

**Code of Banking Practice
Independent Review and the
Code Compliance Monitoring
Committee Independent Review**

**Legal Aid NSW Submission to the Australian
Bankers' Association**

August 2016

Table of Contents

About Legal Aid NSW.....	2
List of Recommendations.....	3
Part A: Code of Banking Practice.....	6
Effectiveness and relevance of the Code of Banking Practice.....	6
<i>Purpose (Terms of Reference (TOR), part (a)).....</i>	6
<i>Structure and clarity (TOR, parts (b)(g)).....</i>	6
<i>Interests of customers (TOR, part (c)).....</i>	7
<i>Effectiveness of the Code's key commitments (TOR, part (d)).....</i>	7
Legal Aid NSW's views about banking practices.....	8
<i>Disclosures and communications by banks about products and services (TOR, part (n)).....</i>	8
<i>Sales, distribution, advertising and marketing practices of banks (TOR, part (o))....</i>	<i>18</i>
Strengthening the operation of the Code and promoting relationships between banks and customers.....	11
<i>The needs of communities in remote, rural and regional areas (TOR, part (h)).....</i>	11
<i>Guarantees (TOR, part (l)).....</i>	12
<i>Laws covering banking services and the extent to which legal obligations act in the customer's best interests (TOR, part (m)).....</i>	15
Staff competency about hardship.....	15
Financial abuse of co-debtors.....	15
Hardship and family violence.....	15
<i>Practices and qualifications of intermediaries (TOR, part (p)).....</i>	17
<i>Financial inclusion (TOR, part (q)).....</i>	18
<i>Impact of technological developments on banking services (TOR, part (n)).....</i>	19
<i>Communicating with vulnerable customers (TOR, part (r)).....</i>	19
<i>Minimum standards for the offer of credit cards (TOR, part (u)).....</i>	21
Initiatives announced by industry on 21 April 2016.....	21
<i>Reviewing product sales commissions.....</i>	21
<i>Supporting ASIC as a strong regulator.....</i>	22
Banks and customers understanding their rights and responsibilities.....	22
Part B: Code Compliance Monitoring Committee Independent Review.....	23

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Customer issues constitute the largest category service for our Civil Law Division.

In 2014-2015 Legal Aid NSW provided 4,887 in house advice and 5,477 minor assistance services in customer law matters. More than one quarter of these matters dealt with credit products, including customer leases. This

submission draws on the casework experience of civil law solicitors in providing these services.

Legal Aid NSW's Mortgage Hardship Service assists people who are in danger of losing their homes because they cannot pay their mortgage or because a guarantee is being enforced against them. If required, the Service also assists people to sell their home to minimise the loss and ensure a favourable outcome to the borrower.

Legal Aid NSW welcomes the opportunity to provide a submission to the Code of Banking Practice Independent Review and to the Code Compliance Monitoring Committee Independent Review being undertaken by the Australian Bankers' Association. Our submission follows the broad topics identified in Terms of Reference. References to specific Terms of Reference are noted in parentheses throughout our submission.

Should you require any further information or wish to discuss this submission, please contact Dana Beiglari, Senior Solicitor, Civil Law at Dana.beiglari@legalaid.nsw.gov.au; or Annmarie Lumsden, Director, Strategic Planning and Policy at Annmarie.Lumsden@legalaid.nsw.gov.au

List of Recommendations

Legal Aid NSW makes the following recommendations:

Code of Banking Practice

1. The Code should continue to be regularly reviewed to ensure that it remains relevant and useful and accommodates legislative, social and technological advances.

The Code should be amended to:

2. Include a short summary of the key contents of each section on the title page: for example, “Part E Banking Services and Practice”; it could then list “Bank Cheques, Account Combinations, Changes to Terms and Conditions, Chargebacks”.
3. Extend the scope of “customers in remote indigenous communities” to include indigenous communities that are not necessarily remote.
4. Give greater prominence to Clauses 27, 28 and 31 (concerning the provision of credit, financial difficulty and guarantees).
5. Impose a more proactive obligation on banks when providing relevant information and enhancing accessibility to people in indigenous communities, older persons and customers with a disability.
6. Impose a commitment towards training so that staff have a “comprehensive knowledge” of the Code rather than an “adequate knowledge”.
7. Impose a commitment to raising community awareness about the existence and operation of the Code.
8. Specify that communications from banks relating to legal proceedings and/or the entering of a default judgment against a client must include a plain English explanation of legal terms.
9. Clarify that vulnerable customers should, as a matter of course, have the content of brochures and other written information explained to them by banks.
10. Clarify that it supports and encourages direct referrals to financial counsellors and legal advisers where necessary, and that this direct referral could include the provision of a telephone number to a customer.
11. Include a provision requiring banks (and their intermediaries) to ensure that marketing and advertising to customers is undertaken in an appropriate and responsible way. This clause could also prohibit or limit the use of high-pressure sales techniques including ‘cold calling.’
12. Include provisions that recognise the difficulties faced by customers in remote, rural and regional areas in accessing services, and impose an obligation on banks to be understanding and flexible in their approach to such customers.
13. Expand the timeframe to review information provided under Clause 31.4, parts (b), (c) and (d) of the Code from one to seven days.

-
14. Impose a positive obligation on banks to obtain written notice from a guarantor as to:
 - whether they have obtained independent legal and/or financial advice, and
 - where they have not obtained independent advice, indicating they understand that they are actively waiving their right to do so.
 15. Impose a positive obligation on the banks to disclose to customers that acting as a guarantor can affect their Centrelink income.
 16. Require banks to assess the financial situation of the guarantor and not enter into a guarantee with a person who receives Centrelink payments as their only source of income and whose only asset is their home.
 17. Require staff to undergo specific financial hardship training to enable them to identify and refer customers to the financial hardship department of the bank as well as to an independent financial counsellor.
 18. Require that posters and brochures about financial hardship be placed in branches.
 19. Require that statements of accounts and bills contain a clause with information about financial hardship relief.
 20. Require banks to make due inquiries into who will receive the benefit of a loan. In particular, where a loan is being used to purchase a vehicle, the bank should require that the vehicle be placed into the names of both debtors. Clause 29.1 of the Code could be amended as follows:

“We will not accept you as a co-debtor under an agreement unless it can be demonstrated to us that you will receive a substantial benefit under the facility.”

21. Include reference to domestic and family violence in relation to financial hardship.
22. Provide that staff be trained in the nature and impact of domestic and family violence, including economic abuse, and in identifying customers who may be experiencing domestic and family violence when making an application for credit.
23. Require an immediate assessment of hardship applications where (a) the application refers to domestic or family violence, or (b) the bank is otherwise aware that the applicant is a victim or domestic or family violence.
24. Require banks to grant hardship applications for one co-borrower where there is evidence of domestic or family violence in respect of the other co-borrower.
25. Allow for the splitting of joint debts where the apportionment does not prejudice the banks’ ability to pursue repayment.
26. Provide for waiver of repayments where it can be shown that the debt was entered into under duress and the customer received no benefit from the credit.
27. Require staff who sell ‘add-on’ insurance with any credit product to have qualifications to provide financial advice.
28. Require banks to advise customers about the suitability of the ‘add-on’ insurance.

-
29. Require banks (beyond their existing obligation under the clauses on account suitability) to develop financial inclusion programs for vulnerable and low income customers, particularly in respect of low or no interest loans.
 30. Require banks to adequately promote financial inclusion programs to customers.
 31. Ensure that where a service exists online, the same service is provided through an alternative method that does not require internet access.
 32. Require banks to screen customers for vulnerability.
 33. Provide that where a vulnerability is identified:
 - the customer should be provided with a centralised contact point within the bank, and
 - appropriate referrals to financial counsellors and/or legal assistance are made in the event that the customer is experiencing financial hardship.

Code Compliance Monitoring Committee

34. The ABA and the CCMC should improve customer awareness about the Code through an advertising campaign. The campaign could include examples of what issues are addressed in the Code and how to obtain a copy of the Code.
35. The CCMC should raise awareness of its role and function amongst customer and consumer advocates.
36. The CCMC should enhance its community engagement program.
37. The referral and information-sharing relationship between the CCMC and EDR should be clarified and strengthened.

Part A: Code of Banking Practice

Effectiveness and relevance of the Code of Banking Practice

Purpose (Terms of Reference (TOR), part (a))

The Code of Banking Practice (the Code) plays an important and ongoing role in setting uniform standards for good banking practice and promoting good faith and transparency between the banks and customers. It establishes a set of criteria for the conduct of banks, provides examples of what customers can expect from their interaction with the banks and can be a useful tool for resolving disputes. This guidance is advantageous for both banks and customers.

The Code needs to be accessible and, to an extent, adaptable so to accommodate and remain relevant in light of legislative changes, constant technological advances and the changing needs of customers, including those with special needs and from a range of culturally and linguistically diverse backgrounds.

Recommendation

The Code should continue to be regularly reviewed to ensure that it remains relevant and useful and accommodates legislative, social and technological advances.

Structure and clarity (TOR, parts (b)(g))

The Code is drafted in plain language. This makes it accessible, and easy for customers to read and understand. There has been an intelligent use of different techniques to highlight information: for example, the use of bold type and the consistent use of the terms “we” and “you”, the use of short sentences in brief numbered paragraphs and the use of self-explanatory headings.

The definitions in the Code are comprehensive and are set out in a logical and user-friendly format. The definition of banking service is succinct but accurate, and adequately covers situations where the service is supplied both directly by the bank and indirectly through an intermediary. The Code also distinguishes between financial products and services provided by another party and those distributed only by the bank. This potentially complex distinction has been drafted as clearly as possible for customers to understand. Legal Aid NSW suggests however that the structure could be further improved by the provision of a short summary of the key contents of each section.

Recommendation

The Code should include a short summary of the key contents of each section on the title page, for example “Part E Banking Services and Practice.” It could then list “Bank Cheques, Account Combinations, Changes to Terms and Conditions, Chargebacks.”

Interests of customers (TOR, part (c))

To a large extent, the Code is presented as a customer-focused document. The introduction establishes that the Code is voluntary, with the goal of setting out “standards of good banking practice” and “key commitments.” These are described clearly towards the beginning of the document, establishing their significance for both banks and customers.

Legal Aid NSW supports the Code’s early identification of the need for specific recognition and attention to “customers with special needs” and “customers in remote indigenous communities.” However, consideration should be given to extending the scope of customers with special needs to include indigenous communities more broadly, not just those located in remote communities. While more acute in very remote areas, levels of indigenous disadvantage are significant in indigenous communities throughout Australia.¹ More detail concerning this submission is provided on page 9 below.

Further, we suggest that Clauses 27, 28 and 31 (which relate to provision of credit, financial difficulties with credit facilities and guarantees) be given greater prominence in light of the significant interactions of customers with banks about these issues. Greater emphasis in the Code to these topics will mean a customer’s attention is more readily drawn to these clauses. This would support the Code’s objective to set out standards of good banking practice and would highlight the banks’ commitment to putting their customers first.

Recommendations

The qualifying term “remote” in Clause 8 of the Code should be removed.

Clauses 27, 28 and 31 (which relate to provision of credit, financial difficulty and guarantees) should be given greater prominence in the Code.

Effectiveness of the Code’s key commitments (TOR, part (d))

The Code’s key commitments are only effective in meeting customer and community expectations if customers are aware of their rights under the Code, and if they can hold banks to account where such commitments are not met.

Legal Aid NSW’s clients are generally not aware of the Code until we advise them about it. To improve the effective operation of the key commitments, the Code should be widely publicised to inform customers, particularly those who are vulnerable, of their rights.

We note that certain vulnerable sectors of the community are specifically recognised in the Code, and that the Code also acknowledges the need for “reasonable measures” or “reasonable steps” to be taken to fulfil banks’ commitments to such groups (see Clauses 7 and 8 in respect of older customers, those with a disability and those in remote indigenous communities). Particular consideration needs to be given to the way information is provided to these groups, and to how they interact with the banks.

¹ For example in 2008, 30 per cent of Aboriginal and Torres Strait Islander Australians aged 15 years and over reported problems accessing services in the previous 12 months, with this proportion highest in very remote areas (48 per cent): see the Productivity Commission’s 2014 Report *Overcoming Indigenous Disadvantage*, p20.

Arguably, there is a need for more than “reasonable” measures to be taken to effectively fulfil the Code’s key commitments in respect of these groups. The specific needs and vulnerabilities of such customers in their interaction with banks should be reflected in the Code. We therefore suggest Code members should take “all practicable measures” in responding to vulnerable customers.

Further, the Code’s key commitments would be implemented more effectively if the Code imposed mandatory training for all bank staff, particularly those directly interacting with customers, about the banks’ responsibilities under the Code. We note the Code’s summary of what the bank’s training regime should achieve for staff (Clause 9(b)). We submit that there should be a higher requisite standard of awareness about the Code, in that staff should have a “comprehensive” - as opposed to an “adequate” – knowledge of the Code. Further detail is provided on pages 15 -17 below.

Recommendations

The Code should impose a more proactive obligation on banks to provide relevant information and enhance accessibility to people in indigenous communities, older persons and customers with a disability. Specifically, the term “reasonable measures” does not adequately account for the particular vulnerabilities of these groups and should be replaced with the term “all practicable measures”.

Clause 9(b) of the Code should impose a commitment as to training so that staff have a “comprehensive knowledge” of the Code rather than an “adequate knowledge”.

The Code should impose a commitment to raising community awareness about the existence and operation of the Code.

Legal Aid NSW’s views about banking practices

Disclosures and communications by banks about products and services (TOR, part (n))

Legal Aid NSW broadly supports the disclosures articulated in the Code around the operation of accounts, the cost of credit, account suitability and terms and conditions. However, we note that disclosures can only go so far in advising customers about their rights and obligations. Our experience with vulnerable customers shows that many have trouble understanding the language and the complex concepts around banking services.

We submit that the key commitment in Clause 3.1(b)(ii) of the Code should specify that banks will, as a matter of course, also explain the contents of brochures and other written information to identified vulnerable customers, even if they do not request it. In our experience vulnerable customers often will not ask for an explanation to avoid embarrassment.

Keeping in mind the resource constraints of banks, Legal Aid NSW supports referrals for customers for legal advice, where it is expressly required, and to Financial Counselling Australia, through the provision of their direct telephone number to assist with those communications. More detail is provided on page 20 below.

In our view, the banks could improve plain language drafting of communications to customers, particularly when those customers are already involved in legal proceedings. Legal Aid NSW regularly advises clients who are unaware that there are legal proceedings on foot or who do not know whether or not a judgment has been obtained by the bank.

Currently, there is no requirement during the court process to notify the client of a default judgment. This can lead to significant delay on the part of the customer in addressing their financial problem. We appreciate that some banks will provide notification, by way of letter, to their customers about a default judgment. However, the wording and language of this communication does not adequately convey the implications of a judgment for the customer. Our casework experience shows that customers need to have the effect of a judgment clearly explained in order for them to take steps to remedy the problem.

We therefore suggest words to the following effect be used to explain the impact of a judgment to a customer:

‘A judgment means that we now have the legal right to evict you from your home’ or

‘A judgment means that we now have the legal right to pursue you for what you owe us. We may remove money from your account or apply to sell some of your possessions’.

We consider that this would significantly improve re-engagement of the customer with the bank and encourage the customer to seek advice and help with their issue.

In addition, the Code should clarify a bank’s obligations to explain the content of its written brochures and other materials to vulnerable customers, and should encourage them to refer customers to financial and/or legal support services.

Recommendations

The Code should specify that communications from banks relating to legal proceedings and/or the entering of a default judgment against a customer must include an explanation of legal terms in plain language.

The Code should clarify that vulnerable customers should, as a matter of course, have the content of brochures and written information explained to them.

The Code should clarify that it supports and encourages direct referrals to financial counsellors and legal advisers where necessary and that this direct referral could include the provision of a telephone number to a customer.

Sales, distribution, advertising and marketing practices of banks (TOR, part (o))

Legal Aid NSW is concerned about the impact on customers (particularly vulnerable customers) of banks' marketing practices, and the lack of any reference in the Code as to how a bank should conduct themselves in this context.

Legal Aid NSW submits that the Code should require banks, and any intermediaries engaged in marketing and sales, to ensure that marketing and advertising to customers is undertaken in an appropriate and responsible way. This would include refraining from high-pressure sales techniques, such as unsolicited phone calls or promoting arbitrary deadlines for product offers. Such techniques are particularly exploitative of and harmful to those customers who may be more vulnerable by reason of their age, disability or language, as demonstrated by the following case study.

Case study: cold calling of a vulnerable customer

Pete told Legal Aid NSW he received a phone call from his bank in approximately 2014 to say that he was eligible for a \$260,000 home loan. Pete said he had not applied for a loan and only had a savings account with the bank, which he believed had about \$10,000 in it. Pete was told that the offer was only available for that week. Pete suffered from alcoholism and depression. He ended up applying for a \$50,000 personal loan and a credit card, which was approved in a very short time frame. Pete told Legal Aid NSW that he would not have approached the bank for a loan if he had not been 'cold called'.

While this example reveals legal concerns beyond the marketing practices of banks, Legal Aid NSW submits that including a guideline in the Code about appropriate marketing and sales would remind banks of best practice industry standards to follow. Accordingly, the Code should include a clause requiring banks, and their intermediaries, to market and advertise in a manner appropriate to the skills and potential vulnerabilities of their customers.

Recommendation

The Code should include a clause requiring banks (and their intermediaries) to ensure that marketing and advertising to customers is undertaken in an appropriate and responsible way. This clause could also prohibit or limit the use of high-pressure sales techniques including 'cold calling.'

Strengthening the operation of the Code and promoting informed and effective relationships between banks and customers

The needs of communities in remote, rural and regional areas (TOR, part (h))

Legal Aid NSW regularly assists clients living in remote, rural and regional areas. Our experience with these clients is that access to services proves to be one of the biggest hurdles for customers engaging with their banks.

People located in remote, rural and regional areas have far less access to necessary support services, such as financial counsellors and legal advice. In our view, the Code should impose obligations on banks to be cognisant of these issues and flexible in accommodating customers living in these areas. This includes allowing such customers adequate time to access support services.

As noted above, the Code currently provides guidance for the banks in providing services to customers living in remote indigenous communities (Clause 8). Legal Aid NSW supports this clause, and its commitment to providing services to customers in such communities. As submitted above however, there is arguably a need for more than “reasonable” steps to be taken in respect of this group. The specific needs and heightened vulnerability of indigenous communities in their interaction with banks should be reflected in the Code through the replacement of the word “reasonable” with “practicable” in Clause 8.

We also submit that additional clauses should be included in the Code that recognise the need to support:

- Customers in remote, rural and regional communities, and
- Aboriginal and Torres Strait Islander people generally (see our proposed Recommendation 3).

We are concerned that the expansion online banking services risks the decline in traditional banking services. This may cause customers in remote and rural communities to be excluded where they do not have the requisite knowledge and/or technology to access online services. Further detail is provided below on page 19.

Recommendation

The Code should include provisions that recognise the difficulties faced by customers in remote, rural and regional areas in accessing services and that require banks to be understanding and flexible in their approach to these customers.

Guarantees (TOR, part (I))

Legal Aid NSW assists clients who have agreed to be guarantors for credit contracts taken out for the benefit of third parties. These clients are frequently vulnerable, elderly people who have agreed to be a guarantor for a family member or close friend. Often, clients view these transactions as providing personal help to a loved one, without fully understanding the legal implications of the contract. Some clients have been pressured or misled by family members to sign guarantees, only to later realise the legal implications of the agreement after the borrower has defaulted on the credit contract. This is demonstrated by the case study on page 13 below.

Legal Aid NSW welcomes the obligations set out in Clause 31 of the Code, which provide extra protections to guarantors. However, in our view, Clause 31 should be improved to assist guarantors to understand the legal implications of guarantee agreements in the following respects.

Period for consideration of debtor's credit history (Clause 31.5)

Clause 31.4 (b), (c) and (d) obliges banks to provide potential guarantors with information about the debtor's credit history. However, Clause 31.5(b) only allows a guarantor "until the next day" to consider this information. In our experience, clients are very often considering becoming a guarantor for a family member and, as such, they can often make decisions based on emotion rather than financial considerations. With this in mind, one day is inadequate for a guarantor to properly consider their options or discuss with the debtor any information provided under Clause 31.4, especially as this information helps the guarantor to make a significant financial decision which may affect their home. We submit that a guarantor should be allowed to consider any information provided under Clause 31.4 (b), (c) and (d) for a seven-day period instead of "until the next day."

Notice of independent legal and financial advice (Clause 31.4)

The requirement in Clause 31.4(a)(i) that a financial service provider notify the guarantor that they should seek independent legal advice should be strengthened. Legal advice is crucial in allowing customers to make fully informed decisions about guarantee agreements and helps prevent both parties entering into unsuitable or unfair contracts. The present requirement should therefore be accompanied by a positive obligation on the bank to obtain written notice from the guarantor as to:

- whether they have obtained independent legal and/or financial advice and,
- where they have not obtained such advice, indicating they understand that they are actively waiving their right to do so.

Advice to customers about impact on Centrelink income

Centrelink and the Department of Veteran Affairs have strict gifting rules, which may affect a person's Centrelink income when that person gives away assets or transfers them for less than their market value. Vulnerable, older people are often caught up in these rules where they guarantee (or mortgage) their home for the benefit of a third party.

In the unfortunate (but sadly common) event that the debtor defaults on the credit contract, he or she risks losing their home and their pension, or having their income reduced because of the gifting rules. The following case study illustrates some of these issues.

Case study: the impact of gifting rules on vulnerable customers

Mr and Mrs Day were an elderly couple on the age pension from a non-English speaking background. Their youngest son asked them to help him borrow money to purchase some properties he wanted to develop. At the time, Mr Day was in the early stages of dementia. Mrs Day queried how they could assist their son as low-income pensioners. Their son assured her with words to the effect of, "Don't worry, you just sign the papers, I will make the payments to the bank." The papers were a loan contract for \$600,000 and a mortgage was subsequently registered against Mr and Mrs Day's home. Mr and Mrs Day signed these documents at the office of their son's solicitor.

Two years later the son advised Mr and Mrs Day that he was unable to keep up the repayments on the loan and that they would have to sell the house to discharge the debt. Mr and Mrs Day reluctantly put the house up for sale and the proceeds of the sale settled the balance of the loan and discharged the mortgage. Their eldest daughter took them in to her home as they had nowhere else to go.

Centrelink found out about the sale of Mr and Mrs Days' home and suspended their pensions pending an investigation about their future entitlement. Centrelink subsequently informed Mr and Mrs Day that they had been overpaid since the date the loan was taken out. Mr and Mrs Day were required to repay the overpayments and their future pension entitlements were reduced by about 50 per cent.

Mr and Mrs Day were wholly unaware of the requirement to inform Centrelink about the loan borrowed against the equity in their home. Unfortunately, Centrelink regarded the loan funds as their asset. As the total loan funds were above the Centrelink asset threshold, Centrelink determined that Mr and Mrs Day had not been entitled to the full pension from that date.

Centrelink also treated the proceeds of the sale of the house as a 'gift' to their son. The fact that the loan had been for their son's benefit and that they used the money from the sale of their home to pay out the loan made no difference. The proceeds of sale exceeded the allowable amount for gifts, so Centrelink treated the proceeds as if they were Mr and Mrs Day's asset, and deemed that they had received income. This exceeded the income allowable for a full pension and their pension was reduced accordingly.

Legal Aid NSW assisted Mr and Mrs Day by persuading Centrelink that the sale of the house was not a gift to their son but a loan. Even when this was accepted, Mr and Mrs Day were still getting a reduced pension. Legal Aid NSW then had to make an application under a hardship provision on the basis that the loan was 'unrealisable'. In the first instance, the application was refused because Legal Aid NSW had not provided evidence that legal action had been taken against the son to recover the loan. However, as Legal Aid NSW was in fact suing the son, Centrelink agreed to restore Mr and Mrs Day's pensions pending the outcome of the legal proceedings.

Cases such as this demonstrate the need for additional safeguards in the Code about the impact of the gifting rules to ensure that vulnerable people are not placed in further hardship. For example the Code could be amended to:

- require banks to provide a mandatory disclosure notice to customers informing them that acting as a guarantor (and also mortgaging a property) can affect the guarantor's Centrelink income.
- require guarantors to provide evidence to the bank that they have received legal and/or financial advice about the potential impact of the guarantee on their Centrelink income.

Suitability Assessment in respect of guarantors

Allowing a Centrelink recipient (usually an older person or a person with a disability) to act as a guarantor means that an already vulnerable person will likely become homeless should the debtor default on the credit contract.

We therefore submit that the Code should impose a positive obligation on banks to assess the suitability of the loan for the guarantor. No such obligation exists at present. Banks should be required to make enquires about the guarantor's financial circumstances. Should those enquiries reveal that a guarantor receives their income solely from Centrelink payments and the guarantee is being taken out against the guarantor's sole asset (that is, their home) then the prospective agreement should be deemed unsuitable for the guarantor.

Recommendations

The timeframe to review information provided under Clause 31.4, parts (b), (c) and (d) of the Code should be expanded from one to seven days.

The Code should impose a positive obligation on banks to obtain written notice from the Guarantor as to positive obligation on the bank to obtain written notice from the guarantor as to:

- whether they have obtained independent legal and/or financial advice, and
- where they have not obtained independent advice, indicating they understand that they are actively waiving their right to do so.

The Code should impose a positive obligation on the banks to disclose to customers that acting as a guarantor can affect their Centrelink income.

The Code should include a requirement that banks assess the financial situation of the guarantor and not enter into a guarantee with a person who receives Centrelink payments as their only source of income and whose only asset is their home.

Laws covering banking services and the extent to which legal obligations act in the customer's best interests (TOR, part (m))

In general, Legal Aid NSW considers that the Code adequately codifies current laws and regulations. However, in our view, the Code should be strengthened to ensure that the banks' obligations to act in the client's best interests are made clear.

Staff competency about financial hardship provisions

Clause 9 of the Code provides that staff and authorised representatives will be trained so that they can comply with the Code.

Many of our clients experience financial hardship. When we advocate for these clients in respect of their credit obligations, we often ask the banks why hardship assistance was not provided to the client in the first instance. Unfortunately, bank staff regularly respond by saying that the client did not self-identify as being in financial hardship.

The Australian Banking Association's own website states "The majority of customers don't call their bank if they're feeling like they're losing control of their finances or experiencing financial difficulty. This is a mistake."

Customers fear that disclosing their difficulty in making payments or changes in their circumstances will lead to banks withdrawing credit. Many customers are still unaware of hardship provisions that may be available to them. Bearing these factors in mind, we make the following recommendations around staff and the financial hardship provisions.

Recommendations

The Code should require staff to undergo specific financial hardship training to identify and refer customers to the financial hardship department of the bank as well as to an independent financial counsellor.

The Code should require that posters and brochures about financial hardship be placed in branches.

The Code should require that statements of accounts and bills contain a clause with information about financial hardship relief.

Financial abuse of co-debtors

Financial abuse is the most common type of abuse experienced by the elderly and is a common tactic used by abusers to gain power in a family relationship. A recent study² found that many women who leave domestic and family violence relationships often have debts which have been accrued by their partners which they did not know about, did not understand or which were incurred under duress.

² Smallwood, E. (2015) 'Stepping Stones: Legal barriers to economic equality after family violence', Women's Legal Service Victoria, Melbourne

We note Clause 29 provides that “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.” However, we consider the Code should go further in addressing this issue by adopting the following recommendation.

Recommendation

The Code should require banks to make due inquiries into who will receive the benefit of the loan. In particular, where a loan is being used to purchase a vehicle, the bank require that the vehicle be placed into the names of both debtors. Clause 29.1 could be amended as follows:

“We will not accept you as a co-debtor under an agreement unless it can be shown to us that you will receive a demonstrated benefit under the facility.”

Hardship and domestic and family violence

The Code does not recognise domestic and family violence as a factor be taken into account when assessing financial hardship. It should do so. Lack of recognition of domestic and family violence further compounds the stress, vulnerability and disadvantage experienced by its victims, as demonstrated by the following case study.

Case study: domestic and family violence and hardship applications

Legal Aid NSW assisted Janet who was experiencing domestic and family violence. Janet is a mother of a young child. The police had obtained an Apprehended Domestic Violence Order for Janet and her child’s protection. Janet’s husband refused to contribute to the mortgage on their home in any way.

We helped Janet lodge a hardship application. At first, the bank told us that the hardship request could not be considered without the consent of Janet’s abusive partner. After we obtained consent through his solicitor, the bank advised that it would not consider Janet’s hardship application until her family law dispute was resolved (in the next three to six months). In the meantime, the bank refused to stop collection activity.

Recommendations

The Code should be amended to:

- expressly refer to domestic and family violence in relation to financial hardship**
- provide that staff be trained in the nature and impact of domestic and family violence, including economic abuse, and in identifying customers who may be experiencing domestic and family violence when making an application for credit**
- require the immediate assessment of hardship applications where (a) the application refers to domestic or family violence or (b) the bank is otherwise aware that the applicant is a victim or domestic or family violence**

- require banks to grant hardship applications for one co-borrower where there is evidence of domestic or family violence in respect of the other co-borrower
- allow for the splitting of joint debts where the apportionment does not prejudice the banks' ability to pursue repayment, and
- oblige banks to waive repayments where it can be shown that the debt was entered into under duress and the customer received no benefit from the credit contract.

Practices and qualifications of intermediaries (TOR, part (p))

Legal Aid NSW assists many clients who have purchased (sometimes unknowingly) 'add-on' insurance, such as consumer credit insurance (CCI), which is underwritten by third parties. Very often, this insurance is clearly unsuitable for the customer. For example, we see cases where CCI products for income protection and sickness or accident are sold to disabled pensioners who would never be able to claim any benefit under the policies.

Case study: unsuitable add-on insurance

Legal Aid NSW assisted Mark in lodging a claim under his loan protection policy.

In response to our claim, the bank said, "loan protection is a non-advice product. This means that staff members who offer loan protection are unable to provide personal product financial advice." The Bank argued that it did not have to advise the customer at all in relation to the suitability of the product.

Mark experienced a period of redundancy and tried to make a claim under his policy. Mark's claim was rejected on the basis that he needed to be employed, without a break, for a continuous period to be eligible to make a claim. Mark was not advised about this by the bank.

Recommendations

The Code should require staff who sell 'add-on' insurance with any credit product to have qualifications to provide financial advice.

The Code should require the bank to advise customers about the suitability of the 'add-on' insurance.

Financial inclusion (TOR, part (q))

Legal Aid NSW has assisted a large number of vulnerable clients who are unable to access suitable credit products and are consequently financially excluded. This financial exclusion often leads to customers having to access alternative products, such as consumer leases, in order to obtain essential items like household goods. These contracts often charge exceptionally high interest rates and do not always result in the customer owning the product at the end of the lease. An example of the impacts of financial exclusion is provided in the following case study:

Case study: financial exclusion

Julie is an Aboriginal single mother who lives in a remote town in west NSW. Julie is a low income earner. After separating with her partner and moving into a new property, Julie needed to buy basic household items, such as a fridge, bed and lounge. Julie was unaware that she may be eligible for any credit products with her bank, such as low rate or no interest loans³.

Julie saw an advertisement from a consumer lease trader, stating that they offer household goods for low prices. Julie made further enquires and signed up to eight separate contracts for various household goods. Julie was charged as much as 175% interest on the value of the goods for some items and was paying some items off for three years. Because of the number of contracts and their high interest rates, Julie suffered periods of financial hardship.

Had her bank told her about the availability of low or no interest loans, Julie may have not entered into unsuitable contracts and may not have suffered financial hardship.

This case shows that financial exclusion leads many vulnerable customers to sign up to unsafe products which further entrench their disadvantage and financial hardship.

We support the banks' commitment to ensuring that their products promote financial inclusion. This is presently reflected in Clause 16 of the Code which promote banks' accountability in ensuring they offer suitable and affordable products to low income earners or disadvantaged customers.

However, Legal Aid NSW considers that Clause 16 does not go far enough in promoting financial inclusion. Banks should be required to develop financial inclusion programs for vulnerable and low income customers, particularly in respect of low or no interest loans. Further, the Code should require banks to actively promote financial inclusion programs to customers.

³ <http://nils.com.au/>

Recommendations

In addition to their existing obligations concerning account suitability, the Code should require banks to develop financial inclusion programs for vulnerable and low income customers, particularly in respect of low or no interest loans.

The Code should further require banks to actively promote financial inclusion programs to customers.

Impact of technological developments on banking services (TOR, part (n))

The development and use of technology in the banking industry has the potential to create efficient methods for customers to communicate with their banks and access banking products. However, the development of these new services risks the reduction of traditional services, such as face-to-face contact in bank branches and personal telephone banking. This could significantly impact vulnerable customers and exacerbate their exclusion from banking services.

Many vulnerable customers, such as the elderly or those living remotely, rely on traditional banking services to engage with their bank. The assumption that all customers either have internet access in their home or are able to easily access it at a nearby facility is false. Many Legal Aid NSW clients do not have capacity, either mental or physical, to use the internet. It is important that the Code strengthens its commitment to these customers and provides a positive obligation on banks to ensure that they will always offer a reasonable alternative to accessing their services, beyond online services.

Recommendation

The Code should ensure that where a service exists online, the same service is provided through an alternative method that does not require internet access.

Communicating with vulnerable customers (TOR, part (r))

Legal Aid NSW has extensive experience assisting vulnerable clients, including older persons, people with a disability and Aboriginal and Torres Strait Islander bank customers. Additionally, Legal Aid NSW also assists customers who are victims of domestic and family violence, are illiterate or do not speak English. Communicating with banks and accessing formal assistance programs can be extremely difficult for such customers, as demonstrated by the following case study.

Case study: communicating with customers from culturally and linguistically diverse communities

Mira is a 46 year old mother who relies on a carer's payment as her income source. Mira was born in Iran and came to Australia in her twenties. Her first language is Farsi and she has limited English speaking and literacy skills. Mira entered into a loan with her bank under pressure from her partner. Mira was experiencing domestic and family violence with regular threats and intimidation from her partner.

Immediately after the loan was granted, Mira's partner demanded that all funds be transferred to his bank account. Mira's partner then threatened harm should she tell anyone about the loan. Mira's partner made no repayments on the loan and Mira had no capacity to make payments herself.

Mira started to receive overdue notices from the bank. She was unable to understand these notices. The bank then attempted to contact Mira twice on the telephone. Because of Mira's limited English she was unable to understand the bank representative on the phone. Mira tried to explain the situation to the bank representative but was unable to do so because of her limited English. The bank had noted on both phone calls that the customer did not speak English but made no further attempts to contact her in a language she understood. Consequently, Mira's debt continued to accrue and she began to receive default notices. The fear caused by her inability to read the letters from the bank and to speak with a bank representative caused Mira immense stress and anxiety. This situation continued for some months until a family member eventually referred her to Legal Aid NSW.

Had the Bank identified Mira's vulnerabilities and made attempts to contact her through alternative methods, such as an interpreter, Mira would have been able to get help sooner and work towards a resolution.

In our experience, vulnerable clients who are eligible for support, such as hardship assistance, are often either unaware of this option or find the process difficult to access on their own. Consequently, the initially manageable problems of many vulnerable people are exacerbated, and develop into serious legal issues. If communication procedures of banks with vulnerable customers were improved, more customers would be able to access assistance earlier to prevent problems escalating.

It is important that banks develop standards for clear communication for vulnerable customers. We note Clause 28 and the standards put in place for banks when dealing with customers in financial difficulty. We commend these clauses that aim to increase vulnerable customers' access to hardship assistance. However, more could be done by banks to improve communication between vulnerable customers and banks.

Often customers are unable to articulate that they are experiencing difficulties engaging with banks because of vulnerability. Additionally, they may not recognise that their vulnerability is relevant to the matter and therefore will not disclose it to the bank. To overcome this, the banks should use mandatory screening questions to identify vulnerabilities in customers. Once vulnerability is identified and the customer is also experiencing financial difficulty, customers should be referred to appropriate support services for assistance. This could simply be a connection or referral to the Financial Counselling Australia's hotline or to a proximate legal advice service.

In Legal Aid NSW's experience, vulnerable customers (and even advocates on their behalf) find it difficult to contact the banks because they are made to call multiple phone numbers, follow a series of prompts and then speak to a different customer service representative for each call. Providing a specific hotline for vulnerable customers with appropriately trained staff to answer these calls will help vulnerable customers communicate more easily with banks and access appropriate services.

Recommendations

The Code should require banks to screen customers for vulnerability.

The Code should provide that where a vulnerability is identified:

- (a) the customer should be provided with a centralised contact point within the bank, and**
- (b) appropriate referrals to financial counsellors and/or legal assistance are made in the event that the customer is experiencing financial hardship.**

Minimum standards for the offer of credit cards (TOR, part (u))

Currently, serviceability of credit cards is assessed on a customer's ability to repay the minimum amount. For example, if a customer spent \$2000 on a credit card with 18% interest and made the minimum repayments, it would take 20 years for the customer to pay off the debt with approximately \$5,691 in interest. This credit card is available to people who earn as little as \$14,000 per year.

There is a fine balance between promoting financial inclusion and offering credit products which further entrench a customer's financial disadvantage. We reiterate our earlier comments that the Code should require banks to develop and promote financial inclusion programs for vulnerable and low income customers, particularly in respect of low or no interest loans.

Initiatives contained in announcement on 21 April 2016

Legal Aid NSW welcomes industry's commitment to the initiatives announced on 21 April 2016. We agree that the initiatives are a step towards increasing transparency and building trust and confidence in the banking industry. We support the inclusion of the initiatives in the Code, to the extent that they are not already provided for.

Our further comments about selected initiatives are set out below.

Reviewing product sales commissions

Legal Aid NSW intends to make a submission to the Independent Review of Product Sales Commissions and Product based Payments by 9 September 2016 (**Independent Review**).

In our view, product sales commissions and product based payments in retail banking lead to poor customer outcomes as they encourage advisers to act in their own interest, rather than in the interests of the consumer.

We support legislative reform to remove product sales commissions and product based payments. More detail will be provided in our forthcoming submission to the Independent Review.

Supporting the Australian Security and Investments Commission (ASIC) as a strong regulator

To carry out their important work, regulators need appropriate resourcing, funding and powers.

We welcome the Australian Banking Association's (**ABA**) commitment to working with the Government and ASIC to implement a 'user pays' industry funding model and to enhance the current breach reporting framework. More detail about our position can be found at pages 20-21 of our submission to the Financial System Inquiry, dated March 2014.⁴

Our casework experience routinely shows that some businesses target vulnerable consumers with unfair trading practices. These practices include aggressive sale and marketing practices, poor quality products and service and exploitative pricing. To support ASIC as a strong regulator, we suggest an extension of ASIC's powers to prohibit conduct or practices that unfairly distort consumer decisions. More detail about our position can be found at pages 12 -13 of our submission to the Financial System Inquiry – Interim Report, dated August 2014.⁵

Banks and customers understanding their rights and responsibilities

Legal Aid NSW considers that most banks appear to have a solid understanding of their rights and responsibilities under the Code. We broadly support ongoing training and engagement between banks, the ABA and the Code Compliance Monitoring Committee (**CCMC**) to ensure this understanding is maintained.

By contrast, customers do not have the same level of knowledge of the Code; indeed, many customers are not aware of its existence. As discussed on page 9 above (and addressed in our recommendation 11), we submit that there should be targeted advertising to customers around the existence of the Code, focussing on how the Code aims to set industry standards, for customers and banks alike. This would not only improve the relationship between customers and the banks, but would demonstrate the industry's commitment to customers.

Recommendation

The ABA and the CCMC should improve customer awareness about the Code through an advertising campaign. The campaign could include examples of what issues are addressed in the Code and how to obtain a copy of the Code.

⁴ Available at: http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0015/19050/Legal-Aid-NSW-submission-to-the-Financial-System-Inquiry.pdf

⁵ Available at :
http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0006/19977/Legal-Aid-NSW-submission-to-the-Financial-System-Inquiry-Interim-Report_-August-2014.pdf

Part B: Code Compliance Monitoring Committee (CCMC) Independent Review

Legal Aid NSW has had limited involvement with the CCMC's investigations and monitoring role but we see benefit in engaging with the CCMC to increase awareness (both within and beyond Legal Aid NSW) about this function.

The CCMC should play an important role in the operation and effectiveness of the Code for customers. However, in our experience, its mandate does not appear to be well publicised and few customers are aware of its existence. Awareness of the CCMC's role among consumer advocates is also somewhat limited. However, we note that the CCMC has recently sought comment from Legal Aid NSW in relation to a survey about the provision of credit and we welcome this engagement.

The CCMC operates as a "check and balance," reinforcing the importance of the Code and banks' compliance with it. This potentially benefits consumers by providing consequences for banks if the Code is breached, and encouraging banks to meet their obligations. However, this benefit may be limited without broad awareness about the role and functions of the CCMC among bank customers and consumer advocates.

We consider that there is scope for improving community engagement via the CCMC website, for example, through publication of case studies of consumer complaints to the CCMC and their outcomes.

More guidance should also be provided about the relationship between the external dispute resolution schemes (EDR) and the CCMC, and in particular about the referral and information sharing relationship about Code breaches as between EDR and the CCMC. It is also not clear whether there is benefit in lodging simultaneous complaints with the CCMC and EDR or commencing litigation.

Legal Aid NSW supports the CCMC's engagement stakeholder engagement program. However the information on the CCMC website about this program with respect to engagement with consumer advocates is very limited, and there is scope for this program to be enhanced.

In our view, it is important that the CCMC maintains its independence as a body responsible for monitoring industry compliance with the Code. As such, the distinction between Clause 36 of the Code and the mandate of the CCMC should be clearly maintained.

Recommendations

The CCMC should raise awareness of its role and function amongst customer and consumer advocates.

The CCMC should enhance its community engagement program.

The referral and information-sharing relationship between the CCMC and EDR should be clarified and strengthened.