Australian Banking Association

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Sankari Sinnasamy
Senior Compliance Analyst
Banking Code Compliance Committee
By email: info@codecompliance.org.au

Dear Sankari

Consultation on BCCC Operating Procedures

Thank you for providing the draft changes to the BCCC Operating Procedures. We set out some key points below and provide more detailed responses against particular proposed changes in the Schedule.

Key points

Remediation

We note that the proposed changes indicate that the BCCC seeks to broaden references to remediation that banks may have provided in respect of Code breaches. While accepting that remediation may be a relevant consideration for some BCCC purposes, it is important to bear in mind that the BCCC Charter expressly provides that:

> "The role of the BCCC does not include determining what redress, including compensation for financial or non-financial loss, should be provided to a customer as a result of non-compliance with the Code."

For this reason, in our view, it should be made clear in the document (and be embedded in other BCCC processes) that commenting on remediation is not to include expressing views on the adequacy or otherwise of remediation in particular cases.

Where the document sets out the BCCC procedure for monitoring remediation, we assume that the BCCC does not intend to replicate the supervision or monitoring of remediation programs that are being conducted under the supervision or auspices of ASIC, consistent with the exclusion of the BCCC's jurisdiction where the matter has already been heard by, or are under investigation by, another forum. This should be clarified in the document.

Naming sanction

The sanctions set out paragraph 215(e) of the Banking Code represent, as the preamble to that paragraph implies, a set of options to be applied in line with the seriousness of the particular breach. In our view, the naming sanction should be considered to be at the more severe end of the range. Some additional content in the document, outlining that the sanction is at the more serious end of the range, would be helpful.

Timeliness

Timely progression of reports and investigations is critical to the effective operation of the BCCC. We endorse the focus on timeliness, though note that this could be strengthened by, for example, committing to goal times for completion of investigations (12 months for example), and to periodic updates to the parties (quarterly for example).

Please see the **Schedule** for more detailed responses.

We'd be pleased to discuss any of these matters further.

Yours sincerely

Jerome Davidson
Director, Legal Affairs
(02) 8298 0417
Reception@ausbanking.org.au

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Schedule

Amendments to BCCC operating procedures – ABA comments

No.	Proposed change	ABA comments
3	Add the following paragraphs: 22. Clause 213 of the Code requires banks to co-operate and comply with all reasonable requests of the BCCC in the performance of its monitoring and investigate activities.	The term 'reasonable requests', as used here and in the Code, is appropriate. In our view, this term envisages the consideration of a range of relevant circumstances including for example, the existence of overlapping requests from regulators such as ASIC. The Operating Procedures could potentially list some of the factors relevant to the BCCC's decision to make requests. This could include the above.
7	Add the following paragraph: 44. Where the BCCC decides to impose a sanction to name a bank, it may apply its discretion to publish an identified Finding accompanied by a Notice of Sanction on its website (see Section 4).	The sanctions set out in paragraph 215(e) of the Banking Code represent, as the preamble to that paragraph implies, a set of options to be applied in line with the seriousness of the particular breach. In our view, the naming sanction should be considered to be at the more severe end of the range. Some additional content in the document, outlining that the sanction is for use in more serious cases, would be appropriate.
8	The 'reasons for amendment document' states: "Move paragraphs 30 and 31 to a new section (Stage 5: Remediation)"	The updated Operating Procedures Consultation Draft document appears to have inadvertently excluded paragraph 30 under the new Stage 5: Remediation section. Current paragraph 30 states: "The BCCC will endeavour to work with the bank to develop recommendations, implement corrective actions, remediate the breach and improve existing practice." It is essential that this be included in the updated version of the Operating Procedures.
9	Add the following paragraph: 46. The BCCC will endeavor to progress and conclude an investigation in a timely manner. Timeframes for each stage of an investigation will be determined on a case by case basis.	Timely progression of reports and investigation is critical to the effective operation of the BCCC. We endorse the focus on timeliness, though this could be strengthened by, for example, committing to goal times for completion of investigations (12 months for example), and committing to periodic updates to the parties (quarterly for example). Receiving these outcomes as early as possible enables banks to act quickly to consider and implement any internal changes and thereby minimise any further risk of non-compliance or customer impact.
10	Add the following sections: Stage 5: Remediation Corrective actions 47. Where the BCCC exercises its power to make a Finding that a	We assume here that the BCCC does not intend to replicate the supervision or monitoring of remediation programs that are being conducted under the supervision or auspices of ASIC. Duplication of the role of ASIC in such circumstances would for example, be inconsistent with the limitation of

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	bank has breached one or more Code obligations as a result of an investigation or inquiry, the BCCC may request a bank to provide information on how it proposes to remediate its breaches. 48. The BCCC may track the bank's development and implementation of any relevant recommendations and corrective actions to assess and report on the bank's efforts to improve banking services for customers. 49. Where appropriate, the BCCC may also make additional inquiries and/or conduct additional monitoring activities to ensure that the bank has effectively and adequately implemented its corrective actions. Customer remediation 50. It is a bank's responsibility to develop and implement customer remediation plans taking into account any relevant regulatory guidelines. 51. The BCCC will not approve or oversee a bank's customer remediation plan. 52. The BCCC may monitor the implementation of a bank's customer remediation plans and request updates as to their progress and completion.	the BCCC's power in paragraph 5.3(d) of the BCCC Charter. We also note that legislation is expected later this year which will increase the role of the Australian Financial Complaints Authority in consumer remediation We suggest that this is clarified in the Operating Procedures.
12	Amend paragraph to: 63. Where the BCCC makes a Finding that a bank has breached the Code, it will include: a. a brief description of the BCCC's findings and the basis on which it made the findings b. comments as to whether the breach identified is serious and/or systemic c. comments on the corrective actions undertaken by the bank to prevent recurrence of the breaches(es) and to remediate customer(s) (see Section 2, Stage 5: Remediation), and	As the BCCC proposes to include more information in its findings, it is important that it take into account any reasons that may exist not to publish any information (e.g. where publication could prejudice proceedings in another forum, or where Privacy Act obligations apply or information is commercially sensitive). Banks should have the opportunity to object to the release of aspects of the finding/s for these reasons. In addition, we note the references in paragraphs 58(c) and 63(c), to comments on the actions undertaken to remediate customers. We note that the BCCC Charter expressly provides that: “The role of the BCCC does not include determining what redress, including compensation for financial or non-financial loss, should be provided to a customer as a result of non-compliance with the Code."

	d. Good Practice Guidance setting out the BCCC's expectations for how banks should ensure ongoing compliance with the applicable Code provisions … 64. Once a Finding has been made, the BCCC will notify the bank and, if applicable, the person(s) who made the allegation (notification of a Finding). In instances where a broader inquiry was initiated as a result of individual customer allegation(s), the BCCC may provide the relevant customers with a copy of the BCCC's outcome. Add the following paragraph: 65. Where applicable, the notification of a Finding of non-compliance with the Code to the bank will also include information on whether the BCCC is considering imposing sanctions on the bank (see Section 4).	For this reason, in our view, it should be made clear in the document that commenting on remediation is not to include expressing views on the adequacy or otherwise of remediation. Finally, at the stage that the BCCC makes a finding that a breach has occurred, the bank's approach to remediation may still be in development, and may change as the remediation program is developed. As a result, publishing comments on remediation at this stage may be misleading. The Operating Procedures should reflect this.
16	Add the following paragraphs: 73. Where the BCCC decides to apply a sanction to name a bank (clause 215(e)) for breaches of the Code, the BCCC has the discretion to publish the Finding of non-compliance, identifying the bank, on its website. 74. In addition to the Finding of non-compliance, the BCCC will publish a Notice of Sanction on its website. This Notice, identifying the bank, will contain a summary of the BCCC's reasons for its findings and decision to impose a naming sanction. 75. The BCCC will provide the bank with at least 24 hours' notice before it publishes the identified Finding and Notice of Sanction. The BCCC will also proceed to name the bank in its next Annual Report.	See comments in relation to item 7 above. In addition, we note that 24 hours' notice may not be reasonably sufficient for banks to arrange notices to relevant regulators (i.e. to the ASX, where this may be required). We suggest a longer minimum period be provided for. We assume that paragraph 74 is intended to apply only to instances in which the naming sanction is imposed. The first sentence of the paragraph, however, could be read differently. This might be dealt with by making paragraph 74 a sub-point of paragraph 73.
17	**Civil and criminal implications** Civil implications	Proposed paragraph 77 seems to be a simple restatement of the law. We question whether its inclusion is superfluous.

77. In instances where the BCCC does not impose a sanction under clause 215(f), the bank has an obligation to consider whether it should report any breaches of the law to the relevant regulator.

Additional points

We note that paragraph 32 and 36 (though not subject to planned change) commit the BCCC to notifying the complainant where an investigation is closed. In our view, the commitment should extend to informing the relevant bank. This opportunity could be taken to amend those paragraphs accordingly.