

6 August 2021

Mr Mike Callaghan
Code Reviewer
2021 Code Review
Australian Banking Association
c/o PO Box H218
Australia Square NSW 1215

via email: submissions@bankingcodereview.com.au

Dear Mr Callaghan

2021 Independent Review of Banking Code of Practice

Thank you for the opportunity to comment on the 2021 Banking Code Review. Our Office supports fair and transparent banking practice across all services for small business customers. Small business often lack sophisticated legal and financial advice placing them in often a more vulnerable position compared to medium and large businesses. To improve the code framework and encourage a more balanced relationship between banks and their small business customers we suggest the following:

1. Explicitly commit to discharging registrations on the Personal Property Securities Register (PPSR) after the repayment of a loan.

We suggest under Chapter 36 of the Banking Code (the Code) the following clause be included. *“Within 5 business days of closing your account, we will discharge any and all registrations we have taken over you as a grantor, both as an individual and organisation, from the Personal Property Securities Register.”*

Our office notes that under the PPSR Act (the Act) a secured party is required to remove their registration once an obligation has been fulfilled. However, we are aware that some banks choose not to undertake this process, partly in the expectation that the borrower will return to them when seeking further finance, and the Act allows a person to make a registration where they believe they are, or will become, a secured party. Removing PPSR registrations should be standard account closure practice and included in the code of conduct as it comprises of a lenders discharging obligations. Obsolete registrations negatively impact a small business by creating delays in obtaining finance or stalling the sale of the business or its assets.

2. Inclusive and accessible services

We suggest Chapter 20 subparagraph 74 be amended to *‘If we decide not to approve a loan to a small business we will clearly advise the small business of the reasons why unless it would contravene the law to do so.’*

Small businesses have unique needs and pressures. We are aware of small businesses in specific industries being denied banking services (debanking). Subparagraph 74 currently uses the language ‘general reason’ this creates ambiguity for small businesses and prevents the small

business addressing issues preventing them from securing loans, often resulting in the further restriction of services.

We note that many 'debanked' small businesses receive impersonal letters denying or closing the banking service, where they had a respectful relationship with the bank previously. We suggest that bank staff dealing with 'debanked' businesses be trained to communicate sensitively, respectfully and compassionately with small business customers who have been 'debanked'. The customers should also be offered time to discuss their specific business with the bank.

3. Consistency in the definition of a small business credit facility.

Inconsistency in definitions for a 'small business' credit facility within similar contexts is confusing for small businesses. We recommend the Code adopt the same credit facility size as covered for small business under AFCA's cap of \$5 million. This is consistent with the recommendation made during the Pottinger Review of the definition of Small Business under the Code of Banking Practice.

We note the timeline for implementation for changes to the Code, including the application of the higher credit limit to the definition of small business, would not come into effect until 2023.¹ Given the ABA has endorsed the Pottinger recommendation to increase the credit limit used in the definition of small business from \$3 million to \$5 million, we encourage the review to consider enacting this change as a matter of priority. It is important to extend the existing small business protections in the Code to as many small businesses as possible.

4. Clarity around the Small Business Chapter

The chapter dedicated to small business in its current form creates disconnect between how the other chapters apply to small business. Small business have unique needs for banking services and community expectations from a small business perspective may not always align with individual consumers, around matters such as chargebacks and surcharges, amongst others. We recommend the Code specifically reference when the alternative chapters within the Code apply to small business and ensure that the Code is not grouping the needs of individuals and small business collectively where they may not align.

5. Code Compliance

We suggest Chapter 3 be amended to include the subparagraph '*Where banks rely on automated systems for compliance with the code such as credit decision engines, credit scorecards, IDR case management systems, there should be bi-annual testing to ensure breaches are not occurring.*'

Small business lending is often more complex than consumer lending. Banks relying on automated systems for compliance may fail to notice systemic issues affecting their small business customers. It is prudent for those relying on these systems to implement a regular testing regime to ensure they continue to uphold the Code.

6. Proposed changes to responsible lending obligations

The Code should provide prescriptive guidance to bank staff to apply additional due diligence in excluding their small business customers from consumer lending obligations in Part 6.

Small businesses need to be able to access timely credit. Our office is concerned with the ambiguity regarding the application of consumer lending laws to small business lending. Small business require finance to grow and availability of finance is often difficult due to substantial collateral requirements. This can encourage those small businesses to seek out alternative

¹ <https://www.ausbanking.org.au/priorities/small-business-definition-to-be-expanded/>

financiers often resulting in higher interest rates and risks of dealing with lenders who do not have the robust processes afforded by Code and AFCA subscription.

7. Resolving complaints and disputes

We suggest the Customer Advocate Guiding Principles be clearly displayed on the banks website where they refer to the customer advocate. This will allow small businesses to better understand the structure and separation of the advocate from the bank and increase uptake of the service.

8. Awareness of the Code

In chapter 2, subparagraph 5 we suggest the Code clearly states *'the Banking Code will be provided to each customer in conjunction with any product disclosure documents when offering a banking service.'*

There continue to be a number of small businesses in the community unaware of their rights under the Code. The promotion of the Code could be improved by including the Code in the documents already prepared for customers who engage with one of the bank's services, thereby utilising existing points of contact.

9. Commitment to transparent timelines and clear communication

The Code could improve communication for all customers by amending Chapter 9 to include a clause to *'ensure all communication via post is also sent electronically, by default'*.

Clear communication and transparent timelines are critical for time poor small business owners. Small businesses rely on the information and timelines provided by banks for their business operations and expectations should be managed appropriately. The Code currently specifies that banks will communicate with their customers through individual communication methods (written, electronic or phone) or as agreed with the bank. This can cause delays in communication where a postal address has changed and the system has not been updated to reflect this.

We suggest further amendments to Chapter 20 to include guidance on communication of appropriate timelines for credit decisions and conditions that may extend the loan application for a small business customer. If a delay occurs and the timeline for a credit decision is revised, banks should be proactively disclosing to their customers the new estimated timeframe.

10. Limit small business bank debt escalation

We suggest Chapter 42 subparagraph 179A be amended to *'Where you are a farmer or small business and we have provided you with a loan for the purposes of your operation, we will not charge default interest (or any fee in lieu of default interest) on that loan during any period that your business is impacted by drought or natural disaster (which includes epidemics and pandemics).'*

This will ensure these protections extend to small businesses generally. Australian small businesses have always had to respond to natural disasters such as drought, floods, and bushfires. The COVID-19 pandemic, which has come on the back of wide-spread natural disasters, has shown that businesses need a mechanism where they can take stock of their situation and prepare for the re-opening of trade.

11. Regulatory developments

The Banking Code of Practice should take a proactive approach to industry developments for product offerings such as Buy Now, Pay Later and new payment technologies.

- **Least Cost Routing (LCR)**

The banking code should contribute to enhance the payment system framework so that retail payments are efficient, secure, and low cost for the future. Our Office supports all acquirers and payment facilitators offering micro and small businesses a pricing plan where LCR is the default, unless the merchant chooses an alternative such as a fixed price package or consumer exercise a choice of payment channel with merchants able to recover the cost. The code should encourage banks to proactively communicate with their small and family business customers on the pricing plans and packages, and facilitate merchant's arrangements that are in the best interests of or chosen by small and family business customers. We further suggest the Code considers including a clause regarding mandatory dual-network debit card issuance as this is critical to the ongoing application of least-cost routing, which gives small businesses choice and the ability to process transactions according to the lowest cost network. Payments methods are changing and as new types of payments evolve it is important the Code proactively considers the affect this would have on small businesses.

- **Buy Now Pay Later (BNPL)**

Given interest from Code members in offering BNPL products we have concerns about any adoption of clauses from AFIA's BNPL code. The BNPL code does not meet the interests of merchants. The Code should consider including BNPL best practice addressing the concerns of both merchants and consumers.

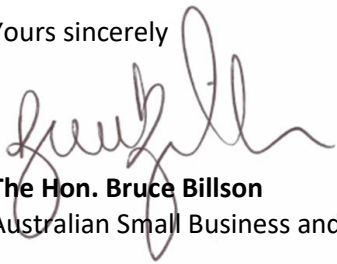
12. Code Governance

ASBFEO recommends the review assess the inclusion of a small business representative on the Banking Code Compliance Committee to advocate for small businesses similar to consumers.

We note further commentary on the Banking Code Compliance Committee will be included in a separate submission to the Independent Review of the Banking Code Compliance Committee.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Miss Kit O'George on 02 6243 7244 or at Kit.OMGeorge@asbfeo.gov.au.

Yours sincerely



The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman