

19 August 2016

Mr Phil Khoury  
Independent reviewer  
Cameron Ralph Khoury  
PO Box 307  
East Melbourne VIC 8002

Dear Mr Khoury

### **Independent review of the Code of Banking Practice: ANZ views**

ANZ welcomes this review of the Code of Banking Practice ('the Code'). It is an opportunity to ensure that the Code is an up to date guide to how banks will treat their customers.

ANZ has contributed to the Australian Bankers' Association (ABA) submission and endorses the industry position. This letter provides ANZ comments on a number of the terms of reference and describes the bank's experience in some areas covered by the Code that may be useful to the review.

Comments below are set out under the relevant item from the terms of reference.

#### **(b) Structure of the Code and clarity in communicating the standards for good banking practices to banks and their individual and small business customers first**

This review should aim to improve the clarity and accessibility of the Code. The Code is rarely referred to by customers when discussing problems and complaints with ANZ.

The Code should, in ANZ's view, set out a plain English statement of our commitment to our customers. Many clauses already meet this objective. Others are lengthy and drafted in an overly legalistic style and could be refined where practicable. The ABA submission lists several such clauses, including clause 31, guarantees.

Greater clarity could also be achieved by further explaining some key terms used in the Code. See response to (m) below.

We support retaining a single Code for retail and small business and farming customers. Creating separate Codes for these customer groups would, in ANZ's view, create unnecessary duplication, inefficiencies and confusion. Where necessary, a distinction between the treatment of customer groups can be explained in the wording of clauses.

#### **(d) (vi) Provide hardship assistance to individual and small business customers experiencing financial difficulties**

ANZ is committed to working with customers who are in hardship and experiencing financial difficulty to try and help them get back on track.



Some of our customers will face unexpected events during their life and may not be financially prepared to cope. Our hardship team assists these customers to work through their situation. When a customer requests hardship assistance, ANZ will:

- assess the customer's request, giving genuine consideration to their circumstances
- look at the customer's financial position
- ask some questions about how the customer's circumstances have changed
- ask how the customer expects to be able to resume their standard repayments down the track, and
- look at the customer's products to see what might be feasible and suitable.

The hardship team will consider whether it is reasonable to expect the customer's situation will improve to the extent they can meet their repayments, or whether assistance via a loan variation or repayment arrangement could return the customer to a position where they can maintain repayments.

### **(e) The role and mandate of the Code Compliance Monitoring Committee (CCMC)**

ANZ has an open and constructive working relationship with the CCMC through the annual compliance statement process. Our experience has been that investigations by the CCMC into possible breaches of the Code are infrequent and usually initiated following complaints to the CCMC by customers dissatisfied with internal or external dispute resolution processes, or by claimants seeking a determination to use in court proceedings.

### **(g) Definitions, including practical definitions of banking services and small business**

The Code defines "small business" as a business with fewer than 20 full time equivalent employees, or in the case of a manufacturing business, fewer than 100 employees. There are more than a half a dozen definitions of small business used in legislation and by various bodies.

The Code is intended to apply to retail banking customers and businesses with limited access to financial, legal and accounting advice. The current definition means the Code will apply to some companies and subsidiaries with large turnovers and large loan facilities, but few employees. This appears at odds with the Code's intent and the way many clauses in the Code are worded.

It would be preferable for the Code to define a small business based on total lending where there is business lending, with the employee definition applying where there is no lending relationship. While there are many legislative definitions of small business in relation to taxation and other areas, the most relevant is that adopted under Unfair Contract Terms legislation, which applies only where the loan value is no more than \$1 million. Keeping the test as close as possible to the same group of small business customers would make it simpler for customers and for bank compliance.

We understand that this definition is also being examined as part of ASIC's review of the Financial Ombudsman Service's (FOS) jurisdiction and is a question which may be considered by the review of the financial system's external dispute resolution and complaints framework now underway.

### **(j) Direct debits and recurring payments made using a debit or credit card**

ANZ acknowledges the difficulties some customers have in cancelling direct debit payments made using credit cards. The reason that banks are not able to support



cancellation of direct debits using credit cards is that customers establish the direct debit relationship using a credit card directly with the merchant, not by authorising a bank to make the transaction on their behalf. The merchant, authorised by the customer, makes the transaction. A bank can 'see' transactions using a credit card, but banks do not make the payment using the credit card.

The same difficulty does not arise with cancelling direct debits made using a bank account since in this case, the bank is authorised to make the transaction on behalf of the customer.

It would be helpful to clarify in the Code how these card-related payments differ from direct debits set up to make payments directly from a bank account.

ANZ will seek to simplify and harmonise the process for customers and provide clear and concise information about direct debit cancellation requirements.

**(m) Laws and regulations covering banking services to individual and small business customers and the extent to which new legal obligations to act in the Client's best interest and responsible lending principles are addressed or require any amendment to the Code**

*Consumer and commercial customer protections*

Protections for bank customers, and related obligations of bankers to their customers, are not widely understood and arise under legislation, common law and contract. Courts have found that provisions of the Code are incorporated into contracts between banks and those customer covered by the Code.

Consumers are protected by the *National Consumer Credit Protection Act 2009* which requires a banker to ascertain and verify a consumer's financial situation, and assess whether the credit contract is not unsuitable. Consumers are generally asked for payslips, and other readily available proof of income as part of this process.

For commercial customers, a banker providing credit is subject to legal obligations designed to protect the interests of the customer. Under statute, this includes sections 12CB and 12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) as well as the extension of unfair contract terms laws to small business under Part 2 Division 2 Sub-division BA of the ASIC Act.

Significant penalties arise for breaches of these protections. Legislation is also proposed governing the design and distribution of financial products and to give ASIC a product intervention power where there is a risk of significant consumer detriment.

Unless specifically requested by the customer, a banker providing credit to a commercial customer is generally not being engaged to provide advice to a business customer on their business interests or financial strategy. Businesses will often engage and pay for advice from accountants or consultants for that purpose to the extent it does not amount to tax advice.

Small businesses are unlikely to have income proof as required of individual consumers under responsible lending legislation. Annual tax returns provide much less frequent snapshots of verification. Requiring small businesses to provide audited accounts could be expected to impose greater costs (accountants and additional documentation) and is likely to impact the provision of credit to small business.



### *Best interest duty*

Where a consumer seeks personal advice on financial products regulated by the *Corporations Act 2001*, Parliament established the obligation of a financial adviser to act in the best interest of the customer. This reflects the significance of financial advice and clear failures in the provision of advice in this area.

Under Section 961B of the *Corporations Act 2001*, the best interest duty requires a financial adviser to take instructions from the client and identify the client's objectives, financial situation and needs. The adviser is obligated to make inquiries to ensure that information is accurate, and a range of products are investigated to meet the client's needs before providing advice. As outlined above in relation to responsible lending, if this applied to small business lending, it would effectively require a verification of the self-declaration which would reduce the availability of credit to small business.

We do not believe that it is appropriate that a banker providing credit to a commercial customer should be subject to a best interest duty. It would mean that the banker would need to undertake a comprehensive review of a commercial borrower's business, strategy, goals and potential options. Such a duty would pose additional costs on small businesses seeking credit and essentially changes the normal role of a banker into that of a financial adviser or business consultant.

Bankers provide customers with products which have characteristics related to their stated objectives. A business and its advisors, including tax advisors, determine which product is the most appropriate.

### *Clarifying Code obligations*

There is scope to improve the explanation of obligations under the Code that a banker makes in relation to their dealings with customers. Three areas which would benefit from this are:

- the need for customers to consider seeking legal or financial advice (clause 3.1),
- the meaning of the commitment to "act fairly and reasonably towards you in a consistent and ethical manner" (clause 3.2), and
- the commitment to "exercise the care and skill of a diligent and prudent banker" in the credit assessment process (clause 27).

Regarding clause 3.1, greater prominence could be given to the recommendation that a customer seek legal or financial advice.

More could also be done to explain what bank employees must do to comply with clauses 3.2 and 27. It could be helpful to point to examples of how these terms have been interpreted, including by the Financial Ombudsman Service (FOS). This could be done using references or hyperlinks to relevant pages on FOS's website.

In ANZ's view it would be helpful to promote understanding of these protections. Particular challenges to achieving this goal are the need to avoid duplication of legislation while providing a simple to understand overview, and more detailed explanation of matters covered through the Code.



**(q) Commitments to accessibility and financial inclusion, including account suitability and basic bank accounts, financial literacy and the implications of technology developments on banking services**

Clause 16, account suitability is currently focused on low income retail customers and transaction accounts. Given the Code's application to small businesses, this clause could be extended to other retail and small business products (eg consumer credit insurance).

**(r) The desirability for the Code to provide for banks to develop standards for communicating and dealing with vulnerable customers including older persons, customers with a disability and Indigenous customers**

ANZ agrees that more can be done to raise awareness of how banks work with vulnerable customers, but this can remain outside the Code.

For example, ANZ is working with other banks to support an important law reform agenda in relation to elder financial abuse, including addressing inconsistencies and gaps in the legal and investigatory process.

ANZ's approach to elder financial abuse is to train frontline staff to identify 'flags' that may indicate financial abuse and to escalate internally for advice. Examples of flags include where the customer attends with a companion but appears confused, doesn't provide the instructions, transactions are out of character or they cannot explain what significant or unusual transactions are for. Our primary goal is to protect our customers' interests.

Staff will attempt to speak to the customer separately to clarify their understanding of the transaction. Where concerns remain, we may discourage large or unusual transactions; limit significant withdrawals that do not appear to benefit the customer; and ensure closing balances are disbursed via a bank cheque in the customer's favour.

Staff may ask if there is a power of attorney in place, or try to identify if the customer has a doctor or lawyer who can clarify if the customer requires decision making assistance.

Staff may provide customers with the contact details of the relevant state elder abuse or seniors' rights body and offer to support customers when they telephone those organisations for advice.

Where ANZ is advised of a dispute between attorneys, or where a family member or friend flags concerns, we will refer them to the relevant statutory body for advice. In the event we have concerns for a customer's physical wellbeing, we will contact the police and request a welfare check.

**(s) The desirability of the Code to include minimum standards for working with small business customers in financial distress. For example, customer communication; notice period for enforcement actions; on request by the customer, disclosing independent valuation reports...**

The Joint Standing Committee report into impairment of customer loans addresses a number of these issues. ANZ has provided detailed information to this inquiry, in the context of agribusiness loans, in two submissions and at a Committee hearing. We support a number of the recommendations made, as detailed below.

*Customer communication*

ANZ practice is to work with small business customers in financial distress to resolve issues and return the business to financial health. Where this is not possible and



following all attempts to resolve issues, we may take enforcement action. We endeavour to ensure a 'no surprises' approach so our customers are aware of their position with the Bank and ensure a fair notice period is given before any enforcement.

ANZ supports the Code including the following minimum notice requirements for small business customers (where the customer is not in default):

- a reminder notice to a borrower being sent at least 6 months prior to the expiry of a commercial term loan
- a minimum of 30 days' notice and the decision is not to extend the existing facility
- banks will clearly set out in the loan terms the types of changes that a bank can make and the period of notice a bank will give to the customer in relation to each of those changes (similar to clause 12.4(c) of the Code).

#### *Valuations, reports and instructions*

ANZ supports the Code including a requirement that banks provide commercial customers with copies of valuation reports and instructions to valuers where they have paid, and instructions to and reports by investigative accountants.

#### *Farm debt mediation*

ANZ is on the record through submissions and testimony to the PJC inquiry as supporting a national approach to farm debt mediation. We engage with State governments to encourage consistency across state-based approaches.

Please feel free to contact me if you wish to discuss any of the matters raised in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rob Lomdahl', written over a horizontal line.

**Rob Lomdahl**