Joint Consumer Representative Submission to the

Australian Bankers' Association Inc

Independent Review of the Code of Banking Practice 2016

September 2016

About Care Inc

Care Inc. Financial Counselling Service (Care) has been the main provider of financial counselling and related services for low to moderate income and vulnerable consumers in the ACT since 1983. Care's core service activities include the provision of information, counselling and advocacy for consumers experiencing problems with credit and debt. Care also has a Community Development and Education program, provides gambling financial counselling as part of the ACT Gambling Counselling and Support Service in partnership with lead agency Relationships Australia; operates outreach services in the region and at the Alexander Maconochie Centre and makes policy comment on issues of importance to its client group. Care also operates the ACT's first No Interest Loans Scheme which was established in 1997 and hosts the Consumer Law Centre (CLC) of the ACT.

About CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most. To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns

About Consumer Credit Law Centre South Australia

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice, as well as legal representation 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 range of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

About Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance, and consumer law. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers. In the 2014 / 2015 financial year, CCLSWA provided advice to 1043 new clients.

About Community Legal Centres Association (WA) Inc

The Community Legal Centres Association (WA) is the peak organisation representing and supporting 28 Community Legal Centres (CLCs) operating in Western Australia. Located throughout the state, CLCs are independent, non-profit organisations which provide legal services to disadvantaged and vulnerable people or those on low incomes who are ineligible for legal aid. On behalf of our members, the Association is committed to the principles of human rights, social justice and equity, including the rights of Western Australians to equity in access to legal services.

About Community Legal Centres Queensland

Community Legal Centres Queensland provides support, leadership and advocacy for Queensland's 33 community legal centres. Community legal centres are independently operating

not-for-profit, community-based organisations that provide free legal services to the public, focusing on the disadvantaged and people with special needs. In 2015, our members helped over 2,000 people with legal problems related to loans and debts they owed, and over 800 clients with consumer complaints, including complaints about banks and financial services. Find out more about our work at www.communitylegalqld.org.au.

About Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

About Consumer Federation Australia

The Consumers' Federation of Australia is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations.

About Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors. Financial counsellors assist people experiencing financial difficulty by providing information, support and advocacy. Working in not-for-profit community organisations, financial counselling services are free, independent and confidential

About the Financial Rights Legal Centre

The Financial Rights Legal Centre (Financial Rights) is a community legal centre that specialises in helping consumer's 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 Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.

About Good Shepherd Microfinance

Good Shepherd Microfinance offers a suite of people-centred, affordable financial programs to people who are financially excluded. These programs promote economic wellbeing for people with low incomes, especially women and girls, and move clients from financial crisis to resilience and inclusion. We work collaboratively with the corporate, government and community sectors to create people-centred programs that enable clients to realise their own economic wellbeing, as they define it themselves. This approach leaves clients feeling valued and in control of their finances and lives.

About the National Association of Community Legal Centres

The National Association of Community Legal Centres (NACLC) is the peak national body for Community Legal Centre (CLCs) in Australia; its members are the state and territory peak bodies of Community Legal Centres. Together, these organisations represent around 200 CLCs across Australia. CLCs are independent, non-profit, community-based organisations that provide free and accessible legal and related services to vulnerable and disadvantaged members of the community.

About National Seniors Australia

National Seniors Australia is a not-for-profit organisation that gives voice to issues that affect people aged 50 years and over. We represent our 200,000 members and the interests of older Australians to all levels of government, business and the community. We give members access to a Financial Information Desk for independent financial information, offer tailored travel and insurance products, provide a range of member benefits and provide news and information through our Australia-wide branch network, bi-monthly lifestyle magazine and e-newsletter.

About the Salvation Army Moneycare

The Salvation Army, Moneycare. Moneycare provides financial counselling, financial capability services, financial literacy and education and a no interest loans program in Queensland, NSW and the ACT. Moneycare has been operating of over twenty five years and is a larger service assisting over 7,500 people with casework services each year. We seek to alleviate hardship as well as build capability and resilience. We have a focus on marginalised and vulnerable people

About South Australian Council of Social Service

The South Australian Council of Social Service is the peak non-government representative body for health and community services in South Australia. It has a vision of Justice, Opportunity and Shared Wealth for all South Australians. The SACOSS mission is to be a powerful and representative voice that leads and supports the South Australian community to take actions that achieve the vision, and to hold to account governments, business, and communities for actions that disadvantage vulnerable South Australians. SACOSS undertake policy and advocacy work in areas that specifically affect disadvantaged and low income consumers in South Australia.

About Uniting Communities

Uniting Communities works with South Australians across metropolitan, regional and remote South Australia through more than 90 community service programs. Our vision is: A compassionate, respectful and just community in which all people participate and flourish. We are made up of a team of more the 1500 staff and volunteers who support and engage with more than 20,000 South Australians each year. Recognising that people of all ages and backgrounds will come across challenges in their life, we offer professional and non-judgemental support for individuals and families.

About WEstjustice: the Western Community Legal Centre (WEstjustice)

WEstjustice was formed in July 2015 as a result of a merger between Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. WEstjustice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas. WEstjustice has a particular focus on working with newly arrived communities. More than 53 per cent of our clients over the last five years spoke a language other then English as their first language. Approximately one quarter of our clients are newly arrived, having arrived in Australia in the last five years. Furthermore, our refugee service in Footscray alone has seen approximately 700 clients in the part five years.

About Women's Legal Service Victoria

Women's Legal Service Victoria (WLSV) is a not for profit organisation which has been providing free legal services to women since 1982. We work with and for women experiencing particular disadvantage to address legal and financial issues arising from relationship breakdown or violence.


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Consumer Credit
Law Centre SA
Legal Advice and Services
Credit • Debt • Financial Counselling


cclswa


Community Legal Centres
Association (WA) Inc


Community
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CONSUMERS'
FEDERATION
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Developing and promoting
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Financial Rights
LEGAL CENTRE


Good Shepherd
Microfinance


NACLC
National Association of
Community
Legal Centres


National Seniors
Australia


THE
SALVATION
ARMY


SACOSS
South Australian Council
of Social Service


UNITING
COMMUNITIES
Care. Compassion. Commitment.


WEstjustice


women's legal
service victoria

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1. Introduction

Thank you for the opportunity to comment on the 2016 Independent Review of the Code of Banking Practice (**the Code**).

The Australian Banker's Association agreed to resource a joint consumer submission to the current review with the Financial Rights Legal Centre (**Financial Rights**) engaged by the Consumer Federation of Australia to consult with consumer representatives to prepare this submission. This submission has been endorsed by:

- Care Inc
- CHOICE
- Consumer Credit Law Centre South Australia
- Consumer Credit Legal Service (WA) Inc
- Community Legal Centres Association (WA) Inc
- Community Legal Centres Queensland
- Consumer Action Law Centre
- Consumer Federation Australia
- Financial Counselling Australia
- Financial Rights Legal Centre
- Good Shepherd Microfinance
- National Association of Community Legal Centres
- National Seniors Australia
- Salvation Army Moneycare
- South Australian Council of Social Service
- Uniting Communities
- WEstjustice: the Western Community Legal Centre (WEstjustice)
- Women's Legal Service Victoria

The 2016 Independent Review of the Code of Banking Practice comes three years after the introduction of the 2013 Code of Banking Practice. The Code itself provides for a review every five years or earlier. This current Review was announced as a part of a package of industry led initiatives including a review of product sales commissions, and an evaluation of an industry wide mandatory last resort compensation scheme.

Trust and confidence in the financial services sector, particularly the banking sector remains low. While the Australian Bankers' Association (**ABA**) reports that "all banks have customer satisfaction ratings above 80 per cent"[1] the most recent survey demonstrates the lowest customer satisfaction in three years and declining rapidly in recent years.[2] The key causes of concern for dissatisfaction were identified by Roy Morgan were poor service, fees and charges, ethics and honesty, interest rate levels, poor advice, aggressive sales, a lack of staff and errors.

[1] ABA, *Banks act to strengthen community trust*, 21 April 2016 http://www.bankers.asn.au/media/media-releases/media-release-2016/banks-act-to-strengthen-community-trust drawing on Roy Morgan poll "Consumer satisfaction with big four banks improves in April" http://www.roymorgan.com/findings/6819-consumer-satisfaction-with-big-four-banks-improves-in-april-201605250009

[2] Hope William-Smith, Banks record lowest customer satisfaction in three years, *Money Managemen*t, http://www.moneymanagement.com.au/news/funds-management/banks-record-lowest-customer-satisfaction-three-years

Other measures show significant dissatisfaction with banks. The banking, finance and insurance industries are perceived to be the least ethical sectors of Australia's economy according to the ethics index survey conducted by the Governance Institute of Australia.[3] Recent Galaxy Research commissioned by ING Direct found that four of the top most five hated five fees are banking related: in order ATM fees, bank monthly account fees, credit card surcharge fees and credit card annual fees.[4] Banks have also been subject to a number of significant inquiries into their practices including the 2013-15 Financial Systems Inquiry[5]- which led to the Australian Government's Improving Australia's Financial System Program[6] - and the Scrutiny of Financial Advice Inquiry.[7]

According to recent figures released by the Financial Ombudsman Service (**FOS**), Consumer credit disputes remain high with 9,159 in 2015-16. [8] Thirty-six per cent of these disputes were about credit cards, 29 per cent about home loans and 20 per cent about personal loans. The most common issue was financial difficulty at 31 per cent.

Financial difficulty disputes have over recent years reduced due to "improvements financial service providers have made in managing hardship requests and complaints from customers in financial difficulty" as well as "consistently low interest rates, which have reduced repayment pressure." Of the 2,857 consumer credit financial difficulty disputes lodged though FOS in 2015-16 the grand majority related to banks (75 per cent) and credit providers (18 per cent) while credit facilities made up the majority of the products complained about (home loans 36 per cent, credit cards 27 per cent and personal loans 23 per cent). The most common financial difficulty disputes involved a Financial Service Provider declining financial difficulty assistance (44 per cent) while failing to respond to a request for assistance was also high at 33 per cent. Deposit-taking disputes (centring on current accounts and savings accounts remain high with 1546 disputes in 2015-16 as are payment system disputes at 1163 disputes.

Consumer Representatives do acknowledge however that the banking sector has been working in many areas to improve the way they engage with consumers. The ABA released a revised industry guideline on hardship in March 2015 which recognises debt reductions and debt waivers as well as introducing simplified documentation requirements. Financial Counselling Australia's annual survey of financial counsellors *Rank the Bank* found in its most recent 2014 report that there was

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[3] Clancy Yeates, Ethics survey: Banking, media and big business on the nose, *Sydney Morning Herald*, 20 July 2016, http://www.smh.com.au/business/banking-and-finance/ethics-survey-banking-media-and-big-business-on-the-nose-20160719-gq9f5h.html

[4] Anthony Keane, Payment pain: Australians' most annoying fees are revealed, *news.com.au*, 4 April 2016, http://www.news.com.au/finance/money/costs/payment-pain-australians-most-annoying-fees-are-revealed/news-story/2a205229757f8bc07e915275144bca5a

[5] http://fsi.gov.au/

[6] Government Response to the Financial Services Inquiry http://treasury.gov.au/fsi

7 Scrutiny of Financial Advice Inquiry http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice

8 FOS Annual Review 2015-16, https://www.fos.org.au/custom/files/docs/20152016-fos-annual-review.pdf

> *"an improvement across the board … [with] each of the big four banks receiv[ing] higher scores in this current survey. …The ratings for all of the [smaller] banks showed a marked improvement."*[9]

The report continued:

> *"Since the 2013 survey, a number of banks, and the banking industry as a whole, have made a number of changes to hardship policies and practices. These include improved referrals to hardship teams, more staff training, streamlined approval processes, reduced documentation and through the Australian Bankers Association, better information about accessing hardship assistance on websites, an industry-wide hardship guideline and new obligations in the Bank Code of Practice."*

The ABA are currently working on establishing draft Financial Abuse and Domestic Violence Guidelines building on existing financial hardship guidelines. Consumer Representatives also commend the ABA for examining a number of the issues that have been raised in the inquiries referred to above including:

- reviewing product sales commissions, committing to establishing independent customer advocates in each bank,
- establishing a register to identify employees who have breached the law or code of conduct;
- developing a set of protections for whistle blowers and
- evaluating the establishment of an industry wide, mandatory last resort compensation scheme.

Consumer Representatives look forward to the banking sector implementing comprehensive and effective reforms with respect to all these issues.

There however remains a number of areas where banks can work harder to improve their relationship with consumers, particularly with those in financial hardship and other vulnerable Australians. This current review of the Code of Banking Practice is timely. While the Code of Banking Practice is one of the better Codes in place in the financial services sector there is room for improvement – particularly with respect to enforcement and compliance. This submission raises these issues and proposes a number of ways to address them.

[9] Financial Counselling Australia, *Rank the Banks*, March 2015, https://www.financialcounsellingaustralia.org.au/getattachment/Corporate/Publications/Reports/Rank-the-Banks-2015-Final.pdf

Recommendations

Code Effectiveness (Term of Ref. (a), (b) and (d)(ii))

1. Consumer Representatives recommend that the Code include a plain English statement that the Code forms a part of the banking service's terms and conditions with the consumer.
2. Consumer Representatives submit that a structure of fines for certain breaches of the Code should be established and administered to incentivise compliance with the Code.
3. Consumer Representatives recommend that the effectiveness of the Code can be improved by ensuring that the document is clear and unambiguous using plain language.

Code Registration (Additional Term of Reference)

4. Consumer Representatives recommend that the ABA register an improved Code of Banking Practice in accordance with ASIC's *Regulatory Guidance 183*.
5. ABA membership require mandatory subscription to the Code of Banking Practice

Accessibility of the Code of Banking Practice Document. (Term of Ref. (b))

6. Consumer Representatives recommend that accessibility of the Code be improved by ensuring that the document intended to be used by banking customers uses plain language, and is clear about which parties are being represented. Consideration should be given to including short summarised information at the beginning of each section.
7. Consumer Representatives recommend that banks commit to providing terms and conditions in plain English as well as including executive summaries
8. Consumer Representatives recommend that the Code should make it clear that some clauses of the latest Code apply regardless of when the contract with the bank was entered.
9. Consumer Representatives recommend that the definition of dispute is harmonised with the latest ISO standard or at a minimum ASIC RG 165.

Account Suitability (Term of Ref (c))

10. Consumer Representatives recommend that the Code commit subscribers to:
    a. make enquiries as to a person's suitability for a banking service or product when they open an account;
    b. set in place systems to pro-actively identify customers who may be using an unsuitable account;

c. refund fees and charges incurred by customers who have been clearly identified as being in the wrong account where this should have been apparent to the bank.

Financial Hardship (Term of Ref. (d)(vi))

11. Consumer Representatives recommend that the Code commit subscribers to offer all customers covered by the Code the same rights as those currently provided to consumers of regulated credit under the NCC, including acceptance of a broadly defined hardship notice; flexible hardship repayment arrangement options, stays of enforcement and a right to go to EDR.
12. Consumer Representatives recommend that the Code commit subscribers to:
    a. commit banks to proactively work with all customers who have been identified as experiencing financial difficulty and develop a plan with that customer;
    b. explicitly commit banks to not imposing any default fees (including late fees and overlimit fees)[10] or default interest once a hardship notice has been given until the an arrangement has been made or the customer has been notified of the refusal to make an arrangement;
    c. ensure that banks will not commence any enforcement action in relation to a debt that is the subject of an application for hardship assistance nor assign a debt in relation to a debt that is subject to a hardship application. If the enforcement action has been made before the hardship application has been made, the bank will not proceed to judgment whist considering the application;
    d. ensure that banks to do not report adverse information on a customer's credit report, including negative repayment history information, while they are considering a hardship notice and while the customer is substantially complying with a hardship arrangement;
    e. encourage banks to work with customers and allow arrangements to work by not recommencing enforcement action, accelerating the debt, or referring to debt collectors, when a promised payment is only few days late, or one payment missed after a period of compliance;
    d. ensure banks try to contact consumers by a number of means before re-activating enforcement action when a hardship arrangement has been breached;
    e. Issue a default notice if a repayment arrangement is breached giving the consumer time to catch up;

[10] We note that these fees have been prohibited by s 133BI of the *NCCP Act 2009* unless the customer has given express consent for their account to go over limit and fees to be charged for this service.

f. strengthen the obligations in clause 28.8 of the Code in relation to confirming any decision in writing with reasons and the main details of any arrangement in writing to specify that the written confirmation must include:

i. what will happen at the conclusion of the arrangement in terms of repayments, arrears and the term of the loan;

ii. whether the account will be listed as in default *or as overdue* on the customer's credit report;

iii. the interest rate that will apply during the arrangement (if any);

iv. any change to fees and charges remain applicable during the arrangement;

v. whether there will be any other immediate consequences of accepting the arrangement, if any (for example cancellation of the consumer's credit card);

vi. the customer's right to complain to EDR if they are dissatisfied with the arrangement offered. This obligation could be confined to the details of the repayments required and what will happen at the end of the arrangement provided there are no adverse consequences for the consumer in accepting the arrangement.

g. banks should be consistent in their written and verbal communication with their customers and where statements conflict with alternative arrangements agreed with the customer there must be a clear cross reference to the appropriate arrangement;

h. expand the remit of clause 28.10 of the Code to provide information on financial difficulty in branches through the hanging of posters and provision of brochures on financial hardship, and that statements of accounts and bills contain a clause with information about financial hardship relief and a financial hardship contact on the FOS website;

i. be drafted with a plain English approach in mind, encouraging customers to seek help with their financial difficulties;

j. include a warning against the risks of using debt management firms.

13. Consumer Representatives recommend that the Code commit the CCMC or the ABA to publish data particularly about the financial difficulty assistance provided under clause 28 of the Code.

Financial Hardship (Term of Ref. (d)(vi))

14. Consumer Representatives recommend that the Code commit subscribers to:

a. commence a dialogue with the borrower at least six months prior to the expiry of a loan term (where it is not envisaged the loan will be paid out within the term). Give at least three months' notice where the decision is made not to roll over a loan that is not in default.

b. give six months' notice of the intention to vary the terms of a loan and bear the cost of any change of terms and conditions to the customer;

c. make specific commitments around the fair use of revaluation, non-monetary defaults and impairment clauses;

d. providing transparent and accountable information to borrowers on the additional costs that the bank incurs when a loan is in default or is impaired;

e. where a bank charges additional fees or interest of any kind associated with a defaulted or impaired loan, the increased costs incurred by the bank must be disclosed in the loan contract, where possible, as a flat dollar figure; and any amount charged that exceeds the increased costs incurred by the bank is to be paid off the loan principal;

f. prohibit conflicted remuneration for all bank staff;

g. extend the clawback period on any bonus or like incentives provided to management and senior executives involved in the line approvals or systematic oversight of lending

h. require bank officers to act in the best interests of customers when providing general advice, arranging credit or selling any other product;

i. require officers from lending and credit management departments to provide consistent information to borrowers, including

    i. copies of valuation reports and instructions to valuers; and

    ii. copies of investigative accountants' reports and instructions to investigative accountants and receivers;

j. require lending officers and credit management officers to ensure that the valuation instructions do not change during the term of the loan agreed in the loan contract.

15. Consumer Representatives recommend that the Code specifically prohibits a bank from freezing a customer's savings account when a consumer is in default with another facility with the bank. This prohibition does not affect any of the bank's rights to freeze an account due to a court order or other enforcement order.

16. Consumer Representatives recommend that the Code:

    a. Set basic criteria in the Code upon which debt waiver may be considered by subscribing banks.

    b. Apply the same criteria to pro-actively identifying customers who may be eligible for debt waiver through their own collections and hardship activities as part of their compliance with their financial hardship obligations.

17. Consumer Representatives recommend that:

    a. references to the NCC from clause 32.3 of the Code be removed and that it apply to all hardship matters

    b. a monetary fine be imposed, plus compensation where appropriate, for non-compliance with the Debt Collection Guideline;

c. notification of customers in writing be undertaken when banks assign a debt, including the name of the debt buyer, their contact details, and the amount currently outstanding;

d. banks include in their contracts of assignment some guidance about working with the debtor to make a repayment arrangement before the use of litigation and, in particular, bankruptcy proceedings.

e. clause 32.2 of the Code be amended to clarify that the Debt Collection Guideline will apply to any assignee of the debt including subsequent assignees

18. Consumer Representatives recommend that the Code requires banks who are reporting repayment history information to any credit reporting agency should inform consumers by way of their regular statements what numeric code has been submitted to the credit reporting agency for the previous repayment cycle, what that Code means and if relevant, how they can avoid any negative information being listed in future. Where statements are sent less regularly than monthly, timely notification should be given by alternative means.

19. Consumer Representatives recommend that the Code:

    a. incorporate a statement to the effect that banks recognise that setting some income aside for savings is consistent with promoting financial empowerment and inclusion, even where the customer is struggling to pay debts;

    b. recognise that debtors may accumulate up to $2,000 for living expenses and unanticipated expenditure without the bank insisting on this amount being used to pay down unsecured debt.

Fees and Charges (Term of Ref (d)(vi))

20. Consumer Representatives recommend that the Code address consumer concerns with excessive fee charging. The Code should commit banks to:

    a. Examine their fees structures to address the extent to which any of their fees are regressive;

    b. Limit the charging of fees for breaches of terms and conditions or default to a maximum of the direct costs incurred as a result of the breach;

    c. Ensure bank fees and charge will not trigger further fees;

    d. Provide consumers a warning that a fee will be imposed if a particular transaction goes ahead, and if a particular service will incur a fee both when the customer opts into the service and when the fee is incurred;

    e. When a bank offers services through physical branches, not charge fees for face to face interaction with branch staff or penalties for going into a branch;

f. Not charge for providing a document under this Code in the following circumstances:

   i. Where documents or computer access have been lost due to family violence or natural disaster;

   ii. The customer has a low income with Centrelink benefits as their main source of income.

21. We note that recommendations in other sections of this submission are also relevant including:

    a. Not charging customers default fees while the bank is considering a hardship arrangement

    b. Account suitability.

Cancelling Direct Debits (Terms of Ref. (j))

22. Consumer Representatives recommend:

    a. clause 21.1 be amended to replace the word "promptly" with the word "immediately";

    b. clause 21.2 should be amended to delete the following: "(but we may suggest that you also contact the debit user)";

    c. subscriber banks should commit to providing ways for a customer to cancel a direct debit via both phone banking and online banking;

    d. the introduction of a clause requiring payment of a fine in addition to reimbursement of any actual loss incurred as a result of a debit overdrawing a consumers account, if a bank has not implemented a direct debit when instructed do so;

    e. a prohibition on fees being charged to stop a direct debit arrangement;

    f. extending the commitment to cancelling direct debits to the recurring payments on credit cards without requiring the customer to contact the debit user;

    g. banks should commit to not charging a consumer a fee for cancelling a direct debit or recurring payment on their own credit or debit card account;

    h. the Code should make it clear that banks will not set a timeframe for reporting unauthorised transactions and other transactions that may qualify for a chargeback that is more than seven days less than the timeframe set by card providers.

Card cancellation

23. Consumer Representatives recommend that banks commit to:

    a. providing simple options for customers to cancel credit cards including online, by e-mail and in writing (in addition to in person or by telephone) ;

b. notifying customers in writing when a card has been cancelled by the bank, including the reasons for cancellation and dispute resolution details;

c. in either circumstance, provide customers with a list of currently active direct debits when an account has been cancelled and instructions on how to cancel them.

24. Consumer Representatives recommend that clause 27 is renamed "responsible lending" and is considerably expanded to ensure that:

a. the bank will act as a prudent and diligent banker;

b. for all credit under the NCCP, the bank will strictly comply with ASIC Regulatory Guide 209;

c. All loans provided will be not unsuitable with a clear process to:

- request detailed information about the financial situation of the borrower;
- verify the financial situation of the borrower;
- ensure the loan meets the needs and objectives of the borrower

25. Consumer Representatives recommend that the Code commit subscribers to:

a. assess all credit card applications on the basis that the customer has the capacity to pay the account out in full within three years if it has been fully drawn to its designated credit limit;

b. not offer unsolicited credit card limit increases by phone, face to face or any other way;

c. increase minimum repayment amounts on all new accounts;

d. if the credit card is being obtained to purchase goods in a linked credit transaction, the limit for the credit card cannot exceed the price of the goods.

e. ask all consumers the credit limit they are seeking and not approve a limit above that requested

f. provide a right to cancel a credit card and reduce their credit limit in writing and an easy to use automated process on online banking and phone banking

g. provide consumers with notification of how much credit they have used at no cost.

26. Consumer Representatives recommend that the Code commit subscribers to undertake not to offer low interest/interest free honeymoon period on cards including on balance transfers; or alternatively:

a. provide consumers with timely electronic notification of balance transfer expiry periods;

b. not offer honeymoon periods for periods of less than 12 months;

c. provide regular disclosure of how much should be repaid per month to pay off the debt within the honeymoon period;

d. require consumers to close the original account from which the balance was transferred.

Electronic Disclosure (Term of Ref (n))

27. Consumer Representatives recommend amending the Code so that:
    a. the bank will not exclude customers from products and services simply because they do not have an email address.
    b. the subscriber will gain the informed consent of the customer to deliver its disclosure documents electronically;
    c. banks will introduce a procedure for consent and notification that covers simple withdrawal of consent, change of email address and the need to check the email address regularly;
    d. banks will introduce procedures to get documents in a paper format simply and easily if the electronic communication failed; and
    e. where a bank offers paper communications, fees will not be charged for paper communications for vulnerable consumers.

Sales Incentives and Bundling Add-ons (Term of Ref. (o))

28. Consumer Representatives recommend that the Code:
    a. include commitments that arise from the current Independent Review of Product Sales Commission and Product Based Payments;
    b. institute suitability requirements with respect to all sales within banks, at minimum requiring that consumers are left no worse-off from switching to another product or purchasing the additional product;
    c. introduce a mandatory delay of at least 14 days between the sale of the primary product and the sale of the add-ons;
    d. allow the promotion of products but prohibit the completion of a sales transaction until the consumer takes a step to opt-in. That is, the consumer would have to call the salesperson themselves (after the mandatory delay) and say that they want to buy the product
    e. commit banks to tell a customer that they can buy the add-on product elsewhere and be given information on how to shop around.
    f. prohibit the sale of add-on products via an 'opt-out' mechanism, such as where the contracts have a pre-ticked box saying that the consumer agrees to buy the add-on unless they say otherwise.

g. reviewing the cover offered by add-on products on a regular basis, to assess whether it meets the needs of the consumers who are buying.

h. reviewing their sales practices for add on products on a regular basis, to ensure they assist consumers provide informed consent in respect of both the cost and the cover offered

Lender's Mortgage Insurance

29. Consumer Representatives recommend that the Code ensure that:
    a. only the actual cost of the LMI to the bank is paid by the consumer;
    b. banks pass on any rebate they are entitled to receive on LMI to the customer who has paid the premium in the event of a refinance;
    c. bank provide clear information to customers about how and when a rebate may be claimed as apart of the documents provided when getting the loan; and
    d. a key fact sheet is provided to better explain this product to consumers.

Relationship Issues - Joint Debtors, Joint Accounts & Guarantors (Terms of Ref. (q) & (r))

30. Consumer Representatives recommend:
    a. 'benefit' under clause 29.1 be clarified, so as to clarify that residing with, or having a familial relationship with, alone, are insufficient to constitute a benefit;
    b. the words "where it is clear, on the facts known to us" are deleted from clause 29.1;
    c. a new clause is added to deal with situations where a co-debtor received minimal benefit. An appropriate remedy in those situations is for the bank to sever the loan so each party has to repay their benefit plus interest.
31. Consumer Representatives recommend that the financial hardship clauses of the Code should be clarified so that either joint-debtor can seek hardship assistance in relation to the account and the bank can make a variation with one debtor.
32. Consumer Representatives recommend clause 30 be amended to make it clear that either party to a joint account or joint credit facility can
    a. ask for no further credit to be extended under the account;
    b. ask for the account to be closed when there is no money currently outstanding;
    c. or request a temporary freeze on funds in a jointly held account.
33. Consumer Representatives recommend banks commit to:

a. a re-draw facility should be suspended immediately on the request of any borrower for a joint account;

b. financial hardship policies include family violence and economic abuse as a potential cause of financial hardship;

c. a range of flexible options available to assist customers experiencing family violence that includes:

   i. moratoriums on repayments where the customer has little or no income;

   ii. severing joint debts to enable the customer experiencing family violence to repay a smaller debt in an affordable repayment arrangement;

   iii. a release from a debt when the customer is in long term financial hardship;

   iv. not listing on the customer's credit report to ensure they can obtain rental property;

d. never asking a co-debtor, guarantor or account holder to seek information, documents or consent from their ex-partner; the bank should communicate with the other customers independently;

e. inclusion of good referral pathways for legal advice, counselling and other support services

34. Consumer Representatives recommend that in line with the ALRC's recommendation 6-5 of its *Equality, Capacity and Disability in Commonwealth Laws* Report, the ABA should issue supported decision-making guidelines recognising that:

    a. customers should be presumed to have the ability to make decisions about access to banking services;

    b. customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;

    c. customers are entitled to support in making and communicating decisions; and

    d. banks should recognise supporters and respond to their requests, consistent with other legal duties. [11]

35. Consumer Representatives recommend that clause 31.4 (d) should include the following additional two commitments:

    31.4. We will do the following things before we take a Guarantee from you (d) provide you with a copy of …vi. any financial information about the debtor obtained by us… v. a copy of any assessment that the loan is not unsuitable

[11] https://www.alrc.gov.au/publications/banking-services

36. Consumer Representatives recommend amending the Code so that banks will commit to providing specific protection for guarantors (as a particularly vulnerable group) that requires disclosure person to person (or in the lesser alternative, by post).
37. Consumer Representatives recommend the Code should commit banks to agreeing to FOS hearing a dispute involving a guarantor when the matter falls out of FOS's jurisdiction due to it exceeding the monetary limits set.
38. Consumer Representatives recommend the Code commit banks to only pursuing a guarantor after recovery action against the debtor's asset.
39. Consumer Representatives recommend clause 31.14 relating to restrictions in enforcing judgment against a guarantor to be extended to where the debtor is a small business

Broadening the Concept of Special Needs (Term of Ref. (r))

40. Consumer Representatives recommend that clause 7 of the Code be expanded to incorporate a broader set of customers with special needs taking into account a range of factors and circumstances including work status, age, gender, geographic distance, language and indigenous status.
41. Consumer Representatives recommend broadening clause 8 by removing the word "remote."

Improving Financial Inclusion (Term of Ref. (r))

42. .Consumer Representatives recommend that the ABA commit to establishing, via the Code a bank account of last resort regime.
43. Consumer Representatives recommend strengthening the promotion of the Code by:
    a. amending Clause 11(c) to ensure that the Code will be displayed prominently on the front page of the subscriber's website;
    b. adding a new commitment to Clause 11 ensuring a copy of the Code will be provided to every new customer of a banking service;
    c. expanding Clause 10(a) of the Code to include subscribers promoting the Code themselves; and
    d. committing the ABA to undertake a significant advertising campaign to promote the Code.

Code Compliance and Monitoring Committee (Term of Ref (e))

44. Consumer Representatives recommend that the CCMC be resourced appropriately to improve its visibility for consumers and consumer representatives.

45. Consumer Representatives support the publication of case studies on consumer complaints and their outcomes on the CCMC website
46. Consumer Representatives support the development of a MOU with FOS to facilitate breach referrals from FOS to the CCMC.
47. Consumer Representatives recommend that the CCMC consult with consumer stakeholders on this process, that the MOU be publicly available, and that the CCMC report on the numbers and type of referrals it receives from FOS, the ABA and other sources.
48. Consumer Representatives recommend that the prohibition on the CCMC investigating an alleged breach of the Code whilst another forum is deciding a dispute should be rescinded. The starting presumption should be that the CCMC will investigate the alleged Code breach. A protocol should be developed to identify test cases that may mean the CCMC should not investigate as this would involve a duplication of an investigation into a systemic issue.
49. Consumer Representatives recommend that the CCMC should be better resourced to conduct own motion inquiries
50. The CCMC should be able to conduct more than one own motion inquiry at a time as needed.
51. Consumer Representatives recommend that the Code Compliance sanction toolbox be expanded to include the following:
    a. a requirement that particular rectification steps be taken within a specified timeframe
    b. a requirement that a compliance audit be undertaken;
    c. corrective advertising;
    d. publication of the Code subscriber's non compliance;
    e. a structure of fines;
    f. suspension or expulsion from the industry association; and/or
    g. suspension or termination of subscription to the Code
52. Consumer Representatives recommend adding a commitment that each bank appoint a Code Compliance Officer to liaise with the CCMC and consumers where appropriate.
53. Consumer Representatives recommend amending clause 36 to empower Consumer Representatives to make super- complaints on systemic issues damaging the interests of consumers.
54. Consumer Representatives recommend that CCMC should explore ways for the data to be made publically available in de-identified form so that researchers and advocates could explore it for trends and insight.

2. Code Effectiveness (Term of Ref. (a), (b) and (d)(ii))

The Banking Code is an important part of the matrix of instruments that dictate Good Banking Practice.

It sets standards for banks to meet that in some cases go beyond the law's requirements (sometimes for all customers, sometimes for some – for example where a legal obligation exists in relation to consumer customers but not small business customers) so that customers, regulators and banks and their employees know what is expected.

The Code influences bank practice and is taken into account in decisions of the FOS and the Courts. To this extent it is effective.

There are however instances where non compliance with the code is common and ongoing – cancellation of direct debits is one area. Chargebacks and provision of credit are other areas where there appears to be ongoing non compliance.

The Code is only effective to the extent it is applied by banks to their interactions with customers to whom the code applies. The degree of compliance in turn depends both on the legal and other incentives that impact banks, the ease of implementation by banks, and the ability of customers, their representatives, the Code Compliance and Monitoring Committee (**CCMC**) and others to raise issues and promote compliance with the Code.

The Code would be more effective if the following issues were addressed:

1. The Code should more clearly state that on adoption of the Code the terms of the code become terms of the contract between the bank and its customer (providing the Code applies to the customer).

The Code is currently a term of banks' contract with their customers:

> *"Any written terms and conditions will include a statement to the effect that the relevant provisions of this Code apply to the banking service but need not set out those provisions."*[12]

However, some banks continue to challenge this. Given the recent *National Australia Bank Limited v Rice*[13] decision, which has confirmed that the Code has contractual force, consumer representatives believe more needs to be done to communicate this clearly to both Code subscribers and consumers to raise awareness that the Code is in fact an enforceable part of the Contract.

To this end, the Code should explicitly and unequivocally state in plain English that the Code forms part of the banking service's terms and conditions with consumers.

[12] Clause 12.3
[13] [2016] VSCA 169

2. Incentives for compliance with the Code should be enhanced

Currently subscribing banks have incentives to comply with the Code where

a. They may be found to be in breach of the code on complaint by an individual

b. They may be found to be in breach of the code as part of an own motion inquiry by the CCMC

c. FOS or a Court finds against a bank when considering a dispute.

It is evident that these incentives are not strong enough to procure routine compliance with all provisions of the Code

The CCMC considers very few individual complaints each year. Many of these are outside jurisdiction. Customers are rarely in a position to identify a Code breach. Even if they do, there is often little incentive for a customer to formally raise a Code breach or take the time to provide substantiation of the breach.

The CCMC has completed two own motion inquiries into compliance with the direct debit provisions of the Code. Both reports found unacceptable levels of non-compliance. The second report was specifically undertaken to investigate whether bank compliance had improved following the first report.

Similarly the obligation to have copies of the Code available to customers in bank branches is often not complied with (whether or not that obligation continues to be relevant is not the point here).

The obligation to cancel a direct debit promptly upon a customer's instructions is unlikely to result in any form of litigation but causes enormous inconvenience and sometimes expense. This clause has been in the Code for many years and yet complaints about non-compliance persist.

It would be both a sign of the banks' real commitment to consumers and some comfort to affected consumers if breaches of such clauses resulted in fines for failure to comply with the Code in recognition of the inconvenience and frustration associated with such breaches. Banks frequently charge their customers for paying late, having a payment dishonoured or an account overdrawn. This would provide a measure of reciprocity and at the same time act as an incentive for banks to get these important issues right.

Where there has been a clear systemic breach of the Code the CCMC should be empowered to impose fines across all affected consumers. Where the consumer has suffered a financial loss as a result of a breach, it is acknowledged that they can seek compensation through external dispute resolution. However a structure of fines for certain breaches of the Code should be established and administered to incentivise compliance with the Code.

In addition to direct debit dishonour clauses there are other clauses such as the provision of statements, account suitability and debt collection where a small fine could apply upon

establishing a breach. The structure of fines would also incorporate larger fines where the financial and emotional impact is greater, for example, with aggressive and inappropriate debt collection practices. Sanctions could for example be $500 or five per cent of the total debt being collected, whatever is greater.

3. Plain language

As will be explored further below under the Accessibility section, the language of the Code could be improved. This is not just an accessibility issue but also goes to the effectiveness of the Code. If banks and their staff are not clear about what is expected, or if there is room for ambiguous interpretation, then the effectiveness of the Code will be diminished.

Recommendations

1. Consumer Representatives recommend that the Code include a plain English statement that the Code forms a part of the banking service's terms and conditions with the consumer.
2. Consumer Representatives submit that a structure of fines for certain breaches of the Code should be established and administered to incentivise compliance with the Code.
3. Consumer Representatives recommend that the effectiveness of the Code can be improved by ensuring that the document is clear and unambiguous using plain language.

3. Code Registration (Additional Term of Reference)

Consumer Representatives[14] recently wrote to the ABA to request that they register the Code of Banking Practice in accordance with the Australian Securities and Investments Commission's (**ASIC's**) *Regulatory Guidance 183.*[15] Consumer Representatives also wrote to five other financial services sector associations administering codes to request that they take the same step.

We argued that registration would increase public confidence in the financial services sector, ensure that the Code meets best practice standards and send a strong signal to consumers that the Code is one in which they can have confidence. Registration would also demonstrate that the banking industry proactively responds to identified and emerging consumer issues and that the Code works to deliver substantial benefits to consumers.

[14] including Financial Rights, Consumer Action Law Centre, Consumer Federation Australia, CHOICE, Financial Counselling Australia, Redfern Legal Centre, CARE Inc and the CCLC SA
[15] http://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf

Code registration would also mean that:

- investigative or enforcement action can be undertaken if misrepresentations are made about the code;
- ASIC can monitor the Code based on issues raised by consumers, External Dispute Resolution (**EDR**) schemes or industry consultations;
- there is greater certainty that consumer concerns and independent review recommendations will be taken seriously and more likely implemented – rather than what can occur now which is that some recommendations for change are watered down or rejected outright;
- consumers can have confidence that there is specific government/ASIC oversight of the Code and its ongoing development;
- the banking sector is making a public statement that it is strong and confident enough to subject its self-regulatory instrument for scrutiny against regulator standards;
- members will not walk away from the Code.

The ABA Code of Banking Practice is arguably the Code that is closest to meeting the requirements of the RG 183. One element that is easily fixed, for example, is shifting the Code review timeframe from every five years to every three years. Consumer Representatives note that the current Review was only instigated three years after the implementation of the current Code because of a political climate unfavourable to the banking industry.

We believe that the ABA should show leadership and send a strong message to consumers, subscribers and the financial services sector by registering the Code with ASIC. Lifting the standards of other industry sectors by creating pressure for other industry bodies to also register their Codes can only benefit the industry and their customers as a whole.

We also believe that subscribing to the Code should be mandatory for all ABA members. Or put another way, membership of the ABA should require mandatory subscription to the Code. We note, for example that there are ABA member banks that are not subscribers to the Code, e.g. ME Bank. This is unacceptable and should be acted upon immediately.

Recommendations

4. Consumer Representatives recommend that the ABA register an improved Code of Banking Practice in accordance with ASIC's *Regulatory Guidance 183.*
5. ABA membership require mandatory subscription to the Code of Banking Practice

4. Accessibility of the Code of Banking Practice Document. (Term of Ref. (b))

4.1 Plain language

The purpose of the Code is to be a 'binding agreement' between a customer and their bank. For that reason, the Code should be clear, well structured and easily accessible to all current and prospective banking customers.

Consumer Representatives acknowledge that the Code is relatively clear and well structured, particularly compared to other financial services sector codes of practice. However, there is still room for significant improvement, with many confusing sections and clauses, long sentences and overly technical language. Additionally, the way the language is used in the Code to reference customers, banks, and the ABA is not clear. The document uses 'we', 'our', 'us', 'you' and 'banking services' in ways that are potentially confusing, and make it difficult to ascertain who is being represented.

Applying the Flesch–Kincaid readability test[16] to the current Code indicates that readers would have to have 13.4 years of education to fully comprehend the document. This means that the 44 per cent of the population who have achieved attainment of year 12 or below would struggle to fully comprehend the document in its current form.

One solution may be to prepare documents that are designed specifically for the intended audience, yet communicate exactly the same information. Summaries or key points for each section could also be considered.

As a corollary to this, banking services terms and conditions are also long and extremely difficult to read and comprehend. Consumer Representatives recommend that banks commit to providing terms and conditions in plain English as well as including executive summaries.

Recommendations

6. Consumer Representatives recommend that accessibility of the Code be improved by ensuring that the document intended to be used by banking customers uses plain language, and is clear about which parties are being represented. Consideration should be given to including short summarised information at the beginning of each section.
7. Consumer Representatives recommend that banks commit to providing terms and

[16] Flesch–Kincaid readability tests are readability tests designed to indicate how difficult a reading passage in English is to understand. There are two tests, the Flesch reading ease, and the Flesch–Kincaid grade level.

conditions in plain English as well as including executive summaries.

4.2 Managing various versions of the Code

There are now four versions of the Code. This is confusing for consumers. We acknowledge that some parts of the Code have to apply based on when the contract was entered. However, other parts of the Code should be able to be updated for consumers regardless of when the contract was entered into. In our view, there are a number of sections that should be adopted and apply to any contract with some examples being financial hardship, family violence, Internal Dispute Resolution (**IDR**), charge backs and cancellation of direct debits.

Recommendation

8. Consumer Representatives recommend that the Code should make it clear that some clauses of the latest Code apply regardless of when the contract with the bank was entered.

4.3 Definition of dispute

The definition of dispute in the Code is unnecessarily narrow. We contend that the definition of dispute should be aligned to the definition of complaint in accordance with AS ISO 10002 – 2006 (or the latest ISO standard) which is:

> *An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.*[17]

The definition should not be limited in any other way. It is essential that the Code recognise that consumers have a broad range of complaints and the Code should ensure that consumers have access to IDR for that broad range of complaints. It is noted that ASIC Regulatory Guide 165[18] intends that dispute and complaint should have the same meaning. It would be useful to improve the drafting of the Code to ensure that is clear.

Recommendation

9. Consumer Representatives recommend that the definition of dispute is harmonised with

[17] Australian Standard ISO 10002-2006, Customer Satisfaction – Guidelines for Complaints handling in organizations https://www.saiglobal.com/PDFTemp/Previews/OSH/AS/AS10000/10000/10002-2006.pdf

[18] ASIC, *Regulatory Guide 165: Licensing: Internal and external dispute resolution,* July 2015 http://download.asic.gov.au/media/3285121/rg165-published-2-july-2015.pdf

the latest ISO standard or at a minimum ASIC RG 165.

5. Account Suitability (Term of Ref (c))

Consumer Representatives believe that commitments under the Code regarding account suitability need to be strengthened.

Despite the efforts of the ABA and individual banks, many eligible consumers have no idea about the existence of basic bank accounts. Many of these same consumers either do not monitor their account statements well, or accept fees and charges as a necessary evil of modern day banking, to the detriment of their own financial position and the bank's reputation.

Case study 1 – Harold's story

Harold banks with one of the major banks. In a three-month period, he paid over $100 in fees. While several of these transactions were from using other banks' ATM's, most were not. Harold is suffering financial hardship. He and his wife are on New Start Allowance, Parenting Payment and Family Tax Benefit. They live in a Housing Authority home with one child and another due next month. Harold suffers from mental health issues and hopefully will soon receive Disability Support Pension.

Source: Gosnells Community Legal Centre

Case study 2 – Rosa's story

Rosa had her Centrelink money paid into her bank account and tried to make weekly rental payments via direct debit. Her finances were precarious and there were not always enough money in her account to cover the direct debit. As a result, she was charged a default payment each time exacerbating the issue of the rent not being paid.

Source: Gosnells Community Legal Centre

Clause 16.2 currently states that "if you tell us that you a low income earner or a disadvantaged person," the bank will provide "factual information about any of our accounts which may be suitable to your needs." This places the onus on the consumer to inform the bank of their status before appropriate information and offers are made regarding suitable accounts for their needs. This is, in many cases, unrealistic to expect the consumer to identify

themselves in this manner. Consumers that many of our organisations work with are unlikely to identify that they on a low income to a bank staff member, unless the issue is raised by the bank. The reality of modern day banking is that many customers rarely ever enter a branch and may have minimal contact with banking staff. Further, banks are now able to easily identify people who would likely most benefit from basic bank accounts through data collected about the amount deposited each month or regular issues with direct debits.

Consumer Representatives refer to Clause 3.1 of the former self-regulatory UK Banking Code where the bank will "assess whether your needs are suited to a basic bank account (if we offer one) and if they are we will offer you this product".[19] This places the onus back on the bank to ensure that such consumers are appropriately identified and offered suitable banking products. Consumer Representatives feel it should be incumbent on banks to enquire as to a customer's financial circumstances when opening a new account and to offer a 'basic bank account' if the customer is eligible. Even more importantly, as customer's circumstances change throughout their lives, banks should put in place systems and procedures to identify where a customer's account is clearly no longer suitable and offer that customer a more appropriate option.

The ABA's Stakeholder Working Group has done some work in this area:

- Surveying banks to determine what affordable transactions accounts were available in 2012 and making that information publicly available;
- Updating their fact sheets and customer booklets to include information about affordable banking;
- Seeking to establish a better working relationship with the Department of Human Services, for example, to better identify people who may qualify for a basic bank account and to give them information accordingly.

We commend these initiatives but they intentionally stop short of making a commitment for banks to pro-actively identify potential candidates, particularly those who are incurring unnecessarily high or frequent fees. Banks are prepared to interrogate customer data for a range of internal reasons, such as marketing and account management. Consumer Representatives think that it's time the banks make a proactive commitment to identifying customers who should more appropriately be in basic bank accounts or similar targeted products. Specific indicators warranting pro-active contact could include:

- Receipt of a government pension or benefit into the account;
- Exceeding a threshold for inward payment dishonours, failed scheduled payments or account overdrafts which are incurring fees;
- The bank is aware of relevant circumstances as a result of hardship being requested/offered on a credit facility.

[19] *The Banking Code* (UK), March 2005 http://www.bankingcode.org.uk/pdfdocs/BANKING%20CODE.pdf Note that the self-regulatory UK Banking Code was superseded by the Banking Conduct Regime in 2009 regulated by the Financial Services Authority.

We note that some banks offer fee free banking on transaction accounts with no eligibility criteria.[20] We commend this approach.

Banks sometimes refund fees and charges when financial counsellors and consumer advocates raise the issue on behalf of a customer as a goodwill measure. This should be obligatory where the bank fails to have in place suitable systems to identify customers in unsuitable accounts.

While the majority of the discussion around account suitability has centred around transaction accounts, a similar problem exists in relation to credit card accounts, where consumers may be in high interest bearing accounts with annual fees and associated reward programs but are carrying significant debt from month to month. While customers are entitled to remain in the account of their choice, banks should alert such customers to the availability of other lower interest products where they offer them. They should also facilitate the transfer of their balance to a more suitable product where the customer agrees.

Recommendations

10. Consumer Representatives recommend that the Code commit subscribers to:

    a. make enquiries as to a person's suitability for a banking service or product when they open an account;

    b. set in place systems to pro-actively identify customers who may be using an unsuitable account;

    c. refund fees and charges incurred by customers who have been clearly identified as being in the wrong account where this should have been apparent to the bank.

6. Financial Hardship (Term of Ref. (d)(vi))

Consumer Representatives believe that while the Code of Banking Practice is a leader in financial hardship provisions in the Australian financial services sector and has in the main shown a strong commitment to working with consumers in this regard, there is more to be done to ensure that consumers are better assisted when experiencing hardship.

Consumer Representatives continue to see a range of issues with respect to how banks implement their financial hardship processes and programs. We will address the issues in three parts:

1. Inadequate compliance with the National Credit Code (**NCC**) and the Code of Banking Practice in so far as it relates to regulated credit and hardship.

[20] As at 2012 when the ABA conducted their survey these banks included the NAB Classic banking account and Citibank Plus.

2. Customers not currently covered by the NCC - small business and individual investors
3. General - Improving the language of the Code

6.1 Inadequate compliance with the National Credit Code and the Code of Banking Practice in so far as it relates to regulated credit and hardship.

Consumer Representatives see the following common problems:

- Banks making artificial distinctions between hardship arrangements under the NCC and other arrangements (where hardship is clearly present and the *National Consumer Credit Protection Act 2009 (Cth)* (**NCCP**) applies but the customer has dealt with collections instead of the hardship team, for example). This has flow on effects for credit reporting, particularly for the collection and sharing of repayment history information, but also for enforcement options, and other clauses of the Code (account combination and debt collection).
- Banks not informing customers about their rights under the NCC as required by the current Code of Banking Practice.
- Banking providing statements and other correspondence that conflict with agreed arrangements (written or verbal) creating confusion. There is an over-reliance on phone contact only.
- A failure by banks to clearly explain what will happen at the end of a period of reduced payments, or no payments being required – are extra payments required? Will the arrears be capitalised?
- A failure by banks to allow arrangements to work – recommencing enforcement action, or referring to debt collectors, when a promised payment is only few days late, or one payment missed after a period of compliance.
- Failure to consider moratoriums in appropriate circumstances.
- Consumers in financial hardship being asked by banks to pay fees to release copies of their statements. Clearly if they're in hardship, they won't be able to pay for statements
- The on-selling of a debt by a bank despite a hardship application being submitted.
- The commencement of enforcement proceedings by banks where a hardship application has been lodged.
- Charging of default fees by banks where a customer has applied for hardship; as with statement charges (referred to above).

- Financial institutions regularly 'lose' documents and the consumer is expected to send sometimes multiple copies of the same documents, all slowing down the hardship application process.

Some of the issues are above are explained in more detail below. The remainder are self-explanatory.

6.1.1 Hardship variations under the law versus other arrangements & failure to inform customer of hardship provisions

The NCC[21] requires all lenders offering regulated credit to consider varying a debtor's contract on grounds of hardship when they have received a hardship notice, which is broadly defined to include oral and written communication. We note in the latest FOS Annual Review 2015-16 that 33 per cent of hardship complaints involved a credit provider failing to respond to a request for assistance.

The Code of Banking Practice further obligates signatory banks to inform customers of the hardship provisions of the NCC if they may apply to the customer's circumstances (Clause 28.7). Consumer Representatives have found that contrary to this, banks go to some lengths to avoid classifying repayment arrangements as variations under the NCC.

Case study 3 – David's story

David had previously had a hardship arrangement with the Bank because he had been unemployed. The original arrangement involved no repayments for three months. The arrangement was silent as to what would happen at the end of this period. Just before the end of the three-month period David received a demand for $3,500 in arrears. His next statement required the payment of the arrears plus another minimum payment. This was shortly followed by a default notice. David had recently secured new employment and paid what he could over the next few weeks. Towards the end of the default notice period he realised that he would not be able to pay all the arrears, plus the new minimum payment due, before the default notice expired. He then applied for hardship again via e-mail. He sought further time to pay the arrears. As he was back in employment, it was clear that he would be able to get back on track within a reasonable time as required by the NCC.

The Bank responded by telephone. David agreed to a repayment arrangement that he thought was challenging but reasonable over the phone. The Bank then confirmed the arrangement in writing. The letter said "this arrangement does not constitute a variation of your contract or change to your contractual obligations in any way. In accordance with our entitlement under the terms and conditions, interest, fees and charges (including late fees)

[21] The *National Credit Code* forms a schedule to the *National Consumer Credit Protection Act 2009* and applied to all consumer lending and lending for investment in residential real estate.

will continue to accrue until the balance is cleared, even if you are meeting the terms of the payment arrangement." At no point does the letter acknowledge the hardship notice, that the provisions of the NCC might apply, or indeed that they have in fact refused to grant a hardship variation under the Code and should therefore have given David their reasons for refusal and information about External Dispute Resolution.

Source: Financial Rights Legal Centre

Case study 4 – Katia's story

Katia was unemployed. She was behind on her credit card with a major Bank for several months running and she received a call from collections. She explained that she was unemployed and looking for work. The Bank made a verbal arrangement with her to pay $50 per fortnight for 3 fortnights. When she later complained to the Bank about a misunderstanding about what would happen at the end of the arrangement she received an e-mail from the bank's Internal Dispute Resolution which said:

"My understanding of your concern is

You are unhappy as you were on hardship arrangement, but later the [bank] Low Rate credit card was referred to an external debt collections agency. You advised that the reason for hardship was unemployment.

What we've done about this

I sincerely apologise for any inconvenience caused to you.

As per our conversation on 12 April 2016, I confirm that I have spoken with the Credit Cards Hardship department and was informed that you have not received hardship assistance. The arrangements that were made were with Credit Cards Collections department."

The hardship provisions of the NCC clearly apply and yet the Bank never mentioned them. Further, the telephone conversation with collections where the customer said that she was unemployed clearly constituted a hardship notice under the law, and yet the Bank did not provide any response, or request for further information. The Bank went on the offer hardship as part of the resolution of this complaint but never explained why they did respond in the way they did to what was clearly a hardship notice in the first place.

Source: Financial Rights Legal Centre

This distinction between hardship under the law and other repayment arrangements has potential ramifications for customers. As noted above, fees and charges, including late fees, may continue to accrue, further entrenching hardship. Debts may be outsourced to debt collectors. Default listings may be made, and as banks start to use the comprehensive credit reporting system, repayment history information may show consumers behind in their payments.

We appreciate that many banks now offer customers very flexible arrangements including interest rate reductions or stopping interest altogether, discounts on the amount outstanding, reduction or complete removal of fees and charges and in some cases debt waivers. We are very supportive of these initiatives but it is important that where these offers come with consequences for the customer's ongoing credit worthiness, the customer should be made aware of this and given the option of accepting a less generous hardship variation without these attendant consequences if they meet the relevant criteria.

6.1.2. Comprehensive credit reporting

Consumer credit providers have had the opportunity to record and list repayment history information since amendments to the Privacy Act commenced in 2014. Under the new arrangements debtors can be listed as on time, one month late, two months late and so on. Very few credit providers (including banks) have so far taken up the opportunity to list this information about their customers but in time they are likely to do so. The NAB did commence reporting repayment history information to the credit reporting agencies (but not on consumer's credit reports) but has put back plans to actually list on its customer's credit reports pending clarification around the interaction between the listing of repayment history information and hardship.

Consumer Representatives have argued from the outset of the policy debate in relation to comprehensive credit reporting that a contract that has been varied cannot be listed as overdue provided the customer is complying with the arrangement. A recent determination of the Financial Ombudsman Service, *Case number 422745*,[22] confirmed the Consumer Representatives' interpretation, that where a payment is no longer due and payable by agreement then the credit report cannot indicate that the payment is overdue. Credit providers, however, are at pains to preserve their right to make arrangements that do not restrict their rights to take all forms of enforcement action including reporting payments as overdue. Further, they argue that Australian Prudential Regulation Authority ("APRA") reporting requirements give them no option but to report accounts as overdue by reference to their original repayment schedule when they have been varied on grounds of hardship.

[22] Available at https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf

Consumer Representatives submit that:

- APRA requirements are unrelated to banks' obligations under the Code of Banking Practice and the NCC. We understand the desire of banks to streamline their systems and procedures by having one reporting standard for both APRA and the credit reporting agencies but the law is clear and may not accommodate this. The bank's obligations to their customers under the Code are distinct from their reporting obligations to APRA and not mutually exclusive. It is possible to comply with both, even if it is not necessarily the cheapest and most convenient option. We submit that provided systems are developed to accommodate the difference, compliance with both should not be overly onerous.

- While banks are able to refuse to offer a variation on grounds of hardship under the Code they must:

    - treat any verbal or written indication from a consumer that they are unable to pay (for example due to unemployment, illness, family breakdown, etc.) as a hardship notice and respond accordingly;

    - have reasonable grounds for refusing a hardship variation (for example that the customer is not likely to be able to get back on track and repay the debt within a reasonable time);

    - clearly communicate that they have refused hardship assistance where applicable and inform the customer of their right to challenge that decision in EDR;

    - Explain the possible consequences of not having an arrangement in place including, for example, whether the person will have a default or negative repayment history information listed on their credit report, whether proceedings may be commenced without further notice, as well as any advantages (such a freezing or reducing interest). We note that ASIC Class Order [CO 14/41] exempts credit providers and lessors from providing written confirmation of any variation to the contract of no more than 90 days. The Code has nonetheless always contained a commitment to confirm the main details of any arrangement in writing. While we originally had no strong objections to the terminology used by banks provided people obtained sensible arrangements and avoided enforcement action, it is now clear that there are negative consequences for consumers that must be addressed. We are now opposed to the continuation of the class order and would have objected to its recent extension had ASIC engaged in consultation on the issue.[23]

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- Do not confuse or mislead consumers by implying or stating that there are "informal" arrangements when this is clearly inconsistent with the consumer credit laws.

6.1.3. Over-reliance on phone contact and verbal arrangements & failure to explain what will happen at the end of the hardship variation/repayment arrangement

Many clients report their dealings with the bank are entirely over the phone. Consumer Representatives support the banks conducting hardship conversations over the phone, and particularly support many arrangements being made without over-reliance on lengthy paperwork and documentary evidence. There are, however, some problems arising from increasing reliance on phone contact:

- Customers may not receive written confirmation of arrangements, or only partial written confirmation. To add to this, documentation they do receive may be at odds with the verbal arrangement made.
- Customers in hardship may be overwhelmed by collections activity and stop answering their phones.

Where banks make verbal arrangements which are not reflected in statements, customers get confused about what is expected of them. Sometimes the statement will state the amount due consistent with the original contact but have a clear notice indicating the account is subject to a hardship arrangement and that the customer should comply with the separate notice which sets out the terms of the arrangement. In other cases, there will be nothing on the statement to indicate that a payment is not due, or a different lesser amount is expected in accordance with the arrangement. This is very confusing, even more so when the original arrangement has not been confirmed in writing.

Clause 28.8 of the Code commits banks to confirming in writing the main details of an arrangement with their customer. In our experience this is not done consistently well. Specifically, it is often unclear what is expected at the end of the arrangement including:

- Does the consumer continue their normal repayments or do the repayments increase? Has the bank talked to their customer about whether increased repayments are affordable?
- What happens to any arrears? Are the arrears capitalised and the term of the loan extended? Is the customer required to pay the arrears in a lump sum? Are the arrears being repaid with higher repayments so the term does not need to be extended?
- How will these arrangements be reflected on the consumer's credit report?

Case study 5

Darshani had lost her well paid job and was making ends meet by temp jobs. She was

applying for jobs and hopeful to get a well paid job soon so she can pay her normal mortgage repayments. Darshani rang the bank and explained her situation. The Bank agreed to reduced repayments while she looked for a job. Darshani was relieved because she was supporting and caring for her elderly parents who live in her home.

The Bank rang Darshani and said she had missed a payment. Darshani was shocked because she had definitely made the agreed payment. Then the Bank said that the arrangement was due to end next week and she then had to make the full repayment. Darshani knew nothing about this and the Bank had never explained the terms of the arrangement or what would happen at the end. The Bank is threatening legal action and Darshani was now very distressed.

Source: Financial Rights Legal Centre

In David's case above there was no mention of the treatment of any arrears at the end of the original arrangement. In Katia's case she made a further verbal arrangement with the hardship department to pay $50 per fortnight until she returned to work (which would be within a month) and then return to minimum repayments. When she returned to work she paid her minimum payment as reflected in earlier statements as she had received no further statements or correspondence from the bank. She was subsequently informed she had breached her hardship arrangement because she had stopped paying the $50 per fortnight in addition to her minimum repayment. The need to do this had never been made clear.

Almost inevitably, customers who are in hardship will be struggling with many accounts – water, electricity or gas, phone, internet, rates and often multiple credit accounts. This amounts to a lot of calls from various collections departments. The sheer number of calls alone can be stressful, and then you add the potential embarrassment of receiving such calls within earshot of colleagues at work, or on crowded public transport. For some customers the underlying cause of hardship may be an additional stressor, such as physical or mental illness or relationship breakdown. Depression and anxiety can also result from job loss alone. It is not unreasonable that many people in financial stress start screening their calls or stop answering their phones at all. For this reason, we consider that banks should try a number of means of contacting their customers before taking enforcement action, when for example they miss a payment under a repayment arrangement, or pay less than the amount expected.

Case study 6 – Sanjay's story

Sanjay was unemployed. He made a verbal arrangement with his bank to make fortnightly repayments of $60 until he started his new job on a particular date and then he would return to normal repayments. The job fell through before he started. Too embarrassed to tell the bank he paid them half his normal repayment and stopped answering his phone. Meanwhile he continued to look for work. The next correspondence he received was from the bank's solicitors demanding the entire amount outstanding on his credit card.

Source: Financial Rights Legal Centre

6.1.4. Failure to allow arrangements to work

Related to the above, customers in hardship will usually have committed to a number of arrangements with a number of creditors. For a range of reasons their ability to meet these commitments consistently may have been over-stated – they may be influenced to over promise due to pressure from collections, or they may be simply overly optimistic about how much they can survive on after meeting the promised commitments. Often, it is simply something unanticipated which has come up. Whatever the cause, customers who are able to comply to the letter with repayment arrangements, every pay cycle, without fail, are more likely to be the exception than the rule. It is important that banks recognise that hardship is often a complex web, involving a number of competing creditors and recognise genuine efforts to comply, rather than taking a sudden death on failure approach.

6.1.5. Failure to consider moratoriums in appropriate circumstances

Financial counsellors report a decline in access to moratoriums for clients in recent times (where a client is relieved from repayments and interest for a set period). It is our understanding that this is also being driven by APRA requirements. While on the whole it is preferable that clients pay something towards a debt rather than nothing when they can, there are circumstances where they really have no capacity to pay at all. Further, clients may have no capacity to pay at all for a set period, but still have a very good chance of getting back on track within a reasonable period (for example, where someone needs surgery with a defined recovery period and has little or no income in the interim but a job to ultimately return to). We reiterate that APRA requirements are designed to control risk at the macro level and should not dictate the bank's relationship with individual customers. Further they do not change the bank's obligation to the debtor under the credit law.

6.2. Customers not currently covered by the NCC - small business and individual investors

The Code of Banking Practice covers a broader group of consumers than are covered by the NCCP Act and hence the NCC. This is appropriate. However, the Code currently makes a distinction in relation to hardship between those consumers who have rights under the NCC and those who do not. With numerous Senate Enquiry recommendations recommending the extension of FOS's jurisdiction in relation to small business, talk in Parliament and the press of a Royal Commission, or alternatively a Banking Tribunal, and FOS actually consulting on expanding its small business jurisdiction, the time is ripe to address this distinction.

The principles behind the NCC provisions are simple and fair in essence. A customer gives notice that they are in financial hardship; the creditor seeks to confirm both that they are in hardship AND that they have a reasonable prospect of getting back on track; then the creditor either agrees to work with them to get back on track with an appropriate arrangement, or the creditor refuses. Where the creditor agrees to hardship, then an agreement is made that should as far as possible enable the debtor to get back on track with minimal long-term consequences. This should include no credit report listing, no enforcement action and no punitive measures taken under the contract (such as default interest and charges), changes to security arrangements etc. Where the creditor does not agree the consumer gets the right to internal and external dispute resolution. Where the creditor's decision is confirmed, either the creditor proceeds to enforcement, or the creditor proposes another solution that may assist the debtor, but may have some long term consequences (such as a credit report listing or change to underlying security arrangements etc.).

There is nothing in these principles that is too onerous for banks to comply with for all customers covered by the Code. Further, they represent only an incremental step from what is in the Code already and are consistent with the proposal FOS is currently consulting in whereby they will have similar powers to impose a reasonable arrangement in a small business or individual investment matter as they currently do in relation to regulated credit.

The Code of Banking Practice should be amended to remove the distinction between regulated credit and other customers and ensure that the principles outlines above are adhered to for all customers in hardship.

Recommendations

11. Consumer Representatives recommend that the Code commit subscribers to offer all customers covered by the Code the same rights as those currently provided to consumers of regulated credit under the NCC, including acceptance of a broadly defined hardship notice; flexible hardship repayment arrangement options, stays of enforcement and a right to go to EDR.

6.3. General - Improving the language of the Code

Consumer Representatives also note that the current wording under clause 28 of the Code could be improved. Clause 28.10 requires information about a bank's processes for dealing with customers in financial difficulty to be made available on the bank's website. That clause is supported by Consumer Representatives but should go further and require:

- posters and brochures about financial hardship be made available in branches, and
- statements of accounts and bills contain a clause with information about financial hardship relief; and
- A financial hardship contact should be made available on the FOS website.

Most significantly though, consumer representatives note that the Code under clause 28 currently includes commitments relating to consumers experiencing financial difficulties with their *credit facility* only.

Consumer Representatives point to clause 14 of the former UK Code for possible guidance on expanding a commitment to assisting those experiencing financial difficulties.[24] The former UK Code applied to all interactions a bank had with a consumer and included the following commitments:

> *14.1 We will consider cases of financial difficulty sympathetically and positively. Our first step will be to try to contact you to discuss the matter.*

This general statement is a proactive commitment to contact a customer and work with them to help them through their financial difficulties. This differs from clauses 28.2 and 28.4 of the Code in three ways. The first is that the UK commitment covers all interactions with the customer not simply the credit facility. The second is that the UK commitment is more active in that they will "try to contact you" as opposed to "we may decide to contact you" under clause 28.4. Under our Code a bank may decide not to contact a customer after identifying a customer is experiencing financial difficulties.

And thirdly the former UK Code makes a simple gracious commitment to work "sympathetically and positively" with a customer. This is not stated in the Australian Code. While this may seem to be a minor issue it is incredibly important for customers to feel that their bank will act in this way. Actual practice (as outlined above in Case Studies **X to X**), consumer experience and recent poor media coverage, has led many to mistrust banks and be cynical regarding any overtures to assist their situation. Many consumers fear disclosure of their financial difficulties will count against them in their interactions with the bank leading to

[24] *The Banking Code* (UK), March 2005 http://www.bankingcode.org.uk/pdfdocs/BANKING%20CODE.pdf Note that the self-regulatory UK Banking Code was superseded by the Banking Conduct Regime in 2009 regulated by the Financial Services Authority.

withdrawal of credit or other penalties. Others are simply unaware that there are options available to them.

> *14.2 If you find yourself in financial difficulties, you should let us know as soon as possible. We will do all we can to help you to overcome your difficulties. With your cooperation, we will develop a plan with you for dealing with your financial difficulties and we will tell you in writing what we have agreed.*

The key difference between this clause and clause 28 under the Australian Code is that the former UK Code commits banks to "develop a plan with you for dealing with your financial difficulties". The Australian Code under 28.8 leaves the potential open as to "whether or not to provide you with any assistance if you are in financial difficulty with a credit facility with us." Consumer Representatives believe that there is scope for banks to be more proactive here and commit to developing a plan.

> *14.3 The sooner we discuss your problems, the easier it will be for both of us to find a solution. The more you tell us about your full financial circumstances, the more we may be able to help.*

While the Australian Code includes encouragement to speak with the bank (under clause 28.5) the tone of the second sentence in clause 14.3 above is such that it actively invokes a sense of active assistance and hence encourages greater disclosure on behalf of the consumer. Clause 28.5 with its use of the phrase "meeting your obligations," is harsher and less encouraging language for consumers in difficult situations. Consumer Representatives would recommend a plain English approach to re-drafting this clause to encourage greater disclosure similar to clause 14.3 of the former UK Code.

> ***14.4** If you are in difficulties, you can also get help and advice from debt-counselling organisations. We will tell you where you can get free money advice. If you ask us to, we will work with debt-counselling organisations, such as Citizens Advice Bureaux, money advice centres or the Consumer Credit Counselling Service. …*
>
> *You should also be aware that there are other companies that charge a fee for managing your debts. It is your responsibility to check the fees that may be charged before asking these companies to act on your behalf.*

An equivalent clause to Clause 14.4 of the UK Code is not found in the Australian Code. In Australia, debtors are given the central contact number for financial counselling on default notices, however some customers could benefit from earlier intervention. Many banks do this already. It may be beneficial to include something in the Code but we also note that independent financial counselling is significantly under-resourced and would not currently be able to service an increase in redirected customers unless an injection of sustainable and ongoing funding is provided.

Consumer Representatives do however recommend the ABA include a similar if not stronger warning within the Code regarding debt management firms. Anecdotally, Consumer Representatives have heard of consumers being recommended debt management firms by

bank staff. The ABA recently signed a joint consumer and industry communique with respect to tackling the exploitation of financial stress consumers by debt management firms.[25] While the communique calls for regulatory reform to bring these businesses in line with other financial services in Australia which currently need to obtain a licence from ASIC and abide by a range of consumer protections, Consumer Representatives recommend that banks commit to warning their customers of the problems caused by engaging debt management firms. This includes the charging of fees – as 14.4 of the UK refers to – but also should refer to the lack dispute resolution options when things go awry, inherent conflicts of interest and a lack of professional standards applying to those who work in the debt management sector.

Recommendations

12. Consumer Representatives recommend that the Code commit subscribers to:

    a. commit banks to proactively work with all customers who have been identified as experiencing financial difficulty and develop a plan with that customer;

    b. explicitly commit banks to not imposing any default fees (including late fees and overlimit fees)[26] or default interest once a hardship notice has been given until the an arrangement has been made or the customer has been notified of the refusal to make an arrangement;

    c. ensure that banks will not commence any enforcement action in relation to a debt that is the subject of an application for hardship assistance nor assign a debt in relation to a debt that is subject to a hardship application. If the enforcement action has been made before the hardship application has been made, the bank will not proceed to judgment whist considering the application;

    d. ensure that banks to do not report adverse information on a customer's credit report, including negative repayment history information, while they are considering a hardship notice and while the customer is substantially complying with a hardship arrangement;

    e. encourage banks to work with customers and allow arrangements to work by not recommencing enforcement action, accelerating the debt, or referring to debt collectors, when a promised payment is only few days late, or one payment missed after a period of compliance;

    d. ensure banks try to contact consumers by a number of means before re-activating enforcement action when a hardship arrangement has been breached;

    e. Issue a default notice if a repayment arrangement is breached giving the

[25] http://consumeraction.org.au/debt-management-firms-comm/
[26] We note that these fees have been prohibited by s 133BI of the *NCCP Act 2009* unless the customer has given express consent for their account to go over limit and fees to be charged for this service.

consumer time to catch up;

f. strengthen the obligations in clause 28.8 of the Code in relation to confirming any decision in writing with reasons and the main details of any arrangement in writing to specify that the written confirmation must include:

   vii. what will happen at the conclusion of the arrangement in terms of repayments, arrears and the term of the loan;

   viii. whether the account will be listed as in default *or as overdue* on the customer's credit report;

   ix. the interest rate that will apply during the arrangement (if any);

   x. any change to fees and charges remain applicable during the arrangement;

   xi. whether there will be any other immediate consequences of accepting the arrangement, if any (for example cancellation of the consumer's credit card);

   xii. the customer's right to complain to EDR if they are dissatisfied with the arrangement offered. This obligation could be confined to the details of the repayments required and what will happen at the end of the arrangement provided there are no adverse consequences for the consumer in accepting the arrangement.

g. banks should be consistent in their written and verbal communication with their customers and where statements conflict with alternative arrangements agreed with the customer there must be a clear cross reference to the appropriate arrangement;

h. expand the remit of clause 28.10 of the Code to provide information on financial difficulty in branches through the hanging of posters and provision of brochures on financial hardship, and that statements of accounts and bills contain a clause with information about financial hardship relief and a financial hardship contact on the FOS website;

i. be drafted with a plain English approach in mind, encouraging customers to seek help with their financial difficulties;

j. include a warning against the risks of using debt management firms.

6.4 Financial hardship and data

One enhancement that banks could commit to so as to improve financial difficulty practices is to publicly report consistent data about arrangements with customers. Reporting on arrangements in the energy sector has been mandatory for some time. For example, the Australian Energy Regulator publishes an annual report on the performance of the sector which includes data on debt levels, payment plans, hardship assistance, in addition to affordability. The General Insurance Code of Practice Compliance Committee also publishes an annual data report which provides a range of data on policies, claims, declined claims, withdrawn claims and internal disputes.

Consumer Representatives consider that the CCMC or the ABA could publish data particularly about the financial difficulty assistance provided under clause 28 of the Code. Data might include the number of customers seeking assistance with financial difficulty, numbers of the type of assistance provided (i.e. payment plans, moratoriums, interest/fee waiver and reduction, debt forgiveness etc) and data about whether assistance has assisted customers get back on track (i.e. data on customers exiting hardship programs). We note that some banks to provide some of this data in their annual or corporate responsibility reports. There would be benefit to public policy in banks reporting this data consistently, so that stakeholders can understand the extent of assistance provided. Reporting might also encourage banks to improve practices through competition by comparison.

Recommendation

13. Consumer Representatives recommend that the Code commit the CCMC or the ABA to publish data particularly about the financial difficulty assistance provided under clause 28 of the Code.

7. Loan Practices (Term of Ref. (d)(iii))

7.1 Impairment of Customer Loans Report

Regarding hardship and the general provisions, Consumer Representatives note the relevance of the findings of the recent Parliamentary Joint Committee on Corporations and Financial Services' Report on *Impairment of Customer Loans*[27] in May 2016. In examining small business lending, the committee determined that there has been a "persistent pattern of abuse of the

27 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/~/media/Committees/corporations_ctte/customer_loans/report.pdf

almost complete asymmetry of power in the relationship between lender and borrower." The Report makes a series of recommendations, including a number to improve the Code of Banking Practice. They include:

a. authorised deposit taking institutions must commence dialogue with a borrower at least six months prior to the expiry of a term loan. Further, where a monetary default has not occurred, they must provide a minimum of three months notice if a decision is made to not roll over the loan, even if this means extending the expiration date to allow for the three months following the date of decision;
b. if a customer is meeting all terms and conditions of the loan and an authorised deposit taking institution seeks to vary the terms of the loan, the authorised deposit taking institution should bear the cost associated with the change and provide six months notice before the variation comes into effect;
c. customer protections relating to revaluation, non-monetary defaults and impairment should be explicitly included in the Code; and
d. subscription to a relevant Code becomes mandatory for all authorised deposit taking institutions.

Consumer Representatives support these recommendations. The report details a series of further recommendations for regulatory and legislative reform. While consumer representatives support these reforms, we believe that the ABA should also consider revision of the Code to include elements of these recommendations including:

- providing transparent and accountable information to borrowers on the additional costs that the bank incurs when a loan is in default or is impaired;
- where a bank charges additional fees or interest of any kind associated with a defaulted or impaired loan, the increased costs incurred by the bank must be disclosed in the loan contract, where possible, as a flat dollar figure; and any amount charged that exceeds the increased costs incurred by the bank is to be paid off the loan principal.
- prohibit conflicted remuneration for all bank staff;
- extend the clawback period on any bonus or like incentives provided to management and senior executives involved in the line approvals or systematic oversight of lending;
- require bank officers to act in the best interests of customers when providing general advice, arranging credit or selling any other product;
- require officers from lending and credit management departments to provide consistent information to borrowers, including:
    - copies of valuation reports and instructions to valuers; and
    - copies of investigative accountants' reports and instructions to investigative accountants and receivers;
- require lending officers and credit management officers to ensure that the valuation instructions do not change during the term of the loan agreed in the loan contract.

Recommendations

14. Consumer Representatives recommend that the Code commit subscribers to:

a. commence a dialogue with the borrower at least six months prior to the expiry of a loan term (where it is not envisaged the loan will be paid out within the term). Give at least three months' notice where the decision is made not to roll over a loan that is not in default.

b. give six months' notice of the intention to vary the terms of a loan and bear the cost of any change of terms and conditions to the customer;

c. make specific commitments around the fair use of revaluation, non-monetary defaults and impairment clauses;

d. providing transparent and accountable information to borrowers on the additional costs that the bank incurs when a loan is in default or is impaired;

e. where a bank charges additional fees or interest of any kind associated with a defaulted or impaired loan, the increased costs incurred by the bank must be disclosed in the loan contract, where possible, as a flat dollar figure; and any amount charged that exceeds the increased costs incurred by the bank is to be paid off the loan principal;

f. prohibit conflicted remuneration for all bank staff;

g. extend the clawback period on any bonus or like incentives provided to management and senior executives involved in the line approvals or systematic oversight of lending

h. require bank officers to act in the best interests of customers when providing general advice, arranging credit or selling any other product;

i. require officers from lending and credit management departments to provide consistent information to borrowers, including
    i. copies of valuation reports and instructions to valuers; and
    ii. copies of investigative accountants' reports and instructions to investigative accountants and receivers;

j. require lending officers and credit management officers to ensure that the valuation instructions do not change during the term of the loan agreed in the loan contract.

7.2. Freezing of accounts

Consumer Representatives are aware that in the past banks have frozen a customer's savings account to force them to call the bank when they were in default on a debt. In our view, this is an entirely inappropriate way to deal with financial hardship and default. We have not come across any recent examples of this conduct by a bank but we are aware of a recent instance where another Authorised Deposit-Taking Institution (**ADI**) used this tactic. In that case the woman was escaping domestic violence, already under severe stress and was suddenly and without warning unable to access to cash to feed herself and her children. We want to ensure that this practice is never used by a bank.

Recommendation

15. Consumer Representatives recommend that the Code specifically prohibits a bank from freezing a customer's savings account when a consumer is in default with another facility with the bank. This prohibition does not affect any of the bank's rights to freeze an account due to a court order or other enforcement order.

7.3. Debt waivers

Most banks have recognised for many years that there are circumstances where a debt should be waived on compassionate grounds because the consumer is in long term financial hardship and cannot reasonably repay the debt. It is commendable that this "common sense" approach to debt waiver has been available and continues to be available. Consumer Representatives want the banks to take the next step to provide more certainty around these types of debt waiver requests.

It is also noted that a number of banks have willingly participated in bulk debt waiver projects where unrecoverable debt for many customers was waived at one time.

Following those projects a couple of major banks have developed their own debt waiver initiatives where specified criteria are made available to financial counsellors, community lawyers and legal aid lawyers, and the banks agree to consider waiving the debts of customers who fit the criteria. The criteria vary slightly but include for example:

- Debt must be unsecured;
- The person must be on a low or limited income on a long-term basis (for example Disability Support Pension, Aged Pension, long term reliance on other benefits or no income);
- Criteria in relation to assets – may be no assets at all, could be no assets apart from the family home;
- No foreseeable change likely (in the next five years or indefinitely);
- Bankruptcy is not a more suitable option (e.g. multiple high value debts);

- Very limited or no capacity to make any repayments.

Criteria or examples of the type of documentation required to support any request for a debt waiver may also be included.

These initiatives have been a very useful way of streamlining access to permanent debt relief for customers in severe financial hardship, at the same time as minimising the resources used by both financial counsellors and bank staff dealing with what otherwise may been protracted and fruitless collection activity, negotiations or disputes.

Consumer Representatives submit that it is now timely to include within the Code a set of 'debt waiver' criteria to facilitate more uniform practices around debt write off for consumers in long-term hardship.

We submit that in addition to the type of criteria above, there could be a range of other potentially relevant factors (if not definitive):

- Domestic or Family violence (leading to the incidence of the debt, or simply adding to the customer's hardship)
- Serious illness or disability (including mental illness)
- Other compassionate grounds.

These other criteria may be particularly relevant where there are assets, such as a home (or caravan or similar (see Dominika and Gareth's story and Beryl's story below).

Case study 7 – Lilly's story

Lilly suffered domestic violence at the hands of her ex-partner and entered into a car loan as a result of this. The loan was used to purchase a car used solely by the ex-partner. There were indications that the lender had engaged in maladministration in granting the loan to Lilly.

Lilly fled the relationship, left her job, took the car and drove interstate, where she moved into a women's refuge. A financial counsellor referred Lilly to the CCLSWA. Lilly subsequently could not make repayments and she surrendered the car, which was sold at auction. The lender attempted to pursue Lilly for the shortfall debt. Lilly was unemployed and receiving Centrelink benefits and had no way of making any substantial repayments.

The complaint with FOS, which started with non-compliance with a request for documents, and developed into a financial hardship dispute with responsible lending/unjust contract re-opening as alternative arguments, was open for 11 months. This matter was subsequently resolved when the lender waived the remaining shortfall debt as a gesture of goodwill. If there were debt waiver guidelines, debt waiver would likely have been pursued as a resolution to the matter at the earliest available opportunity.

Source: CCLSWA

The following case studies are debt waiver success stories.

Case study 8 – Kevin's story

Kevin was wholly dependent on Centrelink payments (Disability Support Pension) due to psychiatric illness (anxiety, depression, social phobia), had no assets, rents, no prospects to improve his income. His adult son used to live with him and they shared costs. When Kevin's son moved out, he had to pay the rent and utilities on his own. He kept on top of the rent as well as the credit card and loan repayments, but he couldn't afford to pay his utility bills and relied on his landlady and friends to feed him.

Prior to his son moving out, Kevin had taken out a personal loan with of $5000 (to fix his car, register it etc.). Financial Rights took on the matter and requested a debt waiver for both his credit card and personal loan debts. The process was straightforward once medical documents and letter from landlady (regarding rent increases as sole tenant) had been provided.

The outcome was that the Bank waived his credit card debt of $3000 and the outstanding amount on his personal loan of $4300.

Source: Financial Rights Legal Centre

Case study 9 – Vincent's story

Vincent was referred to Financial Rights by his aged accommodation social worker. Vincent had an old account and Bank overdraft. He was up to date on payments but was going without meeting basic living expenses as a result. He was wholly dependent on Centrelink payments (aged pension), lived in aged accommodation, and had a plethora of health issues (depression, diabetes, two stents in heart) with no assets. The Bank waived the debts of $500 and $2000 respectively.

Source: Financial Rights Legal Centre

Case study 10 – Dominika and Gareth's story

Dominika's husband Gareth called Financial Rights after discovering his wife had a secret credit card with a limit of $4000 owing $2500. Between the two of them they could not afford to keep up with the minimum monthly repayment. Both Dominika and Gareth were wholly dependent on Centrelink, had a lot of health issues between them and as a result had to travel to Sydney every couple of months for Gareth's heart issues (he had a transplant four years ago). Dominika and Gareth owned a relocatable home worth $175,000 and a vehicle insured for $17,000 (this was encumbered, a loan husband obtained to buy a decent vehicle to make regular trips to Sydney and to get around locally as the area had no reliable public transport). Financial Rights requested a debt waiver and the Bank released them from the debt on compassionate grounds.

Source: Financial Rights Legal Centre

Case study 11 – Beryl's story

Beryl, an aged pensioner, retired in mid 2015 and resided in a retirement village. Her only asset was a motor vehicle valued at $5000. Beryl had credit card debts and personal loans with several major banks, totalling over $32,000.

Gosnells CLC secured debt waivers for all the debts as she had no assets (other than the $5000 car) and was not going to work again and therefore had zero capacity to make repayments.

Source: Gosnells Community Legal Centre

Case study 12 – Nicole's story

Nicole is married with a mortgage and severely ill daughter. She had debts on credit cards with the two major banks totalling $15,000. Nicole was unable to continue making payments as she was unable to work due to her child being ill. Her only asset was equity in her house.

Bank A waived the debt despite the equity. Bank B refused to waive the debt but agreed to list the debt as "no capacity to pay" and this would show on client's credit file.

Source: Gosnells Community Legal Centre

While Consumer Representatives acknowledge that it would be difficult to set specific criteria as every single case is different, we believe that there is some scope to include some general criteria with banks maintaining the ultimate discretion to waive a debt.

We also submit that banks should commit to pro-actively identifying consumers who may meet the relevant criteria through their collections and hardship departments. Financial counsellors and community lawyers should not be the only path to permanent relief for customers in severe hardship.

Case study 13 – Gertrude's story

Gertrude is 72 year old woman whose only source of income is the Age Pension. She had significant credit card debt of around $10,000. She was making repayments of around half of her pension, which was forcing her to use the card again to pay her rent in a caravan park. She had been in this cycle for around three years and was getting further and further behind, with the overall debt growing each day. She received telephone calls from the Bank about twice a week asking her to pay. The callers made her feel like 'she was a criminal' and she became frightened to answer the phone. Each time she explained her circumstances and her inability to pay the amount requested but was always told that she had no other option. She began to make other sacrifices such as buying less food to try and pay the debt.

Source: Western Community Legal Centre

Recommendations

16. Consumer Representatives recommend that the Code:

    a. Set basic criteria in the Code upon which debt waiver may be considered by subscribing banks.

    b. Apply the same criteria to pro-actively identifying customers who may be eligible for debt waiver through their own collections and hardship activities as part of their compliance with their financial hardship obligations.

7.4. Debt Collection

The Code currently commits banks, their agents and assignees to comply with the ACCC and ASIC Debt Collection Guidelines. This provision is not always adhered to by banks. There are further commitments involving assignment that would improve the customer experience, and reduce risk of reputational damage to the assigning bank.

Over-zealous debt collection

Case study 14 – Marjorie and Don's story

Marjorie and Don are aged pensioners. They own a low value car and do not own a home. Don was a victim of the Great Southern Investment scam. Don has been subjected to ongoing aggressive and threatening debt collection and debtor harassment by the Bank for over a year. He has repeatedly given evidence of his financial position.

The Bank has told him he needed to find the money and pay them. The Bank did not care about affordability or working towards a realistic payment plan. The Bank has been obstructive and difficult with his financial counsellor and after the financial counsellor became frustrated, his community solicitor. A detailed complaint about debtor harassment and breaches of the Debt Collection Guideline and the Code of Banking Practice was sent to the Bank. The Bank's response was to contact Don directly with a further demand for payment when it knew he was represented. The Bank never responded to the dispute and instead commenced legal action in Victoria against both Marjorie and Don even though the Bank knew they lived in rural NSW. Marjorie only then found out that the Bank alleged she signed a guarantee which she believes she never signed. The whole situation has been incredibly stressful for Marjorie and Don.

The matter is currently in FOS. Complaints have been made to ASIC (no action so far) and the CCMC (no action while the matter is in FOS). Financial Rights continues to receive complaints from other consumers who have also been harassed by the Bank in similar circumstances.

Source: Financial Rights Legal Centre

More needs to be done to enforce bank adherence to the Guideline. As most banks do the right thing, there needs to be proactive steps taken to reign in those that step out of line. Debt Collection is another example of a code breach that may never be enforced in a court, but can take considerable toll on debtors. Breaches of the Guideline should be subject to monetary fines where appropriate, as argued above.

7.5. Assignment of debts

The current Code commits banks to avoiding the assignment of a debt while a hardship application is being considered under the NCC and while the customer is complying with any resultant agreement. As noted in the section on financial hardship, banks successfully avoid this clause by failing to acknowledge unequivocal hardship notices and offering customers arrangements that are characterised (incorrectly) as not being granted under the NCC. Consistent with the changes recommended above, we suggest that the references to the NCC be removed from clause 32.3 and the clause applied to all hardship matters.

There are also many customers who may be struggling and yet have not been in contact with the bank. It is very confusing and confronting for consumers to suddenly receive contact from an assignee without any prior warning or explanation from their bank. While the legal obligation to send a notice of assignment sits with the assignee, customer care would dictate that the bank should warn the customer prior to the assignment and explain what will happen next.

Consumer Representatives note that not all debt buyers are necessarily equal. Lion Finance for example appears in the top ten users of the civil court system in NSW and is the only major debt buyer that so appears. This accords with the anecdotal experience of Consumer Representatives that this particular organisation has a trigger happy approach to litigation. They are also more likely than other creditors to resort to bankruptcy proceedings, to the great detriment of the bank's former customer, who may end up losing a lot more than the value of the debt plus interest and enforcement costs. The Code already commits banks to dealing with debt buyers who agree to comply with the Debt Collection Guideline. It should go a step further and commit banks to placing parameters around the debt buyer's approach to litigation and in particular, bankruptcy proceedings.

Clause 32.2 of the Code states that if debt is sold to a third party, banks will choose a third party that agrees to comply with the ACCC/ASIC Debt Collection Guideline. It is our view that the Debt Collection Guideline will apply to any assignee of the debt (including subsequent assignees). As a consequence, this clause needs to be redrafted to clarify this point.

Recommendations

17. Consumer Representatives recommend that:

    a. references to the NCC from clause 32.3 of the Code be removed and that it apply to all hardship matters

    b. a monetary fine be imposed, plus compensation where appropriate, for non-compliance with the Debt Collection Guideline;

    c. notification of customers in writing be undertaken when banks assign a debt, including the name of the debt buyer, their contact details, and the amount

currently outstanding;

d. banks include in their contracts of assignment some guidance about working with the debtor to make a repayment arrangement before the use of litigation and, in particular, bankruptcy proceedings.

e. clause 32.2 of the Code be amended to clarify that the Debt Collection Guideline will apply to any assignee of the debt including subsequent assignees.

7.6. Comprehensive Credit Reporting

In 2014 amendments to the *Privacy Act 1988* allowed credit providers to report more comprehensive information on debtor's consumer credit files maintained by credit reporting agencies. One of the new pieces of information able to be reported is repayment history information. This will include a numeric code indicating whether a debtor is on time, one month behind, two months behind etc. The law requires customers to be notified that this information will be shared in a general sense but does not require any notice to the consumer when they are actually reported as being late in their payments.

The Code should rectify this by committing banks to notifying people on their regular statements about the Code reported to the bureau and its meaning. We contend that there are advantages to both banks and their customers to creating an obligation to notify consumers when adverse information has been listed about them in the Code.

For banks:

- consumers will have greater confidence that the bank is being open and transparent if they are notified in a timely fashion about adverse information being reported rather than finding out about it later when they are either refused other credit, or charged at a higher rate of interest than otherwise would be the case;
- it will drive consumers who can pay on time to do so. Consumers are extremely protective of their credit information and will not want to pay higher interest on credit in the future, or risk credit refusals. If they have the power to pay on time, they will do so to avoid negative information being shared with other credit providers more readily than in response to late fees. Not informing consumers immediately that a late payment has been reported is a lost opportunity for banks in driving customer behaviour.

For consumers:

- they will receive timely notification of the consequences of their actions so that they change their behaviour accordingly if it is within their power;
- they will be able to dispute any adverse listing they disagree with in a timely fashion while memories are fresh and evidence can be easily located.

Recommendations

18. Consumer Representatives recommend that the Code requires banks who are reporting repayment history information to any credit reporting agency should inform consumers by way of their regular statements what numeric code has been submitted to the credit reporting agency for the previous repayment cycle, what that Code means and if relevant, how they can avoid any negative information being listed in future. Where statements are sent less regularly than monthly, timely notification should be given by alternative means.

7.7. Promoting a Savings Buffer

Financial Counselling Australia (FCA) recently released a consultation paper titled *Everyone needs a Savings Buffer: Why Income and Expenditure Statements Need a Default Savings Category, July 2016.*[28]

The consultation paper proposes that a savings category be included in standard income and expenditure statements used by creditors when assessing capacity to pay for the purposes of making repayment arrangements in relation to existing debt. The paper also suggested that savings be included in responsible lending assessments, but the bulk of the paper and this section of this submission are about people in financial hardship who are struggling to repay debts.

Creditors currently expect that people in debt pay all of their surplus income toward their debts. This means that people in debt repayment arrangements have no savings buffer and can be subject to bill shocks with other unexpected expenses having a devastating financial impact. Allowing people in debt repayment arrangements to build a modest savings buffer would improve their levels of financial control and resilience; encourage a savings habit; and provide a buffer against possible future financial shocks. It would also promote compliance with repayment arrangements by decreasing the likelihood that the debtor will need to default when confronted with unanticipated expenses.

The UK's Money Advice Service[29] – the government agency responsible for promoting financial literacy – is currently piloting a savings category in its common Standard Financial Statement. A new UK Standard Financial Statement, incorporating a savings category, is subsequently expected to be launched later this year. Some financial institutions in the UK have taken this initiative one step further, providing accounts where the savings are offset against interest on the debt being repaid, and in one case even reducing the debt by the

[28] https://www.financialcounsellingaustralia.org.au/getattachment/Corporate/News/Release-of-Consultation-Paper-Everyone-Needs-a-Sav/Everybody-Needs-a-Savings-Buffer.pdf
[29] https://www.moneyadviceservice.org.uk/en

amount of the savings accumulated after a certain period as both incentive and reinforcement of the value of a savings habit. In all cases the option of including an amount for savings is voluntary, with consumers able to choose to pay downdebt instead.

The FCA paper proposes that Australia do the same and that a reasonable savings buffer would be 10 per cent of a person's income or $20 per month (where the consumer's income can sustain this). This proposal was discussed at a cross industry/consumer collaboration workshop in Melbourne on the 18th August, where banks were represented among other creditors such as telcos and utilities. The discussion on that day identified:

- broad support for promoting a savings habit, including among debtors in financial hardship.
- there was little appetite for setting a precise amount or maximum amount that would be acceptable, but some implementation challenges were identified, such as the need to balance the habit and utility of saving against the goal of debt reduction and the financial capacity that also engenders. There is also some distinction to be drawn between secured and unsecured debt, low and high income earners (10 per cent of a high income can be a considerable amount), and the need to weigh up the advantages of low interest savings against the disadvantages of carrying high interest debt.
- recognition that some creditors do not use income and expenditure statements for hardship in any event (which is positive and not inconsistent with this goal).

There was also discussion of the fact that savings accumulate and that this process would be pointless if the accumulated savings were subsequently seen as a pool of funds available to creditors generally. It was suggested that any commitment to allowing an optional savings buffer as a default position would also need to be complemented by protection for the resultant funds. Consumer Representatives propose that this concept be recognised by setting an upper limit on an amount of funds that can be retained by consumers rather than considered available to creditors in debt negotiations. We submit that this amount would most appropriately be $2000 in line with the amount used in financial stress and financial inclusion surveys: if you had a financial emergency (e.g. your car breaks down, you washing machine stops working) would you be able to raise $2000 within a week?[30] Again, this is entirely optional and debtors would be free to offer their savings as lump settlements if they chose to do so.

Recommendations

19. Consumer Representatives recommend that the Code:

[30] See for example *Financial Resilience in Australia 2016*, *Understanding Financial Resilience*, *Centre for Social Impact and the NAB*, *August 2016*. Also *Families, Incomes and Job, Volume 4:A Statistical Report on Waves 1 to 6 of the HILDA Survey*, Wilkins, Warren and Hahn, p44, available at https://www.melbourneinstitute.com/downloads/hilda/Stat_Report/statreport-v4-2009.pdf

a. incorporate a statement to the effect that banks recognise that setting some income aside for savings is consistent with promoting financial empowerment and inclusion, even where the customer is struggling to pay debts;

b. recognise that debtors may accumulate up to $2,000 for living expenses and unanticipated expenditure without the bank insisting on this amount being used to pay down unsecured debt.

8. Fees and Charges (Term of Ref (d)(vi))

8.1. Current fees and charges

Fees can have harsh and disproportionate impacts upon lower income consumers. Consumer Representatives are aware of extant late payment fees ranging from $9 to $40. A $40 default fee a consumer on Newstart earning $13,717.60 a year pays equates to approximately 7.6 per cent of their fortnightly income. The same fee for someone earning an average fortnightly income of $80,000 pays 1.3 per cent of their fortnightly income on a default fee.

A $40 fee can mean the difference between eating and not eating for a family who are struggling. These fees not only deplete low earning consumer's incomes but also affect whether debits made from their account for things like rent or electricity can proceed or be rejected, as there is less money in the account to pay them. The fees have little deterrence value where the consumer's problem is not organisation but insufficient funds and simply drive consumers faster down the path of financial hardship and pain.

Case study 15 – Anne's story

Anne is living in a women's refuge in South Australia. She was from Pipalyatjara in the APY lands. English is Anne's second language, her first language is Pitjantjatjara. She is a single mother, and suffers from depression and anxiety. In 2015 she entered into a contract for funeral insurance. The direct debits were $34 per fortnight. The Insurer made 17 dishonoured direct debits. After the School Kids Bonus was deposited the Insurer deducted $590. She had incurred approximately $250 in fees from her bank. Financial Rights raised a dispute with the insurer and sought the refund of the premiums taken. They were refunded. Financial Right also sought a refund of the dishonour fees. The Bank refunded on a good will basis without admission approximately $250 being the dishonour fees accrued.

Source: Financial Rights Legal Centre

And the situation only seems to be getting worse. Bank fees continue to rise with fees growing at 2.8 per cent – faster than the consumer price index.[31] Fees have been rising fastest on credit cards, with a 5.9 per cent growth in fees in 2014. Australians paid nearly $12 billion in bank fees in 2014. In that year the average household paid $468 in bank fees.

This seems to be set to continue following the High Court's decision upholding a decision that the ANZ was entitled to charge late payment fees which included a range of indirect costs, such as bad debt provisioning, increase in regulatory capital provision and the shared costs of running collections (even though no actual collections may have occurred).[32] Many of the fees charged by banks penalising their customers for breaches of terms and conditions (late fees on credit cards, overdrawn fees, inward dishonour and honour fees) are essentially regressive. They are both incurred more often by consumers who are struggling with their financial circumstances, or have lower financial literacy levels, or both, and impact many of those same consumers more than others by virtue of the size of the fee in relation to their income and overall wealth.

Credit card late fees as high as $35 are disproportionate, bear no resemblance to what a late payment actually costs a bank and penalise those who can least afford it. Fees purporting to cover the actual loss suffered by the bank are a form of double dipping given the fact that credit card interest rates are set at very high levels in order to reflect the risks and costs involved in unsecured debt.[33]

The consumers carrying debt from month to month (63 per cent of outstanding balances accrue interest)[34] pay high interest and effectively cross-subsidise all other card holders who pay off their accounts regularly and incur almost no interest. Within the 63 per cent of card holders who incur interest there is a sub-group that carry significant balances, far higher than the average balance. Consumer Representatives submit that the overwhelming majority of people carrying significant credit card debt do so because they do not have the means to pay it down quickly or at all. Even those on higher incomes usually carry credit card debt because they have overextended themselves and cannot afford to pay it off except over time. For people who are overstretched, late fees only make the task of repayment more difficult. Banks already charge high interest, make considerable profits, and have other enforcement options apart from late fees.

To the extent that late fees are intended to alter consumer behaviour by acting as an incentive to pay on time, a significant number of consumers do not pay on time because they have

[31] Kelsey Wilkins, *Banking Fees in Australia* http://www.rba.gov.au/publications/bulletin/2015/jun/pdf/bu-0615-5.pdf
[32] *Paciocco v Australian and New Zealand Banking Group Limited* [2016] HCA 28 http://eresources.hcourt.gov.au/showCase/2016/HCA/28
[33] For a full discussion of the illegitimacy of late payment fees see: Adam Schwab, High Court says it's OK for banks to double dip into customers' wallets, *Crikey*, 1 August 2016, https://www.crikey.com.au/2016/08/01/anz-wins-high-court-challenge/
[34] Reserve Bank of Australia, 'Statistical Tables - Credit and Charge Card Statistics C1', 2016, available at: http://www.rba.gov.au/statistics/tables/index.html#money-credit

insufficient funds and/or cash flow problems. They therefore do not respond to such incentives because they cannot. For other consumers, we submit that our recommendations in relation to disclosures under the section on comprehensive credit reporting would be more effective in inducing a change in consumer behaviour than late fees in any event – particular for those who can afford to pay them.

Inward dishonour fees and honour fees, and overdrawn fees, where consumers have insufficient funds in their accounts to meet certain scheduled expenses, are equally regressive in effect. Increasingly consumers are being driven into using direct debits, for example, by virtue of cost incentives or limited payment options offered. For low income consumers paying for goods and services over time is essential, but a direct debit, which triggers late fees by both banks and merchants spells financial disaster for consumers who are living from hand to mouth.

Consumer Representatives believe that this issue needs to be urgently addressed. Public confidence in banks is low. Even without the recent string of scandals & inquiries, the public are extremely sceptical about a sector which posts record profits year after year and yet hits them with dubious charges every time they make the slightest misstep.

This Code review provides an opportunity for banks to acknowledge the issues consumers have with fees and to take steps to place some parameters on unreasonable charges and limit the scope for abuse. There is a good argument to spread some of the costs of the risks of the overall business should be born by customers broadly and shareholders, not placed on those least able to bear them. In the absence of decisive action on this point by banks, consumer Representatives will have good cause to pressure the government to address the recent High Court decision through legislative change. The public would no doubt support such a move.

We note too that under clause 13.7 of this Code a subscriber may "charge … a reasonable fee for providing … a copy of a document under this Code." We have had reports of charges as much as $7 to provide a document. Charges as much as this seems unreasonable.

Banks should develop a list of circumstances in which they will not charge for the provision of statements and other documents, including at the very least:

- Where documents or computer access have been lost due to family violence or natural disaster;
- The customer has a low income with Centrelink benefits as their main source of income.

8.2. Innovative services generate yet more fees

Internet and phone banking have increased the potential for banks to offer innovative services for managing their finances. This is to be encouraged. However, sometimes such services come at a cost and those costs are not clearly disclosed. For example, a customer is invited to set up

dishonour alerts. The customer clicks on the feature and receives a long paragraph of information in addition to a couple of obvious boxes to tick about which account and what form of notification:

> *This alert notifies you when an account has been overdrawn by a cheque, direct entry or periodical payment. Upon receipt of a dishonour alert you may wish to reverse this by depositing funds into your account accordingly by 1:30PM, that day. You will be charged an honour fee to have the dishonour reversed.*
>
> ***Note:** We, and all of the third parties we rely upon to provide the Alerts Service are not liable or responsible for any failure or delay in transmitting information to you or any error or failure in such information. We are not liable to you or responsible for losses arising from any industrial action, or any cause beyond our reasonable control including (but not limited to) any equipment or electronic or mechanical failure or malfunction, the failure of your Electronic Equipment to receive information, or telecommunications breakdowns. We are not liable to you if you suffer loss due to an Alert not being received accurately or at all. If you fail to ensure the security of your Electronic Equipment, or if you fail to notify us of a change in your email or SMS details, we have no liability to you in respect of any loss or damage that may occur after transmission of any Alert by us. You acknowledge that we are not responsible for any loss or damage caused to your data, software, computer, Electronic Equipment or other equipment caused by your use of the Alerts Service.*[35]

If the consumer does not read the above carefully, they can easily miss the warning about the honour fee. Further, the amount is not disclosed. Equally, when the alert is received there is no mention of the fact that the fee will be charged to the account. Without careful checking of statements or internet transaction details such fees can be missed and continue to be incurred without the consumer's knowledge.

Consumer Representatives argue that where banks offer such services, fees need to be much more clearly disclosed both when they opt into a service and when they incur the fee, including where possible a dollar amount, or at least a range and method of calculation.

Recommendations

20. Consumer Representatives recommend that the Code address consumer concerns with excessive fee charging. The Code should commit banks to:

    a. Examine their fees structures to address the extent to which any of their fees are regressive;

    b. Limit the charging of fees for breaches of terms and conditions or default to a maximum of the direct costs incurred as a result of the breach;

[35] Example from St George internet banking.

c. Ensure bank fees and charge will not trigger further fees;

d. Provide consumers a warning that a fee will be imposed if a particular transaction goes ahead, and if a particular service will incur a fee both when the customer opts into the service and when the fee is incurred;

e. When a bank offers services through physical branches, not charge fees for face to face interaction with branch staff or penalties for going into a branch;

f. Not charge for providing a document under this Code in the following circumstances:

   iii. Where documents or computer access have been lost due to family violence or natural disaster;
   iv. The customer has a low income with Centrelink benefits as their main source of income.

21. We note that recommendations in other sections of this submission are also relevant including:

    a. Not charging customers default fees while the bank is considering a hardship arrangement
    b. Account suitability.

9. Cancelling Direct Debits (Terms of Ref. (j))

Clause 21 of the Code states that subscribers:

> *"will take and promptly process your instruction to cancel a direct debit request relevant to the banking service we provide to you."*

There are two distinct problems under this topic: cancellation of direct debits against savings/transaction accounts and cancellation of direct debits in relation to card scheme transactions.

9.1. Savings/transaction accounts

There is no doubt that a bank can and must cancel a direct debit set up against a savings/transaction account when instructed by to do so by the customer. However, this is an area where Consumer Representatives have ongoing concerns as consumers regularly report difficulties cancelling direct debits despite the existence of the Code provision. An instruction to cancel a direct debit on this type of account should be actioned as soon as it is received by the bank and a receipt number given to the customer for their records. Enforcement of and

compliance with this section of the Code continues to be lax. We appreciate the recent work done by the ABA in developing fact sheets on this topic but this is not sufficient to address an issue that has been raised continuously for over ten years and causes consistent consumer frustration and losses, including impacting most seriously on those least able to absorb these losses.

We note that clause 21.2 says that:

> *We will not direct or suggest that you should first raise any such request or complaint directly with the debit user (but we may suggest that you also contact the debit user).*

Banks suggesting consumers also contact the debit user is too often misinterpreted by customers. Consumer's frequently report that the bank is refusing to act on their instruction or counselling them against cancellation. There are only two explanations for this:

1. The bank is actually breaching the Code as alleged or
2. The customer is misinterpreting any suggestion that they need to contact the debit user as refusal or discouragement.

The ABA has expressed the concern that banks do not want to be seen as encouraging people not to meet their obligations. Consumer Representatives counter that it is not the bank's role to interfere with the customer's relationship with other creditors/service providers. Consumers are generally well aware that cancelling a payment will have consequences. The bank should simply act on their customer's instructions as to where to direct (or not direct) their own funds. We submit that the words in parentheses in clause 21.2 should be removed.

The use of the word "promptly" remains somewhat subjective and in order to ensure banks take action, the word should be replaced with "immediately." Banks should also make the process easier by allowing customers to cancel direct debits through their online accounts.

As suggested elsewhere in this submission, an incentive to comply with this part of the Code also needs to be seriously considered to ensure that banks will comply with requests for direct debit cancellation. The Code could for example state that a subscriber will pay the consumer a fine in addition to reimbursement of any actual loss incurred as a result of the debit overdrawing a consumer's account, if the bank does not immediately implement the request to cancel a direct debit.

Case study 16 – Nathan's story

Nathan is a 35 year old male who has recently experienced a relapse of his mental illness. Prior to the relapse, he had been working casually for around two years in marketing. His income was consistent over the two year period and he had obtained a number of loans including a car loan and short term loan to pay the bond for his rental property. Upon relapsing he found himself unable to work and thus without any income. Payments for his

loans were due to be direct debited and when his creditors refused to stop the direct debits, he approached his bank to stop them himself. His bank refused to do so. After a couple of weeks, his application for the Centrelink Sickness Allowance was approved and paid into his bank account. The account was significantly overdrawn due to the direct debits and left him with only about 30 per cent of his Centrelink payment remaining. He had been waiting on the Centrelink payment to pay his rent but due to these direct debits, he was unable to. He subsequently was served with a notice to vacate and evicted from the property. He is now homeless.

Source: Western Community Legal Centre

Consumer Representatives also believe that the Code should strictly prohibit fees being charged to stop a direct debit arrangement. We are aware of at least one bank charging for stopping a direct debit arrangement up until complaints from Consumer Representatives were made. For many consumers, especially those with low account balances (who include many of the clients of our services), an unanticipated or ill-timed direct debit transaction can cause significant difficulties. This can include overdrawing an account, causing additional fees and charges imposed by both the bank and the merchant; transactions being dishonoured, which can also result in fees and leave consumers at risk of other collection measures; or loss of funds, which may have needed to be prioritised for other purposes. In our experience, the cancellation of a direct debit is often necessary when a consumer is in financial hardship to ensure basic living expenses (e.g. rent and food) are paid as a priority. Fees being imposed for cancelling direct debits can be a substantial barrier for low income or vulnerable consumers.

9.2. Card Schemes (Visa and Mastercard)

Consumer Representatives also note that direct debit cancellations do not extend to the cancellation of recurring payments on credit cards: Clause 21.3. The commitment under Clause 21 needs to be extended to recurring transactions via the Visa, MasterCard and all other credit card systems.

We appreciate that there are difficulties in achieving this outcome as a result of the involvement of card schemes, but we think that this problem is so important to consumer confidence that it needs to be resolved. To make matters worse many transaction accounts are now accessed via scheme debit cards, greatly increasing the percentage of transactions that may be affected by this limitation. Although consumers can sometimes avoid this problem by providing their account details rather than their card details, this is not always possible, and most consumers are not aware of the different implications for cancellation in any event.

The same problems flow for consumers on low incomes when they cannot cancel a debit set up on a card as for a transaction account. Further, all cardholders face a number of barriers if they wish to switch credit cards and one of the most significant barriers to switching is cancelling recurring direct debit transactions that are set up from a consumer's credit card. Currently,

recurrent payments made from a credit card are much more difficult to cancel than payments from a transaction account, and credit card recurrent payments can continue to be made even after the card itself is cancelled.

Consumers commonly establish recurring transactions and standing authorities with third party merchants to pay regular bills, such as insurance, utility bills or fitness club memberships. We note recurring payments on credit cards are increasingly common and is encouraged by banks through the establishment of loyalty schemes. However, very few consumers would be aware that if they wish to cancel direct debits from their credit card, they must contact each merchant individually.

Problems can arise when a merchant does not act on an instruction to cancel a regular payment. These problems can also arise when a consumer closes their credit card account but does not arrange with third party merchants to cancel regular payments. In this case, a consumer is generally responsible for establishing and cancelling authorities directly with the relevant merchant. They will also be responsible for any transactions debited to the credit card account, even after the account has been closed.

Case study 17 – Thomas' story

Thomas closed his credit card account with his bank. Two months later, he moved house. Thomas did not provide a forwarding address to his bank, as he was no longer a customer. The next month, an amount of $653 was charged to Thomas' credit card account, despite it being closed. This amount was a regular direct debit from the company providing Thomas' car insurance. Thomas had established a regular direct debit arrangement with his insurer and had not cancelled the arrangement before he cancelled the card. Thomas was not aware that this payment was made. The bank sent statements to Thomas' previous over the next nine months, but these were not forwarded to him. The bank did have Thomas' mobile phone number and could have contacted him at any time, but did not. Thomas then received a notice of assignment and final notice from a debt purchasing company in relation to a debt of $838. Not knowing the origin of the debt, Thomas wrote to the debt purchaser, requesting information. He never received a response. Following the lodgement of a dispute with the debt purchaser at FOS, the debt purchaser provided information about the debt, stating that it had purchased the debt from the bank and that interests had accrued increasing the total amount owing. Thomas argued at FOS that no amount should have been charged to the credit card as it had been closed, and that interest charged was due to error by the bank in allowing the payment. FOS did not accept this argument, relying instead on the terms of the contract which provide 'where a card has been cancelled … you must cancel any periodic payment arrangements that are linked to the card account' and that 'you will … be liable for standing order authority transactions which have not been cancelled prior to termination'.

Source: Consumer Action Law Centre

Consumer Representatives submit that there should be no difference in treatment between credit card accounts and other accounts under the Code. In our view, a consumer should be able to instruct their bank to cancel a credit recurring payment authority, as they can with a transaction account direct debit authority. Further, upon cancellation or closure of a credit card account, a bank should take steps to cancel all regular transactions and other standing authorities.

There should also be no cost to the consumer for cancelling an instruction to debit their own credit or charge card account. Currently consumers can write to the merchant and then complain to the bank, and if necessary FOS, if the merchant does not act on their instructions as the payment is then unauthorised. This is a lengthy, cumbersome process, but it is at least free. Any replacement system should not set consumers backwards.

To facilitate the current cumbersome process and make it as accessible as possible, the Code should make it clear that banks will not set a timeframe for reporting unauthorised transactions that is more than seven days less than the timeframe set by card providers.

Recommendations

22. Consumer Representatives recommend:

    a. clause 21.1 be amended to replace the word "promptly" with the word "immediately";

    b. clause 21.2 should be amended to delete the following: "(but we may suggest that you also contact the debit user)";

    c. subscriber banks should commit to providing ways for a customer to cancel a direct debit via both phone banking and online banking;

    d. the introduction of a clause requiring payment of a fine in addition to reimbursement of any actual loss incurred as a result of a debit overdrawing a consumers account, if a bank has not implemented a direct debit when instructed do so;

    e. a prohibition on fees being charged to stop a direct debit arrangement;

    f. extending the commitment to cancelling direct debits to the recurring payments on credit cards without requiring the customer to contact the debit user;

    g. banks should commit to not charging a consumer a fee for cancelling a direct debit or recurring payment on their own credit or debit card account;

h. the Code should make it clear that banks will not set a timeframe for reporting unauthorised transactions and other transactions that may qualify for a chargeback that is more than seven days less than the timeframe set by card providers.

10. Card cancellation

There are two issues in relation to card cancellation that are not covered by the current Code:

1. Account closure by the customer
2. Card cancellation by the bank.

10.1. Account closure by the customer

The process for cancelling a credit card is stuck in a pre-internet era. According to recent CHOICE research, in order to cancel a Commonwealth Bank credit card a customer needs to visit a bank branch or call to speak to a customer service representative.[36] Similarly, Westpac and National Australia Bank require consumers to call the bank or send a physical letter to cancel a card.[37] Requiring customers to personally contact the credit card provider generally results in the consumer having to explain why they wish to cancel, and engaging in a sales discussion with a customer service representative. Banks should commit to offering consumers other simple options to cancel credit cards, including online, by e-mail or in writing. Ideally this would trigger a list of current recurring debits operational against the cancelled card so that the customer can opt to either cancel them or provide the debiting merchant details of their new card.[38]

10.2. Card cancellation by the bank

Banks reserve the right to cancel a credit card at any time. This can leave customers without the means of payment if they have been relying on the card. It is important that banks:

- notify the customer in writing that the card has been cancelled;

[36] Commonwealth Bank, 'How do I close or cancel my CommBank account?', accessed 7 August 2015, available at: https://www.commbank.com.au/support/faqs/737.html.
[37] Westpac, 'How do I cancel my credit card?', accessed 7 August 2015, available at: http://www.westpac.com.au/faq/cancel-credit-card/ and NAB, 'Credit Card Terms', clause 17.2, accessed 7 August 2015, available at: http://www.nab.com.au/personal/credit-cards/credit-card-terms-conditions-and-other-information
[38] If direct debits against card scheme accounts could be cancelled by contacting the bank as argued for in our section on cancelling direct debits, then this could also be built into the cancellation process.

- provide reasons for the cancellation;
- a list of any current direct debits active against the card (so the customer can make alternative arrangements); and
- provide contact details for IDR and EDR in the event the consumer wants to dispute the facts underlying the decision.

Recommendations

23. Consumer Representatives recommend that banks commit to:

    a. providing simple options for customers to cancel credit cards including online, by e-mail and in writing (in addition to in person or by telephone) ;

    b. notifying customers in writing when a card has been cancelled by the bank, including the reasons for cancellation and dispute resolution details;

    c. in either circumstance, provide customers with a list of currently active direct debits when an account has been cancelled and instructions on how to cancel them.

11. Responsible Lending (Term of Ref. (m))

11.1. Responsible lending and credit facilities

Under clause 27 of the Code, banks have committed to

> *"exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay the credit facility."*

Consumer Representatives contend that the banks have an obligation to ensure that any credit granted to customers must be suitable and the customer can afford to repay the credit without substantial hardship. The NCCP has subsequently given rise to the statutory concept of "responsible lending" obligations which apply to loans or increases in loans. Consumer Representatives believe that the concepts in responsible lending should be applied to all bank loans and credit. We further contend that the banks should be implementing best practice (and going above and beyond legal obligations) in loan suitability and affordability assessments.

The impact of being given an unsuitable loan cannot be underestimated. It causes enormous stress and harm to bank customers. It can cause family breakdown and even self harm. Banks need to do everything possible to avoid it happening. It is no excuse to talk about borrower

responsibility. Customers rely on the bank to make sure they are given suitable credit. It is simply not acceptable to make commercial decisions and cut corners on this issue.

Consumer Representatives regularly see irresponsible lending practices:

Case study 18 – Jenny's story

Jenny receives a Disability Support Pension and works as a nurse part-time. She has severe affective bipolar disorder which affects her judgement, and sometimes results in her making ill-conceived financial decisions.

In July 2014 Jenny applied for a loan with a Bank, with whom she had been banking for almost forty years – since she was eighteen years old. In the twelve months before applying for the loan Jenny had a net combined income, (from Centrelink and wages), of approximately $50,000.

The Bank granted Jenny a lien of credit - secured by her home - with a limit of $12,600. When that credit limit was reached in February 2015, the Bank increased the limit to $140,900 over the phone. The day before that approval, the Bank had denied a similar loan application made by Jenny in person, on the basis of responsible lending obligations.

At the time of her first loan application, the balance on Jenny's savings account was $31.61. The Bank would have been on notice, through the Disability Support Pension payments being made into her savings account, that she had a disability, and a relatively modest income. The Bank understated her debt commitments, which were comprised of numerous credit cards, and fixed repayments on the line of credit at significantly under what would be required to repay the balance over a nine-year term.

In providing credit to Jenny, the Bank made calculations of her living expenses - rather than asking her specific questions. This resulted in the Bank making a number of inaccurate assumptions about Jenny's living expenses and income. The Bank's failure to assess her actual income and expenditure (rather than an artificial means of calculation) are both a breach of its responsible lending obligations, and of the Banking Code of Practice.

A complaint has been made to FOS and ASIC on behalf of Jenny, in relation to the Bank's alleged breaches of its responsible lending obligations. Jenny is awaiting a response from FOS in relation to this dispute.

Source: Consumer Action Law Centre

Case study 19 – Catherine and Steven's story

Catherine lives with her husband, Steven, and two adult children who both have mental health conditions. Catherine is a full time carer for her children due to their disabilities. Steven is on an aged pension, and Catherine is on a carer's pension.

In March 2006, Catherine and Steven were approved by a Bank for a line of credit secured by their home of $50,600, as joint borrowers. Although Steven then had an income of $50,000 per annum, Catherine did not have an income to repay the mortgage on her home and this was recorded in the loan application. The Bank did not require tax returns showing net business income.

In August 2006 the credit limit on the line of credit was extended to $100,300. However, the family income had not increased, and the Bank was on notice of this.

On 13 August 2007 Catherine and Steven entered into a separate home loan for $25,000 with the Bank.

In May 2011, Steven retired and went on to the aged pension. It was about this time that a Bank representative, Glen, came to their house to discuss their line of credit balance, which was approaching its limit. Glen then advised Catherine and Steven that they should cease payments on the line of credit and apply to consolidate it in with their home loan, which then had a $10,000 balance.

On this advice, they made no payments on the line of credit, which has gone into overdraft at 17.94 per cent interest, up from 7.9 per cent on the remainder of the loan. Steven made six applications to refinance the loans as advised, and they were all rejected on the basis that the loan would not be serviceable due to it being in arrears and in overdraft.

Catherine and Steven believe that the Bank's poor advice and service has diminished their credit history so as to make them unattractive borrowers, despite being able to afford the repayments. They want to keep the house, and have the loans consolidated, as promised.

The Bank did not provide hardship relief to Catherine and Steven, despite requests made. The Bank was also not forthcoming in providing requested documents. The complaint had been referred to the Bank's hardship division; however, no assistance was provided.

This matter was referred to FOS, and a recommendation was made in late 2015 in favour of the Bank. However, the recommendation was disputed in relation to a number of key facts which were overlooked. A further determination was made in favour of Catherine and Steven, whereby they had to repay some of the principal, and incur a reduced interest rate. It was determined that that the line of credit extended to Catherine and Steven was in breach of the Bank's responsible lending obligations.

Source: Consumer Action Law Centre

Responsible lending in relation to credit cards is a problem requiring additional tailored solutions and is covered separately below.

Recommendations

24. Consumer Representatives recommend that clause 27 is renamed "responsible lending" and is considerably expanded to ensure that:

    a. the bank will act as a prudent and diligent banker;

    b. for all credit under the NCCP, the bank will strictly comply with ASIC Regulatory Guide 209;

    c. All loans provided will be not unsuitable with a clear process to:

        i. request detailed information about the financial situation of the borrower;
        ii. verify the financial situation of the borrower;
        iii. ensure the loan meets the needs and objectives of the borrower.

For further recommendations on responsible lending and credit cards see below

11.2. Responsible lending and Credit Cards

Credit cards have been a key source of financial problems for consumers over a decade. Statistics released by the Reserve Bank of Australia show that as at June 2016 there were 16.5 million credit cards with outstanding balances of $52.2 billion.[39] Sixty-three per cent of outstanding balances, or almost $33 billion, was accruing interest. This represents a 25 per cent increase in balances accruing interest over the past 10 years.[40] These statistics correspond with the huge increase in household debt. The ratio of household debt to disposable income has almost tripled since 1988, from 64 per cent to 185 per cent.[41] Nearly 50 per cent of callers to Money Help at Consumer Action Law Centre hold credit card debts

[39] Reserve Bank of Australia, 'Statistical Tables - Credit and Charge Card Statistics C1', 2016, available at: http://www.rba.gov.au/statistics/tables/index.html#money-credit
[40] Ibid.
[41] AMP, NATSEM Income and Wealth Report, *Buy Now, Pay Later, Household Debt in Australia*, December 2015. http://www.natsem.canberra.edu.au/storage/AMP.NATSEM%20Report_Buy%20now%20pay%20later_Household%20debt%20in%20Australia_FINAL.pdf

exceeding $10,000, while nearly 10 per cent have debts exceeding $50,000. Every week Money Help receives at least one call from a consumer with credit card debt exceeding $100,000 - it is not unknown to receive calls from consumers with up to $200,000 owing on credit cards. Financial Rights Legal Centre also reports that credit cards top the list of consumer finance products motivating calls to its Credit and Debt Hotline, and have done every year for the past three years.

There have been a number of regulatory developments aimed at addressing this issue including:

- The introduction of responsible lending as part of the NCCP which came into effect for banks in January 2011;
- The requirement for consumers to have to *opt in* to receive credit limit increases, which came into effect in 2012.

Despite this problems persist.

Case study 20 – Terry's story

Terry works full-time and earns an income of approximately $90,000 per annum. He and his wife Helen have three kids, two of which are autistic and require full-time care – which prevents Helen from engaging in mainstream employment. They rent their home, and own two cars worth about $8,000 and $3,000 respectively.

Over the years, Terry has amassed significant credit card debt, and continues to be offered credit limit increases. Collectively, Terry now owes $68,000 across seven different credit cards – their outstanding balances ranging from zero to $18,000. Of these one debt was obtained in 2012, two in 2014 and one in 2015; the remainder are older. In addition the balance was increased nine months ago on the 2014 card, and he received another balance increase two years ago on a card obtained in 2011. Many of Terry's cards have resulted from balance transfers, where he moved his debt across to avoid interest but then failed to close off the previous credit card – creating a 'snow ball effect'. Terry is up to date on minimum payments, but is unable to reduce his ongoing debt balance and this is causing significant stress and anxiety.

Source: Consumer Action Law Centre

Case study 21 – Julia's story

Care ACT worked with young person who was offered a credit card in 2015 with a $9000 limit when her part time income was $14,000 and was clearly unable to afford the repayments at the time the loan was offered.

Source: Care Inc

Case study 22 – Iqbal's story

Iqbal receives the DSP on and off depending on his income. He sometimes works as a painter, and has had mental health and gambling issues. During a four month period in 2015, Iqbal took out credit cards totalling $80,000 with the same banks as his transaction account. He applied online and spent most of the funds on gambling. While it appears that Iqbal's income was listed correctly on credit card applications, his expenses and liabilities were inaccurate. The Bank appeared not to verify the information provided. The debts have caused Iqbal to experience severe financial hardship.

Source: Consumer Action Law Centre

Case study 23 – Alexandra's story

Alexandra earns $80,000 per annum before tax. She has two credit cards, each with an available limit of $20,000. She currently has a balance of $1,000 on one and $0 on the other. She set up a new transaction account with a new bank in 2014 and applied for a credit card as they offered her low interest rate, and bonus points with her transaction account. Alexandra was asked to provide her payslips and details of her liabilities which includes a large mortgage of $1,000,00 with a co-borrower. The credit provider did not ask her what the credit card was for, and offered her a limit of $27,000. Alexandra now has an available credit limit of $67,000. If she reached the maximum on all three facilities, she could not afford to pay the three credit cards and meet her obligations under her mortgage or pay for her basic living expenses.

Source: Consumer Action Legal Centre and Financial Rights Legal Centre

Joint Submission to Senate Inquiry into Credit Card Interest Rates 2015

Case study 24 – Brad's story

Brad was living with a serious psychiatric condition which meant he could not work. His sole source of income has been the Disability Support Pension for over ten years. He desperately needed a car and decided to get a credit card to use the money to purchase a car.

He went to a major bank in about 2015 and applied for a credit card. He only needed around $2000 to buy the car. The bank did not ask him about the limit he wanted or any detail about his living expenses. The bank did check his income. The bank assessment assigned an amount for his living expenses which was completely unrealistic. A credit card was approved with a limit of $8000. Brad promptly spent it all in a manic phase and was unable to make the minimum repayments.

Source: Financial Rights Legal Centre

Consumer Representatives note that the government is currently proposing significant reforms with respect to the offer of credit cards under its *Credit Cards: improving consumer outcomes and enhancing competition Reform Paper*. These reform proposals have arisen at least in part from ongoing concerns raised in the Senate Economic Reference Committee's report from the previous December *Interest Rates and Informed Choice in the Australian Credit Card Market*. Consumer Representatives strongly support the implementation of the recommendations which relevant to this section include:

- Tightening responsible lending obligations to ensure card issuers assess suitability based on a consumer's ability to repay the credit limit within a reasonable period.
- Prohibiting issuers from making unsolicited credit limit increase offers including the ability to seek prior consent.
- Requiring issuers to provide consumers with online options to initiate a card cancellation or reduce their credit limit.

The Federal Government has also indicated that it considers setting higher minimum repayment amounts is worthy of further consideration and is currently seeking stakeholder feedback on this option in this review. Consumer Representatives strongly support a phased increase in minimum repayment percentages or at the very least an increase on new accounts going forward.

Consumer Representatives submit that banks should implement these changes immediately via the Code, in addition to other measures that we believe would assist in ameliorating further over-indebtedness:

- *Assess all credit card applications on the basis that the customer has the capacity to pay the account out in full within three years if it been fully drawn to its designated credit limit*; too often consumers are able to meet their minimum repayments (at least until they experience a change of circumstances) but cannot make any serious inroad into their outstanding balance;

- *not offer unsolicited credit card limit increases by phone, face to face or any other way*. Unsolicited credit limit increases encourage consumers to take on more debt than they initially intended and can lead to financial difficulty. If consumers want a credit card, or to increase the credit limit on their existing card, then the consumer is in a position to make the approach and actively apply to the credit provider, for that product.

- *Increase minimum repayment amounts on all new accounts* to ensure that consumers are encouraged to pay off their balances faster than is currently the case and consequently pay less interest.

- *Ask all consumers the credit limit they are seeking and not approve a limit above that requested*. Consumers often report being granted a higher limit than requested and then using it because it is available. This is a particular trap when people encounter financial hardship and run up their cards on essential living expenses rather than seeking timely advice about other options;

- *provide online tools to cancel a card and reduce their credit limit*. Some credit card issuers already provide online tools allowing consumers to reduce their credit limit and there is no reason why such portals could not also offer consumers the option to close off their credit card account.

- p*rovide consumers with notification of how much credit they have used*. If used strategically such a commitment will help consumers remain mindful of their credit card use, and may help consumers become proactive money managers.

Recommendations

25. Consumer Representatives recommend that the Code commit subscribers to:

    a. assess all credit card applications on the basis that the customer has the capacity to pay the account out in full within three years if it has been fully drawn to its designated credit limit;

    b. not offer unsolicited credit card limit increases by phone, face to face or any

other way;

c. increase minimum repayment amounts on all new accounts;

d. if the credit card is being obtained to purchase goods in a linked credit transaction, the limit for the credit card cannot exceed the price of the goods.

e. ask all consumers the credit limit they are seeking and not approve a limit above that requested

f. provide a right to cancel a credit card and reduce their credit limit in writing and an easy to use automated process on online banking and phone banking

g. provide consumers with notification of how much credit they have used at no cost.

11.3. Honeymoon offers and balance transfers

Consumer Representatives also support a prohibition on "honeymoon" interest rates where promotional interest rates often induce consumers to enter into credit card contracts and be unable to repay the debt once the promotional period is over, incurring large interest charges.

Credit card issuers of low interest honeymoon periods take advantage of consumers with low levels of financial literacy, who do not understand or consider the actual impact of interest rates until it is too late.[42] Further, while banks are able to offer honeymoon interest period credit cards to lure in vulnerable consumers, there is little incentive for these banks to reduce credit card interest rates in order to become more competitive.[43]

Consumer Representatives believe credit cards with honeymoon interest periods place disproportionate costs on disadvantaged consumers and are part of the problem relating to the current gap between cash rates and credit card interest rates.

If honeymoon offers continue to be available then their harmful impact should be minimised by:

- *providing consumers with timely electronic notification of balance transfer expiry periods*. This would help consumers to manage balance transfers positively, to ensure they gain the maximum benefit from the product.
- *Not offer honeymoon periods for periods of less than 12 months.* This would give consumers an opportunity to take advantage of the honeymoon offer by making

[42] Ian McAuley, 'Behavioural Economics and Public Policy: Some Insights' (2013) 4 *International Journal of Behavioural Accounting and Finance* 1, 22.
[43] Ibid.

considerable inroads into their debt. Current offer of six and nine months really offer limited savings and limited opportunity to reduce the debt where the person can only meet the minimum repayment.

- *Provide regular disclosure of how much should be repaid per month to pay off the debt within the honeymoon period.* This would assist in nudging consumers towards taking full advantage of the offer to improve their financial circumstances.
- *Require consumers to close the original account from which the balance was transferred.* Many consumers get into difficulty because they keep the original account open "just in case" and end up drawing on it again. In some cases this happens multiple time accumulating more debt each time. This could be facilitated by only granting transfers of full balances and seeking the consumer consent to close the original facility as part of the transaction.

Recommendations

26. Consumer Representatives recommend that the Code commit subscribers to undertake not to offer low interest/interest free honeymoon period on cards including on balance transfers; or alternatively

    a. provide consumers with timely electronic notification of balance transfer expiry periods;
    b. not offer honeymoon periods for periods of less than 12 months; provide regular disclosure of how much should be repaid per month to pay off the debt within the honeymoon period;
    c. require consumers to close the original account from which the balance was transferred.

12. Electronic Disclosure (Term of Ref (n))

One of the key commitments under the Code at clause 3(e) is that banks will:

> *"communicate with you and/or your representatives in a timely and responsible manner whether by written or electronic communications (including by telephone)."*

It should not be assumed by banks that electronic disclosure is the most appropriate means of communication. People on lower incomes, those with disabilities, older clients, culturally and linguistically diverse customers and others should be able to request all communications in a format they can access without the penalty of a fee. Given the recent changes to postal delivery times by Australia Post, banks must also allow for adequate turnaround times for customers to respond.

While Consumer Representatives support the use of electronic disclosure in most circumstances on the basis that it is better for the environment, can be easier and more convenient for many people and can lead to cost savings, we do so subject to the following:

1. Subscribers should provide notification to consumers that paper documents may no longer be given, that the consumer must remember to regularly check for electronic communications, and that consumers can withdraw their consent at any time. This notification should be given at the time the consent is obtained.

2. Subscriber should be required to make electronic communications available for a reasonable period, and in a format that allows the electronic communication to be saved to an electronic file and printed.

3. Subscribers should have a reasonable expectation that the intended recipient would be able to access, save and print the electronic communication. It is particularly important that the Subscriber checks that the email address is in use or can be accessed easily. When electronic communication fails there should be a procedure for members to follow to contact a customer and update details and provide appropriate disclosure.

4. That electronic disclosure cannot be used as a method to exclude consumers from products and services. For example, a refusal to provide a banking service or product on the basis that the consumer does not have an email address.

Further, banks need to acknowledge that there are many people who need to opt for paper communications and should not be penalised for doing so through the levying of a fee. There are many reasons why people may opt for paper communications. For instance, they may not be able to afford access to the internet at home or via their phone. These people tend to be lower income Australians whose sources of income are, for example, Centrelink payments, disability payments or the aged pension. According to the Australian Bureau of Statistics (ABS) only 70 per cent of those not employed were internet users. [44] For those in the lowest income quintile almost only 67 per cent were internet users. Households located in remote or very remote parts of Australia were less likely to have internet connections (79 per cent). Among the main reasons given for not accessing the internet at home were a lack of confidence or knowledge (22 per cent), and cost (16 per cent). [45]

There are others who simply cannot access the internet, be it because it is not available in rural and remote areas or they do not have the requisite knowledge or experience to use electronic communications, for example older Australians. According to the ABS only 51 per cent of people over 65 use the internet.[46]

[44] ABS, 8146.0 - Household Use of Information Technology, Australia, 2014-15, 18 February 2016 http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0
[45] ibid
[46] ibid

Charging a fee on those on the wrong side of the digital divide is disproportionate and only exacerbates financial hardship. They are in a sense being penalised for being poor.

Note there are further recommendations regarding electronic disclosure and guarantors below.

Recommendations

27. Consumer Representatives recommend amending the Code so that:

    a. the bank will not exclude customers from products and services simply because they do not have an email address.
    b. the subscriber will gain the informed consent of the customer to deliver its disclosure documents electronically;
    c. banks will introduce a procedure for consent and notification that covers simple withdrawal of consent, change of email address and the need to check the email address regularly;
    d. banks will introduce procedures to get documents in a paper format simply and easily if the electronic communication failed; and
    e. where a bank offers paper communications, fees will not be charged for paper communications for vulnerable consumers.

13. Sales Incentives and Bundling Add-ons (Term of Ref. (o))

Consumer Representatives note that the ABA is currently conducting an independent review of product sales commission and product based payments.[47] It is important that banks recognise the impact and distortions these sales incentives create.

We believe that the Code is an appropriate document to implement commitments emerging out of this Review. This will work to build trust and confidence with consumers with respect to sales practices and the incentives that underpin them.

Problems involving the sale of add-on insurance, and particularly consumer credit insurance (CCI), have been raised by Consumer Representatives for decades. Reports by ASIC from 2011 and 2013 demonstrated serious problems with CCI sales practices by Australian banks and other financial service providers. Westpac, for example, has been required to repay consumers who have been mis-sold CCI associated with its home lending, and Esanda has agreed to

[47] http://www.betterbanking.net.au/wp-content/uploads/Terms-of-reference-Independent-review-on-remuneration-FINAL.pdf

compensate consumers for sales conduct of a broker which included selling add-on products without the knowledge or consent of the consumer.[48]

It is noted in this section we define add-on insurance to include CCI, GAP, tyre and rim, and extended warranties. We do not include comprehensive car insurance.

In its 2011 report on CCI, ASIC identified a series of systemic issues:

- *consumers being sold CCI products without their knowledge or consent;*
- *pressure tactics and harassment being used to induce consumers to purchase CCI products;*
- *misleading representations being made during the sale of CCI products; and*
- *serious deficiencies in the scripts used for the sale of CCI products.*[49]

The issues identified by ASIC five years ago however continue to occur. Consumer Action's December 2015 report *Junk Merchants: How Australians are being sold rubbish insurance and what we can do about it*, details the serious problems of add-on products including their poor value, low claim rates, high decline rates and the fact that they are regularly mis-sold. The Report also provides 12 case studies on the issue.

Consumer Representatives have had enough of predatory sales tactics. The banks need to address this issue in an effective way immediately. The banks are at considerable reputational risk if this problem is not addressed. In our view, the banks need to stop selling junk insurance to consumers in a culture with a commission structure that encourages sale by stealth.

The case studies below are even more recent examples that demonstrate the ongoing nature of the problem.

Case study 25 – Theresa's story

Theresa has held a credit card account with her Bank since 2001. She only just found out that she was paying $26-27 per month for insurance to cover her if she was retrenched or to cover medical expenses. At the time she signed up to the card she was a student, not working and receiving Centrelink income. The product was totally unsuitable for her since she could not make a claim. Theresa worked casually in 2003 in a bar for a couple of years. She did not commence full time work until 2006. She stopped working in 2012 when she became pregnant. Since then she has been caring for her child. She intends on studying her masters before returning to work. In 2007 she replaced the credit card with two new credit cards. At the time she was not advised that she had the insurance product that she

[48] For further information see Consumer Action's *Junk Merchants: How Australians are being sold rubbish insurance and what we can do about it*, December 2015, http://consumeraction.org.au/Junk%20Merchants%20-%20Consumer%20Action%20Law%20Centre%20December%202015.pdf

[49] ASIC (October 2011) Report 256: *Consumer Credit Insurance: A review of sales practices by authorised deposit-taking institutions*, paragraph 8 http://download.asic.gov.au/media/1343720/rep256-issued-19-October-2011.pdf

was paying for. Because she was overdrawn one month ago she was advised that one of the charges was for insurance $27 per month. It was only then that Theresa realised she had the insurance and had paid a total of $5000 in premiums since 2001.

Source: Financial Rights Legal Centre

Case study 26 – Maricor's story

Maricor owns her own property secured by mortgage with her Bank. A friend of hers, Jean, approached Maricor to assist her with a car loan she needed for Jean's husband. Maricor introduced Jean's husband to her Bank. Maricor explained everything to the teller that the loan was for her friend Jean's husband and he would need to repay the loan. Maricor says it was not her intention to be a co-borrower for the loan. Maricor says that she sat with Jean's husband whilst he applied for the loan and believed the loan would be in Jean's partners name alone. A loan for $53,000 was applied for and granted with a $9000 premium for Loan Protection Insurance. Jean and her husband are now considering going bankrupt and Maricor is now left with a large debt and a huge add-on insurance debt.

Source: Financial Rights Legal Centre

Case study 27 – Maria's story

Maria called her Bank to transfer funds between her two accounts. During the course of the same conversation she was offered an increase to her credit card limit (which she accepted) without the Bank making reasonable enquiries as to whether she could afford the increase. She was also sold credit card insurance which she did not know she had agreed to.

Two years later she contacted Care as she was in financial hardship and a financial counsellor informed her she had been sold insurance and to date had spent over $3000 in credit card insurance. Maria would not have taken it out if she knew what it was at the time.

Source: Care inc.

Case study 28

In July 2016 the Consumer Action Law Centre was advised by a user of our "DemandARefund.com" website that their Bank's online process made it difficult to determine the cost of CCI prior to purchase.

On review of the web-site, Consumer Action formed the view that the online presentation of the information exploited well-known biases and decision making heuristics, which generally encourage consumers to 'short-cut' the sales process and make a decision without being fully informed of all of the relevant facts. In short, the web-site makes it difficult for the Bank to genuinely gain the consumer's informed consent when selling CCI.

The online form presented consumers with a choice, which also doubled as a sales pitch under the heading "Purchase with Confidence".

The consumer using the form was informed:

"CardAssure credit insurance lets you relax knowing that if the unexpected were to happen to you, up to 100 per cent of the outstanding balance of your credit account may be covered."

The consumer was then given a choice of two tick box options to choose from, before progressing through the application:

- CardAssure – may pay up to $5000 to cover the outstanding balance of your credit facility if you become involuntarily unemployed or are unable to work due to illness or injury. Click here for more details.
- Not at this time thank-you.

The option did not explain that CardAssure entailed a cost to the consumer, or what that cost was. Nor did the page explain that the product has limitations. In order to obtain this information, the consumer was required to "*Click here for more details*" – although even then, the consumer was not provided with any information about cost, or limitations. In order to finally obtain that information, the consumer was required to click again – and read the Product Disclosure Statement (PDS). Finally, at page 13 of the PDS, the consumer was able to ascertain the cost of the product. It should be noted that the process did not require the consumer to read the PDS in order to purchase the product.

Source: Consumer Action Law Centre

ASIC recommended in their 2011 report that bank staff should:

- *make a clear statement that they intend to try to sell CCI, rather than just beginning the sales pitch;*
- *be clear that the purchase of CCI is optional;*
- *use words like 'purchase' and 'buy' to describe the purchase of CCI, rather than potentially misleading words such as 'activate', 'enroll' and 'process';*
- *include a clear question asking the consumer if they consent to purchase CCI;*
- *obtain evidence that a consumer has consented to purchase CCI, such as through a signature or a voice recording (for phone sales); and*
- *end an attempted telephone sale if the consumer indicates once (or at most, twice) that they don't want to buy CCI.*

Consumer Representatives reiterate that the Code is an appropriate forum to address issues of add-on sales practice. We suggest that the Code Reviewer liaise and work closely with the Review of Product Sales commissions and Product Based Payments to ensure that a section on Sales Incentives and Add-Ons is introduced and effective commitments curtailing poor practice and exploitative behaviour are made.

Consumer Representatives strongly recommend that banks commit to introducing suitability requirements with respect to their sales practices. Banks have an obligation to ensure that those consumers who are already experiencing hardship are not left worse off due to the sales practice of the banks.

The Code should include a mandatory deferred opt-in procedure to impose a break between purchase of the primary product and an add-on financial product limiting the point of sale advantage held by those selling add-on insurance. There should be a mandatory delay between the sale of the primary product and the sale of the add-on. The delay might be around seven days, or could be as little as two days. A banks' representative salesperson would be able to promote the product, but the transaction would not be completed until the consumer takes a step to opt-in. That is, they would have to call the salesperson themselves (after the mandatory delay) and say that they want to buy the product. The customer must be told that they can buy it elsewhere and be given information on how to shop around. To avoid doubt, no add-on should be sold through an 'opt out' mechanism, such as where the contracts have a pre-ticked box saying that the consumer agrees to buy the add-on unless they say otherwise.

The UK's Financial Conduct Authority have introduced a similar policy for sales of Guaranteed Asset Protection (GAP) insurance in June 2015. The rules prevent GAP insurance from being introduced and sold on the same day. Instead, there is a four day deferral period in which the customer can consider the purchase and shop around. After the four day period, the business can contact the customer to try to complete the sale. Consumers would be able to make the purchase sooner, at their own initiative, if they wished to do. so.

Consumer Representatives finally note that the Independent Review of Product Sales Commissions and Product Based Payments specifically excludes consideration of 'Remuneration structures, product design issues and quality of advice regarding life insurance products' from the scope of the review. That Review's Terms of Reference support the full

implementation of the Trowbridge report recommendations and legislative reform. Given banks are committed to these reforms they should be reflected in Code of Banking Practice, where appropriate.

Recommendations

28. Consumer Representatives recommend that the Code:

a. include commitments that arise from the current Independent Review of Product Sales Commission and Product Based Payments;

b. institute suitability requirements with respect to all sales within banks, at minimum requiring that consumers are left no worse-off from switching to another product or purchasing the additional product;

c. introduce a mandatory delay of at least 14 days between the sale of the primary product and the sale of the add-ons;

d. allow the promotion of products but prohibit the completion of a sales transaction until the consumer takes a step to opt-in. That is, the consumer would have to call the salesperson themselves (after the mandatory delay) and say that they want to buy the product

e. commit banks to tell a customer that they can buy the add-on product elsewhere and be given information on how to shop around.

f. prohibit the sale of add-on products via an 'opt-out' mechanism, such as where the contracts have a pre-ticked box saying that the consumer agrees to buy the add-on unless they say otherwise.

g. reviewing the cover offered by add-on products on a regular basis, to assess whether it meets the needs of the consumers who are buying.

h. reviewing their sales practices for add on products on a regular basis, to ensure they assist consumers provide informed consent in respect of both the cost and the cover offered.

14. Lender's Mortgage Insurance

Lenders Mortgage Insurance (**LMI**) is often required when a customer's loan to valuation ratio (**LVR**) exceeds a certain threshold. This insurance protects the bank from any shortfall on the sale of the property which forms security for the loan. It does not protect the borrower. The borrower nonetheless is required to meet the premium and this is financed under the

mortgage. Premiums can be very high (e.g. thousands to tens of thousands of dollars), greatly increasing the size of the mortgage and incurring interest accordingly.

Where a consumer pays out a loan early by refinancing or otherwise the bank may be entitled to a rebate on the LMI premium financed by the mortgage. Whether this rebate is passed onto the customer is unclear. The NCC provides for a rebate on consumer credit insurance expressly, but not LMI. Banks should commit to always refunding the customer where they receive a rebate and should be transparent about the arrangement.

Case study 29 – Joan's Story

Joan bought a property in 2013, but her LVR did not meet the banks criteria. The bank advised her she needed to pay $29,000 for LMI for the loan to be approved. The LMI was offered by a bank branded LMI provider. Joan obtained the mortgage. In mid-2016 she refinanced to a new lender whose interest rates were more competitive. Her new loan was approved. She queried whether she would get any refund of the LMI she had paid. The bank advised her that there was no refund.

Source: Financial Rights Legal Centre.

A key problem relating to lenders mortgage insurance for consumers is that it is paid for by consumers but it does not cover them—it covers the lender. This results in consumer confusion and cost. Consumer complaints about lenders mortgage insurance at the Credit Ombudsman tripled in 2012/13.[50] The Credit Ombudsman states that complaints are generally arise because:

> *where a loan is not fully repaid from the proceeds of the sale of the security property and the lender makes a claim on its mortgage insurance policy for the shortfall, the right to recover the shortfall is generally assigned to the lenders' mortgage insurance provider.*[51]

Efforts advanced by the previous former Gillard Government to improve consumer understanding of LMI stalled with the change of government. It was proposed that a key fact sheet would be introduced to better explain this product to consumers, and we think such a reform would be worthwhile. We do not think that this goes far enough, however, and we suggest a further reform to reduce the consumer detriment associated with lenders mortgage insurance. That is making lenders mortgage insurance portable and refundable—should consumers switch mortgages during the period of insurance, then they should be entitled to a refund of a pro-rata amount of the premium and/or be able to 'port' the insurance to a cover a new mortgage.

[50] There were 20 complaints regarding lenders' mortgage insurance in 2010/11 and 2011/12 (COSL 2012 Annual Review, p 23) and 58 in 2012/13.
[51] COSL Annual Report on Operations, p 29.

Recommendations

29. Consumer Representatives recommend that the Code ensure that:

a. only the actual cost of the LMI to the bank is paid by the consumer;

b. banks pass on any rebate they are entitled to receive on LMI to the customer who has paid the premium in the event of a refinance;

c. bank provide clear information to customers about how and when a rebate may be claimed as apart of the documents provided when getting the loan; and

d. a key fact sheet is provided to better explain this product to consumers.

15. Relationship Issues - Joint Debtors, Joint Accounts & Guarantors (Terms of Ref. (q) & (r))

Personal relationships are clearly a fraught area, whether domestic partnerships or familial. The following section covers issues encountered with Code provisions generally plus a specific section in relation to domestic violence.

15.1. Joint Debtors

The Code of Banking Practice currently contains the following provision:

> *29.1 We will not accept you as a co- debtor under a credit facility where it is clear, on the facts known to us, that you will not receive a benefit under the facility.*

Consumer Representatives continue to see cases where this provision is not complied with. We continue to see cases where guarantors are turned into co-borrowers to avoid the extra protections provided to guarantors. The following case, although decided under the old version of the Code, suggests some further clarification of the term "benefit" may be warranted.

Case study 30 – Anne's story

In December 2009 Anne attended a bank branch with her mother Jane. Jane intended to apply for a personal loan of $50,000 as a sole borrower to refinance existing debts including some in default, but was informed that she did not satisfy the banking criteria.

The Bank subsequently advised Jane that she may not be successful in her application without a guarantor.

The Bank proceeded to ask Anne about her financial situation and whether she wished to act as a guarantor on her mother's loan. At the time, Anne was 21 years of age and lived at her mother's address. Anne had limited experience with financial decision making, and she only made such decisions with assistance from her parents.

The Bank did not advise Anne to obtain independent legal advice, and did not speak to her privately about the ramifications of entering into such an arrangement given the obvious financial problems of her mother. The Bank advised Anne that her role in the loan application was to support her mother's loan application.

Anne completed and signed the documents that day. The documents Anne signed were not as a guarantor, but as a 'Co-borrower/Spouse'. Anne did not understand the legal and financial consequences of signing the documents. Neither Jane nor Anne intended Anne to obtain to benefit from the loan, and Anne was not expected to, and did not, make loan repayments.

Jane ultimately defaulted on her loan payments and the Bank sold the debt to a debt collection agency (the Agency). Both Anne and her mother were pursued for the debt as co-borrowers.

Anne lodged a complaint with the Credit Ombudsman Service Limited (COSL) as it was then known on the grounds of unconscionability and maladministration. The Agency initially offered to discount the debt by 20 percent, which Anne rejected. In response to the complaint, the Agency submitted that Anne did benefit from the loan as the loan contract indicated that part of the loan was for household goods. The Agency argued that as Anne resided with her mother, she would have benefitted from the loan through the purchase of household goods.

COSL (now CIO) found that the Bank had adequately disclosed that Anne had entered into the agreement as a co-borrower and that there was no undue influence on the part of the bank.

CIO further found that Anne did receive a direct benefit from the loan within the meaning of clause 26.1 of the Banking Code of Practice (2003), as a significant proportion of the total loan was concerned with maintaining the property. CIO also cited that Anne did not state whether she paid her mother rent or board.

The matter was resolved independently of CIO when the agency released Anne from the loan.

Source: WEstjustice

This interpretation of "direct benefit" as the provision then stood is very broad. It is arguable that the current provision would be even more amenable to this interpretation. The 'direct benefit' that Anne obtained from the loan agreement was derived from residing in the same household as her mother, who used the loans to refinance her existing debts and purchase household goods. In Anne's case, she was not a direct recipient of the finances and did not have control over their disbursement. She was not liable for any of the existing debt. Such an interpretation would justify joining any family member residing with the principal borrower on the basis that a benefit had been received by the co-borrower. This is inconsistent with the finding of the High Court in *Garcia v NAB*, whereby a guarantor who was a director of her husband's company was not "directly involved" as she obtained "no real benefit" for entering into the transaction.[52]

Consumer Representatives submit that the Code should specify certain relationships which do not alone constitute a "benefit" from a credit facility. For instance, the following could be added to clause 29.1: "Residing with, or having a familial relationship alone, are insufficient to constitute a benefit."

In the loan contract forms Anne was identified as a 'Co-borrower/Spouse', as opposed to a mere 'Co-borrower'. It can be imputed that this selection was chosen to bypass the standard checks and balances in the bank's internal processes, as Anne's identification as a daughter (or person other than a spouse) may have required further investigation as to whether Anne did derive direct benefit under the loan under s 26 and/or was a suitable candidate for status as a co-borrower.

The reference to Anne as a spouse was not addressed at any stage in the dispute by the bank, the debt collection agency or CIO. Given the power imbalance between lenders and borrowers, it is desirable that any ambiguity in lending documents should be construed against banks as an extension of the contra proferentem principle. Under contra proferentem, any ambiguity in a contract is to be read against the writer of the contract.[53] We contend that this principle already applies to banking contracts. However, if there is an argument it does not, we submit that it should be included in the Code.

Clause 29.1 also refers to "on the facts known to **us**" as the standard required. In our view, this standard is not consistent with the responsible lending laws in Australia that require the lender to ask the borrower about their needs and objectives. If the bank has made reasonable

[52] *Garcia v National Australia Bank* (1998) 194 CLR 395, 43.
[53] The common law rule of contra proferentem provides that where an ambiguous clause arises in a contract, it should be construed against the party to put the contract forward: *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377

enquiries there is no need to include a proviso about what they have been told. We recommend that the words "where it is clear, on the facts known to us" must be deleted.

Consumer Representatives have seen a number of cases where the co-debtor received very minimal benefit compared to the size of the loan. We believe that the Code needs to also deal with those situations in a way that reflects the inequity of the arrangement. For example, we have seen cases where one borrower's four loans were refinanced in a $30,000 loan and the co-debtor received a small amount of money left over into a joint account. In those circumstances, it is appropriate for the bank to consider severing the liability between the co-debtors so that each debtor pays back the benefit they actually received with interest.

Recommendations

30. Consumer Representatives recommend:

a. a 'benefit' under clause 29.1 be clarified, so as to clarify that residing with, or having a familial relationship with, alone, are insufficient to constitute a benefit;
b. the words "where it is clear, on the facts known to us" are deleted from clause 29.1;
c. a new clause is added to deal with situations where a co-debtor received minimal benefit. An appropriate remedy in those situations is for the bank to sever the loan so each party has to repay their benefit plus interest.

15.2. Financial Hardship & Joint Debts

Many consumers report encountering difficulties in dealing with joint debts when they are in hardship because the bank requires the input of their ex-partner, the joint borrower, who is either non-co-operative or non-contactable. This puts the person who is actually trying to deal with the debts in a worse position than the partner that may have washed their hands of the debt completely.

Case study 31 – Gavin's story

Gavin and his ex-partner are joint debtors on a home loan. Gavin's ex-partner has left the property and Gavin has been living there ever since, paying all repayments as agreed informally between the two. Gavin was involved in a car accident where he was injured and subsequently unable to work. He fell behind in payments and the Bank refused to provide him financial hardship unless he obtained ex-partner's signature. She refused and wouldn't participate in the process. Gavin was three months in arrears when he called Credit and Debt Hotline, not knowing what to do.

Source: Financial Rights Legal Centre

Section 72 of the NCC clearly gives any debtor the right to apply for a variation of the contract on grounds of hardship, with or without their co-debtor. FOS Approach Part 4 – Financial Difficulty (see under the heading Loans held in Joint Names)[54] also supports the rights of joint debtors to apply for hardship assistance without the co-operation of the co-borrower. The Code should reflect this position also.

In a disturbing number of cases the ex-partner may be abusive (See the section on Family Violence below), and requiring the customer to enlist their co-operation could place the customer at significant risk. For this reason, it is preferable that the Code spells out that either co-borrower can approach the bank for hardship assistance without the other and the bank will undertake any necessary contact or information seeking from the other co-borrower.

Recommendation

31. Consumer Representatives recommend that the financial hardship clauses of the Code should be clarified so that either joint-debtor can seek hardship assistance in relation to the account and the bank can make a variation with one debtor.

15.3. Joint Accounts

There is considerable room for improvement in relation to the provisions regarding joint accounts. Clause 30.1 is nothing more than disclosure as it currently stands and does nothing further to protect joint account holders from potential loss.

Case study 32 – Sally's story

Sally and her partner had a joint account with an overdraft facility. When Sally and her partner split, they reduced the account to a nil balance. However, the Bank refused Sally's request to close the account on the basis that her ex-partner had not consented.

A year later, Sally's ex-partner drew on the overdraft. Subsequently, the Bank decided to withdraw the overdraft facility and pursue Sally and her ex-partner for the debt. Sally was liable for the debt but had no knowledge of the overdraft being used and did not derive a

[54] FOS, *The FOS Approach to Financial difficulty series: Dealing with common financial difficulty issues* https://www.fos.org.au/custom/files/docs/4_fos_approach_dealing_with_common_financial_diff_issues_final.pdf

benefit from the account.

Source: CCLSWA

Consumer Representatives submit that either account holder should have the capacity to limit their liability for any future drawings by notification to the bank.

Further, where funds are held in a joint account, either account holder should be able to notify the bank of a breakdown and involving parties to a joint savings account or a re-draw facility, the bank should suspend the account until the parties can agree on how to deal with the funds.

Recommendations

32. Consumer Representatives recommend clause 30 be amended to make it clear that either party to a joint account or joint credit facility can
    a. ask for no further credit to be extended under the account;
    b. ask for the account to be closed when there is no money currently outstanding;
    c. or request a temporary freeze on funds in a jointly held account.

15.4. Domestic & Family Violence

The current Code does not refer to domestic and family violence as an issue that needs to be considered by banks with respect to their interactions with customers; be it in relation to financial hardship applications, guarantees or joint accounts and liabilities or with respect to the safety of customers or security of personal information.

Consumer Representatives note that the ABA is currently seeking feedback on draft Industry Guidelines with respect to helping customers who may be experiencing family and domestic violence. According to the ABA, the draft Guideline seeks to build on existing financial hardship and financial abuse guidelines, and aims to raise the level of awareness across banks about financial abuse in the context of family violence, the impacts of financial abuse and to improve the policies and practices needed to help bank staff help their customers.

Consumer Representatives strongly support the development of this Industry Guideline however we strongly believe that the central elements of this Guideline must be included in the Code.

One of the more challenging issues that women subject to abuse face is dealing with banks and their jointly held loans. These difficulties have a significant impact upon economic and emotional lives.

Consumer Representatives direct the Review to the Women's Legal Service Victoria's (WLSV's) 2015 report titled *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*.[55] This comprehensive report provides extensive details on the key issues women in an abusive relationship face with respect to dealing with banks. They include:

- 25 per cent of the women provided counselling by WLSV's Stepping Stone project havw an accrued debt by an abusive partner against their wishes, without their knowledge, without understanding the loan contract or as a result of coercion.
- Joint finances become a tool of control when the perpetrator can no longer reach their victim in the form of physical or psychological abuse. Even though it may not be in the abuser's best interests to stop payment or default on the debt, they do so knowing that it will cause further pain for their victim.
- Women subject to abuse are unable to deal with a joint debt because the abuser or the bank withholds consent to removing her name, entering a hardship agreement or dividing the debt. They often have to assume the responsibility for the entire joint debt. This can lead to increased debt worsening the financial situation for the abused.
- When a debt is in a perpetrator's name only, women find themselves unable to obtain details about the mortgage for a family home, unable to prevent their partner from removing all the money from their account or to simply access funds to survive. Women in this situation are also unable to access financial hardship agreements to help meet mortgage repayments.
- Women are commonly subject to duress and threats of violence to induce them to enter into joint loan contracts or loan contracts in their sole name which give them no benefit, and are often not fully understood by them. In these cases, the loans process may be controlled by the perpetrator either with completion of online paperwork or by taking control of interviews with bank staff, not allowing the party who has the ultimate responsibility of the debt to query any part of the process. It is especially prevalent with culturally and linguistically diverse clients who have little or no English.

Consumer Representatives continue to see difficult and at times unsafe situations worsened through interaction with the banking system. Consumer Representatives recommend the reviewer read the case studies detailed in WLSV's report.

Case study 33 – Sharon's Story

Sharon is a young woman who was in a relationship with Bruce. Bruce could not afford

[55] Emma Smallwood, Stepping Stones: Legal Barriers to Economic Equality after Family Violence, Women's Legal Service Victoria September 2015 http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report(1).pdf

credit on his own. Sharon has some literacy issues which Bruce was aware of. Bruce had for a while been pressuring Sharon to become a co-borrower on a loan so he could refinance his personal debts. Sharon did not want to obtain a loan but felt compelled to do so. Bruce completed the loan application online and asked Sharon to attend a meeting with the financial service provider to sign the contracts. At the meeting the staff member did not enquire as to who would receive the benefit of the loan even though the staff member ought to have been on notice by the paperwork. Sharon signed the contracts and $20,000 was advanced to a joint account set up for the loan. Bruce then withdrew the money and left Sharon the next day Sharon could not afford the repayments which Bruce was not making. Care Inc. assisted Sharon take the matter to FOS to halt any impending legal action following a failed IDR process. Following numerous submissions by Care Inc., FOS made a recommendation that Sharon be relieved of all obligations under the loan and that her name be removed from it. Care Inc. also ensured that there was no adverse listing on Sharon's credit file which could have impacted on any future loans or contracts she may have wished to enter into.

Source: Care Inc

Case study 34 – Tegan's story

Tegan was in a violent and abusive relationship with her now ex-partner Jackson. In or around 2012 Jackson took Tegan, who lives in NSW, to a Bank branch in Queensland where Jackson knew someone who worked behind the counter. Jackson organised a loan for approximately $20,000 for himself in Tegan's name. Although the money was put into her account, the majority of the loan proceeds were used by him, with some remaining being used for mutual benefit, namely purchasing furniture and obtaining a rental. Tegan was led to believe that Jackson was the guarantor of the loans, and did not realise she was the sole debtor until debt recovery action commenced. Jackson has since been imprisoned for assaulting both Tegan and another person.

Source: Financial Rights Legal Centre

Case study 35 – Kelly's story

Kelly was a pensioner who, in 2004, had a credit card with a $9000 limit. In the next seven years Kelly increased her credit limit six times through unsolicited offers of credit limit

increases, until her credit card limit reached $35,000. During this time Kelly had been in a domestically violent relationship, and her then husband had spent up to the maximum limit on the credit card. The husband did not contribute towards repayments.

By November 2010 Kelly had separated from her husband but still had $32,000 in debt owing on the credit card. Kelly was using the entirety of her pension to meet her repayments and she required her children to help pay for her living costs. CCLSWA sought to negotiate with the bank in 2011 in order to establish a repayment plan that Kelly could afford, however the bank rejected the offer.

In February 2012 the debt was assigned to a debt collector who pursued Kelly for the outstanding debt. In October 2012 Kelly advised the CCLSWA that she was petitioning for bankruptcy, as she could not afford to repay the debt.

Source: CCLSWA

In addition to these case studies, Consumer Representatives also direct the reviewer to Lilly's story (see **Case Study 7** above).

Recommendations

33. Consumer Representatives recommend banks commit to

a. a re-draw facility should be suspended immediately on the request of any borrower for a joint account

b. financial hardship policies include family violence and economic abuse as a potential cause of financial hardship;
c. a range of flexible options available to assist customers experiencing family violence that includes:

i. moratoriums on repayments where the customer has little or no income;
ii. severing joint debts to enable the customer experiencing family violence to repay a smaller debt in an affordable repayment arrangement;
iii. a release from a debt when the customer is in long term financial hardship;
iv. not listing on the customer's credit report to ensure they can obtain rental property;

d. never asking a co-debtor, guarantor or account holder to seek information, documents or consent from their ex-partner; the bank should communicate

with the other customers independently;

e. inclusion of good referral pathways for legal advice, counselling and other support services.

15.5. Encouraging supported decision making

In the context of the above recommendations Consumer Representatives also wish to note the recommendation of the ALRC with respect to encouraging supported decision-making in its *Equality, Capacity and Disability in Commonwealth Laws* Report.[56] This report examined the application of the UN Convention on the Rights of Persons with Disabilities and in particular Article 12(5) which requires state parties to take all appropriate and effective measures to ensure the equal right of persons with disabilities to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit.

The ALRC noted the tension between these rights and the need to protect people from financial abuse and exploitation. While Consumer Representatives have argued for strong recognition of the issues around financial exploitation, family violence and emotional attachments above, we agree with the ALRC that consideration needs to be provided encouraging supported decision-making where appropriate. The principles are in effect not inconsistent in so far as it is key in all circumstances, whether considering co-borrowers, principal borrowers and guarantors, or people with limited capacity and their support persons, to ascertain to the extent that it is practical that all parties understand the obligations they are undertaking and are exercising their own will to the extent of their capacity.

Consumer Action Law Centre is on an advisory group to a Melbourne Social Equity Institute project, establishing equitable support models for individuals with mental and intellectual impairments to engage in consumer transactions. The primary objective of this research is to establish what supports people with mental and intellectual impairments need when participating in consumer transactions and which support models may assist them to engage more equitably in consumer transactions. The ultimate aim is to build expertise and tools for wider industry participation in supporting people with disabilities to be fully included as economic actors. This project may recommend practical support models that banks could adopt, including through the code of practice.

Recommendations

34. Consumer Representatives recommend that in line with the ALRC's

[56] ALRC, *Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)*, November 2014 https://www.alrc.gov.au/publications/equality-capacity-disability-report-124

recommendation 6-5 of its *Equality, Capacity and Disability in Commonwealth Laws* Report, the ABA should issue supported decision-making guidelines recognising that:

a. customers should be presumed to have the ability to make decisions about access to banking services;

b. customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;

c. customers are entitled to support in making and communicating decisions; and

d. banks should recognise supporters and respond to their requests, consistent with other legal duties. [57]

15.6. Guarantors and informed consent

Guarantors are an inherently vulnerable group and at high risk of exploitation. In our experience, the guarantors that contact Consumer Representatives, are generally older consumers, agreeing to accept personal liability and often putting their own assets and home at risk for family members, usually their own children.

Whether or not they are older or vulnerable, guarantors gain no benefit from the transaction, and no checks are performed to ensure they can afford the loan if the debtor cannot. Furthermore, guarantors are often not in a position to make a fully informed decision free of undue influence by borrower or bank representative.

To better achieve fully informed consent to enter into a proposed guarantee, guarantors need access to additional information that they are currently provided under the Code that is, access to documents and a prompt to access legal and financial advice. The additional information that they should have access to includes information about the borrower's financial position and any assessment that the loan is not unsuitable.

Consequently Consumer Representatives believe that the clause 31.4 (d) should include the following additional two commitments:

31.4. We will do the following things before we take a Guarantee from you

(d) provide you with a copy of

…

vi. any financial information about the debtor obtained by us

…

[57] https://www.alrc.gov.au/publications/banking-services

v. a copy of any assessment that the loan is not unsuitable.

Recommendation

35. Consumer Representatives recommend that clause 31.4 (d) should include the following additional two commitments:

31.4. We will do the following things before we take a Guarantee from you

(d) provide you with a copy of

…
vi. any financial information about the debtor obtained by us
…
v. a copy of any assessment that the loan is not unsuitable.

15.6. Guarantors and Electronic disclosure

Problems with guarantees often involve the guarantor having little to no understanding of their role in the process. This can be the result of many factors, including:

a. debtors misleading or concealing the true nature of the transaction or extent of the liability;

b. elder abuse, particularly if the guarantor is dependent on the debtor or has medical problems;

c. in many cases, the debtor does all the organisation before the guarantor is involved to sign the documents, meaning the guarantor may have little to no opportunity to ask any questions or understand what is involved; and

d. the guarantor may sign the guarantee in the presence of the debtor, raising the risk of undue influence or pressure.

Disclosure by electronic of essential documents including the guarantee contract and the underlying credit contract (and any extensions to these) heightens the risk for guarantors.

Disclosure by electronic means, particularly email, may not properly convey the seriousness or risk of the transaction the guarantor is entering. Contracts relating to credit contracts, guarantees and mortgages are already lengthy and difficult for many consumers to understand, even when handed to them personally on paper. There is usually a bundle of documents involved, meaning vital documents may be lost in attachments and skipped over, without the guarantor being aware of this. The fact a guarantor will later sign one of the attached documents does not mean there was effective disclosure of all the requisite information pertaining to their liability and risk.

Posting physical documents to the guarantor's home address is a better method to ensure receipt by the guarantor directly. The security and ownership of email accounts is less certain than a locked letterbox at a residential address. Debtors could set up email addresses for a guarantor and ask their guarantor to consent to electronic correspondence – and in a family context where a guarantor trusts the debtor, it would not at all be unusual for the guarantor to agree. This opens up the risk of whether all relevant documents are fully provided to the guarantor, and also other issues such as access and security of the account and tampering with documents and email.

Consumer Representatives have heard of insurance companies refusing to insure a consumer on the basis that they could not provide an email address. While we have not heard of banks taking a similar approach we wish to ensure that this does not occur.

Recommendation

36. Consumer Representatives recommend amending the Code so that banks will commit to providing specific protection for guarantors (as a particularly vulnerable group) that requires disclosure person to person (or in the lesser alternative, by post).

15.7. Guarantors and external dispute resolution

Guarantors are largely excluded from accessing the free external dispute resolution scheme due to the monetary limits. The maximum value per claim under a dispute with FOS that can be considered is $500,000 with a maximum compensation cap that may be awarded of $309,000 per claim for most disputes. FOS however does have a provision for considering disputes exceeding $500,000 if all parties and FOS agree.[58] To better promote greater access to EDR, Consumer Representatives believe that the Code should commit banks to agreeing to FOS hearing a dispute involving a guarantor when the matter falls out of FOS's jurisdiction due to it exceeding the monetary limits set.

Recommendation

37. Consumer Representatives recommend the Code should commit banks to agreeing to FOS hearing a dispute involving a guarantor when the matter falls out of FOS's jurisdiction due to it exceeding the monetary limits set.

[58] FOS, How FOS applies the monetary limit and compensation caps to claims https://www.fos.org.au/the-circular-4-home/monetary-limit-caps/

15.8. Guarantors and enforcement

Consumer Representatives believe that when a default occurs on an asset held by a debtor under a guarantee then any recovery action that takes place should be conducted against the debtor and their asset in the primary instance. Only after a debtors asset has been sold should the bank pursue a guarantor and their secured asset to cover the difference involved.

Consumer Representatives note that the protections afforded under clause 31.14 relating to restrictions in enforcing judgment against a guarantor do not apply where the principal debtor is a small business. We believe that this should be rescinded and the protections be extended to where the debtor is a small business.

Recommendations

38. Consumer Representatives recommend the Code commit banks to only pursuing a guarantor after recovery action against the debtor's asset.
39. Consumer Representatives recommend clause 31.14 relating to restrictions in enforcing judgment against a guarantor to be extended to where the debtor is a small business

16. Broadening the Concept of Special Needs (Term of Ref. (r))

Under clauses 7 and 8, the Code includes a recognition of the needs of older persons, customers with disabilities and the unique needs of members of remote Indigenous communities. While this recognition should be applauded, Consumer Representatives believe that the Code's understanding of vulnerability and the types of people that are financially excluded is limited and should be broadened.

Financial inclusion in reality means inclusive practices that encompass people in all financial circumstances. However, there is still value in identifying particular groups of people who experience financial exclusion, enabling organisations to target groups who are typically harder to engage. It is also worth noting that consumer's vulnerability and level of financial inclusion can fluctuate. Factors and circumstances that influence financial inclusion can include:

- *Work status:* Research shows that people who are looking for work, working part-time, unemployed students or undertake home duties make up a substantial slice of the financial exclusion landscape. Yet, nearly a quarter (22 per cent) of those who are financial excluded are employed full-time and can be classified as the 'working poor'. Furthermore, this highlights a gap in the market for more appropriate products for full-

time employed people who may not be eligible for current mainstream financial products due to low income or other factors.

- *Age:* The Code mentions older people but do not refer to younger people, yet younger people (18-24) make up 36 per cent of the financially excluded population in Australia.
- *Gender:* Financial exclusion can have difference that relate to gender. For example, women are increasingly seeking payday loans,[59] with a 110 per cent rise since 2005, with this rise greatest for women in family groups. This indicates an increasing level of financial exclusion for many women. Additionally, women can also experience financial abuse.
- *Geographic distance:* Remote regions are not the only regions to experience financial exclusion due to location. Regional and rural areas can also lack access to appropriate financial services due to distance.
- *Language:* Language barriers to financial inclusion in Australia remain significant. Recent research into the use of pay day loans shows a significant growth in first or second generation migrants to Australia with English as a second language.[60]
- *Indigenous status:* It has long been that on all major indicators Aboriginal and Torres Strait Islander people are the most disadvantaged section of the Australian population with respect to health, housing, education, employment and contact with the criminal justice system. Aboriginal and Torres Strait Islander people face a raft of cross-cultural, linguistic and social issues that most other communities in Australia do not experience. While the Code currently acknowledges the needs of "customers in remote indigenous communities" – a need that is acute - there is scope to extend this to all indigenous communities across Australia.

Recommendations

40. Consumer Representatives recommend that clause 7 of the Code be expanded to incorporate a broader set of customers with special needs taking into account a range of factors and circumstances including work status, age, gender, geographic distance, language and indigenous status.
41. Consumer Representatives recommend broadening clause 8 by removing the word "remote."

[59] Digital Financial Analysis (2016), *Women and Payday Lending*, http://goodshepherdmicrofinance.org.au/sites/default/files/Women%20and%20Payday%20FINAL.pdf
[60] Digital Financial Analysis (2015), *The Stressed Finance Landscape Data Analysis*,http://goodshepherdmicrofinance.org.au/sites/default/files/The%20Stressed%20Financial%20Landscape%20Data%20Analysis%20-%20DFA.pdf

17. Improving Financial Inclusion (Term of Ref. (r))

17.1 Financial Inclusion

Consumer Representatives understand financial inclusion to be a combination of access, affordability, convenience, dignity and consumer protection. In this context, access to financial services is does not equate to financial inclusion. The promotion of financial inclusion should enable people to actively use financial services to better manage their lives.

Good Shepherd Microfinance, through its work developing the Financial Inclusion Action Plan program, has gathered best practice learnings from financial inclusion programs across the globe. From this, it is clear that inclusive practices should be embedded throughout the entire organisation, promoting an inclusive ethos to all consumers, not just those considered vulnerable.

Improving financial inclusion means taking real action that improves equality, inclusive growth and resilient communities. To promote financial inclusion, the Code should incorporate the following four action areas, and the particular considerations relevant to each one:

Products and services

- Meet customer needs, and be appropriate to the situation of the customer.
- Ensure that ongoing use is affordable.
- Be accessible – including online, on the phone, in-person & mobile banking.
- Build awareness of products, as well as the most effective way to use them.
- Ensure channels of communication are open, so that clients can find out more information, are given correct information and feel like they can speak to someone if needed.

Capability, attitudes and behaviours

- The environment of the institution is positive and inclusive, making all customers feel confident, comfortable and welcome.
- Provide additional support if the customer needs it.
- Understand that previous negative experiences with banks can affect trust and future engagement.
- Ensure consumers understand their obligations, rights and ability to choose.
- Recognise the role of banks in proactively providing financial information, for example with regard the implications of comprehensive credit reporting.

Culture, awareness and understanding

- The customer may have been excluded in the past based on their cultural or ethnic background.

- Cultural and ethnic background can also affect the customer's relationship to financial matters.
- Language may be a barrier for the customer.
- Experience with financial products may be new.
- Customers may have limited knowledge of the bank and how they can be assisted.

Economic participation and status

- Marginalisation and stigma may be experienced due to gender, employment, age and family situation.
- Financial abuse can affect the economic participation of customers.
- Commitment to proactively support people in financial hardship.
- Enhancing economic participation via enhancing financial capability.

17.2. Bank account of last resort

Consumer Representatives have worked with a number of vulnerable consumers who are unable to obtain a bank account because the available banks in their area refuse applications to open an account or close already existing accounts. In our experience these difficulties are faced disproportionately by Indigenous Australians, regional and remote Australians faced with limited banking choices and aged Australians. We are also aware of at least one case where a consumer's disability has led to a bank refusing to provide a bank account.[61]

The key reason banks put forward to prevent consumers from obtaining a bank account is "behavioural problems" a subjective phrase open to interpretation. Profitability is another reason provided, that is, it is not in the banks commercial interest to open an account for somebody with little funds, particularly if they are rural, regional or remote.

Many banks also refuse to open accounts when a consumer can't meet the 100 point identification check. This particularly impacts regional and remote Indigenous Australians who are unable to obtain identification for a variety of reasons: the name they commonly use is different to that which appears on their birth certificate; names may have been poorly recorded or spelt incorrectly on their birth certificate; others use their traditional name, their English name and a commonly used nickname in different circumstances. This leads to many people unable to obtain drivers licences or any other form of identification used to obtain a bank account. These issues described here predominantly effect older Indigenous Australians. We note that the Code acknowledges this issue at clause 8 (c).

Without access to a bank account consumers are prevented from accessing basic financial tools, taken for granted by most other consumers. Consumers are unable to save, unable to

[61] Miki Perkins, Customer can't walk or talk, but Westpac bans him as http://www.theage.com.au/victoria/customer-cant-walk-or-talk-but-westpac-bans-him-as-staff-fear-abuse-20160810-gqpalz.html

access funds for groceries, consumer goods and services and unable to function in society. The only option for many people is to fall under income management and receive a BasicsCard.

Case study 36 – Peter's story

Peter is a 46 year old Aboriginal man living in regional Western Australia. He is homeless and regularly travels between towns in WA. Peter's case worker contacted the Financial Rights Aboriginal Advice Service after Peter's was refused a bank account by all the banks in his local area. The Banks in his area believed Peter had "behavioural issues." Peter has substance abuse issues.

Without a bank account, Peter is unable to access his finances. Peter is forced to go to Centrelink on a daily basis to obtain a debit card of $40. He has not got full access to his Centrelink payments. The situation is akin to a guardianship order without a court order in place to do so.

Peter remains in limbo. He is unable to purchase groceries and unable to save to work his way out of homelessness.

Source: Financial Rights Legal Centre

It is our view that the ABA should, via the Code, establish a bank account of last resort to ensure that every Australian has the right to access what is a basic, fundamental financial tool required to engage with Australian society.

Recommendation

42. Consumer Representatives recommend that the ABA commit to establishing, via the Code a bank account of last resort regime.

18. Promoting the Existence of the Code (Term of Ref. (d)(ix))

Consumer Representatives assert that much like Legal Aid NSW, very few customers that we engage with are aware of their rights under the Code and first become aware of them in speaking with our services. While Consumer Representatives recognise the difficulties and complexities involved with raising financial literacy and engaging with consumers, we feel there is more that the ABA and individual banks can do.

Under Clause 10 the ABA will "promote this Code" (although it does not spell out how this could take place, nor how such promotion is measured) and make public which banks subscribe to the Code and how consumers can get a copy of the Code.

Clause 11 of the Code commits banks to displaying copies of the Code in branches, making it available on request, publishing this Code on their website and sending it to a customer by mail or by electronic communication on request.

With respect to publishing of the Code on subscriber websites, Consumer Representatives note that they can be very difficult to find and in unintuitive spots. For example, the Code can be found on the ANZ website by going to "about us" and clicking on corporate sustainability which obtusely is about "about ensuring our [ANZ's] business is managed to take account of social, environmental and economic risks and opportunities."[62] From there the user must click on the "customer's link." On this page, amongst other documents, is the Code. (We only found this link by searching for the document on google and working backwards.)

Finding the Code on the Commonwealth Bank website is not much easier at the bottom of the page regarding customer commitment. The Code is found under Corporate Governance on the NAB page. We were unable to find the Code at all on the Westpac site.

Consumer Representatives believe that more thought must be put into where the Code can be accessed on a banks website. While a bank may consider the Code as part of its corporate obligations, this is not the way a customer looking for assistance on their rights would conceive of where to find the document. It is one thing to state in the Code that a bank will place it on a website, it's another to actually make that Code findable and accessible.

Consumer Representatives recommend strengthening this to ensure that the Code will be displayed prominently on the front page of the subscriber's website.

Further a copy of the Code should be provided to every new customer of a bank. It is upon first joining a bank or using a bank's service that a customer is likely to either read or save a copy of the Code to use at a future date. Consumer Representative's believe that subscribers should commit to providing a copy of the Code with every new account or service provided.

Consumer Representatives believe that Code subscribers should commit to promoting the Code themselves through their electronic and mail communication with their customers, social media accounts and other appropriate means.

Finally Consumer Representatives recommend that the ABA undertake a significant advertising campaign to promote the Code.

Recommendations

43. Consumer Representatives recommend strengthening the promotion of the Code

[62] http://www.anz.com/about-us/corporate-sustainability/

by:

a. amending Clause 11(c) to ensure that the Code will be displayed prominently on the front page of the subscriber's website;

b. adding a new commitment to Clause 11 ensuring a copy of the Code will be provided to every new customer of a banking service;

c. expanding Clause 10(a) of the Code to include subscribers promoting the Code themselves; and

d. committing the ABA to undertake a significant advertising campaign to promote the Code.

19. Code Compliance and Monitoring Committee (Term of Ref (e))

The CCMC is key to the effectiveness of the Code in protecting the interests of bank customers. The CCMC promotes compliance with the Code in the following three ways

- Considering individual complaints of a breach of the code
- Conducting own motion inquiries
- Monitoring compliance with the code, currently mainly via the Annual Compliance Survey where subscribing banks are required to report to the CCMC on self identified breaches of the code

Each of these has potential to achieve better outcomes.

19.1. Identification of potential Code Breaches

As noted above, there is little incentive for individuals to make complaints. However complaints about individual breaches are a key source of intelligence for the CCMC and can or should prompt it to explore whether there is any indication that there is a wider problem.

While individual customers have little incentive to advise the CCMC of circumstances which may be a breach of the Code, various other stakeholders do, including consumer and small business organisations. Those organisations are likely to put more effort into identifying possible Code breaches where

a. They are aware of the opportunity to do so
b. It is very easy to do so
c. They can see that some desired outcome (ie better consumer protection) is likely to come from doing so

The CCMC should develop new and efficient ways to get input from financial counsellors, community legal centres, legal aid agencies and others who advise or represent consumers about potential Code breaches, whether theses take the form of formal complaints or simply intelligence that they are seeing what appear to be breaches of particular clauses. In either case the CCMC can consider investigating of its own motion.

Further the CCMC should

- Better promote the Code to advocates
- Report on outcomes of code inquiries (ie what changes in bank behaviour have flowed form a complaint or OMI
- Have the power to accept super complaints (see below)

19.2. Promoting the CCMC

Many Consumer Representatives have provided information to CCMC own motion inquiries via surveys, and some have reported concerns. Others are engaged in the Stakeholder Liaison Group established by the CCMC.

Consumer Representatives note that despite this awareness of the CCMC amongst consumers and advocates is minimal.

Consumer Representatives believe that the visibility of the Code Compliance and Monitoring Committee (CCMC) needs to be improved. Consumer Representatives support Legal Aid NSW's suggestion of the publication of case studies on consumer complaints and their outcomes on the CCMC website.

Recommendations

44. Consumer Representatives recommend that the CCMC be resourced appropriately to improve its visibility for consumers and consumer representatives.

45. Consumer Representatives support the publication of case studies on consumer complaints and their outcomes on the CCMC website

19.3. Relationship between the Financial Ombudsman Service and the CCMC

The CCMC is empowered under s. 36:

> *to investigate, and to make a determination on, any allegation from any person, including the FOS, that we have breached this Code but the CCMC will not resolve, or make any determination on, any other matter;*

Consumer Representatives however believe that the relationship between FOS and the CCMC is unclear. For example it is not clear how many referrals were in fact provided by FOS (or the ABA for that matter) to the CCMC to be investigated, if any at all. Greater transparency is required with respect to the information sharing between FOS and the CCMC and how Code breaches are dealt with and further investigations are decided upon. Consumer Representatives note that the CCMC's 2016-17 Work Plan includes at 1.3 the development of a Memorandum of Understanding (**MOU**) with FOS to facilitate Code breach referrals from FOS to the CCMC, with this MOU to be operational by 30 June 2017. Consumer Representatives strongly support this development and would expect as a part of the process, to be consulted.

Consumer Representatives also note that it is not clear whether there is any benefit at all at lodging simultaneous complaints with the CCMC, FOS or in court (see further discussion below), as raised in Legal Aid NSW's submission to this Review.

Recommendations

46. Consumer Representatives support the development of a MOU with FOS to facilitate breach referrals from FOS to the CCMC.
47. Consumer Representatives recommend that the CCMC consult with consumer stakeholders on this process, that the MOU be publicly available, and that the CCMC report on the numbers and type of referrals it receives from FOS, the ABA and other sources.

19.4. Concurrent Fora

Where an allegation is being considered by another forum, such as the FOS or a court, a CCMC investigation is placed on hold until that other forum has finished its review.

Clause 6.2(a)(ii) of the CMCC Mandate states the CCMC must not consider such an allegation until the other forum has determined or declined to determine (for whatever reason), whether a breach of the Code has occurred. Clauses 6.2(a)(ii) and (iii) of the Mandate state that where an allegation is concurrently before another forum (as defined in the Mandate), and that forum determines a breach of the Code has, or has not occurred, the CCMC must adopt those findings. The CCMC's Guidance Note 5 provides details on how the CCMC is to act in these situations.[63]

Consumer Representatives believe that this prohibition on considering allegations is too strict. Where there are allegations of systemic breaches of the Code, particularly where exceptional, serious or multiple similar allegations are involved, the CCMC should be empowered to

[63] http://www.ccmc.org.au/cms/wp-content/uploads/2015/09/GN5-Concurrent-Forums.pdf

investigate. There is no clear reason or justification that the CCMC should sublimate its own powers to another forum or fora.

Recommendation

48. Consumer Representatives recommend that the prohibition on the CCMC investigating an alleged breach of the Code whilst another forum is deciding a dispute should be rescinded. The starting presumption should be that the CCMC will investigate the alleged Code breach. A protocol should be developed to identify test cases that may mean the CCMC should not investigate as this would involve a duplication of an investigation into a systemic issue.

19.5. Own Motion Inquiries

The Code states at clause 36(d) that subscribers agree

> *"to ensure that the CCMC has sufficient resources and funding to carry out its functions satisfactorily and efficiently."*

This resourcing applies to all CCMC functions including investigations, monitoring compliance and own motion inquiries into compliance with the Code.

Consumer Representatives note that the CCMC have conducted three own motion enquiries since 2013:

- November 2015, Financial difficulty inquiry
- October 2013 Chargebacks Follow-Up Inquiry
- June 2013 Guarantees Inquiry

We understand that another Own Motion Inquiry is currently being conducted on Provision of Credit, clause 27 of the Code.

It is Consumer Representatives' view that the CCMC should be resourced to be able to conduct more than one own motion inquiry at the same time.

Recommendations

49. Consumer Representatives recommend that the CCMC should be better resourced to conduct own motion inquiries

50. The CCMC should be able to conduct more than one own motion inquiry at a time as needed

19.6. Sanctions

The CCMC is empowered to investigate and determine any allegation from any person that a bank has breached the Code. The CCMC can also conduct its own self-initiated investigations. In so doing it considers:

- whether a breach has occurred and its extent;
- the broader and potential impacts of a breach;
- the effect of non compliance on the bank and its customers;
- the root cause of the breach and whether it may be systemic or significant; and
- any remedial action proposed or taken by the bank.

With respect to sanctions arising from a breach (outside of any remedial action taken), the powers of the CCMC are limited solely to publicly naming a Code Subscriber. Clause 36(j) of the Code states that the subscribers

> *"empower the CCMC to name us on the CCMC's website, in the next CCMC annual report, or both, in connection with a breach of this Code, where it can be shown that we have:*
>
> *i. been guilty of serious or systemic non-compliance;*
> *ii. ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time;*
> *iii. breached an undertaking given to the CCMC; or*
> *iv. not taken steps to prevent a breach reoccurring after having been warned that we might be named"*

Consumer Representatives note that the public naming of a subscriber in breach of the Code has been used sparingly. The first (and seemingly only) time a subscriber was named was when Westpac was found to be in serious breach of Clause 28.4(d) and 28.5 of the 2003 Code in 2008. All other breaches listed in the CCMC's Annual Reports (serious or otherwise) leave banks unnamed.

The 2008 Review of the Code of Banking Practice Issues paper also noted that

> *"neither the constitution nor the Code consider what action the CCMC may take if a bank, having been named, refuses to remediate the breach and continues to conduct its business in serious non compliance with the Code. The Committee suggested that the potential outcome of these is that banks can pick and choose which parts of the Code they wish to accept while choosing to be non compliant in respect of some others."*[64]

The Issues Paper went on to recommend that

[64] Review of the Code of Banking Practice: Issues Paper, May 2008, http://www.reviewbankcode2.com.au/IssuesPaperReviewofCodeofBankingPracticeMay2008.html

"consideration be given to broadening the range of sanctions available to the CCMC such as a warning, requirement to rectify of an issue within a specified time and conduct of a compliance audit, so that any sanctions that are imposed are commensurate with the extent and severity of the breach."[65]

This recommendation was not taken up by the ABA.

As a comparison, under the General Insurance Code of Practice at clause 13.15, the Code Governance Committee is empowered to impose one or more of the following sanctions:

- *A requirement that particular rectification steps be taken within a specified timeframe*
- *A requirement that a compliance audit be undertaken*
- *Corrective advertising and/or*
- *Publication of the insurance provider's non compliance*

Consumer Representatives believe that given the evidence of systemic non-compliance with the Code detailed in this submission, the ABA needs to expand the Code Compliance sanction toolbox to improve the effectiveness of the Code and ensure greater compliance. Consumer Representatives fundamentally want to see systemic issues investigated, addressed and fixed and the CCMC needs to be appropriately empowered to ensure that this happens.

ASIC Regulatory Guide 183[66] contemplates a range of potential sanctions that could be applied for breaches of a Code at 183.70:

It is important that subscribers are also subject to a range of sanctions for code breaches that go beyond providing compensation or rectification to individual consumers. These sanctions might include:

a) formal warnings;
b) public naming of the non-complying organisations;
c) corrective advertising orders;
d) fines;
e) suspension or expulsion from the industry association; and/or
f) suspension or termination of subscription to the code.

Note: Suspension or expulsion may raise competition issues and many need to be authorised by the ACCC.

Under Code Effectiveness, we have argued the case for the introduction of a structure of fines. There are a number of provisions that are very unlikely to be tested in court because of the nature of the obligation. For example the obligation to cancel a direct debit promptly upon a customer's instructions is unlikely to result in any form of litigation but causes enormous inconvenience and sometimes expense. This clause has been in the Code for many years and

[65] Ibid
[66] ASIC, Regulatory Guide 183 - Approval of financial services sector codes of conduct, March 2013 http://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf

yet complaints about non-compliance persist. There are other clauses such as the provision of statements, account suitability and debt collection that are similarly unlikely to form the basis of litigation yet have a significant impact upon consumers.

Where there has been a clear systemic breach of the Code the CCMC should be empowered to impose fines across all affected consumers. Where the consumer has suffered a financial loss as a result of a breach, it is acknowledged that they can seek compensation through external dispute resolution. However a structure of fines for certain breaches of the Code should be established and administered to incentivise compliance with the Code..

Recommendations

51. Consumer Representatives recommend that the Code Compliance sanction toolbox be expanded to include the following:
    a. a requirement that particular rectification steps be taken within a specified timeframe;
    b. a requirement that a compliance audit be undertaken;
    c. corrective advertising;
    d. publication of the Code subscriber's non compliance;
    e. a structure of fines;
    f. suspension or expulsion from the industry association; and/or
    g. suspension or termination of subscription to the Code

19.7. Code Compliance Officers

Consumer Representatives note that banks should consider including in the Code a commitment to appointing a Code Compliance Officer. This would be in addition to the role of Consumer Advocate . While such a position is potentially implied in the banks commitment to "annually lodge with the CCMC … an annual compliance statement on our compliance with this Code,"[67] Consumer Representatives believe that there is value in ensuring that this role is identified, highlighted and committed to, to ensure that there is a direct point of contact for the CCMC to engage on compliance issues with subscriber banks.

Consumer Representatives note that such a clause is under the UK Lending Code, 2011:

[67] Clause 36(f)

"267. Subscribers should appoint a Code Compliance Officer who is likely to be the contact person for co-ordinating the annual statement of compliance, compliance visits and other contact with the Lending Standards Board."[68]

Recommendation

52. Consumer Representatives recommend adding a commitment that each bank appoint a Code Compliance Officer to liaise with the CCMC and consumers where appropriate.

19.8. Super-complaints

Consumer Representatives note that in the UK the *Financial Services Act 2012 (UK)* introduced a new mechanism to enable designated consumer bodies to make a super complaint to the Financial Conduct Authority (UK) (the UK's version of ASIC) about features of financial services that are or may be significantly damaging the interests of consumer.[69]

The process is "intended to provide consumer bodies with a mechanism to raise issues with [the Financial Conduct Authority (UK)] about features of the market that may be affecting consumer interests."

The Financial Conduct Authority (UK) is required to respond within 90 days of a complaint being made, with UK Treasury given the responsibility for designating a consumer body under the regime to make a complaint, provided it represents the interests of consumers of any description, including representatives of small and medium-sized enterprises. Examples of those empowered include Which? (the UK equivalent of CHOICE), and Citizens Advice.

A super-complaint needs to set out the reasons why, in its view, a market for goods or services has a feature that appears to be significantly harming the interests of consumers and should therefore be investigated. The complaint is also supported, wherever possible, by documented facts and evidence.

In Australia the super-complaints system has been piloted in NSW by the NSW Fair Trading with CHOICE lodging two super-complaints on free range egg claims and electricity switching sites.[70]

[68] BBA, UKCAThe Lending Code, March 2011, https://www.lendingstandardsboard.org.uk/wp-content/uploads/2016/06/The-Lending-Code-Mar-2011-revised-2015-1.pdf
[69] Financial Conduct Authority, *Guidance for designated Consumer Bodies on making a Super-Complaint under s234C*, June 2013, http://www.fca.org.uk/static/fca/documents/fg13-01-designated-consumer-bodies.pdf
[70] http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_compliance_role/Our_compliance_priorities/Super_complaints.page

Currently the CCMC is empowered to investigate allegations from "any person" including the FOS that a subscriber has breached the Code as well as referrals from the ABA and own motion inquiries: clause 36(b). We believe there continue to be systemic issues that the CCMC either have not or do not want to investigate. Consumer Representatives believe that there is scope for consideration of a super-complaints system to be recognised within the Code by explicitly including empowering Consumer Representatives to make super- complaints on systemic issues damaging the interests of consumers under Clause 36.

If this is not taken up by the ABA Consumer Representatives believe it would be worth pursuing the introduction of a super-complaints system via ASIC or another appropriate regulator.

Recommendation

53. Consumer Representatives recommend amending clause 36 to empower Consumer Representatives to make super- complaints on systemic issues damaging the interests of consumers.

19.9. Monitoring and transparency

The CCMC collects a lot of useful data as part of the Annual Compliance Statement (**ACS**).

There are problems with the comparability of that data. In particular banks do not use the same definition of complaint. It is essential for transparency and comparability that this problem is solved as soon as possible. Above we have recommended a single definition of complaint/dispute and we reiterate its importance.

There is potential for greater value to be obtained from the ACS data. The CCMC should explore ways for the data to be made publically available in de-identified form so that researchers and advocates could explore it for trends and insights.

Recommendation

54. Consumer Representatives recommend that CCMC should explore ways for the data to be made publically available in de-identified form so that researchers and advocates could explore it for trends and insight.

Acronyms

ABA	Australian Bank's Association
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACS	Annual Compliance Statement
ADI	Authorised Deposit-Taking Institution
ALRC	Australian Law Reform Commission
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATM	Automatic Teller Machine
CALD	Culturally and Linguistically Diverse
CCI	Consumer Credit Insurance
CCMC	Code Compliance and Monitoring Committee
CIO	Credit and Investment Ombudsman
CLCAWA	Community Legal Centres Association Western Australia
COSL	Credit Ombudsman Service Limited
DSP	Disability Support Pension
EDR	External Dispute Resolution
FCA	Financial Counselling Australia
FOS	The Financial Ombudsman Service
GAP	Guaranteed Auto Protection Insurance
IDR	Internal Dispute Resolution
ISO	International Organisation for Standardisation
LMI	Lenders Mortgage Insurance
LVR	Loan to Valuation Ration
MOU	Memorandum of Understanding
NCC	National Credit Code
NCCP	*National Consumer Credit Protection Act 2009 (Cth)*
PDS	Product Disclosure Statement
WSLV	Women's Legal Service Victoria


care inc.


choice
CHOICE.COM.AU


Consumer Credit
Law Centre SA
Legal Advice and Services
Credit • Debt • Financial Counselling


cclswa


Community Legal Centres
Association (WA) Inc


Community
Legal Centres
Queensland


consumer
action
law centre


CONSUMERS'
FEDERATION
OF AUSTRALIA
Developing and promoting
the consumer interest


financial
counselling
australia


Financial Rights
LEGAL CENTRE


NACLC
National Association of
Community
Legal Centres


Good Shepherd
Microfinance


National Seniors
Australia


THE
SALVATION
ARMY


SACOSS
South Australian Council
of Social Service


UNITING
COMMUNITIES
Care. Compassion. Commitment.


WEstjustice


women's legal
service victoria