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By email: submissions@bankingcodereview.com.au

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2021 Code Review
c/o PO Box H218
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Dear Mr Callaghan

Review of the ABA Banking Code of Practice – response to Interim Report

Thank you for the opportunity to provide further input to your review of the Australian Banking Association's (ABA) Banking Code of Practice (the Code).

This is a joint submission made on behalf of members of the Consumers' Federation of Australia (CFA) and other consumer representatives and advocates. It builds upon our previous submission made to review (Original Submission).¹ This submission responds to the specific issues raised in the review's Interim Report.

This submission only addresses the issues and recommendations already covered in the Original Submission to the extent that it is necessary and relevant to the Interim Report. We would be happy to provide further information or discuss the detail of the specific recommendations we made in the Original Submission if it would assist your review.

General comments

The Interim Report does a good job of summarising the relevant broad thematic issues that underpin the role of the Code. The six issues raised by the Interim Report are interrelated and speak to the role of the Code, and how it

¹ Available at: <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Consumer-Groups-Joint-Submission.pdf>

can best deliver positive outcomes for customers and banks. These issues need to be considered in light of the primary purpose of the Code, which must be to improve consumer and small business banking customer outcomes. We support some of the potential changes floated in the Interim Report to help improve the Code's efficacy.

At a high level, our view is that the current level of detail in the Code generally is appropriate for its purpose. The Code's current variety of broad commitments and more specific requirements provides value to customers in different ways and makes for a more useful guiding document. We also agree that the 2019 rewrite of the Code improved its accessibility for everyone who may refer to it.

While we made many recommendations in our Original Submission, we do not consider the Code requires a complete overhaul or rewrite for it to be fit for purpose. Our recommendations are aimed at improving the content of the Code to help address more specific issues, particularly where we see evidence of consumer harm. The Code is not the appropriate vehicle to solve every problem in banking, but there are many areas where extra or improved content could help it do more.

Obviously, the Interim Report does not delve into the specific or more detailed recommended changes to the Code raised in submissions. We appreciate that settling a position on the issues raised in the Interim Report will have some impact on whether and how many of those more specific changes are adopted and implemented.

As mentioned in the Original Submission, one issue we still see is in the inconsistency in the level of service provided to consumers. Sometimes banks do everything a customer could reasonably expect to assist them. For some banks, this occurs the vast majority of the time. However, there are still too many instances where Code commitments and regulatory obligations are regularly breached or seemingly completely disregarded, and this causes real harm. Substantive amendments to the Code aside, we would welcome the Final Report offering recommendations about how banks can improve Code compliance generally. The discrepancies in the recent breach reporting data provided to the Banking Code Compliance Committee (BCCC) by the banks demonstrates that not all its members are on the same page with Code compliance.

Influence of the Royal Commission

We strongly agree with the observations in part 4 of the Interim Report, addressing the impact and ongoing legacy of the Financial Services Royal Commission (**Royal Commission**). We recognise that the ABA and the banks have done substantial work over the past few years to address the problems the Royal Commission highlighted and improve the service banks provide. Most of the specific deliverables from recommendations of the Royal Commission within the power of the ABA and banks to address themselves have been delivered, which represents a better outcome than the Government has managed to deliver via legislative reform.

We agree with the ABA's comments in its submission to the Review that there is a measurable difference in the culture of banks and their treatment of the Code since the Royal Commission. However, the Interim Report's observation that changes in culture take time and require reinforcement is correct. The stand-out finding from the Royal Commission was that financial institutions had been putting profits ahead of customer experiences and outcomes for years.

While there has been good work to this point, there needs to be recognition within banks, from the top down, that cultural change continues to be required to rectify problems with bank processes and systems that do not prioritise consumer outcomes. As mentioned in our original submission, some actions and trends by banks have created doubt about whether the banks are fully committed to this long-term cultural change.

How this can be addressed by the Code review

We welcome the indication in the Interim Report that ensuring the momentum of the Royal Commission is not lost is a goal being considered by the review. In terms of changes the Code review can recommend to help support this process, we recommend:

1. enshrining the recent commitments by the banks aimed at improving their culture into the Code (for example, specific commitments not to return to toxic sales-based remuneration structures)²
2. introducing a Code commitment to ensure that the banks have the necessary systems and mechanisms in place to comply with the Code generally, to help direct banks toward considering compliance at a higher level, rather than treating breaches in isolation³
3. improving transparency about both good and poor practice by banks, to motivate compliance and share best practice. This could be achieved by:
 - increasing the powers of the BCCC to identify banks in publications. Reputational consequences of non-compliance appear to be taken more seriously than other consequences
 - banks establishing a good faith approach toward sharing information and technology that is successfully assisting people who are vulnerable or experiencing financial hardship, such as effective methods of identifying people who could benefit from help. These should not be areas where competition results in negative outcomes for customers.

Importance of the Code

Embedding a culture in banks that sees 'doing the right thing' for customers as the key to success is welcome and important. Such an approach will help banks drive solutions-focused and positive consumer outcomes.

However, we are concerned by the position in the Interim Report (if we read it correctly) that it is a problem if banks also view the Code as a regulatory obligation. Following regulation is one key aspect of 'doing the right thing'. Like the Code, financial services regulations are generally designed to deliver a fair marketplace and better consumer outcomes, so prioritising Code compliance, like all regulatory compliance, should be considered central to the success of a signatory bank. In our view, most Code provisions (with some exceptions, particularly where we recommended amendments) are designed so that if compliance is achieved, it will generally improve customer outcomes. Further, if the value of doing right by the customer is not being recognised within banks, one way to make these Code commitments be taken more seriously is to empower the BCCC or ASIC to impose penalties that are a greater deterrent for non-compliance.

The greater opportunity to embed the importance of the Code, in our view, is to change the way banks respond to instances of non-compliance. There is a trend of reporting a significant majority of Code breaches as being caused by human error.⁴ This suggests that banks are not examining the underlying causes of breaches and whether any change in system or process can help prevent breaches. There needs to be a greater focus on analysing how and why breaches are occurring. Consumer advocates commonly report Code and regulatory breaches to banks and are told that they are a 'one off'. Encouraging a cultural shift to place greater focus on closely analysing what is causing 'human error' Code breaches would be one of the most valuable changes the review could create in how banks think about the Code.

Overlap between the Code and the Law

We disagree with the high-level position in the ABA's submission that provisions in the Code which overlap with existing laws should be removed.⁵ Overlap between the Code and law is not necessarily a problem, and in many instances helps make the Code far easier to understand. For the Code to effectively build upon the existing law,

² See Recommendation 9 of our Original Submission.

³ As contemplated by Question 5 in Part 2 of the Consultation Note

⁴ 69% in the June – December 2020 reporting period, as published by the BCCC: <https://bankingcode.org.au/app/uploads/2021/08/BCCC-Report-Banks-compliance-with-the-Banking-Code-of-Practice-July-to-December-2020.pdf>

⁵ <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Australian-Banking-Association.pdf>, page 4

sometimes it is necessary for it to explain the basics of the underlying regulatory framework. While this may amount to duplication, it need not result in added complexity.

Certainly, where the Code simply restates a commitment to follow the law without explaining what it is – such as in clause 50 – there is a valid question about what value the reference provides. However, we agree with the observation in the Interim Report that it may be appropriate to explain the key aspects of legislative commitments where it can be easily and succinctly done, such as in relation to responsible lending obligations.⁶ Where the law is the source of more detail, the Code could refer readers to those relevant sources of for more information.

Code provisions can provide enforceable rights under contract

The other benefit that Code commitments have for consumers, including where there are also related legal standards, is that they provide a contractual right or means by which to hold the bank accountable for the obligation. While a regulatory obligation may exist for the bank, the law may not provide a consumer with the right to enforce a breach against the bank. It may only be possible for regulators to take action, or there may be other barriers that make enforcement impractical.

An example of where a Code commitment could provide a more tangible legal right to consumers relates to the design and distribution obligations (**DADOs**).⁷ The DADOs are designed to be principles based. While they should operate to prevent mis-selling, an individual who is sold a financial product even though they are outside the target market determination (**TMD**) for that product would be very unlikely to be able bring any action or obtain redress under the DADO regime.

A bank would only breach the relevant provisions of the *Corporations Act 2001* if they failed to comply with the DADO regime at a systemic level. The legal framework does contain a provision that imposes civil liability for losses caused by breaches of a provision of the DADO regime.⁸ However, the relevant provisions are not necessarily breached by a one-off sale that has occurred outside the TMD, even if it was clearly the fault of the financial service provider. Rather, the consumer would have to prove that the financial service provider:

- didn't have a TMD at all, or the TMD did not contain the prescribed information;⁹
- failed to review the TMD within the required time;¹⁰
- failed to comply with record keeping obligations;¹¹ or
- did not take reasonable steps that were reasonably likely to result in sales being consistent with the TMD.¹²

This is not the same as a consumer proving that the conduct of a financial service provider led to them being sold a product that caused them loss, and that the sale was outside the TMD. If a bank had a compliant, up to date, TMD and took reasonable steps to guide their staff to act in accordance with it, the single sale in breach would not create any liability. In reality, it would be very difficult for an individual to obtain the evidence sufficient to show deficient compliance. If such a complaint was before the Australian Financial Complaints Authority (**AFCA**), it might consider the fairer outcome to be to remediate the customer for an individual failure. However, this is not certain, and could be made clearer with a commitment in the Code to refund the customer for inappropriate sales caused by the bank.

⁶ See recommendation 12 of the Original Submission

⁷ See recommendation of the 7 of the Original Submission

⁸ *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*; proposed amendment to *Corporations Act 2001*, s 994M

⁹ *Corporations Act 2001*, s 994B or D

¹⁰ *Corporations Act 2001*, s 994C

¹¹ *Corporations Act 2001*, s 994F

¹² *Corporations Act 2001*, s 994E

Clauses in the Code that give customers more valuable or accessible legal rights or avenues for remedy must not be removed from the Code, even if they otherwise overlap with existing law.

Dealing with overlap in terms of compliance

The Interim Report's final sentence in this section also points to a more appropriate solution to dealing with any regulatory or monitoring problems for banks caused by Code/regulatory overlap. As part of the introduction of enforceable Code provisions, the BCCC and ASIC should work together to develop an approach to monitoring and reporting that reduces overlap. If compliance with particular provisions in the Code are already sufficiently monitored by ASIC, then the BCCC may prioritise other areas for monitoring and compliance. The bodies could also agree as to how to streamline breach reporting. For example, breaches of responsible lending obligations should be reported to ASIC, who could be permitted by the banks to pass on statistics if necessary to the BCCC.

The Code's audience

We confirm our view in our Original Submission that the primary audience of the Code should be bank employees. That said, all efforts should be made to use plain language, but we emphasise that detail should be included even if it is complex, where necessary.

In line with the primary goal of improving banking customer outcomes, the Code should be amended in the way that will make it most effective. This is by delivering more valuable commitments in the Code, for the banks to adopt in practice.

An easy read version of the Code

The idea of developing an 'easy read' version of the Code to sit alongside the full version is worth exploring to help improve accessibility. The document could be developed to help people get a general overview of the key rights and protections contained in the Code, with links or references to the sections of the more detailed version available. This would not mean the more detailed version should shy away from plain language, but it could allow for more detail to be inserted to better guide compliance, where necessary. The easy read document, however, might convey more useful information succinctly if customers were introduced to it at the point of first engaging with a bank, when they do not have any particular issue in mind.

Promotion of the Code

The time when customers are most likely to engage and consult the Code with purpose is when they are dealing with a banking problem. If banks want to increase the awareness of the Code amongst customers, telling customers about the Code when problems arise is one promotion strategy that could have far more impact. Using a complaint or problem being raised as a trigger point to refer people to the Code may help these customers engage with it with more purpose, particularly if the bank is not referring the customer to an advocacy service (such as the National Debt Helpline) to assist with the dispute. They could then compare their own experience against the Code commitments.

The other change that may promote awareness of the Code would be through the role of the BCCC. The BCCC has released numerous informative reports that provide valuable insight into key issues in banking. However, the only instances where these reports have reached mainstream media channels have been where banks have been named. Expanding the power of the BCCC to name banks – even if just for good performance, but ideally for poor performance as well – would be the tool most likely to make the Code more prominent in the public domain, if this is a priority for the ABA.

The use of principle-based, prescriptive clauses and industry guidelines

As mentioned at the outset of this submission, there is nothing wrong with the Code's current approach to including general principles to guide bank conduct as well as specific obligations that provide more direct

commitments to customers. It is important that the Code contains guiding principles that make clear the broader consumer outcome that is intended. However, compliance with the Code needs to be capable of assessment, and often these guiding principles need to be supported by identifiable requirements or specific promises.

Adopting the recommendations in our original submission would obviously introduce more specific commitments, but these are seeking to achieve the broader outcomes. Their specificity also means they should only require what is necessary of banks to achieve those outcomes – nothing more.

If banks can identify Code provisions where strict compliance does not benefit their customers, then these Code provisions should be reviewed and amended so that compliance would deliver the intended consumer outcome. This might mean that they could be replaced with a less prescriptive provision that still focuses on the outcome, but in other cases it may mean greater detail. The ABA submission to the Review does not appear to identify specific provisions where compliance does not provide consumer benefit, or where the compliance cost greatly outweighs any benefit. However, if Code provisions are demonstrably having this impact, they should be amended to align more closely with the intended customer benefits.

The role of industry guidelines

Consumer advocates are supportive of the guidelines the ABA has developed over the last three years, many of which contain high quality guidance. Where these updates are made in between Code reviews, the guidelines can be useful to help encourage the improvement of banking conduct or respond to new and emerging issues. However, it is our primary position that the triennial review is a time for these guidelines to be incorporated into the Code, so that they are made binding and permanent.

While they may be reviewed in assessing the Code, the ABA's industry guidelines are not subject to ASIC Regulatory Guide 183, and there is less rigour and transparency in their update and review. In the past, some changes have been made without the same level of transparency or stakeholder consultation, leading to concerns about accountability. As mentioned in our original submission, older versions of these documents are generally not publicly available. Current versions are also not kept on the banking code page¹³ nor on the BCCC website¹⁴ It is in fact very difficult to identify a complete list of all active guidelines on the ABA website.

If the ABA were inclined to amend the Code to focus on more high-level principles and rely on their industry guidelines to provide the greater detail and specifics, it would be essential that the Code and guidelines were amended to specifically clarify that industry guidelines were enforceable in interpreting the Code. If this was not agreed, removing detail from the Code amounts to reducing its value to customers. Additionally, the ABA would need to amend existing processes to ensure that:

- all industry guidelines were easily identifiable and accessible in a single place on their website;
- previous versions of the guidelines would need to be made accessible, so that changes could be compared; and
- any amendments were completed in a transparent manner, involving public consultation with all stakeholders.

We reject the notion that guidelines supporting specific Code commitments should be seen as aspirational documents. They are meant to be supporting documents that outlines in greater details specific requirements to address specific issues (such as financial hardship or family and domestic violence). The notion that Codes of Practice were “aspirational documents” was well and truly rejected by the Financial Services Royal Commission. To shift specific requirements out of the Code and into “aspirational” guidance documents is to undermine the key recommendation of the Royal Commission to “give certainty and enforceability to the terms of the contract

¹³ <https://www.ausbanking.org.au/banking-code/>

¹⁴ <https://bankingcode.org.au/>

between a financial services entity and its client.” It would be disappointing if there are parts of the guidelines where banks refuse to be bound. However there are aspects that banks insist should not be binding, these could be put into separate best practice guides, while the remaining guideline could be made enforceable. In our view, the vast majority of standards set out in all industry guidelines should be commitments the banks are willing to be bound by.

Core commitment – fair, reasonable and ethical

Based on discussions with the ABA, we understand that the ABA and member banks remain committed to clause 10 of the current Code. While banks may have doubts about agreeing to it being enforceable by ASIC, there is no intention to remove it from the Code, or not be held to it in contract.

We maintain that there would be value in making this provision enforceable by ASIC. Fairness is a well understood and important standard. Establishing a normative standard for its meaning in banking would not be a high-risk or complex proposition. There is judicial guidance on the meaning of fairness, and the banks, the BCCC or AFCA could articulate the standard further if needed. That said, as the operation of this provision does somewhat (but not wholly) overlap with other existing legal obligations, making clause 10 enforceable by ASIC would not be one of the most vital recommendations in our Original Submission.

One other point that we raise with regard to clause 10 comes from the BCCC’s submission to the review. At paragraph 22, the BCCC notes that banks tend to report a variety of matters as breaches under clause 10 that are not otherwise specifically covered in the Code. While it is encouraging that this may indicate banks are assessing their wider conduct in terms of Code compliance, this may be worth exploring with the BCCC, to help identify whether there are other acts that come up repeatedly as breaches of clause 10 but should be addressed by more specific Code commitments, rather than only being captured by a broad provision.

Conclusion

The Code’s provisions cannot just be reviewed in isolation as though they are black letter law. The Interim Report gives us a strong indication that the review is being conducted with a clear consideration of the role of the Code from a practical perspective, as well as the wider regulatory environment that applies to banking.

We would be happy to provide further detail on these broader themes, or how they relate to recommendations in our Original Submission if it would assist your review.

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on 03 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



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APPENDIX A – ABOUT OUR ORGANISATIONS

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 marketplace for all Australians.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

Financial Rights Legal Centre

Financial Rights 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 Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Finally we operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies.

Uniting Communities Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy and financial counselling services to Indigenous consumers across north and far north Queensland, with a vision of "Empowering Indigenous Consumers".

Aboriginal and Torres Strait Islander peoples living in regional and remote communities often experience heightened consumer disadvantage. Structural barriers and an uncompetitive marketplace create conditions in which consumer and financial exploitation occur. In its ten years of service delivery, ICAN has assisted people through a range of consumer and financial issues including: dealing with unscrupulous used car dealers, finance companies, payday lenders, telemarketers and door-to-door salesmen. In line with its vision to empower Indigenous consumers, ICAN provides Indigenous consumers with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle consumer disadvantage experienced by Indigenous peoples.

Consumers' Federation of Australia

The Consumers' Federation of Australia (CFA) is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations.

Barwon Community Legal Service

Barwon Community Legal Service an independent Community Legal Service that is funded by the State and Federal Governments to provide free legal information, advice, and casework to members of our local community. A key part of our work is community education and awareness and contributing to law reform, as well as providing direct legal assistance.

Established in 1986 as the Geelong Community Legal Service, our service now supports the legal needs of the Greater Geelong, Bellarine Peninsula, Surf Coast and Colac Otway communities.

Hume Riverina Community Legal Service

HRCLS is uniquely positioned as a cross border community legal centre. Based in Wodonga on the Victorian-New South Wales (NSW) border, the service receives Commonwealth, Victorian and a small portion of NSW funding to provide generalist legal services to a vast catchment area of 17 Local Government Areas in North East Victoria and the Southern Riverina of NSW.

Services provided by HRCLS include legal advice and casework assistance with family law issues (child contacts, property disputes, child support and spousal maintenance), family violence, Victims of Crime applications, credit and debt problems, fines, motor vehicle accidents and consumer law issues.

As a generalist service, we are well placed to help our clients with most of their legal issues, and work with our non-legal (particularly health and financial counselling) partners to provide a holistic, wrap-around service. The majority of our clients are vulnerable and have a range of complex legal and non-legal needs. Many are significantly affected by their experiences of violence, whether this be in the context of family violence, child sexual assault or other violent crimes. Mental health problems, drug and alcohol dependence, involvement with the child protection system or other such impacts often compound their issues.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit specialist community legal centre based in Perth and servicing the State of Western Australian. CCLSWA specialises in the areas of credit, banking and finance, and consumer law. CCLSWA operates a free telephone advice line service which allows consumers across Western Australia to obtain information and legal advice in the areas of banking and finance, and consumer law. CCLSWA also provides ongoing legal assistance and representation to consumers by opening case files when the legal issues are complex. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers.

CCLSWA's mission is to strengthen the consumer voice in Western Australia by advocating for, and educating people about, consumer and financial, rights and responsibilities.