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Banking Code Consultation Team
Regulation & Supervision
Australian Securities and Investments Commission
GPO Box 9827
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Dear ASIC

Submission: ASIC Consultation Paper 373 – Banking Code of Practice

Thank you for the opportunity to provide feedback on the Australian Banking Association's (**ABA**) updated Banking Code of Practice (**Code**). This is a joint submission made on behalf of:

- Consumer Action Law Centre
- Financial Rights Legal Centre
- Financial Counselling Australia
- Consumer Credit Legal Service
- COTA Australia
- South East Community Links
- Indigenous Consumer Assistance Network
- WEstjustice
- Mortgage Stress Victoria
- Uniting Communities Consumer Credit Law Centre SA

Our organisations have been involved throughout the review of the Code over the last two years. We made a joint submission[1] to the original independent review (**Independent Review**) and have engaged with the ABA about the updated Code regularly since. In our view, the new Code disappointingly does not offer many substantial

[1] Available at: https://consumeraction.org.au/review-of-the-2021-australian-banking-association-code-of-practice/

enhancements to the protections it provides customers, compared with the current Code. The main goal of the ABA through the review has been to reduce the reporting obligations on, and oversight of, member banks. This is a bad outcome for consumers.

This submission responds to Consultation Paper 373 (**CP373**) with primary focus on the key changes to the Code amounting to reductions in consumer protections that we are most concerned about, particularly:

- the removal of the commitment in the current code to the clause 49 diligent and prudent banker obligation in regard to general consumer lending. We are concerned this will lead to a significant loss in practical oversight of a key area of banking (and in an area where breaches of the current Code are common); and
- the removal of the clauses referring to the complaint and IDR processes. We are concerned that not all of these processes are contained in law or regulatory guidance, and their removal significantly reduces the value of the Code as a public facing document.

A summary of recommendations is available at **Appendix A**, and information about our organisations is available at **Appendix C**.

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Questions C1-5 – addressing consumer harm

Questions C1 and C2 – other areas the Code should address

As detailed in our submission to the Independent Review,[2] there are numerous additional areas of banking operations that we think the Code could and should address, as well as areas where commitments could be enhanced.

We accept there may be some challenges to developing Code provisions where potential ongoing law reform is being considered by government. However, the areas the ABA has concluded fall into this category (including those discussed in paragraphs 34-37 of CP373) are extremely broad. We are concerned that leaving these issues out of the Code altogether until the next review commencing in not three years but another five years, as proposed, is a bad outcome that will leave a gap in industry leadership and a significant lag in consumer protections.

We therefore urge ASIC to make approval of the Code conditional on the ABA committing to conduct specific focussed reviews of these areas when changes to these laws pass Parliament or the reform consultation process otherwise concludes. The reviews must also be conducted with a view to introducing new Code provisions where the banking industry can make commitments that would deliver improved consumer outcomes, in line with expectations of RG 183. Examples of areas where this would be valuable include:

- Buy now pay later;
- Privacy law;
- Scams;
- The consumer data right; and
- Credit reporting.

RECOMMENDATION 1. Make a condition of ASIC's approval of the Code that the ABA commits to undertake targeted reviews of matters that have been excluded from the Code on the basis that they are the subject of current potential law reform. These reviews should be completed within 12 months of the conclusion of the reform processes.

Questions C3 – Do any changes to the Code reduce consumer protections?

Yes, though these are primarily where we consider the ABA to have incorrectly concluded that Code provisions overlap with the law, and so are discussed below in response to question C5.

Additionally, reducing Code reviews from three to five years is a reduction in protections as well, as it increases the length of time for updates to consumer protections to be introduced. We support the comments in AFCA's submission on this point – that ASIC should only accept this increased period for reviews if there are also clear timeframes for the end date of reviews, and the ABA commits to targeted reviews on the matters outlined in answer to Q1 and 2, and in the future, when required.

Question C4 – Provisions requiring clarification

We have identified 103 out of 181 clauses (over 50% of the commitments) that would benefit from a re-draft to improve clarity and robustness. The issues range from an overabundance of "we may" clauses rather than "we will" directives; phrasing that permits the bank to make a subjective decision via the use of vague generalities like "promptly" and "as soon as possible." While some flexibility through the choice of language may be required in certain circumstances, reconsidering the drafting through a lens of enforceability and robustness – for example,

[2] https://consumeraction.org.au/review-of-the-2021-australian-banking-association-code-of-practice/

by detailing specific exceptions – would be beneficial for achieving greater certainty in consumer outcomes and promoting the guiding principles of trust and confidence, integrity, service and transparency, and accountability.

Our list outlining where code commitments are currently vague or unclear is available at **Appendix B.**

The use of vague or subjective language means parts of the Code are far from enforceable either on a contractual basis or under the enforceable codes regime. Many of the clauses in the Code are not drafted as commitments or are commitments that are too broad in scope. In almost three years since the ABA began this review, little progress has been made on re-drafting any of the Code to improve clarity, robustness or improve the Code's enforceability in line with the new enforceable codes regime.

Aspects of our response to question C14 below may also be relevant to this question.

Clarity required for commitment around interpreters

An important example of this is at clause 45 of the draft Code. The introduction of a commitment to provide interpreters or translation services is potentially one of the most valuable additions to the new Code. However, the clause is vague, such that it is not clear if this provision will stop common problematic bank practices in this area at all, such as using family members (sometimes children) to interpret. We would hold significant concerns if under this clause, banks proceeded with serious, complex or sensitive conversations (such as steps in home repossession or when working with victim survivors of family violence) without an interpreter because one attempt to get a telephone interpreter failed. However, it arguably permits this.

If firmer language in clause 45 cannot be agreed upon then this is an area where a new industry guideline may assist to support this new and significant commitment. This guideline could set clear expectations around when an interpreter must or should be provided to help determine expected industry conduct, and ensure genuine efforts to assist are made. We also urge ASIC to press the ABA to consider an additional commitment to train all customer facing bank staff in working with interpreters to manage conflict of interest and risk.

RECOMMENDATION 2. ASIC should use the Code approval process to have the ABA review the language used so the Code clauses provide more certainty, clarity and robust commitments for consumers seeking to enforce them.

RECOMMENDATION 3. Make the commitment in clause 45 of the Code more certain, so that banks make a material commitment to use qualified interpreters with customers, particularly when discussing serious, complex or sensitive matters, and to ensure staff are trained to identify such situations, and work with interpreters.

Questions C5-9 –provisions removed due to Code and law overlap

Question C5 – Removed Code provisions that do not just overlap with the law

Yes, there are areas where we disagree with the ABA's assessment that existing Code provisions overlap with obligations at law, and we are therefore concerned that the removal of provisions represents a reduction of consumer protections in the current Code. We also disagree with ABA's assertion that the removal of provisions that do overlap with the law is a necessary or inconsequential step to take (discussed further below).

Diligent and prudent banker

We have expressed our concern to the ABA about the dramatic reduction in the scope of chapter 17 in the current Code for individuals, which commits banks to undertake general consumer lending with the care and skill of a diligent and prudent banker. The equivalent clauses 64 and 65 of the draft Code now only apply to credit products that are not regulated by the National Credit Code (**NCC**). Our main concern is in relation to the reduction of oversight of the Banking Code Compliance Committee (**BCCC**) (discussed further below), but the reduction of scope also impacts the extent of consumer protections provided.

The ABA has concluded that the responsible lending regime in the *National Consumer Credit Protection Act 2009* (**NCCPA**) provides the same protections as the diligent and prudent commitment for credit covered, where customers are covered by both. This is incorrect at least in regard to guarantors. Clause 52 of the current Code clarifies that the obligation to exercise the care and skill of a diligent and prudent banker is a commitment made to guarantors of all loans, as well as to borrowers. The not unsuitable test in Chapter 3 of the NCCPA does not refer to guarantors at all.

Restricting clause 65 in the draft Code to apply only to guarantors of loans not regulated by the NCCPA[3] amounts to a reduction in the contractual rights guarantors have against banks that is not a duplicate of commitments banks owe them at law.

More broadly, as the responsible regulator for enforcing the NCCPA, we urge ASIC to consider in detail whether the ABA is correct in concluding that the common law diligent and prudent banker commitment effectively replicates responsible lending obligations in relation to consumer credit. Further, to the extent that the provision does replicate or overlap with the law, we challenge the assumption that this is necessarily a reason to remove the commitment to produce an effective Code. See recommendation 6 in response to questions C7, C12 and C13.

Complaints handling obligations

We also urge ASIC to closely examine whether the provisions of the current Code relating to complaints handling that have been removed are actually substantially contained in ASIC regulatory guide 271 on internal dispute resolution. On our read, it is not clear that the following commitments are clearly replicated:

- current Code clause 201 (keeping customers informed on the progress of their complaint). RG271.76 does refer to keeping consumers informed of the progress of a complaint at key stages of the IDR process but this only applies to "traditional trustees" and the guide is silent with respect to credit providers;
- current Code clause 202's commitment to giving a name of a contact is also not explicit in RG271. In practice, this can and will lead to delays, with consumers having to repeat their stories and the risk of inconsistency for consumers and their representatives – an experience that clients already regularly report to us; and
- current Code clause 206's commitment to providing a date to expect a response and monthly updates (at (b) and (c)) are not specifically referenced in RG271.66[4].

These are commitments that help improve transparency around complaint handling. Our organisations regularly hear from consumers who are unsure about the status of a matter with the bank when they call us seeking help. This happens in relation to hardship applications, reported scams and other issues. This is not an area banks are necessarily doing well in, particularly for people trying to self-represent, and also is one that can have an acute impact on customers when handled poorly. It is not where banks should be reducing their commitments. This issue is also discussed further in response to question C8 below.

RECOMMENDATION 4. ASIC should make Code approval conditional on the ABA reinstating existing Code clauses that offer commitments about complaint handling that go above and beyond the requirements in ASIC's RG271.

Informing customers about how to use joint accounts

Clause 138 of the current Code has also been removed, which contains a commitment to tell people who have joint accounts how to use them. The ABA has indicated that this commitment is now replicated at a high level in some of the guiding principles – but these are explicitly not binding on members. If elderly or vulnerable customers are

[3] This commitment is also made to guarantors of small business loans at clause 76 of the draft Code, but this still leaves guarantors of loans regulated by the NCC without the same protection

[4] https://download.asic.gov.au/media/3o1o5aq5/rg271-published-2-september-2021.pdf

not made aware of the implications of having a joint account this may increase their susceptibility to financial abuse through that joint account. We see the abuse of joint accounts regularly in our frontline work and recent research has revealed the high prevalence of economic abuse in Australia.[5]

Questions C7, C11 and C12 – Do you have concerns about removed Code provisions and BCCC reporting

Relevant to questions C7, C11 and C12 of CP373, our primary concern with the removal of code provisions on the basis that they are restatements of the law is the impact that the removal those provisions listed at para 41 of the CP will have upon the ability of the Banking Code Compliance Committee (**BCCC**) to monitor the services of banks and drive improvements in banking conduct.

Even where provisions do overlap with existing laws, removing commitments from the Code means that the BCCC will no longer oversee compliance with these areas, making it more difficult for it to identify and highlight systemic and emerging issues. It will also reduce the areas where the BCCC can justify specialised investigations and analysis.

While ASIC will in theory oversee compliance with areas covered by law via the reportable situations regime, it is unlikely that it will conduct the same level of specific compliance work and monitoring that the BCCC currently undertakes given the limited resources of the organisation and breadth of regulatory coverage. Further ASIC does not publicly issue annual breach statistics that drill down into the same level of detail as the BCCC currently does.

This is also a significant step backwards in the concept of self-regulation. This is a decision by banks to no longer seek to self-improve their behaviour in meeting the law but to place the entire onus on the busy regulator to police their actions. Analysis of areas like lending is one of the primary reasons the BCCC exists. It doesn't make sense to dramatically cut its remit.

If the reason for removing many areas of oversight from the remit of the BCCC is to remove duplication in reporting obligations, there are surely ways that this could be achieved without such a heavy-handed approach with undesirable consequences.

Further, while we disagree that the diligent and prudent banker provision, for example, duplicates the law, we also challenge the assumption that any clause of an industry code which duplicates the law necessarily needs to be removed. This premise appears to be based on various sections of ASIC Regulatory Guide 183, specifically:

- 183.5 That an effective code must do at least one of three things - address specific consumer problems not covered by legislation; or elaborate on legislation to deliver additional benefits to consumers; and/or clarify what needs to be done from the perspective of a particular industry, practice or product to comply with legislation; and
- 183.30 That a code must do more than restate the law and must not be inconsistent with it.

We address these points in turn.

In relation to 183.5 the Code in its entirety clearly contains many clauses which go above and beyond the law, either by elaborating on or adding to existing legal requirements or addressing issues that are not covered by law. We argue elsewhere in this submission that these clauses could go further, and in some cases have gone backwards, but the point is that there is nothing in the Regulatory Guide which indicates every single clause must exceed the law for a Code to be effective or meet the criteria for approval.

The same arguments can be made in relation to the first limb of 183.30 – that a code must do more than restate the law. Overall the Code does more than restate the law. It is a completely defensible position that a code, which

[5] The Australian Institute of Health and Welfare reports that 12% of the population has experienced economic abuse by a partner since the age of 15. https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary#:~:text=It%20was%20also%20estimated%20that,7.8%25)%20(ABS%202023b).

on balance goes well beyond the law, could also contain some provisions which do restate the law for the sole purpose of committing as an industry to self-regulatory monitoring of particularly crucial obligations; a commitment to make positive steps as an industry to proactively monitor compliance and promote best practice rather than leave all the heavy lifting to the regulator.

In relation to the second limb of 183.30, that a code must not be inconsistent with the law, the diligent and prudent banker obligation in the current (and previously approved) Code is entirely consistent with the law in relation to responsible lending, and goes beyond the law in circumstances where the NCCPA may not apply. The ABA has argued that the diligent and prudent banker obligation is a lesser standard than the responsible lending obligations in the law and, therefore, an inconsistent one[6]. We suggest that this is arguably a moot point. They are not inconsistent in principle or application. 183.30 provides further guidance:

> *"if compliance with a code provision would make it impossible to comply with the law, we will generally take the view that the code provision is inconsistent with the law".*

Similarly at 183.33:

> *" As long as compliance with the code provision would not make it impossible to comply with the law, we will generally take the view that there is no inconsistency."*

It is clearly possible to comply with both the diligent and prudent banking standard *and* the responsible lending obligations, because they are in substance the same – one is simply more prescriptive than the other. The same could be said about other clauses which have been removed on this basis.

In relation to the ABA's concern about confusion for consumers[7], or creating conflicting legal standards[8], this can be addressed in the same way it was in previous versions of the Code by making it clear that where the responsible lending provisions apply the bank will meet the obligation in the clause by complying with them. In relation to the differing regimes and consequences[9] – this is entirely the point of self-regulation/co-regulation. The industry is making a commitment to lift their own standards rather than rely on members being caught out by the regulator.

RECOMMENDATION 5. ASIC should make its approval of the Code conditional on the ABA reinserting all existing Code clauses that have been removed on the basis of regulatory duplication, where their removal may reduce the scope of the BCCC's monitoring and oversight powers. Any concerns about duplicate reporting should be resolved by an alternative breach reporting solution between the ABA, ASIC and the BCCC.

<u>Diligent and prudent banker</u>

Again, while we are concerned about the removal of all those commitments listed at para 40 of the CP, the area we are most concerned about is in relation to the reduction of the scope of the commitment to exercise the care and skill of a diligent and prudent banker. The change to this clause effectively means that lending decisions for all regulated consumer credit are outside the scope of the BCCC's remit. This is a substantial area to lose valuable oversight over, particularly considering that the chapter of the current Code on responsible lending regularly accounts for a significant portion of reported Code breaches.[10] Responsible lending was also a key theme of the Royal Commission and an area where market forces and consumerism create continuous pressure against compliance.

[6] ABA Response to Joint Consumer Submission on the BCOP, 24 Jul 2023, p5
[7] ABA Response to Joint Consumer Submission on the BCOP, 24 Jul 2023, p5
[8] ABA Response to Joint Consumer Submission on the BCOP, 24 Jul 2023, p2
[9] ABA Response to Joint Consumer Submission on the BCOP, 24 Jul 2023, p4
[10] Chapter 17 'A responsible approach to lending' is regularly in the top three chapters for reported breaches: https://bankingcode.org.au/app/uploads/2023/09/BCCC-Report-Compliance-with-the-Banking-Code-of-Practice-July-December-2022.pdf

Irresponsible lending can also have significant downstream consequences in terms of pushing people into financial hardship and all the distress that comes with that experience. Customers rely on their banks to understand how much they can borrow – errors can have a devastating impact. Losing oversight by a body with dedicated resources to monitor the practices of banks in this area is therefore a major loss, and shouldn't be the goal of a Code review purported to be about improving consumer outcomes.

Even if ASIC does have overlapping powers in regard to lending, the likelihood of ASIC using these powers to closely analyse bank lending decisions is low, because there are more problematic players in the credit market that justify greater expenditure of ASIC's resources. We do not believe that ASIC has the resources or the inclination to replicate the activities of the BCCC in this space, given the far greater scope of its regulatory remit. It should recognise this change for what it is – a reduction in oversight of a key area of consumer protection.

RECOMMENDATION 6. ASIC approval of the Code should be conditional on the ABA expanding the operation of clause 64 of the draft Code to reflect clause 49 in the current Code, so it also applies to loans regulated by the NCC.

Question C8 – Utility and readability of the Code

Our primary concern with the utility and readability of the Code relates to the removal of details about bank complaint handling and dispute resolution processes.[11] As detailed above, these have been removed because the ABA considers it to duplicate commitments in ASIC RG271 – which we consider to be partially inaccurate.

However, even removing provisions that are replicated in RG271 reduces the value that referring to the Code offers bank customers. The time that banking customers are most likely to consult the Code is when they are looking to make a complaint. Removing these provisions from the Code will make guidance on the complaint process more difficult to find. Since the 2017 Khoury review at least,[12] the ABA has intended the Code to be available and accessible to the public. For customers who do refer to the Code, it is easily searchable online. It seems far less likely a consumer seeking to find out about the complaints process is going to seek out an ASIC regulatory guide at the Code's direction to understand the commitments banks make about complaints. ASIC regulatory guides are not drafted in plain English for general consumption, but for regulated industry compliance lawyers to better understand their regulated entities' obligations under the law. We appreciate that there are other ways banks communicate this information, but it remains important to have in a public document that outlines key commitments banks made to customers in one readable document, rather than scattered across regulatory guides and the common law.

At a minimum the proposal by the ABA will confuse consumers and make understanding their rights a challenge. At worst it will work to frustrate consumer attempts to seek the restitution or justice where needed and subsequently act as a barrier to consumers to activate their rights.

In practice, therefore, the proposed reduction in Chapter 17 is an effective and significant reduction in consumer protections.

<u>Diligent and prudent banker</u>

The change in the diligent and prudent banker commitment in the draft Code will also negatively impact its utility and readability in another key area. Responsible lending obligations are not well known to the general public – many consumers may not realise that banks undertake affordability assessments because they owe the borrower obligations at law. The current reference in the Code to exercising the care and skill of a diligent and prudent banker may help alert bank customers to the existence of these obligations. It may help guide customers toward making complaints through internal or external dispute resolution processes on the basis that they had been

[11] Chapters 47 and 48 of the current Code
[12] Final Report, 2017 Banking Code of Practice Review, Khoury, P., p 27-36

provided with credit they could never afford to repay. A customer referring to this obligation should be enough for a bank's internal dispute resolution team or AFCA to commence a review of whether the bank complied with responsible lending obligations.

Retaining the application of this commitment to loans not regulated by the NCC (rather than cutting it out altogether), reduces the scope of this clause. It also makes interpreting it far more opaque to customers for a number of reasons. These include:

- It is unlikely that customers will know whether their credit product is covered by the NCC;
- it could give the impression that banks will explicitly *not* exercise due skill and care in when considering lending decisions for products covered by the NCC – making it more likely to create more confusion than retaining the current drafting; and
- the provision is just more complicated as a result of the amendment.

This commitment in the current Code may also be useful guidance and a relevant and specific consideration in determining what may constitute 'reasonable steps' for a bank to take to determine whether a credit product was not unsuitable for their customer, i.e. exercising the care and skill of a diligent and prudent banker should elaborate what 'reasonable steps' a bank needs to take including following internal policies, industry guidance etc.

Question C9 – Proposed consumer guide

We appreciate what the ABA is trying to do with the proposed Customer Guide and it does contain some additional information that may be useful to the general public, but we think it is unlikely many consumers are likely to see it then refer to relevant legislation to understand their rights. We are also concerned it may further complicate matters by adding another confusing disclosure-like document to the different places consumers can be directed by their banks. While we recommend reinstating the clauses removed, if this were not to eventuate then consideration needs to be given to including information about the complaints process and key rights of consumers at the front of the Code.

We are unaware of the ABA either drafting this document with plain English principles in mind or whether they have consumer tested both the document itself and the concept of a Code and separate consumer guide, to see whether consumers are better informed. While we support simply reinserting the commitments outlined in para 41 of the CP into the Code, if this was not to take place, ASIC must at a minimum require the ABA to re-draft the document in line with plain English principles and consumer test the consumer guide concept and the drafting.

RECOMMENDATION 7. The removed clauses outlined in para 40 including the claims handling clauses should be reinstated, however in the event they are not then the information about the complaints process and key rights of consumers should be included at the front of the Code, rather than in a separate document.

RECOMMENDATION 8. The format and content of the ABA's Consumer Guide should go through a plain English review and a consumer testing process to assess whether it provides valuable information in a useful manner and form.

Questions C10-14 – supporting Code compliance

Question C10 – a clause requiring systems and processes in place to comply with the Code

We support the recommendation in the Independent Review to include a clause in the Code requiring banks to have systems, processes and programs in place to support compliance with the Code. The main reason for this is that banks consistently report human error to be overwhelmingly the main cause of breaches.[13] This is a

[13] 80% in last reporting cycle

concerning trend that may indicate an overly simplistic analysis of why breaches occur. It may mean banks are turning a blind eye to systemic issues that increase the likelihood of human errors occurring. While some errors may be unavoidable, there is a significant body of research that suggests many companies have issues with analysis of 'failures', and that there are commonly unidentified underlying causes for repeated human errors made by staff in businesses.[14]

A clause requiring that systems, processes and programs be in place to comply with the Code would prompt banks to ensure that systemic issues causing breaches are not being written off as human error. Where ongoing non-compliance occurs, it would also give the BCCC a basis to investigate areas of concern in a more fulsome way and explore whether banks have internal systemic problems that impact their service delivery. This would be another effective use of the BCCC and improvement in consumer outcomes.

RECOMMENDATION 9. The Code should include a provision requiring member banks to have systems, processes and programs in place to ensure compliance with the Code.

Question C13 – Powers and responsibilities in the BCCC Charter

Materiality threshold

While we understand the Charter is not strictly within the scope of ASIC's Code approval power, we understand the ABA and BCCC are considering the possible introduction of a materiality threshold. To date our organisations have opposed the introduction of a materiality threshold, and continue to have concerns about it.[15] The main reasons for this are that:

- There already appears to be significant inconsistency in the reporting practices of Code breaches by banks, and a materiality threshold may make assessment of reporting practices even more opaque; and
- if some Code provisions are, by their nature, unlikely to ever reach the materiality threshold, a materiality threshold will likely mean that these provisions will be effectively disregarded by banks.

If the ABA and BCCC are proceeding with the implementation of a materiality threshold, this is something ASIC should absolutely consider as part of its approval of the Code. A materiality threshold could effectively render some clauses in the Code unenforceable or irrelevant for particular consumers, which would be an effective reduction in consumer protections. In particular, ASIC, the ABA and BCCC need to ensure that any threshold allows for the materiality of a breach to be assessed with proper regard to the subjective impact it has on customers.

If a threshold is determined with regard to the financial impact a single breach has upon a customer, it is essential that this gives due consideration to the personal circumstances of the customer. For example, we would oppose a bright line rule where breaches that have a financial impact of less than $5,000 (say) on a customer are considered immaterial, because the impact of an amount like this can be dramatically different from customer to customer. For some, this would be everything they have to their name.

In our view, introducing a materiality threshold of this nature should absolutely be a relevant consideration for ASIC when deciding whether to approve the Code, because if it were set too high, many Code protections would simply cease to be relevant for more consumers in financial hardship.

RECOMMENDATION 10. Make ASIC's Code approval conditional on any materiality thresholds on reporting obligations member banks owe to the BCCC under the Charter being designed to ensure that low monetary value Code breaches that impact vulnerable consumers are still reported in full.

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[14] See for example, Edmonson, A., "Strategies for learning from failure" (2011) *Harvard Business Review*, available at: https://hbr.org/2011/04/strategies-for-learning-from-failure; Ray, J. "Dispelling the myth that organisations learn from failure" (2015) *Social Science Review Network*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776873

[15] For more information, see our submission in response to the Interim Report of the BCCC: https://consumeraction.org.au/wp-content/uploads/2021/11/211101_BCCC_InterimReport_Response_Final.pdf

Other issues inconsistent with previous Charter

Clause 2.1 b) appears to replicate the powers of the BCCC that are currently set out in clause 211 of the Code. However, clauses 211.i)[16] and ii)[17] are not replicated here. Other clauses in the draft Code cover similar issues, but are more specific. We think the BCCC should retain general powers or goals of this type and it is not clear why this change has been made.

RECOMMENDATION 11. The powers of the BCCC at clause 2.1.b) of the Charter should replicate clause 211 of the current Code in full.

We are also concerned that the new Charter makes it less clear who has final say over the materiality threshold and the form in which breach data is reported. Specifically:

- Clause 4.2.d) in the draft Charter replaces clause 4.2.b)i) in the current Charter. The current Charter specifies that the BCCC will approve the format for breach data reporting. By comparison, the new version specifies that breach data will be reported in a form approved by the BCCC, but after consultation **and agreement** with Code Subscribers *[emphasis added]*; and
- Clause 4.2c) also states that the materiality threshold will be developed by the ABA and agreed with the BCCC.

The BCCC obviously should consult with the ABA and its members about these issues, but we are concerned that these clauses suggest the ABA and its members may have the final say over these matters. The BCCC should have final say over both these decisions – it is the body responsible for enforcing the Code. The ABA already sets the content of the Code. It undermines the independence and validity of the BCCC's remit if the ABA or its members can dictate the terms on which they report, or what they report on. Considering its potential impact, we would also like to see public accountability around the establishment of any materiality threshold, such as via a commitment to seek consumer input on establishing (or in future, changing) the terms of any thresholds.

These clauses should both be amended to clarify that the final say on these issues rests with the BCCC.

RECOMMENDATION 12. ASIC should not approve the Code unless the Charter makes clear that the final decisions on reporting format and any materiality threshold requirements rest with the BCCC, and ensures a means for seeking external input on the possible impact of any threshold.

Question C14 – Enforceable Code provisions

We maintain our position from our original submission to the Independent Review that any Code clauses that go above the existing law, are reasonably specific and offer material protection to customers, should be designated as enforceable by ASIC.[18]

Identifying code provisions for enforceability

We have undertaken a review of the proposed Code and applied the key threshold criteria from Section 1101A of the *Corporations Act* and the Explanatory Memorandum[19] to identify whether a code provision could, at the very least, be able to be considered for enforceability.[20]

[16] The BCCC will endeavour to drive improvements in compliance with the Code to achieve best practice.
[17] The BCCC will promote awareness of the Code and the role of the BCCC through engagement with key stakeholders.
[18] See recommendation 25, and paragraphs 65-74.
[19] Explanatory Memorandum (EM), Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020
[20] The key criteria identified are:
- Is it a provision? (s.1101A(2)(a))
- Does it represent a commitment to a person by a subscriber to the code? (s.1101A(2)(a))
- Is the commitment a provision that is broad in nature, seeking to make general, in-principle commitment regarding industry practices or aspirational targets? (EM 1.78)

This analysis identified 91 clauses that prima facie could be deemed enforceable code provisions, *as currently drafted*. [21] These clauses are scattered across the Code but generally centre on the following types of commitments:

- information provision (60 clauses)[22]
- fees and charges (11 clauses)[23] and
- timeframes (11 clauses).[24]

In addition, there are 27 clauses[25] that commit banks to specific actions (or inactions) that vary in specificity, including among other things:

- a cooling off period[26]
- not requiring full payment[27]
- not enforcing guarantor security[28]
- not requiring access to super[29]
- not giving a higher credit limit.[30]

This leaves 90 clauses that are unable to be considered for enforceability *as currently drafted*. Many of these are not commitments at all:

- 28 clauses[31] are clarifying or explanatory statements for the scope or application of either the Code generally (e.g. Clauses 1, 97, 98) or specific clauses (e.g. Clause 66 clarifies the scope of clauses 67 to 69, Clause 115 clarifies the scope of 101 and 112).
- others are definitions[32] that could be integrated into the definitions section of the Code;
- others still simply provide (or make clear) the bank's right to do (or not do) something[33] and
- 5 clauses[34] are commitments to training or internal processes that do not meet the standard of a commitment to an individual but indirectly improve consumer outcomes.

- Does it relate to transactions or dealings performed for, on behalf of or in relation to the person? (s.1101A(2)(a))
- Will a breach likely to result in significant and direct detriment to the person? (s.1101A(2)(a))
- Is the potential harm caused by a single breach of the commitment or by multiple breaches of the commitment? (EM 1.97)
- Does it create new or extended obligations, or elaborate on what is already stated in the law i.e. provide further specificity in regards to how subscribers intend to comply with existing law or is it a mere restatement of existing law? (EM1.89)
- Does the code provision relate to:
    - cooling off periods (EM 1.76)
    - providing information to consumers (EM 1.76)
    - fees and charges (EM 1.76)
    - specified action within a specified timeframe (EM 1.93)

[21] Clauses 2, 8, 13, 16, 17, 18, ,19, 20, 21, 26, 27, 34, 35, 37, 38, 41, 42, 43, 50, 51, 52, 54, 59, 69, 70, 71, 72, 73, 77, 79, 80, 82, 83, 84, 85, 89, 90, 93, 94, 95, 99, 100, 101, 102, 103, 104, 105, 109, 110, 111, 112, 114, 117, 118, 119, 120, 121, 122, 124, 125, 127, 128, 129, 130, 131, 136, 137, 140, 141, 142, 146, 147, 149, 150, 151, 152, 153, 160, 161, 162, 163, 167, 168, 170, 171, 172, 174, 175, 178, 181.

[22] Clauses 2, 13, 16, 17, 18, 19, 20, 21, 26, 27, 34, 35, 37, 38, 41, 42,43, 51, 52, 54, 70, 72, 73, 77, 79, 83, 85, 90, 93, 94, 100, 101, 102, 103, 104, 105, 112, 114, 117, 118, 123, 127, 129, 131, 136, 137, 140, 147, 150, 151, 152, 153, 162, 167, 170, 171, 172, 175, and 178.

[23] Clauses 27, 34, 35, 37, 59, 70, 71, 72, 77, 125 and 130

[24] Clauses 21, 26, 34, 35, 37, 73, 83, 85, 90, 112 and 114

[25] Clauses 8, 50, 69, 80, 82, 84, 89, 95, 99, 109, 110, 111, 119, 120, 121, 122, 128, 132,141, 142, 149, 160, 161, 163, 168, 174, and 181.

[26] Clause 140

[27] e.g. Clause 80

[28] e.g. Clause 121

[29] e.g. Clause 174

[30] e.g. Clause 141

[31] Clauses 1, 3, 11, 12, 14, 22, 29, 31, 32, 53, 56, 60, 62, 66, 68, 81, 86, 91, 97, 98, 108, 115, 123, 126, 134, 144, 145 and 154

[32] For example, clause 56 defines a basic account, clause 62 defines an eligible customer, informal draft, no overdrawn fees and no dishonour fees, clause 68 defines a substantial benefit, and clause 154 defines financial difficulty

[33] See for example, clauses 32 and 91.

[34] Clauses 6, 7, 15, 47 and 63.

However there are a set of clauses that if re-drafted to bring further clarity and robustness to them, could be made enforceable:

- there are 17 clauses[35] that are not so much commitments but are uncertain "we may" statements where it is largely unclear or at the very least ambiguous as to the circumstances when these clauses will be enlivened.[36]
- there are other "we may" types of statements where the Code asserts that the customer may ask the bank something with no explicit commitment to do anything with that – although that may be implied.[37]
- there are clauses that are ambiguous on the basis that it says that banks are committed to something rather than stating clearly banks will do something.[38]

And finally there are a number of clauses that involve (appropriately or inappropriately) broad concepts or principles that do not meet the threshold criteria:

- 6 clauses that are too broad and not specific in what they are committing to.[39]
- 30 clauses that include words that could be considered broad or in-principle and as a result the clause is not specific enough.[40]

Picking and choosing code provisions for enforceability

The enforceable code regime is not well designed and there are in-built incentives that encourage industry to be circumspect about either what provisions they are willing to put in their codes or which provisions they are willing to be made enforceable.

The consumer position however has consistently been that as much of any code of practice that can be made enforceable, should be made enforceable. We understand that this is not the position of the ABA (or potentially even ASIC), but picking and choosing a subset of provisions from those that are able to be made enforceable is difficult if not impossible or even appropriate for consumer representatives to do. The enforceable code regime should not require us to pick winners and losers. Ultimately our position remains that as many code provisions that can be made enforceable, should be made enforceable.

RECOMMENDATION 13. ASIC should seek to have the ABA designate as enforceable all clauses that go above existing law, are reasonably specific and offer material protection to customers.

[35] Clauses 23, 24, 36, 55, 61, 88, 113, 116, 133, 156, 157, 164, 165, 166, 177, 179, 180

[36] For example, clauses 23 and 55.

[37] For example see Clauses 133 and 156.

[38] see Clauses 44 and 49

[39] Clause 5 which states banks will do "all things necessary"; Clause 9 asserts that banks will "communicate in a timely manner" and "will give … information that is useful and clear." Clause 44 assets both that banks are committed to providing services that are "inclusive and accessible" which are broad principles and also they will "take reasonable measures to enhance access" without spelling out either what is reasonable or what measures these include. Clause 57 asserts that banks will "raise awareness of our affordable banking products and service". Clause 92 asserts that banks processes in relation to external expert valuations will be "fair and transparent"

[40] Examples of these phrases include:

- "if appropriate", "where appropriate" or "reasonable to do so" "reasonably consider" "practical and reasonable for us to do so" making the circumstances unclear when the clause will be enlivened, for example clause 39, clause 78, clause 87, clause 169
- "We will work to" is a vague commitment to improvement that is not we will improve or we will provide the following, for example Clause45
- "Diligent and prudent" are broad principles: clause 64, 65 and 74.
- "compassionate" and "understanding" are broad principles clause 155
- "Reasonable steps" and "to the extent we can" clauses 67, 106, 107 and 148
- "Act fairly" clause 96
- "promptly" clauses 138 and 139, 158 turn a specific commitment into something less specific
- "we view that" clause 176

Questions C15-C17 – Industry guidelines

Accessibility of Industry Guidelines

The accessibility of the ABA's Industry Guidelines should be improved. It does not appear to us that all the documents listed in paragraph 61 of CP373 are available on the principles, guidelines and protocols page of the ABA's website.[41] Ideally, the ABA's Industry Guidelines should be incorporated into the Code (see below). However at a minimum these Guidelines should be either:

- made available alongside the Code of Practice as the Insurance Council does on its Code of Practice website[42] or
- included as appendices to the Code document itself.

That said, the value that the public gains from accessing these documents remains ambiguous if banks refuse to be held to meet the standard described in them.

Incorporation of industry guidelines into the Code

In our submission to the Independent Review, we recommended the ABA's Industry Guidelines be made mandatory for member banks, or at least treated as relevant to interpreting whether a bank has complied with related Code provisions. A number of our recommendations also sought to effectively incorporate key parts of existing Industry Guidelines into the Code, many of which we considered to be very reasonable and achievable commitments.

Specific aspects of Industry Guidelines we think are appropriate to include in the Code and would have liked to have seen moved into the Code include:

- Most of the content of the ABA's guiding principles on lender's mortgage insurance (**LMI**). See recommendations 55-59 of our submission to the Independent Review in particular – none of these are unreasonable or particularly onerous asks[43]
- Introducing the principles for dealing with debt management firms[44] (contained in the relevant industry guideline) into the Code
- Introducing key commitments from the Industry Guideline on the sale of unsecured debt to the Code, particularly:
    - Not selling debts owed by customers experiencing significant vulnerability such as (but not limited to) domestic or family violence;
    - Not selling debts that will soon become statute barred
    - Only selling debts to buyers that are members of AFCA
- Parts 4.2; 4.3 and 4.6 of the Family and Domestic Violence Industry Guideline should be mandatory so banks commit to:
    - having specially trained staff to work with customers impacted by family or domestic violence;
    - protecting customer confidentiality and safety where family or domestic violence is relevant; and

[41] https://www.ausbanking.org.au/guidelines/
[42] https://insurancecouncil.com.au/cop/
[43] Pages 36-37
[44] https://www.ausbanking.org.au/wp-content/uploads/2021/07/ABA-Industry-Guideline-2020-Debt-Management-Firms.pdf

- making it easier for customers to communicate with their bank where family or domestic violence has been identified or disclosed.[45]

Consumer advocates have engaged with the ABA in developing these Industry Guidelines over the last few years. We understand that parts are aspirational, but we firmly believe that there are substantial sections of them which should be incorporated into the Code as part of the Code review, and that this would not impose an unreasonable burden on banks. Consumer advocates may need to revisit how much time is put into helping the ABA develop these guidelines in future if what goes in remains aspirational in perpetuity.

RECOMMENDATION 14. ASIC should push the ABA to revisit whether valuable but very achievable guidance in Industry Guidelines can be converted into unambiguous commitments, whether by incorporating it into the Code, or designating it as enforceable in the guidelines themselves.

Questions C18-C19 – Guarantor provisions

Enforcing a guarantee is a very serious consequence for someone who does not receive any benefit under a loan, and guarantees by their nature pose an increased risk of being used to perpetrate financial abuse (particularly elder abuse).[46] Banks should tread carefully in this space, particularly when guarantors may be vulnerable. The new Code contains some minor improvements on the commitments made in the existing Code, but we believe the Code should go further. Specifically, we encourage ASIC to push the ABA to reconsider the following recommendations from the Independent Review:

- committing to proactively provide extra support where necessary to ensure guarantors understand the guarantee before entering into it (recommendation 74), or information in ways that are tailored and accessible to the particular guarantor (recommendation 75);
- committing to explore all alternative options with a guarantor if calling on the guarantee before forcing them to sell their principal place of residence (recommendation 79).

In our view, this would not be too much to ask when considering the gravity of the legal and financial commitments a guarantee involves, and we found the ABA's reasons for refusing these recommendations to be unconvincing. Under the proposed Code, banks could still just accept a guarantee from anyone three days after they provide them with the relevant information, regardless of whether the potential guarantor has gained any understanding of the implications of the agreement. Allowing banks to turn a blind eye to the risk of a guarantee being used to perpetrate financial abuse is a standard that falls short of community expectations.

We also refer ASIC to the recommendations in our original submission to the Independent Review, and particularly recommendations 77, 82 and 83, which we also consider to be very reasonable safeguards. In particular, bank staff involved in guarantor arrangements should be proactively looking to identify signs of financial abuse. The Code implies that banks will proactively consider the risk of financial abuse in relation to a co-borrower (at clause 67.c.) – why is this not something banks can commit to doing when dealing with a guarantor?

RECOMMENDATION 15. ASIC should make Code approval conditional on it being amended to require banks to take proactive steps to ensure that a potential guarantor understands the nature and risks they are taking on before accepting their guarantee, and be on the lookout for factors that may suggest a risk of financial abuse.

[45] In our view, the vast majority of the ABA's family and domestic violence industry guideline could be treated as a Code related document and relevant to interpreting compliance with the Code

[46] For more information, see: https://consumeraction.org.au/wp-content/uploads/2019/10/150819-CALC-letter-to-BCCC-Guarantee-breaches-FINAL.pdf

Questions C20 and C21 – recommendations regarding customers experiencing vulnerability, and inclusive and accessible banking services

Explicitly recognised forms of vulnerability

We welcome the expansion to the proposed definition of vulnerability set out in clause 49, however it should be further expanded to also explicitly address individuals that are particularly vulnerable to the rapidly increasing movement toward digital only bank services. This category should at a minimum specifically include people with low digital literacy and over the counter only customers (eg those without ATM cards). It should also include customers in places with limited and/or unreliable digital connectivity, which can be a massive barrier for people to overcome, and it not necessarily the same form of vulnerability as living in a remote location.[47] The landscape of banking and finance is changing and customers who are having (or will have) difficulty adopting these changes need to be treated with extra care by banks.

We would like to see the ABA explicitly commit to finding ways to provide inclusive banking services for prisoners and reduce barriers to accessibility they face. However, at present most banks would fail to deliver the goal of taking extra care with prisoners. Many of our organisations will continue to work with the ABA through its Customer Outcomes Group toward this goal, and we urge the ABA and its members to provide extra care with customers who are incarcerated.

RECOMMENDATION 16. Clause 49 of the Code should explicitly require banks to provide extra support to people who are vulnerable to the increased reliance on digital services for the provision of banking and people who are incarcerated.

Accessibility of banking services

We also recommend that clause 51.c) of the draft Code should be amended to explicitly include reference to a power of attorney, alongside lawyer or financial counsellor.

RECOMMENDATION 17. Clause 51.c) of the Code should be amended so the section of the clause in brackets reads, '(such as a lawyer, financial counsellor or attorney)'.

Recording customer circumstances

We were disappointed with the response to the recommendations detailed in paragraph 78 of CP373, but we understand that the ABA is trying to address issues with privacy law that limit the ability of banks to take certain steps like recording sensitive personal information to help them support people experiencing vulnerability, where it will benefit the customer. We encourage ASIC to require the ABA to revisit these recommendations as part of a review of the Code following the conclusion of the Government's review of the *Privacy Act 1988*, consistent with our Recommendation 1.

Family violence and financial abuse

As noted above we consider there to be a number of additional steps that ABA members should be willing to treat as binding commitments in the ABA industry guides on financial abuse and family and domestic violence. It is disappointing limited progress has been made on this front in the new Code.

Questions C22 and C23 – basic bank accounts

We were disappointed that the ABA decided not to adopt the part of recommendation 39 of the Independent Review that encouraged banks to proactively identify customers who may be eligible for basic bank accounts. Our understanding of the outcomes of the ASIC review referred to in paragraph 89 of CP373 strongly indicate that

[47] For more information, see https://www.digitalinclusion.gov.au/sites/default/files/documents/first-nations-digital-inclusion-advisory-group-initial-report.pdf and https://www.digitalinclusionindex.org.au/

inaction on this issue is costing people on low incomes (and particularly First Nations people) a significant amount of money.

Clearly the requirements under the ACCC authorisation have not been sufficient to stimulate effective action by the banks to identify and transition eligible customers across to basic bank accounts. We disagree strongly with the ABA's assertion that obligations under the ACCC authorisation are sufficient to address this concern. The documents published by the ACCC setting out the ABA's reporting to it on this issue[48] strongly suggest that this is not being taken seriously by the ABA or its members. For example:

- The ABA's "reporting" each year appears to involve a very loose table in an email;[49] and
- Some banks clearly are not doing much on the proactive side – one member bank described its actions to make existing customers aware of their potential eligibility as: "Information is available on (bank) website and staff is aware of the product available".[50]

ASIC should use this process to build upon the work of its Indigenous Outreach Program (the **IOP**) team on basic bank accounts and push the ABA and its members to agree to make meaningful efforts to establish a proper process for proactive contact of customers potentially eligible for basic bank accounts. The work of the IOP in this area has clearly demonstrated both the feasibility of using data to better identify people who are likely to be using high fee accounts that are unsuitable and harmful, and the ineffectiveness of methods other than "opt-out" to address the problem. Banks continue to close branches in regional and remote locations to the detriment of many people, especially First Nations customers, who are also known to be significantly more digitally excluded compared to the general population[51]. Information on a website and staff awareness is highly unlikely to have any impact on this segment of customers. The onus should sit squarely on the banks to identify these customers using their own systems and data analysis and to take effective action to move them to more appropriate accounts. A plan for transitioning customers off high fee accounts should involve a process for identifying where it may be possible to use opt-out processes to get customers incurring significant fees into more appropriate accounts.

RECOMMENDATION 18. ASIC should make it a condition of approving the Code that the ABA and member banks develop a far more comprehensive plan for proactively identifying and moving eligible customers into basic bank accounts, with appropriate opt-out processes. The ABA and member banks should be required to report to ASIC in more detail on outcomes than has been done under the ACCC authorisation.

Questions C24 and C25 – complaints handling and the Customer Guide

See our responses to questions C8 and C9 above.

Please contact Policy Officer [redacted] at **Consumer Action Law Centre** on [redacted] or at [redacted] you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

FINANCIAL RIGHTS LEGAL CENTRE

[48] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association - see links under 'Reporting' subheading

[49] See the second and third reports in particular

[50] See first report, 1 November 2021, Category A bank 8

[51] The most recent Australian Digital Inclusion Index released in July 2023 (https://www.digitalinclusionindex.org.au/key-findings-and-next-steps/), found that there was an overall Index Score of 73.4 for non-First Nations Australians but only 65.9 for First Nations Australians, reflecting a national gap of 7.5 points for First Nations people. This only increases when examining particular cohorts in regional, remote and very remote areas. First Nations people living in remote and very remote areas had particularly low levels of digital inclusion, respectively 21.6 and 23.5 points below the national non-First Nations average. Access is a critical issue in remote First Nations communities.

FINANCIAL COUNSELLING AUSTRALIA

INDIGENOUS CONSUMER ASSISTANCE NETWORK

COUNSEL ON THE AGEING AUSTRALIA (COTA)

CONSUMER CREDIT LEGAL SERVICE

SOUTH EAST COMMUNITY LINKS

WESTJUSTICE

MORTGAGE STRESS VICTORIA

UNITING COMMUNITIES CONSUMER CREDIT LAW CENTRE SA

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. Make a condition of ASIC's approval of the Code that the ABA commits to undertake targeted reviews of matters that have been excluded from the Code on the basis that they are the subject of current potential law reform. These reviews should be completed within 12 months of the conclusion of the reform processes.

RECOMMENDATION 2. ASIC should use the Code approval process to have the ABA review the language used so the Code clauses provide more certainty, clarity and robust commitments for consumers seeking to enforce them.

RECOMMENDATION 3. Make the commitment in clause 45 of the Code more certain, so that banks make a material commitment to use qualified interpreters with customers, particularly when discussing serious, complex or sensitive matters, and to ensure staff are trained to identify such situations, and work with interpreters.

RECOMMENDATION 4. ASIC should make Code approval conditional on the ABA reinstating existing Code clauses that offer commitments about complaint handling that go above and beyond the requirements in ASIC's RG271.

RECOMMENDATION 5. ASIC should make its approval of the Code conditional on the ABA reinserting all existing Code clauses that have been removed on the basis of regulatory duplication, where their removal may reduce the scope of the BCCC's monitoring and oversight powers. Any concerns about duplicate reporting should be resolved by an alternative breach reporting solution between the ABA, ASIC and the BCCC.

RECOMMENDATION 6. ASIC approval of the Code should be conditional on the ABA expanding the operation of clause 64 of the draft Code to reflect clause 49 in the current Code, so it also applies to loans regulated by the NCC.

RECOMMENDATION 7. The removed clauses outlined in para 40 including the claims handling clauses should be reinstated, however in the event they are not then the information about the complaints process and key rights of consumers should be included at the front of the Code, rather than in a separate document.

RECOMMENDATION 8. The format and content of the ABA's Consumer Guide should go through a plain English review and a consumer testing process to assess whether it provides valuable information in a useful manner and form.

RECOMMENDATION 9. The Code should include a provision requiring member banks to have systems, processes and programs in place to ensure compliance with the Code.

RECOMMENDATION 10. Make ASIC's Code approval conditional on any materiality thresholds on reporting obligations member banks owe to the BCCC under the Charter being designed to ensure that low monetary value Code breaches that impact vulnerable consumers are still reported in full.

RECOMMENDATION 11. The powers of the BCCC at clause 2.1.b) of the Charter should replicate clause 211 of the current Code in full.

RECOMMENDATION 12. ASIC should not approve the Code unless the Charter makes clear that the final decisions on reporting format and any materiality threshold requirements rest with the BCCC, and ensures a means for seeking external input on the possible impact of any threshold.

RECOMMENDATION 13. ASIC should seek to have the ABA designate as enforceable all clauses that go above existing law, are reasonably specific and offer material protection to customers.

RECOMMENDATION 14. ASIC should push the ABA to revisit whether valuable but very achievable guidance in Industry Guidelines can be converted into unambiguous commitments, whether by incorporating it into the Code, or designating it as enforceable in the guidelines themselves.

RECOMMENDATION 15. ASIC should make Code approval conditional on it being amended to require banks to take proactive steps to ensure that a potential guarantor understands the nature and risks they are taking on before accepting their guarantee, and be on the lookout for factors that may suggest a risk of financial abuse.

RECOMMENDATION 16. Clause 49 of the Code should explicitly require banks to provide extra support to people who are vulnerable to the increased reliance on digital services for the provision of banking and people who are incarcerated.

RECOMMENDATION 17. Clause 51.c) of the Code should be amended so the section of the clause in brackets reads, '(such as a lawyer, financial counsellor or attorney)'.

RECOMMENDATION 18. ASIC should make it a condition of approving the Code that the ABA and member banks develop a far more comprehensive plan for proactively identifying and moving eligible customers into basic bank accounts, with appropriate opt-out processes. The ABA and member banks should be required to report to ASIC in more detail on outcomes than has been done under the ACCC authorisation.

APPENDIX B - BANKING CODE CLAUSES THAT REQUIRE CLARITY

Clause	Comment
11. Anything that we are required to give to you under this Code may be given to you: a. in person, writing, electronically, by telephone or video conference; b. by telling you that the information is available on a website or other electronic forum; or c. as otherwise agreed with you. However, if this Code specifies the method of communication, then we will comply with that method.	Greater clarity could be provided by cross referencing every clause that this is referring to since it is not clear if this covers concepts like making information publicly available, for example, clause 162
14. The documents in paragraph 13 will clearly set out: a. details of fees and charges, the amounts (if ascertainable), and how often they are debited; b. any interest rate that applies, how and when different interest rates may apply, the method by which interest is calculated, and when interest will be credited or debited; c. how often we give you statements of account; d. how we may change fees, charges, interest or other Terms and Conditions, and how we will notify you of these changes; e. for a Loan, whether the Loan is repayable on demand; and **f.** a statement that information on current standard fees, charges and any interest rates is available on request.	If this clause were to be combined with Clause 13, then this would be more readily enforceable
23. **We may charge** you a reasonable fee for providing you with a copy of a document under this Code. However, **in certain circumstances, we may waive or refund** that fee.	There are three issues with the drafting of this clause: 1. "We may charge you" – it is not clear under what circumstances or conditions banks will charge a consumer. The use of the word "may" also provides the banks with the power to decide when this clause is enlivened. 2. "a reasonable fee" is undefined and again within the power of the bank to decide what is "reasonable"

Clause	Comment
	3. "In certain circumstances, we may waive…" The clause does not outline what these circumstances are, so it is not clear when a consumer can rely on or enforce this clause.
24. **We may charge you a** fee for hard copy statements that are not repeat statements (e.g. out of cycle statements). **If you tell us, and we are reasonably satisfied** that you do not have access to electronic statements, then we will waive or refund that fee.	There are three issues with the drafting of this clause: 1. "We may charge you" – it is not clear under what circumstances or conditions banks will charge a customer. The use of the word "may" also provides the banks with the power to decide when this clause is enlivened. 2. "If you tell us" – places the entire onus on the consumer to enliven this part of the commitment. What happens in the case where the bank is aware of the issue? "If you tell us, or we become aware" or alternatively "If you tell us, or we identify …" 3. "we are reasonably satisfied" this again provides banks with the subjective power to decide when they are reasonably satisfied and does not spell out how a customer can ensure that the bank is reasonably satisfied.
28. If you are a Small Business or an individual and the rules in the National Credit Code about statements of account do not apply to your Loan or credit account, then we will give you a statement of transactions on your account as though those rules did apply.	This clause would be clear and enforceable but for Clause 29
29. However, we do not have to do that **if the nature of the relevant Banking Service means it is impractical for us to do so**.	There are three issues with the drafting of this clause: 1. It is not clear if this is refereeing only to Clause 28 or both Clause 28 *and* 27 2. "we do not have to do that if …. Is impractical for us to do so" This phrase is subjective and places the power with the bank to decide what is and isn't impractical. Such impractical circumstances are not immediately discernible to a reader.

Clause	Comment
	3. This is not a standalone commitment but one that should be combined with Clause 28 (or both clauses 27 and 28 if that is the intention)
30. If you are an individual that is not a Business, we will tell you about a transaction service fee immediately before you incur that fee, **if it is practical and reasonable for us to do so**.	This would be enforceable but for the phrase "if it is practical and reasonable for us to do so", which is only partly spelled out in Clause 31 with an unlimited list of examples where it may not be practical and reasonable. This drafting provides the bank with the ability to decide when something is practical and reasonable, the full list of which is not immediately discernible to a reader.
31. However, **it may not be practical or reasonable for us** to do so in certain circumstances, **for example**: a. dishonour fees; b. if the fee is charged based on end of day balance and, therefore, is not necessarily incurred at the time of the transaction (for example, an overdrawn fee based on end of day balance); c. if you are making an online purchase from a third party, using a merchant terminal, or using another bank's ATM; or **d.** break costs, which may be incurred if your transaction makes a prepayment to a fixed rate Loan**.**	See above. This should be combined with Clause 30.
32. The Terms and Conditions of a Banking Service **may allow us to change those** Terms and Conditions in certain situations without your agreement where allowable under unfair contract terms laws.	This is not a commitment to a customer to do anything at all. The clause provides the bank with a right to change terms and conditions.
33. Subject to paragraphs 34 to 36 below, we will tell you about any change to our Terms and Conditions **as soon as reasonably possible**. This includes a change to our Standard Fees and Charges.	"As soon as reasonably possible" is left undefined and subjective. A timeframe is needed. Makes enforcement difficult.
34. If we change an interest rate, we will tell you **as soon as reasonably possible,** but no later than the date of the change, unless we are not able to because the interest rate is calculated according to a money market or some other external reference rate, or a rate otherwise designated as a variable or floating rate.	"As soon as reasonably possible" is left undefined and subjective. A timeframe is needed. Makes enforcement difficult. Also this is a long convoluted sentence with a many clauses that could be simplified.

Clause	Comment
35. Apart from changes to interest rates and any subsequent changes to repayments, **if we believe a change is unfavourable to you**, then we will give you prior notice of at least 30 Days, subject to paragraph 36 below.	"If we believe a change is unfavourable to you" is dependent on the subjective view of the bank (not the customer) and thus uncertain and unclear. It is also a complicated sentence that could be simplified.
36. **We may give you a shorter notice period**, or no notice, of an unfavourable change if: a. **it is reasonable for us** to manage a material and immediate risk; or b. there is a change to, or introduction of, a government charge that you pay directly, or indirectly, as part of your Banking Service. In that case, we will tell you about the introduction or change **reasonably promptly** after the government notifies us (however, we do not have to tell you about it if the government publicises the introduction or change).	"We may give you a shorter period" is uncertain and dependent on sub-clauses (a) and (b), the first of which includes the subjective phrase "if it is reasonable for us." Further "reasonably promptly" is used left undefined and subjective. It also stands in contrast to the use of "promptly" without the modifier "reasonably." (e.g. Clause 178) What is the difference? Is the addition of reasonably substantive and if so, in what way?
38. We will give you **readily accessible** information about how to close your account. You may close your accounts	It is unclear what the phrase "readily accessible" means vis a vis the use of the term publicly available (e.g. at clause 162)? Is this a clause that requires reference to Clause 11?
40. If we close an account of yours under its Terms and Conditions that is in credit, we: a. will, **if appropriate,** give you **reasonable notice** of the closure; b. will, **if appropriate,** pay you the amount of the credit balance (for example where we have your payment account details); and c. **may charge you an amount that is our reasonable estimate** of the costs of closing your account.	There are a number of issues with this clause: 1. "if appropriate" makes it unclear what circumstances will be for (a) or (b) to be enlivened. It is also solely within the power of the bank to decide when something is appropriate; 2. "reasonable notice" is uncertain and lacks a clear time frame. It is also within the sole discretion of the bank to decide what is a "reasonable timeframe". 3. Subclause (c) provides the bank with a right not the customer and is reliant on the subjective "our reasonable estimate"
44. We are committed to providing Banking Services which are **inclusive and accessible** for all customers. We will take **reasonable measures** to enhance access to our services for customers including, but not limited to: a. older customers; b. people with disability;	"Reasonable measures" is too broad to provide any certainty or clarity. What are the "reasonable measures" that banks will take to meet this clause? Is it limited to the measures listed in clause 45 or is it broader?

Clause	Comment
c. Aboriginal and Torres Strait Islander customers, including in remote locations; d. people with limited English; and e. people of diverse sexual orientations, gender identities and sex characteristics including lesbian, gay, bisexual, trans and gender diverse, intersex, queer and asexual people, and people born with an intersex variation.	
45. We will work to improve **inclusivity and accessibility** for our customers including, **where appropriate and practicable**, organising or referring you to external support free of charge, including: a. interpreter/translation services; b. AUSLAN; c. National Relay Services; or d. accessible documentation (such as using screen readers and easy read guides). Where it is not practicable to refer you to external support (for example, where an interpreter is not available), we will let you know other ways we may provide support.	"where appropriate and practicable" provides significant uncertainty to this commitment, and is solely within the power of the bank to decide what is appropriate and practicable. This is the case even with the example provided. The code should spell out where it would be appropriate or where it would not be appropriate. "We will work to improve" also doesn't really commit to providing measures – it is more of a commitment to a process of improving access which could mean a lot or very little depending on the incremental improvement.
46. **If you tell us you are an Aboriginal or Torres Strait Islander customer**, we will take **reasonable steps** to make our Banking Services accessible to you. We will also: a. tell you about any accounts and services that are relevant to you; b. tell you about any accounts or services that have no or low standard fees, if our enquiries indicate you may be eligible for these and help you transfer to another account you want; and **c.** help you meet any identification requirements if you do not have access to standard identification documents, by following AUSTRAC's guidance on identification and verification of Aboriginal and Torres Strait Islander customers.	"If you tell us" places the entire onus on the consumer (a member of a cohort already identified as potentially experiencing vulnerability) to enliven this commitment. What happens in the case where the bank is already aware of the customer's Aboriginal or Torres Strait Islander status? It should say "If you tell us, or we become aware" or alternatively "If you tell us, or we identify …"
48. We will also **assist our customers** who reside in remote communities (including remote Aboriginal and Torres Strait Islander communities) to **access and undertake their banking**.	"assist our customer" is unclear. This lacks any specificity and renders the clause a motherhood statement and unenforceable.

Clause	Comment
	"access and undertake their banking" are also broad concepts that add to the lack of clarity as to what banks will actually do to assist customers in remote communities.
49. **We are committed to taking extra care with customers who are experiencing vulnerability.** We recognise that a customer's circumstances may require support and that these circumstances may change over time and in response to particular situations. While all customers may be at risk of experiencing vulnerability, this risk may be increased due to a range of characteristics which may include, but are not limited to: a. age; b. disability; c. mental health conditions; d. cognitive impairment; e. serious medical conditions; f. elder abuse; g. family and/or domestic violence; h. financial abuse; i. Financial Difficulty; j. literacy and/or language barriers including limited English; k. cultural background; l. Aboriginal or Torres Strait Islander customers; or m. remote locations. We encourage you to tell us about your circumstances so that we can work with you in relation to your Banking Service, otherwise we may not find out about your circumstances.	"We are committed to taking extra care with customers who are experiencing vulnerability" is a motherhood statement. "Extra care" is vague and unenforceable The phrase "we are committed to" ironically lacks any commitment in that it does not necessarily suggest that banks "*will* take extra care". If this was the case then clause should state "We will take extra care…"
50. If you require extra care **and you tell us** about your personal or financial circumstance, we will work with you to identify a suitable way for you to access and undertake your banking.	"If you tell us" places the entire onus on the consumer experiencing vulnerability to self-identify to enliven this commitment – a circumstance that is unlikely to occur in many cases. What happens in the case where the bank is aware of a customer's vulnerability? It

Clause	Comment
	should say "If you tell us, or we become aware" or alternatively "If you tell us, or we identify …"
51. When we are providing a Banking Service to customers who are experiencing vulnerability we will: a. **be respectful of your need for privacy and confidentiality**; b. provide appropriate guidance and referrals intended to help you to maintain, or regain, control of your finances; and **c. where possible and appropriate**, make it as simple as possible for you to appoint a third-party representative (such as a lawyer or financial counsellor) to deal with us on your behalf.	"be respectful of your need for privacy and confidentiality" is unclear. Does this mean meeting all requirements under the Privacy Act, Consumer Data Right and other related data handling laws and regulations or does it mean something more than this. It is not clear where the appointment of a third part is neither "possible" nor "appropriate" and solely within the bank's hands to decide.
52. If you are an individual a**nd you tell us** that you are a low or no income earner, we will give you information about our accounts that you may be eligible for and may be appropriate to your needs: a. for which Standard Fees and Charges are low; or **b.** for which there are no Standard Fees and Charges (if we offer such a product).	"If you tell us" places the entire onus on the consumer experiencing vulnerability to self-identify to enliven this commitment – a circumstance that is unlikely to occur in many cases. What happens in the case where the bank is aware of a customer's low or no income status? This is particularly confusing given the wording of related clause 53, which suggests that they may become aware of the customer's no or low income status but doesn't spell out whether they would act. It should say "If you tell us, or we become aware" or alternatively "If you tell us, or we identify …"
53. Our obligation in the previous paragraph applies to you regardless of whether or not you are our customer. We may become aware if you are a low or no income earner only if you tell us about it.	See above. Also this clause could be combined with Clause 52.
54. If you apply for a new transaction account, we will ask you if you have any of the following government cards. **If you tell us** that you have one of these cards, and the account you enquire about is not a basic bank account or low or no fee account, then we will give you information about any basic bank accounts or transaction or deposit accounts we offer that have low or no Standard Fees and Charges (see paragraph 56): a. a Commonwealth Seniors Health Card; b. a Health Care Card; or **c.** a Pensioner Concession Card.	The "If you tell us" in this clause is at least paired with a commitment to directly ask the customer. However, we think that it would still be appropriate to clarify this to state "If you tell us, or we become aware" or alternatively "If you tell us, or we identify …" This way it would capture any circumstance where the customer doesn't inform the bank but the bank becomes aware subsequently.

Clause	Comment
55. **We may offer** 'basic accounts', or other kinds of low or no fee transaction accounts.	"We may offer" is not a commitment. It should read "We will offer"
56. Basic accounts have, at a minimum: a. no account keeping fees; b. free periodic statements (you can choose monthly or longer intervals); c. no minimum deposits (except that, if your government benefit is paid into a bank account of yours, you may be required to have it paid into this account); d. free direct debit facilities; e. access to a widely accepted debit payment method (including a debit card) offered by us at no extra cost; [ABA Note: proposed amendment to 56(e) is subject to ACCC approval] f. free and unlimited Australian domestic transactions.* *Note that you may be charged for certain ancillary services. For example, bank cheques, telegraphic transfers, or transactions at ATMs owned and operated by third parties.	This is not a commitment – it is a definition. Clarity is required as to what is being committed to in this section.
57. **We will raise awareness** of our affordable banking products and services such as basic, low, or no fee accounts, including awareness of who they are designed for.	"We will raise awareness" is a vague assertion that could be made more specific with actual measurable commitments
58. **We will give you information that is easily accessible** about accounts that have low, or no, Standard Fees and Charges.	"give you information that is easily accessible" is unclear. Does this mean: • banks will make information available that is easy to access or • banks will provide information that is of its nature and content easy to read Customers need to also read Clause 11 to understand what is being committed to here.
59. If you are an Eligible Customer and you ask for a basic account, or a low or no fee account, we will offer you one of these accounts that has the special features listed in	The drafting of this clause is confusing, when read in tandem with the basic banking clauses.

Clause	Comment
this paragraph and, if we offer basic accounts, will also have the features listed in paragraph 56. The special features are: a. no Informal Overdrafts (except where it is impossible or reasonably impractical for us to prevent your account from being overdrawn); b. No Dishonour Fees; and **c.** No Overdrawn Fees.	Why are the three elements in this clause not included in clause 56? Are these elements available to people who obtain low or no fee accounts? Is there a difference between a basic account and a low or no fee account? Are the special features in all basic, no and low fee accounts? Very confusing.
60. You are not obliged to accept our offer of an account with the special features. **You may request (or we may offer you)** other accounts (including other basic, low fee or no fee accounts) which do not have some or all the special features or may have additional features.	"You may request (or we may offer you)" lacks an explicit obligation or commitment to do anything once the request is made. Will the account be provided?
61. **We may also offer** accounts with some or all of the special features, (and/or the features in paragraph 56), to individuals who are not Eligible Customers under this Part.	"We may also offer" is again uncertain. This clause just adds to the confusing nature of the commitments in Clauses 55 to 62.
62. For the purposes of this Part: 'Eligible Customer' means an individual that is not a business who holds a current government concession card listed in paragraph 54. 'Informal Overdraft' means credit we provide when (without your express agreement) we permit you to overdraw your account. 'No Overdrawn Fees' means we will not charge a fee where your account falls into debit. However, you may be charged interest on the amount in debit. 'No Dishonour Fees' means we will not charge a fee because a debit on a basic, low or no fee account is declined due to insufficient funds in the account.	These are just definitions and not commitments
65. We also owe the above obligation to any Guarantor of a Loan referred to in the above paragraph in assessing the borrower's ability to repay the Loan.	See above.
67. If, on the information that you have provided to us in the course of applying for this Loan, you will not receive a substantial benefit from the Loan, we will not approve you as a co-borrower unless we:	Clarity is required around the concept of "reasonable steps".

Clause	Comment
a. have taken **reasonable steps** to ensure that you understand the risks associated with entering into the Loan, and understand the difference between being a co-borrower and a Guarantor; b. have taken into account the reasons why you want to be a co-borrower; and **c.** are satisfied that you are not experiencing financial abuse.	
69. **You may end your liability** under the Loan by giving us a written request to do so in the following circumstances: a. where credit has not been provided or relied upon by any co-borrower; or b. for any future advances under the Loan, where we can terminate any obligation we have to extend further credit to any other co-borrower under the same Loan.	"You may end your liability" should be replaced by "Upon request, we will end your liability …" Presumably this is the intention of this commitment.
70. **We may** require you to pay for lenders mortgage insurance in connection with a Loan you have. If we do this, we will give you a fact sheet about lenders mortgage insurance. The fact sheet will contain information outlining the key policy features.	The "We may" statement is not really required. It could simply say "Where a bank requires you obtain LMI we will give you …
71. We will not charge you more for lenders mortgage insurance than the actual cost we incur for that policy. **We will not receive a commission** on your lenders mortgage insurance policy.	Does this commitment to "not receive a commission" captures any fees a bank could charge or the receipt of any other benefits?
73. We will tell you how to apply for a Loan, including the following: a. the information we require; and b. after we have received the information we have requested, how long before we are likely to make a decision.	Does this clause need to be read in conjunction with Clause 11?
75. When assessing whether you can repay the Loan, we will do so by considering the appropriate circumstances **reasonably known to us** about one or both of: a. your financial position; or b. your account conduct. Where relevant, we may also take into account your projected future cash flows. We will not ask a third party (such as your accountant) to certify that you can repay the Loan. **Where reasonable to do so**, we may rely on the financial resources of third parties available to you, provided that the third party has a connection to you (that is,	Not clear why the word "reasonably" is required in "reasonably known to us." "Where reasonable to do so" adds uncertainty and is solely within the power of the bank to decide when something is reasonable.

Clause	Comment
to the Small Business). For example, where the third party is a Related Entity of yours (including but not limited to your directors, shareholders, trustees, beneficiaries or related body corporates), or is a partner, joint venturer, or guarantor of yours.	
76. We also owe an obligation to any individual guarantor of the Loan to comply with the above paragraph in assessing the borrower's ability to repay the Loan. Documents we will give you	See above
78. If we decide not to approve a Loan to you, we will tell you the general reason why, unless it is **reasonable for us not to do so**.	It is unclear what the circumstances would be for it to be "reasonable for us not to do so" particularly if the clause is limited to general reasons.
81. If paragraph 79 applies, a reasonable time will not be less than 30 Days. However, we may give you a shorter notice period, or no notice, for a payment failure if: a. you or a guarantor is insolvent, goes into bankruptcy, voluntary administration, other insolvency process or arrangement, or no longer has legal capacity (and we are permitted by law); or b. it is **reasonable for us to do** so to manage a material and immediate risk relating to the nature of the relevant default, your particular circumstances, or the value of the Security.	It is unclear what the circumstances would be for it to be "reasonable for us not to do so"
84. We will not take action against you if you default unless it is permitted under paragraphs 79 to 82 or paragraphs 87 or 88 or one of the following defaults occur: **...** e. **we believe on reasonable grounds** that you or a guarantor has not complied with the law or any requirement of a statutory authority, or it becomes unlawful for you or us to continue with the Loan;	"we believe on reasonable grounds" is somewhat unclear
86. If paragraph 85 applies, a reasonable time will not be less than 30 Days. However, we may give you a shorter notice period, or no notice, if: a. you or a guarantor is insolvent, goes into bankruptcy, voluntary administration, other insolvency process or arrangement, or no longer has legal capacity (and we are permitted by law); or	It is unclear what the circumstances would be for it to be "reasonable for us not to do so"

Clause	Comment
b. it is **reasonable for us to** do so to manage a material and immediate risk relating to the nature of the relevant default, your particular circumstances, or the value of the Security.	
87. We will only act on a specific event of default identified in paragraph 84(a) to (m), if the event by its nature is material, or we **reasonably consider the event has had, or is likely to have, a material impact** on: a. you or your guarantor's ability to meet your or their financial obligations to us (or our ability to assess this); b. our Security risk (or our ability to assess this); or **c.** our legal or reputation risk where paragraph 84(e), (f) or (g) applies**.**	"reasonably consider the event has had or likely to have, a material impact" is subjective and unclear
88. For the following types of Small Business standard form Loans, **we may** include financial indicator covenants or special covenants tailored to the particular nature of these Loans as a trigger for default-based action: a. Loans for property development; or **b.** Loans for a specialised lending transaction, where because of their nature, require additional covenants as a way of banks managing their risks, including margin lending, Loans to self manage**d** superannuation funds, bailment, invoice discounting, construction finance, foreign currency Loans and tailored cash flow lending.	"we may" adds uncertainty to a clause that is already designed to provide the bank with a right rather than the customer
91. If we decide to extend or refinance your Loan, **we are not required to do so** on the same terms.	This is not a commitment to a consumer but provides a right to the bank.
93. Our communication will be **clear**, and we will explain the purpose of the valuation to you. When we will provide you with a copy of a valuation	The use of the word "clear" is broad, hard to enforce and ironically lacks clarity and specificity. Providing material in "plain English" may be more appropriate? This is another clause that needs to be cross referenced with Clause 11.
94. Where we have received a valuation of a commercial or agricultural real property which you have paid for, we will provide you with a copy of that valuation and the related valuer instruction (except where Enforcement Proceedings have commenced).	"We may require you" introduces some uncertainty as to the circumstances where customers will be required to accept "reasonable limitations" – another concept that is not clear and in the hands of the bank to define.

Clause	Comment
We may require you to acknowledge in writing that you accept **our reasonable limitations** on your use of the valuation before we provide it to you.	
95. We will only appoint appropriately qualified and experienced valuers who are members of professional organisations which abide by a **similar code of practice**. Appointing investigating accountants and insolvency practitioners (including voluntary administrators)	"similar code of practice" is not defined and open to interpretation. Is a list of similar codes available?
96. We will act **fairly** when using investigative accountants and insolvency practitioners, and will **ethically** manage potential conflicts of interest when appointing receivers who have been investigating accountants for a Small Business, for example: a. We will only appoint qualified practitioners who are members of relevant professional organisations with appropriate codes of conduct. b. We will require additional internal oversight of the appointment of investigating accountants as receivers, to ensure that the decision is necessary and to review the circumstances leading to the appointment. **c.** If the relationship between the you and the investigating accountant has deteriorated (for example has become unworkable), we will consider the appointment of an alternative qualified practitioner.	Enforcing this would be difficult other than focussing in on those three specific commitments. Requiring banks to do anything more than these three may be difficult.
97. If you are an individual who gives a guarantee and/or indemnity to secure a Loan that we give to another individual or Small Business, and this Code applies to the Loan, then this part of the Code applies to your guarantee and/or indemnity.	Not a commitment
98. Under this part of the Code, we must give you information and follow certain processes designed to help you understand the financial risks of giving a guarantee and to decide whether you choose to accept those risks. However, you must make your own assessment of whether you choose to enter a guarantee. You should consider seeking independent legal and financial advice.	This clause is too broad and a bit of a meta commentary on the section.
101. We will tell you: a. about any notice of demand, we have made on the borrower for the guaranteed Loan, or any Loan the borrower has (or has had) with us, within the previous two years; and b. if any existing Loan we have given the borrower will be cancelled if the guarantee is not provided.	Cross reference to Clause 11 needed

Clause	Comment
This paragraph does not apply if you are a Commercial Asset Financing Guarantor, Sole Director Guarantor, Trustee Guarantor or Partnership Guarantor.	
103. If we approve the Loan being guaranteed by you, **we will let you know** that you can request a copy of our assessment about whether the Loan is not unsuitable for the borrower where regulated under the National Consumer Credit Protection Act, free of charge.	The commitment here is to simply letting someone know. It would be clearer if they just gave the information automatically. Cross reference to Clause 11 needed.
105. If you are a Director Guarantor (other than a Sole Director Guarantor) **we will tell you that you have the right to receive** the documents in paragraphs 100 to 102 and that these documents contain important information that may affect your decision to give a guarantee. **You may choose not to receive some or all of the documents and we will not influence your choice**.	The commitment here is to simply letting someone know. It would be clearer if they just gave the information automatically. Cross reference to Clause 11 needed. It is not clear why the final sentence is needed.
106. Before we accept your guarantee, we will take **reasonable steps** to ensure that a meeting is held with you either in person or via video conference, phone, or some other means to discuss you being a Guarantor.	What are "reasonable steps" in this context? It makes the clause unclear. This should simply read – "We will ensure …" Otherwise without the meeting taking place, the guarantee should not be accepted.
107. We will take **reasonable steps** to ensure that the borrower is not, **to our knowledge,** present at the time of the meeting referred to in paragraph 106. Where the meeting is not in person, this will be done by having you confirm that the borrower is not present, and if the meeting is via video conference, we will also ensure that the borrower is not visible on screen.	Similar, what are "reasonable steps" in this context? It makes the clause unclear. The uncertainty is exacerbated by "to our knowledge". Not clear if this latter phrase is needed. This should simply read – "We will ensure …"
108. Paragraphs 106 and 107 do not apply if: a. you or your lawyer confirm to us that you have received independent legal advice about the guarantee; or **b.** you are a Director Guarantor, Commercial Asset Financing Guarantor, Sole Director Guarantor, Trustee Guarantor, Partnership Guarantor or Vehicle Asset Financing Guarantor; or c. you have accepted an extension of the guarantee.	This is not a commitment. This should be combined with 106 and 107.
113. **You may write to us to limit**, or further limit the liabilities you have guaranteed under your guarantee. However, we do not have to accept your request if: a. the amount, or nature, of the limit you request does not cover the borrower's existing liability (plus any interest owed, or any fees, or charges	"You may write to us to limit." This clause is drafted in such a way that it seems to be implied that the bank will accept a request to limit liabilities if the requirements detailed in subclauses (a) through to (d) are not present.

Clause	Comment
that we may incur in respect of that liability) under the relevant Loan contract at the time; b. we are obliged to make further advances to the borrower; or **c.** we would be unable to preserve the current value of an asset which is Security for the Loan without making further advances	
115. Nothing in this Code requires us to provide you with any information other than the specific factual information referred to in paragraphs 102 and 112.	Not a commitment
116. If a borrower obtains a new Loan or has changes made to an existing Loan, then these may be covered by your guarantee to the extent they fall within the limit contained in your guarantee.	Not drafted as a commitment
119. **You may, by written notice to us, withdraw** from the guarantee: a. at any time before we provide credit under the relevant Loan; or b. after credit is first provided, if the signed version of the relevant Loan differs in a material respect from the proposed Loan, we gave you before you signed the guarantee. This does not apply for any change to the Loan described in paragraph 116. However, if your guarantee applies to more than one Loan, you may only withdraw in relation to a Loan referred to in (a) or (b).	It may be implied, but it is not clear whether the bank will accept the withdrawal request. This would benefit from a "we will" statement.
120. **You may end your liability under a guarantee** you have given to us by: a. paying us the lower of: i. the borrower's outstanding liability, including any future or contingent liability; or ii. the amount to which your guarantee of the borrower's liability is limited under the guarantee; or **b.** b. making other arrangements we agree to in return for releasing you from your guarantee.	Similarly, it may be implied, but it is not clear whether the bank will accept the request to end liability. This would benefit from a "we will" statement
123. However, the restrictions under paragraphs 121 and 122 do not:	This is not a commitment – simply a clarification of clauses 121 and 122.

Clause	Comment
a. apply if, after the default notice is issued and after we have informed you of the limitations of our enforcement rights under this Part, you have specifically agreed in writing that they do not apply; or **b.** require us to first enforce any mortgage or other Security that the borrower has provided if we reasonably expect that the net proceeds of that enforcement will not be sufficient to repay a substantial portion of the guaranteed liability, or as a result of the borrower not providing us with information, documents, or access to premises or assets as required, we are unable to reasonably assess whether the net proceeds of that enforcement will not be sufficient to repay a substantial portion of the guaranteed liability.	
124. If you are a guarantor and we have made a demand for you to pay under a guarantee and you are experiencing Financial Difficulty, **then contact us as soon as possible and we will discuss your options**	"then contact us as soon as possible" places the sole onus on the consumer. "and we will discuss your options" does not commit to doing anything about those options.
126. For paragraph 125 to apply, **you may need to tell us** about the circumstances, and we will refund any Default Interest or fees in lieu of Default Interest which were charged during your default and the drought or natural disaster.	"you may need to tell us" suggests that the commitment in 125 is not automatic where given the nature of the commitment it could easily be automated. Also this could be combined with Clause 125
129. We will treat the deceased person's representative with respect and compassion and provide **clear and accessible information** on what you, the deceased's representative, can do to manage a customer's account in the event of their death. This information will include: a. how to notify us of a customer's death; b. who has authority to access the customer's account or Loan details; c. what information we need to verify the identity and authority of that person; and **d.** what steps the person authorised needs to take to manage the deceased customer's accounts, including information about Direct Debits and Recurring Payments on those accounts, and we will assist you to manage Direct Debits and Recurring Payments in the ways outlined in C2.	Not sure what "clear and accessible information" means – plain English? Does this require cross reference to Clause 11?

Clause	Comment
133. If you have a joint account, from which either you or another account holder can make withdrawals**, you can ask us to change the** account authority so that you all have to approve any future withdrawals. This may be relevant to you if you are vulnerable (see Part B2).	"you can ask us to change" is uncertain and does not commit banks to acting on that request. A "we will" statement is needed.
134. The above paragraph does not apply to directors of a company who are signatories on behalf of the company, rather than joint account holders in their personal capacity. Joint Accounts and financial difficulty	This clause should be combined with Clause 134
135. If you have a joint account with someone and you are experiencing Financial Difficulty, then **we can assist you**. If you ask us to, we can do so without involving the other person initially.	"we can assist you" is broad and unspecific. At the very least it would benefit from a "we will" statement – i.e. we will assist you.
137. If you ask us to, we will give you a list of Direct Debits and Recurring Payments on your accounts for up to the previous 13 months. The list will include only those Direct Debits and Recurring Payments that are known to us from the information we receive about your transactions.	This needs a cross reference to Clause 11. Also should this list not be in an easily actionable state, and/or at the very least in the form that best suits the customer.
138. You can ask us to cancel your direct debit request and we will **promptly** process this. This paragraph does not apply to cancellations of Recurring Payments (whether via a debit card or credit card), which must be done by contacting the Merchant or service provider directly.	"promptly" is too uncertain – cancellations should be done instantly where possible. Also the opening sentence could be drafted more clearly by starting with a "we will statement."
139. You can ask us to investigate an unauthorised direct debit and we will act **promptly** to assist you.	Again "promptly" is too uncertain and subjective, and could also benefit from placing the "we will" statement up front.
143. If, within the time limit set by your credit card or debit Card Scheme rules — you tell us that you dispute a transaction on your card, then we: a. will claim the relevant amount back if we find it to have been incorrectly charged and you have not contributed to the loss; or b. **may accept** the Merchant's refusal to make that chargeback only if the refusal is made in a way allowed under the relevant card's scheme rules.	"may accept" adds a lack of clarity to the commitment. What are the situations where a bank may not accept the Merchant's refusal?
144. You have the rights under the above paragraph even if the payment was debited from your credit card or debit card account and was part of a recurring payment arrangement you have with that Merchant.	This is not a commitment and only clarifies clause 143

Clause	Comment
145. You may have rights to dispute an Unauthorised Transaction under the ePayments Code or as contained in your Terms and Conditions.	This is not a commitment and merely points to other rights, This is useful but is not drafted as an enforceable commitment
146. We will make general information about disputed transactions available to you and notify you of the availability of this information at least once every 12 months.	Does this require a cross reference to Clause 11?
147. If we cancel your credit card, we will tell you. If appropriate, we will give you the **general reasons** for doing so.	Not clear what general reasons are – when specific reasons may be warranted.
148. If we offer CCI, then we will give you clear information that enables you to make an informed decision, including (**to the extent we can**): a. the cost of the CCI, including any interest you will pay on the premium; b. how long you would be insured for; c. the monetary limits on the key benefits payable under the insurance; and **d.** d. the date your insurance ends, if that date is different to the date on which the underlying credit product ends.	"to the extent we can" adds a lack of uncertainty to this clause. This information should be provided in all cases and if it cannot, then there is a problem with the design of the product.
151. We will let you know that whether you purchase CCI or not has no bearing on whether we approve you for a credit card or Loan.	Does this require a cross reference to Clause 11?
152. We will use clear disclosure for CCI on credit cards and Loans to enable customers, as they navigate through the digital experience, to better understand this type of insurance. This will be through: a. use of filtering questions so that we alert you to key policy exclusions such as age, residency and employment status and if you are not eligible to claim a significant part of the policy, not offering this product; b. disclosing the limits of the policy as part of the process (the circumstances in which a payout will be made and the amount of the payout); c. disclosing any incentives you might receive from taking out the CCI product and their effect; d. telling you the total cost of the insurance (if known) before you complete the CCI purchase; e. telling you how the premium is to be paid; and	Not sure what "clear disclosure" – plain English? Does this require a cross reference to Clause 11? Subclause (f) does not refer to what happens if the ongoing premium is not calculated as a percentage or cost per dollar. What occurs in this situation?

Clause	Comment
f. where the ongoing premium is calculated as a percentage or a cost per dollar of the outstanding debt or statement balance, then we will tell you that cost and how we calculate it.	
153. **If you are experiencing Financial Difficulty, then you, or your representative should contact us as soon as possible.** We will discuss your situation and the options available to help you. The sooner you contact us, the sooner we can try to help.	The first sentence places the entire onus on the consumer to enliven this part of the commitment. What happens in the case where the bank is aware of the issue? "If you tell us, or we become aware" or alternatively "If you tell us, or we identify …
154. Financial Difficulty means you are unable to repay what you owe, you expect to be unable to pay upcoming repayments, or you are experiencing difficulty meeting your repayment obligations. This can be as a result of an unexpected event or unforeseen changes outside your control including impacts from: a. an illness or injury; b. loss of employment; c. a pandemic; d. d. natural disasters such as droughts, fires, floods and earthquakes (as declared by an Australian Federal, State or Territory Government) or, if no such declaration is made, where we are satisfied on other grounds that a natural disaster has occurred.	This is not a commitment – it is a definition.
155. When you contact us, or are thinking about contacting us, it is important for you to be open, and as realistic as you can be, about your financial position. In turn, we will be compassionate in trying to understand your situation and when discussing any way we can help.	While generally important to know, the first sentence places a requirement on the consumer.
156. If we are working with you to help you respond to financial difficulties, then you can tell us to deal with your financial counsellor or representative — rather than dealing with you. To do this, you will need to give us their contact details in writing.	This clause is drafted in such a way that while it may be implied, it is not stated explicitly that the bank will do something in response to the request.
157. However, we may deal with you directly again in the following situations: a. if you ask us to; b. if we have made reasonable attempts to contact, or deal with, your financial counsellor or representative but we are unsuccessful; or	This clarifies clause 156 and should be combined.

Clause	Comment
c. if your representative is not a financial counsellor, and i. we reasonably believe the representative is not acting in your best interests; or ii. it is otherwise reasonable to do so in the circumstances. If we decide to deal with you directly under (b), or (c), we will tell you, and will suggest other free alternatives that may be available to you. We will respond promptly to you or your representative	
158. We will respond promptly to you, or your representative's request to discuss your financial difficulties.	"Promptly" is vague – this clause requires a timeframe.
159. We will employ a range of practices that can identify common indicators of Financial Difficulty. If we identify that you may be experiencing difficulty paying what you owe under a Loan (or are experiencing Financial Difficulty), then **we may contact you to discuss** your situation and the options available to help you. We will do this on a case-by-case basis.	"we may contact you to discuss" is unclear" since there is no clear guidance as to when a bank will or won't act. Is the decision based on, for example, the ABA financial difficulty guideline or internal policies, or both? Is it dependent on the costs involved for the bank in proactively contacting the customer? The headings too involve different things that are not necessarily addressed by clauses 159 and 160, that is, whether a customer is or the bank thinks a customer is experiencing financial difficulty. If there is a distinction, it is not clear what the purpose of the distinction is. These are two different states: "We may contact you if you are experiencing Financial Difficulty." "We may contact you if we think you are experiencing difficulty"
160. **If we are able to contact** you and **discuss** your situation under paragraph 159 and we offer basic bank accounts, and you are eligible, **we will offer** this product to you.	The drafting of this clause limits the ability for banks to automatically move people experiencing financial difficulty into accounts, as ASIC is seeking in its recent and ongoing investigation in its Better Banking for Indigenous Consumers Project.
162. We will make information publicly available about our processes for working with customers in Financial Difficulty. What we will consider when deciding on assistance options	Does this require a cross reference to Clause 11?
164. The table below sets out examples of steps we may be able to take to help you in particular situations. …	This table is just drafted as a list of examples of actions banks may take. It is not in a form that is enforceable.

Clause	Comment
165. In **exceptional circumstances**, **we may look outside normal processes** to find a way to assist you if you are experiencing long term hardship as a result of a material change in circumstances.	"exceptional circumstances" is not defined as it is in other Codes such as the Life Insurance Code, leaving this notion unclear and uncertain. "We may" is not a firm commitment and should be a "we will statement"
166. If you are an individual**, we may, at our discretion, reduce or waive your debt** if it is an unsecured personal Loan or credit card, on a case-by-case basis and on compassionate grounds, having regard to the following: a. your individual circumstances; b. if you are unable to meet your repayments now and in the future; c. whether the hardship is genuine and being caused by factors outside your control; and d. our commercial considerations.	"we may, at our discretion, reduce or waive your debt" is not a firm commitment and should be a "we will statement
169. If you ask us to and **where appropriate,** we will refer you to financial counselling organisations that may be able to help you. **We may** also recommend on our own initiative that you seek independent advice from a financial counsellor.	"Where appropriate" is unclear – the code should spell out where it would be appropriate or where it would not be appropriate. "We may" is not a firm commitment and should be a "we will statement
171. If we agree to provide you with help in the form of changes to your agreement with us, then we will tell you in writing about the main details of the arrangements, including: a. the repayments you need to make under the proposed new arrangement; b. what will happen at the end of the new arrangement; and c. whether you accepting the proposed new arrangement will have any adverse consequences in relation to Banking Services or your credit history (for example, an entry in your credit report or cancellation of a Banking Service). This does not apply to **minor individual instances** of help we provide — for example: deferrals, refunds or fee waivers.	While there is a list of 3 examples provided to guide a reader's understanding of "minor individual instances" the unlimited nature of the list makes the clause uncertain as to when a circumstance will be deemed "a minor individual instance".
172. If you are a Small Business and you are in default, we will tell you if we report any payment default of yours under your Loan to a credit reporting body. **You can also independently obtain a copy of your report directly from a credit reporting body**	The second sentence of this clause is drafted in such a way that it is unclear whether the ability to obtain a copy will be told to a Small Business at the same time as being told that the bank will report a

Clause	Comment
	default, or whether this clause is the sum total of the notice that banks will provide. It should be a "We will tell you that you
173. We will comply with the following guidelines in relation to debt collection: a. the ACCC's and ASIC's Debt Collection Guideline: for Collectors and Creditors; and b. the Code of Operation: Recovery of Debts from Department of Human Services Income Support Payments or Department of Veterans' Affairs Payments.	This is a commitment meet the law – something that the ABA has stated that it was seeking to remove. We do not think it should be removed but it contradicts the stated intention, and basis for removal of other clauses it claims are duplicative of the law.
176. We will not sell your debt to anyone else if: a. we are actively considering your financial situation: i. under paragraph 161; or ii. under the hardship variation provisions of the National Credit Code; b. you are complying with an arrangement that you and we agreed to after we completed any considerations of the type referred to in this paragraph; or c. you are experiencing vulnerability and: **i. we are of the view that the vulnerability is likely to be ongoing; and** **ii. there is no reasonable prospect of the debt being recovered.**	This clause will only be enlivened if the *bank* is view that the vulnerability is ongoing and there isn't a reasonable prospect, making this uncertain and less than robust.
178. If we combine or set-off your accounts, including using available funds in one of your accounts to repay a debt you owe us, then we will **promptly inform** you we have done so. When we cannot combine your accounts	"Promptly" is vague – this clause requires a timeframe.
179. If you have an account that relates to any amounts you owe us under a Loan that is regulated by the National Credit Code, then **we may not** combine that account in any of the following circumstances: a. while we are actively considering your financial situation under either: i. paragraph 161 of this Code; or ii. under the hardship provisions of the National Credit Code; b. while you are complying with an arrangement you have made with us after we have considered your financial situation; or	"May not" adds a level of uncertainty regarding when this clause will be enlivened. This should read "will not".

Clause	Comment
c. if doing so breaches Code of Operation: Recovery of Debts from Department of Human Services Income Support Payments or Department of Veterans' Affairs Payments.	
180. If we are considering your financial situation in any of the ways referred to in the above paragraph, then **we may require** that you keep funds in an account until we have decided whether to agree to your request.	"we may require" adds a level of uncertainty regarding when this clause will be enlivened.
181. You can make a Complaint about our Banking Services or our compliance with the Code. Our Complaints resolution process will comply with ASIC Regulatory Guide RG 271: Internal dispute resolution. If that Regulatory Guide does not apply to you, we will act as though it does. ASIC Regulatory Guide RG 271 is available on ASIC's website and can be accessed via this link: https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-271-internal-disputeresolution	This is inaccessible for consumers and inappropriate given RG guidance is not written for consumers, but for regulated firms.

APPENDIX C – ABOUT OUR ORGANISATIONS

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Finally we operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

South East Community Links

South East Community Links (SECL) is a multicultural community organisation providing support to the diverse communities of the South East region of Melbourne. The delivery of our programs and services supports SECL's vision: 'every person counts, every system fair'. We are the largest provider of Financial Counselling services to multicultural communities in Victoria and provide family violence and gambling specialist service. We deliver a wide range of assistance to meet the needs of the community including crisis support, case work, resettlement services for refugee and asylum seekers, financial capability assistance, family violence, housing support, youth and family support services, education pathways, pre-employability needs, and volunteer programs. We work with individuals, communities, policy makers to ensure that every person counts and every system is fair.

Consumer Credit Legal Service

CCLS champions the financial rights of Western Australians on credit, debt and consumer law issues.

• We ensure people in Western Australia are treated fairly in the financial marketplace by providing free, confidential legal advice through our Telephone Advice Line.

• We provide legal representation to people experiencing vulnerability and disadvantage so that they can access justice.

• Our community legal education programs empower West Australians experiencing vulnerability and disadvantage to understand their rights and avoid financial pitfalls.

• We help other service providers, including financial counsellors and community support workers, to understand and support their clients' financial rights.

• We are a voice for change so that financial systems and consumer laws are improved for all.

Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy, and financial counselling services to First Nations peoples across north and far north Queensland, with a vision of "Empowering Indigenous Consumers".

The people we work with are strong, resilient and knowledgeable about their lives and their communities. However, structural barriers and an uncompetitive marketplace in remote and regional communities create conditions in which consumer and financial exploitation occur. As a result, First Nations peoples often experience heightened consumer disadvantage. ICAN provides people with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle systemic consumer disadvantage experienced by First Nations peoples.

WEstjustice

WEstjustice provides free legal services and financial counselling to people who live, work, or studying in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray, as well as youth legal branch in Sunshine, and outreach across the west. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, and law reform and advocacy.

Mortgage Stress Victoria

Mortgage Stress Victoria is a free specialist service helping Victorians in mortgage stress to maintain stable housing. Our team consists of lawyers, financial counsellors and social workers. Mortgage repayments are taking a higher share of Australian incomes than ever before. With housing less affordable than ever and fierce competition to secure rental accommodation, those who cannot make ends meet face eviction from home ownership straight into homelessness. MSV keeps Victorians off the streets and relieves pressure on other government services like public housing, crisis accommodation and health / mental health service providers.

COTA Australia

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

Uniting Communities Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.