

9 January 2024

Our ref: [LP:BFS:CC:EL:PDL]

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
19 Torrens Street  
Braddon ACT 2612

By email: [REDACTED]

Dear Dr Popple

### **Proposed changes to the Australian Banking Association's Banking Code of Practice**

Thank you for the opportunity to provide comments on the proposed changes to the Australian Banking Association's Banking Code of Practice (**Code**).

This feedback has been compiled with the assistance of members of the Queensland Law Society's (QLS) Banking and Financial Services, Competition and Consumer, Elder Law and Property and Development Law Committees, whose members have substantial expertise in this area.

The scope of the consultation is very broad; therefore we have tailored this submission to focus on the proposed changes regarding guarantor protections and the discrete, peripheral issues of scams and principal account holder access to information when an Enduring Power of Attorney (EPOA) is in place. In particular, we proffer the view that further enhancements to the Code are needed as most individual consumers who provide guarantees belong to categories of people who are traditionally considered vulnerable; and, given their often personal relationship with the borrower, generally enter into guarantees for emotional rather than financial reasons. We note that one of the primary purposes of the Code is to afford protections beyond those enshrined in statute.

#### **1. Enhancing guarantor protections**

Recommendations 73 – 79 in Mr Mike Callaghan AM PSM's Final Report of the Independent Review of the Banking Code of Practice 2021 (Final Report) include detailed measures that, if implemented, would enhance guarantor protections. We also note that the breadth of these particular recommendations is not comprehensively reflected in the proposed changes to the Code.

Instead, proposed paragraphs 106 and 107 of the Code seek to give effect to the sentiment of these particular recommendations by imposing an obligation for bank officers to take reasonable steps to ensure that a meeting is held with a guarantor in person, video conference or some other means, before accepting a guarantee.

We note that lenders play an important role in providing prospective guarantors with all key information to understand the risks and to make an informed decision. A prospective guarantor understanding the risks of providing a guarantee and making an informed decision is also in the Banks' interest who may seek to rely on the guarantee in the future.

Members recognise that fulfilling disclosure obligations to a prospective guarantor may be considered a challenging task due to the potential for conflicts of interests to arise. However, there are benefits in our view for guarantors to be in a position to receive the information directly from the bank particularly without the proposed borrower being present. The distinction rests in the nature and the purpose of the communication. There must be a robust process in place to support this disclosure process. It should also be emphasised that information provided in a meeting with a guarantor and any relevant disclosure is not financial or legal advice.

While members support the proposed changes in this respect, members highlight that additional detail should be included to outline clear parameters about the nature and extent of the matters that must be disclosed to a prospective guarantor. As such, proposed paragraphs 106 and 107 of the Code should clearly set out the steps bank officers should take to ensure that the guarantor understands the effect of the guarantee being given, such that their decision to enter the transaction is informed.

Further, it is our members' view that banks should not solely rely on the fact that a guarantor has sought independent legal advice as evidence that the guarantor is informed of the wider facts and matters relevant to the transaction. For instance, a loan recipient's banking and financial history may be relevant in certain circumstances but we understand would not ordinarily be available, upon request, to a guarantor's legal representative to inform independent legal advice. In support of this position, members note the information asymmetry that exists from a prospective guarantor's perspective insofar as the lender is the gatekeeper of the material information and documents used to inform the terms of the guarantee. For independent legal advice to overcome the information asymmetry between the lender and the prospective guarantor it is important that the legal advisor be able to request all relevant documents from the bank.

Ultimately, discharging disclosure obligations as a means of guarantor protection, should be coupled with, and not replaced by, a lender obligation to urge that transactors be independently advised by legal and financial representatives on the arrangements they are proposing to make.

To this end, further consideration should be given to the inclusion of the following further measures in the Code that would boost guarantor protections for guarantors including:

- (i) a tailored approach to disclosure may be required where there are indicators that the guarantor needs more care. Importantly, guarantors should be informed about relevant borrower information held by the lender including the transaction history of the borrower, any existing defaults that the lender is aware of and/or existing indebtedness;
- (ii) systems or policies for identifying when a prospective guarantor may be experiencing vulnerability are in place and effectively implemented;
- (iii) information is available to help customers, including in many languages and access to interpreting services; and

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- (iv) customer information is easy to understand, upfront, accessible, uses plain language and is easy to compare.

Lastly, to achieve the objectives of the proposed changes to the Code, members note the importance of compliance.

### 2. Scams

QLS and its members acknowledge Australia's banking sector's commitment to safeguarding the public against criminal scam activity.

QLS supports the industry led Scam-Safe Accord initiative and acknowledge the banking and financial service industries' commitment to protecting customers from these forms of unscrupulous activities. Although the Code is an important component of the protective measures that will be required to respond to scams, QLS notes the triennial [and proposed 5 yearly] review of the Code will provide further opportunities to integrate additional protective mechanisms developed as part of the Scam-Safe Accord initiative in due course.

While we acknowledge and support these efforts, members wish to highlight the need to ensure the right scam reporting structures are in place to enable accessible and timely reporting of scam activities by affected customers.

### 3. Enhancing principal account holder access to account information

In addition to the obligations proposed by the Code to take extra care with customers who are experiencing vulnerability, members suggest that the Code should clearly address the how the owner of an account retains rights to information and access to accounts when an EPOA or Administration Order is in place. That is, a principal should always be able to access their account details, for example the bank balance and statements and make transactions, even if an EPOA applies.

In terms of making financial transactions, our members acknowledge that certain risks may attend these rights, however they could be effectively managed by limiting the amounts the principal can transact. For instance, a principal may wish to arrange a direct debit to facilitate payment of aged care fees. Our members report that when an EPOA is put in place, banks, more often than not, remove the principal's access to information and cease sending them bank statements. In our members' experience, the principal only wants to have access to this information for the purpose of ensuring payments are being made as they expect.

Thank you for considering our comments in relation to these issues. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED].

Yours faithfully



Rebecca Fogerty

President