Joint Consumer Representative Submission to

Customer Owned Banking Association

Customer Owned Banking Code of Practice
Independent Review - Report Two

October 2019

Financial Rights Legal Centre |PO BOX 538, Surry Hills 2010 | Tel (02) 9212 4216 |Fax (02) 9212 4711 |
info@financialrights.org.au | www.financialrights.org.au | @Fin_Rights_CLC | ABN: 40 506 635 273

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

About the Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

Introduction

Thank you for the opportunity to comment on Report One of your independent review of the Customer Owned Banking Code of Practice (**COBA Code**). The Customer Owned Banking Association (**COBA**) agreed to resource a joint consumer submission to the current review with the Consumer Federation of Australia to consult with consumer representatives to prepare this submission. This submission has been endorsed by:

- Financial Rights Legal Centre
- Consumer Action Law Centre

We support a number of the recommendations made in the Review Report and are pleased to see that a large proportion of the recommendations made by the Joint Consumer Submission have been taken up and integrated into the Review Report, initial drafting and recommendations.

Many of these bring the COBA Code in line with the commitments made by the ABA Code.

Some recommendations would move the COBA Code beyond the ABA Code – these are important recommendations and we would commend COBA to take these up.

However some of the recommendations and drafting do not meet the current commitments of the ABA and keep COBA behind the ABA Code. These include: recommendations regarding commitments to Aboriginal and Torres Strait Islanders, basic bank accounts, financial difficulty, property insurance and proactive data analysis.

The Report explicitly rejects a number of the positions put forward in the original joint consumer submission. We question the reasoning behind these and request that the Review team reconsider its position including with respect to

- specific commitments for Aboriginal and Torres Strait Islander consumers
- requiring an assessment of the suitability of a loan for a guarantor;
- requiring guarantors obtain pre-execution legal and financial advice;
- stronger commitments with respect to third party providers
- the use of brokers; and
- not charging fees for the provision of paper documents.

We also note that the Review Report has failed to address some specific concerns that we raised in our initial submission Joint Consumer Submission.

This submission provides:

- a responses to the general approach to the review of the COBA Code and its drafting;

- commentary and recommendations on the substance of the Review Report – its 22 recommendations and the rejected recommendations of the joint consumer submission; and
- comments and suggested edits of the early draft code as provided at **Attachment A**.

A full list of specific recommendations follows.

Recommendations

General comments on Review Report Two

1. The independent review (and ultimately COBA) should reference and address all of the issues raised in the Joint Consumer Submissions and provide explanation as to why each one has not been taken up.
2. Every clause and sub-clause in the COBA Code should be clear, enforceable and must also be lettered and numbered for ease of reference.
3. COBA should not remove sections of the Code that repeat existing law. Instead they should use those sections as a starting point for additional commitments.
4. COBA should use this review as an opportunity to differentiate its Code from the ABA Code by including stronger commitments to customers.

Advertising and Promotion

5. We recommend that COBA make a stronger statement in line with other Codes by stating: "*We will comply with ASIC regulatory guidance about advertising…*".
6. Restrictions on pressure sales tactics should apply to all services offered not just banking services.

Accessibility and inclusivity

7. Whether it is in proposed clause 2.1 or proposed clause 2.2 consumers with English as a second language need to be included here as a cohort who are likely to be using COBA member banks.
8. COBA members should commit to either providing a basic banking account or at the very least publicly stating whether they offer a basic bank account, and publicly reporting on the take-up of this account by eligible customers.
9. Clause 34.2 should include:
   a) Aboriginal and Torres Strait Islander cultural training – to fulfil clause 2.1.
   b) Elder abuse – to fulfil clause 2.2
10. CRK should remove the limitation in proposed clause 2.3 that the focus of the commitment is only at the inception of the product/service.
11. Remove any terminology which puts the sole onus on the consumer to self-identify as vulnerable.
12. The COBA Code should follow the ABA's lead in Aboriginal and Torres Straight Islander accessibility and commit to proactive measures including:
    a) taking reasonable steps to make information about banking services accessible to Aboriginal and Torres Strait Islanders.
    b) following AUSTRAC's guidance about the identification and verification of those identifying as of Aboriginal or Torres Strait Islander heritage; and
    c) working with customers in remote areas or who have limited English to identify ways for them to undertake their banking.

Information about products and fees

13. Proposed clause 3.2 should be simplified to "*We will make a copy of the standard Terms and Conditions applying to a product or facility available to you. We will not require you to apply for the product or facility first.*"
14. Remove the phrase "*if it is practical and reasonable for us to do so*" from proposed clause 4.7.
15. Section 9 needs to reflect a commitment to ensure that COBA member advertising material accurately reflect the nature and contents of the terms and conditions of the product.

Lending including credit cards

16. The loan suitability assessment should be provided automatically to the guarantor rather than at their request.

Multiple Parties

17. The COBA Code should clarify that the liability of a co-borrower can be reduced to the amount of the benefit they receive from the loan, in order to aid dispute resolution.
18. The COBA Code should apply the specific, voluntary, informed and positive consent principles to all situations where consent is required including the sale of CCI.
19. Proposed Clause 20.1 should include the statement "*We will make clear that LMI is for the bank's benefit, and is not for your benefit*" to ensure that this is included explicitly in the explanation.
20. COBA members should commit to not requiring clients to sign acknowledgement of debts in cases where there may be shortfall debt.

Payment facilities

21. If it is the intention of the current Clause 20.1 to provide guidance to a customer to avoid fees the merchant may charge for a rejected direct debit facility – then this should be explicitly stated.

Financial difficulties and debt collection

22. The phrase *"We will tell you about your right to make a complaint to our external dispute resolution provider if we do not assist you under the National Credit Code"* should be included at proposed clause 31.11 as dot point 4, regarding where a COBA member is not able to assist.
23. A commitment to telling a customer in writing the reasons for a COB's decision whether or not to provide a customer help with relation to their financial difficulty should be included at proposed clause 31.11.
24. Proposed clause 31.11 dot point 3 should be confined solely to free and independent financial counsellors.
25. When writing to the customer about an agreement for assistance to help with financial difficulties the COBA Code should include a commitment to inform the consumer of any consequences.
26. ABA Code Clause 175 should be explicitly incorporated into the COBA Code.
27. ABA Code Clause 179 should be included in Proposed COBA Clause 31.10.
28. The following recommendations from our recent report (*Who is making Australians Bankrupt? A review of applications by creditors in the Federal Court to force people into bankruptcy)* should be incorporated into the COBA Code:
    a) more oversight and monitoring over the practices of debt collectors

b) requiring debt collectors to seek approval from the original creditor COBA member to commence proceedings to force bankruptcy. In this way the creditor can ensure forced bankruptcy is a last resort

c) increasing the threshold at which someone can be made bankrupt from $5000 to $50,000;

d) abolishing or restricting debt collection costs and banning the recovery of legal costs before court proceedings

29. COBA members should make a commitment to not selling debts of those people who receive Centrelink payments of any sort.

30. CRK should reconsider a number of positions take in the report opposing the position put forward in Review Report Two including:

a) specific commitments for Aboriginal and Torres Strait Islander consumers

b) requiring an assessment of the suitability of a loan for a guarantor;

c) requiring guarantors obtain pre-execution legal and financial advice;

d) stronger commitments with respect to third party providers

e) the use of brokers; and

f) not charging fees for the provision of paper documents.

General comments on Review Report Two

Approach to recommendations

Review Report Two states that

> *We have referenced in our report some of the key change proposals made by stakeholders. In some cases, we have explained our reasons for not supporting proposals.*

We note that a proportion of the proposals made by the Joint Consumer Submission (and other stakeholders) have not been either referenced or addressed in the Review. While in many cases this is because they have simply been incorporated into the draft (which we appreciate), there are other recommendations that have not been referenced or incorporated at all.

One of the eleven key criteria for ASIC Code approval is that the Code Content addresses stakeholder issues[1] Specifically RG 183 states that

> *If identified consumer concerns or undesirable practices are not addressed in the code, we will need a detailed explanation for why this is so. Possible explanations may include that:*
>
> *(a) an issue is best dealt with in another specified way (e.g. law reform);*
>
> *(b) industry reasonably needs further time to develop or comply with a code obligation dealing with the issue;*
>
> *(c) there is evidence that the issue is not a real problem; or*
>
> *(d) a cost–benefit analysis of the issue does not warrant it being covered in the code.*

We believe it is incumbent upon the independent review (and ultimately COBA) to reference and address all of the issues raised in the Joint Consumer Submission and provide explanation as to why each one has not been taken up.

Consequently where we think it necessary we have raised issues that we have previously raised in our initial submission. We believe that the review needs to address and explain why a recommendation has rejected.

Recommendations

1. **The independent review (and ultimately COBA) should reference and address all of the issues raised in the Joint Consumer Submissions and provide explanation as to why each one has not been taken up.**

[1] RG 183.55-183.62

Drafting

The Review Report states that:

> *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.*

While we support the intent of this approach, it makes it somewhat difficult for us to not provide comment on the wording provided. We can only work with what is provided to us. We understand that refining and editing occurs along the way but the words there have meaning and substantive effect and should reflect both the recommendations being made and the substance of the issue.

We therefore have raised our specific drafting recommendations again. We have raised many of these drafting suggestions in the body of this submission below but also made specific suggestions in the text as presented in the Review Report Attachment A. Our suggestions, track changes and comments are provided in this submission at **Appendix A**.

We would also like to reiterate our desire that the COBA Code number/letter each and every statement and sub-clause for ease of reference. Including dot points is unworkable and difficult. Having to refer to "dot point 7" is unwieldy and not good practice in terms of readability.

We also note that the drafting as it currently stands includes incredibly long unwieldly sentences with multiple clauses and embedded lists. These need to be reworked.

Finally, it would be our recommendation that each clause and subclause be focused on one idea or commitment. The inclusion of multiple commitments within the same clause makes each sub-clause difficult to reference and, presumably, comply with.

Recommendations

2. **Every clause and sub-clause in the COBA Code should be clear, enforceable and must also be lettered and numbered for ease of reference.**

Repeating the law and the length of the Code

We note that the Review Report has decided to recommend that the Code remove commitments that are, for all intents and purposes, simply repeating requirements under the law. For example, in the section regarding misleading advertising practices it states that:

> *We think that customers are already protected by the law in relation to these matters and so the Code should not be lengthened by covering these matters.*

Further it states at a number of points that entire sections of the Code be removed because of repetition of the law: Section 7 of Part D of the Code re: credit card limit offers; removing reference to the Privacy Act and Broking rules.

We disagree with this approach.

These commitments should act as a spring board upon which the COBA members can make further commitments above and beyond their legal obligations. Removing them from the Code enables these basic commitments to be in a sense forgotten – and therefore not improved upon. We have outlined examples of such extensions in this submission.

In addition, the Code of Practice is a consumer facing document that presents to customers of COBA members a clear outline of the commitments that they are making to the customer. Presenting basic commitments to the customer is – even in the case where they are a repetition of the law - important to do to provide the customer with an easy to access, easy to understand list of their rights and consumer protections. Without a reference to these laws, regulations and prohibitions, it is more likely that a customer will not become aware of the law, their rights and therefore not pursue them. Only the most motivated or aggrieved customers will pursue the matter and seek assistance from a consumer or legal representative who will then be able to explain their rights to them. Removing such commitments and clauses from the Code of Practice therefore results in disempowering customer's ability to engage with their rights.

It also should be said that inclusion of these clauses also acts as a reminder to the industry and their employees of their obligations under the law.

With respect to length, consumer representatives understand that there needs to be a balance struck between an overly long document and a short one. However, if designed and presented properly with plain English throughout, length should not be an issue. As a general rule we do not have any issue with the length of the document and while brevity is useful in drafting of commitments as a totality we would prefer a longer document (with numbered clauses) that captures all the issues needed to address consumer concerns rather than a shorter, less imposing document.

Recommendations

3. **COBA should not remove sections of the Code that repeat existing law. Instead they should use those sections as a starting point for additional commitments.**

Meeting the ABA Code of Practice

We are glad to see that the Review Report has included recommendations that would move COBA members beyond the commitments already being made by the ABA. These include recommendation 10 and proposed clause 10.2 amongst many This is a positive approach and we would commend COBA to make these commitments.

In most cases the sector is catching-up to the ABA Code. In some cases though, the COBA Code is still behind the ABA Code.

We repeat our recommendation from our initial submission that the current review is an opportunity to lay claim to a set of values that distinguishes the sector from ABA members, make commitments that place the customer first and lead the industry.

We are disappointed that, at times, the Review Report falls back on to arguments put forward by the customer owned banking sector that they are too small to lead the industry on matters (eg broking, promotions etc). This approach simply maintains the status quo that the COBA sector is the small poorer cousin of the mainstream sector. If the COBA sector truly wishes to set themselves apart from the rest of the industry as a truly consumer focussed sector – these arguments need to be reconsidered.

COBA members should differentiate themselves from ABA member banks by putting the interests of their customer ahead of their commercial imperative. This should by rights be an attractive proposition to COBA members.

Recommendations

4. **COBA should use this review as an opportunity to differentiate its Code from the ABA Code by including stronger commitments to customers.**

Advertising and Promotion

Targeted audiences

We support Recommendation 1 to include a commitment to undertake advertising and promotion in away that is appropriate for the targeted audience and to prohibit pressure sales techniques. We note however that the former simply meets the legal requirements under the new Design and Distribution Obligations and goes no further. This is not to suggest that this commitment be removed. We do believe that it can and should go further and commit to ensuring that the targeted offers provide genuine value.

Case study –Steve's story

Steve received marketing email for a standalone travel insurance product from his credit union. Steve already held a credit card with the credit union that included travel insurance. The marketing did not raise this fact with Steve and Steve felt he was being encouraged to purchase a product that for all intents and purposes he already held.

Steve's complaint was dismissed by the credit union who argued that the credit union markets products and services to customers in a general non-personalised manner which may in some circumstances be an additional product or benefit which may not be required.

Source: Consumer Action Law Centre

Misleading advertising

We note that the Review Report has rejected the inclusion of specific commitments regarding advertising:

> *We think that customers are already protected by the law in relation to these matters and so the Code should not be lengthened by covering these matters.*

As we have noted above, we disagree with this approach and believe that these clauses should be included, and their intent made explicit in the consumer facing Code of Practice.

We note that Life Insurance Code includes similar clauses and believe the COBA should include them too.

Use of Images

The Review Report states:

> *We gave careful consideration to the Joint Consumer Submission Recommendation 14c that advertising images not detract from statements – but were not convinced that this proposition could be phrased in a sufficiently certain manner.*[2]

We believe that the proposition can and has been phrased with certainty. The Life insurance Code of Practice includes just such a statement at 4.1(d):

> *ensure that any images used do not contradict, detract from or reduce the prominence of any statements used;*

If it is sufficiently certain for life insurers it should be sufficiently certain for COBA members.

Gift cards

Review Report states:

> *We were also not persuaded by Joint Consumer Submission Recommendation 14d that short term customer incentives such as gift cards or reward points should not be offered to take out a product or service. We are aware that for some customers these incentives are advantageous. We are also conscious that the major banks are not subject to this kind of restriction and we think this is an area where competitive neutrality is important for COBs.*[3]

We are disappointed that the Review Report has chosen not to acknowledge or address the harm that these incentives can impact upon vulnerable consumers, rather focussing on the cohort of people who find genuine benefits from such offers.

We are disappointed that the Review Report has chosen not to recommend COBA members take the lead on this issue, particularly one that leads in some cases to poor customer outcomes. While we acknowledge the importance of competition, competition that is based the potential for vulnerable people to be exploited does not lead to a healthy banking sector working for consumer interests.

If COBA members are wishing to differentiate themselves from ABA member banks then putting the interests of their customers ahead of their commercial imperative should be attractive to COBA members.

Compliance with ASIC RG 234

Proposed Clause 1.1 states:

> *We will ensure our advertising and promotional material is not misleading or deceptive and is appropriate for the targeted audience. We will not mislead or deceive you either by what we say or represent, or by omission (what we fail to say or represent). We will* ***have regard to*** *ASIC regulatory guidance about advertising financial products and services including credit when developing and reviewing our advertising and promotional material. (**our emphasis**)*

---

[2] Page 6

[3] As above

As previously raised, the statement "*We will have **regard** to ASIC regulatory guidance about advertising…*" is non-committal in tone, suggesting the possibility of not actually meeting ASIC regulatory guidance. We recommend that COBA make a stronger statement in line with other Codes by stating: "*We will **comply with** ASIC regulatory guidance about advertising…*".

Pressure sales techniques

We support the recommended prohibition on pressure sales techniques. We support including a non-exhaustive list of press sales techniques in the Code. We note however that Clause 1.2 states:

> *We will not engage in pressure sales techniques when promoting our **banking** services to you (**our emphasis**)*

Restrictions on pressure sales tactics should apply to all services offered not just banking services, particularly given customer-owned banks commonly sell other products like insurance. The word "banking" should be removed.

Recommendations

5. **We recommend that COBA make a stronger statement in line with other Codes by stating: "*We will comply with ASIC regulatory guidance about advertising…*".**
6. **Restrictions on pressure sales tactics should apply to all services offered not just banking services.**

Accessibility and inclusivity

Reasonable steps

Clause 2.1 states:

> *We will take reasonable steps to improve the accessibility of our banking services for individual customers including older customers, people with a disability and indigenous Australians.*

The use of the phrase "to improve" steps reads as a weasel word that justifies not taking appropriate steps. "We will take reasonable steps to ensure our banking services are accessible …" is a more proactive statement.

English as a second language

We note that the clause only mentions three vulnerable cohorts. Is this simply a reflection of the ABA Code Clause 32?

Whether it is in Clause 2.1 or Clause 2.2 consumers with English as an additional language need to be included here as a cohort who are likely to be using COBA member banks.

Vulnerability

We also think that the section needs to be reframed to reflect the basic fact that any one of us can be in a position of vulnerability. Any customer could have special needs that need to be recognised by their COB.

All consumers should be treated with sensitivity, respectfully and compassionately. If a customer demonstrates or communicates that they are experiencing a particular vulnerability, then COBA members will ensure that their unique needs are met.

Specific commitments

We note that the Customer Service section at section 34 includes specific commitments regarding those consumers experiencing forms of vulnerability. We would suggest that these two sections need to be combined. This will provide those commitments with more context.

Clause 34.2 should include:

- Aboriginal and Torres Strait Islander cultural training – to fulfil Clause 2.1.
- Elder abuse – to fulfil Clause 2.2

Basic bank accounts

Clause 2.3 states:

> *If at the time of establishing a new banking product, you tell us that you are on a low income or we are aware that you receive a Commonwealth pension or hold a Commonwealth concession card, we will give you information about banking accounts that we offer that may be more favourable for you.*

We are disappointed with the position taken that COBA members should not have to develop a basic bank account. Not doing so will set COBA members behind the commitments made by the ABA and the new commitments currently being consulted on to the ACCC.

The joint submission by consumer groups to the ABA Authorisation application argued that:

- all Member Banks should provide a BBA as defined, to prevent Member Banks from avoiding BBA requirements by instead offering low or no fee accounts with weaker standards, and
- the minimum standards should be altered to improve the standards in specific ways.

The ACCC have stated in their interim authorisation that:

The Banking Code be amended to require Member Banks who currently offer a BBA product … to continue to do so for the period of authorisation. [4]

Given this and the fact that it can be difficult to obtain a basic bank account through a customer owned bank (and that COBA member banks have some of the largest default fees) we believe that COBA members should step up to commit to providing basic bank accounts.

Merely providing a banking account that may be more favourable is unacceptable since it could be a minor improvement of an entirely inappropriate situation.

If COBA members were truly looking to support consumer interests – the provision of a basic banking account should be a basic obligation. At the very least, COBA members should commit to publicly stating whether they offer a basic bank account, and publicly reporting on the take-up of this account by eligible customers.

Proactive identification

Proposed Clause 2.3 is focussed only on the inception of the product/service. This is limiting and consumers can become pensioners, experience periods of low income or receive a Commonwealth concession card at any time. We recommend removing that limitation.

We also do not support the inclusion of any qualifying sentence such as "if you tell us", and instead posit that customer owned banks should have a codified responsibility to put into place technology and processes to proactively identify people who are potentially facing some identified form of vulnerability.

This terminology needs to be improved to remove the sole onus on the consumer to self-identify. They are unlikely to ever do so.

We believe that COBA members should work to develop systems and processes to proactively identify and assist people who are in vulnerable circumstances. This should be a commitment that is in addition to the commitment to deal "with you sensitively, respectfully, and compassionately" at proposed Clause 2.2

We note that in their draft authorisation of the ABA Code the ACCC have proposed that

The Banking Code be amended to require Member Banks to use data analysis and take other proactive steps to identify and contact potentially eligible customers to provide information about basic banking products and inviting them to apply if eligible. [5]

Given this, COBA members will be placed behind the ABA Code in terms of being more proactive when it comes to identifying hardship. COBA needs to make a similar if not more proactive commitment in this regard.

---

[4] ACCC, Draft Determination, Application for authorisation lodged by the Australian Banking Association in respect of certain amendments to the 2019 Banking Code Authorisation number: AA1000441, 27 September 2019, page 25

[5] ACCC, Draft Determination, Application for authorisation lodged by the Australian Banking Association in respect of certain amendments to the 2019 Banking Code Authorisation number: AA1000441, 27 September 2019, page 25

Aboriginal and Torres Strait Islander consumers

The report mentions that:

> *We understand that very few COBs have significant parts of their business in remote parts of Australia. Accordingly we think that the general obligations suffice, provided that, as we propose, these make specific mention of indigenous Australians*

We completely reject this position and urge CRK to reconsider this position. While many Aboriginal and Torres Strait Islander people do live in remote and regional communities they do not exclusively live in remote and regional Australia. According to data from the 2016 Census of Population and Housing, 79% of Aboriginal and Torres Strait Islander people live in urban areas.[6] Many specific needs in the Aboriginal and Torres Strait Islander community are not tied specifically to remoteness or location.

The Banking Code states:

> ***When providing banking services to Indigenous customers***
>
> *35. If you tell us you are an Indigenous customer, we will take reasonable steps to make information about our banking services accessible to you. We will also:*
>
> *a. tell you about any accounts and services that are relevant to you;*
>
> *b. tell you about any accounts or services that have no, or low standard fees, if our enquiries indicate you may be eligible for these and help you transfer to another account you want; and*
>
> *c. help you meet any identification requirements.*
>
> ***When providing banking services to remote customers***
>
> *36. We will take reasonable steps to make information about our banking services accessible to customers in remote communities, including remote Indigenous communities.*
>
> *37. We will provide cultural awareness training to staff who regularly assist customers in remote Indigenous communities*

Apart from Clause 36 location is irrelevant.

These are basic commitments to assist our First Nations peoples. To not act on this is to place COBA banks well behind the ABA banks on this issue.

While we are not expecting COBA banks to open branches in remote or regional communities – where they do already or they have members who do live in these communities, commitments to ensure that they are not penalised for doing so should be made. For example, ATM withdrawal fees should be re-funded to those customers.

---

[6] Australian Bureau of Statistics, 2071.0 – Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016 Aboriginal and Torres Strait Islander Population 2016, 31 October 2017. Available at: https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20islander%20Population%20Article~12.

We reiterate too that the ABA have agreed to meet the recommendations of the Royal Commission and expand their commitments to Aboriginal and Torres Strait Islander communities and other communities subject to systemic financial vulnerabilities under the Banking Code. These commitments are:

- Banks will follow AUSTRAC's guidance about the identification and verification of those identifying as of Aboriginal or Torres Strait Islander heritage.
- Provide that banks will work with customers in remote areas or who have limited English to identify ways for them to undertake their banking.

The same must be committed to under the COBA Code.

Recommendations

7. **Whether it is in proposed clause 2.1 or proposed clause 2.2 consumers with English as a second language need to be included here as a cohort who are likely to be using COBA member banks.**
8. **COBA members should commit to either providing a basic banking account or at the very least publicly stating whether they offer a basic bank account, and publicly reporting on the take-up of this account by eligible customers.**
9. **Clause 34.2 should include:**
    a) **Aboriginal and Torres Strait Islander cultural training – to fulfil clause 2.1.**
    b) **Elder abuse – to fulfil clause 2.2**
10. **CRK should remove the limitation in proposed clause 2.3 that the focus of the commitment is only at the inception of the product/service.**
11. **Remove any terminology which puts the sole onus on the consumer to self-identify as vulnerable.**
12. **The COBA Code should follow the ABA's lead in Aboriginal and Torres Straight Islander accessibility and commit to proactive measures including:**
    a) **taking reasonable steps to make information about banking services accessible to Aboriginal and Torres Strait Islanders.**
    b) **following AUSTRAC's guidance about the identification and verification of those identifying as of Aboriginal or Torres Strait Islander heritage; and**
    c) **working with customers in remote areas or who have limited English to identify ways for them to undertake their banking.**

Information about products and fees

We support Recommendation 3 that the COBA Code include specific customer information requirements in relation to foreign exchange services, terms deposits and cheque accounts, similar to paragraphs 27, 28 and 29 of the ABA Code of Banking Practice provisions.

We also strongly support the inclusion of proposed Clause 10.2 regarding the charging of fees that are reasonable having regard to our costs. This is a sensible approach that moves COBA beyond the ABA Code.

Terms and conditions

Proposed Clause 3.2. states

> *We will make a copy of the standard Terms and Conditions applying to a product or facility available to you,* ***if you ask us.*** *We will not require you to apply for the product or facility first.* ***However, depending on our product range and systems, we may need to ascertain the features or characteristics of the product you are considering before we are able to generate a copy of standard Terms and Conditions for that product.***

ABA Code Clause 24 simply states that this will be given to the customer. "If you ask us" should be removed.

It is also not clear why the final sentence is required or even necessary to state.

Transaction service fee

Proposed Clause 4.7 states:

> *We will inform you of a transaction service fee (e.g. a bank cheque fee), immediately before you incur the fee****, if it is practical and reasonable for us to do so****. This does not apply to a fee incurred by a Small Business.*

It remains unclear what practical and unreasonable circumstances would prevent a customer being told about a transaction fee. We recommend removing "if it is practical and reasonable for us to do so."

It is also unclear why this does not apply to Small Businesses? Do they not deserve to be told of the fee?

Terms and Conditions and advertising

As addressed in the Misleading Advertising section above, Section 9 needs to reflect a commitment to ensure that COBA member advertising material accurately reflect the nature and contents of the terms and conditions of the product.

We note that the Life Insurance Code of Practice Clause 4.1(c) states:

ensure statements in advertisements or marketing communications are consistent with the features of the relevant policy and the disclosures in any corresponding PDS;

A similar commitment should be made here or in the Advertising and Promotion section above.

Informal Overdrafts

We strongly support Recommendation 4.

We note that the ABA have to date baulked from doing something similar and wishing to exclude 'instances where it is impossible or reasonably impractical for us to prevent your account from being overdrawn'.[7] Following consumer representative advocacy on this matter, the ACCC has proposed to authorise the following:

The proposed authorisation AA1000441 is subject to the following conditions:

the Banking Code be amended to require signatories to the Code to either:

a. not charge interest on informal overdrafts in relation to basic banking products where a customer has not expressly sought that facility, or

b. where it is not possible for a bank to prevent interest being charged in the above circumstances, for the amount of interest to be refunded at the end of the month.[8]

The formulation at Clause 6.1 aligns with the consumer position on this point.

Recommendations

---

13. Proposed clause 3.2 should be simplified to "*We will make a copy of the standard Terms and Conditions applying to a product or facility available to you. We will not require you to apply for the product or facility first.*"
14. Remove the phrase "*if it is practical and reasonable for us to do so*" from proposed clause 4.7.
15. Section 9 needs to reflect a commitment to ensure that COBA member advertising material accurately reflect the nature and contents of the terms and conditions of the product.

Lending including credit cards

Report Two states:

[7] Proposed clause 47 Banking Code.

[8] ACCC, Draft Determination, Application for authorisation lodged by the Australian Banking Association in respect of certain amendments to the 2019 Banking Code Authorisation number: AA1000441, 27 September 2019, page 24

> *We do not, however, support the Joint Consumer Submission view that the Code should require 'strict compliance' with ASIC Regulatory Guide 209 Responsible Lending. This would be an uncertain formulation. In any event, ASIC Regulatory Guide 209 is currently under review. The Code individual customer lending provision will need to be reconsidered once ASIC's review is completed.*

A COBA member either complies with RG209 or it does not. There is nothing uncertain about this. We would expect at a minimum that COBA members comply with RG209 in its current and future forms. Not to do so sends the wrong signal to consumers and to ASIC. Putting a decision on this off until after the Review is also unwarranted given its current application.

Property Insurance

While we support Recommendation 6(b) (in proposed clause 12.2) regarding reminders to consumer to obtain mortgage property insurance ABA Code Clause 30 goes further by including a statement to check with your insurer and providing a reference to ASIC's Moneysmart page. We see no reason why the same can't be committed here.

Loan suitability assessment for guarantors

Proposed Clause 12.3 states:

> *If we are required by legislation to prepare a written loan suitability assessment for you, we will tell you so that you can ask us for this. If the loan is guaranteed, we will also tell your guarantor about the loan suitability assessment and provide this assessment to your guarantor on request.*

This should be provided automatically to the guarantor rather than at their request.

Proposed Clause 12.3 should also be either included or cross referenced in Section 18 on guarantors.

Credit card applications

We support the first part of Recommendation 7 including (a) to (e).

We would however note that proposed clause 13.1 states:

> *When you apply for a credit card, we will ask you to specify what dollar limit you would like. We will not issue you with a card with a higher limit. You may, however, at a later date ask us to increase the limit if you want.*

The final sentence should be removed. It goes will out saying. It is also not a commitment from COBA as such. It also risks encouraging COBA members to prompt vulnerable people to ask for limit increases.

With respect to the final part of Recommendation 7 we do not necessarily support removing Section 7 of Part D. We understand that the *National Consumer Credit Protection Amendment (Credit Cards) Regulations 2018* has been introduced and that makes a number of the commitments simply re-stating the law, however there remains merit in making commitments

in line with the law and making further commitments that move beyond the law – as ASIC encourages under RG 183.

For example COBA members could commit to ensuring that they will not constructively prevent a consumer's request to terminate a card or lower the limit of a card. This should include ensuring that where an outstanding balance remains, COBA members will stop all additional charges being incurred on the card until the balance is paid off and the card is cancelled.

Further the COBA members could assist the consumer with cancellation credit card direct debits.

None of these are captured under the *National Consumer Credit Protection Amendment (Credit Cards) Regulations 2018.*

COBA members could also commit to not suggesting an alternative (or alternatives) to reducing a consumer's credit limit – a practice that is occurring and again not captured by the regulations

There are also a number of additional outstanding issues that need to be addressed in the Code. Many of these were raised in the Joint Consumer Submission and have failed to be addressed in Report Two. For brevity we refer to the recommendations made and direct the Reviewer back to our original submission outlining our concerns regarding these:

- mandate increased minimum repayment amounts on all new credit card accounts;
- streamline online card cancellation and preventing the advertising for further credit products or suggestions to reconsider lowering one's credit limit;
- prohibit the mandatory packaging of credit cards with home loans;
- prohibit mandatory receipt of promotional offers for credit and other products and ensure that all such arrangements are provided on a strictly opt-in basis – noting that the amendments have not stopped credit providers from sending further promotional material about products and services from the credit provider or their subsidiaries and corporate partners;
- provide consumers with notification of how much credit they have used at no cost;

Proposed Clause 13.4 states:

> *If we make you an introductory balance transfer offer on your credit card for a fixed period of time, we will give you at least 30 days' notice before that period is due to end.*

While this goes some way to addressing the Joint Consumer Submission Recommendation 29(f) it does not restrict COBA members from offering honeymoon periods of less than 12 months.

We also repeat our recommendation that COBA meet the recommendations of *ASIC Report 604 Credit card lending in Australia – An update*[9] in December 2018 that has highlighted the following measures:

- taking proactive steps—such as tailored communications and/or structured payment arrangements—to help consumers with potentially problematic credit card debt or who are failing to repay balance transfers;
- restricting the amount by which consumers can exceed their credit limit to 10%;
- taking a fairer approach to balance transfers, such as allowing interest-free periods on new purchases; and
- enhancing disclosure about cancelling old credit cards.

Reverse mortgages

We note that Report Two does not comment upon Reverse Mortgages and has included the current wording under Section 8 in the draft at Attachment 1.

The Joint Consumer Submission raised a number of issues with Reverse Mortgages that we wish to see addressed in the new Code. These concerns were not commented upon or addressed by Report Two. They are:

- Reverse mortgage break fees should be limited to levels that reflect the lender's reasonable loss as a result of the contract being terminated early.
- A set of best practice standards in the training of staff should be developed to introduce, arrange or otherwise deal with reverse mortgage loans, to be attached to the COBA Code; with a commitment to meeting and exceeding these best practice standards under the COBA Code.

We believe these should be addressed.

Recommendations

16. The loan suitability assessment should be provided automatically to the guarantor rather than at their request.

---

[9] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-381mr-lenders-commit-to-improve-credit-card-practices-following-asic-review/

Multiple Parties

Joint accounts

We support Recommendation 8

Subsidiary cards

We support Recommend 9

Co-borrowers

We strongly support Recommendation 10 and commend COBA members to take this up and move beyond the ABA Code.

We would however recommend that the COBA Code outline what the remedy should be in those cases where a co-borrower did not receive a substantial benefit.

The Khoury Review of the Banking Code stated that

> *I think that clause 29 should also specify the consequences that flow where a signatory bank accepts as a co-debtor a person who does not have a substantial interest in the credit facility. I set out in Chapter 13.6 my view that, where a signatory bank fails to comply with pre-execution guarantee requirements, the guarantee should be unenforceable.*
>
> *Similarly, I think that the Code should make it clear that a credit facility is unenforceable against a co-debtor where the signatory bank should have known that the co-debtor was not receiving a substantial benefit under the credit facility. This recognises the harm that can result from mischaracterising as a co-debtor and would be consistent with the strong wording currently used in clause 29.1 of the Code "we will not accept you as a co-debtor under a credit facility where…".*

While this was not taken up by the ABA it should be taken up by COBA members.

The COBA Code should clarify that the liability of a co-borrower can be reduced to the amount of the benefit they receive from the loan, in order to aid dispute resolution.

Guarantors

We support recommendation 10 regarding guarantors.

We note that the Review Report does not support the Joint Consumer Submission with respect to undertaking an assessment of the suitability of a loan for a guarantor. This should be reconsidered. The reason for taking this recommendation on board is that:

> *a suitability assessment is a legislative construct designed for a borrower. This construct would not translate to a guarantor who does not in the ordinary course have to make*

> *repayments of the loan, but typically is the provider of security to be accessed in the event of borrower default.*[10]

A guarantor obviously does not have to make repayments in the ordinary course of a loan. However if a loan is called in, a guarantor should not be left in substantial hardship. To allow that to happen would not, in our view be exercising of a diligent and prudent banker. Nor would it be in line with the view taken *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351 which found that similar clauses in the 2004 Code of Banking Practice applied not just to the borrower but to the guarantor.

While a suitability assessment *is* a legislative construct designed for a borrower that fact has no consequence. There is no reason at all to prevent Customer Owned Banks – in acting as diligent and prudent bankers - from committing to similar if not precisely the same suitability and credit checks to ensure that poor outcomes for guarantors are reached. COBA members could, for example, commit to ensuring that in the event of a borrower being unable to fulfil their contractual obligations, that a prospective guarantor will have the capacity to pay either the repayments or meet the loan requirements using their assets without losing the ability to maintain a reasonable place to live.

Report Two also rejected the Joint Consumer Submission regarding requiring guarantors obtain pre-execution legal and financial advice arguing that:

> *We think that there will be situations where guarantors clearly have the knowledge and resources to make their guarantee decision without advice. So we are satisfied that the current Code strikes the right balance in encouraging advice and leaving it to COBs' discretion as to when to require the guarantor to obtain advice about the effect of the guarantee.*[11]

This reasoning places the interests of those guarantors with the knowledge and capability to make decisions over and above the interests of those who do not. It says that the interests of those capable guarantors being inconvenienced (by having to obtain separate legal advice) is more of a priority than those less capable and knowledgeable guarantors in acquiring similar advice that may lead to assisting them to reconsider their position as guarantor and avoid severe hardship if things were to go wrong.

This reasoning also does not acknowledge the issue of elder abuse through provision of guarantees, which was highlighted in the case study of Carolyn Flanagan during the Royal Commission.[12] Many older Australians are asked to provide guarantees, often as a favour to their children. The harm can be substantial, with the older person potentially losing their home if the guarantee is called in.

---

[10] Page 15

[11] Page 15

[12] *Interim Report*, Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol 2 (September 2018) p 257-8.

Ultimately the position of Report Two only serves the financial interests of capable guarantors and the customer owned banking sector, with no benefit to others. This does not appear to consumer representatives as striking the right balance at all.

The Review should reconsider this position.

COB's third party relationships

We support recommendation 11 to reflect the ABA Code with respect to consumer credit sales and its extension to all sales processes and not just to credit cards and personal loans.

However, the implementation of Royal Commission Recommendation 4.3 may place some of these recommendations behind the expected legal requirements. While we accept that the final outcome of the add-on laws is yet to be fully know (although a proposal is currently out) – we would urge COBA members to stretch themselves and get ahead of the law before it is enacted to future proof themselves.

CCI

Proposed Clause 19.3 states

> *If we offer consumer credit insurance, we will ensure that our sales practices take into account the unfamiliarity of many customers with this product*

This reads like it is simply providing a further opportunity to conduct a sales process directed at convincing people to buy the product. Unfamiliarity is one thing – a lack of value is another. This lack of value is a key reason why action is required in this space. It may also explain why in fact people are unfamiliar with it, that is, there is no real need for the product. It is this lack of value that needs to be objectively provided to consumers. This is likely to be the case under the proposed new add-on rules where:

> *The Government proposes that the format, content and mode of delivery of the prescribed information be determined by ASIC, and could include:*
>
> - *The total premium of the add-on insurance contract, including options for different cover levels within a particular product;*
> - *The significant features and benefits, significant and unusual exclusions or limitations, and cross-references to the relevant policy document provisions;*
> - *The duration of the policy;*
> - *When the consumer can initiate completion of sale;*
> - *The product claims ratio;*
> - *Notification that the add-on insurance product is sold by other distributors*
> - *A link to the ASIC MoneySmart website on the particular add-on insurance product (if available); and*
> - *The date the above information is provided to the customer.*

We note that the draft proposed 19.3 includes some of these and different ones:

- *information as to the periodic amount payable for the insurance including any interest you will pay on the premium (where the premium is calculated as a percentage or cost per dollar of the outstanding debt or statement balance we will tell you that cost and how we calculate it),*
- *the total cost of the insurance (if known),*
- *the circumstances in which benefits would be payable,*
- *the key exclusions that apply,*
- *the monetary limits on any benefit, the length of time a benefit would be payable,*
- *the date your insurance ends if different from when the relevant credit product ends;*

It does however not include key elements such as claim ratios and the fact that other distributors may sell the same product. COBA members again need to get ahead of the game and at the very least include the suggestions from Treasury and any additional pieces of information.

Finally proposed clause 19.3, dot point 3 states that COBA members will:

> *only put in place consumer credit insurance if we have your express consent*

Express consent is good but the concept of consent is undergoing significant development at the moment led by the ACCC and Treasury. Similar to our comments below we recommend that COBA members apply the specific, voluntary, informed and positive consent principles to all situations where consent is required including the sale of CCI.

Proposed Clause 19.4 states

> *we will wait at least four days after* ***you apply*** *for a credit product before we offer you consumer credit insurance* (emphasis added)

The Report does not address the Joint Consumer Submission recommendation 46(a) to extend upon the Banking Code as COBs should only be able to refer to the availability of CCI after ***approval*** of the credit product, rather than after an application is complete. This removes any inference (express or implied) that the purchase of the add-on products can influence final approval of the credit product.

Cross selling

Proposed clause 19.1 states:

> *We may introduce third party service providers or introduce, arrange or distribute products and facilities issued by other organisations. We will take steps to ensure that third party service providers we introduce are reputable; and that the third party products and facilities we distribute are useful, reliable and of value to our customers. We will regularly review the third party service providers and third party products and services we introduce and distribute.*

We think that this needs to be constrained by the impact of expected changes to anti-hawking laws for insurance and superannuation under Royal Commission recommendations 3.4 and 4.1

and their likely impact upon cross-selling. COBA members need to get ahead of these changes and not hawk financial products to consumers in an add-on context – that is, for example, the offer of insurance on a call or in an app about a credit card. This takes advantage of somebody whose head is in a different context but may be the same class of financial products.

Lenders Mortgage insurance

We support recommendation 12 to achieve equivalence with the ABA Code on lenders mortgage insurance (**LMI**) protections and extending it to ensuring the lender claim a refund to which the customer is entitled and pay it.

We however wish to raise three issues.

Firstly, proposed Clause 20.1 should include the statement

> *We will make clear that LMI is for the bank's benefit, and is not for your benefit and that the insurer will pursue you for any outstanding amount*

to ensure that this is included explicitly in the explanation.

Secondly, COBA members should provide the consumer with the full cost of insurance, including interest, over the life of the loan.

Third, we would like to raise the issue of shortfalls. Where a consumer has paid for LMI at the time of entering into the loan contract, the lender will make a claim on the LMI for the shortfall debt. The lender suffers no loss in this situation.

However, the insurer has a right of subrogation under the LMI policy, and then pursues the consumer for the shortfall debt that it has paid out to the lender under the policy. These consumers are usually already in a situation of extreme financial disadvantage, being a contributing factor as to why they had to sell their property at a loss, or for it to be repossessed and sold. These consumers therefore are unable to repay the shortfall debt to the insurer and so the insurer sells these debts onwards to bulk debt purchasers.

The bulk debt purchasers then make unreasonable demands on the consumers, for example demanding thousands of dollars in a lump sum.

It is our view that rights of subrogation should not exist under LMI policies. That is, the lenders mortgage insurer should not be permitted to pursue the consumer for the amount paid out to the lender, and should not be permitted to onsell that debt to a debt collector. These consumers are often in severe financial hardship and experiencing extreme vulnerability on a number of levels.

We believe that removing this right would also better align the product with what is reasonably expected, i.e. that it pays out the lender when it doesn't recover the full loan balance when the consumer is unable to make payments. For the insurer to turn around and then seek recovery from the consumer is just unfair. The risk of paying the shortfall should be part of the insurer's risk assessment.

We request that the Code Reviewers bring this issue up with LMI providers to investigate ways that this can be addressed.

One element that should be considered is addressing an issue that we have seen arise in these shortfall debts. Consumer representatives have seen lawyers for banks requiring a customer to sign an acknowledgement of debt, in order for the bank to discharge its mortgage.

Requiring a signature is unnecessary given the existence of mortgage which has the same effect. Signing it also potentially:

- abrogates their rights to seek financial hardship under the General Insurance Code of Practice,
- constrains their ability to raise any dispute in respect of any unjustness (as at the time), or unsuitability and
- in the case of voluntary surrender, constrains their ability to raise any dispute in relation to steps taken to sell.

Any money owing on a shortfall is still owed and it is still an unsecured debt. It doesn't somehow become secured or the Bank has more rights as a result of signing an acknowledgement of debt. The aim seems simply to pressure the customer. There is absolutely no reason to pressure the customer in this way given they are selling the property they are already in financial hardship and if they had the money they would already be paying it.

We recommend that COBA members commit to not requiring clients to sign acknowledgement of debts in cases where there may be shortfall debt.

Third party providers

We note that Report Two rejects joint consumer submission recommendations 44 to 46 regarding third party providers on the basis that they are overly prescriptive. We do not believe that ensuring that third party providers are competent or obliging COBA members from regularly reviewing third party providers (as two examples) is neither overly prescriptive nor onerous. They are basic professional business practices that COBA members should be conducting already and it would be of serious concern to consumer representatives if they are not doing this already. If they are then a commitment to do so would not cause any issues for COBA members.

We recommend that CRK reconsider this position.

Use of brokers

Report Two states that

> *Whilst we are cognisant of the broker-related issues raised during the Royal Commission, we consider that COBs do not have the market power to be able to 'go it alone' in restricting broker remuneration models.*[13]

This is disappointing especially for a sector that asserts that they wish to act in the best interests of the customer because they are customer owned.

---

[13] *Page 17*

As we understand it COBA members are actively lobbying against the implementation of Royal Commission recommendations regarding brokers. This too is disappointing and places COBA members' financial self-interest and the interests of brokers ahead of the clear interest of their customers.

To choose to simply remove any commitments relating to brokers (even though they reflect extant legal obligations) rather than act in a positive way for consumers and add to those commitments is disappointing given the problems that have been raised in the royal commission. This sends the wrong signal to COBA customers and maintains a status quo that is failing consumers.

We therefore cannot support Recommendation 13 and urge CRK to reconsider its position here.

Recommendations

17. **The COBA Code should clarify that the liability of a co-borrower can be reduced to the amount of the benefit they receive from the loan, in order to aid dispute resolution.**
18. **The COBA Code should apply the specific, voluntary, informed and positive consent principles to all situations where consent is required including the sale of CCI.**
19. **Proposed Clause 20.1 should include the statement "*We will make clear that LMI is for the bank's benefit, and is not for your benefit*" to ensure that this is included explicitly in the explanation.**
20. **COBA members should commit to not requiring clients to sign acknowledgement of debts in cases where there may be shortfall debt.**

Account statements and other communications

We support Recommendation 13 re: enhancing account statements and other notifications provided to customers.

We do not support Recommendation 14 for two reasons.

First, we do not support fees being charged for paper account statements as they are essentially a regressive tax that disproportionately harms vulnerable consumers and those experiencing financial hardship. Charging a fee on those on the wrong side of the digital divide is disproportionate and only exacerbates financial hardship. They are in a sense being penalised for being poor.

Second, it is yet another clause that places the burden on a consumer to act. This proposed clause 24.2 shifts the onus on to consumers to learn about, understand, and request an exemption. People who are experiencing financial hardship can and do tend to disengage with

their financial troubles until it is too late. They ignore what is a highly stressful situation in order to deal with day to day life.

Again, if COBA members were really on the side of consumers this would be one simple way to demonstrate and differentiate themselves from the ABA member banks.

We urge CRK to reconsider and recommend that COBA members do not charge fees for the provision of paper documents.

Payment facilities

E-payments Code

We support recommendation 15 regarding COBA members subscribing to the ePayments Code.

Direct debit and recurring card payments arrangements

Report Two states:

> *Joint Consumer Submission Recommendation 57d) proposes that the Code should omit reference to COBs raising with customers, wishing to cancel a direct debit facility, that they may wish to also deal directly with the merchant or supplier. We do not support the Joint Consumer Submission in this. As the Customer Owned Banking Code Compliance Committee Report stated, this is in fact good practice because it may avoid fees that the merchant may charge for a rejected direct debit facility.*[14]

A number of points need to be made in response to this.

The current (and proposed) wording of the clause is focussed on the act of cancelling a direct debit. It states:

> *We will not tell you to try to cancel the facility with the biller or other direct debit user first (but we may suggest that you also contact the direct debit user).*

The inclusion of the parenthesised sub-clause in Clause 20.1 reads as a suggestion for the customer to go the direct debit user to cancel the direct debit rather than the COBA member bank.

The reasoning in Report Two quoted above suggests that this is not what is meant and that it is in fact about encouraging consumers to speak to the merchant to avoid fees that the merchant may charge for a rejected direct debit facility.

Of course, it is good practice to contact the direct debit user if the purpose is to avoid fees the merchant may charge for a rejected direct debit facility. That much is obvious. However, that is

---

[14] Page 19

not mentioned in the text, nor is it in any way clear on a plain reading of Clause 20.1 or proposed clause 27.2.

If it is in fact the intention of the current or proposed sub-clause to provide guidance to a customer to avoid fees the merchant may charge for a rejected direct debit facility – then this should be explicitly stated.

Furthermore, isolating joint consumer submission recommendation 57(d) in this manner is misleading. The recommendation to remove the imperative to contact the merchant or supplier directly is in the context of a broader recommended commitment to remove the need for the consumer to have to go to the merchant or supplier to cancel the direct debit (or for that matter recurring payments) at all.

Finally, Report Two does not address the need for immediate action to be taken to remove a direct debit. Given the instantaneous nature of the New Payments Platform and payments generally – it is beyond credulity that direct debit cancellation (and recurring payment cancellation) cannot be made immediate if not instantaneous. It is unclear why any time is required.

Recommendations

21. **If it is the intention of the current Clause 20.1 to provide guidance to a customer to avoid fees the merchant may charge for a rejected direct debit facility – then this should be explicitly stated.**

Information privacy and security

Consent

We support recommendation 17 with respect to improving consent.

However it is not clear to consumer representatives why this has been limited to direct marketing purposes only. If the principle of specific, voluntary, informed and positive consent is appropriate for direct marketing surely it is appropriate for all cases where consent is required – otherwise COBA members will be saying explicitly that such qualities of consent are not applicable to other situations. Such a position is incongruent.

We recommend that COBA members apply the specific, voluntary, informed and positive consent to all situations where consent is required. This is the framework developed by the ACCC in the Consumer Data Right and is equally applicable in this case.

Financial difficulties and debt collection

We support recommendation 18 regarding improving commitments to customers experiencing financial difficulties and debt collection. We note that Report Two states that these changes would "meet virtually all of the Joint Consumer Submission recommendations".

However, there are key elements that are not being taken up by the Review that are in the ABA Banking Code – continuing to place the COBA Code behind the ABA Banking Code. There is no explanation as to why these have not been taken up. They are as follows:

Debt waiver

We note no clause has been drafted regarding the potential for a debt waiver. ABA Banking Code Clause 171 and 172 state.

> *When we may waive your debt*
>
> *171. In exceptional circumstances, we may look outside normal processes to find a way to assist you if you are experiencing long term hardship as a result of a material change in circumstances.*
>
> *172. If you are an individual, we may, at our discretion, reduce or waive your debt if it is an unsecured personal loan or credit card, on a case by case basis and on compassionate grounds, having regard to the following:*
>
> *a) your individual circumstances;*
>
> *b) if you are unable to meet your repayments now and in the future;*
>
> *c) whether the hardship is genuine and being caused by factors outside your control; and*
>
> *d) our commercial considerations.*

There is no reason why these could not be similarly included in the COBA Code.

Right to go to EDR

ABA Code Clause 174 states:

> *We will tell you about your right to make a complaint to our external dispute resolution provider if we do not assist you under the National Credit Code*

This must be at least included at Clause 31.11 as dot point 4, regarding where a COBA member is not able to assist.

Reasons for the decision

The ABA Code 177 commits members to the following

> *We will tell you in writing:*

a) whether we will provide you with help in relation to your financial difficulty; and

b) the reasons for our decision.

The reasons for the decision are currently not included at 31.11 and should be.

Financial Counselling

Proposed clause 31.11 dot point 3 states the COBA members will:

> *offer to provide you with contact details for a financial counselling or similar service in appropriate cases.*

This should be confined solely to free and independent financial counselling services. This should not be an opportunity to direct people to a financial planner or some other for profit service like a debt management firm. The ABA Code does not do this and nor should the COBA Code.

Informing customer of consequences

When writing to the customer about an agreement for assistance to help with financial difficulties the COBA Code should include a commitment to inform the consumer of any consequences. This is the case in the ABA Code at Clause 17(c) which states:

> *we will tell you in writing about the main details of the arrangements, including:… whether you accepting the proposed new arrangement will have any adverse consequences in relation to banking services or your credit history (for example, an entry in your credit report or cancellation of a banking service)*

Other consequences could include cancellation of the consumer's credit card. These must be provided to the customer in writing.

Not requiring customers to access superannuation

ABA Code Clause 175 states

> *We will not require you to access your superannuation to pay any amount you owe us under a loan (unless you are borrowing for a self-managed superannuation fund). However, you may wish to discuss this option with a financial counsellor. You can also find out more about this from the Department of Human Services, see humanservices.gov.au*

This should be explicitly stated in the COBA Code.

Tell customers if they report any payment default to a credit reporting body

ABA Code Clause 179 states

> *We will tell you if we report any payment default of yours under your loan to a credit reporting body. You can also independently obtain a copy of your credit report directly from a credit reporting body*

This should be included at proposed Clause 31.10

Recommending other products

We note that proposed clause 31.10 dot point 5 states that:

> *If we reach agreement about assistance to help you with your financial difficulties, we will… tell you if we offer banking products with terms that may be more favourable for you and provide you with information about your options to transfer to these;*

This is a positive step. We would however like to note that we have had experience of COBA members recommending inappropriate products to those experiencing financial difficulties. For example the discretionary risk product 'Mutual Aid' which is sold by People's Choice Credit Union ('People's Choice')[15] There are many concerns with discretionary risk products – the key one being that clauses containing discretionary terms may be considered unfair within the meaning of s12BF of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act).

We believe this and any other similar products should not be provided by COBA members and a commitment to this should be included in the COBA Code.

Debt Collection

We support the COBA Code achieving equivalence with respect to commitments on debt collection.

We do however wish to draw your attention to the recent report *Who is making Australians Bankrupt? A review of applications by creditors in the Federal Court to force people into bankruptcy*[16] and the recommendations therein. Relevant recommendations that should be considered include:

- more oversight and monitoring over the practices of debt collectors
- requiring debt collectors to seek approval from the original creditor COBA member to commence proceedings to force bankruptcy. In this way the creditor can ensure forced bankruptcy is a last resort
- increasing the threshold at which someone can be made bankrupt from $5000 to $50,000;
- abolishing or restricting debt collection costs and banning the recovery of legal costs before court proceedings

When a debt is sold, the seller can specify conditions for how the debt is managed. The above recommendations could be fulfilled in this way.

We would also recommend that COBA members make a commitment to not selling debts of those people who receive Centrelink payments of any sort.

---

[15] https://www.peopleschoicecu.com.au/globalassets/corporate-documents/forms/frm-7-2-1-mutual-aid-form-pds.pdf .

[16] https://consumeraction.org.au/wp-content/uploads/2019/08/Who-is-making-Australians-bankrupt-July-2019.pdf

Recommendations

22. The phrase *"We will tell you about your right to make a complaint to our external dispute resolution provider if we do not assist you under the National Credit Code"* should be included at proposed clause 31.11 as dot point 4, regarding where a COBA member is not able to assist.
23. A commitment to telling a customer in writing the reasons for a COB's decision whether or not to provide a customer help with relation to their financial difficulty should be included at proposed clause 31.11.
24. Proposed clause 31.11 dot point 3 should be confined solely to free and independent financial counsellors.
25. When writing to the customer about an agreement for assistance to help with financial difficulties the COBA Code should include a commitment to inform the consumer of any consequences.
26. ABA Code Clause 175 should be explicitly incorporated into the COBA Code.
27. ABA Code Clause 179 should be included in Proposed COBA Clause 31.10.
28. The following recommendations from our recent report (*Who is making Australians Bankrupt? A review of applications by creditors in the Federal Court to force people into bankruptcy)* should be incorporated into the COBA Code:
    a) more oversight and monitoring over the practices of debt collectors
    b) requiring debt collectors to seek approval from the original creditor COBA member to commence proceedings to force bankruptcy. In this way the creditor can ensure forced bankruptcy is a last resort
    c) increasing the threshold at which someone can be made bankrupt from $5000 to $50,000;
    d) abolishing or restricting debt collection costs and banning the recovery of legal costs before court proceedings
29. COBA members should make a commitment to not selling debts of those people who receive Centrelink payments of any sort.
30. CRK should reconsider a number of positions take in the report opposing the position put forward in Review Report Two including:
    a) specific commitments for Aboriginal and Torres Strait Islander consumers
    b) requiring an assessment of the suitability of a loan for a guarantor;
    c) requiring guarantors obtain pre-execution legal and financial advice;
    d) stronger commitments with respect to third party providers
    e) the use of brokers; and
    f) not charging fees for the provision of paper documents.

Customer service and complaints

Interpreters and hearing difficulties

We support Recommendation 21.

We would wish to clarify proposed clause 34.3 to ensure that where a consumer requests an interpreter or the use of the National Relay Service that this is provided. The reason this is important is that consumer representatives have too often heard accounts of banking staff saying that they can understand the customer despite the difficulties. It is important to recognise and acknowledge that it is the customer's understanding that is important not necessarily the staff member's. The use of the phrase "where appropriate" provides too much room for the COBA member to interpret it in a way that maintains the status quo.

Complaints

We support recommendation 22 and agree that this will need to be revisited in light of the RG165 noting that COBA members could choose to get ahead of the game and include best practice commitments within their code.