



**Small Business
Development Corporation**

Our ref: D24/219

Banking Code Consultation Team
Regulation & Supervision
Australian Securities and Investments Commission
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Dear Banking Code Consultation Team

**CONSULTATION PAPER 373: PROPOSED CHANGES TO THE BANKING CODE
OF PRACTICE**

The Small Business Development Corporation (**SBDC**) welcomes this opportunity¹ to provide feedback to the Australian Securities and Investments Commission (**ASIC**) consultation paper on the Australian Banking Association's (**ABA**) proposed changes to its Banking Code of Practice (**the Code**), noting that the SBDC is not a subject matter expert in this field.

The SBDC is an independent statutory authority of the Government of Western Australia, established to support and facilitate the growth and development of small businesses in the State.

In early 2012, the SBDC's structure and governing legislation² was enriched with the introduction of the role of Small Business Commissioner (as Chief Executive Officer) and establishment of Dispute Resolution Services. In 2020, the Commissioner was granted greater ability to inquire into conduct that is having an adverse impact upon small business in Western Australia. To this end, the Commissioner has established an Investigations and Inquiry Unit whose role, amongst others, is to investigate and inquire into poor and unfair business practices that affect the commercial activities of small businesses.

Among its key strategic objectives, the SBDC has a critical role in ensuring the interests of small businesses in Western Australia are represented to all tiers of government and advocating for a fair operating environment. In line with this, the

¹ This submission outlines the views of the SBDC and does not necessarily represent the views of the Western Australian Government.

² See the *Small Business Development Corporation Act 1984 (WA)*.

SBDC works closely with and feeds relevant issues and emerging trends to relevant authorities, including ASIC, the Australian Competition and Consumer Commission, and the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**).

Feedback on the Code consultation

The Code contains a set of contractually enforceable standards that subscribing banks are expected to uphold, providing protections to consumers and small businesses.

The ABA has expressed the opinion that the primary role of an industry code is to raise standards and complement the legislative requirements that set out how industry participants must deal with consumers, establishing protections that operate in addition to the law.

With regard to the current consultation, the ABA has stated that it has removed some provisions in the proposed Code that it considers duplicative of other legislative or regulatory obligations, in a bid to simplify the Code and avoid unnecessary duplication.

In line with the views raised by several other stakeholders, including the ASBFEO and the Australian Financial Complaints Authority (**AFCA**), the SBDC has concerns that such 'simplification' could lead to changes that diminish the protections offered to small businesses under the current Code. The SBDC believes that ASIC should carefully examine all proposed amendments – especially the deletions – to ensure protections for small businesses are not reduced under the new Code and deliver actual real benefits.

The SBDC notes that the ABA has proposed to remove and/or amend significant sections of the Code, including most of the complaint provisions. Some of the complaint provisions have been moved to the unenforceable *Introduction* to the Code, whilst others – including commitments to provide the name and contact details of the person handling the complaint and to keep complainants informed of the progress of their complaint – have been completely removed.

While the ABA has stated that the reason for their removal is to remove duplication, the SBDC shares AFCA's concerns that these changes would result in the loss of commitments that are not reflected elsewhere in regulatory guidance. In particular, the SBDC supports AFCA's view that the complaint provisions should be retained in the Code itself and enhanced (as recommended in the 2021 independent Review of the Code), rather than weakened.

Despite the ASBFEO's calls as part of the 2021 Code Review for the wording to be changed, the SBDC notes that the proposed wording in Part B, paragraph 78 remains substantially the same as the current chapter 20, paragraph 74, regarding advice to a small business when a loan is not approved, being: "*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.*" The ASBFEO had recommended the sentence be changed along the lines

of: *“If we decide not to approve a loan to a small business, we will clearly advise the small business of the reasons why unless it would contravene the law to do so.”*

In the SBDC’s opinion, inclusion of the term ‘general reason’ creates ambiguity, and ‘general’ should be removed. When a small business is refused a loan, it would be highly beneficial for the business owner to be advised of the specific (rather than general) reason for the decision, potentially enabling them to address the issue.

The SBDC is strongly supportive of the proposal to retain the diligent and prudent lender obligation for small business loans and to extend this obligation to unregulated lending, to which no other legal standard applies. The concerns of other stakeholders, including AFCA, about the proposal to remove this obligation for consumer loans is also noted.

In relation to the threshold for total credit limit used in the definition of ‘small business’, the SBDC supports long-held calls for this to be increased to \$5 million from the current \$3 million. This change would result in a greater number of small businesses having protections under the Code and more closely align to other legislated provisions which have in recent years expanded small business coverage (such as unfair contract term protections under the Australian Consumer Law).

The SBDC is also concerned about the ABA’s proposal to increase the interval between Code reviews to five years instead of the current three-year requirement. Given the significant changes that can occur in the industry over a period of several years, the SBDC believes that the Code should be reviewed more frequently than every half a decade.

Thank you for the opportunity to provide feedback in response to the consultation. If you would like to discuss this submission in more detail, please contact [REDACTED] Senior Policy and Advocacy Officer, on [REDACTED] or at [REDACTED]

Yours sincerely

[REDACTED]
Small Business Commissioner

18 January 2024