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Dear Banking Code Consultation Team

Submission in response to Consultation Paper 373: Proposed changes to the Banking Code of Practice

We refer to ASIC's consultation paper CP 373 Proposed Changes to the Banking Code of Practice dated 17 November 2023 ("**Consultation Paper**"). King & Wood Mallesons has a specialist Financial Services and Regulatory team which operates nationally. We work in an advisory capacity in relation to bank and banking regulatory matters with banks and other participants in the financial services sector, and with regulatory bodies, and industry bodies. We have extremely deep and longstanding expertise in banking and financial services matters. We have advised the Australian Banking Association ("**ABA**") in connection with the Banking Code of Practice ("**Code**") since its inception in the 1990s, including the proposed changes to the Code.

This submission is made on our own behalf, and not on behalf of the ABA.

1 C3: Do you think any of the consumer protections in the current Code intended to prevent harm have been reduced in the proposed Code?

King & Wood Mallesons agrees with the ABA's approach to remove those parts of the Code that are duplicative of the law, for the reasons set out below.

1.1 The Code's role has never been the central repository of all customer rights

The Code has never been seen as a document which comprehensively explains all rights and obligations under the law for customers of member banks. We note there are a significant number of rights and obligations of member bank customers that have never been detailed in the Code, such as client money provisions, unfair contract terms, specific privacy rights and the various prescriptive requirements in the *National Consumer Credit Protection Act 2009* (Cth) ("**NCCP Act**") and the *Corporations Act 2001* (Cth) ("**Corporations Act**") regarding contracts and other disclosure documents. Incorporating all of these obligations into the Code would add to its length and complexity and including summaries of these regimes may not assist a customer's understanding of their rights, as the regimes are complex and difficult to summarise.

The Code is a living document that is regularly reviewed and updated to respond to current and emerging issues in the banking industry. For this to occur, Code updates must allow for provisions to be removed once the issue has been addressed by the Parliament or is otherwise no longer relevant, otherwise the Code would greatly increase in size over time with superfluous provisions. For example, the proposed Code update has consolidated the obligations concerning cheques, as their historical need has been diminished. To properly maintain the Code, it must be regularly reviewed and updated. This is particularly relevant in this Code update due to the rapid increase of regulatory regulation over the past 10 to 15 years.

1.2 Separate, but repetitive, Code obligations may confuse customers

The Code operates as an overlay of additional obligations and restrictions that sit on top of those in law. This arrangement adds to the legal complexity in this area, as the answer to any particular legal question may require consideration of the various different and overlapping laws and codes that may apply.

Code provisions are distinct legal obligations. Where legal obligations are duplicated or paraphrased in the Code, this creates an independent contractual obligation, meaning there are two distinct legal obligations applicable to member banks and two distinct sets of remedies for those obligations.

A good example of this is the diligent and prudent banker obligation in current clause 49 of the Code.

Clause 50 provides that for individuals who are not a business, the clause 49 obligation is fulfilled by complying with the law. This means that the technical content of current clause 49 of the Code for consumer credit exactly replicates the obligations under the NCCP Act.

The NCCP Act is intended to be the sole regime for banks and other credit providers in relation to responsible lending, and reflects the Parliament's view on the standard that should be met. The duplicative nature of clause 49 for NCCP Act-regulated credit contracts therefore adds unnecessary complexity to this regime.

Even if clause 49 did exist for consumer credit as a separate and distinct obligation to the NCCP Act, overlapping coverage of the same obligations in the Code and other legislation can make it difficult for customers to understand their rights. In the case of current clause 49, for example, it is very difficult to say whether this obligation overall imposes a higher or lower standard compared to the responsible lending obligations in Chapter 3 of the NCCP Act. Particular elements of it clearly appear to be a lower standard. For example, the courts have held that clause 49 does not require the bank to be satisfied that the customer has the ability to repay a facility before offering it.[1] In addition, there are a very different set of remedies available for a breach of responsible lending obligations under the NCCP Act, which includes statutory damages based on statutory principles, compared to a breach of contract remedy under the Code. This creates a further confused picture for the customer.

Duplication of this clause for customer contracts regulated by the NCCP Act may also lead a customer to believe that their only source of rights is clause 49 of the Code, because that is what the Code focuses on. The principles of clarity and transparency promote having one clear regime that addresses an issue, rather than two (or more) inconsistent and overlapping regimes.

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[1] See *Dinh v Commonwealth Bank of Australia* [2021] WASCA 127 at [178] – [180], as affirmed in *Gardiner v National Australia Bank Ltd* [2023] NSWSC 45 at [360].

Although our example focusses on clause 49, the same general concerns apply to all circumstances where the current Code replicates a statutory provision in different language.

1.3 It is fairer on customers to clarify the Code focuses on obligations above the law

The Code does not purport to be a comprehensive guide of customer rights, rather its role is to provide member bank customers with additional protections not currently set out in the law. Accordingly, although the Code may include some level of overlap with the law, such overlap is not intentional.

To avoid misleading customers that the Code contains all customer protections, the fairer outcome would be to clarify that the Code concentrates on obligations member banks have committed to provide that are over and above the law, rather than greatly expanding the Code to address each customer right under law. To do so would be antithetical to the purpose of providing a customer-friendly document.

2 C14: Do you have any other feedback on the ABA's response to the recommendations relating to enforceable code provisions?

Below we set out our views on the two provisions proposed by Mr Callaghan in the Review to be enforceable code provisions.

2.1 Proposed clause 5: "efficient, honest and fair"

We agree with the ABA's response (dated 6 December 2022) to the Independent Banking Code of Practice Review undertaken in 2021 by Mr Mike Callaghan AM PSM ("**Review**") that existing clause 10 (now proposed clause 5) should not be designated as an enforceable code provision, regardless of whether the obligation is to act in a "fair, reasonable and ethical" manner or to act "efficiently, honestly and fairly".

As the proposed drafting is now reflective of sections 912A(1)(a) of the Corporations Act and 47(1)(a) of the NCCP Act, we do not consider it appropriate or necessary to designate proposed clause 5 as an enforceable code provision.

A breach of the "efficiently, honestly and fairly" general conduct obligation attracts a civil penalty under each piece of legislation for a corporation of a base amount of 5,000 penalty units (with possible escalations for benefit derived or turnover). However, a breach of an "efficient, honest and fair" enforceable code provision would only give rise to a civil penalty of 300 penalty units (and escalations do not appear to apply). Accordingly, failing to act efficiently, honestly and fairly would give rise to two separate civil penalty provisions, with the enforceable code provision penalty being significantly less onerous. Although the courts will consider a number of other factors including the number of breaches, the normal expectation would be that the penalties under the general conduct provisions would be significantly higher than those under the enforceable code provision regime, all factors being equal.

As section 1101A(3)(a) of the Corporations Act provides that a code cannot be approved by ASIC if the obligations under it are inconsistent with relevant law, unless the obligations imposed by the code are more onerous than under the relevant law, we consider that this is an inconsistency which would make proposed clause 5 ineligible for approval as an enforceable code provision (if this is the kind of inconsistency which the section is targeted at avoiding).

Even if there is no legal issue here, the example also demonstrates how this would create a two-tier penalty regime that may be difficult for customers to follow. The result would be that the same breach would result in potentially higher penalties in a financial services or consumer credit

context, and much lower penalties in other contexts, such as small business loans. Although this is the way the enforceable code penalty regime is designed, it nevertheless results in obfuscated outcomes for consumers to understand.

2.2 Appropriate systems, processes and programs

We also agree with the ABA's reasoning in its response to the Review that it is not appropriate to include an enforceable code provision in the Code regarding member banks having in place appropriate systems, processes and programs. In particular, we note that:

(a) member banks already have existing obligations as Australian credit licensees, Australian financial services licensees and authorised deposit-taking institutions to maintain adequate systems, processes and programs, with many of these obligations already subject to civil penalty regimes;

(b) such an obligation is not suited to a private contractual undertaking between a customer and a bank, as it is an overarching requirement relating to a bank's internal operations; and

(c) this proposal is unprecedented not only in the banking industry, but in other regulated industries in Australia.

3 C16: Are there any parts of the Industry Guidelines that would be best placed in the Code?

We do not believe that the ABA's Industry Guidelines are suitable for inclusion in the Code as they are not intended to be contractual obligations and are not drafted in a way that are suitable to being contractual obligations.

We make the observations below.

3.1 Additional complexity and confusion

Including Industry Guidelines in the Code would greatly increase the length of the Code, which is antithetical to the ABA's intention to simplify the Code. By making the Code longer, this is likely to add complexity for customers reading the Code and member banks understanding and implementing the requirements of the Code.

3.2 Regulator engagement

Industry Guidelines are intended to be more flexible living documents than the Code which are updated and amended to address emerging issues. If the ABA were to include Industry Guidelines in the Code, the obligations would need to be reviewed and approved by ASIC each time there was an amendment, making it more difficult for the ABA to promptly and effectively respond to issues.

3.3 Redrafting

Industry Guidelines are not currently drafted in a form or style that is readily adaptable to contractual obligations, making it difficult to establish the content of any specific legal obligations or standards from the text. This is intentional to reflect that Industry Guidelines are only intended to operate at a general level and are not intended to create legal obligations. However, if the Industry Guidelines in their current form were incorporated into the Code, there would be significant uncertainty as to exactly how the Industry Guidelines are applied to affect the specific obligations of member banks and the specific rights of a customer in any individual situation.

If the Industry Guidelines were to form part of the Code, and so part of the contract between member banks and their customers, the Industry Guidelines would need to be redrafted in a specific

and precise manner, which could result in the commitments becoming more limited. We note that Industry Guidelines are non-binding, and often represent aspirational targets that not all member banks are immediately able to comply with. If it is proposed that the Industry Guidelines were to form part of the Code, the general and aspirational statements would need to be refined and potentially restricted in order to become realistic contractual obligations. The time required to update systems and processes to ensure all member banks can comply with contractually enforceable provisions would also likely extend far beyond when the proposed Code is intended to be introduced and would therefore delay other important updates to the Code being implemented (eg, the new small business definition).

Even if the Industry Guidelines were redrafted to be considered contractual obligations, it is likely that there would be a degree of complexity, inconsistency and uncertainty introduced by this process, offsetting the benefits produced to customers of an increased level of bank obligations.

3.4 Unprecedented approach

Recommendation 10, to our knowledge, is unprecedented in recommending that all guidance material be given equal status to the primary law, regulation or code it relates to. It is very common for particular regimes to have non-binding guidance issued that assists with the implementation of that regime without formally changing its legal status.[2]

4 C17: Should any of the Industry Guidelines be treated as Code-related documents?

We note that the concept of a code-related document in Regulatory Guide 183 Approval of financial services sector codes of conduct ("**RG 183**") does not align with recommendation 10 of the Review. The role of code-related documents for the purpose of RG 183 is for ASIC to consider whether, in conjunction with other freestanding documents, the Code meets the approval criteria set out in RG 183. RG 183 is clear that these code-related documents are not approved by ASIC,[3] and do not form part of the Code itself. There is no suggestion in RG 183 that code-related documents must not be voluntary.

This differs to Callaghan's recommendation 10, which states that Industry Guidelines should be considered code-related documents that should form part of the Code and are contractually enforceable.

If submission request C17 relates to whether Industry Guidelines should be code-related documents for the purpose of RG 183, we do not believe this is an appropriate question for public submission. In accordance with ASIC's views in RG 183 as to the purpose of code-related documents, we believe it should be within ASIC's own view as to which documents it is required to consider when determining whether the Code meets the requirements in RG 183. In any event, we submit that the content of the Industry Guidelines is not in substance content which would have any material impact on the Code's compliance with RG 183.

If submission request C17 relates to Callaghan's concept of code-related documents in recommendation 10, we re-iterate our comments in our response to C16.

If all guidelines are to be code-related documents, then similarly to the position if they were all made binding, we expect members will require a more detailed approval process, and this will hamper the need for prompt updating where required.

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2 For example, ASIC and the ATO commonly issue guidance on their interpretation of laws which they have oversight of which in itself is not legally binding.

3 RG 183 at [RG 183.133].

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Yours sincerely

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