



SUBMISSION

2021 INDEPENDENT REVIEW OF BANKING CODE OF PRACTICE

BY

WESTJUSTICE (WESTERN COMMUNITY LEGAL CENTRE LTD)

6 AUGUST 2021

Acknowledgements

WEstjustice acknowledges the ancestors, elders and families of the Kulin nation, who are the traditional owners of Western Melbourne, the country we are located on. As we work to achieve a just and fair society we pay our respects to the deep knowledge embedded within the Aboriginal community and Aboriginal custodianship of Country. We acknowledge this land as a place of age-old ceremonies of celebration, initiation and renewal, and that the Kulin peoples' living culture has a fundamental role in the life of this region.

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1. INTRODUCTION

WEstjustice appreciates the opportunity to make this submission to the 2021 Independent Review of the Banking Code of Practice (**Review**) in its capacity as a community legal centre (**CLC**) operating in the Western suburbs of Melbourne.

Overall, we welcome many of the changes that were made to the *Banking Code of Practice (Code)* in 2019 and commend the banking sector for its commitment to assisting consumers experiencing barriers or hardship. However, there is still room for improvement. This is particularly important as our understanding and perception of difficulties faced by consumers shifts and evolves through new experiences such as the COVID-19 pandemic.

WEstjustice (Western Community Legal Centre Ltd) was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service and Wyndham Legal Service. We are a generalist CLC with offices in Werribee, Footscray and Sunshine. We provide free legal advice, representation and education to people experiencing systemic injustice and disadvantage in the Western suburbs of Melbourne.

The Local Government Areas (**LGAs**) we service are among the most disadvantaged in Melbourne, characterised by low Socio-Economic Indexes for Areas (**SEIFA**) scores and higher unemployment rates than the Victorian average. The cities of Wyndham, Maribyrnong, Melton and Brimbank had further COVID-19-related decreases in employment which significantly exceeded both the Greater Melbourne and state averages, even when allowing for JobKeeper payments.

Our Economic Justice program offers legal advice and assistance across a range of consumer, debt and financial services matters. The program's specialised clinics include: the Mortgage Wellbeing Service (serviced by a lawyer, financial counsellor and social worker); Restoring Financial Safety Economic Abuse clinic (in partnership with women's refuge, McAuley Community Services for Women); a consumer and debt clinic; a financial counselling clinic led by Burmese bi-cultural community workers; and a Settlement Justice Program (in partnership with local settlement agencies providing services to newly arrived refugees). In the past year, these legal clinics successfully challenged or negotiated waivers of over \$830,000 in debt, and obtained over \$480,000 in compensation for our clients.

This submission is informed by the stories and experiences of our clients.

2. TERMS OF REFERENCE

We note that the scope of the Review is subject to eight Terms of Reference (**TOR**). Our submission will be confined to the following TOR as the most relevant to our clients and their communities, namely:

- TOR 1: The extent to which the Code remains appropriate having regard to the recent reforms to the laws and regulations covering banking services to individual and small business customers;
- TOR 3: The extent to which the Code contributes to banking services being inclusive, affordable and accessible for all customers;
- TOR 4: The effectiveness of the provisions of the Code and whether these provisions meet consumer and community expectations; and
- TOR 5: The role of the Banking Code Compliance Committee (**BCCC**) and whether there is a need for adjustment to its duties and powers.

3. TOR 1 – THE EXTENT TO WHICH THE CODE REMAINS APPROPRIATE AND REFLECTIVE OF RECENT REFORMS

3.1 Cyber Scams

Case study: Hope App Scam

Over the last six weeks, WEstjustice has seen a high number of clients from newly arrived and refugee communities affected by the Hope App and Wonderful World App scams in our Consumer, Settlement Justice and Burmese Financial Counselling clinics. Many of the clients have been from non-English speaking backgrounds and reported difficulties engaging with their banks when it became apparent that they had lost money due to these scams. Most of our clients are newly arrived migrants or refugees, are from low income or Centrelink-reliant households and have limited English language skills. As such, the losses as a result of the scam have had a disproportionately significant effect on our clients.

The Hope App scam is sophisticated in that its interface mimics other legitimate investment mobile applications. The Hope App encourages users to deposit more money into the app in order to attain greater monetary commissions. When a user first installs the app, it fosters a sense of legitimacy by enabling the user to withdraw some of their ‘commissions’ for a short period of time. Further commissions are also awarded for users who encourage their friends and families to download and install the app. All of our clients were asked to deposit money into various Australian bank accounts and asked to send screenshots of the payments to a Whatsapp number. Once they did so, our clients reported that they would no longer receive responses on the Whatsapp, and shortly after the application was removed from the Apple App Store and Samsung Playstore.

The amounts lost by our clients range between \$100 and \$13,000. The combined loss suffered by our clients already totals over \$75,000 – a small amount relative to some fraud activity, but often money constituting their entire savings which would be put toward essential costs such as rental bonds or car registration. We are aware that there are many others affected by the scam who reside outside of WEstjustice’s catchment area or are yet to be seen by WEstjustice due to its limited capacity.

The case study above is an example where the law has simply not caught up with the evolving nature of financial cybercrimes which results in very limited legal recourse for our clients, many of whom are consumers experiencing vulnerability. Of concern is that in many cases, our clients attempted to raise these issues with their banks at the first instance but were either turned away, could not navigate English-only automated phone systems or were unable to overcome language barriers despite requests for interpreters. Given that the Hope App was using Australian bank accounts operated by the big four banks, we consider this a lost opportunity for banks to promptly identify and freeze offending accounts, recover funds, and better identify the offenders.

In response to the scams, WEstjustice has written to the Customer Advocate offices of the four major banks. We have also written on behalf of our clients seeking to rely on provisions within the ePayments Code to encourage banks to utilise their powers to reverse unauthorised transactions. To date, our clients’ matters are yet to be resolved.

We note that the Australian Securities and Investments Commission recently conducted a review into the ePayments Code and in particular, proposed to remove the protections provided under the

ePayments Code for victims of scams, noting that the ePayments Code is not an ‘ideal place to set rules for preventing and responding to scams’.¹

WEstjustice submitted in response to that consultation that a narrowing of the application of the ‘mistaken internet payment’ or unauthorised transaction provisions of the ePayments Code would reduce consumer protections in cases where we consider our clients genuinely made mistaken or unauthorised transactions at great personal and financial harm.

In the event that the ePayments Code is further amended to remove these provisions, we are concerned this will leave consumers in a vulnerable position with no legal recourse and a significant regulatory gap in a quickly evolving area of crime.

We consider that it would be appropriate for the Banking Code to be amended to include paragraphs that require banking institutions to take all reasonable steps to ensure that where scams such as the Hope App scam have caused customers to lose money to fraudsters:

- Any relevant transactions are investigated by the customer’s bank as soon as possible;
 - A receiving authorised deposit-taking institution under the Code that receives a transfer of money to a scam payee be obliged to investigate the relevant transactions as soon as possible;
 - Clients are provided with relevant accessibility measures (i.e. non-English languages, AUSLAN/National Relay Service where needed) to enable them to report the scams as soon as possible; and
 - There be proactive engagement between banks and their customers to prevent scams of this nature from spreading. This also means providing this information in accessible formats to cater for language barriers, disability and literacy.
- **Recommendation 1:** Insert paragraphs in the Code to place an onus on banks to investigate scam activity as soon as reasonably practicable and stipulate that consumers are provided with a dedicated scams/fraud telephone line (with interpreters as required) to enable them to report scam activity or other circumstances involving fraud or financial crime that are of a time-sensitive nature.

3.2 Changes to Credit Reporting

Credit reporting laws have recently changed and we consider that the Code needs to be updated to reflect these changes.² Currently the Code’s paragraphs focus on the banks notifying customers of defaults and negative listings.

As changes to the credit report regime will now compel banks to make mandatory positive credit listings, we submit that it would be appropriate for the Code to include paragraphs requiring banks to proactively explain all mandatory credit reporting obligations to customers, including: how credit facilities are positively reported to credit reporting agencies; what information is being reported where a hardship arrangement is made; and that the recording of a hardship arrangement cannot be used to calculate a credit score.

¹ See further Australian Securities and Investments Commission, *Consultation 341: Review of the ePayments Code – Further Consultation* (March 2021).

² On 3 February 2021, the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* was passed, with changes to come into effect in 2022.

- **Recommendation 2:** Insert paragraphs in the Code requiring banks to advise a customer of all the ways in which their repayment history and hardship arrangements are reported on their credit report.

3.3 Natural Disasters and Pandemics

With ongoing concerns about the effects of climate change and increasing occurrences of natural disasters, there is an opportunity for the Code to recognise that hardship is often caused not by personal circumstances but situational and systemic factors too. In light of this, there needs to be a commitment in the Code to ensure banks are assisting customers and their communities facing financial difficulties in an emergency, such as a pandemic, or natural disasters including floods, fires, droughts, cyclones and earthquakes.

In our view, the COVID-19 Special Note did not adequately address the emergency of the pandemic for banking customers because it did not require banks to extend enhanced hardship responses to consumers experiencing difficulties during the pandemic, but rather only provided greater flexibility for the banks.

- **Recommendation 3:** Insert paragraphs in the Code that commit banks to providing greater hardship responses to consumers experiencing difficulty due to an emergency situation such as a natural disaster or pandemic.
- **Recommendation 4:** Extend the commitments under paragraph 179(a) of the Code (and equivalent commitments) to apply to all people impacted by emergencies and natural disasters.

4. TOR 3: THE EXTENT TO WHICH THE CODE CONTRIBUTES TO BANKING SERVICES BEING INCLUSIVE, AFFORDABLE AND ACCESSIBLE FOR ALL CUSTOMERS

4.1 Inclusive Banking for Culturally and Linguistically Diverse ('CALD') Communities

Banking is an essential service that affects all people in the community, irrespective of language, culture, disability or other barriers. As a legal service operating in the Western suburbs of Melbourne, we frequently encounter newly arrived migrant and refugee communities who have expressed difficulty communicating with their banks. In some concerning cases, our clients have entered consumer credit contracts with Code subscribers and presented to our services as totally unaware of their obligations and responsibilities pertaining to these contracts, despite the requirements on lenders provided in the Code and the *National Consumer Credit Protection Act 2009* (Cth) (incorporating the National Credit Code).

Of concern are some cases where clients have requested an interpreter at a bank branch but have not been provided with one. As discussed above, this has been highlighted in the recent Hope/Wonderful World App scams where many of our non-English speaking clients were unable to report the scam to their banks despite the banks operating in one of the most CALD communities in Victoria.

A failure to provide interpreters not only poses an accessibility barrier for CALD consumers but also further exposes them to the risks of financial and elder abuse, particularly in circumstances where consumers are forced to rely on friends and family for interpretation and advice.

We consider that inserting paragraphs in the Code that expressly require banks to provide interpreters to non-English speaking clients (whether onsite if available or via telephone services such as the Translating and Interpreting Service (TIS National)) will ameliorate these risks to our clients. It will also bring banks in line with the conduct modelled in other financial services codes of practice such as the *General Insurance Code of Practice 2020 (Insurance Code)*.

Paragraph 101 of the Insurance Code states the following:

Where practicable, we will provide access to an interpreter if you ask us to, or if we need an interpreter to communicate effectively with you. We will record if an interpreter is used or if there are reasons we are unable to arrange one.

A provision similar to that above will bring banks into line with other financial services providers.

- **Recommendation 5:** Insert paragraphs in the Code requiring banks to use interpreters if requested by the consumer and to proactively offer the use of an interpreter where it appears the consumer speaks limited English or English as an additional language.

4.2 Accessibility for Family Violence Victim-Survivors

We note that Chapter 14 of the Code provides that all signatories must ‘take extra care with customers who are experiencing vulnerability’. Specifically, paragraph 40 states that ‘if 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’. We consider that this does not go far enough to address the vulnerabilities enumerated in paragraph 38 of the Code, and is not suitable for people experiencing family violence/financial abuse or elder abuse as paragraph 40 expressly places the onus on a victim-survivor of family violence to notify the bank of their circumstances before any appropriate assistance can be provided. This creates a considerable barrier for victim-survivors, many of whom may not realise they are in such a situation let alone actively seek help from the bank. This is a misunderstanding of the complex dynamics of family violence.

Of our clients who have been able to identify that they are in a family violence situation and notify their bank, the support provided has been mixed and dependent upon the particular banking institution. We are of the view that specific amendments to the Code will increase the consistency of victim-survivors accessing banking services and appropriate assistance. This will reflect the findings of the Royal Commission into Family Violence (Victoria) and bring the Code into line with other codes of practice across the financial services industry.

Paragraph 97 of the Insurance Code is worded broadly enough not to solely place the onus on the victim-survivor to disclose their family violence circumstances, as it states the following:

If you tell us, or we identify, that due to a vulnerability you need additional support or assistance, we will work with you and try to find a suitable, sensitive and compassionate way for us to proceed. We will do this as early as practicable and we will protect your right to privacy.

Paragraph 98 of the Insurance Code further operationalises this support and sets out that:

If you tell us, or we identify, that you need additional support from someone else (for example, a lawyer, consumer representative, interpreter or friend), then we will recognise this and allow for it in all reasonable ways. We will try to make sure our processes are flexible enough to recognise the authority of your support person.

- **Recommendation 6:** Insert paragraphs in the Code referring to banks' obligations under the Australian Banking Association (**ABA**) Industry Guideline – Preventing and responding to family and domestic violence.
- **Recommendation 7:** Insert paragraphs in the Code to operationalise the support provided in Chapter 14 of the Code on similar terms as those in paragraphs 97 and 98 of the Insurance Code.

5. TOR 4: THE EFFECTIVENESS OF THE PROVISIONS OF THE CODE AND WHETHER THESE PROVISIONS MEET CONSUMER AND COMMUNITY EXPECTATIONS

The Consultation Note states the effectiveness of the Code provisions are measured with regard to consumer and community expectations for banks to:

- Act in a fair, reasonable and ethical manner;
- Provide hardship assistance to individual and small business customers experiencing financial difficulties;
- Support customers during crises such as the COVID-19 pandemic;
- Resolve complaints and disputes between banks and their individual and small business customers;
- Support customers experiencing vulnerability;
- Make customers aware of the existence and benefits of the Code, including the existence of and their eligibility for basic, low fee and no fee bank accounts.

Whilst we consider that the Code has set out a solid foundation of ethical behaviour reflective of consumer and community expectations, there are various areas that can be strengthened to ensure that the Code is responsive and reflective of the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the Royal Commission into Family Violence (Victoria).

5.1 Financial Abuse

There were a number of insertions to the Code in 2019 that enhanced protections for family violence victim-survivors, but we believe these protections can be strengthened in the Code by including the below further amendments.

Lending to Co-Borrowers – Paragraph 54 of the Code

We commend the ABA on the insertion of this important clause to protect a co-borrower who may be experiencing financial abuse. However, this same approach should also be taken with lending to a sole borrower. Evidence from our Restoring Financial Safety Economic Abuse legal clinic has shown that many victim-survivors can be coerced into applying for a loan solely in their name. Banks should be taking steps to ensure that borrowers understand the risks of entering into a loan and be satisfied that

they are not experiencing financial abuse, irrespective of whether they are co-borrowers or sole borrowers.

Furthermore, paragraph 54 indicates the bank will only consider information provided by a co-borrower in the course of applying for the loan. We think this is unnecessarily limiting and a bank may become aware of information in other ways. For example, it is not unusual for a victim-survivor of family violence to not notify the bank that they will not receive a substantial benefit from the loan, but often the bank can pick up on red flags that abuse may be occurring such as body language, controlling behaviour in interactions by one co-borrower, or lack of communication by the other co-borrower. We recommend that paragraph 54 also be amended to require banks to consider all available information and circumstances and to make reasonable enquiries to this end.

Furthermore, we believe that a loan should be unenforceable against a person where the bank ought to have known that a person was not receiving a substantial benefit from the loan. There should be a paragraph inserted in the Code clarifying that liability for a loan be reduced to the amount that the borrower actually received or benefited from the loan.³

- **Recommendation 8:** Amend paragraph 54 of the Code so that it applies to sole borrowers, not only co-borrowers.
- **Recommendation 9:** Amend paragraph 54 of the Code to require banks to consider all available information and make reasonable enquiries when assessing whether a borrower will receive a substantial benefit from the loan.
- **Recommendation 10:** Insert a paragraph in the Code stipulating that the liability of a borrower can be reduced to the amount of the benefit they received from the loan funds.

Keeping Accounts Safe - Abusive Transactions

The Code currently offers no specific protection to customers who are receiving abusive transactions (i.e. receiving abuse in the written description field of an online banking transaction). A Commonwealth Bank study recently revealed 162,000 transactions had been flagged for using abusive language in the three month period between the end of October 2020 and the end of January 2021. This is an area of concern as banks must ensure that banking products and services are not being weaponised by perpetrators to carry out abuse. We recommend that there should be a paragraph in the Code showing commitment by the banking industry to flag and block abusive transactions. This paragraph could be included in Part 8, Chapter 30 – “Keeping your accounts safe and secure”.

- **Recommendation 11:** Insert a paragraph in the Code that commits banks to protecting customers from abusive transactions.

Public-Facing Family Violence Policies

In 2020, the Insurance Code made it a mandatory requirement for all subscribing insurers to have a public-facing family violence policy published on their websites. We believe the Banking Code should

³ This was recommended in the 2017 review of the Banking Code of Practice.

follow this approach and make it mandatory for all subscribing banks to publish a family violence policy on their website.

- **Recommendation 12:** Insert a paragraph in the Code requiring banks to have public-facing family violence policies on their websites.

Commitment to Training All Staff in Family Violence

The importance of training bank staff at all levels to identify red flags of financial abuse and/or family violence and to know how to escalate the issues appropriately cannot be understated. Once potential financial abuse is identified the matter should be escalated to a specialist team who is well versed at dealing with such situations and who can provide discrete, sensitive assistance and appropriate referral pathways for external support.

- **Recommendation 13:** Insert a paragraph in the Code that commits banks to training all bank staff who interact with customers on how to identify financial abuse and what needs to be done to deal with the situation appropriately and safely.
- **Recommendation 14:** Insert a paragraph in the Code requiring banks to have a specialist team or staff that can provide assistance where financial abuse or family violence is identified.

5.2 Guarantees/Guarantors

Currently, the Code is silent on addressing the issue of people coerced into being a guarantor for a loan. This has been a common issue for family violence victim-survivors (financial abuse) and elderly people (elder abuse). We recommend that the Code strengthen protections for these groups that are most at risk.

- **Recommendation 15:** Insert a paragraph in the Code (similar to paragraph 54) stipulating that if it becomes apparent that a person is being forced or coerced to sign a guarantee, the bank must not approve that guarantee.

In addition to this, people who are at risk of losing their primary place of residence subject to a guarantee being enforced should be provided with a suitability assessment and a clear explanation that their asset is being relied upon.

- **Recommendation 16:** Insert a paragraph in the Code requiring banks to perform a suitability assessment and notify the guarantor, where appropriate, had they been applying for the loan in their own right that their application would have been rejected.
- **Recommendation 17:** Insert a paragraph in the Code requiring banks, when adding a guarantor to a contract, to specifically explain what asset is being relied upon and why a guarantee is needed.

Furthermore, while the Code does outline some pre-execution requirements, it does not stipulate that a guarantee will be unenforceable if not complied with by the bank. This provides little consequence for the bank and no redress for a consumer in the Code where the bank has breached its requirements. It was recommended in the last Banking Code review that the Code should specify that a guarantee is unenforceable if the signatory bank fails to comply with the pre-execution

requirements. Similarly, it was recommended that non-compliance with a post-execution requirement means that the guarantee is unenforceable in relation to debt or costs that accrue after that time. We reiterate this recommendation.

- **Recommendation 18:** Insert a paragraph in the Code specifying that a guarantee is unenforceable if the signatory bank fails to comply with the pre-execution or post-execution requirements.

5.3 Debt Collection

Chapter 43, paragraphs 180-182 of the Code provide that banks will comply with the *ACCC's and ASIC's Debt Collection Guideline: for Collectors and Creditors (Debt Collection Guideline)* when recovering debt from consumers. For consumers experiencing vulnerabilities such as language barriers, paragraph 180 is not clear as to what obligations are actually imposed on the banks when collecting debt. Our clients are often not aware of what the banks are and are not allowed to do until they obtain specific legal advice from our service. Debt collection is one of the most stressful points of interaction between banks and our clients, which is further exacerbated by the fact that many of our clients are not aware of the existence of the Debt Collection Guideline.

It would be useful for paragraph 180 to be better operationalised by listing some of the provisions of the Debt Collection Guideline, including in relation to:

- Appropriate contact;
- Conduct towards the debtor, their family members and other third parties;
- Privacy obligations;
- A debtor's right to be represented by an advocate;
- A debtor's right to request documents relevant to the alleged debt and to be provided with these within a reasonable timeframe;
- The requirement for a creditor to engage a professional interpreter if the debtor cannot speak English or cannot understand what is being communicated.⁴

- **Recommendation 19:** Amend paragraph 180 of the Code to list some of the obligations on banks and their representatives under the Debt Collection Guideline in an "including but not limited to" style.

Paragraphs 182-185 of the Code refer to obligations on banks when selling debts to third parties. In our experience, this is where many issues occur for our clients, particularly with respect to:

- Lack of communication with our clients that their debt has been sold to a third party;
- Third parties not being bound by all of the regulatory and legislative requirements that banks are obligated to comply with;
- Debts being sold even when the customer's financial situation is being considered pursuant to paragraph 184 of the Code.

Although debt collection activities involving the purchase of a consumer credit debt require membership with the Australian Financial Complaints Authority, the *Australian Collectors & Debt Buyers Association Code of Practice 2020* is generally weak in terms of debtor protection and only applies to the very few subscribing members of the Australian Collectors & Debt Buyers Association. Debtors seeking relief may be dependent on legislation that differs from jurisdiction to jurisdiction

⁴ ACCC and ASIC, *Debt collection guideline: for collectors and creditors* (April 2021).

(such as Victoria's specific provisions on prohibited debt collection activity) or the Debt Collection Guideline. Communications from debt collectors have few prescriptive guidelines as to their form and content. Compared to the higher standard expected of signatory banks to the Code, collectors:

- Rarely offer plain English specificity as to the nature of the original debt and what it pertains to (i.e. account numbers rather than product names and/or descriptions, or no information about when the debt accrued and how it breaks down);
- Do not offer the details of services that may assist such as financial counsellors;
- Generally offer deadlines by which full payment is required and omit details about the possibility to negotiate settlements or instalments;
- Will rarely proactively offer interpreter services for consumers who have limited or no English who try to communicate; and
- Do not all have protocols to engage with consumers in a culturally safe manner (i.e. in dealing with debts owed by First Nations consumers) or with consumers experiencing or escaping family violence.

The abovementioned conduct causes a consumer, who 'slips through the cracks' and winds up subject to debt collection activity, to move from the banking environment where there are obligations and processes to provide support to a debt collection environment where there may be none at all.

It has been our infrequent, but unfortunate, experience to encounter signatories to the Code who have not considered a consumer's situation once a debt has been sold to another party or legal action has been initiated. This generates major inconsistency through the life of a consumer's banking journey. Debt collection should be a last resort after substantive and proactive engagement by the signatory bank has not produced an appropriate and fair outcome.

Furthermore, paragraph 182 of the Code only applies when a debt is sold to another party. This paragraph should also apply when a bank engages a debt collector to collect on their behalf, not just when a debt has been sold.

Additionally, where there are concerns that a bank's debt collector has not complied with the guidelines in the Code, the bank should recall or repurchase the debt from the debt collector.

- **Recommendation 20:** Insert a paragraph in the Code which states that a debt will only be referred to a debt collector as a matter of last resort after substantive and proactive engagement with the customer by the bank.
- **Recommendation 21:** Amend paragraph 182 of the Code to state, "If we sell a debt to another party or use another party to collect a debt on our behalf, we will only choose a party that understands the obligations under this Code, has agreed and continues to comply with these guidelines, and appropriately trains its staff and agents on the application of the Code.
- **Recommendation 22:** Insert a paragraph in the Code which states, "If we become aware that another party to whom we have sold a debt or instructed to collect a debt on our behalf has failed to comply with the guidelines in this Code, we will recall or repurchase the debt from that party."

5.4 Small Business Customers

Banks should be compelled by the Code to consider the sustainability and likely viability of a business when undertaking a suitability assessment for a loan application. This is particularly important where asset-based lending is involved and a person's primary place of residence may be at risk of seizure in default under the loan.

- **Recommendation 23:** Include in paragraph 51 of the Code a third point requiring banks to consider the sustainability and likely viability of a business when assessing affordability.

Furthermore, as the responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Cth) do not apply to business loans, this gap should be bridged by the Code if banks are serious about providing suitable loans that consider the ability of the small business customer to repay the loan without causing substantial hardship and which meet their requirements and objectives.

- **Recommendation 24:** Insert a paragraph in the Code requiring banks to consider whether the small business will be able to comply with its financial obligations under the contract without substantial hardship and whether the loan meets the borrower's requirements and objectives when assessing a loan application.

5.5 When Things Go Wrong/Financial Hardship

We support the Code retaining paragraphs 171 and 172 regarding debt waivers and the 'How we may be able to help' section at page 47. However, these sections of the Code can be strengthened by including additional examples of hardship support that can be offered.

Paragraph 172 should make explicit reference to family violence by amending the paragraph to include financial abuse as a factor outside the customer's control causing genuine hardship. This is an important recognition that victim-survivors of family violence should not be held liable for debts incurred under circumstances of financial abuse.

- **Recommendation 25:** In paragraph 172 of the Code delete the words "if it is an unsecured personal loan or credit card", so that other forms of debt such as mortgage shortfalls after sale and mortgage arrears, interest and fees are not excluded.
- **Recommendation 26:** Amend paragraph 172(c) of the Code to read, "whether the hardship is genuine and being caused by factors outside your control, such as financial abuse".
- **Recommendation 27:** Add the following examples of financial hardship support to the list on page 47 of the Code:
 - Waiving arrears, interest, fees and/or charges;
 - Waiving a shortfall on your loan balance after sale of the secured asset;
 - Reducing interest rates;
 - Capitalising arrears and/or interest owed.

6. TOR 5: THE ROLE OF THE BCCC AND WHETHER THERE IS A NEED FOR ADJUSTMENT TO ITS DUTIES AND POWERS

Paragraph 215 of the Code enumerates a number of sanction powers afforded to the BCCC if the Code is breached by a bank. The powers of the BCCC should be expanded to include monetary penalties. One example to look to is the Insurance Code which provides that the General Insurance Code Governance Committee may impose a community benefit payment of up to \$100,000 for a significant breach of the Insurance Code by an insurer.⁵ The ability to impose a similar monetary sanction should be afforded to the BCCC. The community benefit payment scheme can also have the added advantage of (indirectly) providing some form of redress to a group or class of people who were impacted by a Code breach while preserving their ability to seek individual remedies if they choose to.

- **Recommendation 28:** Introduce an additional sanction to paragraph 215 of the Code to allow the BCCC to impose monetary penalties.

Further, the fact that only two banks have been publicly named by the BCCC for breaches of the Code might be indicative that the BCCC can be more proactive in its compliance measures. The reality is that even seemingly small indiscretions amount to real and significant harm for the people and communities we service. We know that those most at risk of experiencing vulnerability are likely to be the last to seek out and engage a code compliance body, which is why it is critical for the BCCC to think of more creative ways to proactively monitor compliance of the Code. If the BCCC is seen to be proactive and increases its visibility of enforcement action, it will go a long way toward gaining consumer confidence and trust and therefore empowering them to seek support.

- **Recommendation 29:** Insert in the Code a commitment by the BCCC to consider creative and proactive compliance measures it can undertake to discourage poor practice and prohibited behaviour by banks.

We thank you again for the opportunity to comment on the Review. Please contact Matthew Martin at WEStjustice on (03) 9749 7720 or at matthew@westjustice.org.au if you have any questions about this submission.

Yours sincerely,



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⁵ Insurance Council of Australia, *General Insurance Code of Practice 2020*, Part 13.