

Mr Mike Callaghan AM PSM
Independent Reviewer
Banking Code of Practice
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Dear Mr Callaghan

Australian Payments Network (AusPayNet) welcomes the opportunity to respond to the *2021 Independent Review of the Banking Code of Practice – Consultation Note*. As you are aware, AusPayNet is the industry association and self-regulatory body for the Australian payments industry. AusPayNet manages and develops regulations, procedures, policies and standards governing payments within Australia.

AusPayNet's interest as a stakeholder arises, in part, from the fact that the Banking Code of Practice (the 'Code') applies to 'payment services' as an example of 'banking services' (Chapter 1). AusPayNet's response to the Consultation Note is expressed through that lens. AusPayNet acknowledges the range of views held by its diverse member base¹ and as such has focused on issues that may impact the frameworks we administer, rather than matters of commercial interest.

As an overall comment, AusPayNet favours an approach to the review of the Code which has regard to the pace of technological innovation in payments and the parallel acceleration of regulatory change. We would urge that the Code not seek to replicate other regulatory regimes nor to create duplicate areas of reporting for Code subscribers. Given the pace of technological and regulatory changes, the Code should aim for neutrality from both those perspectives. Our comments throughout this submission stem from this approach.

Response to specific questions

Extent to which the Code meets community expectations

2) Does the Code remain relevant given changes to legislation and regulations affecting banking services?

The Terms of Reference state that one objective of the review of the Code is to ensure that the Code continues to respond appropriately to the contemporary environment. To ensure this outcome and to keep the Code relevant, a principles-based, technology neutral approach should be adopted rather than 'point in time' methods and mechanisms which can be superseded.

Clause 28 on Cheque accounts is a good example. Cheque use has been in steady decline for many years. The Australian community and business have largely moved away from cheques. Banks do not necessarily offer accounts with cheque access. The rate of decline in cheque use has been accelerating over the last five years. Since 2016 cheque use has declined by 63%, based on RBA statistics.

¹ AusPayNet members <https://www.auspynet.com.au/join-us>

In the context of the Code as a whole, the emphasis on the old ‘technology’ of cheques is disproportionate. The detail and extent of clause 28, and its location as part of Chapter 11 (which is a significant Chapter), is no longer warranted and deserves review.

As a specific comment, AusPayNet notes that clause 28(b) of the Code references a historical ‘special clearance’ process that is now obsolete under the rules for cheque clearing between members of AusPayNet’s Australian Paper Clearing System (APCS) framework. As such, clause 28(b) should be removed.

Extent to which the Code meets community expectations

2) In particular, does the Code need to be amended in the light of such developments as: Mandatory Credit Reporting; Open Banking; Design and Distribution Obligations; and Buy Now Pay Later?

The breadth of developments that are identified in the Consultation Note underscores the need for the Code to be agnostic from both a regulatory and technology perspective. As an industry body with a diverse membership, AusPayNet recognises that new developments create issues that extend beyond Code subscribers and involve a broad category of entities and new entrants in the payment system. External regulation, rather than the Code, may be a better avenue to cover the range of issues and participants involved. The current, continuing developments in Open Banking and Buy Now Pay Later (*BNPL*) illustrate the issues.

Open Banking: the implications on the Code are yet to fully emerge, and it would be premature to amend the Code specifically for Open Banking. The future direction of Open Banking continues to take shape as the Government responds to the *Inquiry into Future Directions for the Consumer Data Right – Final Report* (‘CDR Report’)². Clarity on issues that are central to payment schemes such as liability management is crucial, and Treasury’s detailed consideration of this is still ongoing.

BNPL: there is further scope for the regulatory landscape to develop and change (in addition to AFIA’s BNPL Code of Practice), such as the possible introduction of an electronic-money licence. In response to the Treasury consultation *Review of the Australian Payments System*, AusPayNet’s submission notes “the impact of specific payment/fintech licenses in other jurisdictions and their role in stimulating innovation. These licences provide clarity around requirements, consumer protections and access rights.”³

These examples show that it is preferable that the Code articulate principles rather than address specific technology or regulation and that it would be premature to amend the Code specifically for Open Banking or BNPL, or to seek to replicate aspects of those regimes in the Code.

AusPayNet flags below some other parts of the Code which may require amendment because of other innovation and developments, including changes in customer behaviours. The shift to mobile wallets is a significant development since the last review of the Code. Even before the impact of COVID-19, the Reserve Bank’s *2019 Consumer Payments Survey*⁴ noted the rapid growth in mobile payments in the three year period since its 2016 survey, when “*the ability to make mobile payments was still a relatively new feature of the retail payment system*”.

² <https://treasury.gov.au/publication/inquiry-future-directions-consumer-data-right-final-report>

³ AusPayNet submission to the Treasury Consultation ‘Review of the Australian Payments System’, dated 22 January 2021

⁴ <https://www.rba.gov.au/publications/bulletin/2020/mar/consumer-payment-behaviour-in-australia.html>

These developments illustrate that a technology- or regulatory-specific approach has the twin disadvantages of becoming outdated and also creating potential inconsistencies and duplication:

- Chapter 30 (Keeping your accounts safe and secure). The outcome of ASIC's proposals in the ePayments Code review regarding consumers' disclosure of their passcodes could have an impact on clause 116 of the Code regarding safeguarding devices under the Code
- Chapter 34 (Direct debits and recurring payments). The advent of new methods for regular payments, such as the New Payments Platform's (NPP) planned "PayTo" service may have an impact on this Chapter, including the potential for the terminology in Chapter 34 to become outdated, including for example "BSB and account number".
- Chapter 44B(e) (Basic accounts). This paragraph requires a Code subscriber to offer a '*choice of a debit card (such as eftpos) or a scheme debit card ... such as Visa Debit or Mastercard Debit*'. It may not be necessary to require the option of both, and still achieve the intent of the provision. In any event, potential regulatory developments by the Reserve Bank may cover the field on this issue, and duplication in the Code should be avoided. We also note that the terminology-specific descriptions are susceptible to becoming outdated.
- "Device" definition. This definition and its use in the Code deserves review because:
 - The defined term is limited to 'a device *given by us to you....*'. This is not sufficient in the contemporary environment where, as noted above, mobile wallets are gaining dominance and consumers pay with mobile phones that are not issued by ADIs;
 - Clauses 116 and 117 do not use the defined term "Device". It is unclear if this was intended, and creates uncertainty as to the meaning of 'device' in those clauses; and
 - ASIC has proposed to move away from the use of the word 'device' in the ePayments Code. This could also impact clause 116. AusPayNet suggests that it is preferable if the Code aligns with the ePayments Code on the definition.
- Acronym "BSB". The acronym is a historical reference that is no longer accurate. We suggest that 'BSB' is moved from the 'Acronym' section to the 'Definitions' section and defined as: '*a digital address that identifies a financial institution and its particular administration centre, processing centre, branch or office*'.

The Code's audience

2) Has an appropriate balance been achieved between making the Code easy to read and navigate for the customer, while giving the banks enough guidance to implement the Code?

As a stakeholder with a regular need to consult the Code, AusPayNet has observed that the layout and numbering in the Code, as well as the Table of Contents, is not easy to navigate. The numbering system for Parts, Chapters and clauses/paragraphs contributes to this. It is unclear what weight to give to the un-numbered headings, and the statements under the headings.

The introductory sections that accompany the Code (Guiding Principles, "Our role in society" and "What is the Banking Code of Practice") articulate slightly different concepts from the Code provisions (e.g. 'trust', 'honesty', 'integrity', 'safeguards and protections not set out in the law'). The role of these sections and

whether they affect the Code provisions is not clear, although AusPayNet notes that the BCCC Guidance Note on clause 10⁵ comments on the Guiding Principles.

The Code's audience

- 3) While the Code says that relevant provisions apply to its terms and conditions for all banking services and guarantees, do they have sufficient clarity such that a court or external dispute resolution mechanism can treat a breach of a provision as a breach of contract?**

Careful consideration needs to be given to the Code's provisions to ensure that they have sufficient clarity for this purpose. The views we expressed in Q2 above may also be relevant to take into account when considering this question.

Acting in a fair, reasonable and ethical manner

- 1) Is the commitment for banks to act in a fair, reasonable and ethical manner (Clause 10) one of the most important clauses in the Code?**

AusPayNet supports Clause 10 as one of the most important clauses in the Code. However, it is not currently being signalled as such. It is written as a secondary clause in Chapter 4 “*Trained and competent staff*” under the heading ‘*How our staff will engage with you*’. That location, and those headings and wording do not obviously suggest that it is intended to be read as one of the most important clauses in the Code. Nor does it suggest that it has the breadth canvassed in the Consultation Note, which references the BCCC Guidance Note on clause 10. If this clause is to be clearly recognised as one of the most important clauses in the Code, AusPayNet suggests that it merits being re-located to be given more prominence.

In support of the Clause 10 ‘fair, reasonable and ethical’ commitment in the Code, AusPayNet notes that there is considerable industry collaborative work underway, for example AusPayNet and the ABA are working to provide adequate protection for customers from scams. This work will continue to have ongoing importance.

Customers experiencing financial difficulties

- 5) Do banks assist customers facing financial difficulties in line with the commitments in the Code?
- 6) Does the Code provide clear and comprehensive information on whether and how their bank will assist them if they are in financial difficulties? Should there be more guidance as to what banks will consider in deciding whether and how to assist customers in financial difficulties?
- 12) Should the Code outline what constitutes ‘meaningful and sustainable’ debt repayments in circumstances of financial hardship?

Questions of financial difficulty sometimes arise when AusPayNet members are following a process to recover funds from an unintended recipient’s account following a mistaken internet payment (‘MIP’) by a

⁵ [BCCC Guidance Note – Clause 10.](#)

consumer. Our comments on financial hardship and difficulties are limited to this MIP aspect, and do not address the broader aspects of financial hardship and difficulty.

The MIP process for the recovery of funds is covered by AusPayNet's procedures and guidelines⁶, which mirror the process in the ePayments Code. The MIP process tries to balance the interests of the customer who has made the mistake, against the interests of the unintended recipient.

The AusPayNet guidelines recognise that our members may consider the particular circumstances of an unintended recipient and whether the recovery of funds would cause undue hardship.

One specific aspect of the current ePayments Code review focuses on the MIP provisions. ASIC is considering the range of issues involved if ADIs were to be permitted to recover partial amounts from an unintended recipient's account where the full amount of the MIP is not available, and what 'reasonable endeavours' an ADI can make to recover the funds. The AusPayNet guidelines will be amended in line with the ePayments Code when that review is completed.

To the extent that the issue of funds recovery in a MIP situation intersect with Qs 5,6, and 12, AusPayNet suggests that any proposals for the Code relating to a bank's assistance for customers in financial difficulties and debt repayments in circumstances of financial hardship take into account the matters under consideration by ASIC relating to the recovery of funds for a mistaken internet payment, to ensure that banks are able to comply in a consistent way with their obligations under the Code and the ePayments Code as well as the AusPayNet guidelines.

Inclusive and accessible services and supporting vulnerable customers

3) Could the Code be strengthened in terms of helping to ensure that services are inclusive and accessible and vulnerable customers are appropriately supported?

As part of AusPayNet's vision that payments should be convenient and secure for all, AusPayNet undertook an extensive consultation in 2019 with people living with vision or motor impairments, and their networks. AusPayNet recognises that, in an environment where innovative payment solutions and technologies are making payments convenient for users, they should also remain inclusive and accessible. Following the consultation, AusPayNet developed the Accessibility Guidelines⁷ to raise awareness and understanding of designing for inclusion and accessibility (particularly for PIN Entry on Touchscreen Terminals), and has encouraged its members and others in the payments industry to consider the Guidelines when developing future technologies.

Having regard to the pace of technological innovation, AusPayNet supports the current principles-based approach to inclusive and accessible services in the Code, and that the Code seek to remain technology-neutral to 'future-proof' its provisions on inclusive and accessible banking services.

Where specific issues may arise in relation to inclusive and accessible banking services, AusPayNet would welcome the opportunity to provide further support on those issues, building on from our work on accessibility described above.

⁶ These procedures and guidelines are confidential to AusPayNet members. They can be shared on a confidential basis for the purpose of the Review, if requested.

⁷ [Guidelines for Accessibility in PIN Entry on Touchscreen Terminals](#)

Summary

In summary, having regard to the pace of technological innovation in payments, regulatory change, and changes in customer behaviour and banking services, AusPayNet favours an approach to the review of the Code which aims for neutrality from a technology and regulatory perspective, and which assesses the relevance of existing Code provisions as well as new developments. We also suggest that any Code review recommendations are appropriately timed to align with the outcomes of other concurrent reviews such as the Treasury *Review of the Australian Payments System*, ASIC's review of the *ePayments Code*, and the Government's response to the *CDR Report*, without creating duplication of those regimes.

We welcome the opportunity for further engagement or to discuss any issues covered here in greater detail.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Andy White".

Andy White
CEO, AusPayNet