Dear Sir / Madam

I refer to the above consultation and confirm that CCLSWA recently contributed to and endorsed joint consumer submissions responding to the review of the BCCC and the Banking Code. We reiterate and maintain our current Code concerns which are adequately captured by these submissions (further copies ***attached*** for ease of reference).

Kind regards

[redacted]

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Please note that I work part-time, and will respond to your email as soon as possible

In the spirit of reconciliation, Consumer Credit Legal Service (WA) Inc acknowledges the Tradition Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.
……..

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01 November 2021

By email: bcccreview@crkhoury.com

Phil Khoury and Debra Russell
Cameron Ralph Khoury
Review of the BCCC

Dear Mr Khoury and Ms Russell

Review of the BCCC: response to Interim Report

Thank you for the opportunity to respond to the Interim Report (**Interim Report**) of the Review of the Banking Code Compliance Committee (**BCCC**). This is a joint submission from Consumer Action Law Centre, Financial Rights Legal Centre, Financial Counselling Australia, Care ACT, Consumer Credit Legal Service (WA) Inc and COTA. Details about our organisations is provided at **Appendix B**.

As you are aware, we have also responded to the review of the Australian Banking Association (**ABA**) Banking Code of Practice (the **Code**),[1] and to the Interim Report of that review.[2] This response builds upon our comments in those submissions.

Consumer representatives value the work of the BCCC and consider it to perform an important function in terms of regulatory oversight of the banks. Bank reporting to the BCCC helps to mandate internal organisational focus on compliance with the Code, and is vital to transparency on Code compliance. In terms of its public reporting function, the BCCC's reports provide unique data and insights into broader bank performance on its commitments to customers. We find particular value in the aspects of BCCC reports that analyse specific data in detail, such as those on the BCCC's own motion inquiries.

However, we see some clear shortcomings in the output and effectiveness of the role of the BCCC. The most obvious and easily fixable are the limits on the ability of the BCCC to identify banks in its Own Motion Inquiry and Compliance Statement reports. This greatly dilutes the transparency and effectiveness of the purpose of the BCCC.

[1] Available at: https://consumeraction.org.au/review-of-the-2021-australian-banking-association-code-of-practice/
[2] Available at: https://consumeraction.org.au/review-of-the-aba-banking-code-of-practice-response-to-interim-report/

The sanction powers of the BCCC should also be expanded, to be in line with ASIC Regulatory Guide 183 and other equivalent codes. Another more complex but just as important issue is the glaring inconsistencies in the data it receives from the banks. If the ABA wants the BCCC to be capable of most effectively improving Code compliance and the way banks treat customers, these issues should be addressed as a priority.

We have not responded to all the questions posed in the Interim Report, as some are outside our expertise, particularly where they relate to internal BCCC or bank matters. A summary of our recommendations is available at **Appendix A**.

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Question 1 – The Role and purpose of the BCCC

a) Would the BCCC's role and purpose be clearer if the Code and the Charter were amended to describe this as "monitoring Code compliance and promoting best practice Code implementation"?

Yes, it would make sense to have a consistent purpose expressed in both the Code and the Charter of the BCCC. This description adequately addresses the key functions and purpose of the BCCC at a high level.

b) What more should the BCCC do to build a shared understanding of its role and how it fits into the regulatory and quasi-regulatory landscape?

Consumer representatives have generally positive sentiments towards the BCCC and the way it performs its role. That said, there is some uncertainty about the boundaries of its functions, such as in relation to:

- The shared boundaries of oversight with the Australian Financial Complaints Authority (**AFCA**) and the Australian Securities and Investments Commission (**ASIC**)
- How it monitors and engages with the banks behind the scenes in relation to reports and other best practice work.

Interaction with ASIC

As new aspects of regulation come into play, the efficiency, effectiveness and understanding of the regulatory landscape for banking would be improved if the BCCC is able to create more certainty and share greater detail about how its role interacts with ASIC. There is obvious potential for unnecessary and confusing overlap between the role of the two entities, particularly as ASIC may have power to enforce certain Code provisions.

Industry, consumers and all other stakeholders would benefit if the BCCC and ASIC could work to establish both information sharing agreements, and a MOU or similar that sets out their respective roles, and divides areas of focus, to the extent that their powers are adequate and will allow. Ideally this would include a commitment to share information relating to data obtained from industry and complaints. Separate to reducing overlap for the banks in reporting, a significant benefit of information sharing would also come from allowing ASIC and the BCCC to share complaint information. It is currently common for consumer representatives to encourage and assist clients to lodge complaints at AFCA, ASIC and the BCCC, all for the same issue. Establishing processes to ensure that complaints and data go to wherever they are needed, regardless of who initially received the complaint, would make a significant difference in the experience of consumers in providing information to the BCCC and other regulators. It would also reduce double handling across the board. The potential of information sharing with ASIC is explored further in the submission in relation to specific types of data.

Interaction with AFCA

Increased clarity around how complaints made to AFCA feed into the work of the BCCC would also help other parties better understand where the BCCC receives (or does not receive) intelligence from. It is generally apparent at the point where a final determination is made by AFCA whether and what aspects of a dispute have been referred to the BCCC. However, this is less clear in the majority of cases which settle. In these circumstances, AFCA should still clarify with the complainant when they settle a dispute whether AFCA has or will alert the BCCC of the complaint. Any preliminary analysis by AFCA of potential Code breaches should be provided to the BCCC as standard practice. If AFCA is not going to, it should be made common practice for AFCA to inform the complainant that they may submit a complaint to the BCCC. This is explored further in response to Question 6 below.

Increasing transparency around best practice work

We understand that the publication of reports—from both Compliance Statement reports and own motion inquiries—is the final (or close to final) step in the BCCC's use of information and data it receives from the banks, and follows or coincides with direct feedback and engagement with the banks about the analysis. We understand

the banks report that they find this feedback to be valuable, however it is an aspect of BCCC work where there are limits on what is currently being published. The BCCC reports detail the recommendations made to banks. However, more detail about the specifics of BCCC engagement with the banks at this point would be helpful to better understand the impact of the BCCC. It would be particularly valuable if the BCCC began publishing what banks commit to do in relation to recommendations and feedback. Ideally this would be in an identified format, but even as de-identified information it would be useful to better understand how banks work with the BCCC, and what comes of these reviews.

c) Would there be benefit in the BCCC consulting more transparently about its proposed priority areas each year?

Some consumer representatives have been part of BCCC yearly consultation processes to determine their priority areas in the past, while others have not. For those involved, these processes have been useful and informative. The BCCC should continue to seek feedback from a range of consumer representatives each year, and adopt a formal and transparent process under which the attending organisations rotate, to ensure all interested and appropriate consumer representatives get a chance to provide input over time. We also anticipate that BCCC work plans would change across the year as new data and evidence is gathered of how banks are performing. To this end, consumer representatives would value being provided brief periodic updates (such as a brief email) from the BCCC on what issues they are working on are and most interested in, whenever there are meaningful updates. This would help us better identify what issues may be most worthwhile reporting to the BCCC. If the priority areas and current opinions of the BCCC did not reflect what recent casework is indicating to us, it would also provide a prompt to discuss this.

Question 2 – The BCCC and small business matters

It is our understanding that it is a small proportion of breaches of the Code that relate to small business customers, and that only a small proportion of BCCC Committee's work is therefore specifically focused on small business matters. Considering this, it is our view that adding a small business focused member to the Committee for all matters would be inappropriate. If there have been teething issues with optimising the role and impact of the Small Business Panel, we would recommend that a better interim step would be to set up clearer guidelines and processes for when and how the Small Business Panel is to be consulted, rather than appointing a specialist Committee Member, when small business expertise would not be relevant to a majority of issues considered.

We also recommend expanding the Small Business Panel to include a small business caseworker with experience from the specialist telephone financial counselling service for small business, the Small Business Debt Helpline (www.sbdh.org.au). As COVID-19 and lockdowns have pushed many small businesses – particularly in major cities – into financial situations they may have never faced before, this kind of additional expertise would be a valuable to the panel. The current members with financial counsellor expertise are predominantly focused on rural business.

RECOMMENDATION 1. Retain the Small Business Panel and provide further guidance about when Committee Members should seek guidance from the Panel, as well as what the guidance should involve.

Question 3 – The Charter's governance framework

While acknowledging that this review is treating the appropriate inclusion or exclusion of the BCCC Charter within the Code as a matter for the broader Code review, it is our view that the most logical place for the Charter would be for it to sit as an annexure to the Code.

a) Views are sought as to whether: An alternate member should only be able to be appointed where a BCCC member is absent or unable to participate for a prolonged period – and that in this case the appointing body should appoint the alternate rather than the BCCC member?

We support retaining the ability for a Committee Member to be replaced by an alternate to take part in a meeting, even if it is for a short-term absence. We do not see the harm in allowing alternates to play a role where there are unforeseen circumstances or legitimate reasons that a Committee Member cannot make a meeting. It is preferable for the appointed members to attend as many meetings as possible, but if a meeting needs to occur, this should not be prevented by one member being unavailable in the short-term. Personal circumstances are unpredictable, and flexibility in Committee operations should allow for this.

However, we agree that the ability to appoint alternates (whether short or long-term) generally should sit with the appointing body of that Committee Member, rather than the member themselves. We suggest the simplest way to manage this would be for the appointing body to designate a standard alternate at the same time as when the Member is appointed.

RECOMMENDATION 2. Retain the ability to appoint alternates for any period of a Committee Member's absence, but the alternate should be selected by the body that appoints the Committee Member.

b) Views are sought as to whether: There should be tighter provisions to deal with conflicts in the interests of maintaining the confidence of stakeholders?

Yes. The current approach taken in clause 12.4 of the Charter appears to permit Committee Members to make decisions on matters with potential perceived conflicts of interest, particularly for industry members. On our reading of the current clause 12.4, we would expect that a consumer or banking representative Committee Member would be considered to have a material personal interest in a matter that came before the BCCC if they had been directly involved in it in some way at their employer. However, it seems unlikely that the threshold would be met if the matter related to that current or a previous employer, but the member had no specific knowledge of it.

In our view, there is a perceived conflict of interest if a Committee Member is presiding over a matter directly related to the business interests of a current employer. If in future a banking representative member is a current employee of a subscribing bank and a matter relates to potential findings against that subscriber, they should be conflicted out of any discussion and decisions on the matter. It directly impacts the financial and reputational interests of their employer.

While the more likely situation may be that the current employer of the consumer member may lodge a complaint, the consumer member's situation is not the same. Consumer representatives act on behalf of their clients. Their organisation does not have any direct financial interest in the outcome of the complaint. The current limits on the powers of the BCCC regarding compensation and redress mean the client a complaint is made on behalf of would not have a financial interest, either. We certainly agree that if the consumer representative had been directly involved in the matter, they should be conflicted out. However, if the complaint simply comes from the employer of the consumer representative, we consider the conflict to be manageable. That said, if an appropriately qualified alternate was appointed and available where a complaint did come from the employer of a consumer representative, it would seemingly also solve any perceived problem of this type.

RECOMMENDATION 3. Amend clause 12.4 of the Charter to clarify that a Committee Member has a conflict of interest that requires them to conflict out if they are required to assess a matter that directly relates to the business interests of their current employer.

Question 4 - BCCC compliance statements

Question 4 Views are sought about the cost/ benefits of BCCC Compliance Statements and what changes should be made in light of the enhanced breach and complaints reporting to ASIC that will begin in October 2021.

a) Please comment on: The purposes served by the Compliance Statement process and BCCC reporting as to the data it collates from these

Increase bank focus on Code compliance

The Interim Report identifies one of the more valuable benefits of the Compliance Statement process at paragraph 107.a – that it requires banks to consider their Code obligations in detail and assess their level of compliance. The Code's value is directly tied to the extent that banks and their staff know and comply with their obligations. Most customers are not aware of the Code at all, let alone the specific commitments it contains. In most situations, whether the Code has any impact at all relies upon the bank having processes in place to ensure compliance, and their employees acting in accordance with those processes (and the Code more generally).

Accordingly, requiring banks to provide an assessment of their compliance with the Code plays an important part in making Code compliance a greater priority. Completing a Compliance Statement requires all bank staff to understand the Code obligations relevant to their work. If a bank hopes to accurately and properly complete a Compliance Statement, all their customer facing staff must undertake a level of self-assessment of their performance, and consider the experience of their customers. Proper identification of Code breaches could never hope to be achieved without this. If the review does recommend a materiality threshold or otherwise reducing the self-reporting obligations of banks in some way, one way to ensure this benefit is not lost could be to introduce a requirement for customer facing bank staff to complete self-assessments bi-annual or annually, to keep the Code at forefront of mind.

Ideally, Code compliance should feed into the design of banking systems, so that compliance is demonstrable and ensured by design. That said, in practice the vast discrepancy in Code breaches being reported suggests that few banks have got close to this point, and we have doubts about the accuracy of the self-reported data obtained in this process more generally.

The elements of Compliance Statements that go beyond merely identifying breaches also encourage important reflection within banks. Banks should absolutely know, or be committed to working out, why there has been any considerable variation in Code breaches. Breaches of the categories described in paragraph 83 of the Interim Report should be examined. If a customer has been significantly financially impacted, the bank should be able to explain to the customer what happened, so why not explain to the BCCC as well? The same goes for where the same breaches occur repeatedly – if the bank is serious about Code compliance, it should be investigating these issues already. In our view, Section B also only requires information that banks are highly likely already recording – if they weren't it would be concerning.

When listed as it is in paragraphs 82-87 of the Interim Report, the requirements of a Compliance Statement do read to be very detailed and lengthy. However, much of the information required in Compliance Statements should already be obtained by a bank committed to Code compliance. The required analysis of that information also should already be undertaken if the bank is seeking to improve compliance.

Transparency

Compliance Statements are also the main mechanism by which banks are held to account to their claim to comply with the Code. 99% of bank/customer interactions and consumer outcomes will never be scrutinised or assessed by any external source. Accordingly, these reports are almost always the final point at which there is any required assessment of whether a bank has complied with its own agreed upon rule book.

In the wake of the Royal Commission, all parties should place considerable value upon means by which the conduct of financial institutions can be measured. Banks should see it as an opportunity to demonstrate their claimed improved conduct, while regulators and the general public surely have the right to expect evidence for these claims. While Compliance Statements may rely on self-reporting, they are the best available broad indicator of whether the Code is generally being met.

Although genuine transparency is obviously stymied by the de-identification of published results, these Statements at least require the banks to account to the BCCC for their breaches. As the Interim Report mentions at paragraph 107.b-d, this disclosure provides for a key point at which the BCCC can analyse detailed information about Code compliance, which can lead to identifying trends and performance. This is an important function that can help identify potentially harmful trends across industry which may not otherwise be identifiable, as well as areas where individual banks are not measuring up. Based on the public commitments of the banks, we would expect this information to be useful in improving consumer outcomes.

The value of the transparency provided in these Compliance Statements is also reduced by the obvious vast discrepancy in the way breaches are identified and recorded. There is just no way that the banks are on the same page in how they treat this reporting, which does reduce the value of the Compliance Statement public reports, and probably the confidential feedback received by the banks.

This point of transparency, and the current existing shortcomings described above, cause consumer representatives to be sceptical of the proposal of the banks to introduce a materiality threshold. Based on recent reports, unless one major bank is incorrectly identifying many reported breaches or breaking them down incorrectly, there is no doubt that many other banks are already underreporting Code breaches. Rather than make a genuine attempt to get banks on the same page in terms of reporting, the ABA is first advocating for a materiality threshold that would reduce the obligation across the board.

There has been no compelling evidence from the ABA or any other source to indicate that a materiality threshold will get the banks to start measuring breaches in the same way. Based on current practice, it seems more likely that banks would interpret the materiality threshold differently as well, leading to additional unknown variables making comparison of performance more difficult. This and other concerns with a materiality threshold are discussed further below.

b) What data and insights in the BCCC's Compliance Statement reports are most useful? Least useful? Please point to specific examples in recent reports.

For the amount of data collected to produce them, the published Compliance Statement reports currently do not provide a wealth of valuable insights. If banks do not develop consistency in reporting and systems that can guarantee greater accuracy in reporting, they probably will never be, particularly while the information is de-identified. However, it is the main form of reporting we have on Code compliance, and it does perform the important functions described above.

If the majority of BCCC resources are going into assessing Compliance Statement data, reducing the way this function is prioritised may be worthwhile, provided it can free up more resources to undertake more deep dive own motion investigations. This also needs to be balanced however with the risk that it may leave no real means of ensuring a bank is complying with a Code provision across the board.

<u>Useful sections</u>

Consumer representatives have found particular value in parts of the Compliance Statement reports that speak in detail to a specific issue.

The sections in the July-December 2020 report which provide some detail on the proportion and impact of breaches related to the COVID-19 pandemic was useful information. We are currently in unchartered waters with

many unknown variables. We anticipate this information would help banks understand where increased risks exist, and how their experience may compare to others. This sort of information can also help put consumer representatives on notice identify where extra care or services may be needed for their client base.

The same can be said for the sections in the same report, and the report on the first half of 2020, regarding scams and fraud. This information can help put banks on notice about what better industry players are doing in regard to red flags, and it helps disseminate information about common scams to banks, and to other readers.

We also place significant value on the statistics relating to requests for financial difficulty made to the banks, and the outcomes of those requests. It appears this information is not published in all Compliance Statement reports, but when it is, it has proved useful and offers valuable insights into an area where trends can be difficult to identify. Including this information in the future would therefore be a welcome enhancement.

Data that should be useful, but currently isn't

Compliance Statement reports contain several important data points that are collected in Compliance Statements. However, current trends and the approach of banks to reporting particular factors greatly dilute their value.

One example of this comes with the overall number of reported breaches across the Code as a whole, as well as within specific chapters. These figures should ideally provide useful data points on trends and indicate where banks are improving, and where they need to place greater focus. However, for a long time now these reports have simply recorded a general trend for breaches to increase and banks have consistently reported that this increase only reflects an improvement in their ability to identify breaches. No doubt there were major changes to the way these breaches were reported in the years following the Royal Commission. However, at this point it is hard to make much of this data. Banks continue to report that despite the increase in breaches they are improving and that the bad culture of the past has gone.

Banks cannot continue to have it both ways. It is difficult to understand how banks can be so certain that things are improving, while they are still uncovering higher rates of breaches. We obviously do not want to discourage improved reporting, but there must be a tipping point where an increase in breaches is treated as cause for concern, rather than celebration. We encourage this review to consider whether requiring banks to provide more specific (perhaps quantified) detail on breach identification improvements may help improve accountability in this regard.

A similar issue also arises with the reporting of the causes of breaches. As set out in our submission to the broader Code Review, we consider the rate at which banks report human error to solely be responsible for breaches to be a concerning indicator that systemic issues are not being properly addressed. This should be an extremely valuable point of analysis for the BCCC and banks, that could help undertake a root cause analysis and improve customer outcomes, but instead seemingly indicates an inability to properly analyse problems, or an insistence that the Code simply sets such a high bar that it is not possible to train staff to consistently meet it. We do not accept this and would welcome any recommendations or insight into how the BCCC can get better data out of the banks in this regard.

c) Do you support any of the options put forward in paragraphs 110 and 111 of this Interim Report to streamline Compliance Statement reporting? Are there better options?

Materiality threshold

Consumer representatives are not wholly opposed to the concept of a materiality threshold. However, we cannot support this proposal at present and think that it should only be considered in detail if it is preceded by a genuine effort to improve the consistency in the way banks are reporting breaches at present. Current discrepancies give us no confidence whatsoever that the data issues would be fixed by the threshold, or that the threshold would even be implemented in the same way by all banks. Developing established rules around how breaches are to be reported must take precedence.

Should this issue be resolved, it is still our primary position that the most direct way for the banks to reduce the amount of resources that go into breach reporting to the BCCC is for them to put greater efforts into reducing the number of breaches. There are still Code breaches that should be wholly or predominantly avoidable but which are obviously not being treated with sufficient priority. An obvious example of this comes with the snail-like pace the banks are setting on improving their performance on cancelling direct debits. The recent BCCC report indicated improvement but by no means a good outcome, with a 71% pass rate.[3] While better than the 44% rate the last review found, it is not a good mark for something that should be one of the simpler fixes in terms of Code compliance. Consumer representatives have been raising this issue for years, but in spite of ample time and complaints, it still is not fixed!

Direct debits also provide another pertinent example of another problem with the materiality threshold – being the difficulty in how it is set. If the threshold was at the same level where the BCCC currently requires more detailed information (set out at paragraph 83 of the Interim Report), there is a good chance that failing to cancel most single direct debits would not meet the threshold. However, for some customers the failure to cancel a direct debit could have significant consequences. A bank telling a customer in financial hardship that they cannot cancel a direct debit for them may force them into prioritising an unfair or unaffordable and unnecessary expense, leaving them short and unable to afford essentials.

Any materiality threshold would need to have an effective mechanism that required banks to consider the subjective impact of the breach and the particular circumstances of the customer, when assessing if the threshold is met. Real care and consideration would need to be taken to ensure that breaches of this kind did not just fall off the ledger, particularly if the goal of the threshold is for banks is to spend less time identifying and reporting on breaches. In this regard, we would not support an approach that classified particular provisions as conclusively never meeting the materiality threshold. There are few, if any, Code provisions that we think breaches of are always immaterial. Further, to treat any as this would be to effectively remove them from the Code. Why would banks pay them any mind?

Similarly, there would need to be extra work taken to improve banks tendency to write breaches off as human error. If this continues, it may mean that a materiality threshold would hide significant ongoing systemic problems.

If a materiality threshold were adopted, it should also be developed with the primary goal of reducing the amount of BCCC capacity that is taken up by work related to Compliance Statement data and reports, rather than primarily focusing on the reduced reporting benefit to banks. We expect that in most instances reducing the types or number of breaches that are reportable would likely reduce the burden of this process for both the BCCC and the banks. However, an increase in available BCCC capacity is far more likely to lead to work that delivers a consumer benefit, compared with reducing the compliance burden for banks, where savings in time spent reporting could be directed anywhere.

RECOMMENDATION 4. The number one priority in improving the operation of Compliance Statements should be to establish transparent processes that improve the consistency in how breaches (and their causes) are identified and reported across banks. This must take precedence over the development of a materiality threshold.

Proposals in paragraphs 110.c-e

Streamlining reporting so that identical reports to those provided to ASIC could be provided to the BCCC to cover the same conduct and breaches as far as possible would make sense and could create significant efficiencies. However, the BCCC should retain a power to require additional supplementary aspects of information – both as a rule, to address gaps in ASIC's reporting data that can be pre-empted, and by means of follow up, if issues are

[3] https://bankingcode.org.au/app/uploads/2021/09/BCCC-compliance-update-cancellation-of-direct-debits-September-2021.pdf

identified based on the data received. Such arrangements also need to take heed of some of the exemptions that ASIC has, or is planning to, provide to industry from particular breach reporting obligations.

We would like to see this opportunity be used to develop a broader data sharing arrangement between ASIC and the BCCC. Progressing an arrangement beyond just the sharing of breach reporting data could have added benefits. For example, the BCCC and ASIC could also coordinate their strategic focuses of their specific inquiries to make them more purposeful and reduce overlap. As detailed above, developing a complaint sharing framework between ASIC and the BCCC would also make it possible for customers to lodge complaints once, but ensure that they are received by the appropriate bodies for any kind of investigation.

If the BCCC moved toward restricting reporting obligations to specific subsets of the Code, it would make sense to prioritise those which are higher risk. However, reporting should not be dropped permanently for any particular Code obligations, as this would risk that any focus on them within the banks would be lost, and Code compliance would be disregarded. While breaches of some provisions may predominantly be of lower risk, this can change depending on particular circumstances, and these provisions are still in the Code for a reason. If this is model considered, at a minimum some obligations deemed to be low risk should still be reported on in each period, but the low-risk provisions required should vary or rotate, so all provisions are reported on at some point. This would help ensure that banks retain the systems in place to monitor compliance and retain high standards in these areas. If this move was adopted, we would also like to see it come with a deeper analysis of a specific area in each compliance period, to allow the BCCC to produce more valuable insights within the Compliance Statement report.

At present due to the disparate changes in circumstances that are happening in society caused by the COVID-19 pandemic and associated lockdowns, we would not support moving to annual reporting. At present there is just too much changing at a fast pace that we think annual data would be extremely difficult to interpret. Should the broader economic and societal situation stabilise in future, annual reporting may be viable – particularly if the reports could be released after a similar time following receipt of the information as the six-monthly reports currently are. Any later, and the data would be too old. It would also mean only three reports would be released during each Code update.

Proposals in paragraphs 111 (Section B of the Compliance Statement)

The BCCC should still receive the information it currently obtains via section B of the Compliance Statement on complaints by some means. If banks are already reporting this information to ASIC, the information just needs to be passed on to the BCCC as well. This would reduce double handling for everyone involved.

We oppose the proposal in paragraph 111.b to dispense with the need to collect compliance monitoring information – at least until the banks stop telling the BCCC that any increase in complaint numbers is due to enhanced identification, rather than an increase in breaches. At the very least, there should be an ongoing requirement that any bank claiming to have improved breach identification in a reporting period explain what those efforts involve.

We strongly oppose a watering down of the level of information provided about financial difficulty assistance requests and outcomes. This is important information and there is little transparency around these issues via other sources. Unless this information is going to be collected and published by ASIC, we strongly recommend that it continues to be provided to the BCCC. There is also some valuable information obtained in Section B relating to lending, such as figures on co-borrower loans, consumer credit insurance, how many guarantees on loans have been enforced, figures on basic bank accounts[4], and statistics on direct debit cancellations. While many of these areas may benefit more from a 'deep dive' inquiry, monitoring statistics on this information still provides valuable insights, and surely helps inform the BCCC how to prioritise inquiries.

[4] This may be dispensed with if the data provided to the ACCC under the terms of their Code authorisation adequately addresses the issue in full https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association

While there may be some other aspects of the Section B information that may not be consistently essential, the provision of the information would impose a low imposition upon the banks. For example, how hard is it for a bank to track how much training and what type of training their employees are receiving in relation to the Code? The same goes for basic information around bank branches, customers, accounts and otherwise –surely these are not great burdens for banks to bear. We agree with the comment in paragraph 112 of the Interim Report that codification of the reporting system would surely reduce the burden for all involved.

d) Should the BCCC have the power to report on Compliance Statement data on an identified-bank basis?

Yes. The de-identification of data drastically reduces the value and transparency around the levels of Code compliance by the banks. This is an outdated practice that creates a massive hole in the efficacy and impact of Compliance Statement reports that needs to be addressed. It sits in contrast to the data reported on complaints by AFCA as well. The banks should agree to allow publication of the data they provide as a matter of course.

Publishing names in these reports is also likely to create more public interest and may result in media coverage of the BCCC's reports. The only BCCC publications which have been picked up in any detail by media in the past are the two that named banks. This would increase the reputational incentives for banks to improve their performance and provide transparent data, with answers to explain any trends that arise.

Any concern that naming banks would raise the stakes in a way that may incentivise reduced reporting of breaches (similar to the comments at paragraph 197 of the Interim Report) should also carry little weight. Honest reporting is essential to the idea of self-regulation. If banks respond to expanded powers of the BCCC by becoming more hesitant to properly report to the body, then we have to question the point of self-regulation and the Code. If the banks are committed to improving consumer outcomes and standing by the Code, they should be prepared to speak to their record on Code compliance, and individual banks could see it as an opportunity to distinguish themselves as a provider of a superior service. Any concerns about how size may impact reporting figures could be easily dealt with by scaling the data, or reporting breaches relative to proportion of market share.

RECOMMENDATION 5. Amend the BCCC Charter so that the information provided in Compliance Statements and own motion inquiries is not confidential, and can be reported on an identified basis by the BCCC.

Question 5 -What ASIC reportable situation reports should the BCCC ask banks to provide to it contemporaneously with ASIC lodgement?

There is likely to be a significant overlap between reportable situations under the ASIC breach reporting regime and Code breaches which currently require more detailed information to be provided under Section A of the Compliance Statement. Most of the information required to be provided to the BCCC in these circumstances is also covered by the ASIC reporting obligations.

If banks are preparing a report for ASIC on the breach and will eventually have to report substantially the same information to the BCCC, it makes sense for it all to be provided at the same time for any ASIC reportable situation (assuming it also involves a Code breach). If the reports to ASIC were also prepared to include the minimal additional requirements for the BCCC (this appears to us to only include what Code chapter was breached and the relevant product and business unit), the reporting could be completed in one go. The subsequent reporting in the Compliance Statement could then just list the number of breaches already notified by this manner in the reporting period, or list them by reference number or other identifier.

These are the kind of breaches that would even be reported on if a materiality threshold was in effect. It may also be that the BCCC would have different criteria for what kinds of breaches warrant further investigation than ASIC, being focused on the higher standard the Code prescribes in some circumstances. Any inefficiencies could be minimised if the BCCC worked to accept the reports in the same format as is required by ASIC.

There are benefits in the BCCC knowing what ASIC is receiving and may be investigating. It would help avoid duplication, and receiving the information sooner may help the BCCC launch relevant own motion inquiries sooner, when they are more relevant. There are also many reasons that ASIC may not investigate breaches that would be of interest to the BCCC, so just because ASIC didn't investigate a reported matter doesn't mean the BCCC would not wish to investigate a matter. Reporting these breaches contemporaneously should be preferred, particularly if it can be done through the one process (or two very similar ones).

RECOMMENDATION 6. Banks should be required to contemporaneously report any ASIC reportable situations to the BCCC, if they involve a likely breach of the Code.

Question 6 - What issues need to be navigated in a documented information sharing agreement as between AFCA and the BCCC?

Considering their closely related functions, having a clear document sharing policy between the BCCC and AFCA should be a priority that would help improve the effectiveness of both services. Any information sharing agreement between AFCA and the BCCC should:

- Empower AFCA to share information even where a matter resolves before a final determination is made. It is not clear whether AFCA shares information with the BCCC from the vast majority of cases which are settled before final determination. Even if AFCA has not have made a final determination, preliminary analysis on potential Code breaches should be provided to the BCCC. These cases would also be useful to examine whether banks were coming to the same conclusions on Code compliance as the BCCC would in contentious situations. This ability to share information should also not be impacted by any settlement agreement containing a confidentiality clause.
- Be developed with complainant informed consent and confidentiality in mind, when relating to specific matters. Where it would not impact the value of the information to the BCCC at all, AFCA should share details of complaints without providing the personal information of the complainant. Where personal information is necessary to share the details of the matter (or the BCCC may need to investigate further), AFCA should seek the prior informed consent of the complainant.
- Ensure that there are well established arrangements for AFCA to notify the BCCC of any trends it identifies in complaints, either about a particular bank, or the industry as a whole.
- Establish a process for the BCCC to refer matters that may warrant remediation to AFCA's Systemic Issues Team, as contemplated at paragraph 202 of the Interim Report.

Question 7 – BCCC Inquiries

a) How could the BCCC have sharpened the focus of its past Inquiries?

Consumer representatives consider the own motion inquiries of the BCCC to have resulted in its most valuable publications to date. The subject matter of past inquiries has been relevant, which suggests the process for deciding priority of inquiries is currently appropriate. That said, we would be happy to provide input into this process if appropriate or required in future.

Publishing greater detail in the initial stages about the process an inquiry will follow and steps involved would also beneficial. Consumer representatives report being uncertain about the status and progress of BCCC inquiries, particularly when information is sought early, then nothing is heard for a while. Setting out a clearer process would allow interested parties to better understand how information requested is being used at different times, and understand the likely outputs of the inquiry.

Just as with the Compliance Statement reports, the most significant restriction on the impact of the BCCC's own motion inquiries is the inability of the BCCC to name banks. In our view, these inquiries generally appear to be based on the most accurate and detailed information and data. The prospect of being reported on as an industry leader (or as a poor performer) in these reports would be a significant driver for banks to improve their compliance across the board, and in particular on issues where problems with Code compliance are known. There is no good reason that these reports should be de-identified.

As the Interim Report notes, the impact of some of the reports is also reduced where their publication takes a long time. That said, we hope that the BCCC is engaging with the banks in the interim to push them to address problems identified. In terms of how this can be addressed, it may be that the inquiries could focus more directly on Code breaches and conduct that is more likely to cause significant harm. That said, as we noted above, there should always be some recognition that some breaches that may appear to be lower risk may have a significant impact upon some individuals, depending on their circumstances.

b) How could the BCCC make more use of bank resources to gather and report data for a BCCC Inquiry?

This question is largely outside our area of expertise, as more useful responses will require an understanding of internal bank data, and how it is shared with the BCCC. However, we understand that one of the main reasons that BCCC reports can take a while to compile is because there are difficulties in collating, cleansing and developing consistencies across the data provided by the banks. While it is difficult for external stakeholders to know if this would assist, it may be worth exploring whether the BCCC can set more strict parameters about how they want data to be provided for own motion inquiries, so that it reduces the variability between what banks report and reduces the margin for misunderstanding.

d) Are there opportunities for the BCCC to work more in partnership with Customer Advocate Offices in relation to Inquiries?

In our submission to the broader Code review, we adopted the 2017 Code review recommendation that bank Customer Advocates report to the BCCC on the progress of the banks toward addressing non-compliance relating to direct debits. Whether such a responsibility rests with the Customer Advocate or the bank more broadly is not of great concern to us – just that there is an increased level of accountability in areas where longstanding poor compliance records exist.

It may be that for some banks, the Customer Advocate role is the best placed employee to liaise with the BCCC on particular issues. However this may not always be the case. In our experience, Customer Advocates at banks do play important and valuable roles in the organisations, but due to their role, sometimes sit independently from the bank's formal decision-making structure. While this may allow for a more independent and frank assessment and disclosure to the BCCC, this can sometimes mean that the Customer Advocate does not hold a sufficiently authoritative position in the bank to consistently directly influence priorities. Considering this, it may be that the relevant senior manager of the team within the bank responsible for direct debits (for example) is the best person to report to the BCCC on progress, and receive feedback where needed.

Question 7 f) - How could the BCCC help to reduce the workload for banks in reporting, without diminishing the intelligence gathered or reducing the confidence of stakeholders?

If the BCCC identifies priorities for future inquiry, providing greater notice to banks about the specific data required for the investigation (including specifically how it needs to be reported) may allow banks to collect data in a reportable manner from the outset. This approach would need to be balanced against the impact it may have on getting data that is actually representative of business as usual, and not reflective of banks temporarily putting extra resources into an area it knows will be the subject of a future report.

Question 8 - Investigations powers

a) Does the Charter unduly restrict the BCCC's discretion to investigate an allegation of a Code breach?

Yes. See below.

b) Should the BCCC be able to investigate an allegation that is made to the BCCC more than 2 years after the person making the allegation became aware of the event (subject to the application of the Guiding Principles in clause 3.1 of the Charter)?

We agree with the BCCC's position regarding the two-year limit imposed on their ability to investigate allegations, and support the comments in paragraphs 170-171 of the Interim Report. The BCCC's decision on whether to investigate an allegation should be considered on a case-by-case basis. The time passed from when the alleged conduct occurred should always be a relevant consideration, but any bright line time limit on the ability to investigate an allegation is inappropriate.

We strongly agree with the comments in the Interim Report that this strict time limit does not reflect the lifespan of some banking arrangements. For example, consumer representatives regularly assist customers who have been struggling for many years to keep up with the repayments on longstanding debt arrangements. In some situations, the customers may have been put on a hardship plan that was always going to keep them financial hardship years previous, but only realise that they should have been offered other options when seeking assistance from a financial counsellor. The Interim Report rightly points out that a dispute, via IDR and AFCA alone, could push out the two-year timeframe. In the 2020-21 financial year, 4% of banking and finance complaints before AFCA took over a year to close.[5]

The ABA is obviously correct that BCCC investigations should aim to be relevant to current practice, and this is something that the BCCC should take into account in particular when assessing complaints relating to older conduct. However, while some practices and processes in banking change, other things do not. In fact, some aspects of change in banking move at a frustratingly slow pace, and it is a reality that some lessons relevant to today could be learned from a review of conduct and processes many years before. The BCCC must ensure that it uses its limited investigative resources on matters that are relevant to current practices, but any hard restriction based on the time of an allegation is not appropriate.

RECOMMENDATION 7. Amend clauses 5.1c) and 5.3b) of the BCCC Charter to allow the BCCC to investigate an allegation regardless of when the relevant conduct occurred, if the BCCC considers it relevant to current banking practices, and otherwise consistent with its guiding principles.

c) Would there be problems if clause 5.3d) is reworded to clarify that the BCCC can investigate a Code breach allegation if another forum has considered the allegation but not made a finding as to whether or not the Code has been breached?

The biggest issue with the current clause 5.3d) is the way it interacts with disputes before AFCA. The role of the BCCC explicitly excludes determining redress and compensation for customers. In contrast, this is the fundamental role AFCA plays in overseeing dispute resolution, yet the BCCC is prevented by clause 5.3d) from considering a matter while it is before AFCA. The functions of the two do not overlap. For this reason we disagree with this exclusion applying to AFCA on principle, and recommend that it should be amended.

Separately, there is definitely scope to clarify clause 5.3d) to make its operation clearer and more reasonable without unreasonably impacting other forums. We understand the amendment proposed by this question would amend the last sentence, to help clarify that another forum does not explicitly need to decline to make a finding

[5] AFCA 2020-21 Annual Review, https://www.afca.org.au/about-afca/annual-review/2020-21/banking-and-finance-complaints

on a Code breach for the BCCC to investigate. Silence on the question of a Code breach by the other forum should be enough to allow the BCCC to investigate if it considers necessary and appropriate.

Additionally, as the lead body for enforcing the Code, any restrictions the findings of other bodies have on the BCCC's power to investigate should be limited to individual Parts of the Code. For example, say an ASIC investigation reached conclusions including that there was a breach of Part 4 of the Code, but does not speak to any other Part of the Code. If the BCCC also considers there to be reason to investigate whether a breach of Part 9 occurred in relation to debt collection regarding the same banking process, the BCCC should be able to investigate this, despite the finding on Part 4.

We also encourage the Review to consider further amending this section to allow the BCCC to undertake concurrent investigations as well, where parameters can be agreed with by another regulator (particularly ASIC). We would like to see ASIC and the BCCC to be able to come to an agreement where information is provided to the BCCC for Code compliance investigative purposes concurrently. This would require clause 5.3d) of the Charter to be amended so the BCCC could investigate before another forum completes their investigation, if agreements are made to avoid overlap.

RECOMMENDATION 8. Amend clause 5.3d) of the Charter to allow the BCCC to investigate Code breach allegations:

- at the same time that AFCA is considering a dispute relating to the same conduct
- if another forum has not made a finding as to whether or not the Code has been breached
- in relation to a specific Part of the Code even if another forum has made a finding about whether another Part of the Code has been breached, but not that Part
- concurrently while another forum is considering the allegation, if reasonable arrangements can be set up to ensure the BCCC's investigation will not impact the other forum and will not create unnecessarily overlap.

d) Does clause 5.4 of the Charter narrow in any respect the power of the BCCC to investigate alleged breaches of the Code, noting that the Code is clear that the law takes precedence? Is clause 5.4 unnecessary?

We consider clause 5.4 to have a minimal impact, considering other provisions of the Charter and the way the Code operates. It seems obvious that investigations would need to have regard to the Code and the law. Clause 5.4 may be unnecessary, but we think it does not cause any harm either.

Question 9 – Information from the BCCC about the outcomes of allegations to complainants

In the experience of consumer representatives, the information provided from the BCCC in response to a breach allegation is not consistent.

In one instance where the BCCC did investigate a complaint, Consumer Action received a detailed response letter. By comparison, where an allegation made on behalf of a client did not lead to an investigation, Consumer Action was simply told as much six months later.

Informing complainants about the outcome of any consideration or investigation of their complaint may increase the likelihood that consumers would engage in the complaint process with the BCCC. Consumer representatives do encourage and assist their clients to make complaints to the BCCC, but this can be a difficult sell when the complaint will not lead to any form of personal remedy, and there is no guarantee they will hear about the outcome of the complaint.

While there may be legitimate restrictions on the ability of the BCCC to disclose information about its decisions or processes in some circumstances, people should generally have a right to know about the outcome of their complaint insofar as the conduct impacted them. However, we appreciate provided a detailed explanation for why a complaint was not worthy of investigation may not be the top priority for an organisation with few staff, and it does reflect the processes of other regulators.

For consumer representatives, what would be useful to receive from the BCCC – be it in direct response to complaints or by another means – is feedback on what kind of information the BCCC is interested in, to help assess whether we should take the time of complaining to the BCCC, as contemplated in our response to Question 1.c).

Question 10 – Sanctions powers

Suspension and expulsion power

We reiterate our recommendation in the broader Code review that a power to suspend or expel banks be provided to the BCCC, though it is not a main priority as we recognise it is an extreme response and there is some complexity in whether this would benefit customers. However, we still consider there to be a fundamental flaw if a bank can make public claims to be a Code signatory while not making any effort to comply with the Code. The right to claim to be a Code signatory should not be unconditional – it should not be a club without obligations. It seems the BCCC would be the appropriate body to adjudicate this as well, though we hope that if a bank did display wilful disregard for the Code, the ABA would take action at a higher level.

Power to order a compliance review (Code clause 215.b)

The Interim Report correctly interprets our recommendation to the broader Code review regarding clause 215.b). The BCCC should be able to require a bank to undertake a compliance review of any direction made by any regulator (provided it relates in some way to a Code provision). There is no reason to restrict this power. We also recommend that this power should explicitly provide the BCCC the option of requiring that the review be undertaken by an independent auditor if necessary.

Power to report non-compliance to ASIC

As is clear from our comments above, we would like to see arrangements made to allow for coordinated and open sharing of information between ASIC and the BCCC more broadly. At the very least, this should permit the BCCC to alert ASIC to potential serious or systemic non-compliance. As noted above, opposition to broadening this power due to any claim it may create a reluctance for banks to be open with the BCCC is essentially opposing the whole underlying justification for self-regulation. The broader financial services industry regularly complains about the red tape imposed by regulation, and claim it is not necessary. If they cannot be trusted to self-report to a quasi-regulator, then it is hard to see how the industry can be trusted to regulate itself in any way whatsoever.

Naming banks

As is also clear from our comments above, we think that restrictions on the BCCC's ability to name banks in reports should be significantly amended. This includes broadening this power. There have been many significant instances of non-compliance with the Code in the last few years, yet only two banks have been named by the BCCC, and these arguably do not represent the most significant breaches of the Code. Where this does occur in relation to specific non-compliance, we support requiring the banks to publish information on their website to notify customers. If there were doubts about the ability to provide a sufficient message within a banking app, the bank could at least be required to provide a link to the article on their website.

RECOMMENDATION 9. The power of the BCCC to sanction banks by naming them for non-compliance should be interpreted more broadly.

Role in remediation

We support the preliminary thinking set out in the Interim Report that the BCCC should refer matters that may warrant remediation to AFCA's Systemic Issues Team, but also recommend that the BCCC should have the power to refer these matters to ASIC, where AFCA was of the view remediation was warranted, but terms could not be agreed with the bank. We also note that we are not aware of any major remediation programs that have been overseen by the AFCA Systemic Issues Team to date, so we encourage the reviewers to ensure this group has the capabilities necessary to perform this role as part of the review.

Community benefit payments

We see no good reason why the BCCC should not be provided with a power to issue sanctions requiring community benefit payments to be made. The power of the Insurance Council of Australia's Code Governance Committee has not caused any significant problems for that industry, and it can be an appropriate form of sanction in some circumstances, such as where remediation is not possible or the conduct of the bank is likely to have negatively impacted a particular community group in some way. Any concerns about whether a $100,000 payment will look 'derisory' should not stand in the way of implementing this sanction. $100,000 still looks far better than $0, and would likely make a major difference to the recipient organisation. Another way to avoid the size of this payment being considered tokenistic would be to increase the maximum amount payable under the sanction, particularly for the major banks. As noted in our submission to the broader Code review, we emphasise that the power should require the payments be directed to an entity that assists, as close as possible, those harmed by the conduct.

RECOMMENDATION 10. Introduce a sanction power that allows the BCCC to require community benefit payments be made where a significant breach warrants it. Payments should be required to be made to an organisation that as closely represents or benefits the class or individuals most likely to have been impacted by the conduct.

Question 11 - Secretariat support

c) Whether extended delivery times would be improved by a modest increase in appropriately skilled resourcing?

By and large, the resourcing of the BCCC is outside our area of expertise. However, we do emphasise that reducing delivery times on BCCC publications would help improve the overall impact of the Committee. We encourage the review to consider whether resourcing could be approached in different ways – such as whether increased funding could be alternatively used to develop programs to make reporting to the BCCC by banks easier and in a format that would greatly reduce the need for significant data cleansing to be undertaken. Alternatively, it may be that additional BCCC staff could run training programs for banks based upon the outcomes of investigations.

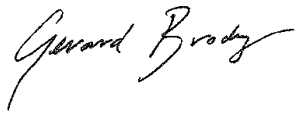
Additionally, we encourage the reviewers to consider whether the resourcing of the BCCC has expanded at a sufficient rate as the remit of the Code has expanded (and will hopefully continue to expand, with this review).

Conclusion

This review is an opportunity to significantly improve the effectiveness of the BCCC in terms of the impact it has on the experiences and outcomes of subscribing bank customers. While reducing the regulatory burden reporting to the BCCC imposes upon banks is also an important goal of the review, it must not take precedence over helping the BCCC most effectively deliver on its mandate, or this calls into question why the Code should exist at all.

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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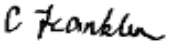

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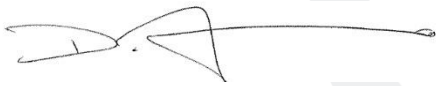

David Ferraro | Managing Solicitor
UNITING COMMUNITIES CONSUMER CREDIT LAW CENTRE SA

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. Retain the Small Business Panel and provide further guidance about when Committee Members should seek guidance from the Panel, as well as what the guidance should involve.

RECOMMENDATION 2. Retain the ability to appoint alternates for any period of a Committee Member's absence, but the alternate should be selected by the body that appoints the Committee Member.

RECOMMENDATION 3. Amend clause 12.4 of the Charter to clarify that a Committee Member has a conflict of interest that requires them to conflict out if they are required to assess a matter that directly relates to the business interests of their current employer.

RECOMMENDATION 4. The number one priority in improving the operation of Compliance Statements should be to establish transparent processes that improve the consistency in how breaches (and their causes) are identified and reported across banks. This must take precedence over the development of a materiality threshold.

RECOMMENDATION 5. Amend the BCCC Charter so that the information provided in Compliance Statements and own motion inquiries is not confidential, and can be reported on an identified basis by the BCCC.

RECOMMENDATION 6. Banks should be required to contemporaneously report any ASIC reportable situations to the BCCC, if they involve a likely breach of the Code.

RECOMMENDATION 7. Amend clauses 5.1c) and 5.3b) of the BCCC Charter to allow the BCCC to investigate an allegation regardless of when the relevant conduct occurred, if the BCCC considers it relevant to current banking practices, and otherwise consistent with its guiding principles.

RECOMMENDATION 8. Amend clause 5.3d) of the Charter to allow the BCCC to investigate Code breach allegations:

- at the same time that AFCA is considering a dispute relating to the same conduct
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- concurrently while another forum is considering the allegation, if reasonable arrangements can be set up to ensure the BCCC's investigation will not impact the other forum and will not create unnecessarily overlap.

RECOMMENDATION 9. The power of the BCCC to sanction banks by naming them for non-compliance should be interpreted more broadly.

RECOMMENDATION 10. Introduce a sanction power that allows the BCCC to require community benefit payments be made where a significant breach warrants it. Payments should be required to be made to an organisation that as closely represents or benefits the class or individuals most likely to have been impacted by the conduct.

APPENDIX B – 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 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.

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.

Care ACT

Care Financial Counselling Service (Care) has been the main provider of financial counselling for low to moderate income consumers in the ACT since 1983. Care's core service activities include the provision of information, advice, advocacy and support for people in financial difficulty. Care also provides a Community Education program, makes policy comment on issues of importance to its client group and operates a No Interest Loan Program.

Care runs the Consumer Law Centre (CLC), a community legal centre, which provides consumer credit and debt advice to vulnerable clients in the ACT. The CLC has operated for over 20 years and is the only specialist consumer law centre in the ACT. The CLC has experience in Australian Consumer Law, credit and debt issues, insurance, telecommunications issues, fair trading, bankruptcy, and financial abuse.

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.

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.

COTA Australia

COTA Australia is the peak national organisation representing the rights, needs and interests of older Australians. COTA Australia is the national policy and advocacy arm of the COTA Federation which comprises COTAs in each State and Territory. COTA Australia focuses on policy issues from the perspective of older people as citizens and consumers.

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04 October 2021

By email: submissions@bankingcodereview.com.au

Mike Callaghan AM PSM
2021 Code Review
c/o PO Box H218
Australia Square, NSW, 1215

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 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 isolation[3]

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.

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[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 page[13] nor on the BCCC website[14] 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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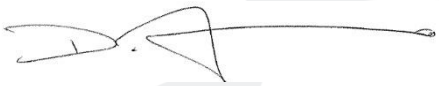

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APPENDIX A – ABOUT OUR ORGANISATIONS

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.

August 2021

2021 REVIEW OF THE AUSTRALIAN BANKING ASSOCIATION CODE OF PRACTICE

Joint submission by consumer organisations

2021 REVIEW OF THE AUSTRALIAN BANKING ASSOCIATION CODE OF PRACTICE

Joint submission by consumer organisations

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2021 Code Review
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By email: submissions@bankingcodereview.com.au

Dear Mr Callaghan

Thank you for the opportunity to respond to the 2021 review of the Australian Banking Association (**ABA**) Banking Code of Practice (the **Code**). This is a joint submission made on behalf of members of the Consumers' Federation of Australia (**CFA**), the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations.

The organisations that have contributed to this submission have a particular expertise in consumer finance laws, largely informed by the lived experiences of the clients we assist, through free financial counselling and legal advice services. Information about the contributors to this submission is available at **Appendix B**. Many of us regularly interact with the ABA and its members, both when representing our clients in disputes, and as advocates for the purpose of improving banking outcomes for consumers more broadly. Several representatives of our organisations are also current members of the ABA's Consumer Outcomes Group. Recognising our expertise and perspective, the ABA provided some resourcing to the CFA to support the development of this joint submission.

In the period since the last Code review, the Code underwent a plain language rewrite, the banks faced a Royal Commission and committed to reform, Australia has experienced numerous extreme weather events, and the COVID-19 pandemic has impacted many peoples' day to day and financial lives. The responses and the conduct of the ABA and its members throughout this period has been mixed. In some areas, the banks have provided real assistance to consumers, demonstrating a genuine desire to treat consumer outcomes as a priority and working collaboratively with our organisations to address consumer harms. However, there remains a number of areas where bank conduct disappoints consumers. While some issues are new, most relate to concerns raised by our organisations for years. Many of these issues continue to result in significant harm to consumers, most often impacting those who are more vulnerable, with bank conduct sometimes contributing to that vulnerability.

Despite the lessons of the Financial Services Royal Commission, there still appears to be systemic and cultural problems within banks that are not being recognised as such. We are concerned that banks still too often report 'human error' as the main cause of Code breaches, without properly identifying the root cause.[1] More important than improving the protections in the Code is the need for the banks to put more work into seeking to truly rectify problems within bank cultures, processes and systems that do not prioritise consumer outcomes. We urge the Code Reviewer and the ABA to approach this review with the goal of identifying addressing problems at their source, to improve the overall approach to Code compliance.

[1] As noted in the Bank Code Compliance Committee's Building Organisational Capacity Report: https://bankingcode.org.au/app/uploads/2021/02/BCCC-Report-%E2%80%93-Building-Organisational-Capability.pdf.

The recommendations in this submission are aimed at addressing conduct that we see cause consumers harm. They are wide ranging, as there remains room for improvement across all areas of banking services. We strongly encourage you to adopt our recommendations and push the banks to make substantial reforms to the Code that improve transparency around compliance and deliver valuable protections to bank customers. A summary of the recommendations contained in the submission is available at **Appendix A**.

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EXECUTIVE SUMMARY

Consumer representatives strongly urge the Code Reviewer and the ABA to approach this Code review with the primary goal of making banking services more accessible and fairer, particularly for people who are, or have been, experiencing some form of vulnerability or financial hardship. Making substantive commitments aimed at this goal needs to take priority. The commitments also need to be binding – the ABA should not use voluntary guidelines or aspirational goals where there should be binding commitments made that are enforceable by the customer. Even where there are very good existing commitments in the Code, consumer representatives see inconsistent application of these by the banks, making enforceability essential.

There is room for improvement across almost all areas of banking, and consumer advocates consider all the recommendations made in this submission to be reasonable and important. However, there are six key areas of emphasis where we urge the Code Reviewer and ABA to pay particular attention, which are:

- Supporting First Nations People. There are still many barriers that negatively impact the banking outcomes of Aboriginal and Torres Strait Islander people. Banks need to increase their focus on removing these barriers – be it due to language, physical remoteness, cultural differences or forms of systemic disadvantage experienced by First Nations People.
- Making interpreters available. A number of the commitments contained in the Code are directed at improving the way banks communicate with their customers. This all means nothing if the communication is not in a language the customer speaks. A Code commitment is needed to ensure that customers who need or prefer to use an interpreter – be it for an Indigenous language, another spoken language, or Auslan - are provided access to one for important conversations with their bank.
- Sale of debt. There are significant problems with the conduct by many players in the debt collection industry. The practices by debt buyers and contingent collectors acting on behalf of banks are a major problem experienced by people seeking assistance from consumer representatives. Banks need to take a more proactive approach to monitoring the conduct of debt collectors they do business with, and commit not to work with those who do not meet community expectations.

- Guarantors. It is not fair or reasonable that guarantors can sign up to arrangements where they risk losing their home under a contract where they receive no benefit. Cases involving vulnerable guarantors continue to be some of the most devastating situations that consumer representatives come across. Banks should not be forcing people out of their homes as a result of the default of a third party.
- Scams. The prevalence of scams has greatly increased over the last few years. A big part of this is due to the increased move towards electronic transacting, which has been pushed upon less technologically competent consumers faster than they are comfortable due to the COVID-19 pandemic. Banks are always in a better position to identify scams taking place over their systems, and need to take greater responsibility in their prevention.
- Implementing the Consumer Data Right. The legal framework which applies to this reform leaves consumers open to significant risks relating to the handling and sharing of their data. It is vital that this is implemented by the banks from a customer-focused perspective, with a particular focus on informed, voluntary and unbundled consent. The Code should be used to publicly commit to protect consumers' data.

We urge the banks to treat these issues, as well as the others identified, with increased priority. There are repeated references in this submission to recommendations accepted from the last Code review, but which are yet to be properly implemented. An example of this is the ongoing difficulty bank customers can face when trying to cancel direct debits and recurring payments.

Many of our other recommendations in regard to the types of support banks offer customers experiencing vulnerability or financial hardship will also not be new to the ABA. These are areas where the same problems arise far too often, are where there are solutions that we have pushed for years. There are some areas where we appreciate the ABA and its members are already working toward addressing. Our recommendations on those issues should be met with little resistance.

This review should also be treated as chance to reaffirm the commitment of the banks to the lessons of the Royal Commission. The trust of consumer advocates in the sincerity in the commitments made following the Royal Commission by the ABA and its members took a big hit when banks supported the proposed repeal of responsible lending laws by the Government. This process can address the reputational problems supporting that Bill has caused.

As numerous ABA members have commenced a foray into the buy now, pay later space, the ABA must also recognise the need for the Code to make commitments in this regard. The CEOs of the major banks have made public statements about the need for regulation in this space – this is their opportunity to take the lead in the marketplace. Just as important is the need for banks to be proactively thinking about how they can further commit to helping people who have been impacted by adverse weather events, as their frequency increases across Australia and the world.

In terms of Code enforceability, there is a need for the ABA to both expand the powers of the Banking Code Compliance Committee, and to engage with the Australian Securities and Investments Commission to make significant portions of the Code enforceable under statute. Enforceability of the Code is essential to its efficacy. Without substantial oversight, the Code is more a piece of marketing than anything else. The BCCC's powers are out of date. If the ABA is resistant to making the vast majority of the Code enforceable by ASIC, it must expand the powers of the BCCC to ensure it can respond appropriately and proportionately to breaches.

Incorporating all of our recommendations would result in an increase in the length of the Code. While the banks may be resistant to this idea, a longer Code means more valuable commitments to consumers. Unless the banks instead agree to make ABA industry guidelines enforceable, a longer Code is unavoidable if the banks want to use this process to improve the consumer protections and outcomes it provides.

Further work needed to deliver upon 2017 Review commitments

1. There have been considerable improvements to the ABA Code in the last four years. These were largely driven by the last review of the Code, completed by Phil Khoury who released his report in 2017 (**2017 Review**).[2] Updates stemming from that review introduced many more substantive protections to customers, and greatly improved the breadth of issues addressed in the Code. However, while we do not wish to re-hash the past review in detail, there are some key issues and commitments made by the ABA that are still not fully resolved. The Terms of Reference for this review specifically recognise submissions may address the operation of changes from the last review, in terms of whether they achieve their intended effect. The below points are areas we consider there is additional work needed to deliver upon the commitments that came from the 2017 Review.

The plain language re-write and the main audience of the Code

Plain language an improvement

2. A significant change to the Code recommended by the 2017 Review was the plain language re-write that was completed in 2019. As stated in the Consultation Note, the re-draft of the Code was aimed at making it more 'customer friendly' and more accessible, so that customers do not need substantial financial or legal experience to understand the commitments within it. The use of plain language has undoubtedly been an improvement in terms of accessibility. The Code is now easier to navigate and understand—even for lawyers, financial counsellors and others with financial services experience—along with customers without the same expertise.

3. However, it is the experience of consumer representatives that the re-write has not led to a drastic increase in the number of consumers that are aware of the Code, or the rights that it provides them. Consumers seeking our help are largely unaware of the Code, let alone how bank conduct may be in breach of it. This is not a criticism, it rather just reflects the reality that the Code is not likely to ever be a resource that a majority of consumers will turn to and rely on themselves, which aligns with the known limitations of disclosure in financial services in terms of offering effective consumer protections.

Substantial provisions should take precedence over plain language

4. Considering the above, while using plain language and making customers more aware of the Code are commendable goals, the desire to use plain language should not prevent meaningful principles as well as detailed and specific provisions from being introduced into the Code. The Code is going to be far more valuable to customers where it provides substantial and valuable commitments, even if it results in a longer, more detailed Code. As Khoury stated, adopting plain language should not make the Code any less enforceable.[3]

5. While new provisions and revisions absolutely should be written in plain language as far as possible to make them more accessible, the main benefits consumers will get from the Code come from the banks acting in accordance with the provisions in the Code, regardless of whether their customers are aware of them. The primary audience for the Code should still be Code signatories. Secondary audiences would be the Australian Financial Complaints Authority (**AFCA**), the Banking Code Compliance Committee (**BCCC**), the Australian Securities and Investments Commission (**ASIC**), financial counsellors, lawyers and other advocates, who can help enforce the Code when necessary. Strengthened provisions should result in an

[2] Independent Review – Code of Banking Practice, Khoury, Phil, 31 January 2017, available at http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf (**2017 Review**).
[3] Ibid, p 6.

improvement in conduct broadly, and means that there are real remedies available to customers if they are breached.

RECOMMENDATION 1. The Code should be reviewed from the perspective that making substantial commitments to improve consumer outcomes is most important, even if it means adding detail or complexity into the Code.

Use of Guidelines

6. Linked to this theme from the 2017 Review has been the introduction of industry guidelines, a number of which have been developed and published by the ABA in the last few years. Many of these guidelines go into greater detail about specific issues addressed in the Code. These guidelines are useful for ABA members and advocates in encouraging best practice.

7. However, a shortcoming of these guidelines has been their enforceability. Based on our review, it appears that all the guidelines explicitly state that they are voluntary or not binding upon ABA members. While this means that the ABA might be able to publish documents that recommend a higher level of conduct without buy in from all members, their value is significantly diminished by their lack of enforceability. Transparency around changes made to guidelines is also lacking, with previous versions not made available to the public.

8. There have been a number of guidelines that the ABA has developed with significant input from consumer advocates, on issues that we see causing significant harm to banking customers.[4] We recommend important aspects of these guidelines be made mandatory via the Code. The existing guidelines should make it relatively simple for these commitments to be incorporated into the Code without delay. Alternatively, the guidelines could be specified as enforceable and relevant to interpreting corresponding Code provisions.

9. If the guidelines are not incorporated into the Code, then detailed commitments within the guidelines must be made explicitly enforceable, and must be explicitly permissible to use to interpret relevant provisions of the Code. Developing guidelines that are not enforceable should not be considered as sufficient progress in lieu of changes that should really be enforceable and within the Code. Reliance on guidelines that are aspirational is contrary to the acknowledgement by leading institutions (commercial and government) during the Financial Services Royal Commission that the sector had often operated in ways that were clearly contrary to community expectations and in some instances were illegal. Enforceability is fundamental. Ultimately the legitimacy of the ABA rests on the commitment of its members and the ABA to do the right thing by consumers.

RECOMMENDATION 2. Where industry guidelines are used to expand on Code commitments, the guidelines should be made enforceable in interpreting those provisions of the Code, or the most important commitments in guidelines should be put into the Code.

Outstanding issues from the 2017 Review

10. While there were many improvements that came from implementation of the 2017 Review recommendations, there are still some not yet delivered on, despite being accepted by the ABA. It is disappointing that progress has lagged in these areas. Addressing those issues on a substantive, timely and transparent basis should be a priority for the ABA as part of this review.

[4] One example is the Sale of unsecured debt guideline - https://www.ausbanking.org.au/wp-content/uploads/2019/11/Industry-Guideline-on-the-Sale-of-Unsecured-Debt-November-2019.pdf.

Default fees

11. Recommendation 63 from the 2017 Review was to introduce a commitment to set reasonable default fees, having regard to the cost that the default act caused the bank.[5] As noted by Khoury in the 2017 Review, there was already clear public opinion at that time that banks should not be profiting off default fees. By comparison, the Customer Owned Banking Association's (**COBA**) Code of Practice contains a paragraph committing to set reasonable default fees with regard to their cost (as it did back in 2017, too).[6] Consumer representatives are very concerned that some signatory banks set overdrawn fees and/or credit card late fees at $20 (or even more), when the cost to the bank of an overdrawn account or late payment is less than a few dollars.[7]

12. In its formal response to the 2017 Review, the ABA indicated that it needed further time to consider recommendation 63, citing legal obligations including competition laws, and any potential regulatory approval required.[8] Considering that the COBA Code has been able to include an equivalent clause without any known issues, and the Code has ACCC approval,[9] these reasons should not stand as a barrier to inserting this clause. Member banks need to accept that the days of profiting from defaults are over and give effect to their acknowledgment during the Financial Services Royal Commission of cultures that are unacceptable.

RECOMMENDATION 3. Introduce a Code commitment to set default fees at rates that are reasonable having regard to the loss incurred. Banks should not profit from acts of default.

Direct debits and recurring payments

13. The key parts of recommendations 59 and 60 from 2017 Review were that the ABA should improve direct debit and credit card recurring payment cancellation processes for customers.[10] Both were supported by the ABA in principle,[11] yet this remains an ongoing issue for customers.

14. In 2017, the Code Compliance Monitoring Committee (**CCMC**) released a report indicating that compliance with the old Code provision requiring banks to assist customers cancel direct debits was an ongoing issue, as it had been for years prior.[12] In September 2019, the BCCC provided an update indicating that while there was some progress in this space, there were seemingly still problems.[13] Breaches of Chapter 34 of the Code (which covers direct debits and recurring payments) also remained a prominent feature in breach reporting for the 2019-20 financial year.[14] In some of these cases, customers were still being referred to the merchant to cancel the request. This indicates either inadequate training, or significant compliance failures, considering internal procedures back in 2017 were apparently clear on this issue.[15]

15. On direct debits, the ABA rejected part of the 2017 Review recommendation 59 suggesting signatory banks' Customer Advocates be tasked with championing this customer service issue and report to the

[5] 2017 Review, Khoury, above n 1, p 153.
[6] Customer Owned Banking Association, *Code of Practice*, January 2018, clause 5.2, https://www.customerownedbanking.asn.au/storage/customer-owned-banking-code-of-practice-january-2018-1607307671vNoPS.pdf (**COBA Code**).
[7] See for example, https://www.hsbc.com.au/content/dam/hsbc/au/docs/ways-to-bank/personal-banking-booklet.pdf ($20 overdraw fees); RBA research indicated that the average late payment fee for credit cards was $18 in 2020 https://www.rba.gov.au/publications/bulletin/2021/jun/bank-fees-in-australia-during-the-covid-19-pandemic.html.
[8] Australian Banking Association, *Code of Banking Practice – Response by Australian Bankers' Association to Review Final Recommendations,* 28 March 2017, p 23, https://www.ausbanking.org.au/wp-content/uploads/2019/05/Banking-Industry-response-to-Khoury-Review.pdf (**ABA 2017 Review Response**).
[9] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association.
[10] 2017 Review, Khoury, above n 1, p 143-145.
[11] ABA 2017 Review Response, above n 7, p 22.
[12] Banking Code Compliance Monitoring Committee, *Report: Improving banks' compliance with direct debit cancellation obligations*, October 2017, https://bankingcode.org.au/app/uploads/2019/06/CCMC-Report-Improving-banks%E2%80%99-compliance-with-direct-debit-cancellation-obligations-October-2017.pdf.
[13] Banking Code Compliance Commission, *Direct debit compliance update*, September 2019, https://bankingcode.org.au/direct-debit-compliance-update-september-2019/.
[14] Banking Code Compliance Commission, Banks' compliance with the Banking Code of Practice – January – June 2020, *April 2021*, p 30.
[15] 2017 Review, Khoury, above n 1, p 142.

CCMC on it. Cancelling direct debit payments should be easy for people to do, and is important to allow them to manage their own money. Being unable to easily stop direct debits can have a significant impact on the financial wellbeing of people on modest incomes in particular, as it means the amounts being debited can take precedence over other essential expenses. Financial counsellors continue to report that banks are not cancelling direct debits as requested. We encourage the reviewer to again recommend that bank Customer Advocates report to the BCCC on progress on this issue.[16]

16. On recurring payments, the ABA has failed to deliver on recommendation 60 of the 2017 Review to build functionality and processes to enable banks to carry out customer requests to cancel credit card recurring payment arrangements. This is a long-standing issue and it is time that it was fixed. The reason it has not been addressed is because of the cost for banks to do so. It is unreasonable for banks to earn interchange fees from these payments but not be prepared to fund the investment to allow consumers to switch them off. There should be an easily accessible process in branches, on internet banking websites and in apps to cancel these payments.

17. While it is yet to be released, we understand the recent update to the COBA Code of Practice will contain a clause that will commit members to providing clear, simple guidance on their websites about the difference between direct debits and credit card recurring payments, as well as how to cancel both of these. We strongly recommend that ABA members commit in the Code to the same.

RECOMMENDATION 4. Implement recommendations 59 and 60 of the 2017 Review on direct debits and credit card recurring payments, and consider further recommendations to ensure customers are able to easily cancel these payments.

<u>Cancelling credit cards or facilities where no financial default has occurred</u>

18. Recommendation 27 from the 2017 Review was that banks should explain the reason for cancelling a credit card where possible, and recommendation 28 was to restrict banks from enforcing credit facilities early against individual or small business borrowers for non-monetary defaults, with limited exceptions.[17] Recommendation 27 was accepted and introduced into the Code by clause 144.The wording of the clause however gives the banks a broad out by requiring this only if it is 'appropriate'.

19. While recognising the discussion on recommendation 28 in the 2017 Review primarily concerned small businesses, the recommendation clearly covered individuals as well. The ABA response indicated the industry required additional time to consider the recommendation, but supported the general goal of improving transparency and moving away from clauses allowing broad reasons for cancellation, as well as explaining reasons for cancellation more clearly.[18]

20. Non-monetary defaults for small business contracts are covered in reasonable detail under Chapter 22 of the Code. However, there are no equivalent clauses that apply to individuals in the Code. The only other clause which comes close to covering the issue is clause 143 – we may close an account in credit (which also doesn't preclude closing an account in debt).

21. We see no reason why there cannot be a similar commitment in the Code to that for small business customers, for consumer customers. This would involve restricting the reasons that banks may treat as non-monetary defaults under credit facilities together with a commitment to always explain why the bank is cancelling an account, particularly if it is in debt – including for credit cards.

[16] Having banks report to the BCCC as a method for monitoring progress on issues is discussed in the response to term of reference 5 below.
[17] 2017 Review, Khoury, above n 1, p 92.
[18] ABA 2017 Review Response, above n 7, p 11.

RECOMMENDATION 5. Introduce a Code commitment not to enforce credit facilities against individuals for non-monetary defaults except in limited circumstances, like those contemplated for small businesses in clause 80. Amend clause 144 so where a credit card is cancelled by the bank, commit to telling customers why unless it is prevented by law.

Term of Reference 1: Amending the Code to address recent law reform

The Financial Services Royal Commission

22. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) shone a light on many serious and widespread problems that had become ingrained in the culture and practices of large financial firms in Australia. Throughout the Royal Commission and in the months following Commissioner Hayne's Final Report (**Hayne Final Report**) being published,[19] the ABA and its members indicated a commitment to adopting all the recommendations and genuinely stamping out extremely harmful practices and attitudes in their businesses.

23. However, in the last 12 months, as the COVID-19 pandemic and Government delays and backflips have lengthened the implementation process, it appears to consumer advocates and regulatory specialists that the ABA and its members are now looking to cut corners on some of these recommendations, or depart from some altogether. The most obvious of these has been the ABA's support of the Government's proposed repeal of responsible lending obligations. For the ABA to support the repeal of responsible lending obligations in contradiction of recommendation 1.1 of the Hayne Final Report is extremely disappointing. The ABA's stance on this issue creates doubts about whether the banks remain committed to learning all the lessons and truly fixing the problems so clearly highlighted by the Royal Commission.[20]

24. The recommendations below address areas where the Code should be amended to help ensure relevant recommendations from the Hayne Final Report are fully implemented by ABA member banks, and would help the ABA demonstrate a genuine commitment to heed the lessons of the Royal Commission.

Point-of-sale reform

25. Recommendation 1.7 in the Hayne Final Report was for the Government to abolish the 'point-of-sale exemption', which allows retailer partners of licensed credit providers to sign people up to credit products to purchase another product (the principal product), despite the retailer not holding an Australian Credit License (**ACL**) themselves under the *National Consumer Credit Protection Act 2009* (**NCCP Act**).[21] Point-of-sale lending constitutes a significant portion of irresponsible lending matters seen by consumer representatives, which suggests that retailers regularly fail to make appropriate lending decisions when using this exemption. Records often indicate a failure to properly record and assess the true financial position of the customer. Salespeople are incentivised to close the sale, which relies on the consumer being approved for the credit product. Mismatches with incentivisation were clearly and recurrently highlighted during the Royal Commission's hearings and in its findings.

26. Consumer representatives continue to assist consumers who have been signed up to inappropriate personal loans and credit cards that they were never able to afford, and which put their financial wellbeing at risk, via the point-of-sale exemption. These issues are particularly common in car yards and appliance stores, including some of Australia's largest brands.

[19] Financial Services Royal Commission, *Final Report*, February 2019, https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf (**Hayne Final Report**).
[20] https://www.ausbanking.org.au/statement-from-aba-ceo-anna-bligh-on-the-release-of-the-final-report-of-the/.
[21] Hayne Final Report, Financial Services Royal Commission, above n 18, p 86-88.

27. Recommendation 1.7 should have been quickly implemented, yet the process has stalled and is now well behind schedule. While the Government apparently remains committed to this reform, we are concerned that the Government will continue to stall or abandon this commitment.

28. Consumer advocates recognise that most banks don't take advantage of the point-of-sale exemption, but we nevertheless urge the banks to take the lead on this issue, particularly considering ABA members issue most credit cards. A commitment in the Code not to rely on the point-of-sale exemption would be consistent with the lessons of the Royal Commission, and could provide further motivation for the Government to deliver on its promise.

RECOMMENDATION 6. Introduce a Code commitment that member banks will not establish or maintain any arrangement with third party retailers under which the retailer can sign up individuals to credit products using the point-of-sale exemption.

Design and Distribution Obligations (**DADOs**)

29. The DADOs, coming into effect on 5 October 2021, will require that issuers and distributors of financial products design and distribute products to suitable target markets. Products should be consistent with the objectives, financial situation and needs of the target market, and issuers and distributors need to then take reasonable steps to ensure product distribution is consistent with the relevant target market determination (**TMD**), which must be recorded.[22] The commencement of the DADOs should help reduce situations where customers are signed up to financial products that are inappropriate, or poor value.

30. However, the DADOs confer few legal rights to individual consumers. The laws are focused on product design and distribution to target markets, rather than conferring rights on individual consumers. Further, while it is necessary to publish TMDs, ASIC guidance indicates that it does not consider TMDs to be a consumer-facing disclosure document,[23] meaning they are likely to be complex and not necessarily designed with consumer understanding in mind. To address these issues, we make the below recommendations.

RECOMMENDATION 7. Introduce a Code commitment to:

- publish plain language target market determinations for all relevant products; and
- provide redress to customers who are sold a product in circumstances where they are not in the DADO target market .

31. We also strongly encourage the ABA to use the introduction of the DADOs to introduce Code commitments to not market credit products to children.

RECOMMENDATION 8. In regard to children, introduce a Code commitment to:

- not market products directly to children through school programs or any other means; and
- not include children in the target market determinations for any products that charge monthly fees or fees for own-bank ATM transactions, default fees, EFTPOS transactions or BPAY transactions.

[22] ASIC, *Regulatory Guide 274: Product design and distribution obligations*, December 2020, https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-274-product-design-and-distribution-obligations/, p 6.
[23] Ibid, p 46.

Remuneration

32. Recommendation 5.5 in the Hayne Final Report was to fully implement the recommendations of the Sedgwick Review of 2017.[24] Broadly speaking, the Sedgwick Review's recommendations focused on banks moving away from remuneration structures and performance assessments that are directly or solely based on sales performance, and changing bank culture more broadly to focus less on sales.[25] This is a crucial aspect of the reform needed to properly address the cause of some of the worst customer outcomes that were examined by the Royal Commission.

33. The ABA recently commissioned a final independent assessment by Mr Sedgwick into the implementation of his recommendations, and the ABA reported that the process had been fully completed, and the change was a substantial achievement.[26] While this is encouraging, we draw the Code reviewer's attention to the results of surveys undertaken by the Finance Sector Union (**FSU**) in relation to this review, which indicated that a significant number of staff did not believe the change in remuneration structure and performance assessment had actually been substantially made.[27] Some responses suggested that the changes being made were more cosmetic than substantial. As noted by Commissioner Hayne, full implementation of the Sedgwick Review recommendations will only have the desired impact if it is achieved both in letter and spirit.[28] We accordingly encourage the Code Reviewer to consider whether it is necessary to seek further information from the FSU, or otherwise from bank sales staff directly, to determine whether further action is required to fully implement the Sedgwick Review recommendations.

Consumer Action Case study – Silvia's story

Silvia's (name changed) only source of income is the pension and she has no savings. Silvia told us that:

She suffers from depression and has had issues with different forms of addiction. Silvia told us that she had done all her banking for the last 20 years with the same big 4 bank.

Earlier this year, Silvia went into her bank branch in the outer suburbs of Melbourne and took out a $25,000 loan, which was secured over her home (which she previously owned outright). Silvia says that she had originally asked for $20,000 and told the bank representative that she wanted it to pay off $5,000 she owed on her credit card, and to do some home improvements.

Silvia recounted that the bank representative asked her some questions about her finances, and then the representative told her she was going to receive a $25,000 loan—$5,000 more than she asked for. She felt that they didn't really give her a choice about getting a loan for a lower amount.

The mortgage required Silvia to repay $133 a fortnight—or around 14% of her pension. Silvia told us that she was already having trouble affording her utilities, groceries, home and contents insurance and health insurance on the pension before taking out the loan. She also owed money to her son, but the bank didn't ask her about other liabilities like this. She was already living pay check to pay check.

While Silvia managed to make the repayments, the loan was causing her a great deal of stress. She has attempted suicide because of stress. The loan repayments were direct debited from her account a few days after her pension is paid each fortnight. The real reason Silvia didn't miss any repayments is because she still had the loan funds to pay for things. She spent most of the loan funds already, and she only has $7,000 left.

[24] Hayne Final Report, Financial Services Royal Commission, above n 18, p 374-375.
[25] Stephen Sedgwick AO, *Retail Banking Remuneration Review Report*, 19 April 2017, https://www.retailbankingremreview.com.au/wp-content/uploads/2017/04/FINAL_Rem-Review-Report.pdf (**Sedgwick Review**).
[26] Stephen Sedgwick AO, *Retail Banking Remuneration Review: Final Report* May 2021, https://www.ausbanking.org.au/wp-content/uploads/2021/06/Retail-Banking-Remuneration-Review-Final-Report-2021.pdf.
[27] Finance Sector Union, FSU Submission: Sedgwick Review into remuneration 2021, April 2021, https://3kqyiv26wqw515se566olqgq-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/FSU-Submission-Sedgwick-review-public.pdf.
[28] Hayne Final Report, Financial Services Royal Commission, above n 18, p 370.

Silvia complained to the bank, claiming the loan was provided in breach of responsible lending laws as it was larger than the loan she requested and the repayments were causing her financial hardship. The bank acknowledged that it could have been more prudent in advancing the funds, and offered to waive all future interest on the loan, and refund any interest already paid. Silvia was happy with the bank's acknowledgement and this resolution.

34. Furthermore, Mr Sedgwick's final report found that there has been limited progress by the banking industry to capture data correlated with good consumer outcomes, noting that banks need to develop measures of customer outcomes, not just customer satisfaction or advocacy. This sort of data is necessary to determine whether remuneration practices are or are not contributing to customer outcomes.

35. The general commitments by the banks in implementing the Sedgwick Review should be enshrined in the Code, so that its lessons are not forgotten. This should be an enforceable code provision.

RECOMMENDATION 9. Introduce an enforceable Code commitment that staff remuneration structures and performance assessments will not be solely or directly based on sales performance.

Consumer Credit Insurance (**CCI**)

36. While it took a Royal Commission for some insurance product issuers to acknowledge it, CCI has long been recognised as a form of junk insurance. Chapter 18 of the Code already addresses the sale of CCI, however this will likely need to be revised to ensure all clauses comply with the new anti-hawking of financial products laws and deferred sales model (**DSM**) for add-on insurance, which will apply to the sale of CCI from 5 October 2021. We encourage banks to consider implementing protections that go beyond the law in the Code in relation to CCI, given the long history of poor consumer outcomes related to this form of junk insurance. Banks should not be selling CCI products with low claim to premium ratios at all after the DADOs are introduced, as these products so rarely provide good value to consumers.

37. Clause 67 in the Code needs to be amended to ensure compliance with the DSM, as an offer to sell CCI could not be made by a bank until at least four days after the customer has made a 'commitment to acquire' the principal product—which may require more action from the customer than just applying for it. We also suggest that clause 68 be deleted—the DSM sets a higher bar for communication during the legislated deferral period.

38. Consideration should also be given to whether clauses 62, 64 and 65 also need to be amended, to make clear that these interactions for the most part may only occur four days after the commitment to acquire the principal product has been made. The additional protections in these clauses should be retained in any amendments.

39. Clauses 64, 65 and 66 should be expanded to apply to all sales of CCI – not just those sold via digital channels. In particular, the commitment at clause 66(a) not to offer CCI altogether where a customer is not eligible to claim a significant part of the policy should be a commitment in all situations. We note that the new version of the COBA Code will make this commitment.

40. After 5 October 2021, when the DADOs, DSM and anti-hawking laws come into effect, we anticipate there being very limited situations where CCI could be sold in accordance with the law.

RECOMMENDATION 10. Expand the operation of clauses 64, 65 and 66 in the current Code to apply to all sales of CCI, not just when it is sold in digital channels.

RECOMMENDATION 11. Introduce Code commitments:

- not to sell CCI with low claim to premium ratios; and
- to provide a refund to any customer sold CCI if they are largely ineligible to claim under the terms of the CCI product.

Responsible Lending Obligations

41. As noted above, the Royal Commission recommended retaining responsible lending laws in the NCCP Act as they currently stand. Disappointingly, the ABA has supported the Government's *National Consumer Credit Protection (Supporting Economic Recovery) Bill 2020* (**NCCP Repeal Bill**), which contradicts the recommendation 1.1 of the Royal Commission. Consumer advocates strongly oppose the NCCP Repeal Bill. Commissioner Hayne was very clear that responsible lending laws should be applied as they stand, not weakened:

> *"…I am not persuaded that the terms of the NCCP Act should be amended to alter the obligation to assess unsuitability. My conclusions about issues relating to the NCCP Act can be summed up as 'apply the law as it stands'."*[29]

42. An even more obvious endorsement of responsible lending laws was present in Commissioner Hayne's Interim Report:

> *"A critical legislative step towards fostering effective competition in the consumer lending market, and enabling the confident participation of consumers in a lending market in which both consumers and lenders trade fairly and in good faith, has been the introduction of the responsible lending provisions of the NCCP Act."*[30]

43. Consumer groups have expressed our serious disappointment in the decision of the ABA to publicly support the Government's proposal to repeal responsible lending obligations. Responsible lending laws are critical safeguards that help to greatly reduce the risk of consumers being sold unaffordable credit.

44. The ABA's support for the repeal also backflips on its commitments to implement recommendations from the 2017 Review. Recommendations 15 and 16 from 2017 Review were directed at making the banks' commitment to lend responsibly more prominent.[31] The ABA committed to this, such that the commitment exists in the Statement of Guiding Principles.[32]

45. The terms of reference for this review specifically refer to potential changes to responsible lending obligations. The Consultation Note speaks to this issue at Part 12, which includes a note that breaches of responsible lending obligations were the third highest of all breaches in 2019-20. Our recommendations on this topic are written in a way that is mindful of the uncertainty about the future law in this area.

46. For member banks to deliver on their important promise to lend responsibly, we recommend replacing clause 50 in the Code with more substantive provisions, enshrining the fundamentals of responsible lending laws in the Code. Recommendation 13 should apply to all loans to individuals that are wholly or predominantly for personal, domestic or household purposes, or to purchase renovate or improve a residential property for investment purposes. This commitment in the Code would not be an adequate substitute for responsible lending laws as they stand in the NCCP Act, given the many lenders who are not members of the ABA and the limitations on enforceability. Nevertheless, we consider a commitment to

[29] Hayne Final Report, above n 18, p 60.
[30] Financial Services Royal Commission, *Interim Report,* Volume 1, September 2018, https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf, p 21.
[31] 2017 Review, Khoury, above n 1, p 64-66.
[32] ABA 2017 Review Response, above n 7, p 6.

lending responsibly in the Code, in line with the existing responsible lending laws, is still a worthwhile improvement.

RECOMMENDATION 12. Insert a Code commitment into Chapter 17 not to provide or increase credit to a borrower if they could not comply with the financial obligations under the credit contract, or if doing so would cause them substantial hardship. This should include a commitment to assess and verify the borrower's requirements and objectives, income and expenses.

RECOMMENDATION 13. Retain all existing commitments in the Code relating to responsible lending to individuals.

47. These recommendations should not pose any real concern for the banks. If responsible lending laws are retained, recommendation 13 would replicate the existing law – which clause 50 essentially already does. If the NCCP Repeal Bill were to pass, there would also be consequential changes to an APRA prudential standard requiring ADIs to assess an individual borrower's capacity to repay without substantial hardship.[33] APRA standards, however, do not give customers any legal rights, leaving a very problematic gap the Code could then fill. Additionally, leaders of some of the big 4 banks have recently stated in Parliamentary inquiries that not much would change even if responsible lending laws were repealed.[34]

Other law reform[35]

Mandatory credit reporting

48. The *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (**Mandatory Credit Reporting Act**) passed on 3 February 2021. The Act introduces a new mandatory comprehensive credit reporting regime and provides a framework for the reporting of hardship arrangements between credit providers and their customers, on customers' credit reports. Under the Mandatory Credit Reporting Act, there will be two categories of information that are reported on a borrower's credit report by a creditor each month a contract is on foot – being:

- Repayment History Information (**RHI**), which is reported as a number from 0 to 7 (0 meaning that payments are up to date), and is retained for two years; and
- Financial Hardship Information (**FHI**), which indicates whether or not a financial hardship arrangement under the NCCP Act has been agreed to. Records of hardship arrangements are retained for one year.

49. One of the concerns consumer advocates have with this system is that hardship arrangements recorded on credit reports might deter borrowers from seeking hardship assistance, even when it could greatly relieve financial pressure on them. People might be concerned that having FHI recorded will reduce their options for obtaining credit in future, or impact other existing credit facilities. As key providers of credit, a public commitment by the banks not to refuse credit applications solely on the basis of FHI flags could help reduce consumer concerns and the risk of struggling customers avoiding hardship assistance.

50. Rather, banks should use FHI flags as a trigger to seek further information about the borrower's financial situation. It may be that the hardship that led to the arrangement has been resolved, or that the new product is cheaper and more suitable than the product the hardship arrangement exists on. Using FHI flags in this way can produce better lending outcomes for borrowers and banks. To help ensure that FHI is used appropriately and to provide better oversight in this new area of law, the banks should also be required to

[33] https://www.apra.gov.au/consultation-on-revisions-to-new-prudential-standard-aps-220-credit-risk-management.
[34] House of Representatives Economics Committee Estimates, *Hansard,* 15 April 2021, Canberra. See for example, CBA CEO Mr Matt Comyn's remarks that only very modest changes would be made to operational processes, and no changes whatsoever would be made to income verification, should the NCCP Repeal Bill pass.
[35] The establishment of AFCA and the BCCC are addresses below in responses to term of reference 4.c. and term of reference 5, respectively.

record how they use FHI, and report to the BCCC on this generally – such as by providing data on how often FHI is used in a lending decision, and rating the significance placed on the FHI as part of that decision.

RECOMMENDATION 14. Introduce a Code commitment not to use FHI as the sole reason to make adverse decisions on credit facilities, including:

- to cancel a credit facility, or reduce the limit;
- consider as a 'default' under an existing facility; or
- to refuse an application for credit.

RECOMMENDATION 15. Banks should be required to report periodically to the BCCC on how often FHI is used in credit decisions, and the extent to which it influenced those decisions.

51. Another issue with the system under the Mandatory Credit Reporting Act is its complexity. Even following the passing of the Act, there has been disagreement between consumer advocates, banks and the Australian Retail Credit Association about how RHI and FHI should interact where hardship arrangements are on foot. Unfortunately, these complexities will have an impact upon the credit reports of banking customers when flags are added.

52. Communicating in plain and clear ways about the impact on customers' credit reports of financial hardship arrangements is vital. This would go a long way to improve consumer understanding of the credit reporting system. Additionally, banks should notify consumers in real time (for example via their banking app or by other communication) when they will report negative RHI or any FHI on the customer's credit report. This would provide an opportunity for customers to make a payment when they are able to pay on time, and provide an opportunity for inaccuracies to be corrected before harm is caused. Banks should also commit, as far as they are able to under the law, to not record RHI or FHI where the default is related to family violence or financial abuse.

RECOMMENDATION 16. Introduce a Code commitment to clearly communicate with customers about what kind of hardship arrangement has been agreed (or not agreed) and the impact of any arrangement, or late payment, on the customer's credit report. This should include how RHI and FHI will be reported, in addition to default information.

RECOMMENDATION 17. Introduce a Code commitment to inform customers in real time when a bank has reported negative RHI or any FHI on their credit report.

RECOMMENDATION 18. Introduce a Code commitment to not record RHI or FHI where the default is related to family violence or financial abuse, and this is within the law.

KEY AREA OF EMPHASIS: THE CONSUMER DATA RIGHT (CDR) AND OPEN BANKING

53. In the time since the 2017 Review, the Government has developed, amended and (largely) implemented CDR rules, following a review into open banking. The CDR is not contemplated at all in the Code, and there are very limited references to confidentiality and privacy in the Code, despite a guiding principle speaking to it.

54. There are still changes and updates being made to the CDR rules, standards and other instruments that make up the broader CDR legal framework. However, some of the changes over the last 12 months have caused significant concern for consumer representatives, with major concessions being made by Treasury to reduce the FinTech industry's costs and oversight, at the expense of consumer protections. As the framework currently stands, there are holes in the CDR framework. While the CDR has been marketed by the Government as part of a commitment to give people greater control over their data, these holes mean

that the CDR regime does not mandate that industry treat the confidentiality of, and informed consent to share, consumer data as top priorities.

55. The ABA and its member banks have taken a leading role in the development and introduction of the CDR as it applies to banking, and have displayed a willingness to support consumer rights in this space. By introducing appropriately targeted Code commitments on this issue, the banks can help fill some of the gaps in the CDR framework, and demonstrate to customers that banks can be trusted with handling their personal financial information. The CDR and open banking can help streamline many parts of banking, but it is vital that consumers have confidence in the system and trust their data and information will only be used for the purposes they want and understand.

56. One primary issue that needs to be addressed in the Code is in regard to the way the banks seek consent from customers to use their data. A fundamental building block of the CDR must be that it operates only with the informed, voluntary consent of consumers. Consumer representatives are already seeing broad bundled consents to data sharing being required as a precondition to use the CDR in many situations, with little to no opportunity upfront to restrict the ways their data may be shared. Sometimes this requires consumers to provide their consent to allow their data to be shared for marketing purposes as a precondition to acquiring a product or service. Banks need to ensure that CDR consents are not misused, and should give customers every opportunity to consent only to the use of their data that is actually necessary to deliver the service or product they are seeking.

RECOMMENDATION 19. Introduce a Code commitment that when banks seek the consent of a customer to use, record or disclose their personal information, that the consent sought will be voluntary, express, informed, specific as to purpose, time limited unbundled and easily withdrawn.

RECOMMENDATION 20. Introduce a Code commitment that where a requesting customer consents to use or disclose their personal information for marketing purposes, the bank will:

- not make consent a precondition for the customer to obtain a banking service or product;
- provide sufficient information for the customer to understand how their personal information will be used, and by who; and
- rely only on positive affirmation to the question, rather than using an opt-out process.

57. In addition to the risk of personal information generally being shared beyond a customer's intentions, consumer representatives are particularly concerned about the lack of protections for consumers experiencing vulnerability, and the potential difficulty that may be involved in accessing the limited protections that do exist.

58. There are a handful of clauses in the *Competition and Consumer (Consumer Data Right) Rules 2019* (**CDR Rules**) that allow data holders to refuse to disclose data if they consider it necessary to prevent physical or financial harm.[36] However, there is no obligation for banks or other data holders to have systems in place for recording this data, or to provide consumers with a means for self-identifying as vulnerable to potential abuse. Without proactive efforts from industry to inform consumers of these rights, beyond that required under the law, vulnerable people in these circumstances will remain unaware of their rights.

59. This situation could be made worse by further potential amendments to the CDR regime regarding joint accounts, which if passed, would undermine the right to voluntary, informed consent. Treasury have

[36] CDR Rules, clauses 3.5(1)(a); 4.7(1).

recently consulted on changes to the CDR that would create a single consent data sharing model for joint accounts. This would mean that a joint account holder's data could be shared through open banking based solely on the other account holder's consent. The model proposed would use an opt-out process as the default, assuming pre-approval has been given by the other joint account holder. This would put customers experiencing economic abuse or family violence at increased risk, as the CDR system could be used to perpetrate financial abuse, while requiring an additional action from the victim to put a stop to it.

60. The Code cannot fix these fundamental design problems with the CDR, but it is hugely important that the banks do take the actions they can, such as to do everything in their power to inform customers of their rights if they are at risk of abuse, and establish processes to help them exercise these rights.

61. Beyond these concerns with the flaws in the CDR system, we also encourage the banks to commit to providing customers with useful CDR-based tools to help them better manage their bank accounts. One example of this would be to address the ongoing issues with direct debits and recurring payments, by at least making information on existing transactions of this nature easily accessible to customers.

RECOMMENDATION 21. Introduce a Code commitment to include prominent and easy to identify pathways for joint account holders experiencing economic abuse or family violence (in branch, online, and in app environments) to alert banks to these issues in order to enable customers to better rely on the protections contained in the CDR Rules.

RECOMMENDATION 22. Introduce a Code commitment to providing a CDR-based tool for customers that lists all direct debits and recurring payments.

Increasing use of artificial intelligence (**AI**) in banking

62. We also strongly encourage ABA members to ensure that the increasing use of technology in banking is undertaken to a high ethical standard, and does not risk negatively impacting their customers.

63. AI in banking can speed up banking processes and make life easier for customers. However, it is essential that the use of AI applications does not discriminate or otherwise negatively impact fairness or safety. Australia's recently developed Artificial Intelligence Principles are a valuable guide in this area.[37] The Commonwealth Bank of Australia (**CBA**) was involved in developing these voluntary principles. A public commitment to meet these principles would help guide good industry practice in this area, and send a positive message to the public about the intent of ABA members in the use of AI.

64. To lead the field in this space, we recommend that ABA members have regard to the recommendations of the *Human Rights and Technology: Final Report*, released by the Australian Human Rights Commission, earlier this year.[38] We consider recommendation 10 in particular to represent an important commitment to customers that could be easily reflected in the Code.

RECOMMENDATION 23. Introduce a Code commitment to meet Australia's AI Ethics Principles in developing and introducing the use of AI in banking.

RECOMMENDATION 24. Introduce a Code commitment to notify any customer when a bank materially uses AI in a decision-making process that affects the legal, or other significant, rights of the customer.

[37] Department of Industry, Science, Energy and Resources, *Australia's AI Ethics Principles*, https://www.industry.gov.au/data-and-publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles.
[38] Australian Human Rights Commission, *Human Rights and Technology: Final Report*, March 2021, https://tech.humanrights.gov.au/downloads.

Term of Reference 2: enforceable code provisions

65. As is recognised in the Consultation Note, consumer representatives have supported the development of the enforceable code provisions regime, but have held concerns about the ability of industry to pick and choose specific code provisions to be enforceable by ASIC.[39] These concerns relate to the risk that industry deciding what is enforceable will undermine the intent of the reform, make the status of the code (part enforceable, part not) more confusing to the public, and lead to enforceable provisions being prioritised by industry over non-enforceable ones.

66. These concerns are still held by many consumer representatives. Member banks should comply with all provisions of the Code, regardless of whether the particular provision is enforceable by ASIC.

67. That said, we recognise that pushing to make all code provisions enforceable may have the potential to encourage subscribers to avoid making further commitments under the Code that go beyond the law, and provide further protections for consumers. This is a disappointing by-product of a poorly designed enforceability regime. We have made recommendations throughout this submission about which provisions in the Code we consider should be made enforceable. We also recommend that the ABA improve alternative means of enforcing the Code– see our response to Term of Reference 5 and the powers of the BCCC on this issue in particular. It is also essential that all provisions remain enforceable by consumers under contract, and these obligations can be used by consumers through all forms of dispute resolution.

Our view on the ABA's qualifications on Commissioner Hayne's view

68. The ABA's 2019 submission to Treasury on Hayne Final Report Recommendation 1.15 addressing the enforceability of industry codes sets out the ABA's position on this issue.[40] While we agree with some of the criteria recommended in the submission for identifying enforceable code provisions, we disagree with some of the recommended restrictions and would go further in some other aspects.

69. The ABA's submission on enforceable code provisions essentially recommends the following additional criteria be met for a clause to be enforceable, on top of Commissioner Hayne's view[41] that any terms that can form part of the contract between a bank and customer should be enforceable:

- that the provision set out specific obligations, rather than general guiding principles or statements;
- that the provision provides a material protection to customers (and a breach would cause a significant loss);
- that the provision goes beyond the existing law and not just duplicate legislative obligations; and
- that the provision addresses matters within ASIC's jurisdiction, as opposed to something covered by another regulator's remit, such as APRA or AUSTRAC.[42]

70. We recognise the value in the first criteria—provided that the line between general and specific is reasonably drawn. For example, clause 10 of the Code is sufficiently specific to be enforceable and is a clause that can be given sufficient meaning to be applied to a particular situation (as it has already been in decisions by the BCCC). This is discussed further below in response to term of reference 4.a. This qualification cannot be taken to restrict eligible clauses to those that have a black and white meaning, such

[39] See for example, https://consumeraction.org.au/wp-content/uploads/2020/03/Recommendation-1.15-Enforceability-of-financial-services-industry-codes.pdf/.

[40] ABA, *Consultation Paper: Enforceability of financial services industry codes: taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission*, 18 April 2019, https://www.ausbanking.org.au/wp-content/uploads/2019/05/Enforceability-of-Codes.pdf (**ABA Enforceable Code Provisions Submission**).

[41] Hayne Final Report, above n 18, p 108-112.

[42] ABA Enforceable Code Provisions Submission, above n 37, p 5.

as meeting a specific number of days to do something. There is no good reason to take such a restrictive approach, given many legislative provisions are principles-based without that level of specificity. Another example of a clause we consider to be sufficiently specific is clause 38—concerning the Code commitment to take extra care with customers experiencing vulnerability. When assessing the treatment of a customer who meets this criteria, compliance with this clause could be assessed. If there was little to no assistance offered by a bank to a customer experiencing vulnerability, the bank should face repercussions for this failure.

71. We agree with the second of the ABA's additional criteria—that the provision provide a material protection to customers, depending on where the line is drawn. The ABA's submission suggests limiting this to "significant" provisions that protect customers from behaviours that could give rise to real and identifiable damages or losses.[43] What is "significant" must be determined having regard to the vast differences in the circumstances of consumers. In financial terms, significant loss should include any clause that if breached, may cause financial loss. While an incorrectly charged fee may be a drop in the ocean to a wealthy bank customer, it may be the difference between being able to pay the bills and put food on the table for a person in financial hardship. Material losses can also be non-financial, and a broad interpretation of what is significant loss is essential here, too. In short, our view is that low value losses and non-financial impacts (such as distress) should be included as real and identifiable damages and losses.

72. The third criteria set out by the ABA is also reasonable—if the obligation already wholly exists at law elsewhere, there is no need for a clause to be made an enforceable Code provision. That said, we would expect that this means the ABA will commit to revise the enforceability of any clause should there be a relevant change in the law. Where a clause even only partially goes beyond the existing law though, this should still be made enforceable (see our comments regarding clause 10 below for an example of this).

73. To the extent that the ABA's last criteria extends beyond the third criteria, we disagree with the ABA's position. Regardless of whether a Code clause relates to the jurisdiction of another regulator, if the commitment goes beyond that which exists at law, it should be made enforceable. If necessary, ASIC can seek to consult with other regulators to help assess compliance in these situations, but the ABA cannot claim its members have a free pass on all issues that stray into the realm of another regulator. We take particular issue with this argument considering the ABA's current support of the NCCP Repeal Bill seeks to remove the jurisdiction of ASIC over responsible lending by banks. It would be a ludicrous position for the ABA to take to suggest that if this passes, the role of APRA as the primary rule maker for responsible lending precluded making Code provisions on responsible lending enforceable. This criterion should be abandoned.

74. By applying these criteria in the way we propose, we anticipate that the majority of substantive Code commitments should be enforceable Code provisions. We see no reason why most Code provisions that provide a substantive protection to consumers should not be made enforceable at law. A code of practice is required to be a set of rules that provide commitments to their customers – not vague statements or descriptions, and if the banks are going to put their name to a Code containing these provisions, there should not be any major concern about their enforceability.

RECOMMENDATION 25. All Code clauses that make a commitment that goes above other existing law, offers material protection to customers and is reasonably specific, should be made enforceable Code provisions.

[43] Ibid.

Compliance problems should be addressed by enforceability

75. In addition to the Code provisions that meet the criteria set out at recommendation 25, the ABA should commit that Code clauses which are frequently being breached by members will be made into enforceable provisions, to help motivate and drive compliance. In practice, it is likely that most of these provisions would already meet the criteria set out under recommendation 25, if adopted. However, should there be a (not already enforceable) Code provision identified by the BCCC as being regularly breached, it should be made enforceable in response. There have been ongoing issues with compliance in areas where banks have dragged their feet for years, such as in relation to cancelling direct debits upon request. In compliance reports to the BCCC, the vast majority of breaches are also still being put down to human error,[44] which raises doubts about whether anything is likely to change with the status quo.

76. The ABA should commit to a process for ensuring that Code clauses which are breached frequently or repeatedly are made enforceable provisions, if they are not already. The BCCC should be given the power to direct the ABA to act on these provisions, based on areas they identify as problematic. The provisions should then be made enforceable 12 months after the BCCC identifies the provision. This would serve as a motivator for the banks to fix ongoing areas of non-compliance, but also give the banks an opportunity to fix the issue.

RECOMMENDATION 26. The ABA should commit to make any clause for which substantial or repeated non-compliance is reported to the BCCC an enforceable Code provision, to help improve compliance.

Code provisions difficult for consumers to monitor

77. There are also a number of Code clauses that set out commitments that customers may have some difficulty alleging breaches of based on their own experiences. Some examples of these include clause 37 and 39 regarding training (a customer won't know if the employee has been trained or not, even if their conduct suggests they haven't) and would include a clause committing to the Sedgwick Report recommendations, if implemented as per recommendation 9 above. While these are enforceable at contract and may be explored in disputes by AFCA, compliance is far better identified by a regulatory body, rather than via disputes arising out of contracts.

78. We encourage the Code Reviewer to consider whether these are clauses that should still be enforceable by ASIC to complement contractual enforceability and BCCC oversight, to help drive compliance.

Term of Reference 3: Inclusivity, affordability and accessibility

KEY AREA OF EMPHASIS: SUPPORTING ABORIGINAL AND/OR TORRES STRAIT ISLANDER PEOPLES

79. Working in partnership with Aboriginal and/or Torres Strait Islander peoples (who we have referred to forthwith as First Nations peoples) to help address the impact of consumer credit and debt issues should be a priority for the ABA and all member banks.

[44] BCCC, *Banks' compliance with the Banking Code of Practice – January – June 2020*, April 2021, https://www.afca.org.au/sites/default/files/2021-04/BCCC-Report-Banks-compliance-with-the-Banking-Code-of-Practice-January-to-June-2020-April-2021.pdf, p 11.

80. We have continued to see consumer credit and debt issues detrimentally impact First Nations communities throughout recent years, including in relation to banking products.[45] These issues are largely the same problems that have been known for years, yet little has changed.[46]

81. Banks have an important role to play in partnering with First Nations communities to address some of these impacts. This is a commitment that needs to be taken seriously at all levels within banks. In recent years, there have been increased efforts by some ABA members to be more proactive in this area, but they have had mixed results. Where problems have arisen, specialist consumer representatives report that common issues appear to be under resourcing and support of teams and services dedicated to assisting First Nations customers within the banks, incomplete consultation with First Nations' communities, and a lack of prioritisation and follow-through. Because of this, progress has been piecemeal and slow. Examples of this have occurred with the rollout of dedicated Indigenous customer lines. While these are a great initiative, some have been plagued by excessively long wait times, suggesting under resourcing as well as bureaucratic policies and procedures that limit their effectiveness. This issue is made worse when First Nations customers are told they cannot call the general bank line instead, forcing them into an inaccessible or substandard service.

82. Banks must embed cultural competency and safety into their practices at all levels, and work in partnership to ensure First Nations communities have their voices heard, are aware of their rights and can access culturally appropriate services in all areas of banking. This should include member banks committing to ensuring that staff at all levels, from the board down, undertake appropriate cultural competency and safety training. Banks should adopt a strengths-based approach in working with First Nations communities and enter into partnerships with respect for, and trust in, the leadership, knowledge and services of the community, as recommended by the Close The Gap Campaign Report 2021.[47] This includes building steps into key decision-making processes in banks to consider community perspectives on how bank processes and policy positions may impact First Nations peoples.

RECOMMENDATION 27. Introduce a Code commitment that every ABA member embed cultural competency and safety into their practices and training, and work in partnership to ensure First Nations communities have their voices heard, are aware of their rights and are aware of culturally appropriate services in all areas of banking.

RECOMMENDATION 28. Introduce a Code commitment that all ABA member banks will adopt a strengths-based approach in working with First Nations communities and enter into partnerships with respect for, and trust in, the leadership, knowledge and services of those communities.

Other commitments

83. For many First Nations people, English is their second, third or even fourth language. This can make understanding the intricacies of complex financial products even more difficult, as well as generally communicating with bank staff. In areas where there are substantial First Nations communities who predominantly speak an Indigenous language, banks should engage interpreting services, to help reduce a significant barrier for some First Nations people. While these services are not widespread, they are available – for example in the Northern Territory, the Aboriginal Interpreter Service provides interpreting

[45] For further information, see the following examples of consumer group research published on this issue:
Consumer Action Law Centre and Victorian Aboriginal Legal Service, *Consumer Issues in Victorian Aboriginal Communities during 2020: Integrated Practice Project Report*, June 2021, https://consumeraction.org.au/wp-content/uploads/2021/06/VALS-IP-Report_FINAL_UPDATED2_WEB.pdf;
Indigenous Consumer Assistance Network Ltd, *Yarnin' Money Report*, 2019, https://ican.org.au/wp-content/uploads/2019/05/YMReport2019.pdf.
[46] See for example, M. Schwartz, F. Allison and C. Cunneen, Australian Indigenous Legal Needs Project, 2013, *The Civil and Family Law Needs of Indigenous People in Victoria*, https://apo.org.au/sites/default/files/resource-files/2013-11/apo-nid36506.pdf
[47] https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-2021.

services. Where services are available, banks should also arrange for the translation of important documents, or at the very least, make sure documents are in plain English (see Recommendation 38 below).

84. One issue that consumer representatives who work with First Nations people report as an ongoing problem is the fees charged for using ATMs. While the ABA and ACCC have worked to increase the availability of fee-free ATMs in remote communities, there are still ATMs charging considerable amounts for withdrawals (often with withdrawal limits) and balance enquiries. Where clients seek to withdraw a significant amount on a single trip to an ATM, this can result in multiple $2.50 fee charges, which add up to a sizeable amount for people on low incomes.

85. Fee charging ATMs are still used as they are often more readily available, particularly as many more bank owned ATMs appear to be getting phased out in recent years. We encourage the ABA to look into ways to address the huge fees charged by privately owned ATMs, and work to increase the number of fee free ATMs as an association wide issue.

86. We support retaining the reference at clause 35.c) of the Code to following AUSTRAC's guidance on identification and verification of persons of Aboriginal and Torres Strait Islander heritage. However, this remains a highly problematic area, as banks appear to take too narrow an interpretation of this guidance, to the disadvantage of First Nations people. The practical implementation of the guidance needs to improve. Some of the problems reported by consumer representatives include:

- that identification requirements change from call to call with the same bank, and can differ between banks;
- the broader list of examples of people and entities that can verify identification within the main section of the AUSTRAC guidance is not being applied to First Nations customers.[48] Instead, some banks seem to confine the entities who can verify the identification of First Nations customers to the shorter list of four entities within the section headed "Flexible Approach for Aboriginal and Torres Strait Islander customers". The list of people and entities who can verify First Nations customers should be read in addition to the broader list in the main section of the guidance, not in exclusion to that list;
- banks having lists of community elders able to verify identities, but the lists are out of date;
- banks will not yet accept financial counsellors as being able to identify clients; and
- in the NT, not accepting the "evidence of age card" which is a government-issued card, used as a form of identification if a person does not have a driver licence or passport and includes a photograph.[49]

87. One urgent step needed to help reduce barriers here is for banks to accept registered financial counsellors and community lawyers as referees for AUSTRAC guidance purposes, in line with the second dot point above.

88. Providing more detail on specific bank policies in this area would also help ensure consistency and navigate this difficult issue. These policies should also set out the processes banks use to identify which of their customers identify as First Nations people. Being more proactive in identifying First Nations customers is essential for a bank to better assess and understand whether these services are accessible by the people who need them, as well as their wider impact.

[48] https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/customer-identification-and-verification/identifying-customers-who-dont-have-conventional-forms-id.
[49] https://nt.gov.au/driving/mvr-services/apply-for-nt-evidence-of-age-card.

RECOMMENDATION 29. Introduce a Code commitment to making interpreting or translation services available at branches for common First Nations languages and dialects.

RECOMMENDATION 30. Introduce a Code commitment to ensure that fee-free ATMs are available in all remote and regional areas.

RECOMMENDATION 31. Introduce a Code commitment that banks will publish a policy or guidance on their processes and alternative requirements for customers with limited identity documents. This should include specifically clarifying:

- that referee statements for First Nations people can come from any person listed in the AUSTRAC guidance (either under the general section, not just the 'Flexible approach for Aboriginal and Torres Strait Islander customers'); and
- the processes banks use to proactively identify First Nations people amongst their existing customer base.

89. First Nations people living in remote areas can also be impacted by the distance necessary to travel to a bank branch. This issue is covered further in regard to branch closures, in response to term of reference 4.c) below. For many First Nations communities, the nearest bank branch might be hundreds of kilometres away, or the roads may be impassable in the wet season for many weeks. As an example, a consumer representative acting for a client with multiple loans from a major bank was told that their request for documents could not be processed as the bank had no identification on record for the client. The client apparently needed to attend a bank branch – the nearest being over 900km away in Cairns. As with the availability of ATMs, we strongly encourage the ABA and its members to work together with First Nations communities to improve the availability of banking services , for example, by providing mobile banking services that travel to remote communities on a regular cycle. These issues will also be addressed by better training of staff interacting with First Nations people, for example, to check the location of the customer before suggesting they travel to the nearest branch and improved identification processes.

KEY AREA OF EMPHASIS: CULTURALLY AND LINGUISTICALLY DIVERSE CUSTOMERS

90. We support stronger commitments in the Code to make interpreters available for customers who need them. For people from non-English speaking backgrounds, having interpreters available to help with banking is an issue of access, inclusion and equality. It is all too common that financial counsellors to work with clients from non-English speaking backgrounds who have been signed up to loan and insurance products that they were sold to them despite them not understanding their rights and obligations under the contract.

South East Community Links Case Study: Amina

In 2016, Amina, a Burmese woman, applied for a credit card when she needed money to bring her fiancé to Australia. She did not know how to make the application, so she used a middle man recommended to her by a community member. This "middle man" made the application online, to the same bank that Amina banked with, for a card with a limit of $13,000.

When the card was approved, he went with her to the bank. He took her to the ATM and got her to obtain a cash advance of 15% of the approved credit limit ($1950) which was his "fee".

When Amina presented to financial counselling for assistance with a credit card debt in early 2018 she had been trying to make the payments and was borrowing money to meet other living expenses. Her English was limited, and an independent interpreter was required to support Amina with her financial issues.

In our discussions, it was clear that Amina did not know what interest was and did not understand that an application for a credit card did not require a fee to be paid to a middle man.

91. Banks should commit to using independent, trained interpreters. Alternative arrangements such as relying on bank staff who speak other languages is not appropriate as they are not trained interpreters nor are they independent. It also risks impinging upon the customer's right to privacy in situations where a cultural group in an area is small and well connected.

92. Relying on family members, friends or community members to assist a customer is also problematic because:

- there is no guarantee that their interpreting skills are sufficient to cover technical financial details;
- they might have vested interests in the outcome of the conversation;
- these arrangements might perpetuate economic or financial abuse; and
- if things go wrong because of a misunderstanding, this can cause additional problems between the customer and the person who helped them. Financial counsellors have seen some particularly sad examples of this involving children that were relied on for interpreting.

South East Community Links Case Study: Samia

Samia, a youth leader at SECL mentioned that recently she attended a Bank with her father to refinance a loan. The terminology/jargon used by the bank was very hard for her to translate to her father in Dari. An interpreter was not offered.

Samia's father got angry and blamed her for not helping him understand. Samia's father ended up signing for the loan without having a full grasp of his obligations.

A few points to consider about this incident is the negative impact on Samia:

- She had to miss school on the day to support her father (she is in year 12 and sometimes a day missed can make things harder to catch up)
- It affected her confidence as she felt that she was "labelled" as someone who does not speak English well
- Although she understood what they were saying, the excessive use of "bank language" contributed to her "failure"
- She mentioned that sometimes "It does create anxiety for her when asked to support her father as she feels that the decisions made are her responsibility".

93. Interpreters should be made available upon request by a customer. Bank staff should also offer to arrange an interpreter where they believe it would assist the customer. In particular, no important conversations should be had with customers who have difficulty speaking and understanding English. Where important documents are involved and a translated version is not available, banks should also work to provide interpreters to help explain the document. The ABA Consumer Outcomes Group has been working on developing a way to classify the risk of particular conversations. There should be an exhaustive list of low risk conversations that can be had without an interpreter, and for all other conversations, banks should arrange one.

94. We note that the general insurance industry has committed in its code to make interpreters available to customers who require one, as well as relevant training for staff who will use interpreters.[50] We appreciate

[50] Insurance Council of Australia, *General Insurance Code of Practice*, 2020, clauses 101-103.

that the ABA has been working towards this goal as part of the ongoing work associated with the consumer outcomes group. Now is the time to enshrine this commitment to customers in the Code.

RECOMMENDATION 32. Introduce a Code commitment to:

- provide a qualified interpreter for any customer who requests one, or if a bank employee considers it necessary to communicate effectively with the customer; and
- arrange relevant training around using interpreters for bank employees who are likely to be involved communications involving an interpreter.

Customers with hearing difficulties and/or who are deaf

95. Linked to the above recommendation, to similarly assist with accessibility, the banks should additionally commit via the Code to ensure that the National Relay Service (via phone) or Auslan interpreters are made available to people who identify as deaf, or otherwise have difficulty hearing. While using Auslan interpreters may involve an increased cost for the banks by comparison to telephone interpreters, the need for accessibility is just the same.

96. Additionally, numerous people in this position (particularly older people) do not qualify to have interpreting services covered by the National Disability Insurance Scheme. Providing this service would help people in particular who cannot access the National Relay Service due to digital technology and language barriers, as well as assisting people who have difficulty hearing to attend branches. Further, mandatory mask wearing during the COVID-19 pandemic can make it even more difficult for people who are deaf to communicate.

Uniting Communities South Australia Case Study: Christine

Christine was planning to go overseas. Christine is deaf and has limited English skills which has affected her ability to understand online communications to identify a scam and protect herself from online scammers. The Deaf community have been targeted by scammers who have infiltrated the social circles within the community. Her family members were concerned that she was being groomed by someone from Singapore who asked her to bring $13,000 cash and bottles of Australian wine.

Christine attended the local bank branch to ask about a travel card. Christine had a credit card but was concerned about the risk of unauthorised transactions whilst overseas and her family prompted her to get a travel card.

The bank teller did not use an Auslan interpreter. Christine was told that in order to get a travel card, she would need internet banking. Christine smiled and nodded as she was confused as to what the teller wrote on a piece of paper. Christine barely used the internet herself and only had an email set up at a life skills course she was attending at TAFE. The teller set up Christine for internet banking.

Christine walked out of the bank with a username and password for internet banking, unaware that anyone who had these codes would be able to access all of her bank accounts. Christine took photos of the documents and was asked by the people from Singapore to send her the photo of the username and password so they could assist her managing her travel card.

If the bank had used Auslan interpreters, they would have discerned the cultural barrier that Christine was showing gratuitous concurrence and that she did not understand internet banking and would need to seek help from others to access internet banking. Similarly, an Auslan interpreter may have altered the bank that Christine was likely being groomed.

Secondly, if the bank had taken extra care with Christine in relation to internet banking, it would have been clear that internet banking and setting up a travel card, would place Christine in an even more vulnerable and precarious position. It was safer for Christine to use her credit card rather than set up internet banking.

RECOMMENDATION 33. Introduce a Code commitment to offer to communicate with customers through the National Relay Service if they have hearing difficulties and bank staff think that the customer would benefit from this assistance.

RECOMMENDATION 34. Introduce a Code commitment to provide Auslan interpreters upon request for customers who are deaf and use Auslan.

97. We also recommend that clause 32 of the Code be amended to also specifically refer to people with hearing difficulty or who identify as deaf, in addition to the four existing subsections. This is because people who are culturally deaf[51] do not necessarily identify as a person with a disability.

RECOMMENDATION 35. Add a new subparagraph to existing Code clause 32, to refer to people who have difficulty hearing, or identify as deaf.

People in prison

98. Another group of individuals that routinely face additional unnecessary barriers to undertake their banking are people who are currently in prison, or who have recently been released. We understand that Legal Aid Queensland has provided detailed feedback on this issue in its submission. We also understand that the Indigenous Consumers Assistance Network is putting in a submission specifically addressing this issue as well. Having had the benefit of seeing both submissions, we endorse the recommendations made on this issue.

99. However, we do specifically wish to flag one issue in particular in this area—being that banks do not widely accept prison or corrections department identification as satisfying 100 points of identification, despite it being a Government issued form of identification. In addition, the mechanisms by which this identification can be provided to the bank need to be broader than in branch presentation or uploading the document online to ensure that people can access banking services while inside prison. This seemingly unnecessary barrier can make it extremely difficult for prisoners or people recently released from prison to prove their identity for banking purposes.[52]

RECOMMENDATION 36. Introduce a Code commitment to recognise identification issued by Government corrections facilities as a valid form of 100 points of identification relevant for banking purposes.

Reverse mortgages and older customers

100. While preparing this submission, we were told by the ABA that none of its members currently offer reverse mortgage products. We appreciate that this largely dispenses with any pressing need to address these products in the Code, despite the ABA accepting a recommendation from the 2017 review to include specific protections for reverse mortgage matching those from the COBA Code.[53]

101. However, recognising that product offerings of members may change in future, we encourage the ABA to consider whether some safeguards should be in place, considering the complexities and risks that are well

[51] Someone is likely to identify as culturally deaf if their first language is a sign language, not a spoken one. This is commonly people who were deaf from a very early age and have predominantly engaged with the Deaf community.

[52] For more information on this issue, see: Financial Counselling Australia, *Double Punishment: How people in prison pay twice*, May 2018, https://www.financialcounsellingaustralia.org.au/docs/double-punishment-how-people-in-prison-pay-twice-2018/, part 7.5.

[53] ABA 2017 Review Response, above n 7, p 8.

recognised with reverse mortgages. Alternatively, members could commit not to offer reverse mortgages. The recommendations made below are set out primarily as consumer advocates hold concerns about reverse mortgages for three key reasons:

- the complex nature of these products that make them hard for people to understand;
- the high fees associated with breaking a reverse mortgage and the complexity in explaining how these fees work; and
- because the nature of these products increases the risk that they may be used to engage in financial abuse, particularly for older customers.

RECOMMENDATION 37. Introduce Code commitments to:

- limit break fees for reverse mortgages to amount which reflect the bank's reasonable loss as a result of the early termination of the contract; and
- only sell reverse mortgages through designated staff who are trained to ensure that they can properly explain how the reverse mortgage works in detail, including break fees. These staff should also be trained to work with older people.

Plain language in terms and conditions

102. Making financial products easier to understand is core to the improvement of banking accessibility for all customers. Recommendation 58 of the 2017 Review referred to an existing clause in the previous Code to provide information in plain language. Khoury not only supported retaining this clause due to the complexities of terms and conditions documents, but also for this to be monitored and enforced by the CCMC.[54] The ABA accepted this recommendation in part – supporting the goal, but not the role of the CCMC.[55]

103. There is no specific commitment to use plain language in terms and conditions documents in the current Code, except for loans to small businesses.[56] Clause 17 commits to give useful and clear information, but not to use plain language outside of the Code.

104. Unfortunately, banking terms and conditions documents often are complex, voluminous and difficult to understand. In some instances, customers need to refer to multiple documents to obtain the full terms and conditions of a product. Some of those documents then have numerous schedules to them, sometimes with different sets of definitions in each.

105. Consumer representatives recommended in submissions to the 2017 Review that terms and conditions documents both be set out in plain language, and should include executive summaries if they are long documents. Khoury rejected the latter part of this recommendation, and neither of them have occurred since. While we recognise that disclosure is always going to have limitations in financial services, banks can certainly do better than they are now.

106. Banks should also commit to draw the attention of customers to any unusual or unexpected terms or conditions of a product or service before they sign them up to it, such as significant fees in particular circumstances (even if reflective of the reasonable cost on the bank) or requirements to avoid fees that may not be expected by a customer.

[54] 2017 Review, Khoury, above n 1, p 139.
[55] ABA 2017 Review Response, above n 7, p 21-22.
[56] Code clause 73.

RECOMMENDATION 38. Introduce a Code commitment to use plain language in all terms and conditions documents. This should be an enforceable Code provision, or banks should be required to report to the BCCC on progress.

RECOMMENDATION 39. Introduce a Code commitment to provide summary documents of terms and conditions where the full version is quite long, or spread across multiple documents. A similar summary document should also be made available when changes to existing arrangements are made. Both documents should address any unusual or unexpected terms or conditions.

Small business customer accessibility

107. Some of the consumer representatives contributing to this submission assist small business clients. We have some recommendations below to improve protections for small businesses in the Code, based on our casework experience.

108. The first relates to the definition of small business used by the Code. We strongly recommend that the definition be amended to reflect the recommendation of Commissioner Hayne in the Royal Commission Final Report. The definition should be simplified and less restrictive. We note that impending COBA Code that will be released soon will adopt a definition of a small business that allows for the business to have a maximum total debt of up to $5 million. The Code should have the same commitment.

RECOMMENDATION 40. Amend the Code's definition of small business by removing the $10 million restriction on annual turnover, and expanding the total debt limit to $5 million, rather than $3 million.

109. The other recommendation in this regard relates to loans that are predominantly for a small business purpose. When assessing the ability of a small business to repay a loan, the Code should specifically recognise that the bank should consider the earning capacity and viability of the business when assessing the repayment capacity of the business. It should be clear that making business loans solely on the basis of available security (particularly where that security is a business owner's residential home) is unfair. The taking of collateral for business lending can create inappropriate incentive for lenders, including focusing on the existence of the asset as the primary reason for making the loan, rather than the repayment capacity of the business.

110. Loans that are predominantly for a personal, domestic or household purpose should be assessed according to existing responsible lending laws. Currently, loans that are essentially consumer loans but have a minor business purpose are not captured by the NCCP Act because of the operation of regulation 28RB of the *National Consumer Credit Protection Regulations 2010*. In our view, this dangerous law reform leaves consumers at risk. We recommend that banks continue to apply responsible lending obligations for any loan that is predominantly for a personal, domestic or household purpose, even if there is a lesser small business purpose as well.

RECOMMENDATION 41. Amend clause 51 to specify that earning capacity and viability of a small business will be considered in loan affordability assessments, where the loan is predominantly for a small business purpose. Banks should not make small business loans solely on the basis of collateral in the form of the applicant's residential property.

Term of Reference 4: Meeting consumer and community expectations

4.a. Act in a fair, reasonable and ethical manner

111. Consumer advocates agree with the comments in BCCC Guidance Note 2[57] emphasising the importance of clause 10 in the Code, and the general approach to interpreting this provision. The clause can and should be interpreted broadly. It is an important obligation at a principle level, and should be a guiding measure that banks assess all their decisions and processes against. As a Code commitment, it should also be demonstrated in individual dealings with customers.

112. Measuring compliance with this clause can be assessed in a number of ways. The BCCC cases referred to in the Consultation Note provide an example of how this clause can interact with other Code provisions. The obligation is a standalone one as well, though. The conduct of a bank can be assessed against this requirement in any situation.

113. While it may have some overlap with existing legal obligations (eg ACL[58] and Australian financial services licence (**AFSL**) holder[59] obligations to engage efficiently, honestly and fairly), clause 10 should be interpreted to cover additional ground. Licence obligations can arguably be limited to only apply to actions that banks undertake for which it requires one of these licences, whereas the Code provisions apply to all bank conduct. An example of where this can mean clause 10 has broader application is in relation to a range of interactions between the bank and customer after a product has been sold. The obligations of the bank as an AFSL or ACL licence holder may not extend to all aspects of this service.

114. The requirement to act reasonably and ethically can be interpreted to go beyond the requirement to be efficient, honest and fair. For example, it could be argued that by providing a customer with a complete list of terms and conditions for a complex credit product, a bank has acted honestly and fairly. However, providing these documents without explaining them in some situations is unlikely to be reasonable or ethical, or meet customer or community expectations.

115. Consumer advocates strongly support the proposal in the Consultation Note that clause 10 of the Code should be a provision ASIC is empowered to enforce, particularly as its breadth means full compliance is unlikely to be something customers are ever in a position to fully enforce themselves via contract.

RECOMMENDATION 42. Clause 10 of the Code should be an enforceable provision.

4.b. Hardship assistance

116. A major theme in the feedback consumer representatives provide on the approach of banks to financial hardship is that there is inconsistency in the assistance offered and provided. The Code already contains some reasonably strong commitments in this area. However, whether the good intent stated in the Code leads to good outcomes for customers appears to be based in part, on chance – particularly for customers not being assisted by financial counsellors or lawyers.

117. In some circumstances, banks are receptive to customer seeking hardship assistance, and will work with the customer to find a good solution. In other instances, financial counsellors report that they have to tell customers to specifically mention the word "hardship" for a bank to entertain the possibility of alternative arrangements. Some banks are better at this than others, but even the variation within banks can be significant. This is often reflected in calls to the National Debt Helpline as well, where people still regularly

[57] BCCC, *Clause 10 – fair, reasonable and ethical behaviour*, Guidance Note No.2, https://bankingcode.org.au/resources/guidance-note-no-2-clause-10-fair-reasonable-and-ethical-behavior/.
[58] *National Consumer Credit Protection Act 2009* (Cth), s 47(1)(a).
[59] *Corporations Act 2001* (Cth), s 912A(1)(a).

report hardship responses from the major banks that fall well short of the treatment they tell consumer advocates they are offering, in general meetings.

118. Our primary message in this section is that banks need to do more to work to make sure that the Code commitments around financial hardship are well understood by their frontline staff members, in particular. There is too often a breakdown between the Code & its implementation on the ground at the point of contact with the customer.

Terminology – financial difficulty/hardship

119. As part of this review, consideration needs to be given to the decision to use the term 'financial difficulty' in the Code, as well as 'hardship' and 'financial hardship'. The Code predominantly refers to financial difficulty, but then intersperses this with hardship at other times, and not necessarily only when referring to the hardship provisions under the NCCP Act. It would be preferable to use a single consistent term throughout the Code, unless there is a good reason otherwise.

120. We recommend consistently using the term 'financial hardship', as this is a term that is also used in the NCCP Act. While financial difficulty may have been preferred for a plain language approach previously, the differing terms confuses and complicates this issue through the Code. Using financial hardship would also not result in the creation of an additional concept in the Code.

RECOMMENDATION 43. Review the use of the terms 'financial difficulty', 'hardship' and 'financial hardship' in the Code, with a view to using a single consistent term where possible. If there is no need to distinguish it, using 'financial hardship' would be the preferable option.

Clause 161

121. Throughout the Code there are some clauses which appear to place obligations on customers, rather than the banks. The clearest example of this is clause 161, which places an obligation upon the customer. The Code binds banks, not customers. A clause could still point out the value of receiving full and realistic information, without telling the customer to do something. For example, a clause could state, "Once you contact us about your financial situation, we will work compassionately with you to understand your complete situation and to identify any realistic forms of assistance we may be able to provide you".

RECOMMENDATION 44. Redraft clause 161 so it does not impose obligations on the customer.

Forms of hardship support

122. We strongly support retaining the table of examples of how banks may help people in financial hardship at page 47 of the Code, as well as clause 172 that raises the possibility of waiving a debt.[60] Publishing a list of potential forms of assistance can help customers (and advocates) understand how banks may assist, and may enable them to identify the forms of assistance that might be most beneficial to them. Recommendation 45 sets out additional information in this regard that would provide a more complete picture of potential assistance.

123. One additional step that should be made into a Code commitment is for the banks to work with customers, where possible, to agree upon a hardship arrangement that will leave them with a savings buffer. Earlier this year, Westpac adopted a policy that was aimed at allowing customers to enter a repayment arrangement that would leave them some financial breathing room,[61] so that an unexpected expense does necessarily not push the customer to the brink. This would make a huge difference to the lives of many

[60] Clauses 171, 172.
[61] https://www.westpac.com.au/about-westpac/media/media-releases/2021/20-may/.

people experiencing financial hardship. We urge all other ABA members to adopt a similar policy, and for this to be reflected by a Code commitment.

RECOMMENDATION 45. Amend the table 'Restoring your financial position is possible' on page 47 of the Code, by adding the following potential forms of assistance:

- Waiving fees
- Reducing interest rates
- Capitalising interest owed
- Entering a payment arrangement with a savings buffer.

RECOMMENDATION 46. Introduce a Code commitment that when establishing a financial hardship repayment arrangement, banks will offer customers an arrangement that leaves them with a savings buffer, where possible.

Proposals in the Consultation Note

124. We strongly support many of the proposals contemplated in Part 7 of the Consultation Note.

125. We agree that making more hardship information readily available, including the ABA 'Promoting understanding about banks' financial hardship programs' Industry Guidelines,[62] should be made a Code commitment. This would make finding important information easier for customers at a stressful time. This could be done by amending clause 168. One thing the banks did well in the early stages of the COVID-19 pandemic was proactively sharing the message that assistance was available if required. Perhaps one of the minor upsides of the pandemic was that it normalised discussions about debt problems, and helped people more proactively seek financial assistance. Making more information proactively available about hardship assistance would help send a message that banks are happy to have this conversation with customers.

126. Banks should also focus more generally on ensuring that forms of hardship assistance are better explained to customers before they are entered into. Financial counsellors report that people often don't understand the full impact of hardship options, such as that the capitalisation of interest under a loan deferral will increase the overall cost of the loan. In some instances, people make decisions they later regret or which were not in their best interests. Communicating key details at the point of entering a hardship arranging is an area where banks should take extra care.

RECOMMENDATION 47. Amend clause 168 of the Code to additionally commit to making suitable, accessible and comprehensive information on financial hardship assistance prominent and easily identifiable on banks websites, in branches and periodically on account statements.

127. We similarly agree with the suggestion that the Code include further commitments on the information that banks will consider when deciding whether to help someone in financial hardship.

RECOMMENDATION 48. Amend clause 169 of the Code to additionally commit to providing details on bank websites about the types of information that banks may consider when deciding whether to help someone in financial hardship. These lists should not be exhaustive.

128. We also strongly agree that the data published by the BCCC on hardship requests would be more valuable if banks were required to provide information for publication about the outcomes of hardship requests.

[62] ABA, https://www.ausbanking.org.au/wp-content/uploads/2019/04/Updated_financial_hardship_guideline_Nov_2016.pdf.

This is a significant gap in the information publicly available, and this information would greatly help inform future discussions around policy.

RECOMMENDATION 49. Introduce a Code commitment for banks to provide statistics on hardship requests to the BCCC for publication, including the number of requests and outcomes of requests, such as approval rates and the relevant forms of assistance provided, the average length of hardship arrangements and the current number of customers on hardship arrangements.

129. We also agree with the comment in the Consultation Note that some of the references in the Code to legislation or to guidelines in relation to hardship may cause confusion or uncertainty for consumers. However, we strongly support retaining the cross-references to guidelines and legislation in the Code as these provide substantive rights to individuals. We would support introducing additional provisions or notes which spell out key details such as who is covered by the National Credit Code (**NCC**) and the key protections under relevant provisions applying to debt collection. This kind of information that merely restates the law or other guidelines could be inserted as a note to the Code, rather than a specific Code clause.

KEY AREA OF EMPHASIS: SALE OF DEBT

130. Debt collection practices continue to cause significant harm to people facing financial hardship. Financial counsellors and community lawyers regularly hear from people whose wellbeing has been impacted by illegal and/or unethical conduct by debt collectors who have purchased debts from banks, as well as by contingent collectors. For this reason, we highlight this area as a key issue in this submission, and urge the ABA to commit to greater steps to help improve consumer outcomes in this area.

131. We recognise the work the ABA has undertaken to date with consumer advocates on this issue, including by developing the sale of unsecured debt industry guideline (**Sale of Debt Guideline**), though the impact of this guide is limited because it is voluntary.[63] As the largest owners of debt in the Australian consumer lending market, banks are in a strong position to significantly influence the conduct and collection practices of debt collectors.

132. We recommend banks commit to not selling unsecured debts to external debt collectors. Failing this, as a starting point, banks should at least commit not to sell debts where the customer is experiencing significant vulnerability. An example of where this would apply is if the customer may be experiencing (or the debt came about through) financial abuse or domestic violence.[64] We additionally strongly recommend that debts should never be sold where a customer is in the circumstances listed on page 3 of the Sale of Debt Guideline.

133. Similarly, the Guideline's commitment not to sell statute-barred debts should also be included in the Code.

134. Where debts are sold, banks should only sell to debt buyers that commit in writing to follow relevant legal obligations, and monitor compliance – as per Recommendation 33 of the 2017 Review. We strongly support retaining the explicit references to debt collection guidelines at clause 181, and the commitment at clause 182 only to sell to debt buyers that agree to comply with those guidelines. Additional specifications set out in the Sale of Debt Guideline should also be made mandatory.

RECOMMENDATION 50. Introduce a Code commitment not to sell debts:

[63] ABA, *Industry Guideline: Sale of Unsecured Debt*, 2019, https://www.ausbanking.org.au/wp-content/uploads/2019/11/Industry-Guideline-on-the-Sale-of-Unsecured-Debt-November-2019.pdf.

[64] This specific commitment is already recommended in the voluntary ABA industry guideline *Preventing and responding to family and domestic violence*, https://www.ausbanking.org.au/wp-content/uploads/2021/05/ABA-Family-Domestic-Violence-Industry-Guideline.pdf.

- owed by customers who are experiencing significant vulnerability, or where the debt was caused in part by significant vulnerability; or
- that are, or will soon become, statute-barred.

RECOMMENDATION 51. Introduce a Code commitment that banks will only sell debts to debt collectors that:

- are members of AFCA; and
- provide training to all collection staff addressing working with people experiencing vulnerability.

135. Unfortunately, even with these restrictions on eligible debt buyers, past debt collection industry conduct makes it highly likely that there will continue to be operators chasing debts sold by ABA members that will cause harm and breach the law. The Australian Collectors and Debt Buyers Association Code of Practice (**ACDBA Code**) has some good protections in it, such as not accepting indefinite payment arrangements that do not make meaningful changes to debts, but the level of enforcement of this code is minimal. In addition, most consumers are not aware of the ACDBA Code or the legal obligations that apply to debt collection, and so will not be aware of their rights. Where ABA members continue to sell debts, or engage contingent collectors, they need to commit to doing all they can to assist customers in these positions.

136. To see real improvement in how debt buyers impact bank customers when chasing purchased debts, the banks need to be involved in monitoring the conduct of debt buyers they work with, particularly with debts they have sold to them. Again, at page 2 the Sale of Debt Guideline provides a good reference for the mandatory reporting data that banks should demand of their debt buyers to remain eligible to buy debts from them. This again, should be made into an enforceable Code commitment. Undertaking random audits of debts sold would also help banks reduce the risk of harmful debt collection practices, by seeking the debt buyer's documentation of their work with the debt, and undertaking follow up with customers about their experience.

137. Greater action should also be taken in regard to specific customer debts sold. As a starting point, banks should commit to inform customers when they sell their debts of the key rights they have, and the key limitations on what debt collectors can do. This should be set out in the communications advising of the sale of the debt, and banks should attempt to have a conversation, by phone or in person, with customers about this also. Banks should also retain the right to buy back debts from the debt buyer.

138. The other area where banks could have a significant impact on the conduct of debt buyers is in relation to bankruptcy. The recommendation in the Sale of Debt Guideline to require a debt buyer to consult with the bank prior to commencing bankruptcy proceedings should also be converted into a Code commitment, noting that this is a commitment COBA members will make in the new version of their Code as well. Further, banks should make it a condition of the sale of debts worth under $20,000 sold that the debt buyer must commit to not initiating bankruptcy proceedings to recover the debt. While the bankruptcy threshold was recently lifted to $10,000, consumer advocates were disappointed this was not raised further. Banks should use the Code to commit to stronger protections.

RECOMMENDATION 52. Introduce a Code commitment to inform customers of their key rights, and restrictions that apply to debt collection, under relevant guidelines and laws if their debt is sold.

RECOMMENDATION 53. Introduce a Code commitment to monitor the impact of the conduct of debt collectors that banks sell debts to, based on the current ABA Sale of Debt Guideline as a minimum standard. If a debt buyer is not meeting the necessary standards, commit to stop selling debts to them and remediating affected customers, including buying back debts. Contingent collectors engaged by banks should be subject to the same monitoring and expectations as a condition of engagement.

RECOMMENDATION 54. Introduce a Code commitment to:

- make a term of all contracts for the sale of debts under $20,000 that the debt buyer will not commence bankruptcy proceedings to recover the debt; and
- require debt buyers to consult with the bank before commencing bankruptcy proceedings.

Lenders mortgage insurance (**LMI**)

139. Outside of paying the premium for it, bank customers only have the misfortune of dealing closely with LMI if they are in significant financial hardship. ABA members make some good commitments via Chapter 19 of the Code, but there is more that banks should commit to do.

140. The guiding principles published by the ABA on LMI go further than the commitments in the Code, but are explicitly not binding. Important key commitments from these principles about informing customers about LMI should be made into Code commitments. It is still very common that clients of consumer representatives do not understand what LMI is at the point when they are facing repossession and a potential shortfall debt. While the LMI factsheet may address this information, key points should also be explained to customers.

RECOMMENDATION 55. Introduce a Code commitment to explain to any customer required to take out LMI:

- that LMI protects the lender against a shortfall debt, and does not benefit the customer; and
- what a shortfall debt is, and that the insurer may pursue the customer if there is a shortfall debt.

141. Where a shortfall debt does occur, it is vital that customers are treated reasonably and given a legitimate opportunity to work with the bank to find the best solution for their circumstances. While banks may elect to consult with their LMI provider at this point, the customer's relationship is with the bank, and the bank should come to its own decision about the customer's ability to repay the loan. This is consistent with AFCA guidance on this situation,[65] and should be committed to via the Code.

142. Another important requirement is for banks to commit only to purchase LMI from companies that make the same commitments around debt collection and sale of debt as detailed above. Consumer advocates frequently advise clients who are being chased by debt collectors for debts sold by LMI providers.

RECOMMENDATION 56. Introduce a Code commitment where there is a shortfall debt to work with customers to find the best solution possible for them, and to make a decision on the capacity of the customer to repay the debt, independent of the LMI provider.

[65] AFCA, *The AFCA Approach to financial difficulty: dealing with common issues*, https://www.afca.org.au/make-a-complaint/financial-difficulty.

RECOMMENDATION 57. Introduce a Code commitment to only purchase LMI from companies that make the same commitments around debt collection and the sale of debt as banks do via the Code.

143. We understand that the newest update to the COBA Code due to be released this year will also contain some commitments that go beyond the current Code in this space. We recommend that the ABA amend existing clauses to match these commitments.

RECOMMENDATION 58. Amend clause 70 of the Code to include a commitment to disclose the cost of LMI to the customer, and to explain that interest will accrue on this amount over the life of the mortgage.

RECOMMENDATION 59. Amend clause 71 of the Code to additionally commit to help customers claim any refund they are entitled to under a LMI policy, or claim it on behalf of the customer and pay it to them.

4.c. COVID-19 and banking

144. ABA member banks are to be commended for the valuable support they have provided to date to people who have been put into financial hardship by COVID-19. The substantial relief provided for mortgagees and other borrowers during 2020 in particular, helped at a time that otherwise would have been disastrous for many. Unfortunately, 2021 has continued to see outbreaks and lockdowns play havoc with the livelihoods of a large portion of the population. We understand that ABA banks are again offering similar support for individuals and businesses that are being significantly impacted by these lockdowns. For many, the reduction in income will be temporary and offering temporary leniency on debts will help people get back on their feet without causing significant long-term financial problems.

145. That said, throughout this year financial counsellors have heard from a number of clients who reported that when their COVID-19 hardship arrangement came to an end, they were told they had to repay all deferred loan repayments upfront. We are continuing to receive these reports, despite raising concerns with the relevant banks.

146. While there has been useful assistance provided to people who were put into financial hardship as a result of the pandemic, it appears there was a less generous approach offered for people who were already in financial hardship prior to the onset of the pandemic. We encourage consistency in approaches where possible.

147. In reflecting on these forms of assistance, we encourage the ABA to consider the long-term impact of the additional and widespread assistance provided in response to the COVID-19 pandemic. Our understanding is that in the vast majority of situations, the assistance provided not only made a material difference to people's lives at a time when they really needed it, but will also not cost the banks too much in the long term. The majority of deferred mortgagees are back on regular repayments, which is a good outcome for both the bank and the customer. We strongly encourage banks to take heed of this, and reflect it in how they approach hardship assistance in future. We hope this will result in a greater willingness to provide substantial temporary hardship assistance more broadly, recognising that it need not result in a loss for the bank or the borrower.

<u>The COVID-19 special note</u>

148. Considering the significant change in the financial landscape in Australia, the need to reduce some obligations temporarily was understandable. However, we strongly encourage the Code Reviewer to seek data from the banks to explore the impact of the note, in terms of whether it was needed, and the overall impact it had on customers.

149. We anticipate that the ABA will consider using this note as a model for future catastrophes, particularly if one has as widespread impact. To help understand the case for another similar intervention, it would be helpful to know:

- was the additional leniency necessary - how often were Code breaches relieved as a result of the note?
- where this did occur, did it result in negative outcomes for impacted customers?
- how did this lead to better outcomes overall for customers or the wider population?

150. If a similar note is used in future, we would encourage the ABA to consider stating that leniency will be provided to all customers impacted by a change to a Code commitment.

Temporary branch closures

151. Lockdowns presented a rather unique set of circumstances where branches had to be temporarily closed for extended periods. Many banks reported that they took extra steps to engage with customers who rely upon branches and in-person banking. It is clear that lockdowns will continue to occur, or extreme weather may force closure of bank branches for extended periods in future. As such, we recommend inserting some basic Code commitments to assist people that rely on in-person banking.

RECOMMENDATION 60. Introduce a Code commitment that in the event of temporary forced branch closures, banks will:

- be lenient with any contractual obligations for customers who rely on in-person banking; and
- work to identify customers who rely on in-person banking at the branch and contact them to resolve any pressing banking issues.

Permanent branch closures

152. Since the onset of the pandemic, many ABA member banks appear to also have made the decision to permanently close bank branches. While ABA members commit to the Industry Protocol on branch closure,[66] consumer representatives have still seen this cause significant problems for consumers in regional and remote areas. In particular, consumer representatives who work with First Nations peoples who live in remote areas have reported this change causing significant problems, which is disappointing considering clause 36 of the Code specifically commits to assisting these customers. Older customers are also disproportionately impacted by branch closures.

153. To help reduce the likely impact of branch closures in future, we recommend that examples of specific minimum commitments are introduced at clause 36, to indicate how banks will assist customers living in remote communities. Included in this should be ensuring that ATMs that will be fee free for customers are within a reasonable distance, and a commitment to send frontline staff to engage with remote communities on a regular basis. Consumer representatives who visit many remote communities have been told by residents that the ABA or its members have made promises that banking services will be provided in the area, but this has not eventuated.

154. For many people in communities impacted by recent closures, the transition process to alternative banking options has been fraught with problems. Internet and phone access can be problematic in remote communities. Consumer representatives have reported some consumers having difficulty transitioning and the bank assistance provided was insufficient. If the branch closure protocol has been followed, it clearly does not meet community expectations. We understand that protocol is supposed to be reviewed

[66] https://www.ausbanking.org.au/branch-closure-protocol/.

with the review of the Code. The ABA should review this document as a priority, and seek to engage with people in remote communities to assess what needs to change. In future, banks should identify customers who have predominantly used in branch banking services and work to provide equivalent support for those customers. Banks should specifically ascertain if these customers are not confident using internet or phone banking, to determine what other support may be required.

RECOMMENDATION 61. Introduce a Code commitment to identify and engage with customers who rely on in-person banking to assist them in the event of temporary or permanent branch closures.

4.d. Dispute resolution by the banks

155. There has been a great deal of change in the legal framework around dispute resolution since the 2017 Review. Most notable is the establishment of AFCA, but significant amendments have also been made to ASIC Regulatory Guide RG 271 on internal dispute resolution (**ASIC RG 271**),[67] with these due to come into effect on 5 October 2021. Major changes were made to the timeframes for assessing complaints in this area, impacting the role of the bank Customer Advocate in particular.

Internal dispute resolution (**IDR**)

156. There will need to be some changes made to Chapter 48 of the Code on the handling of complaints, to ensure it complies with ASIC RG 271, particularly around the timeframes for handling a complaint at clauses 204-206. The standard timeframe for responding to a complaint is now 30 calendar days, and this includes multi-tiered IDR processes, including Customer Advocate reviews, which also must not be treated as a mandatory step in the complaint handling process by financial firms.

157. We support the suggestion in the Consultation Note that clause 196 be expanded to outline the most important key obligations of banks and consumer rights in relation to dispute resolution that are provided by ASIC RG 271, rather than just referring to a commitment to comply with ASIC guidelines. Putting all important information in one place is a much preferable option in terms of accessibility. The Australian Law Reform Commission is currently undertaking the Review of the Legislative Framework for Corporations and Financial Services Regulation because of the complexities in understanding financial services laws.[68] One clear example of additional complexity is where understanding the substance of a clause requires the reader to reference multiple pieces of legislation or guidance. This should be avoided in the Code where possible, even if it means the Code gets longer.

158. One ongoing difficulty regularly seen or heard about by financial counsellors and lawyers assisting consumers in their disputes at IDR stage is in regard to obtaining documents relevant to a dispute. Unsatisfactory responses to requests for documents are too common, with responses often failing to provide all the documents requested, or not complying with the timing requirements under section 185 of the NCC. This is an area where we urge the ABA to push its members on improving. As the obligations already exist in the NCC, we suggest that the best way to help drive improvement in this area may be to establish a requirement for banks to report to the BCCC on compliance with section 185 of the NCC, as well as any instances where compliance has required repeated requests by the customer or their representative.

159. An ongoing concern about the internal handling of complaints across the whole financial sector is in regard to withdrawal rates. It is not uncommon for financial counsellors and community lawyers to hear from consumers who have raised an issue with a firm, only to be told that there is little that can be done, or that

[67] ASIC, *Regulatory Guide 271: Internal Dispute Resolution*, 30 July 2020, https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-271-internal-dispute-resolution/.
[68] https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/.

there are low prospects of success. Research released by ASIC in 2018 indicated that 18% of complainants withdrew their complaints before reaching a conclusion, with the predominant reasons being related to frustration or difficulties with the process.[69] We hold some concerns that convincing customers to withdraw complaints, or not to lodge them in the first place, is a strategy employed by financial firms to reduce the progression of complaints. We note that ASIC RG 271 requires firms to report on the number of complaints withdrawn. To help identify whether there are issues with the way banks are managing complaints in this regard, we encourage the ABA to agree to greater oversight here. Specifically, requiring banks to seek to identify and record complaint withdrawal reasons would be valuable information. We recommend requiring banks to report complaint withdrawal numbers and reasons to the BCCC, for ongoing review.

RECOMMENDATION 62. Require banks to report to the BCCC on compliance with section 185 of the NCC, and cases where the customer or their representative claims that requested documents were not provided in full, and allow the BCCC to publish this information.

RECOMMENDATION 63. Introduce a Code commitment to seek to identify why a customer has withdrawn a complaint when this occurs. Require banks to report to the BCCC on the number of complaints which are withdrawn before a formal IDR decision is made, and the reasons for the withdrawal, and allow the BCCC to publish this information.

Disputes in AFCA

160. Generally, the experiences and reports of the conduct of ABA member banks at the AFCA stage of a dispute is of a reasonable standard. However, from time to time there are cases where banks make the process more difficult than it should be, by either taking an unreasonable stance toward resolving the dispute, or more often, by ongoing delays.

161. Banks should be committed to seeking to resolve complaints as efficiently as possible, as this is in the best interests of both parties.

RECOMMENDATION 64. Introduce a Code commitment that in AFCA disputes, banks will be fully transparent, not cause unnecessary delays and aim to resolve disputes as quickly as possible. Commit to aspire to the meet equivalent of the Government model litigant obligation.

RECOMMENDATION 65. Introduce a Code commitment to proactively assist customers experiencing vulnerability navigate the AFCA process, if required.

Remediation

162. The fallout from the Royal Commission has led to the most significant volume of remediation ever undertaken in the financial services industry. So many instances of widespread and systematic misconduct were uncovered that the damage bill went well into the billions. ASIC is currently in the process of reviewing and updating its regulatory guide RG 256 on remediation so there are likely to be changes to regulatory obligations in this regard soon. However, regardless of this, banks need to be more proactive in identifying misconduct or errors that have cost their customers, and rectifying the situation.

163. In recent remediation programs, there have been a few issues that have reduced the effectiveness of the attempts to reimburse those impacted which should be specifically addressed by Code commitments. One disappointing trend is that many remediation funds are often going unclaimed, as consumers are either not aware of the process, or perceive the effort to receive the funds as outweighing the amount owed.

[69] ASIC, *The consumer journey through the Internal Dispute Resolution (IDR) process of financial service providers*, September 2018, https://asic.gov.au/media/4959291/rep603-published-10-december-2018.pdf.

Another concerning trend is the use of settlement deeds as part of remediation schemes. Consumers should not be stopped from pursuing the balance of their claim through AFCA and other forums in order to take part in a remediation scheme, and banks should commit to not requiring settlement deeds in remediation payouts.

164. To help ensure remediations are as effective as possible, banks should commit via the Code to roll out remediation programs that have as few barriers as possible for an impacted person to be remediated, as quickly as possible and using their best efforts (including all contact details available), to notify all individuals impacted.

RECOMMENDATION 66. Introduce a Code commitment that banks will investigate and rectify any error or past misconduct, by remediating all impacted customers, even if the amount of the loss is small.

RECOMMENDATION 67. Introduce Code commitments that where designing and carrying out remediation schemes, banks will:

- make the process for consumers to be refunded as simple as possible (and automatic where appropriate);
- ensure the programs are sufficiently resourced to ensure individuals impacted can be contacted and remediated as quickly as possible, using the best records of contact details;
- only use assumptions that are beneficial to customers; and
- not use settlement deeds as part of a remediation process, or other methods that aim to reduce potential liability for poor conduct by banks.

4.e. Supporting customers experiencing vulnerability

165. It is the experience of consumer advocates that the ABA and its members are generally open to receiving suggestions and feedback on how to best assist customers experiencing vulnerability. However, in some respects, the Code is somewhat light on in terms of substantive commitments regarding vulnerability.

166. In 2019, the ABA undertook a consultation titled *Every customer counts: better banking for vulnerable customers* (**Vulnerability Consultation**), intended to produce a guideline for assisting vulnerable customers.[70] Many consumer groups provided feedback to the ABA on this issue, yet the guideline has never been finalised and released. Some aspects of this are addressed in the Financial abuse and family and domestic violence industry guideline (**DV Guideline**)[71] and similar guideline specifically addressing financial and elder abuse (**Financial Abuse Guideline**),[72] but the consultation addressed a far wider range of situations. As such, there still a number of additional steps that consumer advocates would like to see the ABA take in this area.

Identifying vulnerability

167. As a starting point, the Code's broad statement that banks will take extra care when customers are experiencing vulnerability at clause 38 is concluded with the sentence, "We may become aware of your circumstances only if you tell us about them". This sentence is problematic – it places the onus on customers to self-identify as vulnerable. Banks may find out about a person's circumstances by many other means than being told directly by the customer. It is crucial for bank staff to be proactive in identifying if

[70] https://www.ausbanking.org.au/wp-content/uploads/2019/05/Issues_paper_-_Vulnerable_customer_guideline_-_March_2019.docx
[71] https://www.ausbanking.org.au/wp-content/uploads/2021/05/ABA-Family-Domestic-Violence-Industry-Guideline.pdf, 1 April 2021.
[72] https://www.ausbanking.org.au/wp-content/uploads/2021/07/ABA-Financial-Abuse-Industry-Guideline.pdf, 22 May 2021.

there are any risk factors or triggers present which may alert them to the need to provide tailored assistance and take extra care. Whilst some characteristics of a person's vulnerability may be easier for staff to identify, there are others that staff should work to proactively identify, as they may not be flagged by the customer at a branch or over the phone. People generally will not refer to themselves as 'vulnerable'. Clause 38 should also be amended to clarify that the forms of vulnerability listed are not exhaustive. People can experience vulnerability for a range of reasons. The sentence preceding the list should be amended to end, 'including, but not limited to:'.

168. It follows that banks should invest more in proactively identifying customers who may be experiencing vulnerability based on the information available to them. Data analysis techniques should be used to pick up on indicators of potential vulnerability or need, and initiate more appropriate services to meet those needs – and where possible, without forcing conversations about these issues if they are already apparent. Such indicators may include:

- hardship assistance is requested on a credit facility;
- account activity indicates regular government support payments (i.e. Centrelink income);
- account activity includes large overseas transactions or cash withdrawals, which may indicate a scam or gambling activity;
- inward payment dishonours threshold is exceeded;
- there are failed scheduled payments; or
- an account is overdrawn.

169. The great work some banks have recently done in relation to identifying and responding to abusive comments in online transactions should also be reflected as an obligation in the Code.

170. Where a person does self-identify as vulnerable, proving vulnerability should also not be a requirement unless a bank has a reason to believe otherwise. Proof can be complicated to obtain, and its requirement may exclude many. For example, a person should not be required to show an intervention order is in place to prove that they are experiencing family violence – there are many reasons why victims may have no proof of abuse. In the rare case where there is a requirement to raise the issue directly with a customer this should always be done so with the utmost care, tact and empathy.

171. We also note that the new COBA Code will additionally explicitly recognise disability, cultural factors or English being a second language, and a person's unfamiliarity with banking products and services as other forms of vulnerability someone may experience. The ABA should expand this clause to commit to taking additional care with people in these circumstances as well.

RECOMMENDATION 68. Expand clause 38 to also explicitly recognise the following types of vulnerability:

- Disability
- Cultural factors
- English being a second language
- A person being unfamiliar with banking products
- People in prison and those transitioning out.

RECOMMENDATION 69. Delete the last sentence from clause 38 of the Code, and clarify that the list of forms of vulnerability in the clause is not exhaustive. Banks should not rely on customers to self-identify as vulnerable, and should be investing more in proactively identifying customers experiencing vulnerability, through staff training and data analysis.

Communicating with customers experiencing vulnerability

172. A question posed by the ABA in the Vulnerability Consultation was whether banks should commit to making an easy-to-understand explanation of their commitment to customers experiencing vulnerability available. Consumer representatives generally support this proposition, but stress that communicating this information needs to be done in multiple ways, and proactively.

173. Banks should make informing new or prospective customers about the basic forms of assistance available for people experiencing vulnerability part of their standard initial engagement, regardless of whether this is undertaken in person, over the phone or online. Proactively asking customers for their preferred form of communication at this point is also important.

174. There can be improvements to how banks record data about customers experiencing vulnerability. Banks often identify vulnerability in branches, but it is not clear that there are adequate systems to record this for the benefit of other parts of the bank. This can often leave customers being required to explain their circumstances repeatedly, which can be frustrating and distressing, make banking more difficult and can at times, increase the risk of negative outcomes. An example of how this can become a more serious problem is where a transaction is refused in one branch because of suspicions of financial abuse, but then approved in another. Banks should address this issue by committing to record information relating to vulnerability. Where this has involved a discussion about the issue with the customer, the bank should seek the consent of the customer to record the information so that it is available for their other interactions with the bank. We understand that the Financial Services Council is working on an update to the Life Insurance Code of Practice which would include a clause that addresses this, stating, "We will ask for your permission to keep a record of the support or assistance you require".

175. There is also a need for this information to be protected. This information should not be shared externally with other financial service providers such as via the CDR. Where banks are storing information about customer vulnerabilities, it is also better to describe it in terms of the needs of the customer, which is the substantive point that needs to be shared internally, rather than the vulnerability or causal factor.

176. We also strongly recommend that DV Guideline part 4.3 about protecting the confidentiality of customers where there is suspected or reported domestic violence or financial abuse be made into a Code commitment. The ability for customers to protect their information in these situations is vital, including from joint account holders or co-borrowers.

RECOMMENDATION 70. Introduce a Code commitment that banks will have systems in place to record any vulnerabilities identified, so this information is available to other departments in the bank, and customers don't have to explain themselves repeatedly. If a customer volunteers this information, ask for their consent to record it.

RECOMMENDATION 71. Introduce a Code commitment that banks will respect the confidentiality of customers who are experiencing domestic violence or financial abuse and work with them to establish safe ways to communicate, in the way set out in part 4.3 of the DV Guideline.

Domestic violence and/or financial abuse

177. The release of the DV Guideline and Financial Abuse Guideline this year was an encouraging sign of a willingness and intent by ABA member banks to do more to help people experiencing these serious forms

of vulnerability. Many of the key commitments in these Guidelines should be made into Code commitments.

178. Both Guidelines set out a range of potential signs of family or domestic violence, or financial abuse.[73] Banks should commit to providing specialist training to all staff that ever interact with customers aimed at helping them identify these potential signs, and how to respond to them, such as that contemplated in part 4.4 of the Financial Abuse Guideline. This commitment could be added to clause 39. There should also be staff who are provided with additional specialist training that can help them deal with more serious or complex situations. These staff members should be experts in how to best assist these customers, and well across all forms of assistance the bank can provide to the customer, and potential external support referral pathways.

179. Consumer representatives still come across examples of situations where unsatisfactory conduct by bank staff has made it far easier for family or domestic violence perpetrators to use banking systems to their advantage. In one situation a bank teller facilitated a transaction in the language spoken by the perpetrator and not by the account holder. In another, the bank had recorded that an account holder had consented in a branch to allow the bank to deal with a third party, but the bank staff had insufficient notes of when this occurred, and no CCTV footage of the conversation in the branch either.

Consumer Action Case study – Hannah's story

Hannah (name changed) contacted the National Debt Helpline in late 2020 because she was struggling to pay her credit card debts, totalling over $60,000. She told us that her doctor has deemed her unfit to work due a brain injury she suffered when she was a teenager. Hannah also suffers from depression and is struggling to support her son, while on JobSeeker.

Hannah told us that she got the three credit cards from two of the 'Big 4' banks years ago prior to 2009 (predating responsible lending laws), when she had no income. Her boyfriend at the time signed her up to them. This was before responsible lending laws were introduced. Hannah said she needed her boyfriend's help to fill out the paperwork as she didn't understand how to complete it herself. Hannah also remembers her boyfriend helping her take up unsolicited offers to increase her credit limit on the cards—she thinks this most recently happened around 5-7 years ago.

Hannah said that her boyfriend had made minimum repayments on the credit cards for years, but stopped paying them when he lost work due to the COVID-19 pandemic. They no longer live together. Hannah told us that the banks put her on hardship arrangements during 2020 as she had no way to meet the repayments, but when this ended, the banks started seeking payments from her.

While Hannah's boyfriend was previously able to afford the credit cards, they are solely in her name, and she has been left with the debts. It is likely that issuing Hannah these credit cards would breach current responsible lending laws, as she was unable to make repayments herself without suffering substantial hardship. However, at the time, these protections were not in place. Hannah is now being assisted by a financial counsellor. Prior to contacting the National Debt Helpline, she said that she had felt helpless and thought there was no way out from her debts.

180. The Guidelines also recommend the use of digital technology to identify uncharacteristic behavior that that could be indicative of financial abuse.[74] This should also be made into a Code commitment—and the qualifications that banks need only investigate the feasibility of this, subject to bank system constraints,

[73] DV Guideline, part 3.1; Financial Abuse Guideline, parts 3.1; 3.2.
[74] Financial Abuse Guideline, part 4.3.

should be removed. Digital safeguards in this space cannot be an optional step for banks. To properly ensure compliance, where suspicious transactions do occur and this technology would have identified the transaction and created an opportunity to stop it, banks should be liable for the loss incurred by the customer.

181. A useful reference for banks in this space is British Standards Institution Code PAS 17271: 'Protecting Customers from financial harm as a result of fraud or financial abuse', which provides a model for banks to be proactive in spotting financial abuse.[75] This code lists the following examples of suspicious activity on an account:

- Multiple chequebooks;
- Sudden increased spending;
- Transfers to other accounts;
- Multiple password attempts;
- Logins from new devices, multiple geographical locations;
- Sudden changes to the regular operation of the account;
- A withdrawal or payment for a large amount;
- A payment or series of payments to a new payee;
- Financial activity that matches a known method of fraud or financial abuse.

182. In addition, banks should all commit to establishing their own specific public facing policies which address how they work to identify and respond to customers experiencing domestic violence or financial abuse.

RECOMMENDATION 72. Amend clause 39 to explicitly clarify that training aimed at assisting customers in vulnerable situations includes identifying potential vulnerabilities, including signs of domestic violence and/or financial abuse.

RECOMMENDATION 73. Introduce Code commitments to:

- use digital technology to identify uncharacteristic behavior that that could be indicative of financial abuse, and compensate customers where a bank's failure to do so contributes to abuse or loss;
- having specialist staff trained to provide additional assistance in situations where there is suspected, reported or known significant domestic or financial abuse; and
- establish public facing policies specifically addressing how banks can assist people who are experiencing domestic violence or financial abuse.

<u>Older customers</u>

183. There are also a range of unique concerns that arise amongst consumer representatives that specialise in working with older people. One such concern is that older customers with limited cognition are not able to remember their PIN numbers and have been known to write their PIN numbers down or use PIN numbers that are easy to recall. This is a known vulnerability for older customers and banks can do more to proactively reduce the incidence of financial abuse by monitoring accounts, inviting customers into a

[75] https://shop.bsigroup.com/ProductDetail?pid=000000000030330331.

branch to assist customers with how they can manage accounts to keep them safe, in particular if they are experiencing cognitive decline to recall PIN numbers but still have legal capacity.

Uniting Communities South Australia Case Study: Veronica (identity changed)

Veronica's family took her debit card and guessed her PIN numbers which were the birth years of her and her husband combined. Veronica never disclosed her PIN to her son but he was able to make attempts and guess the PIN. Veronica did not authorise her son to use the card but her son depleted her savings using her card. The transactions on the account were a vast change of spending with that of Veronica's past spending. The transactions included Uber eats, taxis in the early hours of the morning, pubs and bottle shops.

Veronica had banked with the same institution for a long time and the transaction activity dramatically and drastically changed. Veronica was never contacted by the bank to inform her about the activities on her account or how she could improve the security on her accounts. The bank denied liability to Veronica because the bank said that she used a PIN that incorporated the year of her birth.

184. Further, the closure of bank branches and reduction of face-to-face transactions is a greater risk for some older customers who are on the wrong side of the digital divide. It has forced some to 'authorise' family members or carers to act on their behalf, or utilise payment systems they are not familiar using. It also becomes harder for customers experiencing vulnerability to make the bank aware of vulnerability, when the accessibility and opportunities for face-to-face interactions are being reduced. Our experience has been that it is easier for a victim of abuse to negotiate a claim with a bank where the abuse ought to have been apparent in a customer facing context.

Financial Rights' Case Study – Adrian's story – elder abuse - C138746

Adrian, a disability pensioner, had a default judgment and order for possession of his home entered against him in the Supreme Court of NSW. While Adrian knew he had signed a mortgage over the property, he was duped to do so at the request of his (now estranged) grandson, who told him it was to secure a joint loan so he and his grandson could purchase an investment property together. Adrian was told the loan would be secured by the investment property, and that the mortgage over his house was just a "back-up". In fact, there was no joint purchase of an investment property and no other security for the loan, and Adrian had transferred a 15% interest in his property to his grandson for no consideration. Adrian had no capacity to pay the loan, and thought his grandson was taking care of it. He wasn't. Adrian's grandson had drawn down on the loan and spent the money himself (while pretending to our client they had purchased an investment property) and then disappeared.

Financial Rights raised a defence for Adrian in the Supreme Court arguing that the loan breached responsible lending laws and the loan process was riddled with red flags of financial abuse. Neither the bank nor the broker had properly assessed Adrian's capacity to pay the loan (he had no capacity to pay at all). Under the loan contract Adrian was liable to pay the monthly payments of $1400. At the time Adrian's gross monthly income was $1750 and his living expenses were $1250. The broker who arranged the loan had never even met Adrian (the grandson had falsified the loan application documents, including forging Adrian's signature). Adrian's home was his only asset worth more than $2000.

Neither the bank nor the broker had picked up that Adrian had received no independent advice (legal or financial) about the transaction – the same solicitor purported to act for both parties, despite the transaction clearly being improvident from Adrian's perspective.

Finally the loan clearly did not meet Adrian's requirements and objectives, which were to obtain funds to jointly purchase an investment property. The proposed investment property should have been security for the loan, but instead the bank took Adrian's personal residence as the only security.

Financial Rights made an application to set aside the bank's default judgment. We then entered into negotiations with the bank which agreed to set aside the judgement and discharge the mortgage. Had the bank and the broker complied with responsible lending laws the red flags of financial abuse would have been apparent.

185. Additional strategies banks should introduce to further reduce the risk of financial abuse include:

- banks checking with elderly customers that internet/mobile phone app is appropriate for the customer to avoid customers who are on the wrong side of the digital divide being exposed to abuse;
- requiring an enhanced verification whether in person or by utilising video remote technology and facial recognition to confirm transactions over a set amount (eg amounts over $10,000 requiring a person to verify and confirm the instructions to transfer funds). Alternative arrangements could be used in remote or regional areas where internet and branch access is difficult;
- for large transactions, also requiring that bank staff speak to the customer alone (without any support person) to help confirm that they understand and intend on making the transfer;
- removing any requirement that a customer must set up internet banking in order to access particular products (eg not requiring a customer to have internet banking to set up a travel card);
- involving specialist organisations in consultation processes when making major changes, such as the Council on the Ageing or Deaf Australia. To ensure these organisations have the capacity to undertake this work, this will often require funding, as many have had significant funding cuts impairing their ability to effectively participate and inform industry about access requirements;
- commitment to increase staff that are dedicated to assist older customers in person, including in branches, mobile bank staff, or by providing face-to-face services at major shopping centres (similar to Australia Post);
- establishing elder abuse specialist units so that customers impacted can access specialist staff, particularly if they are not able to use the internet or telephone.

186. Another major risk factor for older Australians in particular is the rate at which society is moving away from cash based society, toward digital payments. COVID-19 has fast-tracked this trend, and while it may be suitable for most people, there are parts of society that it risks leaving financially excluded. Older people are one such group, but some small businesses and other people who use technology less also may suffer from this change. Banks should commit to ensuring that they will continue to make cash available to customers, and assist people who prefer to use cash, rather than eBanking.

RECOMMENDATION 74. Introduce a Code commitment that banks will continue to support customers who prefer to use cash, rather than cards or forms of eBanking.

Co-borrowers and domestic violence/financial abuse

187. Earlier comments in this submission on the implementation of the CDR and treatment of joint account holders are relevant to this issue, but the way co-borrowing interacts with domestic violence and financial abuse is much broader than that alone.

188. One key protection for co-borrowers from abuse is the question of whether both borrowers are receiving a substantial benefit from a credit product. This is addressed in the Code in Chapter 17 already, and was an issue covered in the 2017 Review. However, we urge the ABA to revise where they landed on this previously. Recommendation 34 from the 2017 Review was to require banks to make reasonable enquiries about

whether a co-borrower will receive a substantial benefit to a loan as part of the approval process.[76] The ABA did not wholly accept the recommendation, but raised no concern with the prospect of undertaking reasonable enquiries.

189. However, in assessing whether someone receives a substantial benefit, clause 54 only requires the bank to consider information provided in the course of applying for the loan—and not necessarily make reasonable enquiries, or consider any other information available to them. Banks should consider all the information available to them in these situations including from any existing or previous banking relationship.

190. We also recommend that the exception to the substantial benefit requirement that can be met by satisfying the subsections in clause 54 should be restricted to only apply where the purpose of the loan is to purchase real property, and both co-borrowers will live in the property. There should be no exception where borrowers do not receive a substantial benefit in relation to other types of loans – this exception is simply too open to abuse. We are concerned that as it currently operates, clause 54 risks making it easier for people in abuse situations to be signed up as a co-borrower than a guarantor.

Financial Rights' Case Study – Diane's story – C173715 – domestic violence

Diane (name changed) is a single mother of two children (then 1 and 11), and called National Debt Helpline (NDH) in 2018. She contacted NDH as she had escaped from an abusive relationship that involved emotional and financial abuse. Diane had obtained a number of loans within a 12-month period with two of the big four banks (3 personal loans which she still owed over $36,000) and an additional loan with a second tier lender for over $11,000. Diane told Financial Rights these loans had been part of a pattern of financial abuse at the hands of her then partner. Her ex-partner had used the loans from the banks to fund an overseas holiday, and pay off a credit card that was in Diane's name but used by her ex-partner. When Diane called us, she was unable to meet repayments and had an Apprehended Domestic Violence Order in place over her ex-partner who was facing criminal charges.

We lodged an internal dispute with all three lenders arguing that the credit providers had failed in their responsible lending obligations and provided unsuitable loans. Whilst the NCCP Act also includes protections against "unjust loans", those provisions require the lender to be on notice of the unjustness (i.e. they needed to have seen something that indicated that abuse was taking place). Given the way financial services products are now largely online, there would be very little evidence of unjustness the lender would have been on notice to. The responsible lending provision, however, did assist Diane as the bank was required to make inquiries as to the loans purpose and its affordability beyond what the unjustness provisions require. Verification of Diane's income would have showed that it had been inflated on application.

Financial Rights was able to help Diane reach positive outcomes with her lenders after making these arguments.

191. In addition, we urge the ABA to reconsider recommendation 35 from the 2017 Review – which was to clarify that a credit facility is unenforceable against a person where the bank should have reasonably known that the person was not receiving a substantial benefit. The ABA rejected this, claiming it would be an unfair penalty for a situation that is difficult to verify.[77] This argument does not weigh up considering the term 'reasonably known' is used. Banks should be undertaking their due diligence in these situations. If it was difficult to verify, this bar may not be met, and the bank would not be liable. However, if the indicators were available to the bank, they should own up and accept responsibility. They can still chase the real borrower, who did receive the benefit.

[76] 2017 Review, Khoury, above n 1, p 103.
[77] ABA, 2017 Review Response, above n 6, p 15.

192. To additionally protect co-borrowers, we also recommend that the liability of a co-borrower for the loan should be reduced to the amount of the benefit they received from the loan funds. This can help prevent co-borrowers from been left holding all liability for a loan they only marginally benefited from. It is all too common for consumer representatives to hear from victim survivors of financial abuse who are being chased for the entire amount owing for a loan when their abusive partner leaves and the bank cannot contact them.

193. Another issue consumer representatives report is inconsistent approaches to how financial hardship variations for co-borrowers experiencing family violence or abuse are applied. In some situations, banks have required both parties to the credit facility to agree to a hardship variation. In other circumstances, this has been facilitated with just one party. The ABA should work with its members and consumer groups to identify a consistent approach to these issues, with the different hardship options banks may offer customers set out in the Guidelines.

RECOMMENDATION 75. Amend clause 54 to:

- require banks to consider all information available to them in assessing whether a co-borrower will receive a substantial benefit; and
- reduce the application of the exception contained at 54(a)-(c) to loans that are for real property. This exception should not apply in other circumstances.

RECOMMENDATION 76. Introduce a Code commitment stating that:

- if the bank should have reasonably known a co-borrower was not receiving any substantial benefit, they will be released from liability for the loan; and
- in any event, the liability of a co-borrower can be reduced to the amount of the benefit they received from the loan funds.

KEY AREA OF EMPHASIS: GUARANTORS

194. Some of the banking arrangements posing the greatest risk are where people who are vulnerable act as guarantors. This is highlighted as a key issue in our submission because of this risk, and also because we recommend substantial changes that could help address this risk.

195. Important context to the review's assessment of this area is the BCCC's recent report on compliance with the guarantor obligations in the Code by the banks, which indicated a concerning lack of Code compliance in this area.[78] The report indicates a significant lack of attention to detail in an area that can have such significant impacts upon the guarantor. Some of the case studies in the report also demonstrate just how significant a risk acting as a guarantor can be to anyone, and particularly people who are vulnerable.[79]

196. Due to responsible lending protections, guarantees are effectively the only situation where a person can currently legally commit themselves to a loan that may force them to sell their principal place of residence, even if there is no material change to their own circumstances. When this occurs, it is devastating for the guarantors. It can drive wedges between families, and push people who were previously living within their means into financial hardship. We want ABA members to commit to stop these scenarios arising. This is our primary ask on guarantees.

197. One of the major issues that consumer representatives regularly see when assisting guarantors at risk of losing their home is that these people rarely had a true understanding of the financial risk they are taking

[78] BCCC, *Banks' compliance with the Banking Code guarantee obligations*, August 2021, https://bankingcode.org.au/app/uploads/2021/08/BCCC-Inquiry-Report-Banks-compliance-with-the-Banking-Codes-guarantee-obligations-August-2021.pdf.
[79] See for example, p 25.

on at the time they entered into the agreement. This can occur because the guarantor does not understand what the financial impact of becoming responsible for the loan would be for them, or they did not understand or fully appreciate the risk the primary borrower was taking on.

198. We recommend that the Code should impose a positive obligation on banks to assess the suitability of the loan for the guarantor, that is, assess whether the arrangement would cause the guarantor substantial hardship if the guarantee is called upon. Substantial hardship would include consideration of whether the consumer is likely to have to sell their assets (particularly a primary place of residence) to meet their payment obligations. If the guarantee is likely to result in substantial hardship then the prospective transaction should be deemed unsuitable for the guarantor. As part of the suitability assessment, the bank should also satisfy itself that the guarantor is not experiencing financial abuse. This risk is not considered in the Code, unlike in regard to co-borrowers who do not receive a substantial benefit.

199. We also recommend a Code commitment that ABA members will not, under any circumstance, force anyone to leave their principal place of residence to repay a debt they guaranteed.

200. Instead, banks should rely on different arrangements to recover the outstanding debt. One example would be to allow the guarantor to take on the loan via an affordable interest-free repayment plan. Alternatively, banks could still treat a place of residence as security, but commit to giving the guarantor a life interest in any property that is their principal place of residence. While this may mean it takes significantly longer for the bank to recoup the loan when the property is eventually sold, these are extraordinary situations in which this would apply. If banks are going to hold themselves out as good corporate citizens, they should not use a business model that allows them to kick people out of their home in situations where the guarantors are not benefiting from the underlying loan themselves.

201. The other additional area where there is a dire need for improvement is in the information the guarantors are provided with about the risk they are taking on, both in terms of the financial situation of the borrower, and the impact becoming responsible for the loan would have on them. To address the first of these issues, we recommend that as part of the guarantee approval process, banks ensure that they obtain all consents necessary from the borrower to provide the guarantor with all the financial information the bank has about the borrower's circumstances, including their responsible lending suitability assessment. The current Code clause 99 goes some way to achieving this, but falls short in some ways – particularly by explicitly excluding an obligation to give the guarantor the bank's internal opinions. The affordability assessment should be provided. We understand that the new COBA Code will contain a clause essentially requiring the borrower to agree to release all relevant information to the guarantor before they will accept a guarantee.

202. To address the second area where guarantors lack information, we recommend that banks commit to undertaking an affordability assessment of the guarantor as part of the approval process, and provide them with the outcome. That way, the guarantor can better understand what the impact of the guarantee being called upon would have on them. We recommend this even if the ABA accepts recommendation 75 and commits not to ever force guarantors to leave their home. People should be made aware if they are going to sign up to an agreement that could see them effectively lose the ownership of their home. Should the ABA not accept recommendation 75, banks should otherwise refuse to accept guarantees if repaying the loan at the time it is entered into would force the guarantor into substantial hardship.

RECOMMENDATION 77. Introduce a Code requirement for a suitability assessment in respect of guarantees, and take reasonable steps to be satisfied that the guarantor is not experiencing financial abuse.

RECOMMENDATION 78. Introduce a Code commitment that banks will not force any guarantor to sell their principal place of residence to repay a loan they have guaranteed. Instead, banks should commit to either allow the guarantor to retain a life interest in their principal place of residence, or allow them to repay the loan interest-free.

RECOMMENDATION 79. Introduce a Code commitment that banks will not accept guarantees from borrowers unless the borrower agrees to allow the bank to provide all relevant financial information it holds to the guarantor, including the suitability assessment undertaken under responsible lending laws.

RECOMMENDATION 80. If Recommendation 77 is not accepted, introduce a Code commitment that banks will not accept a guarantee from a person if the suitability assessment indicates that repaying the loan would cause them substantial hardship.

203. In addition to this reform, we also recommend that subsection a) of clause 108 of the Code, which provides an exception to the three-day period requirement for guarantors to consider information before a guarantee can be accepted, be deleted. The risk in this area is simply too great, and in our experience these decisions are often made based on emotion or due to a sense of obligation. Giving the guarantor a period of time to actually consider the legal impact of the guarantee should not be avoidable.

204. We also have concerns about the exceptions contained in Chapter 25 for sole director guarantors and trustee guarantors, which apply to clauses 97, 99, 101, 102, 103, 109 and 110. Sometimes perpetrators of financial abuse will set up companies with their victim as a director to make access to finance easier. In this situation, these exceptions may make it easier for the abuse to go unnoticed by the bank. We therefore recommend clarifying that this exception does not apply where the borrower and director or trustee have a personal relationship or are family members.

205. Finally, we also recommend that safeguards be introduced into the Code that ensure banks are required to inform prospective guarantors of the potential impact that acting as a guarantor can have upon Centrelink payments, due to Centrelink's gifting rules, and on their potential aged and health care choices. These are serious potential impacts upon guarantors.

RECOMMENDATION 81. Delete subsection a) from clause 108 of the Code, so having received independent legal advice does not preclude the operation of clause 107.

RECOMMENDATION 82. Restrict the application of the exemption to clauses 97, 99, 101, 102, 103, 108, 109 and 110 for sole director guarantors and trustee guarantors so that it does not apply where the borrower and director, or trustee, have a personal relationship or are family members.

RECOMMENDATION 83. Introduce a Code commitment requiring banks to provide and explain information to customers about the potential impacts acting as a guarantor can have upon:

- payments by Centrelink; and
- health and aged care choices.

Debt management firms

206. The ABA has been supportive in the last few years of the work consumer advocates have been undertaking in regard to debt management firms (**DMFs**). We frequently see DMFs acting for people experiencing

financial hardship in ways that are contrary to their best interests. We strongly support the content of the ABA's DMF guideline,[80] and encourage the ABA to incorporate key aspects of this into the Code.

RECOMMENDATION 84. Introduce a Code commitment to:

- advise customers of free alternatives to using debt management firms if they have one acting for them, and the bank believes the firm is not acting in the customer's best interests; and
- alert ASIC where banks believe a debt management firm is acting contrary to the law or in a way that is harmful to their client.

4.f. Promoting the Code and low-cost bank accounts

Identifying low income earners

207. The effective promotion of low-cost bank accounts can be significantly impacted by the ability of banks to identify people who are on low incomes and may be eligible for these accounts. On this issue, Chapter 15 of the Code sets an encouraging standard. However, as with clause 38 discussed above, the final sentence in clause 43 similarly states, "We may become aware if you are a low income earner only if you tell us about it". This sentence is problematic, considering that in many cases the bank records of a customer will often quite obviously indicate that they are on a low income. Under the ACCC authorisation of the Code, the banks are also obliged to proactively identify customers who might be eligible for basic bank accounts,[81] making the sentence in clause 43 even more redundant.

208. Consistent with the ACCC's authorisation, there needs to be specific commitments about how banks will proactively identify customers who may be eligible for basic bank accounts. We believe that further steps need to be taken in this space, as financial counsellors continue to receive calls from people obviously on low incomes in fee charging bank accounts. Banks should be using triggers from customers' banking records to prompt them to assess whether customers may be eligible. At a minimum, this should include people who receive government support payments, or anyone that the bank is aware holds a health care or concession card. If there are additional triggers being used by one bank to identify this, this should be rolled out to be consistent across all banks, as the obligation applies in the same way. Banks should also ensure that they do not take an overly restrictive approach to eligibility for basic bank accounts – banks should treat all people on a low income as potentially eligible for a basic bank account.

RECOMMENDATION 85. Delete the last sentence from clause 43.

RECOMMENDATION 86. Commit to proactively reviewing whether customers who receive government support payments are eligible for basic bank accounts.

RECOMMENDATION 87. The target market determination for basic bank accounts should define the target market sufficiently broadly to include all persons on a low income.

Increasing uptake of basic bank accounts

209. Where banks do identify existing customers who do appear to be eligible for a basic bank account and the account would appear to fully satisfy their banking habits, we recommend that banks adopt an opt-out process, so that disengaged customers do not miss out on the savings in fees. We have been told that CBA has begun using an opt-out approach. While financial counsellors are yet to see widespread evidence of this proactive rollout, we see no reason why this could not be used more widely. For example, identifying an eligible customer could result in a prompt explaining the benefits of a basic bank account, and informing

[80] https://www.ausbanking.org.au/wp-content/uploads/2021/06/ABA-Guiding-Principles-Debt-Management-Firms-DMFs-July-1-2021.pdf.
[81] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association.

them that their account will be swapped over in 30 days, unless the customer informs the bank they want to stay with their current account.

210. We also strongly encourage banks to make information about their basic bank accounts easily accessible on their website. Further, the application process to sign up for a basic bank account should be no more difficult than the process to open an account with fees. It should not necessarily prescribe that customers come into a branch. Sign up forms and processes on websites should contain explicit prompts to help determine whether a person is eligible for a basic bank account as well.

RECOMMENDATION 88. Introduce a Code commitment that to proactively offer basic bank accounts, banks will:

- prominently advertise their existence on their website;
- use an opt-out model for existing customers identified who are eligible for, and would benefit from, a basic bank account; and
- use explicit prompts in hard copy forms and online sign-up processes to make people aware of basic bank accounts, and help identify whether a new customer is eligible (and offer them a basic bank account, if so).

Commit to offering basic bank accounts

211. One issue that arose during the ACCC authorisation process was a question around whether all ABA member banks offer a basic bank account, as opposed to an alternative low or no-fee account with weaker standards. While clause 44A, which appears to make offering a basic bank account optional, was approved by the ACCC, there was a clear indication from the ACCC that it preferred all members to offer a basic bank account. Assuming all members continue to offer basic bank accounts, we recommend using this opportunity to amend clause 42 so that all members commit to offering a basic bank account.

RECOMMENDATION 89. Amend the language in clause 42 so all ABA members commit to offering a basic bank account.

ACCC authorisation data

212. The ACCC's authorisation of the Code was conditional on reporting statistical information to the ACCC on the uptake and use of basic bank accounts. Due to the COVID-19 pandemic, the due date for the first set of data to be provided to the ACCC was extended to 31 October 2021. We strongly encourage the Code Reviewer to obtain this information from the banks, and consider it in assessing whether the banks are doing a sufficient job of proactively publicising basic bank account eligibility.

213. To further assist public messaging and increase the motivation for banks to be proactive on this front, this data should be published. We encourage the Code Reviewer to consider whether it is appropriate for banks to provide these report details to the BCCC, for publication in a way that allows for comparison between the rates that banks are identifying eligible customers.

Awareness of the Code

214. As noted at the outset of this submission, it is still uncommon for people who present to financial counsellors or community lawyers for assistance with banking problems to have any kind of awareness of the content of the Code. While we support additional efforts to increase general awareness of the Code, communications are far more likely to be received if banks are advising consumers of the existence of the Code when they have an issue arise and it can help them.

215. Accordingly, we would like to see a commitment that if a bank becomes aware that they may have breached the Code and this has impacted a customer who has an active complaint or dispute with them, that they will notify the customer of the breach and remediate.

216. Additionally, banks need to do more to ensure their own staff have a proper understanding of the Code. Financial counsellors still hear from clients who have been treated by bank staff as though the Code doesn't exist. Financial counsellors also sometimes still have trouble having their role as an advocate for their client recognised, despite the specific assurances in the Code that customers can have financial counsellors act on their behalf.

RECOMMENDATION 90. Introduce a Code commitment that if, during a dispute with a customer, a bank becomes aware of a potential Code breach, they will inform the customer of the breach and of any rights they have regarding the breach under the Code, or their ability to raise it as an argument in AFCA. Proactive remediation should also occur where appropriate.

Term of reference 5: The BCCC's powers, duties and sanctions

217. The monitoring role and powers of the BCCC are extremely important in ensuring the overall impact of the Code. The BCCC is a valuable information resource, and has undertaken relevant own motion investigations into key issues in the time since its establishment.

218. However, the BCCC's powers are relatively weak compared to other code oversight bodies. We believe its impact could be far greater if its sanctions powers were expanded for situations where Code breaches warrant more significant responses. We recommend that the BCCC's powers and resources be expanded as set out below. We also support retaining the BCCC Charter, but that key powers should continue to be reflected in the Code itself as well.

Penalties

219. In regard to existing powers, there are some unnecessary and inappropriate restrictions on when the BCCC can use its sanction powers, under clause 215.

220. Under subsection b), the BCCC has the power to order a compliance review, but this sanction is restricted only to undertake assessments of remediation actions. We believe there may be many other situations where a compliance review may be a valuable and important direction, such as where there are signs a breach may be systemic or widespread. This power would be more valuable if it could be ordered in regard to any Code breach which meets a condition of clause 214.

221. Similarly, we recommend that subsection f) is also amended. Under the current drafting, the BCCC is permitted to report serious or systemic non-compliance with the Code to ASIC, but only where the non-compliance is additionally ongoing. It should be within the power of the BCCC to report any kind of serious or systemic non-compliance to ASIC.

RECOMMENDATION 91. Amend clause 215 as per below:

- Expand the power under subsection b) to order a compliance review to be a general power, not limited to remediation actions; and
- Remove the requirement under subsection f) that serious or systemic non-compliance with the Code must also be ongoing before the BCCC may report it to ASIC.

222. We also consider that the sanctions available to the BCCC should be expanded more generally, consistent with those contemplated under ASIC Regulatory Guide RG 183 (**ASIC RG 183**).[82] Some of the more significant sanctions powers in RG 183 are currently not available to the BCCC. The ABA regularly refers to its Code being the first financial industry code to be approved by ASIC.[83] For this statement to hold any value, the Code needs to remain up to date with ASIC recommendations, and comparable codes.

223. We note that the General Insurance Code Governance Committee now has a number of additional sanctions powers available to them under the General Insurance Code of Practice (**GICOP**).[84] The BCCC should have similar powers.

224. In regard to the recommended power to issue financial penalties, this power should take a similar form to that in at clause 174.c. of the GICOP. However, we additionally recommend that the BCCC should have the power to make general directions about the recipients of community benefit payments, to ensure they can be directed in a way that is relevant to the breach that led to it, and consistent with the BCCC's view of the issue.

225. The power to identify banks in BCCC publications should also be sufficiently broad to allow the BCCC to be used in any BCCC report. For example, the impact of the BCCC's recent report on compliance with the guarantor obligations in the Code, while confirming widespread non-compliance, does not name any banks and it has garnered relatively little public attention. The ability of the BCCC to name banks (for either strong compliance or non-compliance) would greatly increase the likelihood of public interest in the publications, and in turn, act as a stronger motivation for compliance.

RECOMMENDATION 92. Introduce the following additional sanctions powers for the BCCC:

- the power to order corrective advertising;
- the power to identify banks in all BCCC publications relating to compliance with the Code;
- the power to order a bank to compensate an individual for any direct financial loss or damage caused by a breach of the Code;
- the ability to suspend or expel banks from the ABA if their conduct is serious and ongoing; and
- the ability to impose financial penalties for serious or systemic breaches, as well as for a failure to report known Code breaches.[85]

Banks should report to BCCC on progress

226. At recommendations 38, 62 and 63 above, we have made recommendations that banks should be required to report to the BCCC on the progress they are making on meeting the recommended Code commitment, and the BCCC should be able to publicly report on this. This would be a similar arrangement to recommendations made in the 2017 Review that recommended Customer Advocates report on behalf of banks to the CCMC,[86] but in many instances the ABA did not accept there was a need for the reporting arrangement. In particular, this was the stance of the ABA in relation to recommendations around

[82] https://asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf, para RG183.70.
[83] See for example, https://www.ausbanking.org.au/new-independent-banking-code-review-now-calling-for-submissions/.
[84] https://insurancecode.org.au/app/uploads/2021/07/GI-Code-2020.pdf, clause 174.
[85] https://insurancecouncil.com.au/wp-content/uploads/2021/05/ICA001_COP_Literature_Code_OnScreen_RGB_DPS_10.2_LR2.pdf, clause 174.
[86] 2017 Review, Khoury, above n 1, see for example Recommendations 58, 59, and 60.

simplifying terms and conditions, and making the cancellation of direct debits sand recurring payments easier for customers.[87]

227. As is detailed above, four years later, the banks have not in our view, made the advances that should have been made in these areas. Had these recommendations been adopted in full, the greater motivation of having to report to the (then) CCMC and have those reports published may have led to better consumer outcomes. Certainly they do not seem to be commitments that are particularly complex, or which should have taken four years to complete.

228. Considering these outcomes in these areas, we encourage the Code Reviewer not to shy away from recommending a reporting arrangement, just because the ABA did not accept this aspect of the recommendations last time. Considering these issues are not yet resolved, the ABA has no good reason to turn away from such requirements again.

Resourcing

229. As a final comment on the BCCC, we strongly encourage the Code Reviewer to seek internal information from the BCCC to examine whether there is a need for greater resourcing. We query this because while there appears to be many good ideas and proactive plans coming out of the BCCC, there is often a significant time between these plans being announced and their execution. For example, the BCCC's inquiry into vulnerability, inclusivity and accessibility addresses extremely relevant questions,[88] but we are unaware of any progress undertaken on this front. It may be that this has been influenced by the COVID-19 pandemic or other factors, but it may warrant a review of the funding available to the BCCC.

Term of reference 6: Other matters of particular concern

Independent legal advice

230. An additional concerning issue that has arisen in the work of some consumer representatives relates to where a customer is required to get independent legal advice as a condition precedent to a credit offer. We do not think that referral to a legal practitioner necessarily serves to protect the borrower. Furthermore, in South Australia, a number of clients have reported that when this requirement arose they were all told by the bank to go to the same particular legal practitioner. This practitioner seems to have had numerous complaints made against him to the Legal Practitioners Conduct Commissioner. Clients say this practitioner failed to explain documents. Further, clients often failed to understand the purpose of this process was to receive *independent* advice and rather believed the solicitor was acting for the lender.

231. Where there is a need for clients to seek independent legal advice, banks should refer customers to the relevant state or territory Law Society and avoid referring or providing names or details of any specific legal practitioners to ensure the customer is getting genuine independent advice.

RECOMMENDATION 93. Introduce a Code commitment that banks will not refer customers to specific legal practitioners where a customer is required to obtain independent legal advice prior to entering into an agreement with the bank.

Meeting other commitments in new COBA Code

232. Throughout this submission, we have mentioned where the (soon to be released) updated COBA Code will provide relevant commitments to COBA customers beyond that which the current ABA Code confers on its customers. The sections detailed below are additional areas where the COBA Code will include

[87] ABA, 2017 Review Response, above n 6, p 21-22.
[88] https://bankingcode.org.au/bccc-launches-vulnerability-inclusivity-and-accessibility-inquiry/.

commitments that do not have any equivalent in the ABA Code, or go beyond the equivalent provision. We urge the ABA to at least match these provisions as part of the Code update.

Advertising

233. COBA are going to have a specific section in their new code addressing ethical advertising, including commitments to:

- ensure their advertising and promotional material is not misleading or deceptive;
- ensure that representations or omissions made are not misleading or deceptive;
- any images used in marketing material will not contradict or detract from the prominence of any statements made;
- have regard to relevant ASIC regulatory guidance on advertising; and
- not use unfair pressure selling techniques when promoting products or services.

234. By comparison, the ABA Code only has a few similar relevant clauses, such as clause 15 (giving clear information) and clause 21 (ensuring marketing material is distinguishable from terms and conditions). While it is arguable that the COBA commitments are largely covered by existing consumer laws, considering the poor historical track record of banks in their messaging to customers (for example, CCI), ABA members should consider introducing equivalent commitments to advertise and market themselves responsibly.

Fair terms and conditions

235. The existing COBA Code contains a commitment (which will be retained) to use standard terms and conditions which strike a fair balance between the customer's legitimate interests, and the bank's legitimate interests.[89] The ABA Code currently contains no such equivalent. We consider this commitment to go beyond that which is required under the unfair contract terms regime, and we urge the ABA to match this commitment.

Fees

236. There will be a number of provisions in the COBA code addressing fees. One was mentioned above regarding default fees being reasonable with regard to the bank's costs. However, additional commitments that we consider not to have an equivalent in the ABA Code include:

- to regularly review fees and charges;
- ensuring fixed rate loan break fees are reasonable, having regard to any loss caused;
- making interest rates and fees for products publicly available; and
- explaining how interest rates are calculated, upon request.

237. These again are commitments we would like to see matched in the Code.

Subsidiary cards

238. The COBA Code will specifically address subsidiary cards in two clauses, aimed at ensuring that:

- the primary cardholder understands their liability for debts incurred by the subsidiary cardholder, and how to stop or cancel the subsidiary card; and

[89] https://www.customerownedbanking.asn.au/storage/customer-owned-banking-code-of-practice-january-2018-1607307671vNoPS.pdf, clause 4.2.

- if a request to cancel the subsidiary card is made, a commitment that the primary cardholder will not be responsible for any losses resulting from unauthorised use of the subsidiary card after the request is made.

239. We encourage the ABA to match these commitments in the Code.

Credit cards

240. The new COBA Code will commit to prompt people who are transferring an existing credit card balance onto a new card of the same issuer to cancel the old card. This again, is a commitment that the ABA members should match.

Account statements

241. COBA will also make additional commitments regarding the information given in account statements and how they are provided, including the following we consider to have no equivalent in the ABA Code:

- to ensure that statements show unbundled fee amounts, as well as indicating the impact of any fee-free limits or rebate schemes;
- to enshrine a commitment that free and simple methods of accessing account balances are available, such as an online facility;
- clearly and specifically disclose where account statements will only be available electronically as part of the offer of the relevant product; and
- ensure that customers can save or print information provided to them electronically.

242. Again, while not groundbreaking commitments, these are easy to meet and important for transparency.

Discretionary risk products

243. The new COBA Code will include a commitment not to sell discretionary risk (non-insurance) products. These products are junk and the ABA should commit to do the same.

RECOMMENDATION 94. The ABA should meet all commitments that will be contained in the new COBA Code, where they go beyond the current commitments made in the ABA Code.

Term of reference 7: Code review frequency

244. We support the existing process that sees the Code reviewed every 3 years. This is consistent with ASIC guidance on industry codes. Three years also gives enough time for ABA members to fully implement recommendations, and for the next review to be undertaken at a point where there has been sufficient time to assess whether changes have had an impact, or if further steps need to be taken.

245. However, while a detailed review every three years is a good approach, we consider that the Code should be treated as a living document, and amendments to strengthen the Code should be made where change makes it appropriate in the shorter term. This has occurred to some extent, but there have been some limits on the effectiveness of the process.

246. As has been set out above, there have been a number of areas in the last four years where the ABA has engaged with consumer groups to work to develop industry guidelines. While we support the ongoing development of these guidelines, it has possibly meant that these guidelines were developed instead of making additional Code commitments in the interim. The problem with this, as mentioned above, is that the guidelines are not binding. In future, we would like to see the ABA develop these guidelines, but also obtain agreement from members to enshrine the more important protections in the Code at the same

time. That way, the next review will not need to solidify so many aspects of these guidelines into the Code as we consider to be required here.

Term of reference 8: Other matters under ASIC RG 183.

247. ASIC RG 183 sets out that ASIC's approval process for codes primarily focuses on the adequacy of a code's core rules. Specifically, paragraph RG 183.60 of states "It is essential that core rules address existing and/or emerging problems in the marketplace…"

248. Paragraph RG 183.62 goes onto state "If identified consumer concerns or undesirable practices are not addressed in the code, we will need a detailed explanation for why this is so."

249. With that in mind, we also wish to address the final issues below that we consider to reflect emerging problems in the marketplace, that are not otherwise covered by the Code.

KEY AREA OF EMPHASIS: SCAMS

250. In June this year, the ACCC reported that Australians reported losing over $851 million in scams in 2020, a record amount and a major increase on previous years.[90] This trend was reflected in the issues that consumers sought out assistance for from financial counsellors and community lawyers in 2020, with a great deal more people seeking assistance having lost money through scams. The signs so far through 2021 are that this will continue. We raise this as a particular matter of concern as the financial impact on consumers of scams can be significant, and there is a serious lack of meaningful protections under the current legal framework. It is a space where want to see the banks commit to do more.

251. The hole in the legal framework is likely to expand shortly, as ASIC's review of its ePayments Code appears likely to exclude the oversight of scams from its remit.[91] This is a change that the ABA supported in its response to ASIC's consultation on this code, though it has also called for the development of separate regulatory guidance addressing scams.[92] We also understand that scams were covered in a previous version of the ABA's industry guideline on financial abuse.

252. Consumer representatives are extremely concerned about the lack of consumer protection in relation to scams and strongly urge banks to use the review of the Code to make commitments that ensure they play a greater role in the prevention of scams, and take on more responsibility to protect consumers. Banks have far greater ability to identify scams than consumers do, partially due to the technology available to banks, as well as the insight that comes from dealing with so many transactions. It is also arguable that the significant rise in scam prevalence has been made possible in part by the movement toward an increased focus on eBanking, a trend the banks are supporting.

253. It should also be recognised that consumers are often not in a position to protect themselves in relation to scams. Many scams are sophisticated and realistic—sometimes they involve carbon copies of legitimate investment websites; others intercept legitimate emails or texts exchanged with businesses; others present themselves as legitimate marketplaces or online sellers when in reality they are selling a scam. In general, banks are required to protect consumers against fraudulent transactions, and they have specific obligations under AUSTRAC requirements to monitor transactions to protect against criminal activity, which includes fraudulent scam activity. Banks also have obligations to provide services with due care and

[90] https://www.accc.gov.au/media-release/scammers-capitalise-on-pandemic-as-australians-lose-record-851-million-to-scams.
[91] ASIC, *Consultation Paper 341 – Review of the ePayments Code: Further consultation*, May 2021, https://asic.gov.au/media/eh2fceff/cp341-published-21-may-2021.pdf.
[92] ABA, *Review of the ePaymetns Code: Further consultation*, 2 July 2021, https://www.ausbanking.org.au/wp-content/uploads/2021/07/20210702-ABA-response-to-CP-341-ePayments-Code-review.pdf.

skill, as well as 'efficiently, honestly and fairly', under the law – there is benefit in the Code clarifying what banks are required to do under these provisions in relation to scam detection and prevention.

254. Consumer representatives recommend that ABA members commit via the Code to a system more like that contained in the 'UK Contingent Reimbursement Code',[93] which was a landmark piece of work developed by joint industry and consumer group work. Fundamentally, that code places a far greater onus on banks to reimburse customers for funds lost through scams that use their systems. Similar to this, we would like to see the banks take on more responsibility for known scams, by taking a more interventionalist approach to stopping this from happening, or reimbursing the customer where they have failed to do so.

255. Clients of consumer representatives who have fallen victims of scams have reported that they have been contacted by their bank when trying to make a transaction they later found out to be a scam. In some cases, the bank may have contacted them and briefly mentioned that a scam alert had been flagged. In other situations, the customers simply reported that they had been asked to confirm they wanted to continue with the transaction. Due to the psychological nature of some of these scams, this is often not sufficient for the customer to question whether they are being scammed. However, it appears at this point the bank is aware of the high likelihood of it being a scam.

256. These are the situations where we want the banks to be more proactive. Specifically, where a bank is suspicious that a transaction is a scam, they should commit to block the transaction, even against the customer's wishes. In such situations, banks should have specialists who are trained to have detailed conversations with customers about the scam. At this point, customers will often need to be talked through the scam in detail, and if the banks have this information, they should be having these conversations. Banks should commit to reimburse the customer where a scam causes them loss, and the bank did not take adequate steps to flag and stop the transaction.

257. Help for people who believe they have fallen victim to scams should also be easily identifiable on bank apps and on websites. This communication should recognise the vulnerability of scam victims, including that many victims are older or come from non-English speaking backgrounds—communication needs to be comprehensible and tailored to the needs of victim groups.

RECOMMENDATION 95. Introduce a Code commitment to have systems in place to identify potential or likely scams, and where this is identified:

- If the bank is suspicious the customer may be getting scammed (for example, due to other customers being similarly scammed), step in to prevent the transaction;
- If the bank believes it is possible that the customer is being scammed, have a specialist staff member contact the customer to talk the customer through the risk and scam in detail.

Further commit that if the bank fails to take reasonable steps to flag and stop a scam transaction, it will reimburse the customer for their loss.

RECOMMENDATION 96. Introduce a Code commitment to make information for a person who believes they have been scammed, and contact details for specialist assistance, readily available on bank websites and in banking apps.

[93] https://www.lendingstandardsboard.org.uk/crm-code/.

Other matters relating to ePayments

258. As the role of different payment forms is only going to increase, there are a number of additional commitments we would like to see from ABA members to help improve consumer protections and outcomes with the advances in technology.

ePayments Code

259. As a first step, regardless of whether or not it continues to have any relevant to scams, we would like to see ABA members commit in the Code to subscribe to ASIC's ePayments Code. This code is currently voluntary, and this is likely to remain the case for some time, but it still contains some valuable protections for consumers. Not all ABA member banks are subscribers to this code. We note that in their new code, COBA members will make this commitment.

RECOMMENDATION 97. Introduce a Code commitment that ABA members will subscribe to ASIC's ePayments Code.

Facilitating least cost routing

260. We also urge ABA members to support the Reserve Bank of Australia's (**RBA**) goal of rolling out least cost routing across the country, to reduce the fees associated with making payments via cards, both in person and online. The best way to support this process would be to commit to issuing dual network debit cards (**DNDCs**), rather than single network cards. A recent consultation paper released by the RBA indicates that it is currently unlikely to formally require banks to issue DNDCs, though it would set out an expectation for the major banks to continue to issue DNDCs. Regardless of this guidance, the rollout of least cost routing would be best supported if all ABA members committed to issuing DNDCs.

RECOMMENDATION 98. Introduce a Code commitment that all ABA members will only issue dual network debit cards.

Buy now, pay later (BNPL) and wage advance products

261. The presence and impact of BNPL and wage advance products in the wider payments marketplace is increasing at a rapid pace, and is dramatically changing the credit and financial product landscape. This is a major concern for consumer advocates as these products are designed to avoid the credit laws and important consumer protections, via loopholes in the NCCP Act. There are now multiple ABA members that are offering these products, with some developing their own products while others have established partnerships with BNPL providers.

262. The shocking lack of regulation covering these products makes it all the more important that the Code be used to implement consumer protections applying to BNPL and wage advance products where banks are involved. We are concerned that by seeing a bank associated with these products, consumers will assume the products are safer and more trustworthy. This leaves more reason to have safeguards in place with products that are associated with banks, than in the wider market.

263. It is the unanimous view of consumer representatives that BNPL and wage advance products should be captured under the NCCP Act, and treated as regulated credit. People seeking assistance from financial counsellors are increasingly reporting that they have multiple BNPL debts on the go at one time, which when coupled with numerous other credit debts, can amplify the impact of financial hardship. There is a desperate need for responsible lending assessments to be applied before people can accrue debt via BNPL. This appears to be a view shared by many of the banks as well.[94]

[94] See for example, ANZ CEO Shayne Elliot's comments to the Senate Standing Committee on Economics, Friday 16 April 2021, p 40; CBA CEO Matt Comyn's comments to the Senate Standing Committee on Economics, Thursday 15 April 2021, p24-25.

264. The ABA needs to take the lead on this issue. We strongly urge the ABA to commit in the Code to treat BNPL and wage advance products they issue as though they are regulated by the NCCP Act, including by applying responsible lending obligations. This is the only way to properly protect consumers from unnecessary harm through these products.

265. Further, where ABA members elect to develop partnerships with BNPL providers, they should also ensure that these arrangements are only entered into with BNPL or wage advance product providers that are members of AFCA, and commit to meeting ASIC's IDR guidance. It would be unconscionable for a bank to endorse a financial product issuer that does not allow consumers proper dispute resolution processes. Banks should additionally seek to ensure that any partnerships they establish are with companies that ensure many more additional rights for their customers. Unfortunately as the only industry code currently in the BNPL space falls drastically short of what we would consider valuable, the membership of AFCA is the only yardstick we have to measure BNPL or wage advance providers.

RECOMMENDATION 99. Introduce a Code commitment to treat BNPL and wage advance accounts issued by ABA members as though they were subject to the NCCP Act.

RECOMMENDATION 100. Introduce a Code commitment only to partner with BNPL providers or wage advance product providers that are members of AFCA, and who agree to meet ASIC guidance on dispute resolution.

Climate Change and extreme weather events

266. One final area of increasing concern is the impact of climate change, and the increasing frequency of extreme weather events. We appreciate the assistance and flexibility provided to consumers who have been impacted by extreme weather events (or natural disasters) by the banks in recent years. Like the pandemic, these events are devastating for some, and force many more to put their lives on hold. Providing customers with the ability to pause repayments and other forms of hardship assistance while they work to pick up the pieces can make a world of difference. We strongly support the ABA's statements on natural disaster responses,[95] and encourage the ABA to consider whether any of these commitments can be solidified by inserting them into the Code.

267. However, as these events are only going to become more frequent, it is time to consider what else can be done. We firstly recommend that the Code specifically commit to providing additional hardship assistance to customers impacted by extreme weather events or natural disasters. This could firstly be addressed by adding being impacted by an extreme weather event or natural disaster as a specifically recognised form of vulnerability, at clause 38. Additionally, we recommend expanding the application of clause 179A, which commits to not charge default interest to farmers impacted by drought or natural disaster, to all customers. Any person impacted by an extreme weather event or natural disaster should not be charged default interest while they are experiencing or recovering from the event.

268. There is also a role for the banks in risk mitigation. Because of the importance of maintaining adequate home insurance for residential properties in areas at higher risk of harm due to extreme weather events, we urge banks to take the steps set out at recommendation 103. It is always going to be in the interests of banks as well as the borrower to ensure that mortgaged properties are adequately insured against extreme weather.

RECOMMENDATION 101. Amend clause 38 of the Code to specifically recognise being impacted by an extreme weather event (or natural disaster) as form of vulnerability.

[95] https://www.ausbanking.org.au/natural-disaster-response/.

RECOMMENDATION 102. Amend the operation of clause 179A o the Code to commit not to charge any person significantly impacted by an extreme weather event (or natural disaster) default interest for a reasonable period following the event.

RECOMMENDATION 103. Introduce a Code commitment to:

- include the likely cost of insuring a property from all significant extreme weather risks in the responsible lending affordability assessment for any mortgage applicant; and
- proactively ask customers in hardship on their mortgages whether they have current insurance over their property, and offer to pay for it ex gratia as part of hardship assistance if they do not.

Conclusion

More than 100 recommendations are a lot for a Code review that is not supposed to be all encompassing. However, while it might be true that the general consumer view of the banks has improved since the Royal Commission, there is clearly room for further improvement.

Our organisations engage in advocacy work to provide a voice that advocates for the interests of consumers in general, and particularly for people who are experiencing disadvantage or vulnerability. The recommendations made therefore reflect what we consider to be the necessary steps to bring the Code up to a standard that would meet reasonable consumer expectations. Some of these recommendations are already being met by some banks, but compliance should be committed to via the Code. Others are areas where we consider the current practices of banks are not meeting what consumers can, and should, expect.

ABA members offer essential services for the benefit of the community. For banks to meet customer expectations, it is essential that they continue to improve in their commitments to customers with a focus on consumer outcomes. This should result in the adoption of improved Code protections, and in a genuine commitment to applying the rights and protections provided to consumers under the Code.

We look forward to engaging with you as the reviewer, and with the ABA and its members, to further explain the reasoning behind these recommendations, and to advise on how to better implement the Code into banking processes.

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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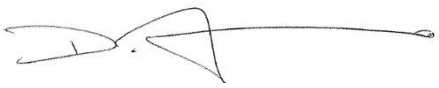

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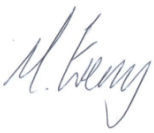

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APPENDIX A – LIST OF RECOMMENDATIONS

RECOMMENDATION 1. The Code should be reviewed from the perspective that making substantial commitments to improve consumer outcomes is most important, even if it means adding detail or complexity into the Code.

RECOMMENDATION 2. Where industry guidelines are used to expand on Code commitments, the guidelines should be made enforceable in interpreting those provisions of the Code, or the most important commitments in guidelines should be put into the Code.

RECOMMENDATION 3. Introduce a Code commitment to set default fees at rates that are reasonable having regard to the loss incurred. Banks should not profit from acts of default.

RECOMMENDATION 4. Implement recommendations 59 and 60 of the 2017 Review on direct debits and credit card recurring payments, and consider further recommendations to ensure customers are able to easily cancel these payments.

RECOMMENDATION 5. Introduce a Code commitment not to enforce credit facilities against individuals for non-monetary defaults except in limited circumstances, like those contemplated for small businesses in clause 80. Amend clause 144 so where a credit card is cancelled by the bank, commit to telling customers why unless it is prevented by law.

RECOMMENDATION 6. Introduce a Code commitment that member banks will not establish or maintain any arrangement with third party retailers under which the retailer can sign up individuals to credit products using the point-of-sale exemption.

RECOMMENDATION 7. Introduce a Code commitment to:

- publish plain language target market determinations for all relevant products; and
- provide redress to customers who are sold a product in circumstances where they are not in the DADO target market .

RECOMMENDATION 8. In regard to children, introduce a Code commitment to:

- not market products directly to children through school programs or any other means; and
- not include children in the target market determinations for any products that charge monthly fees or fees for own-bank ATM transactions, default fees, EFTPOS transactions or BPAY transactions.

RECOMMENDATION 9. Introduce an enforceable Code commitment that staff remuneration structures and performance assessments will not be solely or directly based on sales performance.

RECOMMENDATION 10. Expand the operation of clauses 64, 65 and 66 in the current Code to apply to all sales of CCI, not just when it is sold in digital channels.

RECOMMENDATION 11. Introduce Code commitments:

- not to sell CCI with low claim to premium ratios; and
- to provide a refund to any customer sold CCI if they are largely ineligible to claim under the terms of the CCI product.

RECOMMENDATION 12. Insert a Code commitment into Chapter 17 not to provide or increase credit to a borrower if they could not comply with the financial obligations under the credit contract, or if doing so would cause them substantial hardship. This should include a commitment to assess and verify the borrower's requirements and objectives, income and expenses.

RECOMMENDATION 13. Retain all existing commitments in the Code relating to responsible lending to individuals.

RECOMMENDATION 14. Introduce a Code commitment not to use FHI as the sole reason to make adverse decisions on credit facilities, including:

- to cancel a credit facility, or reduce the limit;
- consider as a 'default' under an existing facility; or
- to refuse an application for credit.

RECOMMENDATION 15. Banks should be required to report periodically to the BCCC on how often FHI is used in credit decisions, and the extent to which it influenced those decisions.

RECOMMENDATION 16. Introduce a Code commitment to clearly communicate with customers about what kind of hardship arrangement has been agreed (or not agreed) and the impact of any arrangement, or late payment, on the customer's credit report. This should include how RHI and FHI will be reported, in addition to default information.

RECOMMENDATION 17. Introduce a Code commitment to inform customers in real time when a bank has reported negative RHI or any FHI on their credit report.

RECOMMENDATION 18. Introduce a Code commitment to not record RHI or FHI where the default is related to family violence or financial abuse, and this is within the law.

RECOMMENDATION 19. Introduce a Code commitment that when banks seek the consent of a customer to use, record or disclose their personal information, that the consent sought will be voluntary, express, informed, specific as to purpose, time limited unbundled and easily withdrawn.

RECOMMENDATION 20. Introduce a Code commitment that where a requesting customer consents to use or disclose their personal information for marketing purposes, the bank will:

- not make consent a precondition for the customer to obtain a banking service or product;
- provide sufficient information for the customer to understand how their personal information will be used, and by who; and
- rely only on positive affirmation to the question, rather than using an opt-out process.

RECOMMENDATION 21. Introduce a Code commitment to include prominent and easy to identify pathways for joint account holders experiencing economic abuse or family violence (in branch, online, and in app environments) to alert banks to these issues in order to enable customers to better rely on the protections contained in the CDR Rules.

RECOMMENDATION 22. Introduce a Code commitment to providing a CDR-based tool for customers that lists all direct debits and recurring payments.

RECOMMENDATION 23. Introduce a Code commitment to meet Australia's AI Ethics Principles in developing and introducing the use of AI in banking.

RECOMMENDATION 24. Introduce a Code commitment to notify any customer when a bank materially uses AI in a decision-making process that affects the legal, or other significant, rights of the customer.

RECOMMENDATION 25. All Code clauses that make a commitment that goes above other existing law, offers material protection to customers and is reasonably specific, should be made enforceable Code provisions.

RECOMMENDATION 26. The ABA should commit to make any clause for which substantial or repeated non-compliance is reported to the BCCC an enforceable Code provision, to help improve compliance.

RECOMMENDATION 27. Introduce a Code commitment that every ABA member embed cultural competency and safety into their practices and training, and work in partnership to ensure First Nations communities have their voices heard, are aware of their rights and are aware of culturally appropriate services in all areas of banking.

RECOMMENDATION 28. Introduce a Code commitment that all ABA member banks will adopt a strengths-based approach in working with First Nations communities and enter into partnerships with respect for, and trust in, the leadership, knowledge and services of those communities.

RECOMMENDATION 29. Introduce a Code commitment to making interpreting or translation services available at branches for common First Nations languages and dialects.

RECOMMENDATION 30. Introduce a Code commitment to ensure that fee-free ATMs are available in all remote and regional areas.

RECOMMENDATION 31. Introduce a Code commitment that banks will publish a policy or guidance on their processes and alternative requirements for customers with limited identity documents. This should include specifically clarifying:

- that referee statements for First Nations people can come from any person listed in the AUSTRAC guidance (either under the general section, not just the 'Flexible approach for Aboriginal and Torres Strait Islander customers'); and
- the processes banks use to proactively identify First Nations people amongst their existing customer base.

RECOMMENDATION 32. Introduce a Code commitment to:

- provide a qualified interpreter for any customer who requests one, or if a bank employee considers it necessary to communicate effectively with the customer; and
- arrange relevant training around using interpreters for bank employees who are likely to be involved communications involving an interpreter.

RECOMMENDATION 33. Introduce a Code commitment to offer to communicate with customers through the National Relay Service if they have hearing difficulties and bank staff think that the customer would benefit from this assistance.

RECOMMENDATION 34. Introduce a Code commitment to provide Auslan interpreters upon request for customers who are deaf and use Auslan.

RECOMMENDATION 35. Add a new subparagraph to existing Code clause 32, to refer to people who have difficulty hearing, or identify as deaf.

RECOMMENDATION 36. Introduce a Code commitment to recognise identification issued by Government corrections facilities as a valid form of 100 points of identification relevant for banking purposes.

RECOMMENDATION 37. Introduce Code commitments to:

- limit break fees for reverse mortgages to amount which reflect the bank's reasonable loss as a result of the early termination of the contract; and
- only sell reverse mortgages through designated staff who are trained to ensure that they can properly explain how the reverse mortgage works in detail, including break fees. These staff should also be trained to work with older people.

RECOMMENDATION 38. Introduce a Code commitment to use plain language in all terms and conditions documents. This should be an enforceable Code provision, or banks should be required to report to the BCCC on progress.

RECOMMENDATION 39. Introduce a Code commitment to provide summary documents of terms and conditions where the full version is quite long, or spread across multiple documents. A similar summary document should also be made available when changes to existing arrangements aremade. Both documents should address any unusual or unexpected terms or conditions.

RECOMMENDATION 40. Amend the Code's definition of small business by removing the $10 million restriction on annual turnover, and expanding the total debt limit to $5 million, rather than $3 million.

RECOMMENDATION 41. Amend clause 51 to specify that earning capacity and viability of a small business will be considered in loan affordability assessments, where the loan is predominantly for a small business purpose. Banks should not make small business loans solely on the basis of collateral in the form of the applicant's residential property.

RECOMMENDATION 42. Clause 10 of the Code should be an enforceable provision.

RECOMMENDATION 43. Review the use of the terms 'financial difficulty', 'hardship' and 'financial hardship' in the Code, with a view to using a single consistent term where possible. If there is no need to distinguish it, using 'financial hardship' would be the preferable option.

RECOMMENDATION 44. Redraft clause 161 so it does not impose obligations on the customer.

RECOMMENDATION 45. Amend the table 'Restoring your financial position is possible' on page 47 of the Code, by adding the following potential forms of assistance:

- Waiving fees
- Reducing interest rates
- Capitalising interest owed
- Entering a payment arrangement with a savings buffer.

RECOMMENDATION 46. Introduce a Code commitment that when establishing a financial hardship repayment arrangement, banks will offer customers an arrangement that leaves them with a savings buffer, where possible.

RECOMMENDATION 47. Amend clause 168 of the Code to additionally commit to making suitable, accessible and comprehensive information on financial hardship assistance prominent and easily identifiable on banks websites, in branches and periodically on account statements.

RECOMMENDATION 48. Amend clause 169 of the Code to additionally commit to providing details on bank websites about the types of information that banks may consider when deciding whether to help someone in financial hardship. These lists should not be exhaustive.

RECOMMENDATION 49. Introduce a Code commitment for banks to provide statistics on hardship requests to the BCCC for publication, including the number of requests and outcomes of requests, such as approval rates and the relevant forms of assistance provided, the average length of hardship arrangements and the current number of customers on hardship arrangements.

RECOMMENDATION 50. Introduce a Code commitment not to sell debts:

- owed by customers who are experiencing significant vulnerability, or where the debt was caused in part by significant vulnerability; or
- that are, or will soon become, statute-barred.

RECOMMENDATION 51. Introduce a Code commitment that banks will only sell debts to debt collectors that:

- are members of AFCA; and

- provide training to all collection staff addressing working with people experiencing vulnerability.

RECOMMENDATION 52. Introduce a Code commitment to inform customers of their key rights, and restrictions that apply to debt collection, under relevant guidelines and laws if their debt is sold.

RECOMMENDATION 53. Introduce a Code commitment to monitor the impact of the conduct of debt collectors that banks sell debts to, based on the current ABA Sale of Debt Guideline as a minimum standard. If a debt buyer is not meeting the necessary standards, commit to stop selling debts to them and remediating affected customers, including buying back debts. Contingent collectors engaged by banks should be subject to the same monitoring and expectations as a condition of engagement.

RECOMMENDATION 54. Introduce a Code commitment to:

- make a term of all contracts for the sale of debts under $20,000 that the debt buyer will not commence bankruptcy proceedings to recover the debt; and
- require debt buyers to consult with the bank before commencing bankruptcy proceedings.

RECOMMENDATION 55. Introduce a Code commitment to explain to any customer required to take out LMI:

- that LMI protects the lender against a shortfall debt, and does not benefit the customer; and
- what a shortfall debt is, and that the insurer may pursue the customer if there is a shortfall debt.

RECOMMENDATION 56. Introduce a Code commitment where there is a shortfall debt to work with customers to find the best solution possible for them, and to make a decision on the capacity of the customer to repay the debt, independent of the LMI provider.

RECOMMENDATION 57. Introduce a Code commitment to only purchase LMI from companies that make the same commitments around debt collection and the sale of debt as banks do via the Code.

RECOMMENDATION 58. Amend clause 70 of the Code to include a commitment to disclose the cost of LMI to the customer, and to explain that interest will accrue on this amount over the life of the mortgage.

RECOMMENDATION 59. Amend clause 71 of the Code to additionally commit to help customers claim any refund they are entitled to under a LMI policy, or claim it on behalf of the customer and pay it to them.

RECOMMENDATION 60. Introduce a Code commitment that in the event of temporary forced branch closures, banks will:

- be lenient with any contractual obligations for customers who rely on in-person banking; and
- work to identify customers who rely on in-person banking at the branch and contact them to resolve any pressing banking issues.

RECOMMENDATION 61. Introduce a Code commitment to identify and engage with customers who rely on in-person banking to assist them in the event of temporary or permanent branch closures.

RECOMMENDATION 62. Require banks to report to the BCCC on compliance with section 185 of the NCC, and cases where the customer or their representative claims that requested documents were not provided in full, and allow the BCCC to publish this information.

RECOMMENDATION 63. Introduce a Code commitment to seek to identify why a customer has withdrawn a complaint when this occurs. Require banks to report to the BCCC on the number of complaints which are withdrawn before a formal IDR decision is made, and the reasons for the withdrawal, and allow the BCCC to publish this information.

RECOMMENDATION 64. Introduce a Code commitment that in AFCA disputes, banks will be fully transparent, not cause unnecessary delays and aim to resolve disputes as quickly as possible. Commit to aspire to the meet equivalent of the Government model litigant obligation.

RECOMMENDATION 65. Introduce a Code commitment to proactively assist customers experiencing vulnerability navigate the AFCA process, if required.

RECOMMENDATION 66. Introduce a Code commitment that banks will investigate and rectify any error or past misconduct, by remediating all impacted customers, even if the amount of the loss is small.

RECOMMENDATION 67. Introduce Code commitments that where designing and carrying out remediation schemes, banks will:

- make the process for consumers to be refunded as simple as possible (and automatic where appropriate);
- ensure the programs are sufficiently resourced to ensure individuals impacted can be contacted and remediated as quickly as possible, using the best records of contact details;
- only use assumptions that are beneficial to customers; and
- not use settlement deeds as part of a remediation process, or other methods that aim to reduce potential liability for poor conduct by banks.

RECOMMENDATION 68. Expand clause 38 to also explicitly recognise the following types of vulnerability:

- Disability
- Cultural factors
- English being a second language
- A person being unfamiliar with banking products
- People in prison and those transitioning out.

RECOMMENDATION 69. Delete the last sentence from clause 38 of the Code, and clarify that the list of forms of vulnerability in the clause is not exhaustive. Banks should not rely on customers to self-identify as vulnerable, and should be investing more in proactively identifying customers experiencing vulnerability, through staff training and data analysis.

RECOMMENDATION 70. Introduce a Code commitment that banks will have systems in place to record any vulnerabilities identified, so this information is available to other departments in the bank, and customers don't have to explain themselves repeatedly. If a customer volunteers this information, ask for their consent to record it.

RECOMMENDATION 71. Introduce a Code commitment that banks will respect the confidentiality of customers who are experiencing domestic violence or financial abuse and work with them to establish safe ways to communicate, in the way set out in part 4.3 of the DV Guideline.

RECOMMENDATION 72. Amend clause 39 to explicitly clarify that training aimed at assisting customers in vulnerable situations includes identifying potential vulnerabilities, including signs of domestic violence and/or financial abuse.

RECOMMENDATION 73. Introduce Code commitments to:

- use digital technology to identify uncharacteristic behavior that that could be indicative of financial abuse, and compensate customers where a bank's failure to do so contributes to abuse or loss;
- having specialist staff trained to provide additional assistance in situations where there is suspected, reported or known significant domestic or financial abuse; and

- establish public facing policies specifically addressing how banks can assist people who are experiencing domestic violence or financial abuse.

RECOMMENDATION 74. Introduce a Code commitment that banks will continue to support customers who prefer to use cash, rather than cards or forms of eBanking.

RECOMMENDATION 75. Amend clause 54 to:

- require banks to consider all information available to them in assessing whether a co-borrower will receive a substantial benefit; and
- reduce the application of the exception contained at 54(a)-(c) to loans that are for real property. This exception should not apply in other circumstances.

RECOMMENDATION 76. Introduce a Code commitment stating that:

- if the bank should have reasonably known a co-borrower was not receiving any substantial benefit, they will be released from liability for the loan; and
- in any event, the liability of a co-borrower can be reduced to the amount of the benefit they received from the loan funds.

RECOMMENDATION 77. Introduce a Code requirement for a suitability assessment in respect of guarantees, and take reasonable steps to be satisfied that the guarantor is not experiencing financial abuse.

RECOMMENDATION 78. Introduce a Code commitment that banks will not force any guarantor to sell their principal place of residence to repay a loan they have guaranteed. Instead, banks should commit to either allow the guarantor to retain a life interest in their principal place of residence, or allow them to repay the loan interest-free.

RECOMMENDATION 79. Introduce a Code commitment that banks will not accept guarantees from borrowers unless the borrower agrees to allow the bank to provide all relevant financial information it holds to the guarantor, including the suitability assessment undertaken under responsible lending laws.

RECOMMENDATION 80. If Recommendation 77 is not accepted, introduce a Code commitment that banks will not accept a guarantee from a person if the suitability assessment indicates that repaying the loan would cause them substantial hardship.

RECOMMENDATION 81. Delete subsection a) from clause 108 of the Code, so having received independent legal advice does not preclude the operation of clause 107.

RECOMMENDATION 82. Restrict the application of the exemption to clauses 97, 99, 101, 102, 103, 108, 109 and 110 for sole director guarantors and trustee guarantors so that it does not apply where the borrower and director, or trustee, have a personal relationship or are family members.

RECOMMENDATION 83. Introduce a Code commitment requiring banks to provide and explain information to customers about the potential impacts acting as a guarantor can have upon:

- payments by Centrelink; and
- health and aged care choices.

RECOMMENDATION 84. Introduce a Code commitment to:

- advise customers of free alternatives to using debt management firms if they have one acting for them, and the bank believes the firm is not acting in the customer's best interests; and
- alert ASIC where banks believe a debt management firm is acting contrary to the law or in a way that is harmful to their client.

RECOMMENDATION 85. Delete the last sentence from clause 43.

RECOMMENDATION 86. Commit to proactively reviewing whether customers who receive government support payments are eligible for basic bank accounts.

RECOMMENDATION 87. The target market determination for basic bank accounts should define the target market sufficiently broadly to include all persons on a low income.

RECOMMENDATION 88. Introduce a Code commitment that to proactively offer basic bank accounts, banks will:

- prominently advertise their existence on their website;
- use an opt-out model for existing customers identified who are eligible for, and would benefit from, a basic bank account; and
- use explicit prompts in hard copy forms and online sign-up processes to make people aware of basic bank accounts, and help identify whether a new customer is eligible (and offer them a basic bank account, if so).

RECOMMENDATION 89. Amend the language in clause 42 so all ABA members commit to offering a basic bank account.

RECOMMENDATION 90. Introduce a Code commitment that if, during a dispute with a customer, a bank becomes aware of a potential Code breach, they will inform the customer of the breach and of any rights they have regarding the breach under the Code, or their ability to raise it as an argument in AFCA. Proactive remediation should also occur where appropriate.

RECOMMENDATION 91. Amend clause 215 as per below:

- Expand the power under subsection b) to order a compliance review to be a general power, not limited to remediation actions; and
- Remove the requirement under subsection f) that serious or systemic non-compliance with the Code must also be ongoing before the BCCC may report it to ASIC.

RECOMMENDATION 92. Introduce the following additional sanctions powers for the BCCC:

- the power to order corrective advertising;
- the power to identify banks in all BCCC publications relating to compliance with the Code;
- the power to order a bank to compensate an individual for any direct financial loss or damage caused by a breach of the Code;
- the ability to suspend or expel banks from the ABA if their conduct is serious and ongoing; and
- the ability to impose financial penalties for serious or systemic breaches, as well as for a failure to report known Code breaches.

RECOMMENDATION 93. Introduce a Code commitment that banks will not refer customers to specific legal practitioners where a customer is required to obtain independent legal advice prior to entering into an agreement with the bank.

RECOMMENDATION 94. The ABA should meet all commitments that will be contained in the new COBA Code, where they go beyond the current commitments made in the ABA Code.

RECOMMENDATION 95. Introduce a Code commitment to have systems in place to identify potential or likely scams, and where this is identified:

- If the bank is suspicious the customer may be getting scammed (for example, due to other customers being similarly scammed), step in to prevent the transaction;

- If the bank believes it is possible that the customer is being scammed, have a specialist staff member contact the customer to talk the customer through the risk and scam in detail.

Further commit that if the bank fails to take reasonable steps to flag and stop a scam transaction, it will reimburse the customer for their loss.

RECOMMENDATION 96. Introduce a Code commitment to make information for a person who believes they have been scammed, and contact details for specialist assistance, readily available on bank websites and in banking apps.

RECOMMENDATION 97. Introduce a Code commitment that ABA members will subscribe to ASIC's ePayments Code.

RECOMMENDATION 98. Introduce a Code commitment that all ABA members will only issue dual network debit cards.

RECOMMENDATION 99. Introduce a Code commitment to treat BNPL and wage advance accounts issued by ABA members as though they were subject to the NCCP Act.

RECOMMENDATION 100. Introduce a Code commitment only to partner with BNPL providers or wage advance product providers that are members of AFCA, and who agree to meet ASIC guidance on dispute resolution.

RECOMMENDATION 101. Amend clause 38 of the Code to specifically recognise being impacted by an extreme weather event (or natural disaster) as form of vulnerability.

RECOMMENDATION 102. Amend the operation of clause 179A o the Code to commit not to charge any person significantly impacted by an extreme weather event (or natural disaster) default interest for a reasonable period following the event.

RECOMMENDATION 103. Introduce a Code commitment to:

- include the likely cost of insuring a property from all significant extreme weather risks in the responsible lending affordability assessment for any mortgage applicant; and
- proactively ask customers in hardship on their mortgages whether they have current insurance over their property, and offer to pay for it ex gratia as part of hardship assistance if they do not.

APPENDIX B – 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.

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.

Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as an Aboriginal Community Controlled Co-operative Society in 1973. VALS is the only dedicated, multidisciplinary legal and support service for Aboriginal and Torres Strait Islander peoples in the State of Victoria. VALS plays a vital role in supporting Aboriginal people in custody and providing referrals, advice/information, duty work and case work assistance across criminal, family, civil and strategic litigation matters.

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.

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.

South East Community Links

South East Community Links (SECL) is a multicultural community organisation providing support to the diverse communities of the South East region of Melbourne. The delivery of our programs and services supports SECL's vision: 'every person counts, every system fair'. We are the largest provider of Financial Counselling services to multicultural communities in Victoria and provide family violence and gambling specialist service. We deliver a wide range of assistance to meet the needs of the community including crisis support, case work, resettlement services for refugee and asylum seekers, financial capability assistance, family violence, housing support, youth and family support services, education pathways, pre-employability needs, and volunteer programs. We work with individuals, communities, policy makers to ensure that every person counts and every system is fair.

Care ACT

Care Financial Counselling Service (Care) has been the main provider of financial counselling for low to moderate income consumers in the ACT since 1983. Care's core service activities include the provision of information, advice, advocacy and support for people in financial difficulty. Care also provides a Community Education program, makes policy comment on issues of importance to its client group and operates a No Interest Loan Program.

Care runs the Consumer Law Centre (CLC), a community legal centre, which provides consumer credit and debt advice to vulnerable clients in the ACT. The CLC has operated for over 20 years and is the only specialist consumer law centre in the ACT. The CLC has experience in Australian Consumer Law, credit and debt issues, insurance, telecommunications issues, fair trading, bankruptcy, and financial abuse.

Financial Counsellors' Association of Western Australia

The Financial Counsellors' Association of WA (FCAWA) was incorporated in 1985 and the primary objectives are to establish, monitor and improve standards for financial counsellors in Western Australia. FCAWA is the peak body promoting financial resilience across Western Australian reducing financial hardship supporting financial counsellors and their clients through education, information, resources, and relevant legal supports.

Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the primary national civil society body dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. It has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters. When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

COTA Australia

COTA Australia is the peak national organisation representing the rights, needs and interests of older Australians. COTA Australia is the national policy and advocacy arm of the COTA Federation which comprises COTAs in each State and Territory. COTA Australia focuses on policy issues from the perspective of older people as citizens and consumers.

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.