

Dear Sir/Madam,

Thank you for the opportunity to provide feedback to the BCCC's Consultation on its priorities for 2022-2023.

Rather than providing a new submission, we attach a copy of the submission we provided to the Code of Banking Practice Review which highlights what we see as the important issues regarding the Banking Code over the next 12-18 months.

We also highlight the importance of ensuring that Regional and Remote consumers have access to adequate banking services (including face to face services) which meet their small business and personal Banking needs. In LAQ's experience, some regional bank closures is making this access difficult for some consumers and small businesses.

Please do not hesitate to contact us, should you have any questions.

Kind Regards

[Redacted]

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# **Independent Review Code of Banking Practice 2021**

**Submission by Legal Aid Queensland**

## Independent Review – Code of Banking Practice 2021

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Independent Review of the Code of Banking Practice. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients on banking and finance, credit and debt, insurance, telecommunications and consumer law. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to responsible lending, insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications, and unsolicited consumer agreements.

LAQ assists and represents clients with legal issues relating to members of the Australian Bankers Association. This submission is informed by that knowledge and experience.

### Specific Questions from 2021 Independent Review of Code of Banking Practice Consultation Note

#### Extent to which the Code meets community expectations.

- 1) Overall, does the Code adequately articulate the standards of service and behaviour currently expected by individual and small business customers?**

In LAQ’s view, community expectations of the standards of service and behaviour to be provided by banks have changed since the last review. Customers are more aware of their rights and the obligations of banks. The Banking Royal Commission has played a pivotal role in raising public awareness of what constitutes unacceptable and inappropriate standards of service and behaviour from banks. It is important that as part of this review the Code is amended and updated to reflect emerging and changing community expectations and the implemented recommendations of the Banking Royal Commission .

- 2) Does the Code remain relevant given changes to legislation and regulations affecting banking services? In particular, does the Code need to be amended in the light of such developments as: Mandatory Credit Reporting; Open Banking; Design and Distribution Obligations: and, Buy Now Pay Later?**

The Banking Code remains a relevant and integral part of the regulatory landscape. It helps to clarify and promote the standards of service and behaviour the community can expect when dealing with banks. The

Code needs to be updated to reflect and respond to recent legislative and other developments including changes to:

- Mandatory Credit Reporting;
- Open Banking;
- Design and Distribution Obligations and
- Buy Now Pay Later products.

**3) Do the changes to the Code sufficiently respond to the findings from the Royal Commission, particularly in meeting community expectations that banks will have in place the systems to ensure that the commitments in the Code will be honoured by all member banks?**

The Code requires updating and amending to reflect those recommendations of the Banking Royal Commission for which legislation has been implemented by the Commonwealth Government. The Code also needs to be updated and amended to reflect new technologies and banking products that have become available in the Banking and Finance market since the Code was last reviewed.

**4) Have the changes to the Code and the bank's performance in meeting their obligations improved the relationship between banks and their customers?**

In LAQ's experience, the Banking Royal Commission findings of misconduct in Banking and Financial Services has significantly impacted and reduced community trust. The recent Code changes made following recommendations made by the Banking Royal Commission have led to some improvement in customer trust but further work is required.

**5) Are individual and small business customers confident that banks will deliver on their commitments under the Code?**

In LAQ's experience, customers have mixed views on whether banks will deliver on their commitments under the Code. Customers fall into a number of groups:

- (a) Customers who are not aware of the commitments under the Code and are unaware of the banks' commitments under the Code.
- (b) Customers who are confident the Banks will deliver on their commitment and who have had positive experiences in their dealings with the Banks and the Code.
- (c) Customers who have previously had bad experiences with banks and the Code and as a result are not confident the banks will deliver on any commitments they make.

As a result, not all individuals and small business customers are confident that banks will deliver on their commitments under the Code.

In LAQ's submission, banks need to improve:

- (a) How they make customers aware of banks' commitments under the Code;
- (b) How they make customers aware of how to enforce their rights under the Code; and
- (c) The consistency of how individual banks resolve complaints that are made by consumers under the Code.

### The Code's audience

**1) Has the customer friendly re-write of the Code resulted in more customers accessing and relying on the Code?**

In LAQ's experience, consumer advocates (including financial counsellors) and consumer lawyers are the most common users of the Code and actively work to promote and increase awareness of the Code within the community.

LAQ acknowledges that the customer friendly rewrite has resulted in an increased use of the Code by customers. However, further work needs to be undertaken by the ABA and the Banks to promote community awareness of the Code and encourage its availability and use by customers.

**2) Has an appropriate balance been achieved between making the Code easy to read and navigate for the customer, while giving the banks enough guidance to implement the Code? Does the Code have sufficient detail such that key provisions can be enforced, including by being designated as enforceable provisions under the law?**

Yes.

LAQ considers the Code provides sufficient guidance to enable implementation by the Banks. In LAQ's view, the Code provisions are already enforceable as part of the contract that banks have with their customers.

**3) While the Code says that relevant provisions apply to its terms and conditions for all banking services and guarantees, do they have sufficient clarity such that a court or external dispute resolution mechanism can treat a breach of a provision as a breach of contract?**

In LAQ's view, there is sufficient clarity so that a Court or external dispute resolution service can treat a breach of a provision of the Code as a breach of contract.

**4) Should the Code include a commitment by the banks that they will put in place the systems and mechanisms to ensure that all provisions in the Code will be implemented?**

LAQ supports this proposal. Such a commitment would also positively impact and improve community trust in the Banking and Finance sector.

**5) Acting in a fair, reasonable and ethical manner:**

- 1) Is the commitment for banks to act in a fair, reasonable and ethical manner (Clause 10) one of the most important clauses in the Code?**
- 2) Does Clause 10 underpin the other commitments in the Code as well as every other aspect of a bank's dealings with its customers?**
- 3) Is Clause 10 currently enforceable under the law?**

LAQ supports the view that Clause 10 is the most important clause in the Code. The importance of Clause 10 is also recognised in the Banking Code Compliance Committee's Guidance Note 2<sup>1</sup>

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<sup>1</sup> <https://bankingcode.org.au/resources/guidance-note-no-2-clause-10-fair-reasonable-and-ethical-behavior/>.

which states:

*“Clause 10 is one of the Code’s most important obligations and should be embedded within banks’ internal culture to ensure they meet the BCCC’s expectations – to act fairly, reasonably and ethically in all circumstances.*

*... ..  
”*

*The Guidance Note highlights that clause 10 is a broad obligation and extends to the design of banks’ products and services, marketing and sales practices, processes and policies. In accordance with clause 9 of the Code, banks must ensure staff are supported and trained to competently comply with clause 10. Banks must identify, investigate and fix any breaches of the fairness obligation and report them to the BCCC.”*

The commitment to act fairly, reasonably, and ethically has a dual role:

- (a) A standalone commitment to treat all customers fairly, reasonably, and ethically which if implemented effectively builds trust between the Banking Industry and Customers. This commitment can reasonably be viewed as applying to the entirety of a bank’s relationship with a customer including after sales conduct by a bank.
- (b) A guiding principle that sits behind all other commitments in the Code and informs how they should be implemented.

In LAQ’s view, Clause 10 should be made an enforceable code provision.

### **Customers experiencing financial difficulties**

#### **1) Is the Code in line with customer and community expectations regarding the assistance banks should provide individual and small business customers facing financial difficulties?**

In LAQ’s view, the Code does set out a number of commitments detailing how banks will assist customers in financial difficulty. However, these commitments can be enhanced to better meet community expectations by:

- (a) amending the Code in all of the ways set out in this submission.
- (b) ensuring that the Commitments are consistently and reliably applied by Bank staff and across the industry.
- (c) Amending clause 59 to make it clear that in relation to joint accounts, individuals can ask for hardship either jointly or without the knowledge of the other borrower. Rather than the customer having the obligation to request that the other borrower is not informed Banks should ask the borrower whether they are making the hardship application jointly or by themselves and whether they wish information about their hardship request shared with the other borrower.

#### **2) Do banks assist customers facing financially difficulties in line with the commitments in the Code?**

In LAQ’s experience, there are differences in how customers facing financial difficulty are assisted by Banks both internally within a bank and when comparing approaches between banks.

The key outcomes that customers are looking for when they are facing financial difficulty are:

- (a) consistency in how they are treated compared to other people in financial difficulty.
- (b) confidence they have been heard.
- (c) confidence that their individual circumstances have been considered by the Bank's response.
- (d) practical, tailored, realistic and creative solutions that assist them to out of their financial difficulties and allow them to get back on track with their lives.

**3) Does the Code provide clear and comprehensive information on whether and how their bank will assist them if they are in financial difficulties? Should there be more guidance as to what banks will consider in deciding whether and how to assist customers in financial difficulties?**

In LAQ's submission, there should be comprehensive guidance in the Code which clearly and understandably identifies out what considerations the banks will consider in deciding whether and how to assist customers in financial difficulty. Currently, many customers find the financial difficulty process opaque regarding what information is required and why.

Clearly identified and understandable guidance in the Code:

- (a) is likely to improve transparency.
- (b) will enable customers to provide relevant information earlier in the process.
- (c) will streamline the financial difficulty process.

**4) How active are the banks in identifying customers who may be facing financial difficulties and contacting them to discuss their situation and offer assistance?**

LAQ is not aware of the specific internal processes utilised by banks to proactively identify customers facing financial difficulty. However, LAQ supports all banks using available data to proactively identify and offer assistance to customers facing financial difficulty.

**5) Is it clear as to what customers are covered under Part 9 of the Code?**

In LAQ's submission, customers reading Part 9 of the Code may not immediately identify whether they are covered. This uncertainty could be corrected by Part 9 having a table which provides a non-exhaustive, de-identified list of real world examples of customers who have been helped under Part 9. Such a list would perform a similar role to the table on page 47 of the Code which sets out examples of the type of help a bank can provide in financial difficulty.

**6) Do the banks actively promote how they can help customers in financial difficulty? Is the publicly available information easily identifiable, accessible, and comprehensive?**

In LAQ's experience, banks have actively promoted how they can help customers in financial difficulty following natural disasters and during the Covid-19 pandemic. Banks could utilise the actions implemented for natural disasters and the pandemic to improve how they promote financial difficulty assistance for customers experiencing financial difficulty due to life events such as injury and illness and which are not related to major disaster events.

**7) Should the Code include a provision that banks will advise customers of all their rights under the Code with respect to financial hardship assistance when a customer approaches a bank seeking information on dealing with financial difficulties?**

LAQ supports this proposal. Such a provision would also positively impact and improve community trust in the Banking and Finance sector.

The definition of “rights” should also include an obligation by banks to disclose how the hardship arrangement will be recorded on the customer’s credit report.

**8) Should the additional safeguards for consumers contained in the ABA Industry Guideline: The Sale of Unsecured Debt be included in the Code?**

LAQ supports the incorporation of the protections outlined in the ABA Industry Guideline: The Sale of Unsecured Debt in the Code. The Guideline contains a number of important protections for customers which should be incorporated into the Code. The incorporation of these standards would also positively impact and improve community trust in the Banking and Finance sector.

**9) Should the Code outline what constitutes ‘meaningful and sustainable’ debt repayments in circumstances of financial hardship?**

LAQ supports the Code outlining what are meaningful and sustainable debt repayments in circumstances of financial hardship. Providing a definition of this term will provide:

- (a) context to the Commitment in the Code;
- (b) more certainty for customers and advocates engaging with the Code;

However, any definition of the term meaningful and sustainable should not impact the Bank having a flexible and innovative approach to financial difficulty which is key to helping customers overcome their individual circumstances of financial difficulty.

**10) Should the BCCC regularly publish data on the percentage of requests for financial difficulty assistance granted by banks, along with the nature of the assistance provided?**

LAQ supports this proposal. It will improve transparency and provide the community with a better idea of the types of assistance that is available from Banks. Such a proposal, if implemented, would also impact and improve community trust in the Banking and Finance sector.

**11) Is the Code appropriate with respect to dealings with deceased estates? Are there potential gaps, and/or could the coverage of the undertakings be clarified?**

In LAQ’s submission, the Code should also deal with how Banks will treat joint debts when one of the joint account holders has died. In the context of joint debts, when a partner has died the remaining account holder in addition to their responsibility to continuing paying the debt will be under significant stress associated with the death. Providing guidance about how the Banks will treat applications for hardship s in these circumstances will provide peace of mind for customers in what is a difficult time.

**Hardship assistance during COVID-19**

**1) Was the support offered to customers during the COVID-19 pandemic in line with expectations of customers and the community? Were there any gaps in the assistance provided during COVID-19?**



In LAQ's experience the support that banks offered to customers during the Covid-19 pandemic was in line with the community's expectations. The support provided benefited many thousands of customers in Queensland. However, the effects of the Covid-19 pandemic on some groups of customers has not ended, and it is important that Banks continue to provide support to customers who remain in financial difficulty as a result of Covid-19. LAQ is concerned that Banks may not be continuing to provide support to customers in on-going and complex circumstances that have, at least in part, been worsened by the effect of Covid-19. In LAQ's view, banks should be trying to do more to assisting customers in these circumstances to make their way out of unmanageable financial circumstances with dignity and with the smallest impact possible on their financial circumstances.

LAQ notes that since outbreaks have worsened in NSW, Victoria and South Australia the Banks are again offering very practical assistance to those people affected by Covid-19 and the lockdowns it has forced. This has included the Commonwealth Bank announcing that they have extended a moratorium on forced home sales until at least February 2022.

However banks were not as clear as to the effect on a customer's credit report of accepting an offer of hardship assistance. They were not clear how the recording of repayment history information associated with the hardship arrangement might affect their ability to obtain credit in the future or affect their ability to refinance the loan for which hardship assistance was provided.

### **2) Should the Code specifically include a commitment that banks will support customers facing financial difficulties in emergencies or special circumstances, such as a significant economic shock, fire, flood, drought, flood, and earthquake?**

In LAQ's experience, natural disasters have a significant effect on all sectors of the community. It is clear that the frequency of natural disasters affecting the community is increasing. As a result, in LAQ's submission, the Code should include a Commitment that banks will support customers facing financial difficulties in emergencies or special circumstances, such as a significant economic shock, fire, flood, drought, flood, and earthquake. It would reflect the Commitment that Banks have already demonstrated in practice in recent natural disasters and the pandemic.

In addition, LAQ strongly supports Clause 179A of the Code which commits the Banks to not charging default interest on a farming loans following drought and natural disasters.

In LAQ's submission, the scope of Clause 179A should be expanded by the Banks committing to not charging default interest on all loans affected by drought and natural disasters.

In LAQ's view where an offer of hardship assistance during a natural disaster is accepted by the customer, a customer's credit report should not be affected.

### **3) Were customers impacted by the COVID-19 Special Note to the Code?**

LAQ did not support the introduction of the Special Note because it did not provide any benefit to consumers. However, LAQ has seen no evidence of customers being adversely impacted by the Covid-19 Special Note to the Code.

**4) Could breaches of the Code be considered more serious if they occurred while customers were navigating the COVID-19 pandemic which contributed to extreme stress among some customers?**

In LAQ's submission, it is appropriate for breaches to be considered as being more serious if occurring during the Covid-19 Pandemic because of the significant impact financially and emotionally such breaches can have on an individual customer. Recognition of the seriousness could be reflected in:

- (a) the Banking Code Compliance Committee's Consideration of the breaches as serious or systemic under its sanctions power.
- (b) awards of non-financial loss in determinations made by the Australian Financial Complaints Authority (AFCA).

**Inclusive and accessible services and supporting vulnerable customers**

**1) Has the Code contributed to banking services being inclusive, affordable, and accessible to all customers?**

In LAQ's view, the Code has contributed to banking services being more inclusive, affordable and accessible. However, further updates and amendments to the Code o, as outlined in this submission, will make banking and financial services more inclusive and accessible.

**2) Does the Code meet customer and community standards for banks to support customers experiencing vulnerability?**

In LAQ's submission, technology has developed significantly and is relied on more heavily by banks since the last review of the Code. As technology and online tools are increasingly being used to deliver banking and other financial services, it is important that the technology can be accessed by people with a disability. Industry data shows that the use of technology in the delivery of financial services is steadily increasing, with the use of mobile banking increasing by 71.8% between 2013 and 2017.<sup>2</sup> The onset of the COVID-19 pandemic is also considered to have increased the number of customers accessing financial services remotely (i.e. through telephone banking or online banking).

Not all vulnerable groups are able to use or have access the technology. For example:

- (a) Some older people,
- (b) Customers with English as a 2<sup>nd</sup> language,
- (c) Sight and hearing impaired customers,
- (d) Some people with disability,
- (e) People living in remote and regional areas.

It is important that the Code contains commitments to:

- (a) provide face to face banking services for these vulnerable groups, and

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<sup>2</sup> *The way Australians bank*, Roy Morgan, May 2018 <  
<http://www.roymorgan.com/~media/files/findings%20pdf/2018/may/7577-the-way-australians-bank.pdf>>.

- (b) ensure new technology is accessible for vulnerable groups.

LAQ supports the adoption by the Banking and Finance sector of Universal Design Principles. In a disability and vulnerability context, the importance of Universal Design is that they focus society, government and institutions on designing systems, products and processes that are accessible, usable and understandable by all.

Universal Design posits that the application of inclusive design principles in the first instance improves user experience of persons with disability/ vulnerability as the system is purposefully designed to be accessible to them, rather than later modifying a system in response to accessibility limitations raised by users with disability. Systems that are designed to work for the portion of the population living without disability/vulnerability often require modification to ensure persons with disability can have the same independent and equitable access to the system.

**3) Could the Code be strengthened in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported?**

LAQ refers to its answer to Question 2 and specifically to its comments about the importance of the Banking and Finance sector adopting Universal Design Principles.

**4) Do banks take a broad approach to ensuring their products and services are sufficiently inclusive or accessible, or is it largely focused on physical aspects of accessibility, such as branch set up?**

In LAQ's submission banks should take a broad approach to providing appropriate support and being accessible and inclusive for vulnerable customers. In LAQ's experience, some banks are more innovative and holistic in their approach to being inclusive. LAQ recommends banks sharing information about strategies and projects that have worked to improve accessibility and inclusivity in banking and finance. In LAQ's experience, banks do share his type of information to assist in improving practices. LAQ supports the adoption of Universal Design Principles in the development and maintenance of products and services by the Banking and Finance Sector.

**5) Should the Code include more specific undertakings regarding the steps that banks will implement so that services are inclusive and accessible to all customers?**

LAQ supports this proposal and refers to its answers to Questions 2 and 4 LAQ submits that the Banks and the Code should adopt Universal Design principles as a way of ensuring that services are inclusive and accessible to all customers.

**6) Have the banks been proactive in identifying existing customers who are, or may, be eligible for basic accounts?**

In LAQ's experience, banks, as an industry, have not been proactive in identifying existing customers who are, or may, be eligible for basic bank accounts.

**7) Is Part 6 sufficient in outlining how banks will help small business obtain finance?**

LAQ has no submissions to make in response to this question.

**8) Should the Code incorporate some of the provisions in other codes of conduct (such as the 2020 General Insurance Code) that cover dealings with vulnerable customers?**

In LAQ's submission, the Banking Code should adopt similar Commitments to two sections in the 2020 General Insurance Code of Practice:

- (a) Paragraphs 101-103 which set out commitments relating to how insurers will use interpreters.
- (b) Paragraph 104 which sets standards about how insurers treat people experiencing mental health illnesses.

### **Promoting the existence and benefits of the Code**

- 1) Are the provisions in the Code requiring banks to promote the Code effective? and**
- 2) What constitutes promoting the benefits of the Code? Does it involve referring to the Code on bank web sites and having copies of the Code available in bank branches? Should it include bank staff advising customers in their dealings with the bank that their rights and obligations are covered in the Code – for example by referring to the Code when a customer logs onto their internet banking?**

In LAQ's experience, it is important that provisions in the Code requiring the banks to promote the Code remain and are implemented effectively by the Banks. However, for customers to obtain all of the benefits of the Code, the promotion by Banks and Bank staff needs to go beyond placing a link to the Code on its website and having copies of the Code in branch.

The promotion also needs to:

- (a) provide a context to the Code by advising customers of their rights and the bank's obligations under the Code and how to enforce the rights in the Code.
- (b) provide de-identified case studies of how customers have benefited as a result of their rights under the Code.
- (c) Attach a fact sheet about the Code to loan , financial hardship enquiries and other bank correspondence that is provided to consumers.

**3) Do banks effectively promote the availability of basic and low or no fee accounts, including outlining eligibility for these accounts?**

LAQ is not aware of any ways that banks have attempted to promote the availability of basic and low or no fee bank accounts to customers.

### **Resolving complaints and disputes**

- 1) How effective are the provisions in the Code requiring banks to first refer customers to their internal dispute resolution processes and if the complaint cannot be resolved successfully, referring the customer to ACFA?**

In LAQ's experience it is not clear at what point a customer is referred to IDR particularly if the contact that the customer is having is with collections. In LAQ's advice experience, the customer has often had significant interaction with the bank about a particular issue (before they seek assistance from LAQ) but no referral has been made to IDR by the bank.

These Code provisions are only effective if the IDR Department at a bank provides a prompt and effective response to the client's individual circumstances. The experience of LAQ clients is that some IDR Departments resolve complaints effectively for customers but other IDR Departments do not effectively resolve

Effective IDR teams tend to:

- (a) be well resourced.
- (b) have staff who are;
  - a. trained and kept up to date in dealing with customers experiencing vulnerability,
  - b. effective and confident communicators,
  - c. understanding of and responsive to the needs of vulnerable customers and customers experiencing stressful and difficult financial circumstances.
- (c) have effective internal quality control processes that ensures consistent and appropriate decision making.
- (d) flexible and pragmatic.

### **2) Should the Code have more information on the relevant ASIC regulatory guidelines for handling customer disputes and a commitment that the Code will be updated in line with changes to these guidelines?**

LAQ supports the view that the Code should contain:

- (a) more information about ASIC Regulatory Guidelines for handling disputes; and
- (b) a commitment that the Code will be updated to reflect changes in ASIC Regulatory Guidelines for handling disputes.

The inclusion of current information on relevant ASIC regulatory guidelines for handling customer disputes and a commitment that the Code will be updated in line with changes to these guidelines will ensure customers have access to current guidance regarding how their disputes are likely to be handled by a Bank.

### **3) Do customers understand the role of the Customer Advocate? Are customers using the Customer Advocate?**

In LAQ's experience, most customers are unfamiliar with the role of the Customer Advocate unless they have previously had a dispute with a bank and received an IDR response outlining as an option the ability to escalate the complaint to the Customer Advocate. The role of the Customer Advocate is also not well understood by most customers. The current wording of the standard IDR letter does not enhance this understanding.

It is also not clear how the role of the customer advocate is defined by each individual bank. In LAQ's view, the customer advocate ought to sit outside of the Internal review process and be able to take a fresh look at the complaint. Some banks have a model that is independent of the IDR department whilst other banks

have the customer advocate embedded in the IDR department. Our experience with the customer advocates who are embedded in the IDR department has not been positive.

To ensure independence and avoid unconscious bias and conflicts of interest:

- it is best practice to appoint the Customer advocate and senior staff in that team from outside the bank to avoid the potential of investigating fellow employees who they may have worked with and or mixed socially with throughout their banking career.
- The customer advocate should not have offices within or work close by other sections the bank
- The customer advocate should avoid using internal staff as their experts or to take advice from when collating material to form opinions when considering complaints.

The customer advocate role can however be very helpful particularly in those circumstances where a customer complaint is outside the jurisdiction of AFCA.

There are also instances where customers remain unaware of the Customer Advocate, for example:

- A customer may lodge an EDR complaint without receiving an IDR response. This may be for a variety of reasons, such as frustration, urgency, or not receiving a response within the required timeframe. In these cases, the customer is unlikely to be informed of the Customer Advocate unless they conduct their own research.
- Customers who are disadvantaged, whether because of poor literacy, impaired understanding, or mental health issues, are not always confident in understanding the role of the customer advocate or dealing with them.
- A hardship variation refusal would not, in many cases, contain details for the Customer Advocate.
- An account may have progressed to the enforcement stage and been referred by the Bank to lawyers.. In these circumstances, the customer may have disengaged from the bank for a number of reasons before reengaging after receiving from a lawyer notification of threatened legal proceedings. At this point, the customer is unlikely to be informed of the Customer Advocate.

A Code commitment to provide comprehensive information about the availability and role of the Customer Advocate when the account is first in difficulty or when it is identified that a customer is experiencing vulnerability would be beneficial for all customers.

In LAQ's experience, there have been positive outcomes achieved through the Customer Advocate process particularly where matters of 'fairness' become relevant. LAQ is supportive of the role of the Customer Advocate in improving fairness of bank outcomes.

### **Proposed changes to responsible lending obligations**

- 1) What are the implications for the Code of the Government's proposed changes to the responsible lending obligations in the Credit Act?**
- 2) If the current responsible lending obligations are removed from the Credit Act, should the Code be amended such that the commitment to exercise the care and skill of a diligent banker be the same for individuals and small businesses?**

In LAQ's submission, if the Government's proposed changes to responsible lending obligations in the National Consumer Credit Protection Act 2009 are successful then banks should commit to retaining responsible lending obligations in the Banking Code.

In the alternative, the Code commitment to exercise the care and skill of a diligent banker should be the same for individuals and small businesses.

### Enforceable provisions

#### **1) What are the features of provisions in the Code that could be considered by ASIC and the ABA in deciding which provisions should be designated as enforceable?**

In assessing which provisions of the Banking Code should be viewed as enforceable, ASIC and the ABA should be guided by Recommendation 1.16 from the Banking Royal Commission. All provisions which provide some substance to the terms of the contract between bank and customer or guarantor should be made enforceable. In particular, LAQ refers to Clause 10 of the Banking Code which requires banks to act in a fair, reasonable and ethical manner. This Clause sits behind and informs the conduct of banks when they are implementing the commitments that they have made under the Banking Code. As a result, this clause should be designated as enforceable.

#### **2) What are the provisions which represent specific commitments and where a breach is likely to cause significant detrimental harm to a customer?**

In LAQ's view the specific provisions where a breach is likely to cause significant harm to a customer are:

- (a) Clause 10 – A Bank will act fairly, reasonably, and ethically.
- (b) Clause 49 – A commitment to act as a diligent and prudent banker when extending credit.
- (c) All provisions relating to responsible lending.

#### **3) To what extent would a provision have to go beyond the existing law to be considered as a possible candidate for being designated as an enforceable provision?**

In LAQ's view the focus should not be on whether a provision goes beyond the existing law. The focus for this decision should be on:

- (a) Royal Commission recommendation 1.16; and
- (b) The potential harm caused to customers.

#### **4) If some provisions are designated as enforceable, how can customers be assured that they can rely on all provisions in the Code?**

In LAQ's view, this question highlights the importance of Clause 10 of the Code and the obligation of banks to act in a fair, reasonable, and ethical manner. If Banks want to continue to rebuild trust in the community, the focus must be on the need to act in a fair, reasonable, and ethical manner. It will

follow that customers will be more confident that all clauses in the Code will be complied with and implemented.

- 5) Should a factor to take into account when considering which provisions to designate as enforceable be the extent that the provision underpins the overall implementation of the Code and, in doing so, would help reassure customers that they can rely on the enforceability of all provisions in the Code?**

Please see LAQ's comments concerning Clause 10 above.



## BCCC

- 1) Is the BCCC's monitoring of compliance with the Code, investigation of potential breaches, and guidance provided to banks contributing to improved compliance with the Code?**

In LAQ's view, the BCCC's role in monitoring the code has been effective and contributed to improved compliance with the Code.

- 2) Is the Charter the appropriate instrument to record BCCC's duties and powers in monitoring compliance with the Code?**

LAQ has observed no issues arising as a result of the Charter being used to record the BCCC's duties.

- 3) Is self-reporting of breaches by banks an effective approach to assessing their compliance with the Code?**

Self-reporting is an effective approach to monitoring compliance with the Code when it is used in conjunction with the BCCC undertaking own motion inquiries.

- 4) Are the range of sanctions available to BCCC appropriate, particularly in responding to serious and systemic breaches of the Code?**

LAQ supports the BCCC having the same range of sanctions as are set out in clauses 173-178 of the General Insurance Code of Practice for the General Insurance Code Compliance Committee.

- 5) Does the experience to date of the two banks being publicly named for breaches indicate that the sanctions are effective in influencing the banks to improve their systems to prevent further breaches? Should consideration be given to imposing financial sanctions for systemic breaches?**

LAQ supports the BCCC having the ability to impose financial sanctions for systemic breaches, similar to the power set out in Clause 174 of the General Insurance Code of Practice.

- 6) Does the BCCC have sufficient financial resources to carry out its functions?**

LAQ has no information about the budget of the BCCC to be able to comment. However, LAQ supports the Code Compliance Monitoring Committee being properly and adequately resourced to ensure that it has the ability to undertake its functions and proactively undertake investigations.

## Specific issues identified by Legal Aid Queensland

### 1. Access by Prisoners to basic banking services

The prison population is comprised of people who, for the most part, fit the category of "vulnerable" banking customers. The prison population is overwhelmingly comprised of people who may have a low IQ, acquired brain injury, mental health condition, and, especially in the case of women; are victims of childhood sexual violence and domestic violence. People of indigenous heritage are over-represented in the prison system.

Incarceration creates an almost impossible barrier for prisoners to be able to communicate with a bank. Further, no banks have policies or processes that deal specifically with prisoners.

The fact that banks have no specific process that allows communication with prisoners means that prisoners must use ad hoc processes. For example, prisoners can either write to a bank, obtain assistance from an organisation such as the Queensland Prisoners Legal Service, or provide a Power of Attorney to an associate.

All these processes are problematic. Engaging a service organisation is difficult as the organisations that can help are under resourced and the bureaucratic processes are inefficient.

The use of a Power of Attorney can force an already vulnerable person to provide confidential details to a person who may then misuse the power. The situation may be compounded where there is a power imbalance such as a domestic violence situation.

Without suitable bank policies and procedures to deal with incarcerated customers, most are inclined to do nothing, with the result that financial difficulties and other issues are exacerbated. This makes reestablishment and integration into the community after release more improbable.

### **Recommendations**

- 1) All financial institutions create a contact point for customers who are imprisoned, with a suitable policy to ensure identity can be easily verified. This may require liaising with State Corrective Service departments. Each bank's contact point could be made available to each State's legal aid Commission as well as any independent community legal service such as Queensland's Prisoners Legal Service.
- 2) Banks should consider policies such as repayment moratoria for incarcerated customers, or, where certain criteria are met, waiver of the debt.

There has been a recent increasing tendency for banks to close the accounts of customers who have been charged with certain offences such as child sex offences and fraud. This policy focuses on the offence itself whereas the reason for the offending can usually be causally linked to an aspect of the customer that would place them in the "vulnerable" bank client category.

### **2. Assistance for problem gamblers**

Problem gambling is an addiction that is affecting more and more Australians from all walks of life. The Code does not currently provide any guidance to Banks on how to appropriately identify and engage with customers who are suffering from a gambling addiction. In LAQ's view, it is important that guidance for banks be provided either in the Code or through a guidance document that accompanies the Code.

### **3. Valuations and transparency**

The Code commits banks to providing copies of valuations and corresponding instructions to small business and agricultural customers where enforcement is not underway. In LAQ's submission:

- these commitments should be extended to all customers; and
- the carveout for enforcement action should be removed.

The reticence regarding the provision of valuations while enforcement action is underway seems to stem from a concern that this information is commercially sensitive and may be passed onto a bidder.<sup>3</sup> In LAQ's submission, the importance of transparency and fairness outweigh the hypothetical risk that a customer would act against their interest in passing on a valuation to a potential bidder. We also note the Banking Royal Commission Recommendation 1.12 concerning APRA implementing changes to APS 220 to provide for separation between internal valuation and loan processes.<sup>4</sup> The revised changes have been delayed and will take effect on 1 January 2022. Although these are welcome, we consider it to be a relatively simple matter for the Code to provide for an explicit similar commitment in this review.

#### 4. Default Fees

Recommendation 63 from the 2017 Review was to set reasonable default fees having regard to the cost the default act caused the bank.<sup>5</sup>

In LAQ's submission, the Code should be amended to set reasonable default fees. It is unlikely that setting default fees at a reasonable rate would be viewed as anti-competitive.

#### 5. Direct debits and recurring payments

Recommendations 59 and 60 from 2017 Review set out the importance of improving direct debit and recurring payment cancellation processes.<sup>6</sup> Both were supported by the ABA in principle. These recommendations should be implemented as part of the current review.

In LAQ's experience, customers still find it difficult to:

- (a) understand the process for cancelling direct debits and recurring payments; and
- (b) then successfully cancel direct debits and recurring payments.

#### 6. Design and distribution Obligations

Design and Distribution Obligations (DADO's) apply to Banks from 5 October 2021. These obligations are principles based which means they do not give individual rights to customers. In LAQ's submission, Banks should commit in the Code to:

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<sup>3</sup> [https://www.ausbanking.org.au/wp-content/uploads/2019/05/ABA-132351-v1-Industry\\_guideline\\_-\\_Appointing\\_property\\_valuers.pdf](https://www.ausbanking.org.au/wp-content/uploads/2019/05/ABA-132351-v1-Industry_guideline_-_Appointing_property_valuers.pdf), p 2

<sup>4</sup> <https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-1-final-report.pdf>, p 23.

<sup>5</sup> <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>, p 153.

<sup>6</sup> <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>, p 143-145.

- (a) compensate, where the Bank is at fault, a customer for any loss they suffer if they are sold a product that they do not meet the target market for under the DADO's.
- (b) Make public target market determinations that they make about products that they market and sell.

## **7. Responsible lending obligations**

Recommendations 15 and 16 from the 2017 Review highlighted the importance of Responsible Lending<sup>7</sup> to the Banking Industry. The ABA also agreed to give prominence to the commitment to lend responsibly.<sup>8</sup> Recommendation 1.1 of the Banking Royal Commission also highlighted the importance of retaining the existing responsible lending law.

In LAQ's submission, all commitments in the Code that deal with responsible lending should be retained.

## **8. Credit cards sold at the Point of Sale of goods**

Recommendation 1.7 from the Royal Commission<sup>9</sup> recommended the law governing credit sold in store at the point of sale be reformed. Currently, customers can be signed up to credit at the point of sale without the seller needing an Australian Credit License (ACL), As yet, there has been no draft legislation put forward to implement this recommendation.

In LAQ's experience, the sale of credit at the point of sale continues to result in vulnerable customers being signed up to unaffordable credit. This unaffordable credit causes significant financial hardship.

In LAQ's view, the Code should be amended to commit Banks to not entering into, or establishing a relationship, with third parties who do not have an ACL and rely on the point of sale exemption to sell credit to customers.

## **9. Consumer Credit Insurance**

The deferred sales model for add-on insurance will apply to the sale of add-on insurance from 5 October 2021. In LAQ's submission, Clauses 64-66 should be amended to apply all sales of CCI and not just digital sales. Clauses 67-68 will also need to be amended as a result of this new law commencing.

## **10. Scams**

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<sup>7</sup> <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>, P 64-66.

<sup>8</sup> <https://www.ausbanking.org.au/wp-content/uploads/2019/05/Banking-Industry-response-to-Khoury-Review.pdf>, p 6.

<sup>9</sup> <https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-1-final-report.pdf>, p 86-88.

ASIC in its Consultation Paper 341<sup>10</sup> has taken the position that scams should be excluded from the ePayments Code. The ABA has supported this view. If this proposal is implemented this will leave a significant regulatory gap and cause uncertainty for customers around the responsibilities of Banks with respect to scams. In LAQ's view, the Code should include commitments by the Banks regarding scams. These commitments should include a commitment by the Bank to provide reimbursements to customers who are scam victims where the bank could have reasonably identified the scam but did not prevent it from occurring. The Banks should also commit to:

- (a) improving how they advise the community about scams that they identify; and
- (b) putting a stop in place to prevent transactions being made to scams the bank has identified.

### **11. Consumer Data Right and Open Banking**

LAQ supports the premise behind open banking and the Consumer Data Right as providing customers with greater control over their own personal and banking data. However, it remains important that privacy rights of customers are protected as this new technology is rolled out by banks. To achieve this, the Code should include a commitment that privacy, and the secure handling of data are the key priorities of CDR for banks.

### **12. First Nations People**

In LAQ's submission the Code should include commitments by the Banks to First Nations people to:

- (a) Ensure access to face to face banking services for all First Nations people including those living in rural and remote areas. Technological solutions do not always provide reasonable and easy access to Banking services in remote parts of Australia.
- (b) Provide interpreters where available.
- (c) Each Bank should develop a Reconciliation Action Plan that includes substantive commitments to consult with First Nations communities.
- (d) A greater number of Fee Free ATM's should be provided in remote and regional areas.
- (e) Dedicated phone lines within Banks for First nations people must be appropriately resourced.
- (f) Banks should commit to incorporating in the Code and implementing the AUSTRAC Guidelines around identification for First Nations People.

### **13. Mandatory Credit Reporting Commitments**

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<sup>10</sup> ASIC Consultation Paper 341 - <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-341-review-of-the-epayments-code-further-consultation/>

The *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* passed on 3 February 2021. This new legislation has created a number of issues that the Code should address because they will not be addressed by any other source. In LAQ's view the Code should address the following Mandatory Credit Reporting issues:

- (a) Banks should take an individual approach to joint accounts when reporting financial hardship arrangements. If an individual approach rather than an account based approach is adopted it obviates the need for special treatment for individuals who identify as the victims of domestic violence. It also obviates the need to make a disclosure about domestic violence to obtain special treatment. This approach is likely to assist many individuals not just individuals who are the victims of domestic violence and protects an individual's privacy
- (b) The Banks should agree that they will not use a hardship flag as the sole reason for reducing a credit limit or cancelling a continuing credit contract.
- (c) The Code should set out rules on the use of hardship flags. For example, Repayment History Information can only be reported if the customer breaches the hardship variation and not the original contract.
- (d) The Banks should commit to explaining the individual consequences of any hardship arrangement or late payments on their credit reports even where the bank agrees to accept late payments or hardship arrangement.
- (e) The banks should also ensure that changes to a contract that don't involve hardship but do not involve a refinance will not be recorded as a financial hardship arrangement.
- (f) That "time to sell" arrangements which involve payment default will be defined as a financial hardship arrangement unless a customer specifically asks that it not be defined as a financial hardship arrangement,

#### **14. Customers from a culturally and Linguistically Diverse Background**

In LAQ's experience, Banks do not have a consistent approach regarding when they use interpreters to assist customers who speak and understand limited English. Using staff members who also speak the same language is not an appropriate approach. This includes assisting customers who have sight or hearing impairments. In LAQ's submission the Code should include requirements that commit banks to:

- (a) Offering and then arranging interpreters.
- (b) Using a Professional interpreting service to assist customers where an interpreter is requested.

#### **15. Plain Language of all documents including documents setting out terms and conditions**

Recommendation 58 of the 2017 review suggested the inclusion of an obligation on banks to use Plain language in all terms and conditions documents. In LAQ's experience, customers continue to find it very difficult to understand lengthy and legalistic terms and conditions documents. This lack of understanding leads to them not understanding their legal rights and obligations. In LAQ's submission, the Code should include an obligation to plain language all terms and conditions documents so that customers can understand their rights under the banking services that they obtain.

#### **16. Small Businesses – Sustainability of the business should be taken into account**

Clause 51 of the Code sets out how banks will assess whether a small business can afford to repay a loan. In LAQ's submission, this assessment should also include an assessment of the sustainability of the business that the loan or facility is being obtained for.

#### **17. Use financial hardship or financial difficulty but not both in the Code**

The Code uses both financial hardship and financial difficulty in the Code. In LAQ's submission to avoid confusion the Code should use one term or the other but not both.

#### **18. Providing financial hardship assistance**

The table on page 47 of the Code sets out a non-exhaustive list of examples of the ways in which a Bank might provide financial hardship assistance to a customer. In LAQ's submission, this list should be expanded to include:

- (a) The waiving of fees; and
- (b) The capitalisation of interest.

#### **19. The sale of debt**

The ABA has released a Guideline of the sale of Unsecured debt.<sup>11</sup> LAQ welcomes the guidance it provides banks on how they should interact with debt collectors. In LAQ's submission, in addition to the guideline the following commitments should be included in the Code:

- (a) The Banks will not sell statute barred debt.
- (b) Debt collectors should be required to consult with the Bank, who sold them the debt, before they commence bankruptcy proceedings.

#### **20. Importance of the access to face to face banking services for vulnerable groups**

In LAQ's experience, many customers experiencing vulnerability need access to face to face banking services in order to meaningfully engage with the banking system. The Code should include a specific commitment that requires banks to proactively engage with vulnerable groups likely to need face to face banking assistance.

LAQ notes Clause 38 of the Code says 'We may become aware of your circumstances only if you tell us about them.' However, in LAQ's experience, Banks find out about a customer's circumstances using many other means and does have the ability to proactively engage with customers. LAQ is also aware that the ABA is developing a Vulnerable Customers Guideline to assist Banks with how they engage

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<sup>11</sup> <https://www.ausbanking.org.au/wp-content/uploads/2019/11/Industry-Guideline-on-the-Sale-of-Unsecured-Debt-November-2019.pdf>

with vulnerable customers. This guideline will give further context to the existing Code obligations and how they should be implemented. LAQ looks forward to this guideline being finalised.

### **21. Co-borrowers and substantial benefit**

Financial abuse is an issue that causes major harm in the community and is a significant aspect of domestic violence. Recommendation 34 of the 2017 was that the Code should be amended to require that banks to make reasonable enquiries about whether a co-borrower will receive a substantial benefit to a loan as part of the approval process. This recommendation was not implemented. Since the last review, financial abuse and its effect on customers now plays an even more significant role in society. It is important that banks play their role in addressing this issue. In LAQ's submission,

- (a) Recommendation 34 of the 2017 Review should be implemented.
- (b) Clause 54 of the Code should be amended to require banks to use all information available to them and not just the information provided to them as part of the application, in assessing whether a co-borrower will receive a substantial benefit.

### **22. Buy Now Pay Later and Wage Advance Products**

LAQ has seen a significant rise in the proportion of the customers we assist who have Buy Now Pay Later (BNPL) products and Wage Advance Products. In LAQ's experience these products set up a cycle of dependence where customers regularly return to get a new loan from these providers in order to survive financially. These products are causing significant financial harm to the customers we assist. These products are not subject to the same regulation as other credit products. As a result, these products are easier for customers in difficult financial circumstances to obtain. This ease of access is not always in their financial interests and can cause more harm. LAQ is aware that some ABA members are entering the BNPL space through partnerships with existing companies and in some cases looking at designing their own products. In LAQ's submission in order to protect vulnerable customers who are using these products, there should be commitments in the Code where banks agree that:

- (a) They will apply their responsible lending obligations to all BNPL and wage advance products that they issue. These products should be treated as if they are regulated credit under the National Credit legislation.
- (b) They agree to only partner with and sell the BNPL products of providers who are members of AFCA. LAQ notes the AFIA BNPL Code and the fact that it is a weak code that does not impose strong obligations on BNPL Code Members.

### **23. Guarantees**

In LAQ's view, the Code should include a commitment that if a prospective guarantor would not have been successful in obtaining a loan under responsible lending, they should not be approved as a guarantor on the loan. In LAQ's view, allowing loans of this nature results in what is effectively asset lending. In the event a guarantee is given over a person's principal place of residence and the guarantee is called in, where selling the property would leave the guarantor with nowhere to live they should be given a life interest in the property. Such a proposal would contribute to addressing issues of financial elder abuse and family and domestic violence.



## **24. Code reviews**

LAQ supports the Code being reviewed every 3 years but notes that as the Code is a living document it should be amended, as required, outside of the review process.