

6 August 2021

Our ref: BT-MC

Mike Callaghan AM PSM
2021 Banking Code Review
PO Box H218
Australia Square NSW 1215

By email: [REDACTED]

Dear Mr Callaghan

Banking Code Review

Thank you for the opportunity to provide feedback on the Banking Code Review (**Review**). The Queensland Law Society (**QLS**) appreciates being consulted on this important issue.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Elder Law Committee, whose members have substantial expertise in this area.

Recommendations:

- The Banking Code of Practice (**Code**) should contain a specific commitment to provide face to face banking services to all customers.
- The Code should include a specific commitment to offer, and use, interpreters for customers with English as a second language, and where appropriate, to use interpreters for sight and hearing impaired customers and First Nations customers.
- The Review should examine the Code's safeguarding measures in the context of customers with impaired decision-making capacity and the Code should include details as to how banks will deal with these customers in such a way that appropriately balances the need for safeguarding with the person's autonomy.
- The Review should consider how banks identify and then interact with enduring powers of attorney (**EPOAs**), powers of attorney and other similar documents, and that the Code reflect best practice in this area to prevent financial abuse.
- Due to the proposal for scams to be removed from the ePayments Code, the Code should clearly outline how banks will respond to scams.

Inclusive and accessible services and supporting vulnerable customers

The Review has been asked to assess the extent to which the Code contributes to banking services being inclusive, affordable and accessible for all customers, including small business customers, Indigenous customers, customers with disability, customers in remote, rural and regional areas, older customers and customers with limited English. QLS welcomed the substantial plain-English re-write of the Code that occurred in 2019, but believes that more can be done to ensure the Code remains accessible for all customers.

Some vulnerable customers struggle to engage with the increasingly online and technologically dependent banking and finance world, who nonetheless need to remain engaged with their banks.¹ As technology develops, it must be accessible for vulnerable customers who cannot access technology, or, for a variety of reasons, cannot use it.

QLS considers that the Code contain a specific commitment to provide face to face banking services to all customers. The Code should also include a specific commitment to offer, and use, interpreters for customers with English as a second language, and where appropriate, to use interpreters for sight and hearing impaired customers. The implementation of easy-English/icon literature should also be considered.

The need to balance safeguarding with autonomy

Part 4, Chapter 14 of the Code provides information as to how banks deal with customers who may be vulnerable. However, nowhere in the Code mentions how banks should deal with those customers who are subject to an EPOA or administration order (i.e., customers who have impaired decision-making capacity). Some of our members report that banks are not taking into adequate consideration the rights and needs of these customers. For example, our members report that, on becoming aware that an EPOA has been activated, it seems Suncorp's policy is to effectively wipe the person's existence from their records and replace it with the relevant attorney, where the customer is no longer entitled to receive bank statements or conduct any transactions (much like a child's trust account). Our members report that this has resulted in customers being unable to monitor transactions conducted on their own accounts and to withdraw even minimal amounts for basic necessities (for example, withdrawing \$20 for coffees).

QLS considers that such conduct disregards the fact that decision-making capacity may fluctuate,² and is in tension with the principles of both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) which emphasise the person's right to participate, to the greatest extent practicable, in decisions affecting their life, and to preserve, to the greatest extent practicable, the person's right to make their own decisions.³

¹ For example, according to the 2019 Digital Inclusion Index⁹, whilst digital inclusion is improving overall for Australians, people aged 65+ are Australia's least digitally included age group: "Measuring Australia's Digital Divide The Australian Digital Inclusion Index 2019" (Roy Morgan, 2019) pp 6, 16-17. <https://digitalinclusionindex.org.au/the-index-report/report/>.

² 'Capacity can change or fluctuate. An adult with a medical condition or illness may temporarily lose capacity, but then regain capacity at a later date. On the other hand, an adult with dementia or delirium, for example, might have capacity on some days (or during some parts of the day) and not others.' See Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (7 April 2021) <https://www.publications.qld.gov.au/dataset/capacity-assessment-guidelines/resource/23e5bde1-40d7-4115-a15d-c15165422020>.

³ See, for example *Powers of Attorney Act 1998* (Qld) Schedule 1, Part 1, Principle 7; *Guardianship and Administration Act 2000* (Qld) s 11B(3) General Principles.

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QLS recommends that the Review examine the Code's safeguarding measures in the context of the person with impaired decision-making capacity as the banks' customer, and that the Code include details as to how banks will deal with these customers in such a way that appropriately balances the need for safeguarding with the person's autonomy.

Further, QLS recommends that the Review consider how banks identify and then interact with EPOAs, powers of attorney and other similar documents, and that the Code reflect best practice in this area to prevent financial abuse.

Responding to scams

Scams, particularly online scams, disproportionately affect older Australians, because they often have more accumulated wealth than younger people and may be seen by scammers as generally less internet and computer savvy or familiar with new technology.⁴ The Code does not provide any information as to how banks will respond to scams, presumably because scams are covered under the ePayments Code.

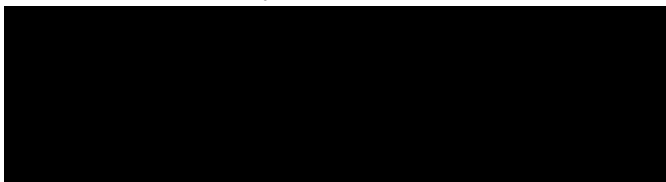
However, the current 'Review of the ePayments Code: Further Consultation' (**Consultation Paper**) proposes to amend the ePayments Code to clarify the definition of "mistaken internet payment" to ensure that it only covers actual mistakes inputting the account identifier and does not extend to payments made as a result of scams. The Consultation Paper states:

We [ASIC] do not think the [ePayments] Code is an ideal place to set rules for preventing and responding the scams. We think that the issue of whether to extend the [ePayments] Code to deal with industry's response to scams should be considered as part of the process of making the [ePayments] Code mandatory. We do not believe we can deal appropriately with subscribers' response to scams in a voluntary [ePayments] Code.⁵

Accordingly, QLS recommends that the Code clearly outline how banks will respond to scams.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President

⁴ Australian Competition and Consumer Commission, *Advice for older Australians* (web page) <https://www.scamwatch.gov.au/get-help/advice-for-older-australians>.

⁵ Australian Securities and Investments Commission, *Review of the ePayments Code: Further Consultation* (Consultation Paper, May 2021) 20-21 <https://asic.gov.au/media/eh2fceff/cp341-published-21-may-2021.pdf>.