



**Law Council**  
OF AUSTRALIA

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

**Mr Mike Callaghan AM PSM – Independent Reviewer**

**16 August 2021**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council of Australia (**Law Council**) is grateful for the assistance of its National Elder Law and Succession Law Committee (**NELSC**), as well as the Small and Medium Enterprise Business Law Committee (**SME Committee**) and Financial Services Committee (**FS Committee**) of the Business Law Section, and the Australian Consumer Law Group of the Legal Practice Section in the preparation of this submission.

## Introduction

1. The Law Council welcomes the opportunity to provide a submission to the 2021 Independent Review of Banking Code of Practice (**the Code**). This submission responds to select questions in the Consultation Note on which the Law Council considers it can most usefully respond.
2. It is provided in addition to the Law Council's earlier remarks made during its virtual meeting with the Independent Reviewer, Mr Mike Callaghan AM PSM, on 19 July 2021.

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

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

3. In the Law Council's view, overall the terms in the Code adequately articulate standards of service and behaviour currently expected by individual and small business customers.

#### **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?**

4. The Law Council considers the Code does remain relevant, but would benefit from amendments to reflect the developments in banking conduct and processes required under each of the four areas mentioned. The Law Council notes that even without amendments to the Code, banks have additional compliance obligations under the legislation that applies, or will apply, for Mandatory Credit Reporting, Open Banking and Design and Distribution Obligations (**DDO**).

#### **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?**

5. The Law Council considers that the amendments made to the Code to cater for the recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) do sufficiently respond to the findings of the Royal Commission as far as process and articulation of expected behaviours are concerned. It should be noted that some areas of Royal Commission's recommended reforms are yet to be implemented and these may conflict with the Code - for example, the deferred sales model for add-on insurance.
6. The Law Council does recognise however that achieving cultural change may not be as easy to achieve as including wording in the Code. The Law Council refers to its answers below to questions 1) and 2) under 'acting in a fair, reasonable and ethical manner'.

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

7. The Law Council recognises that it is difficult at this point to assess whether changes to the Code have improved the relationships between banks and their customers. Given the impact of various government lockdowns during the COVID-19 crisis, the Law Council suggests that the reactions of the banks by suspending loan repayments, agreeing not to take enforcement action on loan defaults, and a range of other supportive activities have been far more influential on improving that relationship. Given the outcomes from the Royal Commission, the COVID-19 crisis has provided banks with an important opportunity to demonstrate compassionate and fair responses.

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

8. From the experience of the SME Committee, due to the ongoing lockdown consequences being suffered by both individuals and small businesses, the expectations for banks to deliver on their commitments under the Code have not been actively considered by many individual and small business customers. Rather those customers are looking to their banks to continue to display compassionate and fair behaviour by reintroducing or maintaining actions such as suspending loan repayments.

## 2. The Code’s audience

**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?**

9. While in general the Law Council considers that the Code should be able to be understood by both customers and banking staff, as discussed below, it suggests that additional guidance is required with respect to dealings with deceased estates.
10. The Law Council recognises that the Code contains sufficient detail for some of the important provisions to be made legally enforceable as against a bank that has committed to comply with the Code. This may depend on whether the Australian Securities and Investments Commission (**ASIC**) choose to pursue such enforcement. Additionally, as the Code is part of a contract between the bank and the customer, it could also be enforced by the customer through an individual action, a class action or through an AFCA complaint.

**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?**

11. In the Law Council's view, if a term of the Code is sufficiently precise to create legal obligations then it will be enforceable.<sup>1</sup>
12. The incorporation of the Code has been considered by the courts. For example, in *National Australia Bank Ltd v Rice* [2015] VSC 10, the guarantor successfully argued that the National Australia Bank had not met its obligation under the Code to give prominent notice of the required warnings. The Court determined that this was a breach of warranty under the guarantee contract.

**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?**

13. The Law Council supports the inclusion of a commitment by the banks to 'have in place and maintain' (rather than 'put in place') the systems and mechanisms to ensure that all provisions in the Code will be implemented. The FS Committee considers that requiring the banks to 'put in place' relevant systems and mechanisms is somewhat redundant, as the Code has been designed having regard to existing systems and mechanisms that banks already have in place.
14. On a related but separate note, the Law Council understands that system and processing errors often contribute to, or are the cause of, banks and their wealth management arms needing to compensate customers for financial losses. This can occur when system functionality does not reflect the description provided to customers, and can be the result of incorrect information being put into a system or a system processing a transaction incorrectly.
15. From the experience of the SME Committee, the most important commitment a bank should make and put into practice is to have systems and processes that accurately record customer information and product balances. The SME Committee would expect that increased diligence in setting up system functionality or processing information should almost entirely mitigate a bank's risk of such errors.

### 3. Acting in a fair, reasonable and ethical manner

**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?**

16. The Law Council agrees that clause 10 is one of the most important clauses in the Code, and that it has been clearly and succinctly expressed within the Code in a manner which should resonate across all staff levels within banks.
17. At the same time, from the SME Committee's experience, clause 10 articulates an aspirational outcome. The Royal Commission highlighted some unfair and unreasonable behaviour, particularly by banking staff towards vulnerable customers, where banking staff had supported the position of the bank *vis a vis* a customer, which from a contractual perspective was in essence often adversarial. A bank's relationship with its customers is generally that of debtor/creditor, and contract law

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<sup>1</sup> It is noted that the Australian Financial Complaints Authority (**AFCA**) treats Code breaches as contractual breaches.

does not require one party to consider the interests of the other party as each party is expected to look after their own interests.

18. The FS Committee notes that, prior to the Royal Commission, major banks had already commenced significant remediation and staff training programs in response to issues that had already been identified, including the need for a cultural shift. The Law Council recognises that it may take considerable time and sustained, focused and consistent training for bank employees to genuinely take on board this obligation and for banks to embed the appropriate culture throughout the organisation.

#### **Does Clause 10 underpin the other commitments in the Code as well as every other aspect of a bank's dealings with its customers?**

19. The Law Council recognises that having the behaviour evoked by clause 10 of the Code as underpinning the other commitments in the Code, as well as every other aspect of a bank's dealing with its customers, is an aspirational outcome that differs from the historic position banks and their staff have for many years taken in some circumstances. As noted above, progress has been made but ongoing effort is required to ensure that the requisite culture is in place to facilitate compliance with this clause.
20. It is the experience of the SME Committee that, as noted in the Consultation Note, 'the bank's failure to build a strong compliance structure led to numerous systemic and serious breaches which impacted many of the business units' customers. For these reasons, the Banking Code Compliance Committee (**BCCC**) found that the bank's engagement with its customers was not 'guided or informed' by its commitment to engage in a fair, reasonable, and ethical manner.<sup>2</sup> It considers that historic reluctance by banks to incur expenditure on implementing robust compliance and risk management systems and processes has contributed to the problem.
21. The FS Committee has observed that over the past few years banks have significantly increased their expenditure on compliance and risk management systems and resources, which has at least in part been in response to more onerous legislative obligations that have been introduced. Many of these new legislative obligations (for example, the banking executive accountability regime) are aligned with promoting compliance with clause 10 and related obligations of the Code.

#### **Is Clause 10 currently enforceable under the law?**

22. The Law Council notes that clause 2 of the Code states:

'Our written terms and conditions for all banking services and guarantees to which the Code applies will include a statement to the effect that the relevant provisions of the Code apply to the banking service or guarantee'.

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<sup>2</sup> BCCC Finding CX3998 – The Banking Code Compliance Committee cited in Consultation Note, 11.



23. Accordingly, it is the position of the Law Council that the commitments made by banks in clause 10 of the Code should be enforceable under contract law as terms of the contract between the bank and a customer.<sup>3</sup>

## 4. Customers experiencing financial difficulties

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

24. The Law Council considers the clauses in the Code regarding assistance banks should provide individual and small business customers facing financial difficulties are in line with customer and community expectations.
25. For the sake of completeness, the FS Committee notes that:
- (a) banks always have the opportunity to choose to agree to reduce a loan amount or waive a debt when dealing with customers facing financial difficulty, independently of the provisions of the Code;
  - (b) under the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**), banks (as credit providers) are required to respond to hardship requests; and
  - (c) banks may take different approaches when dealing with individual customers and small business customers in particular circumstances, as the different customer types have different risk profiles.

### **Do banks assist customers facing financial difficulties in line with the commitments in the Code?**

26. From the SME Committee's experience, banks generally deal with small business customers facing financial difficulty in line with their commitments in the Code.

### **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?**

27. The Law Council considers that the Code provides relatively clear information on whether and how banks will assist customers experiencing financial difficulties. It notes that it currently provides for those customers to contact their bank, as well as providing for a bank to determine that a customer may be in financial difficulty and to then contact the customer. The Code recognises that in both scenarios the ability of the bank to assess and assist the customer with their financially difficult position is dependent upon the customer providing the bank with appropriate information and agreeing to the bank's involvement, or to having their situation referred to a third-party support provider, such as a financial counsellor or an insolvency specialist.

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<sup>3</sup> AFCA's treatment of Code breaches as contractual breaches will apply to clause 10 but given its breadth, how it will be applied in practice is yet to be seen.

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

28. In the Law Council's view, it is clear that Part 9 'When things go wrong' covers both individual and small business customers as well as guarantors, whether an individual or a corporate entity.

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

29. From the experience of the SME Committee, during the COVID-19 crisis period banks have actively promoted to individuals and to small business that they can help in times of financial difficulty. However, they do not necessarily promote exactly what they can do to help.
30. From the Law Council's experience, publicly available information is generally either in a TV, radio or newspaper advertisement, or on the bank's website. This information, particularly on a bank's website, should be identifiable and accessible, and as comprehensive as set out in the Code.
31. It also notes that the former Australian Small Business and Family Enterprise Ombudsman, and now the current Ombudsman, regularly provide information to the public on what arrangements banks can provide to assist small businesses suffering financial difficulty.

### **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?**

32. The Law Council notes that although under the Code banks have committed to promoting the Code and ensuring that it is available and accessible in different ways (including in hard copy and electronically), a bank is not required to provide a copy of the Code to any customer. The Law Council considers it would be beneficial to customers, particularly those in financial difficulty, and those making a complaint, to be reminded how they can access or obtain a copy of the Code, which would then ensure the customer has been provided with the opportunity to access information on customer rights under the Code. The Law Council notes that whether or not a customer chooses to read the Code is beyond a bank's control. Please also see further comments in paragraph 69 below relating to the obligation to promote the Code.

### **Should the additional safeguards for consumers contained in the Australian Banking Association's Industry Guideline: The Sale of Unsecured Debt be included in the Code?**

33. The Law Council considers that banks should meet the requirements of the Australian Banking Association's (ABA's) Industry Guideline: The Sale of Unsecured Debt, including meeting the additional safeguards for consumers contained in that Guideline. As such, the Guideline should not be voluntary. The best way of addressing this problem is for the key protections in the Guideline to be made mandatory in the Code.

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

34. The Law Council considers it would be useful for the Code to include an outline of what constitutes ‘meaningful and sustainable’ debt repayments in circumstances of financial hardship.

**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?**

35. The Law Council believes it would be appropriate for the BCCC to regularly publish this data on its website on a no names basis with general references only to circumstances.

**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?**

36. The Law Council has identified several potential gaps in Chapter 45 of the Code with respect to dealings with deceased estates. In this regard, it makes the following proposals, many of which have been relayed to the ABA in earlier correspondence.

*First proposal*

37. Information about an estate is often requested from a bank in order to apply for a grant of representation. The Law Council is concerned by the inconsistent practice of banks in responding to such requests. For example, some banks are only providing the last four digits of the account number which has been deemed insufficient by the courts to issue the grant. It may not be sufficient for the executor to comply with its legal obligations to disclose assets<sup>4</sup> and that may mean that the deceased’s legal personal representative will not obtain protection from legal liability upon distribution of the assets.<sup>5</sup>
38. Paragraph 191 of the Code deals with requests before there is a grant of representation. For consistency, the Law Council suggests that the paragraph be amended to state that the following documents and/or evidence are needed to establish authority to access information about the customer’s account:
- (a) If the customer has made a will, the deceased’s representative is the person nominated as executor. To establish that authority, that person should produce:
- evidence of the deceased’s death;
  - a certified copy of the will; and
  - evidence to establish that the person is the named executor, ie evidence of identity.
- (b) If the customer has not made a will, the deceased’s representative is the person entitled to a grant of letters of administration. To establish that authority, that

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<sup>4</sup> See eg, *Probate and Administration Act 1898* (NSW) ss81A and B.

<sup>5</sup> *Ibid* s92.

person should produce:

- evidence of the deceased's death;
- evidence (such as a statutory declaration about futile searches) to show the absence of a will;
- evidence to establish a presumptive entitlement to letters of administration. Satisfactory evidence is a letter from the representative's solicitor; and
- evidence of identity.

The Law Council notes that it should not be necessary that that person has applied for letters of administration – this is contrary to paragraph 191 as currently worded.

(c) If the customer has made a will, but there is no person nominated as executor or the nominated person is not able or willing to act as the deceased's representative and there is no alternative executor nominated, the deceased's representative is the person entitled to letters of administration with will annexed. To establish that authority, that person should produce:

- evidence of the deceased's death;
- evidence to establish a presumptive entitlement to letters of administration (satisfactory evidence is a letter from the representative's solicitor);
- evidence to establish that there is no nominated executor or that the nominated executor is not able or willing to act as the deceased's representative; and
- evidence of identity.

The Law Council adds that it should not be necessary that that person has applied for letters of administration – this is contrary to paragraph 191 as currently worded.

39. In addition, the Law Council notes that the use of the word 'or' in paragraph 191 is ambiguous. It is concerned that it does not create a clear hierarchy between 'a person authorised by a will, a person identified as a next of kin in the death certificate or other official document acceptable to us, or a person who has applied for letters of administration'. The Law Council notes that the next of kin will not usually be the most appropriate person where the executor is named in the will and suggests that this be clarified.

### *Second proposal*

40. The Law Council recommends that Chapter 45 of the Code should state that, if authority is established, the deceased's representative may attend to the following:
- obtain funds to pay the funeral account upon producing the funeral account; and
  - obtain funds to pay the filing fee for the application for a grant of representation upon producing a letter from the representative's solicitor, or similar document, stating the amount of the filing fee.
41. It suggests that this could be dealt with in new subparagraph 191(c):

- allow access to the account by the deceased person's representative to pay the deceased's funeral and testamentary expenses.

### *Third Proposal*

42. It is not unusual for an estate to receive income in the form of rental income, dividends, business income or interest. The estate may also receive funds from an asset-holder – such as an employer, a life insurance company or a superannuation fund – which is prepared to make payments prior to a grant of probate or administration being obtained.
43. In order to receive these funds, soon after the date of death the deceased's representative should open a discrete bank account in the name of the estate. As a matter of law,<sup>6</sup> the deceased's representative should keep the estate funds and their own funds separate. The deceased's own bank accounts will usually be frozen when the bank is notified of the date of death.
44. Law Council constituent body and committee members report that the practice of some banks is to disallow opening an estate bank account until a grant of probate or administration is obtained. This is particularly problematic in contested matters where obtaining a grant can take many months/years.
45. In addition, the Law Council understands that in practice, some banks require the full names, dates of birth and residential addresses of all estate beneficiaries as a prerequisite to opening an estate account, even if the beneficiaries would play no role in administering the account. It may not be possible to provide this information, for example, if the will creates a testamentary trust where the full extent of beneficiaries is not necessarily known. The Law Council suggests that only the details of the deceased's representative are needed, subject to the provision of 100 points of ID.
46. The Law Council suggests that this issue be addressed in new paragraph 191(d) allow the deceased's representative to open an account on behalf of the estate.

### *Fourth Proposal*

47. Chapter 45 of the Code does not deal with the bank's requirements where the bank dispenses with the requirement that the deceased's representative obtain a grant of representation. The Law Council recommends that these issues should be addressed as follows.
48. Where the value of the deceased's estate, including the proceeds of the customer's account, is less than \$50,000.00, and the deceased's representative does not need or wish to obtain a grant of representation, the bank will act on the instructions of the deceased's representative (pursuant to paragraphs 38(a), 38(b) and 38(c), above) upon the deceased's representative producing the following:
  - (a) if the customer has made a will:
    - (i) a statutory declaration that:
      - the will is the testator's last testamentary act;

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<sup>6</sup> *Korda v Australian Executor Trustees (SA) Limited* [2015] HCA 6, [111].

- the representative has no reason to doubt the validity of the will;
  - the value of the deceased's estate, including the proceeds of the customer's account is less than \$50,000.00; and
  - the representative will administer the estate according to law, including distributing the estate in accordance with the will; and
- (ii) an indemnity against adverse claims against the bank.
- (b) if the customer has not made a will or other testamentary act:
- (i) a statutory declaration that:
- the value of the deceased's estate, including the proceeds of the customer's account is less than \$50,000.00; and
  - the representative will administer the estate according to law, including distributing the estate in accordance with the legislation applying to an intestacy; and
- (ii) an indemnity against adverse claims against the bank.

#### *Fifth Proposal*

49. Paragraph 190(d) deals with the bank acting on the instructions of the court authorised deceased's representative. The Law Council suggests that the Code should state that the bank should require the following for the purpose of so acting, and nothing more:
- a certified copy of grant;<sup>7</sup> and
  - an authority from the legal personal representative about payment of the proceeds of the customer's account.

#### *Sixth proposal*

50. Practitioners report that some banks have national policies of requiring solicitors who are instructed in the administration of an estate to provide correspondence and documents in hard copy rather than by email. This increases costs and leads to a delay in administering the estate without providing risk benefits. In line with contemporary legal and business practice, the Law Council suggests that the accepted forms of communication be clarified in Chapter 45 of the Code.

## 5. Hardship assistance during COVID-19

**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**

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<sup>7</sup> Unless the bank has agreed to dispense with the requirements for a grant, in which event the bank should act on instructions from the person named as executor or entitled to obtain letters of administration if the material required by para 48 has been provided.

### **assistance provided during COVID-19?**

51. From the SME Committee's experience, the support provided by banks to small business customers during the COVID-19 crisis was initially provided more promptly than either small business customers or the community had been expecting. Whether instigated by requests from the Australian Government, or from the Australian Small Business and Family Enterprise Ombudsman, the support provided by banks was gratefully accepted and appreciated by small business. Aside from concerns with regard to the manner in which banks unnecessarily applied responsible lending criteria for individuals to small businesses, there were no obvious gaps in that support.

### **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?**

52. The SME Committee suggests that it may be appropriate for the Code to 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 the same way the Code currently does for farmers under clause 179A.

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

53. From the SME Committee's experience, the only aspect of the COVID-19 Special Note that impacted customers was the slight extension of the notification periods with regard to the complaints process.

### **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?**

54. In the Law Council's opinion, it may be appropriate to consider breaches of the Code to be more serious if they occurred while customers were navigating the COVID-19 pandemic which contributed to extreme stress among some customers. This may depend on the relevant circumstances.

## **6. Inclusive and accessible services and supporting vulnerable customers**

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

55. From the Law Council's perspective, it is difficult at this point to assess whether banking services have become inclusive, affordable, and accessible to all customers and if they have, whether the Code has contributed to that particularly given the impact of various government lockdowns during the COVID-19 crisis.

### **Does the Code meet consumer and community standards for banks to support customers experiencing vulnerability?**

56. In the Law Council's view, the Code goes some way to meet consumer and community standards for banks to support customers experiencing vulnerability

although it is difficult for a code to address strategies to assist the many vulnerable and disadvantaged consumer groups that may be impacted by banking misconduct (such as First Nations and culturally and linguistically diverse consumers, consumers with disabilities, mental health and cognition issues, drug and alcohol dependencies, experiences of family violence including financial abuse, people in prison.). Rather than suggesting the Code be amended, the Law Council suggests that it is the implementation of the Code provisions that will ensure that vulnerable customers are dealt with appropriately. There are recognised strategies to communicate effectively with diverse groups, including building their legal capability and awareness, and the Law Council refers to the findings of its Justice Project in this regard.<sup>8</sup>

**Could the Code be strengthened in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported? Should the Code include more specific undertakings regarding the steps that banks will implement so that services are inclusive and accessible to all customers?**

57. The Law Council considers that additional guidance is required in relation to dealings with enduring powers of attorney (**EPOAs**) for people with impaired decision-making capacity. These issues have been previously flagged with the ABA. As facilitated by the ABA, the Law Council has welcomed the opportunity to meet with specific banks to convey its concerns.
58. In this context, Law Council constituent body and NELSC members have identified instances of banks refusing to honour an EPOA, or imposing unreasonable conditions on doing so, where an attorney attends a bank to conduct a legitimate transaction. Certain practices around refusing to honour EPOAs which have been drawn to the Law Council's attention include:
  - (a) disregarding any EPOA that was executed more than 12 months previously (despite the fact that most EPOAs become active many years after execution, and that a principal who has lost mental capacity will be legally incapable of executing a fresh EPOA);
  - (b) requiring the principal to attend the bank personally to verify the EPOA (which may be impossible given the principal's location, physical health or mental capacity);
  - (c) disregarding the EPOA entirely and referring the attorney to the relevant state/territory Public Trustee (which is unnecessary);
  - (d) requiring, where there are joint attorneys, that the joint attorneys attend *personally together*, every time, to draw or transact funds ie, the attorneys were not allowed to deal with the account electronically, or attend the branch separately;
  - (e) requiring, despite express wording in the EPOA document permitting 'joint or

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<sup>8</sup> Law Council of Australia, *Justice Project Final Report* (2018), see in particular People: Building Legal Capability and Awareness [chapter](#). Several of its other chapters canvass the barriers, experiencing and needs of particular groups in accessing justice and the law, including people experiencing family violence, Aboriginal and Torres Strait Islander persons, recent arrivals, people with disability, and prisoners, and may provide useful context.



- several' appointment of attorneys, that the attorneys attend *personally together*;
- (f) refusing to accept the verification of identity (**VOI**) of an attorney, and/or insisting that the attorney attend before an independent JP to verify their identity as a prerequisite; and
  - (g) refusing to accept electronically certified copies of EPOA and/or VOI documents.

59. The Law Council is concerned that the above practices can be indiscriminate in their operation in relation to an attorney perpetrating elder financial abuse, compared to one who is acting properly. As a result, such practices may be likely to encourage less transparent and risky arrangements to give the attorney to ability to manage their finances, like authorities to operate, joint accounts, ATM transactions and online banking.
60. The Law Council understands that these issues do not present across the board and tend to arise with respect to certain banks. However, in the interests of consistent dealings with EPOAs, it suggests that further guidance be provided in the Code.
61. At the same time, the Law Council notes that Chapter 14 does not specifically encourage banks to identify red flags of elder abuse. In recognition of the important role that banks can play in identifying elder abuse, the Law Council suggests that Chapter 14 include more information setting out the warning signs of elder abuse<sup>9</sup> and responses.
62. More generally, the SME Committee recognises that strengthening the Code in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported is a behavioural issue, which is often difficult to implement, even with additional staff training requirements and sanctions for non-compliance.

**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?**

63. From the experience of the SME Committee, the banks focus largely on physical aspects of accessibility, particularly given the impending application of the DDO legislation, which will require them to assess potential product customer cohort needs when designing and issuing products from October 2021.
64. As mentioned in response to the previous question, from October 2021 banks will be required to comply with the DDO legislation so it would not be appropriate for the Code to potentially include any commitments that may not align with those obligations.

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

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<sup>9</sup> See eg, the Law Council's Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse, September 2020, which sets out specific warning signs of elder abuse.

65. The Law Council suggests that community legal centres and other organisations that assist vulnerable customers, such as financial counselling services, should be made aware of the ability of banks to provide these accounts to eligible customers. In this context, funding may be required to ensure that such services are well placed to assist customers. The Law Council has consistently drawn attention to insufficient funding available for community legal services to meet demand, particularly on civil law issues.

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

66. From the SME Committee's perspective, subject to the concerns discussed below with regard to banks applying responsible lending criteria for individuals to small business loan applications, Part 6 of the Code does not contain sufficient information to outline how banks will help small business to obtain finance. Part 6 does not go into any detail as to the types of financial information a small business should provide in order to be appropriately assessed both with regard to loan repayment and loan servicing ability, nor the required information with regard to when and what type of security or guarantee a bank may require for a loan.

**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?**

67. The Law Council does not consider it necessary for the Code to include additional clauses dealing with vulnerable customers as the Code is comprehensive in this regard.

## 7. Promoting the existence and benefits of the Code

**Are the provisions in the Code requiring banks to promote the Code effective?**

68. The commitments to promote the Code and to provide customers with access to the Code are prominently included as clause 4 and 5 of the Code.
69. The Law Council recognises that although a bank may make the Code available, even prominently, on its website, may have brochures on the Code prominently displayed in its branches, and may provide copies of the Code to new customers and to customers taking up new products, making a complaint or who is receiving compensation, there will always be customers who do not read what they are given, and may not be aware of the Code and its contents. In short, so long as banks are promoting the Code in the ways described, the Law Council considers that is as effective a promotion of the Code as can be expected in practice.

**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?**

70. The Law Council suggests that promotion should also involve bank staff advising customers in their dealings with the bank that their rights and obligations are covered in the Code and by references to the Code being prominently displayed when a customer logs onto their internet banking.

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

71. From the experience of the SME Committee, banks do not generally promote the availability of basic and low or no fee accounts to concession holders and vulnerable customers. It is aware that such customers are more likely to find out about these accounts from their support networks such as their disability or aged care providers, or from community legal centres, particularly those that regularly deal with clients in financial distress.

## 8. Resolving complaints and disputes

**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 the Australian Financial Complaints Authority (AFCA)?**

72. From the SME Committee's experience, the Code's provisions on internal dispute resolution procedures and references to AFCA are very effective, particularly as banks also have compliance obligations regulated by Australian Securities and Investment Commission (**ASIC**) with regard to complaints from customers.

**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?**

73. It is the position of the SME Committee that there is no need for the ASIC compliance obligations that apply to banks with regard to complaints from customers to be duplicated in the Code.

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

74. Under the ABA's Guiding Principles for Customer Advocates, it is clear that the Customer Advocate's core objective is to enhance existing complaints processes and ensure customer complaints are escalated, and responded to within specified timeframes, that responses are thorough and fair, and that the Customer Advocate may also influence systems, processes, and decision-making.
75. The Law Council notes that the Customer Advocate's role is essentially to improve processes for customers who have made a complaint, and in practice has little influence on internal or external dispute resolution decision-making.
76. The Law Council is aware that bank customers who make a complaint are generally referred to the bank's Customer Advocate if the internal disputes centre accepts that it is necessary. This may not occur until the consumer has some assistance from a lawyer or financial counsellor, or the SME is particularly forceful. The role of the Customer Advocate can, however, be confusing for a complainant customer because the name suggests they advocate for the customer's position on the complaint. However, it has been the experience of the SME Committee that as an employee of the bank, the Customer Advocate will, as the ABA's Guiding Principles set out, work to ensure the bank's processes operate efficiently. However, this can translate to the complainant that their complaint is unfounded or will not be upheld.

## 9. Government's proposed changes to regulatory framework for consumer credit

### **What are the implications for the Code of the Government's proposed changes to the responsible lending obligations in the Credit Act?**

77. The Law Council made a submission to the Senate Standing Committee on Economics with respect to the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020* (Cth) on 10 February 2021. While recognising the legal profession has a broad range of opinions as to the appropriateness of existing responsible lending obligations, the Law Council's submission supported the retention of these obligations in the Credit Act.
78. If the Government's proposed changes to the responsible lending obligations in the Credit Act were to proceed, then the SME Committee does not consider that any changes to the Code would be required as a consequence of those changes.
79. The FS Committee notes that Chapter 17 of the Code currently requires a bank to exercise the skill and care of a diligent and prudent banker.

### **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?**

80. The Law Council considers that the commitment in the Code to exercise the care and skill of a diligent banker should be the same for individuals and small businesses.
81. The FS Committee considers that paragraphs 49 to 52 in Chapter 17 of the Code currently achieve this objective.

## 10. Enforceable provisions

### **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?**

82. The Law Council is of the view that any provision of the Code to be designated by ASIC as enforceable should be process based, should fit within the existing law, and should be of such importance to the improvement of the relationship between the banks and their customers. In addition, any breach which would be likely to cause significant detrimental harm to a customer should be designated by the ABA as essential for all banks comply with, and any breach of the provision would then be sufficiently serious to evoke the involvement of the banking regulators.

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

83. In the Law Council's view, the provisions in the Code that represent specific commitments and where a breach is likely to cause significant detrimental harm to a customer, as well as being important in improving the relationship between the banks and their customers, are those in:

- Part 5 'When you apply for a loan';
- Part 6 'Lending to Small Businesses';
- Part 7 'Guaranteeing a Loan'; and
- Part 9 'When things go wrong'.

84. It is the clauses in these Parts of the Code that the Law Council considers should be considered by ASIC and the ABA in deciding which provisions should be designated as enforceable.

**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?**

85. The Law Council submits that for many provisions of the Code, the fact that they are incorporated into the contract between the bank and its customer should suffice to protect customers in the event of breach. It is only those provisions in the Code, the breach of which will clearly result in a significant and direct detriment, over which ASIC should exercise its power under section 1101A of the *Corporations Act 2001* (Cth). The exercise of this power enables ASIC to enforce Code provisions when consumers may not. The declaration by ASIC will enable ASIC to protect consumers from such breaches on a systemic scale. This is the purpose of the section and is consistent with the Law Council's view that the authority to make laws rests with parliament and it is not for ASIC to designate as enforceable provisions of the Code which do not meet the required test, being that a breach will result in a significant and direct detriment.

86. In this context, the Law Council notes that under section 1101A of the *Corporations Act 2001* (Cth), ASIC has the power to identify a Code provision as enforceable if ASIC considers that:

- the provision represents a commitment to a customer by the bank relating to transactions or dealings performed for, on behalf of or in relation to the customer;
- a breach of the provision is likely to result in significant and direct detriment to the customer;
- any additional criteria prescribed in regulations are satisfied (currently there are none); and
- it is appropriate to identify the provision as an enforceable Code provision, having regard to any matters prescribed in regulations (currently there are none).

87. Beyond this, the Law Council submits that as provisions of the Code are incorporated into the contract between the bank and its customer, many provisions should be considered enforceable provisions from the ABA's perspective, even if they go beyond the requirements of the existing law. The Royal Commission's view that the purpose of industry codes is not merely to mirror the law, but to go beyond and achieve good practice for customers is supported. The Law Council notes that the authority to make laws rests with parliament and it is not for ASIC to designate as enforceable provisions of the Code that go beyond the application of the law but for the ABA to have the final say in what is an enforceable provision in the Code.

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

88. The Law Council notes that many of the Code provisions are behaviourally-based, which makes them difficult for ASIC to designate as an enforceable provision.

**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 consumers that they can rely on the enforceability of all provisions in the Code?**

89. The Law Council has noted in its answer to the previous question that in its view any provision to be designated by ASIC as enforceable should be process-based, rather than behaviourally-based.

## 11. BCCC

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

90. From the experience of the SME Committee, for governance purposes a Charter would generally be the appropriate instrument in which to record the BCCC's duties and powers in monitoring compliance with the Code.

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

91. The Law Council notes that even if the Code was legislated, self-reporting is an appropriate practice.

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

92. From the Law Council's perspective the sanctions available to the BCCC, even those for serious and systemic Code breaches, aside from the ability to advise ASIC, which has approved and registered the Code, are not particularly robust. The Law Council notes that as banks are primarily regulated by Australian Prudential Regulation Authority (**APRA**), the ability for the BCCC to advise APRA would be a more influential sanction and should be included.

**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?**

93. It is the Law Council's view that it is more influential if a regulator such as APRA or ASIC publicly names a bank for breaching the Code as there has been little recognition in the press of the BCCC's sanctions.
94. The FS Committee notes that a systemic breach by a bank could, in any event, constitute a significant breach of a statutory provision applicable to financial services or credit licensees which is a civil penalty provision.