commonwealth Bank of Australia*, the bank accepted that the Banking Code formed part of its contract with the plaintiff, and that clauses in the Banking Code were breached.[259] However, Pembroke J found that no loss was caused by the breaches, and there was therefore no remedy for the plaintiff.[260]

While this variance in judicial approach remains, relying on the courts and contract law as a mechanism for enforcing the Banking Code may be more uncertain than the positive statement of the ABA suggests.

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252 See, eg, *Viney Review Issues Paper*, above n 64, 102–3; Pearson, *Financial Services Law and Compliance in Australia*, above n 22, 300–1.

253 [2012] SASC 222, [116]. This decision was upheld in *Starrs v Commonwealth Bank of Australia* [2013] SASCFC 94, although no specific reference was made to the claims based on the Banking Code.

254 *Commonwealth Bank of Australia v Starrs* [2012] SASC 222, [118].

255 [2012] VSC 222, [100].

256 [2012] 1 Qd R 140, 155.

257 [2011] NSWCA 152, [45] (Campbell JA). The other members of the Court agreed with Campbell JA: [1] (Giles JA), [2] (Hodgson JA).

258 Ibid [103]–[107] (Campbell JA).

259 [2013] NSWSC 335.

260 Ibid [39]. See also a discussion of this case in Randal Dennings and Eibhlin Hamman, *Breach of Code of Banking Practice Does Not Necessarily Lead to Relief* (2 September 2013) Clayton Utz <http://www.claytonutz.com/publications/news/201309/02/breach_of_code_of_banking_practice_does_not_necessarily_lead_to_relief.page>, where the authors suggest that this case 'reinforces the principles that lie behind the Code of Banking Practice and makes it clear that a mere breach should not of itself necessarily result in an adverse finding against a bank'.

On other concerns of small businesses, the ABA responded to an earlier Senate Committee recommendation for a code of practice for small business lending with the comment that '[t]he current Code of Banking Practice already applies to small businesses and the ABA is always willing to meet with small businesses and their representative organisations to discuss any improvements'.[261]

In relation to concerns about compliance with the Banking Code provisions on direct debits, the ABA's Chief Executive has been reported as saying that '[b]ank staff need more information about the processes involved to cancel a direct debit' and as indicating that the industry is developing information for both consumers and staff.[262]

The Australian government's attitude to the recommendations for a small business lending code is not known. The former government did not issue a response to the 2012 report, and a representative from the current government indicated, on 11 December 2013, that it did 'not intend to respond to the report as this matter is being considered as part of the government's Financial System Inquiry'.[263] Interestingly, in one of the only areas where it has suggested a specific change to an industry code, the FSI has recommended that the Banking Code be adjusted to address the use of non-monetary default clauses, a concern raised by small businesses.[264]

Ultimately, as an industry code, it is the industry members that will determine the standards that they are prepared to commit to through the Banking Code. There is more, however, that could be done to encourage the banking industry to address these and other concerns about the scope and administration of the Banking Code. Although it is often argued that effective self-regulation requires that a government be willing to 'step in and escalate from self-regulation to command',[265] there does not appear to be any real regulatory threat in relation to the continuation and/or improvement of the Banking Code today.[266] However, there are a number of implicit benefits accruing to the banking industry as a result, in part, of the existence of the Banking Code. For example, a representative from the ABA has noted that the *2004 Modified Code*:

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261 Australian Bankers' Association, 'Australian Bankers' Association Responds to Report: Competition within the Australian Banking Sector' (Media Release, 6 May 2011) <http://www.bankers.asn.au/Media/Media-Releases/Australian-Bankers--Association-responds-to-report--Competition-within-the-Australian-banking-sector>.

262 Mihm, above n 239.

263 Commonwealth, *Parliamentary Debates*, Senate, 11 December 2013, 1525–6 (Arthur Sidodinis, Assistant Treasurer).

264 See *FSI Final Report*, above n 1, 264 recommendation 34.

265 See, eg, Pearson, 'Business Self-regulation', above n 14, 37. Although, the telecommunications industry has been cited as a sector where this condition did not hold true: see Karen Lee, 'Counting the Casualties of Telecom: The Adoption of Part 6 of the *Telecommunications Act 1997* (Cth)' (2009) 37 *Federal Law Review* 41, 59.

266 See also Pearson, 'The Place of Codes of Conduct', above n 14, 364.

> has been cited as one of the reasons why the *Corporations Act* requirements for bank basic deposit accounts could be wound back, because of the standards in place via the Code of Banking Practice and the EFT Code.[267]

In the case of a 'basic deposit product', neither a Financial Services Guide[268] nor a Statement of Advice[269] is required to be provided, and, in specified circumstances, a Product Disclosure Statement is not required, or can be provided at a later time than is the case for most other financial products.[270]

In addition, authorised deposit-taking institutions ('ADIs'), including the banks, have been exempted from other recently imposed regulations, including some of the recent amendments to the *NCC* and *NCCPA* to impose price controls of consumer credit products.[271] The fact that ADIs 'are subject to a broader range of prudential and regulatory oversight than other classes of credit providers' was cited as part of the reason for this exemption; the Banking Code (and the *Customer Owned Banking Code*) are regulatory instruments that do not apply to non-ADI credit providers, and are therefore part of the 'broader … regulatory oversight' of ADIs that justifies this exemption.[272]

However, these regulatory benefits accrue equally to businesses that subscribe to the Banking Code (or similar code) and those that do not. Perhaps an approach to facilitate further improvements that is likely to be more successful than a regulatory threat is to make explicit the various regulatory benefits, and make them available only to financial services providers that subscribe to an ASIC-approved code.[273] A precedent for such an approach does exist in relation to the exemption from certain obligations in the *Corporations Act* that is available to members of ASIC-approved codes.[274] This provides an illustration of a mechanism capable of ensuring that regulatory benefits provided, in part, because of the existence of industry codes, are granted only to those industry members that have subscribed to a relevant code.

The ASIC-approval process alone is, of course, no guarantee that the concerns identified above will be addressed. However, this process provides for more detailed assessment of the benefits of an industry code, including by requiring, for example:

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267 Godfrey, above n 14, 179.

268 *Corporations Act* s 941C(6).

269 *Corporations Act* s 946B(5).

270 See *Corporations Regulations 2001* (Cth) reg 7.9.07FA; *Corporations Act* s 1012G(1).

271 ADIs are exempt from the 48 per cent price cap on credit contracts, other than small amount credit contracts: *NCC* s 32A, and small amount credit contracts, which are also subject to price controls, are defined to exclude products offered by ADIs: see *NCCPA* s 5(1) (definition of 'small amount credit contract').

272 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancement) Bill 2012 (Cth) 71 [5.48].

273 One of the impediments to the ABA seeking approval of the Banking Code in its current form is the expectation of ASIC that codes will be independently reviewed every three years: *ASIC RG183* [RG183.82].

274 *Corporations Act* s 962CA.

- that the code addresses the existing or emerging problems in the marketplace;[275] and if it does not, that a detailed explanation of why the code does not deal with identified consumer concerns or undesirable practices be provided;[276]
- that there are a range of remedies and sanctions for non-compliance;[277] and
- that independent reviews occur at intervals of no more than three years.[278]

Seeking approval of the Banking Code in light of these and other criteria might encourage the banking industry to engage more deeply with the concerns identified above.

VI CONCLUSION

The Banking Code is described by the ABA as 'the banking industry's customer charter on best banking practice standards'.[279] The two previous major incarnations of the Banking Code represented significant advances on the consumer protections available at the time, with the result that customers of subscribers to the Banking Code were afforded greater protections than customers of many other financial institutions.[280] The third major incarnation of the Banking Code was developed following the McClelland Review, but the rapid pace of legislative change outstripped the drafting and implementation response, with the result that many of the recommendations of the review were superseded by legislation. Further, earlier advances in consumer protection delivered by the Banking Code were also overtaken by legislative developments.

Despite this, the Banking Code still has a significant role in the regulation of the financial services sector, and, through the complicated, sometimes dance-like relationships between the Banking Code, legislation, other agreements and guidelines, other industry codes, and the EDR schemes, in contributing to the continuous improvement of standards in the sector. Its future as part of the regulatory framework for financial services seems assured.

The Banking Code is not a perfect instrument. Among other things, there remain concerns about compliance in some areas and the mechanisms for enforcement when there is non-compliance, tensions in regards to aspirational matters and competitive neutrality, and a lack of coverage of one of the

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275 *ASIC RG183* [RG183.60].
276 *ASIC RG183* [RG183.61]–[RG183.62].
277 *ASIC RG183* [RG183.68]–[RG183.73].
278 *ASIC RG183* [RG183.82].
279 Australian Bankers' Association, *1993 Code*, above n 7.
280 Particularly in the period between the implementation of *2003 Code* and *2004 Modified Code*, and the implementation of the *2009 Mutuals Code*.

significant emerging issues in the banking sector, that of financial exclusion from consumer credit. Despite these criticisms, the Banking Code (and by extension self-regulation) has played, and can continue to play, an important role in the financial services sector. The FSI has acknowledged this role in broad terms, and its view that self-regulation and industry codes should continue to be part of the regulatory mix should be accepted by the Australian government. The government will need to ensure that any changes to the regulatory framework following the FSI will facilitate and support the self-regulation role. However, the government should also consider whether the implicit regulatory benefits accruing due, at least in part, to the existence of self-regulatory instruments like the Banking Code need to be made explicit and tied to membership of an ASIC-approved code. In turn, this may encourage the banking industry to address some of the outstanding issues and criticisms, and ensure that the Banking Code can fulfil its potential to deliver high standards and continuous improvement for consumers and small businesses.