

12 October 2020

Mr John Sheehy
CEO
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Dear Mr Sheehy

Independent Review of the definition of “small business” under the Banking Code of Practice

Thank you for providing the Banking Code Compliance Committee (BCCC) with the opportunity to comment on the independent review (review) into the small business definition under the Banking Code of Practice (the Code).

The BCCC and the Banking Code of Practice

The BCCC is an independent compliance monitoring body established under clause 207 of the Banking Code of Practice (the Code). The Committee is comprised of an independent chairperson, a banking representative and a consumer representative.

The BCCC’s purpose is to monitor and drive best practice Code compliance.

To do this the BCCC:

- examines banks’ practices
- identifies current and emerging industry wide problems
- recommends improvements to bank practices, and
- consults with and keeps stakeholders and the public informed.

The BCCC’s Charter sets out its powers and functions, which include:

- monitoring Code-subscribing banks’ compliance with the Code
- investigating allegations that a bank has breached the Code
- making Code breach findings and recommendations, and
- applying sanctions.

Nineteen banking groups currently subscribe to the Code. These banking groups account for approximately 95% of the Australian household banking market.¹

¹ Australian Prudential Regulation Authority - Monthly Banking Statistics for August 2020.

Following reviews of the 2013 Code of Banking Practice (2013 Code) and the Code Compliance Monitoring Committee (CCMC), the Australian Banking Association (ABA) redrafted the Code and the Australian Securities and Investments Commission (ASIC) announced it had approved the 2019 version of the Code on 31 July 2018. A revised iteration of the Code was approved by ASIC on 24 June 2019 and came into effect on 1 July 2019. A later version of the Code was subsequently approved by ASIC that applied from 1 March 2020.

On 1 July 2019, the BCCC replaced the CCMC and its powers and functions are set out in its Charter. Copies of the Code and the BCCC Charter are available on the BCCC's website.²

Code obligations

The 2019 version of the Code broadly applies to small business customers and includes some specific obligations regarding these customers, including Part 6 (Chapters 21 to 24) - *Lending to small business*.

As you will be aware, the 2019 Code defines a small business as:

A business is a "small business" if at the time it obtains the banking service all of the following apply:

- a) it had an annual turnover of less than \$10 million in the previous financial year; and*
- b) it has fewer than 100 full-time equivalent employees; and*
- c) it has less than \$3 million total debt to all credit providers including:
 - i. any undrawn amounts under existing loans;*
 - ii. any loan being applied for; and*
 - iii. the debt of all its related entities that are businesses.**

BCCC Small Business and Agribusiness Advisory Panel (the Panel)

Clause 208 of the Code and 10.2(b) of the Charter states:

The BCCC acting unanimously will appoint, on terms it thinks appropriate, a person or a panel of persons, with expertise in small business and/or agribusiness to act as a consultant on small business and agribusiness issues. The consultant [the Panel] will provide advice on small business/agribusiness matters where requested by the BCCC.

In March 2020, the BCCC established the Panel to provide it with expert insight, advice and guidance on small business and agribusiness banking matters.³

² <https://bankingcode.org.au/>

³ <https://bankingcode.org.au/about/the-committee/small-business-and-agribusiness-advisory-panel/>

The five members of the Panel are:

- Ms Alexandra Hordern – Director of Advocacy at the Australian Small Business and Family Enterprise Ombudsman
- Mr Jeffrey Caldbeck – CEO of Rural Financial Counselling Service NSW (Central West)
- Mr Denis McMahon – Senior solicitor for the Farm & Rural Legal Service at Legal Aid Queensland
- Mr Neil Slonim – founder of thebankdoctor.org, a not for profit online resource for small businesses, and
- Mr Brett Smith – CEO of Rural Business Support.

The Committee’s views on the definition of “small business” under the Code

Consistency of the definition and its application

In November 2019, the BCCC published the Report of its Inquiry into banks’ transition to the 2019 Code.⁴ In relation to small business and farming customers, the BCCC summarised its findings as follows:

The BCCC required banks to explain how they will apply the Code’s small business definition. Eleven banks told the BCCC they intend to apply a broader definition to small business customers than that prescribed in the Code.

The BCCC is concerned that 2 of the 11 banks adopting a broader definition of small business, have reserved the right to contend that the Code does not apply to the relevant customer in the event of a BCCC investigation. The BCCC finds this unacceptable and expects that the Code’s small business obligations, if broadly applied by a bank, should continue to apply for the purposes of any BCCC inquiry or investigation.

Where a bank has chosen to adopt a broader small business definition, it should not later assert the relevant Code obligations do not apply.

Two of the big four banks provided information about how they will report small business data to the BCCC. One of them has indicated it will report to the BCCC in line with the Code requirements, and the other has stated that it will report small business data on a best endeavours basis.

Without exception, banks must develop capabilities for reporting small business data to the BCCC. Banks need to provide consistent reporting to allow for benchmarking and year on year comparisons.

Further information about the BCCC’s findings about the application of the Code definition can be found on pages 17 to 19 of the Report.

⁴ <https://bankingcode.org.au/app/uploads/2019/11/BCCC-Inquiry-Report-Banks-transition-to-the-2019-Banking-Code-of-Practice-November-2019.pdf>

The BCCC's position is that it is very important for there to be a uniform definition across the industry. We note, in particular, that the Code definition is different to the Australian Financial Complaints Authority's (AFCA) small business jurisdiction. While AFCA's Rules reflect the 100 employees criteria, there is a monetary restriction that a credit facility must not exceed **\$5 million** and there is no turnover threshold.

Such discrepancies in definitions may impose restrictions on the BCCC's ability to cohesively compile and assess data relating to small business customers, which supports our monitoring and reporting on banks' compliance with the Code.

Specific definition criteria

The BCCC notes the Review seeks input as to whether particular aspects of the Code's small business definition should be amended. These include:

- the amount of credit in issue, and whether that should be a total across the business and its related entities, or limited to each credit facility, and
- whether the criteria (number of employees, turnover, credit facility) should be subject to an "and" or an "or" condition.

The BCCC has sought input from the members of its Panel and we are sharing a summary of their comments below in light of their expertise in this area.

- There is concern about the 'total credit' provision in the Code definition as this excludes many small businesses and farmers where total facilities can exceed the current \$3m and recommended \$5m threshold.⁵ The small business definition should be based on a per facility calculation rather than a total credit exposure calculation.
- The three criteria (turnover, credit, employees) should be subject to an "or" rather than an "and" condition.
- Panel members have reinforced the BCCC's position that the definition should be consistent across the industry.
- Irrespective of the overall small business definition, family-owned farms and other businesses in the agricultural sector with greater than \$5m in credit are not necessarily large or sophisticated borrowers and should be captured within the scope of the definition.

The BCCC supports the Panel's comments. Eleven banks confirmed during the BCCC's Inquiry that they are already applying the Code to a broader range of small business customers than the current definition requires. A uniform adoption of a \$5m credit threshold may lead to more consistent application across industry and, less confusion and more consistent outcomes for small business customers.

⁵ In general, the 2017 Banking Code review, the Financial Services Royal Commission and the Australian Small Business and Family Enterprise Ombudsman's *Inquiry into small business loans* all recommended that the Code's definition should incorporate credit facilities up to \$5 million.

Contact details

Should you wish to speak with the BCCC to obtain any further information about the Code or its monitoring work, please contact us c/o the BCCC's CEO, Sally Davis, on 03 9613 7341 or by email at sdavis@codecompliance.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ian Govey', written in a cursive style.

Ian Govey AM
Independent Chairperson
Banking Code Compliance Committee