



26 August 2019

Phil Khoury
Independent Reviewer
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Dear Phil Khoury

Customer Owned Banking Code of Practice Independent Review - Report One

Thank you for the opportunity to comment on Report One of your independent review of the Customer Owned Banking Code of Practice (**COBA Code**). The Customer Owned Banking Association (**COBA**) agreed to resource a joint consumer submission to the current review with the Consumer Federation of Australia to consult with consumer representatives to prepare this submission. This submission has been endorsed by:

- Financial Rights Legal Centre
- Consumer Action Law Centre
- Consumer Credit Legal Service (WA)
- Financial Counselling Australia
- Financial & Consumer Rights Council Inc.

Consumer Representatives are supportive of the overall approach to this review and the recommendations regarding style, structure and language. We have a few comments and recommendations which are set out below.

Approach to Independent Review of COBA Code

Consumer Representatives support Cameron Ralph Khoury's (CRK's) Report Series approach to this review. It appears to be a simple and transparent approach to collecting and responding to stakeholder feedback. We also strongly support CRK drafting relevant parts of the COBA Code as the review progresses. This is a more transparent and efficient approach to redrafting a code of practice than first making a series of recommendations which is then followed by a separate drafting exercise.

The second report will be the most substantive of the three reports. We support having a robust and transparent feedback mechanism following that report which might include a roundtable, various workshops, and/or a public submission process.

Code style and structure

Consumer Representatives support Recommendation 1.

We support removing the introductory passages in Parts A and B of the COBA Code as it was unclear whether those sections were intended to be binding or not. Some sections of Part A were also repetitive and superfluous. Consumer Representatives support CRK's conclusion that these introductory passages detract from the message that all of the COBA Code is enforceable. Everything within the COBA Code must be enforceable, and it must be clear within the COBA Code that this is the case.

Consumer Representatives strongly support Recommendation 1C that the entire COBA Code should be enforceable by customers as provisions incorporated in the customer contract with the customer owned bank.

Consumer Representatives also reiterate Recommendation 11 that we made in our March 2019 Submission that every clause and sub-clause must be lettered and numbered for ease of reference and enforceability.

Recommendations

1. Every clause and sub-clause in the COBA Code should be clearly enforceable and must also be lettered and numbered for ease of reference.
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Key promises

Consumer Representatives are not opposed to the COBA Code adopting the Royal commission "six norms of conduct" as its Key Promises as long as the substance of the existing 10 key promises are incorporated into the detailed obligations of the Code. The current key promises include many critical obligations to customers and should not be lost during this revision process.

With respect to the proposed promises we would note the following:

Promise 1

Proposed promise 1 states:

Customers are our owners and the reason we exist; we will deliver banking services in the interests of all of our customers

Firstly we are concerned with the dichotomy between customers as owners and measures to improve how customers are treated. It is also a particularly vague promise that seems to us to be difficult to enforce.

It is important to note that not all customers share the same interests, and what is in the best interests for all customers as a whole may not be in the best interest of any one individual customer. For example an action that is in the interests of all customers by, say, saving money and lowering costs in a remediation, may not be in the interests of the individual customer or customers seeking remediation. This is only further muddied by the concept of customers also being owners.

This promise might need to be re-drafted to clarify that COBs will deliver banking services in the interests of individual customers. Alternatively it may be better to exclude this from the key promises.

Promise 4

Proposed promise 4 states:

We will act fairly.

We recommend that this read “We will act honestly and fairly.”

Promise 5

Proposed promise 5 states:

*We will provide products and services that are fit for **general** purpose (our emphasis)*

Given the new Design and Distribution laws we think it would be more appropriate that promise 5 reads:

We will provide products and services that are fit for purpose

As it currently reads, selling CCI to someone on a disability pension would not be a breach of this promise since the product may in fact be fit for general purpose.

Promise 8

Proposed promise 8 states:

We will contribute to the community in which we operate.

As it currently reads, proposed promise 8 sounds as though COBs will not contribute to Australia or actively excludes contributing to communities where they don't operate.

Promise 8 could be simplified to simply read:

We will contribute to our community.

[or]

We will contribute to the community

Recommendations

2. The substance of the extant 10 key promises should be incorporated into the detailed obligations of the new COBA Code.
 3. Promise 4 should read: “We will act honestly and fairly.”
 4. Promise 5 should read: “We will provide products and services that are fit for purpose”
 5. Promise 8 could be simplified to simply read: “We will contribute to our community” or “We will contribute to the community”
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Language and style

Consumer Representatives strongly support Recommendation 3.

We agree with CRK that provisions should only be included in the COBA Code if they add to the obligations that would otherwise apply to COBs and that any provisions that simply restate the law should be removed. We are pleased to see support for our earlier recommendation that Code language should be removed that places an onus on the customer to act before a COB will do so.

Small business provisions

Consumer Representatives support Recommendation 4.

We support using the broader definition of “Small Business” as recommended by the Royal Commission. We also support creating a new Small Business lending provision for the COBA Code as there is currently no section in the COBA Code specifically addressing subscribers’ obligations with regard to small business.

Comments on initial drafting

Consumer Representatives recognise that the initial drafting included in this first report is simply to demonstrate the style approach CRK plans to use for the detailed obligations. As such we will keep our comments general

Part A – Our promises to you

Proposed Part A states:

We undertake to comply with this Code in our dealings with you. We will incorporate this Code by reference in our written Terms and Conditions for products and facilities to which the Code applies. We will ensure we do this within six months of the commencement date of this Code [or, if later, within six months of becoming a COBA member]. (our emphasis)

The two emphasised parts above could be express in a more plain and straightforward way:

- “We undertake to comply with...” could be more plainly written as “We will comply with...”
- “We will ensure we do this...” could be more plainly written as “We will do this...”

Initial draft Small Business lending provision

The current COBA Code applies to all small businesses as defined in the Definitions section of the COBA Code including Section 6 Responsible Lending Practices. We would be concerned if small business is intended to be carved out of the commitments into only its own limited section.

While we understand that small business lending is not currently covered by the *NCCP Act*, the initial draft Small Business Lending provision effectively back tracks on current small business lending obligations.

For example, the initial drafting suggests that there is no longer a requirement that the COB form an opinion the borrower *will* be able to repay the loan: cf current clause 6.3. In particular, the newly worded obligations will have a negative impact on small business borrowers and third-party guarantors who secure loans against their homes, as the Code provides their protections. We are regularly contacted by consumers in relation to difficulty arising from small business loans – where the ‘business loan’ was actually for personal or domestic purposes, or where finance is approved without sufficient assessment of the sustainability of the business venture or affordability of repayments. This can cause severe consequences for the individuals involved, including homelessness.

Numbering

It is unclear why the numbering is set at 6A. It should simply read 6, 7, 8...

Proposed 6A1

Proposed 6A1 states:

*On request, we will tell you what information we need to assess your application for a Small Business loan and **the likely time** we will take to decide if we are willing to make the loan.*

“[T]he likely time” is too vague for a timeframe reference. Timeframes in the COBA Code should be as clear and precise as possible.

Proposed 6A.2

In addition to the views expressed above with respect to the watering down of responsible lending commitments, wording relating to guarantors needs to be tightened up.

If security over a home (of borrower or guarantor) is provided, customer owned banks will be less incentivised to undertake inquiries expected of a diligent and prudent banker.

The wording is also problematic in the context of lenders considering guarantors in the assessment of a borrower's ability to repay, especially if this is secured over the guarantor's home as this may put the guarantor into substantial hardship.

Proposed 6A.5

Proposed 6A.5 states:

*If we are unwilling to provide you with a Small Business loan, we will explain the reasons to you **if we can.***

"[I]f we can." is far too vague for a Code commitment. It is the exact kind of language that defeats an entire obligation by creating a giant subjective "out" for any member that does not want to comply.

Proposed 6A.6

Proposed 6A.6 states

We will be fair when selecting and instructing external property valuers and investigative accountants to undertake work in connection with a loan to your Small Business. This includes ensuring that:

- *the selected valuer or accountant is appropriately qualified and*
- *experienced;*
- *their advice is reasonably based; and*
- *any conflicts of interest are appropriately managed*

We recommend that all COBA Code clauses and subclauses are numbered and lettered, and bullet points avoided as much as possible.

Proposed 6A.7

Proposed 6A.7 states:

We will provide you with a copy of our instructions to a valuer or accountant and their reports, if we have charged you for these and we propose to rely on these in a way that adversely affects you as a Small Business borrower.

This provision needs to be broken up in to short sentences. There are too many dependant clauses in one sentence and it makes the obligation unclear. Will COBs only provide copies of their instructions/reports if the customer is charged for them AND they are relied on? Could a customer get a copy of an accountant's report only if he was charged but not if the COB relied

on it? What if the customer was not charged for a report but it was relied on in a way that adversely affected the customer?

Proposed 6A.9

Proposed 6A.9 states:

We will give you reasonable notice if you breach a loan obligation and we require you to pay the full amount of a Small Business loan or we take proceedings to enforce the loan. In the case of a breach of a payment obligation, we will give you at least 30 days' notice. For other breaches, we will give you at least 3 months' notice.

Again, the first sentence is far too long and its meaning is unclear.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



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About Financial Rights

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