



cameron. ralph. khoury

**Customer Owned Banking Code of
Practice
Independent Review 2019
Draft Report Three**

September 2019

Contents

1.	Introduction	3
2.	Code Compliance Committee	5
3.	COB obligation to cooperate with Code Compliance Committee	7
4.	Resourcing	8
5.	Reviewing the Code	9
	Attachment 1 – Early version Part C of Code	10
	Attachment 2 – Comparison with ABA Banking Code of Practice	11

1. Introduction

The Customer Owned Banking Code of Practice (the Code) is the code of practice for Australia's mutual banks, credit unions and building societies (COBs). It has been in force since 1 January, 2014 with only minor changes since that time. It is a voluntary Code, albeit almost all of the members of the Customer Owned Banking Association (COBA) have chosen to become subscribers to the Code, and are bound to comply with the Code.

The Code specifies that it is to be reviewed by COBA in consultation with stakeholders at least every 5 years. To assist with this review, COBA established a Code Review Advisory Committee that includes representatives of 10 of the 64 subscribers to the Code.

At the recommendation of the Committee, COBA engaged cameron. ralph. khoury (CRK), a Melbourne based consultancy, to undertake this review and the redrafting of the Code. CRK and its principal Phil Khoury have extensive experience in drafting and reviewing codes of practice in a diverse range of sectors including financial services, clean energy, development aid and aged services.

We began by releasing an Issues Paper asking for public submissions. We have analysed the 6 submissions we received in response. This is the last of three reports we plan to release to stakeholders. Our aim has been to obtain stakeholder feedback at intervals as we develop our recommendations, so that feedback from one tranche of work can inform the next tranche of work.

1. First report

Our first report provided a general update as to progress in relation to the Review, proposed principles to guide the Code revision project and our recommendations as to the introductory sections of the Code and the Code key promises. By way of example of the language and style we are recommending, our first report also set out drafting of a new small business lending provision.

Our first report was publicly released on 7 August. We have received 3 written submissions in response – available on the Review website at cobcop.review@crkhoury.com.

2. Second report

Our second report set out our recommended changes to the detailed obligations in the Code (current Part D of the Code but to become Part B of the revised Code). Our report also attached initial, early-version draft provisions for the purposes of testing ideas with stakeholders.

Our second report was publicly released on 26 August. We are currently consulting with stakeholders and have requested feedback by 14 October.

3. Third report

This third report sets out our recommendations as to the Code administration provisions (current Part E of the Code). These recommendations have been shaped using the principles discussed in detail in the first report.

As for earlier reports, we have attached initial, early-version draft provisions for the purposes of testing ideas with stakeholders. In drafting provisions, we have applied the plain language and other style aims discussed in previous reports.

Again we have referenced in our report some of the key change proposals made by stakeholders in response to our Issues Paper. In some cases, we have explained our reasons for not supporting proposals. Where a stakeholder has made submissions that go to the detail of drafting, we have generally not provided explanatory notes in this report and expect to discuss those drafting suggestions once our focus moves to detailed drafting.

As for our previous reports, this report will be distributed to all those who have made submissions to our Review and will be posted to the website. Whilst the Report does not pose specific questions for response, and there is no need to repeat points made already, we would welcome input, either by phone or email.

Feedback is requested by 31 October. Any submissions in response will be made available from our website cobcop.review@crkhoury.com.

Phil Khoury
Tel: 03 9421 3111
cobcop.review@crkhoury.com.

2. Enforceability of Codes

In March, the Treasury, Australian Government released a Consultation Paper *Enforceability of financial services industry codes*. We understand that the Treasury may release the Government's proposals quite soon. This is obviously highly relevant to this Report and it will need to be reconsidered in light of what the Government proposes. With that proviso, we set out below our views and recommendations as to how the Code administration provisions should be enhanced.

3. Code Compliance Committee

Compliance with the Code is currently overseen by the Code Compliance Committee. The Code requires a 3 person committee, comprising an independent Chair, an industry representative and a consumer representative. We think that this composition is appropriate and that the Code should continue to specify this.

It is common practice for code compliance monitoring to be defined both within the Code itself (generally the obligations on the signatories and the compliance monitoring committee's role and powers) and through a separate charter (or similar name) which typically covers administrative detail such as appointments and reporting processes. This approach helps to keep the Code simpler and we propose it should be continued.

The Code needs to define the Code Compliance Committee's responsibilities and powers clearly and appropriately. This is particularly important in the new environment of greater regulator involvement with codes. In our view, the Committee's role should be to encourage continuous improvement and good practice in compliance with the Code, to monitor compliance with the Code and to take action to address any significant non-compliance with the Code. This is necessary to maintain the profile of the Code with COBs and ensure that COBs do not overlook their obligations under the Code. We recommend that the Code administration provisions are revised to set out this role more clearly.

To provide stakeholders with confidence that the Committee will fulfil this role, we think that the Code needs to place mandatory obligations on the Committee (through its secretariat) to:

- a) assess the environment and take a risk-based approach to setting the Committee's priorities and workplan;
- b) to require COBs to provide periodic compliance reports – enabling the Committee to assess and compare COBs' compliance measures and results;
- c) to undertake at least one detailed planned study (own motion investigation) of a particular aspect of the Code every year – again to enable the Committee to independently assess and compare COBs' compliance measures and results; and
- d) to report publicly about this work.

In addition, the Committee must investigate where there is credible information of serious or systemic breaches. Information of this kind may be gathered through the Committee's monitoring work or information may be provided to the Committee by a member of the public or other person. The Committee should not be obliged to investigate every complaint that a COB has breached the Code. First, the Committee is not a forum for providing customers with compensation – that is the role of the Australian Financial Complaints Authority. Second, to achieve maximum impact, the Committee should target its resources on serious one-off matters and repeat breaches in the interests of ensuring future compliance by COBs. To clarify the Committee's role, we recommend that the administration and enforcement provisions should place less emphasis on complaints by the public to the Committee (of which in fact the Committee currently receives very few) and more emphasis on the investigation of serious and systemic matters.

The Committee needs to have adequate powers and discretions to carry out its monitoring work and to take action in relation to detected breaches. This will be necessary in order to obtain ASIC approval of the Code (see ASIC Regulatory Guide 183.70).

To strengthen the Committee's monitoring capacity and effectiveness, we think that it may occasionally be appropriate for the Committee to require a COB to undertake a compliance review to test the adequacy of the COB's control framework to achieve compliance with aspects of the Code. We are proposing that the Committee should be able to direct a COB to do this.

If monitoring or an investigation leads to a finding of a breach, we think that the emphasis of action undertaken by the Committee should be on prompt rectification of the breach and on ensuring future compliance. We do understand that the Committee must have some sanctions powers as required by ASIC, however we do not see the Committee as having a role in 'punishment' and for example, do not support the Joint Consumer Recommendation 82a) that the Committee should have the power to fine COBs.

For the role that we envisage for the Committee, we think sanctions should be focused on reporting breaches publicly including any failure to comply with Committee requests, directing remedial action, referring serious or systemic issues to ASIC and where issues are serious enough to warrant consideration of the status of a COB as a signatory – to COBA.

In some circumstances, we accept that it may be appropriate for the Committee to operate privately (without naming the COB publicly) when requiring a COB to undertake rectification of a breach. However we are concerned about too much happening 'behind closed doors'. This does not achieve stakeholder confidence that the Code is being appropriately administered and enforced. It is also important – and ASIC expects – that the Committee will inform ASIC about serious or systemic breaches of the Code. We recommend that the administration and enforcement provisions provide the Committee with broader powers to publicise and escalate breaches.

Recommendation 1

The Code administration provisions should more clearly articulate the Code Compliance Committee's role and responsibilities:

- a) There should be emphasis on monitoring and encouraging continuous improvement and good practice in compliance with the Code.
- b) The Committee's investigative role should be focused on serious or systemic breaches of the Code.

Recommendation 2

To provide stakeholders with confidence that the Committee will fulfil this role, the Code should place mandatory obligations on the Code Compliance Committee to:

- a) assess the environment and take a risk-based approach to setting its priorities and workplan;
- b) to require COBs to provide periodic compliance reports;
- c) to undertake at least one own motion investigation per year; and
- c) to report publicly about this work.

Recommendation 3

The Code should provide the Code Compliance Committee with a sufficient suite of powers to carry out its monitoring and direct rectification and broad discretion as to when to use those powers. In addition, the Committee should have the power to advise ASIC of a customer owned bank's serious or systemic breaches of the Code.

4. COB obligation to cooperate with Code Compliance Committee

The Code currently obliges COBs to cooperate with the Code Compliance Committee. To support this obligation, we think that the Code could be more explicit about what that cooperation entails. It should include explicit obligations to provide Committee requested compliance reports and other documents and information within the timeframe specified by the Committee. There should also be an explicit obligation to comply in a reasonable timeframe with any Committee directions or sanctions imposed by the Committee. The Committee's directions powers should not be restricted to a situation where the Committee has found a breach. Rectification may, for example, be appropriate where the Committee finds that a COB has an inadequate control environment – even if there are not confirmed instances of breaches.

Recommendation 4

The Code should explicitly oblige customer owned banks to:

- a) provide the Code Compliance with requested compliance reports, documents and information within the timeframes specified by the Committee; and
- b) comply in a reasonable timeframe with any Committee directions or sanctions.

5. Resourcing

COBA provides the funding for the Code Compliance Committee and the small secretariat that supports the Committee. Currently the Australian Financial Complaints Authority is contracted to provide staff, accommodation and some support functions for the secretariat.

Not surprisingly, a central concern in ASIC Regulatory Guide 183 is that there are adequate resources for effective code administration. We understand that COBA has already increased its resourcing of the Code Compliance Committee. An expanded Code will, however, warrant a broader scope of monitoring. Accordingly we would expect that the Code Compliance Committee will need some greater resources to carry out its responsibilities.

Recommendation 5

The Code Compliance Committee should revisit its resourcing needs in light of the broader reach of the Code and expanded expectations of consumers and regulators.

6. Reviewing the Code

To meet ASIC requirements, the Code must include an obligation to independently review the Code at intervals of no more than 3 years (rather than 5 yearly as the Code currently specifies). The independent reviewer should be required to consult with a broad range of stakeholders.

Recommendation 6

The Code should include a commitment to have an independent review every 3 years. The independent reviewer must consult with a broad range of stakeholders.

Attachment 1 - Early-version Part C of Code

Customer Owned Banking Code of Practice



Part C – How the Code is administered

Publicising the Code

1. In conjunction with the Customer Owned Banking Association (COBA), we will publicise this Code and promote our adoption of it, including in our branches. We will give or post you a copy on request. We will publish the Code (or a link to it) on our website.

Training our staff

2. We will ensure that our employees, agents and representatives receive training on the Code, and that they apply it in their dealings with you.

Administration of the Code by an independent Committee

3. The Code is administered by the Code Compliance Committee, an independent committee established and funded by COBA. The Committee consists of an industry representative, a consumer representative, and an independent Chair. The Code Compliance Committee Charter sets out the processes for appointing Committee members. This Charter is published on the Committee's website.

Role of Code Compliance Committee

4. The Code Compliance Committee must:
 - monitor and oversee compliance with the Code;
 - encourage continuous improvement by Code subscribers in meeting Code obligations, including by publishing good practice guidance;
 - investigate potential serious or systemic breaches of the Code by a Code Subscriber including by requesting the Code Subscriber to provide relevant documents and other information;
 - exercise its sanctions and directions powers if the Committee finds repeated breaches or a serious breach of the Code by a Code Subscriber; and

- provide reports to regulators and to the public about compliance with the Code by Code Subscribers and how the Committee has exercised its sanction and other powers, including an Annual Report on Code Subscribers' compliance with the Code and the Committee's compliance activities.
5. For the purposes of monitoring and overseeing Code compliance and encouraging good practice, the Code Compliance Committee must:
- review AFCA determinations about Code Subscribers;
 - undertake an annual environmental scan to assess Code Subscriber compliance risk areas and to set the Committee's priorities and work plan;
 - require Code Subscribers to provide periodic compliance reports to the Code Compliance Committee;
 - undertake at least one own motion investigation each year to assess compliance with one or more areas of Code compliance and identify good practices;
 - issue public reports about the extent of compliance with the Code and good practice compliance measures; and
 - provide feedback to COBA about industry trends and the adequacy of Code provisions.
6. The Code Compliance Committee must investigate if the Committee has credible information that a serious or systemic breach of the Code by a Code subscriber is likely to have occurred. For this purpose, the Committee may take into account information:
- obtained by the Committee from the Code Subscriber, for example, in compliance reports;
 - provided by the public in a complaint made to the Committee; or
 - provided by anyone else including another Code Subscriber, a consumer representative or AFCA.

Sanctions and directions powers

7. The Code Compliance Committee has the following sanctions and directions powers:
- formally warn a Code Subscriber found to be in breach of the Code;
 - require a Code Subscriber to undertake a compliance review (either an internal review or by an external adviser as is acceptable to the Committee) and to provide the Committee with the findings and recommendations of the reviewer, the Code Subscriber's rectification plan in response to the review and updates about implementation of that plan;
 - require a Code Subscriber to undertake a staff training program on the Code;

- require a Code Subscriber to undertake a rectification and/ or remediation program, such as corrective advertising, if found to be in breach of the Code;
- publicly name a Code Subscriber found to be in breach of the Code;
- advise COBA of a Code Subscriber's non-compliant status and/or failure to comply with the Committee's requests or directions;
- advise ASIC of a Code Subscriber's serious or systemic breaches of the Code.

Our compliance responsibilities as Code Subscribers

8. We will cooperate fully with the Code Compliance Committee in the discharge of its responsibilities, including provide requested compliance reports, documents and other information within the timeframe specified by the Committee. Where the law or our duty of confidentiality prevents us from disclosing information without first obtaining the consent of a third party, we will take reasonable steps to obtain that consent.
9. We will comply in a reasonable timeframe with any directions or sanctions imposed by the Committee.

Role of COBA

10. COBA must ensure that the Code Compliance Committee is adequately resourced.
11. COBA may amend the Code from time to time. Before doing so, COBA will consult with Code Subscribers and other stakeholders as COBA determines.

Reviewing the Code

12. In consultation with the Code Compliance Committee, COBA will arrange for the Code to be independently reviewed at intervals of no more than 3 years. The independent reviewer must consult with a broad range of stakeholders.

Attachment 2 - Comparison with ABA Banking Code of Practice

	Proposed new COB Code provision	Banking Code similar provisions
Publicising the Code	1	4, 5
Training our staff	2.	33, 39, 48
Administration of the Code by an Independent Committee	3.	207, 208
Role of Code Compliance Committee	4.	211
	5.	211
	6.	211
	7.	214
Subscribers	8.	213
	9.	213
Role of COBA	10.	212
	11.	-
Reviewing the Code	12.	6, 7