

19 August 2019

By email: dstevens@codecompliance.org.au

Donna Stevens
Code Compliance Manager
On behalf of the Banking Code Compliance Committee
PO Box 14240
Melbourne VIC 8001

Dear Donna,

Inquiry into banks' conduct when accepting and enforcing guarantees

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide brief feedback to the Banking Code Compliance Committee (BCCC) inquiry into banks' compliance when accepting and enforcing guarantees (banks' compliance with the guarantee provisions of the 2013 Code of Banking Practice) (the '**Code**').

Our legal team has highlighted concerns about guarantee provision compliance in relation to elder abuse, dispute resolution obstacles and co-borrowers that should be guarantors.

In addition to brief feedback about these issues, we also wish to direct the BCCC to our submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) *Interim Report*. Specifically, we refer to pages 31–33 and 33–36 of our submission in which we discuss guarantees and guarantee provision breaches in more detail. The submission is also accessible here:

<https://consumeraction.org.au/royal-commission-into-misconduct-in-the-banking-superannuation-and-finance-sector-submission-on-the-interim-report-rounds-1-to-4/>

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians

Elder abuse

Many older Australians are asked to provide guarantees, often as a favour to their children. This was highlighted at the Royal Commission in the evidence given by pensioner Carolyn Flanagan. Ms Flanagan had signed a

guarantee she had provided to secure a loan taken out by her daughter and her partner to purchase a franchise business. Ms Flanagan had poor eyesight, trouble speaking due to an operation on her tongue for cancer treatment, and was unemployed on a disability pension.¹ When the business did not succeed, Ms Flanagan as the guarantor lost ownership of her home and was nearly evicted. The case study included evidence of a 'pre-filled' acknowledgement that she had been properly advised and understood the guarantee, which was apparently not uncommon.²

Consumer Action has assisted clients who have acted as guarantors in circumstances that were not dissimilar. Unfortunately, specific case studies are not possible, often due to the monetary restriction on access to justice through the Financial Ombudsman Service Australia (FOS)'s open dispute resolution process, leading to settlements with confidential terms or clients who decided not to continue with our legal assistance.

Generally, some of the issues highlighted by Consumer Action client and worker assistance in relation to this are:

- the guarantor signing the guarantee on the same day as signing the loan documents (in breach of clause 31.5 Banking Code) – and potentially forward dating the guarantee even though the mortgage securing the guarantor's property would be signed on the same day as the credit contract
- the guarantor being asked to sign the guarantee in the presence of the borrower (in particular, where this is a family member of the guarantor and they do not want to feel embarrassed in front of family and feel further pressure to sign) – breaches FOS Approach on Elder Abuse (Nov 17)
- red flags that should require more inquiries and checks to satisfy a lender of the validity of a guarantee:
 - o family-member company directors who have limited English and/or education
 - o family member who becomes a company director shortly before the loan is entered into.

Dispute resolution issues

As mentioned above, FOS was limited in its approach to guarantees in that it could not waive a partial guarantee and could not review any guarantee over \$500,000 and/or any guarantee where there was more than \$309,000 owing.³ This resulted (on multiple occasions) in our clients not being able to access redress even though there were clear compliance issues with the guarantee provisions. This drastically limited their access to justice.

We note that the cap on the Australian Financial Complaints Authority (AFCA)'s jurisdictional cap on review of guarantor claims to be unlimited when secured against the guarantor's home, and otherwise higher, at a \$1,000,000 or \$5,000,000. This should have a significant effect on guarantor's ability to access justice, and similarly, for banks to be incentivised to comply with the guarantee provisions of the new Banking Code.

Where a co-borrower should have been guarantor

When considering guarantee breaches, it is also important to note the continued issue (that has not been resolved in the 2019 Banking Code of Practice) of co-borrowers that have not received a substantial benefit under a loan and, in reality, should have been a guarantor rather than a co-borrower. As stated in submissions to the ABA, we recommend a prohibition on a bank entering into a co-borrowing arrangement unless each borrower receives a

¹ *Interim Report*, Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol 2 (September 2018) p 257.

² *Interim Report*, Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol 2 (September 2018) p 258.

³ FOS, *The FOS Approach to disputes lodged by guarantors* (October 2013) p3.

substantial benefit from the arrangement. The risk of harm caused by co-borrowing arrangements is significant, particularly in the context of economic abuse by family members.

We understand that the banks wish to continue allowing co-borrowing in instances where parents enter into a loan jointly with their dependent to purchase property (to facilitate inter-generational transfer of wealth). If the Code is to allow these arrangements, then the prohibition on co-borrowing unless both parties receive a substantial benefit should have a limited exemption in the case of loans for the purchase of real property.

Contact details

Please contact Senior Policy Officer **Brigette Rose** at **Consumer Action Law Centre** on 03 9670 5088 or at brigette@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in blue ink that reads "Gerard Brody". The signature is written in a cursive style.

Gerard Brody | CEO