



Australian Securities & Investments Commission

# **Submission to the Review of the Code of Banking Practice**

September 2000

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# Section 1

## **Executive summary**

The Banking Code of Practice (the Banking Code) has an important role to play in the regulatory regime for providing consumer protection to bank customers. Since it was first developed, however, there have been significant changes in the products offered, and the delivery channels used, by banks. There have also been significant changes in the regulatory regime applying to banks. It is thus timely that the code is being reviewed. ASIC's submission seeks to look at the implications of these changes for the code and both make recommendations for changes and raise issues for further consideration.

We have tried to be helpful in these comments, however, given the importance of the Financial Services Reform (FSR) Bill, we would reserve the right to review our comments in light of the final form of the legislation and any issues that emerge about the administration of the finance industry.

The timing of the review raises some issues given the subsequent legislative developments.

At this stage, we do not have the final content of the FSR legislation, which may impact on the role of the Banking Code and its content. Our comments are based on the exposure draft of the FSR Bill; however, the Bill may change before it is enacted as legislation.

## **The regulatory environment**

The regulatory environment in which the Banking Code sits will undergo significant change in the near future, primarily as a result of the implementation of the FSR Bill. Other changes will also follow from the implementation of the Privacy Amendment (Private Sector) Bill, amendments to the Uniform Consumer Credit Code, and the expansion of the Electronic Funds Transfer Code of Conduct. The role that the Banking Code should play within this changed environment will need to be considered by this review.

### **Financial Services Reform Bill**

There are a number of possible roles for the Banking Code in the context of the FSR Bill. The balance between these possible roles will depend on the final form of the legislation and will need to be considered again at that time.

1. One role might be to elaborate, or 'flesh out', the requirements of the legislation. The Banking Code is not the only possible vehicle for elaborating the legislative requirements, but does provide one possible option.
2. The second role for the Banking Code might be to lift standards in the industry generally. It can do this by addressing issues that are industry-specific and/or not governed by existing legislation. This is the type of role that has been traditionally be played by industry codes in the deposit-taking sector.
3. Finally, the Code might be used to provide guidance on the provisions of the legislation.

It would be useful to ensure that the requirements in the Banking Code are not inconsistent with the requirements of the FSR Bill. One major area where inconsistencies may arise is in the provisions on disclosure of information. Both the FSR Bill and the Code have fairly extensive obligations to provide information about products and services to customers and potential customers. Disclosure is required both at point of sale, and on an ongoing basis.

Areas where there is overlap between the requirements of the Bill and the requirements of the Code include product coverage, content, recipients, timing of disclosure, and form of disclosure. Based on the current draft of the Bill, it appears that, in general, only minor amendments to the Code would be needed to ensure consistency. However, it will be important to assess the Code against the final form of the legislation.

Note that the Code also covers obligations and practices not currently covered by the FSR Bill. It could therefore be possible to consider creating a Banking Code that covers only issues that are not addressed by the FSR Bill. However, we proceed in this paper on the basis that the Code will continue to cover issues also covered in the FSR Bill.

### **Dispute resolution**

Under the current draft of the FSR Bill, banks will have to provide their customers with access to appropriate internal and external complaints and dispute resolution processes. The Government has indicated that internal procedures will be required to comply with Australian Standard AS4269-95, while external procedures must satisfy the guidelines in s. 12FA (2) of the ASIC Act (as set out in ASIC's Policy Statement No 139).

We understand that all Banking Code members are also members of the Banking Industry Ombudsman. While we acknowledge the success of this scheme, we are of the view that there is still scope for updating the relevant Code provisions, particularly as they relate internal procedures, to ensure that they reflect any legislative requirements and good industry practice.

We suggest that the Code could spell out some basic complaint handling requirements for the internal process, and require the external process to be consistent with the regulatory guidelines for the approval of external schemes. The Code could also require banks to promote the availability of complaints and dispute resolution processes.

### **Code approval**

Under the proposed FSR Bill, ASIC will be given a power to approve industry codes of practice. It will not be mandatory for an industry code to be approved. However, there are some benefits associated with having an approved code, including:

- guidance about ASIC's compliance approach; and
- a higher degree of credibility with consumers.

If banks were hoping to seek ASIC approval of the Banking Code, it would be valuable to consider, during this review, the issues that we are likely to examine during the approval process. These may include the extent of consultation on the code, and the extent to which the Code provides adequate dispute resolution processes, addresses identified problems, provides effective procedures for implementation and administration, and meets standards such as those in the 'Guide to Fair Trading Codes of Conduct'.

### **Privacy**

One way that banks could meet their obligations under the proposed Privacy Amendment (Private Sector) Bill might be to include a privacy module, approved by the Privacy Commissioner, in the Banking Code.

### **Amendments to the Uniform Consumer Credit Code and EFT Code**

Changes are likely to be made to the Uniform Consumer Credit Code (UCCC) and the EFT Code in the near future, and these changes may in turn require minor amendments to the Code. The UCCC will, and the EFT Code should, continue to prevail over the Banking Code in the event of any inconsistency.

In addition, it may be appropriate to examine whether any of the credit provisions in the Banking Code are made redundant by the UCCC provisions. In doing so, provisions in the Banking Code that have wider application than those in the UCCC should be retained.

## Other “big picture” issues

### **Rationalisation of codes and ADR schemes**

This review could consider whether there should be:

- a single code for all deposit-taking institutions; and/or
- a single ADR scheme for all deposit-taking institutions, or for all non-bank deposit-taking and credit institutions.

We do not yet have any final views on these issues. However, we believe that there is a strong case for rationalisation of ADR schemes in the finance sector. We would welcome further discussion on this issue.

### **Cross-functional codes**

Another issue is whether the Banking Code should be expanded to cover all retail products and services offered by banks. In our view, this would result in unnecessary duplication and proliferation of codes. Instead, we suggest that the Banking Code could require members to comply with other codes relevant to the products and services offered by the bank.

### **Monitoring and administration**

We are of the view that the monitoring and administration provisions in the Code should be spelt out in more detail. Although we do not have a firm view about whether a separate Code administration body needs to be established, we do think that the Code should specify the body or bodies that will undertake the administration functions.

The existing monitoring provision in the Code should also be improved, and should include provision for some external monitoring. Finally, the Code should include specific provisions on sanctions and publicity, and should provide further details on the process for review and amendment.

### **Electronic commerce**

We encourage banks to adopt the recently released Best Practice Model for E-Commerce. One way to adopt this model might be to include a specific e-commerce section in the Banking Code, which applies to all products and services offered by banks. Many of the principles in the Best Practice Model are relevant for all retail activities, and this solution would reduce the need to develop a separate e-commerce code.

The Code could continue to include specific provisions for deposit-taking and credit products.

It is also important to consider whether the Code needs to be updated to take into account developments in e-commerce. For example, many of the disclosure provisions in the Code require written disclosure, however, electronic communication may often be preferable for both banks and their customers. The Code could therefore include a provision to allow for electronic communications where specifically agreed to by the consumer.

## Consumer experiences with the Code

There have been a number of recent surveys that will be relevant to assessing whether the existing Code provisions need amendment. These include:

- a survey of financial services caseworkers, which was commissioned by ASIC's Consumer Advisory Panel;
- a recent ASIC survey of the websites of deposit-taking institutions; and
- the Consumer Issues survey, also commissioned by our Consumer Advisory Panel.

Also relevant is the consumer experience as identified by complaints to dispute resolution schemes and regulators, and the results of our annual Code monitoring exercise.

These results provide some suggestions for areas where the Code provisions could be improved or expanded.

## Other changes to existing Code provisions

There are a number of areas where we have suggested changes to the Code may be warranted. These are detailed below.

Code objectives and principles. These could be reviewed and updated in light of the role eventually determined for the Code in the new regulatory environment.

Coverage for small businesses. Small businesses are often disadvantaged in their dealings with financial institutions, and would benefit from having access to the protections offered to consumers under the Code. We suggest that the definition of small business used to expand the Code's application should be consistent with the definition in the FSR Bill.

Terms and conditions. Surveys indicate that terms and conditions documents may not always be readily available. The FSR Bill should improve this situation, however consumer representatives would also like to see additional requirements to draw consumers' attention to the availability of the documents.

Disclosure of fees and charges. Our research shows that overall knowledge of transaction fees is low, and that many consumers would like better disclosure. Disclosure could be improved if transaction account statements included a summary of transaction costs for the statement period, and information about the fees regime applying to specific accounts was provided through internet and telephone banking.

Notifying changes to fees and charges. There are some minor changes that could be made to the Code to clarify these provisions.

Third party guarantors. There is anecdotal evidence that consumers are continuing to provide guarantees for family members and others when they do not fully understand the implications. This review could examine

whether the existing Code provisions could be amended to facilitate greater understanding. Some possibilities to consider might include: providing a checklist for prospective guarantors, advising the guarantor of the reasons why a guarantee is needed, requiring that an explanation about the guarantee be given in the absence of the borrower, and providing protection to guarantors of loans to small businesses.

Credit assessment. Financial services caseworkers have raised concerns that an assessment of ability to pay is not made at the time that an increase in credit limit is sought or offered. Clause 15.1 of the Code could be amended to clarify that it applies in these circumstances. However, it may be an issue more appropriately addressed in the UCCC.

Account combination. The review could examine whether further restrictions should be placed on the right to combine accounts.

Staff training. Our surveys indicate that basic staff training could be improved in relation to knowledge of complaints handling procedures by front-line staff.

## Suggestions for new areas of Code coverage

There are also a number of issues that could be usefully considered for inclusion in the Code.

Direct debits. The Code could oblige banks to automatically re-credit account keeping or transaction fees where an institutional error has occurred.

Joint accounts and joint finances. The review could consider whether it is appropriate for banks to take further steps to minimise the losses associated with unauthorised use of a card by a subsidiary cardholder (eg when a relationship ends). We also encourage banks to consider developing guidelines about how they will enforce joint debts that are the subject of a family law settlement.

Access to documents. Providing consumers with copies of relevant documents (correspondence, file notes, statements, signed contracts, and house valuations) may facilitate early resolution of complaints. The review should consider whether a right to access these documents should be included in the Code.

Debt collection practices. The Code should deal with issues concerning debt and recovery practices, and provisions should be based on the ACCC guidelines on section 60. The Code should also ensure that banks are responsible for the conduct of any agents in meeting the appropriate standards.

Loyalty schemes. We understand that loyalty schemes involving banks have been the subject of some consumer complaints, however, we do not have any firm views on whether the Code should address issues relating to loyalty schemes at this time. This issue could be considered during the review.

## Other matters

Finally, there are some other important matters that could be addressed by banks outside of the code context. Some of these are discussed earlier in our submission. Others include:

- whether some consumers might need to have a personal interview and explanation before purchasing some products; and
- how the needs of people from non-English speaking backgrounds can best be met, including in relation to explanations of products or services.

# Section 2

## Introduction and overview of submission

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### ASIC's role

The Australian Securities and Investments Commission (ASIC) is an independent Commonwealth government body established by the *Australian Securities and Investments Commission Act 1989* (ASIC Act). Our statutory objectives include to:

- maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- promote the confident and informed participation of investors and consumers in the financial system.<sup>1</sup>

We regulate and enforce laws that promote honesty and fairness in:

- investments, superannuation, insurance, deposit taking and financial advice to Australian consumers
- buying and selling shares, debentures, options, futures contracts, managed investments and other securities in Australian markets;
- directing and managing companies, company financial reports, raising money from investors and takeovers.

We administer consumer protection regulation for deposit-taking activities, general insurance, life insurance, futures contracts, superannuation, retirement savings accounts, and securities.

Consumer protection regulation for these products includes:

- disclosure requirements that apply to product issuers; and
- regulation of persons providing financial services (such as advice and dealing services) to such products (ie intermediary regulation).

We do not have responsibility for:

- credit, except to the extent it is dealt with in codes of conduct;
- the level of fees and charges (as distinct from disclosure of these fees and charges);
- branch closures; and
- foreign exchange dealings.

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<sup>1</sup> s. 1(2) Australian Securities and Investments Commission Act 1989.

As well as administering and enforcing relevant consumer protection legislation, ASIC is given specific responsibilities with respect to codes of practice and alternative dispute resolution (ADR) schemes.

Section 12FA of the ASIC Act provides that ASIC has the function of monitoring and promoting market integrity and consumer protection. This includes the function of promoting the adoption of, and approving and monitoring compliance with, industry standards and codes of practice (including standards and codes in relation to the resolution of disputes between the providers of financial services and consumers).

Section 12FA (2) provides that ASIC cannot approve an industry code unless it is satisfied with the procedures for dispute resolution.

Although we have not been asked to approve the Banking Code of Practice, we have (as the successor to the Reserve Bank of Australia in relation to this function) been given a formal monitoring role with respect to the Banking Code of Practice (see 'Monitoring' in the Code).

We also have relevant experience of consumer issues and consumer complaints. This has been gained through our enforcement activity, role in monitoring the deposit-taking codes of practice, involvement with the ADR schemes, and liaison activities with consumer groups and industry representatives. This submission is based on our experiences in those areas.

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## Outline of submission

This submission examines some of the regulatory and other 'big picture issues' relevant to the review, as well as the detail of current Code provisions. We have both noted areas where we feel change is justified and also areas which have been raised with us as needing attention, but which we have not formed firm views upon.

Section 3 provides an overview of the regulatory environment and the expected changes to that environment, particularly the proposed Financial Services Reform (FSR) Bill. We examine what role the Banking Code should play in this new environment, and what amendments might be needed to facilitate that role.

Section 4 examines other 'big picture issues', such as the question of rationalisation of codes and/or ADR schemes, Code administration and monitoring, and the impact of electronic commerce issues.

In section 5, we summarise the results of recent research and monitoring exercises, as well as relevant complaint and dispute information. This information on consumer experiences provides a background to our more detailed comments on the content of the Code.

Sections 6 and 7 examine areas where the existing Code provisions could be amended and where new provisions could be included.

Finally, section 8 raises some other issues that may be best addressed in forums other than the Code.

# Section 3

## The regulatory environment

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### The Code in the current regulatory environment

The Code of Banking Practice is an important piece of self-regulation operating in the financial sector. Along with the Credit Union Code of Practice, the Building Society Code of Practice, and the Electronic Funds Transfer (EFT) Code of Conduct, the Banking Code provides a set of rules and practices designed to improve consumer protection in this sector. It is particularly important as there is presently no legislation that specifically deals with consumer protection issues in relation to deposit products. This will change, however, with the passage of the FSR Bill.

The following encompasses the current consumer protection regulatory environment for the Banking Code:

- Part 2, Division 2 of the Australian Securities & Investments Commission Act. This includes general prohibitions against misleading or deceptive conduct, unconscionable conduct, and other unfair practices.
- Parts IVA and V of the Trade Practices Act in relation to the supply of credit products and services.
- Uniform Consumer Credit Code. This is a statutory code that provides detailed regulation of the provision of consumer credit.
- Privacy Act - in relation to credit reporting.
- Various State and Territory consumer protection legislation.

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### Changes in the regulatory environment

The regulatory environment within which the Code currently sits will undergo substantial change with the expected passage and implementation of the FSR Bill. It will be essential to consider the implications of these changes in this review.

Other changes in the regulatory environment that will need to be considered during this review include the passage and implementation of the Privacy Amendment (Private Sector) Bill, the changes to the Uniform Consumer Credit Code, and the proposed expansion of the EFT Code of Conduct.

This section of our submission examines the likely impacts of these regulatory changes, and suggests possible ways forward in light of those impacts.

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## The Financial Services Reform legislation

This section addresses the possible impact of the proposed FSR Bill. The FSR Bill has not been finalised, nor considered by the Parliament. Changes to both the scope and the detail of the provisions are therefore possible. However, in preparing this submission, we have assumed that the basic structure of the legislation will remain, and our comments should be read in that light.

References to the provisions of the FSR Bill are references to the provisions in the Exposure Draft of the Bill, published in February 2000.

### Overview of the intended interaction between the FSR Bill and codes of conduct

The FSR Bill is designed to deal with convergence in the financial sector. It seeks to provide common rules in relation to a range of functions, such as disclosure and dispute resolution, regardless of the type of financial product involved.

Provisions have been drafted flexibly so that they can apply across the full range of financial products that are subject to the regime. In drafting the Bill, however, Treasury recognised that in a range of areas, including disclosure, there may be a need to spell out or elaborate upon the general requirements as they apply to particular products. One of the ways in which flexibility is said by Treasury to be achieved is:

The list (of disclosure requirements) is cast in fairly general terms, with the capacity for the information that must be included under particular heads in relation to particular products to be fleshed out in a number of ways:

- through a regulation making power (see proposed subsection 983C(2))
- under an industry code of conduct which may be approved by ASIC; and
- through ASIC guidance in the form of policy statements.<sup>2</sup>

The legislation itself covers a number of matters that are also covered by the Code. In particular, both regimes deal with pre-contractual disclosure, ongoing disclosure and dispute resolution. As is made clear in the supporting materials to the legislation, however, such dual coverage is not of itself a problem. It is envisaged that industries will use codes to explain and build upon the legislation's requirements for particular

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<sup>2</sup> *Financial Services Reform Bill, Commentary on the draft provisions*, Department of the Treasury, February 2000, p. 145.

products. The important issue is to ensure that requirements are not inconsistent.

## The role of the Banking Code post the FSR Bill's passage

The proposed changes to the financial services market will have a significant impact on banks, as well as other deposit-taking institutions. The role of the Banking Code in this environment needs to be considered.

In our view, the Banking Code could remain an important part of the regulatory environment once the FSR Bill has been passed and implemented. The Code could play some or all of three main roles:

- elaborating, or 'fleshing out' the requirements of the legislation;
- providing rules or standards for product-specific issues that are not addressed in legislation; and
- providing guidance on provisions in legislation.

However, the balance between these possible roles will depend on the final form of the legislation and will need to be considered again when the final form is known.

### **Elaborating the requirements of the legislation**

One key area where elaboration of the legislative requirements might be needed is that of the content of the Product Disclosure Statement. Whilst recognising that the Banking Code is not the only possible vehicle for elaborating on the requirements of the legislation, it may have a number of advantages:

- it is an existing known quantity and timely reforms can be made to it through the present process;
- because of the close involvement of industry in drafting the code, the manner in which banks operate will be well understood and will be taken into account;
- codes are usually quicker to amend than legislation (although they too still usually take some time).

That said, the success of the Code as the vehicle for building up on the legislation is dependant to a large degree upon it operating effectively and enjoying the confidence of consumers. It may also be that, in some instances, other mechanisms, such as statutory regulations, or ASIC policy statements, will be the most suitable vehicle for a particular issue. The role of codes in this area may also depend on the final form of the FSR legislation, and would need to be reviewed once the legislation is introduced.

### **Addressing or improving industry-specific issues**

The Code can also play an important role in lifting the standards in the industry generally. It can do this by addressing issues that are industry-specific and/or not covered by legislation such as the FSR Bill. This is the type of role that has traditionally be played by industry codes in the deposit-taking sector. Examples of issues in the current code that are not covered by the FSR Bill or privacy legislation include matters associated with account combination, foreign currency transactions, and joint accounts and subsidiary cards.

### **Providing guidance on legislative provisions**

Finally, there may be circumstances where the Code could play a useful role in providing guidance on specific provisions in the legislation. For example, the Code could suggest criteria for determining whether changes to the PDS are 'material' changes, and thus must be notified to retail clients.<sup>3</sup>

### **Retaining the Banking Code**

As can be seen from the above discussion, we consider that the Code can play a role in the regulatory environment for banks.

As noted above, there may also be other vehicles that could be used to elaborate or provide guidance on the legislative requirements.

However, even if a different vehicle is used for interpreting legislative requirements, we believe that there is still a need to retain the Code to deal with industry/product specific issues not covered by legislation. There are a number of reasons for our position.

First, the Code currently addresses industry specific issues that are not addressed in actual or draft legislation. Such issues include those associated with account combination and foreign currency transactions. The relevant provisions were put into the Code in the first place to address existing consumer problems. Without the Code, there will be no immediate vehicle for addressing these types of issues. Consumer complaints may increase, and resolution of those complaints may become more difficult in the absence of guidance from an industry code about appropriate standards.

Secondly, the code provides a suitable vehicle for addressing emerging consumer issues in a relatively prompt manner. Consumer complaints and concerns about bank practices can be fed into Code reviews to ensure that relevant issues are addressed and appropriate standards developed. Reliance upon legislation to address all consumer problems will inevitably involve greater uncertainty and time delays.

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<sup>3</sup> See proposed s. 987B(1)(c) FSR Bill.

Thirdly, the Code review process provides a regular mechanism for reviewing and updating bank standards and practices. Without a Code, there is a risk that the standards will remain at a fixed level.

Finally, the monitoring process that is part of the Code gives important feedback to banks, consumers, and regulators about the practices and performance of banks. In the same way, the Code provides an objective measure against which the conduct of a bank can be assessed in the event of a complaint or dispute by a Customer.

## Consistency with FSR Bill requirements

The Code will need to be consistent with the requirements in other legislation, particularly the proposed FSR Bill. In this part of our submission, we note some areas where differences or inconsistencies may arise. Of course, further detailed attention to this issue will be needed once the final form of the legislation is settled. Our views need to be seen in that light and we may revisit them once the final form of the legislation is in play.

We note that ensuring consistency between regulatory instruments does not necessarily mean that the two instruments should be the same. Consistency merely requires attention to be given to areas where compliance with the Code will result in:

- an inability to comply with legislative requirements; or
- a breach of legislative requirements.

We have not sought at this time to provide detailed suggestions for changes to the Code wording, however, we would be happy to provide assistance in this area if required.

The major area where there is overlap between the FSR Bill and the Code, and therefore the potential for inconsistency, is in the information disclosure requirements, both point of sale disclosure and ongoing disclosure.

Another important area of overlap between the Code and the Bill is the issue of dispute resolution. This issue is discussed in detail later in our submission.

### **Point of sale disclosure**

Disclosure at point of sale is covered in both the Banking Code and the FSR Bill.

In the draft Bill, the point of sale disclosure requirement is to provide a Product Disclosure Statement (PDS).

In the Code, disclosure is provided by the terms and conditions (clause 2) and the schedule of current fees and charges (clauses 4 and 5). These must be provided at the time of, or before, the contract is made.

Areas where there is overlap between the point of sale requirements in the current draft Bill and the Code include:

- product coverage;
- content;
- recipients;
- timing of disclosure; and
- form of disclosure.

One point of sale disclosure document or two?

The question of how these overlaps are dealt with will be affected, in part, by whether banks combine the PDS and terms and conditions to create one point of sale disclosure document, or whether they continue to provide two separate documents - the PDS and the terms and conditions (plus fee schedule). The current draft of the FSR Bill would permit the inclusion of additional information (ie terms and conditions) in the PDS.<sup>4</sup>

We note that the two documents do have slightly different purposes. The PDS is designed to assist consumers when making a purchasing decision. In contrast, the terms and conditions are designed to provide an ongoing record of all the rules governing the product. As we understand it, the PDS is not intended to represent the contract between the consumer and the bank; the terms and conditions document is so intended.

Additionally, a PDS will not be required for all Banking services (see below).

For which products is point of sale disclosure required?

There are some differences in application between the current draft of the FSR Bill and the Code.

For example, under the Code, terms and conditions must be provided for all ongoing Banking services. Under the current draft of the FSR Bill, a PDS will be required for all 'financial products'.<sup>5</sup>

The definitions of 'Banking service' in the Code, and 'financial product' in the draft Bill are not identical. As a result, there may be some circumstances where a PDS is required, but a terms and conditions document is not, and vice versa (For example, a PDS will not be required for credit products as credit does not fall within the definition of a 'financial product' in the FSR Bill.)

The potential inconsistency this creates will obviously be less of an issue if the PDS and the terms and conditions document are provided separately.

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<sup>4</sup> Proposed s. 983C(3)(b) FSR Bill.

<sup>5</sup> See proposed ss. 982A, 982B, 982C FSR Bill.

#### Content of point of sale disclosure

There is some duplication in the information that must be disclosed in the PDS and the terms and conditions or other disclosure document. However, the content requirements detailed in the Code are not inconsistent with those detailed in the current draft of the Bill.

#### Who is entitled to the information?

Similarly, there are differences between the current draft of the FSR Bill and the Code in terms of to whom the point of sale disclosure must be made. The definitions of 'retail client' in the draft Bill and 'Customer' in the Code are not identical. One important difference relates to the coverage of small businesses. There may therefore be some circumstances where a PDS is required to be provided, but terms and conditions are not.

There are also some circumstances where a PDS is not required to be provided, even though a terms and conditions document is required. However, in the case of standard savings and transaction products, these circumstances will be relatively rare.

#### Timing of disclosure

There are only minor differences between the requirements of the current draft of the FSR Bill and the Code in relation to timing of disclosure.

The question of the difference in timing requirements will not be relevant if the PDS and terms and conditions are to be provided as separate documents. (Although in practice, it may often be appropriate to provide the documents at the same time.)

That said, we are of the view that it is always advisable for consumers to view terms and conditions prior to entering into a contract. There would therefore be benefits in making the timing requirements for terms and conditions documents the same as those in the current draft of the FSR Bill for PDSs.

#### Form of disclosure

The current draft of the FSR Bill permits a financial institution to provide a PDS in electronic form. However, there is no such provision in the Code for the terms and conditions document or other disclosure requirements.

We think that it is important to consider the issue of electronic communications in the context of the Code, and this issue is discussed later in our submission.

Any potential inconsistency between the Bill and Code requirements on this issue will be less relevant if the PDS and terms and conditions are provided separately.

## Ongoing disclosure

### Timing of disclosure

Under the current draft of the FSR Bill, material changes to, and any significant event that affects, any matters specified in the PDS must be notified.<sup>6</sup> Similarly, under the Banking Code, variation to the terms and conditions must be notified to the customer concerned.

There are, however, some differences between the notification requirements, and their timing, in the FSR Bill and in the Code. In some cases the Bill requires notification at an earlier time than does the Code. In others the Code requires notification at an earlier time than the Bill.

One option available to deal with this difficulty is to amend the Code provisions to bring the time at which disclosure is required to be made in line with the Bill. However, this would result in a reduction of the notification period in some important areas (eg variation of the method by which interest is calculated), and we do not think there is a case for such action.

An alternative is to keep the current provisions in the Code, but make it clear that compliance with earlier notification requirements spelt out in the Bill will be required. This is an approach that is being considered in the current process of expanding the EFT Code of Conduct.

A clause to give effect to this option could be along the lines of:

Where legislation and this Code both require a Code subscriber to provide notice of a change to the PDS or terms and conditions or other information at different times:

- (a) the Code subscriber shall provide notification of the change at the earliest time it is required under the legislation or this Code, so as to satisfy the obligations of both; and
- (b) the provision of the notification at or before the time required by this Code, will satisfy the Code's requirements for notification of the change.

A solution along these lines would ensure that the current protections are not reduced, but also minimises costs for banks, as they will not have to provide the same information on more than one occasion.

### Form of disclosure

The notification requirements between the current draft of the FSR Bill, and the Banking Code also differ in terms of the form of notification that is required. In particular, the notification requirements under the draft Bill permit electronic notification of changes.

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<sup>6</sup> Proposed ss. 987B(1), 987B(3) FSR Bill.

As already discussed, this issue should be addressed as part of the process of allowing electronic communications in appropriate circumstances (see below).

To whom should disclosure be made?

Finally, there is an inconsistency between the Code and the current draft of the FSR Bill as regards whether notification of any or all changes must be provided directly to the affected consumers, or can be provided in a less direct way. In particular, the Code allows for indirect notification for some changes to the terms and conditions.

We note, however, that indirect disclosure to affected customers, for example, through newspaper advertisements does not appear to be very effective.

Earlier this year, we commissioned an exploratory survey of consumer views on the manner in which fees and charges are disclosed. A summary of the results is provided later in our submission (see section 6). However, it is worth noting here that consumers do not generally learn about transaction fees through newspaper advertisements. Only a few of the consumers surveyed had seen see official notices in newspapers. However, those consumers regarded these notices as too formal and expressed in legal jargon, and therefore paid little attention to this source.

### **Supplementary information**

The current draft of the Bill provides that a Supplementary PDS can be issued to change the information in a PDS.

In contrast, the Code does not specifically provide for a supplementary terms and conditions document, but allows for a consolidation of the terms and conditions document where sufficient changes have been made.

### **Other disclosure requirements**

The Code also provides for disclosure of general information on request (eg clause 3.1, 6.1, 6.2). The provision of this information is not inconsistent with the Bill, and can be seen as providing additional industry specific rules.

Both the Code and the current draft of the Bill include a requirement for regular statements of accounts. These provisions are generally consistent, however some attention may need to be give to the exceptions in the Code (for passbook accounts, and for accounts where no transaction is made) to ensure that banks are not at risk of contravening the requirements in the current draft Bill.

Finally, the current draft Bill also includes requirements for provision, in specified circumstances, of a Financial Services Guide and a Statement of Advice.

While these documents may be required in some cases in situations where the Code will apply, the current Code provisions do not cover similar disclosure requirements, and therefore there is no overlap or potential for inconsistency.

### **Summary**

The above discussion demonstrates that there are some areas where amendments to the Code may be needed to ensure that there is consistency between the Code provisions and the requirements of the proposed FSR legislation. However, on the whole, these changes are likely to be minor.

It may also be worth considering whether changes to the Code might be needed to facilitate the provision of a combined PDS and terms and conditions document, assuming that this option is not prohibited by the FSR legislation.

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## Dispute resolution

### Impact of FSR Bill

The Code currently contains provisions on both internal dispute resolution (IDR) and external dispute resolution or alternative dispute resolution (ADR). These provisions were developed at a time when IDR and ADR were relatively new concepts in Australia. However, since that time, the role of industry dispute resolution and the characteristics of effective dispute resolution have advanced considerably. In the light of this experience, we take the view that the current provisions of the Code are inadequate and require significant improvement if they are to meet consumers' needs.

We would also draw your attention to the discussion of ADR schemes under Section 4.

Banks will soon face new requirements to improve their dispute resolution processes. Under the proposed FSR Bill, all holders of an Australian Financial Services licence will need to have appropriate internal and external complaints resolution procedures to resolve complaints from retail customers.<sup>7</sup>

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<sup>7</sup> Proposed s. 883A(g) FSR Bill.

Whilst the regulations (still to be drawn up) will confirm how these procedures should be approved by ASIC, the Commentary to the Bill indicates that:

- internal dispute resolution procedures must comply with Australian Standard AS4269-95 (or other recognised Australian standard); and
- external complaints resolution procedures must satisfy the guidelines set out in the current s12FA(2) of the ASIC Act.<sup>8</sup>

ASIC has set out its policy on how it will apply the current s. 12FA (2) guidelines in its Policy Statement 139 (PS 139). This policy may need to be revisited once the FSR Bill and regulations are finalised.

Failure to provide the appropriate dispute resolution procedures will be a breach of a licence condition.

## Standards for dispute resolution

Within the financial services sector, the banking industry has been a leader in setting up high quality external ADRs. The Australian Banking Industry Ombudsman (ABIO) has been a successful scheme, and has provided benefits to consumers. We understand the ABIO Board has announced that it will seek to have the scheme approved by ASIC under PS 139.

Despite the success of the Banking Ombudsman scheme, we are of the view that there is still scope for updating the relevant Code provisions, to ensure that they reflect any legislative requirements and good industry practice. We also note that caseworkers and others have expressed concerns about the effectiveness of internal dispute resolution (IDR) within banks, the links between ADR and IDR, and the promotion of dispute resolution procedures.

Some areas where we believe the current provisions could be improved are spelt out below.

- Anecdotal evidence suggests that there is a lack of compliance with clause 20.2 of the Code. We also note that our survey of internet banking sites, discussed later in our submission, showed that only 33% of sites provided information on an internal dispute resolution process, and only 8% of sites provided information on an external dispute resolution facility. We believe that it is of great importance that consumers are able to easily access information about their dispute resolution options. They should not have to search for that information. Additionally, there is room for strengthening the requirements here to ensure that consumers are provided with this information at an optimal and relevant time (eg when they raise a concern or make a complaint).

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<sup>8</sup> *Commentary on the draft provisions*, *ibid.*, p. 89.

- Clause 20.2 also does not reflect the fact that banks will increasingly be dealing with consumers over the telephone, or via the internet, rather than by visiting a branch. The clause should be amended to ensure that this information is accessible to consumers, regardless of the method they use for dealing with their bank.
- In clause 20.3, there is a lack of guidance as to the time that should normally be taken to resolve disputes internally. While we agree that it is not always possible to resolve all complaints within a specified time, it is nevertheless important to set a reasonable standard for the timely resolution of complaints. Appropriate extensions can be built in to the guidelines for exceptional circumstances. Where these exceptional circumstances are relied on, a bank should still provide consumers with regular updates on the progress of the investigation (see PS 139 and clause 11.5a of the current EFT Code).
- Clause 20.5 leaves it optional for the external process to take into account the question of fairness when making decisions. In our view, this should be one of the standard criteria for decision making within the external process. In addition, an external process should also have regard to concepts of “good industry practice”

There are many other areas where the dispute resolution provisions in the Code could be improved.

## Suggested changes to the Code

In considering the question of how the relevant Code provisions on dispute resolution could be amended to improve the standards of dispute resolution and to ensure compliance with the relevant licence conditions, we have examined two options for change.

One option would be to substantially rewrite the relevant clauses to specify the complaints procedures (both internal and external) in detail. A second option, however, would be to simply delete the detail of the current provisions, and instead include a requirement that banks comply with the relevant standards set out in PS 139 and the proposed FSR Bill.

On balance, we have taken the view that, in the case of the external process (ADR), it would be more effective to delete the detail of the provisions (ie clauses 20.4 and 20.5), and refer instead to the various regulatory requirements for the approval of schemes that are reflected in PS 139. That is, we believe that the bank ADR arrangement should be approved under PS 139.

The regulatory requirements are quite detailed and specifically apply to the financial services sector. This approach should reduce the risk of duplication and of inconsistency in the event that the regulatory requirements change.

In the case of the internal IDR process however, we are concerned that the current AS4269 standard is fairly general, and does not provide detailed guidance for complaint handling in the financial services sector. In the future, more detailed guidance may be provided by the legislation or by an ASIC policy statement. In the meantime, however, it may be appropriate for the Banking Code to spell out some basic standards for the internal process.

We also note that in a recent survey (described later in this submission), financial services caseworkers raised serious concerns about the manner in which institutions, including banks, handled consumer complaints internally.<sup>9</sup> Three-quarters (76%) of the 65 caseworkers surveyed said that they were concerned about some practices of banks in the area of complaint handling, or were concerned about bank industry practices in this area generally. Only 9 caseworkers (13%) said that they had generally positive or favourable experiences with bank practices in complaint handling.

In the context of deposit-taking institutions generally, specific issues raised by caseworkers included:

- poorly trained call centre and branch staff, who did not understand relevant issues, did not have the authority to make decisions and were reluctant to refer the matter to a supervisor;
- where more than one type of account is involved, inability to be able to deal with a single individual or section within the institution, and lack of communication and consistency between different sections;
- lack of consistency in the information provided by institution staff;
- lack of response to enquiries and complaints or undue delay in response;
- increased workloads for caseworkers because of the additional work in contacting and re-contacting institutions;
- refusal to compensate, or to adjust accounts, for losses suffered as a result of institutional error (including reluctance to refund overdraft fees where the overdraft results from institutional error); and
- lack of referral to external ADR in cases where a complaint or dispute is not resolved.

The results of this survey are also consistent with comments made by the Banking Ombudsman. In the ABIO's 1998-99 annual report, the Ombudsman stated that there had been an increase in complaints about issues relevant to the quality of service provided by banks, and

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<sup>9</sup> Issues covered in the survey question included: willingness to listen, recording of complaints, taking steps to deal with complaints, responding within reasonable time, providing fair accessible internal dispute resolution processes, and providing information to customers about dispute resolution processes.

suggested that this level of complaint may continue to increase unless steps are taken by banks to more effectively manage their relationship with their customers. In particular, the Ombudsman suggested that it would assist consumers if banks:

- directed additional resources to their dispute resolution processes;
- devolved greater responsibility to those responsible for settling disputes with customers; and
- gave more prominence to the existence of the internal dispute resolution process, for example, by promoting a toll free number.<sup>10</sup>

Further guidance on acceptable procedures for IDR may address some of these issues. However, appropriate staff training is also needed.

Another issue is that the current provisions do not require banks to make available their formal internal dispute resolution procedure *until* an initial decision on a complaint has been made within the bank, and the consumer does not accept that initial decision. However, there are no obligations about timeliness, fairness or other criteria when a complaint is considered at this first stage. This is inconsistent with the approach taken in the EFT Code, where the internal process is available when a complaint is made and is not immediately settled to the satisfaction of both the cardholder and the institution.<sup>11</sup>

In practice, we believe that the formal IDR procedures should be available as early as possible. As currently drafted, however, the Code appears to introduce an additional, preliminary stage that sets no deadlines for resolution. This may potentially delay the resolution of some complaints. We therefore recommend that the Code be amended to make it clear that the formal IDR procedures are available for all complaints when lodged.

Below we have suggested a possible way of dealing with dispute resolution in the Code.

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<sup>10</sup> Australian Banking Industry Ombudsman, Annual Report 1998-99, p. 4.

<sup>11</sup> See clause 11.1, 11.3 EFT Code.

## **Resolution of complaints and disputes**

### *Internal complaint handling*

A bank will have an internal process for handling complaints with its customers. This process will:

- be free of charge;
- be consistent with Australian Standard AS4269-95;
- ensure that customers are notified of the name and contact number of a person who is investigating their complaint;
- specify time frames (of not more than 45 days) within which an investigation must be completed (unless there are exceptional circumstances);

[Note: Exceptional circumstances may include delays caused by other institutions involved in resolving the dispute.]

- provide monthly updates on the progress of investigations that continue beyond 45 days (except in cases where the bank is waiting for a response from the Customer and the Customer has been advised that the bank requires such a response); and
- require the bank to provide written reasons for its decision in respect of a complaint [subject to any Code provisions on election for electronic communications].

The internal process will be available for all complaints other than those that are resolved to the consumer's satisfaction immediately they are drawn to the attention of the bank.

### *External dispute resolution*

A bank will have available to its Customers an external and impartial process for resolving disputes. This process will be free of charge and will be consistent with the regulatory guidelines for the approval of external complaints resolution schemes.

### *Publicising and notifying Customers of complaints and dispute resolution processes*

A bank will prominently publicise the availability and accessibility of both its internal and external processes for resolving complaints and disputes.

As a minimum, information about internal and external processes will be readily accessible in bank branches, through bank Internet sites, and through bank telephone banking services.

In addition, a bank will provide a Customer with written information [subject to any provision for electronic communication] about:

- (i) the internal process, at the time that a Customer makes a complaint that is not immediately resolved to the satisfaction of both the Customer and the bank; and
- (ii) the external process, at the time that a Customer is advised of the final outcome of the internal process and that outcome does not wholly satisfy the Customer's claim.

## An ADI-wide dispute scheme?

One question that has arisen in recent times is whether there should be a single ADR scheme covering all deposit-taking institutions. This issue is discussed in the next section of our submission.

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## Code approval

Under the proposed FSR Bill, ASIC will continue to have the power to approve industry codes of practice (section 1041A). However, the draft Bill does not make it mandatory for an industry participant to be a party to a code. Nor will it be mandatory for an industry code to be approved. We note, however, that the relevant provision is in draft form, and may change before it is enacted. The following comments need to be read in this light.

Whether or not ASIC approval is sought for the Banking Code will be a decision that banks and their representatives will need to make. However, we believe that there will be some benefits associated with having an approved code. For example:

- if a code sets standards for industry participants to meet their legal requirements, ASIC approval of those standards may provide guidance about ASIC's compliance approach to the relevant legal obligations.
- the approval process will require ASIC to independently assess the adequacy of the Code in addressing the identified consumer and market problems. Therefore, ASIC approval may provide such a code with a higher degree of credibility with consumers.

At this time, we are not able to provide detailed guidance as to how we will exercise our code approval powers. We are currently preparing a draft policy paper, which will be finalised and released for comment when the FSR Bill requirements are finalised.

However, it is possible to identify some general areas that are likely to be important in the code approval process.

First, we will want to ensure that the industry's process for developing (or reviewing) a code has involved adequate consultation with all

stakeholders, transparent procedures, impartiality, and early involvement of ASIC.

Secondly, adequate ADR procedures will need to be reflected in the Code. In fact, under our current approval power, we cannot approve a Code unless we are satisfied with the procedures for ADR.<sup>12</sup> Of course, membership of an approved ADR scheme will also be a licence condition.

Thirdly, we will want to ensure that the code meets appropriate criteria. This is likely to include issues such as:

- effective standards to address identified consumer and/or market problems;
- effective procedures for implementation and administration of the Code;
- meeting relevant standards for codes, such as those contained in the 'Guide to Fair Trading Codes of Conduct'.

Some guidance on our likely approach to code approvals can also be found in our policy statement on approving ADR schemes (PS 139).

We reiterate that it will be the decision of banks as to whether they choose to seek ASIC approval of the Banking Code. However, in the event that banks intend to apply for approval, it may be useful for this review to address the issues discussed above.

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## Privacy

### **Impact of the Privacy Amendment (Private Sector) Bill**

The Code provisions on privacy and confidentiality (clause 12) were introduced at a time when there was generally no privacy legislation governing the private sector. (Credit reporting requirements are the exception.) However, the Government has now decided to enact privacy legislation that will apply to the private sector, including banks.<sup>13</sup>

Once the Act comes into effect, banks will be able to meet their obligations by developing a self-regulatory code that is approved by the Privacy Commissioner.

If banks decide to take this approach, there may be benefits in incorporating the privacy rules within the existing Banking Code (rather than creating a separate privacy code). For example, the existing infrastructure of the Banking Code could be used to support a privacy module. Importantly, dispute resolution schemes tell us that they rarely

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<sup>12</sup> Section 12FA, ASIC Act 1989.

<sup>13</sup> Privacy Act (Private Sector) Amendment Bill.

get a privacy complaint which does not also involve other code issues and that they find it convenient to deal with the issues as a package. Additionally, consumers and banks are less likely to be confused or overloaded with paper if there is only one primary Banking Code that deals with all relevant issues, including privacy.

If privacy is covered in the revised code, consultations will need to occur with industry to determine the earliest possible start up date. Ideally, this would not necessarily have to wait until the legislation was enacted if the timetable for that legislation takes longer than expected.

A privacy module in the Banking Code could also include some specific guidelines to explain how the National Principles for the Fair Handling of Personal Information (“the National Principles”) will apply in the specific context of banks. Some or all of the current provisions in clause 12 might be able to be rewritten as guidelines for this purpose. (Although note our discussion below about the concerns that caseworkers have about the adequacy of the current provisions.)

An example of how such a privacy module might work in an industry code can be found in the current draft of the expanded EFT Code of Conduct. Clause 21 is structured as follows:

- (a) Code subscribers must comply with the National Principles before the private sector privacy legislation comes into effect;
- (b) after the legislation comes into effect, Code Subscribers will comply with the National Principles in the legislation, or in codes that are approved under that legislation;
- (c) a number of guidelines are provided to assist in interpreting the National Principles and applying them to EFT transactions;
- (d) the guidelines are not determinative of the terms of the National Principles.

### **Caseworker experiences**

Financial services caseworkers have some concerns with the current privacy provisions and their application by banks. In a recent survey, 50% of caseworkers said that they either had concerns about some practices in the collection and use of customer information, or had concern about industry practices or conduct generally. Only 17% had generally positive or favourable experience. (The remainder of respondents were not in a position to comment on this issue.)

Particular issues of concern raised by caseworkers included:

- disclosure of information about accounts to third parties (including parents, employers and others) without authority; and
- failure to disclose information to a third party (eg adviser) despite an authority from the customer.

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## Uniform Consumer Credit Code

A 'post-implementation review' of the Uniform Consumer Credit Code (UCCC) was conducted in 1997 and 1998. The review recommended some changes, and these have been implemented through the Consumer Credit (Queensland) Amendment Act 1998. The amendments are due to come into effect on 28 October 2000.<sup>14</sup>

We have not reviewed these changes in detail to assess whether there are any consistency implications for the Banking Code. However, we note that the UCCC will continue to prevail over the Banking Code to the extent of any inconsistency.

The UCCC is also now being reviewed as part of the National Competition Policy legislative review program. Again, any changes to the UCCC that result from this review may have implications for the provisions in the Banking Code.

One issue that has already arisen is the inconsistency in application between the Banking Code and the UCCC. The provisions in the UCCC apply where the credit is provided 'wholly or predominantly for personal, domestic or household purposes'. In contrast, the Banking Code applies to Banking services that are supplied to an individual 'wholly and exclusively for his or her private or domestic use'. It would be worth considering in this review whether there is a need to amend the Banking Code to bring its coverage in line with the UCCC.

Another issue that we are aware of relates to notification requirements. When it comes into effect, the Consumer Credit (Queensland) Amendment Act will require credit providers to give 20 days (reduced from the current 30 days) notice of various changes to the terms and conditions.<sup>15</sup> Again, this may be an issue where consistency between the UCCC and the Banking Code could be considered. (See also our comments above in relation to consistency between the notification requirements in the Banking Code and the current draft of the FSR Bill.)

There is also a broader issue about whether the disclosure and other requirements in the UCCC make the credit-related provisions in the Banking Code redundant.

For the most part, the provisions in the UCCC impose greater obligations on banks than do the relevant provisions in the Banking Code. If this is the case, there may be an argument for deleting the credit-related provisions in the Banking Code. If redundant provisions remain in the Code, there is a risk that institutions may comply with those provisions, without also realising that the UCCC provisions impose stricter legal obligations.

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<sup>14</sup> See <http://www.creditcode.gov.au/amendments.htm>, downloaded 10/8/00.

<sup>15</sup> See ss 30, 31, 32, and 33.

We have not examined the detail of the UCCC to assess the extent of any overlap. We have therefore not formed a view about the need to delete any or all of the credit-related provisions in the Banking Code.

As a general rule, however, there may be limited value in including provisions in an industry Code where those provisions are made redundant by legislative requirements. Before deleting the relevant Banking Code provisions, however, it will be important to carefully compare the coverage of the Banking Code and the UCCC to ensure that any additional protections offered by the Banking Code because of its wider application are not lost.

This issue is particularly important if, as we recommend, the Banking Code is expanded to cover small businesses. The UCCC provisions do not apply to small businesses, who therefore have limited rights to information disclosure and dispute resolution for credit matters. Deleting the credit-related provisions in the Banking Code would therefore immediately take away one of the important benefits that would be gained by expanding the applicability of the Banking Code to small businesses.

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## Revised EFT Code

The Discussion Paper notes that the EFT Code of Conduct is currently being reviewed to expand its application to new banking technologies. When the revised EFT Code is finalised, section 1.4 of the Code will need to be updated to take account of the EFT Code's expanded jurisdiction.

# Section 4

## Other ‘big picture’ issues

### Rationalisation of codes and ADR schemes

ASIC is presently considering the issue of the structure of finance sector self-regulatory arrangements. This includes the possibility of the rationalisation of self-regulatory schemes. We are yet to formulate final views on the desirability of:

- a single industry code for deposit-taking institutions; and/or
- whether there should be a single ADR scheme for deposit-taking institutions, and perhaps also other credit providers such as mortgage industry participants.

However, we believe there is a strong case for rationalisation of ADR schemes in the finance sector.

In our *Submission to the Inquiry on Industry Self-regulation* we discussed the issue of functional and institutional regulation and rationalisation in the context of the entire financial services sector. Much of it is also relevant when considering coverage of the deposit-taking institutions. A copy of our submission to the Self-Regulation Inquiry will be provided with this submission.

Set out below are some of our present thoughts on the topics. We think that the general issues of convergence, duplication, and gaps and overlaps of both codes and ADR schemes is one that needs further detailed discussion between all relevant stakeholders. We would welcome involvement in this process.

#### **Industry codes**

Currently, the codes of practice for banks, building societies and credit unions are virtually identical, thus providing a similar level of protection for all consumers, regardless of which type of institution they transact with. This has the benefit of consistency and fairness.

If the codes are to remain substantially similar, then there may be benefits in consolidating them into one code covering all deposit-taking institutions. This approach has been taken in the United Kingdom, where the Banking Code applies to banks and building societies.

In addition, if codes are to play a role in providing guidance about legislative requirements, it would be beneficial to have the same standards applicable to all institutions.

However, if the current reviews of the Payments System Codes result in divergent codes with industries using their codes to give themselves a marketing advantage then this would be to the advantage of consumers. To consolidate codes in these circumstances could have the negative effect of resulting in a lowest common denominator code.

Rationalisation of industry codes also has obvious implications for administration and funding arrangements.

We reiterate that we have not formed a firm view of this issue. However, our initial view is that, as long as all consumers of deposit-taking and credit products receive a similar base level of good practice, we do not have any significant concerns about continuing to have separate codes for banks, building societies, and credit unions. However, we would support further studies in this area.

### **ADR schemes**

The issue of rationalisation is also very relevant to ADR schemes.

As we noted in our submission to the Inquiry on Self-regulation, one possibility is to move, over time, towards three broad based ADR schemes, based on:

- banking and credit;
- life insurance, investments and financial advice; and
- general insurance.

If further study showed that this approach was viable and beneficial for consumers, it would result in one ADR scheme to cover the banking and credit activities of banks, building societies, and credit unions.

Another option would be to have two ADR schemes for deposit-taking institutions - one covering banks, and the other covering all other non-bank ADIs and credit providers (including perhaps the mortgage industry and/or friendly societies).

As discussed in the previous section, the ADR membership requirements anticipated as part of the FSR reforms will bring this issue to the fore sooner rather than later. We would be pleased to be involved in any discussions to progress such matters.

It is interesting to note that, in the United Kingdom, the process of rationalisation extends even further than the approach suggested above. A Financial Ombudsman Scheme will be established, and it will apply to all firms that are authorised by the Financial Services Authority (FSA) and that conduct regulated activities, and also to mortgage lending and unsecured lending by authorised firms, as well as the provision of general insurance services by a bank or building society. The Scheme will also be open to unauthorised firms who choose to join.

The FSA suggests that the costs of moving to a single unified scheme will be outweighed by the benefits, including:

- enhanced and consistent complaints handling;
- the existence of a single accessible Ombudsman to deal independently with any dispute that consumers cannot resolve with their firm;
- increased satisfaction and corporate reputation;
- improved quality of complaints handling; and
- greater efficiency in operation.<sup>16</sup>

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## Cross-functional codes

Another related issue is that of cross-functional industry codes. With increasing convergence of products and services in the financial services sector, banks (and other deposit-taking institutions) no longer offer just savings, transaction and credit products.

In some cases, other products, such as insurance or superannuation, may be offered by a company related to a bank (eg within the same group), and the bank supplies those products as an agent of the issuing company. In other cases the sale will be handled by a person employed by the selling entity but physically located within the bank, with the difference in roles not readily apparent to the consumer.

The current Code applies to deposits, loans or other banking facilities. It does not specifically apply to other financial products that might be supplied by banks as agents, and the issue of whether the Banking Code should cover all retail products and services offered by banks is one that could be considered in this review.

There are clearly some benefits in maintaining product-specific codes. They can provide a level of detail that may be missed if a code is broadened to cover all products and services offered by an institution group. In addition, the documentation associated with a cross-functional code would be likely to be long and unwieldy. Finally, a code that contains obligations for non-banking products and services (eg insurance) may result in different standards applying for similar products that are sold by different industry segments.

However, it is important that banks also meet good practice consumer protection standards when they are supplying other financial products to their customers. It may therefore be worth considering whether the Banking Code could play a role in encouraging or compelling membership of other relevant industry or function codes (for example,

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<sup>16</sup> *Complaints handling arrangements*, Financial Services Authority consultation paper 49, 2000..

the EFT Code of Conduct, General Insurance Code of Practice<sup>17</sup> and others).

One solution might be to include in the Banking Code a provision that requires members to comply with other relevant codes. For example, it could be a requirement in the Banking Code that Code members who supply general insurance (either as an agent or principal) must also comply with the General Insurance Code of Practice, to the extent they carry on activities regulated by that Code.

Of course, such an approach would not have the effect of mandating compliance with the General Insurance Code by the product issuer of a general insurance product if that product issuer is not a bank, but a related company. However, it should go some way to requiring appropriate practices by bank staff.

There may also be other ways to achieve a similar outcome, whilst also recognising that more than one corporate identity may be involved in distributing relevant financial products to bank customers. We think that the general issue of convergence of codes is one that will inevitably require further detailed discussion between all relevant stakeholders.

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## Monitoring and administration

Code monitoring and administration is an issue of concern for ASIC. We believe that appropriate monitoring and administration is a key feature of an effective code, and we strongly encourage clarification and improvement of the existing provisions in the Code.

### Models for administration

There are various functions that can be considered when looking at the question of administration and monitoring. These include:

- educating Code members about the Code;
- promoting the Code to consumers, their advisers, and the general public;
- monitoring compliance with the Code provisions, and administering appropriate sanctions for non-compliance;
- arranging for regular reviews of the Code;
- implementing changes to the Code arising from formal reviews or otherwise;
- monitoring relevant external developments, including legislative changes;

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<sup>17</sup> Note that membership of an approved code is currently a license requirement for all general insurers (s. 113 Insurance Act). However, it is suggested in the *Commentary on the draft provisions* that this provision will be repealed (p. 185).

- encouraging expansion of Code membership;
- maintaining a record of Code members;
- developing and promulgating guidelines to assist in the implementation and administration of the Code.

These functions can be located in a separate Code administration body, that has some measure of independence from the relevant industry association. Alternatively, an administration body could be established within a relevant ADR scheme.

However, it may also be possible and appropriate to divide the various administration functions between different bodies and organisations, including perhaps the industry association, the ADR scheme, a separate administration body, the regulator, and/or others. Thus, although it may be advantageous to allocate all of the various administration functions to just one body, it is not essential.

Although we do not have a firm view as to how the Code should be administered, we think that the Code needs to detail how, and by whom, the various administration functions will be carried out. The existing provisions will need to be amended if they are to achieve this goal.

We will have responsibility for approving codes (although it will not be mandatory for financial sector businesses to be party to an approved code). As discussed earlier, one issue that we will consider in the approval process is whether the code provides for effective implementation and administration.

## Improving the compliance monitoring

If an industry code is not adequately monitored, then consumer and government confidence in the code is likely to diminish. Adequate arrangements for monitoring compliance will be a key criteria if we are asked to approve an industry code.

The Banking Code is currently monitored by ASIC. Banks self-assess their compliance with the Code against a pre-determined questionnaire, and we report on the results of that process annually.

We have some concerns that the current monitoring process may not be completely effective in identifying areas of non-compliance. We also question the utility of some of the information collected now that the initial code implementation phase has passed and systems are in place. In addition, we recognise the compliance burden on banks involved with the current monitoring procedures and would like to minimise these where it will not impact upon levels of confidence in the code.

We therefore plan to review the monitoring procedures that we carry out to assess whether the self-assessment process could be made more effective. However, we have held off reviewing monitoring procedures until after the review of this Code to avoid institutions having to deal with two lots of changes in short succession.

We do not have a firm view on whether the monitoring should continue to be conducted by ASIC, or in fact should be conducted or commissioned by a code administration body or another organisation.

One possibility is to locate the monitoring function within an external dispute resolution scheme. However, the monitoring function is quite different in nature to the existing functions of the schemes.

Regardless of who conducts the monitoring, we consider that it is important that the Code provides sufficient detail of the monitoring process, including:

- the name of the body that will conduct the monitoring; and
- appropriate obligations on Code members to provide relevant information to the monitoring body.

It is also very important for any self-assessment process to be complemented by some form of external monitoring. Although self-assessment generally provides a good guide to compliance in areas where compliance is generally high, some form of external monitoring can be an appropriate means of validating the results of self-assessment and increasing the credibility of the codes.

External monitoring can also be used to identify any areas of non-compliance that are not picked up by the internal compliance activities of the institutions. For example, in our monitoring, we have noted a discrepancy between the number of complaints received by institutions and the reported number of instances of non-compliance. (Of course, we recognise that not all complaints will be substantiated.)

Also, some limited external monitoring exercises for the EFT Code showed that there were some significant discrepancies between the institutions' reported level of compliance and the results from the external monitoring exercise.<sup>18</sup> Although these results are not directly relevant to the level of compliance with the Banking Code, they do demonstrate that there can be discrepancies between a self-assessment exercise and external monitoring results.

Some external monitoring would be possible without the consent or involvement of institutions. For example, compliance with the various information disclosure provisions could be tested using a 'shadow shopping' exercise.

However, for external monitoring to be comprehensive, industry cooperation is necessary.

In our view it would not be necessary or appropriate for external monitoring to involve an annual full-scale review of compliance with every provision of the Code and every party to the Code. This would

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<sup>18</sup> See *Report by the Treasury and the Australian Competition and Consumer Commission on the operation of the EFT code of conduct*, March 1998, p. 15-23.

impose heavy costs on banks. Those costs would be unwarranted, given the generally high level of compliance with the Code that currently exists.

Instead, we suggest that external monitoring could occur less frequently than annually, and could involve a more limited and targeted exercise, that identifies and concentrates on higher risks areas (eg areas where higher levels of complaint have been received, or issues that are of greater significance for consumers).

A possible way to reword the Monitoring section of the Code is proposed below. Note that, in this suggested clause, the phrase 'Monitoring body' would need to be replaced with the name of the body or organisation that is to undertake the monitoring function.

[Monitoring body] is responsible for monitoring compliance with the Code.

Each bank will provide [Monitoring body] with an annual report on:

- their compliance with the Code; and
- information concerning the number of disputes referred to in clauses [x - y] of the Code, the categories in which those disputes fall and the manner in which each dispute is resolved.

The content of the annual report will be developed by [Monitoring body] in consultation with banks [and ASIC].<sup>19</sup>

At least once every three years, [Monitoring body] will conduct or commission a targeted external review of compliance with the Code. The scope of the review will be agreed upon by [Monitoring body] and the Australian Bankers' Association, [in consultation with ASIC].

Each bank will cooperate with the external review, and provide reasonable access to documents, information, bank staff, systems and procedures.

[Monitoring body] will provide a consolidated report annually to the Treasurer of the Commonwealth [and ASIC] on the operation of the Code and the results of the internal and, if any, external monitoring.

On request, [Monitoring body] will also provide ASIC with information about compliance by individual banks. [Note that this clause will not be needed if ASIC is the monitoring body.]

## Sanctions and enforcement

In part, enforcement of the Code provisions occurs through the internal and external dispute resolution processes.

However, this is not a completely satisfactory arrangement. The internal and external dispute resolution processes generally work best in

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<sup>19</sup> Note that if ASIC is not the monitoring body, it should be consulted on the process.

circumstances where a dispute involves a direct financial loss, and is a one-off occurrence. They are less effective in cases of Code breaches that do not involve a direct financial loss, and where there is evidence of systemic breaches.

An effective code also needs an encompassing process for dealing with allegations of Code contraventions, and for imposing appropriate sanctions.

Other industry codes, such as the General Insurance Code of Practice, establish a regime for investigating allegations of Code breaches, and for imposing sanctions in the event that those allegations are proved. This regime complements the internal and external dispute resolution procedures for resolving individual disputes.

This review should consider establishing an independent regime for investigating alleged contraventions and imposing appropriate sanctions. The Code should detail:

- who can make complaints about non-compliance (this should include consumers, consumer advocates, regulators and other government agencies, and dispute resolution schemes);
- the process for making complaints;
- the decision maker(s);
- the decision making process; and
- the available sanctions (a range of effective sanctions should be available, so that a flexible approach can be taken).

It goes without saying that the process for investigating instances of non-compliance should be impartial, fair, transparent, and accountable.

## Publicity

The Code should also make provision for publicising the Code. Although general awareness of the Banking Code amongst consumer advisers is higher than awareness of other payments systems codes, there is still room for improvement. For example, a survey of 65 financial services caseworkers showed that only 21% had a reasonable knowledge of the Banking Code and its provisions.

The lack of awareness of the Code is probably not unexpected, given the fact that banks are not required to publicise the existence of the Code.

It is obviously important that bank staff are aware of the Banking Code's existence, and can apply the relevant principles and practices in their day-to-day work. We discuss the issue of staff training later in our submission.

However, for a code to be of real value, it is also important that consumer advocates and intermediaries assisting consumers have some understanding of the Code, as it can provide a standard against which the conduct of banks can be measured.

It is not as critical that consumers know of the details of the Banking Code. In general, consumers are not interested in knowing the source of each of the various obligations that are imposed upon banks. However, where code membership is used as a marketing tool, consumer awareness of the Banking Code will obviously be beneficial to code members. Awareness of relevant codes can also play a role in increasing consumer confidence that code members meet standards that are above and beyond those required by law.

This review should therefore consider including provisions in the Code to ensure that its existence and relevance is publicised by individual banks, the Australian Bankers Association (ABA), and, if established, any administration body.

It may also assist consumers and their advisers if a summary of the Code were developed, perhaps by the ABA or an administration body. Such a document could be made available in branches, and on web sites.

## Process for review and amendment

The Code should also provide more detail on the process for its review and amendment. It could, for example, specify matters such as:

- who will conduct the review (or how that person(s) will be chosen);
- what procedures should be adopted;
- who the 'interested persons' are whose views should be considered;
- how transparency will be achieved;
- the manner in which amendments to the Code will be agreed upon and implemented.

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## Electronic commerce

Another 'big picture' issue to be considered in this review is whether, and if so, how, the Code needs to be amended to take into account e-commerce issues and developments.

Many e-commerce issues that are relevant for banks will be in the arena of electronic funds transfers. These 'transaction issues' are already being considered in the context of the current review of the EFT Code of Conduct, and do not need to be discussed further here.

However, there are other e-commerce issues that are not specific to funds transfers, and therefore could be addressed in this Code.

## Best Practice Model for E-commerce

Some guidance as to the type of issues that could be addressed in this Code can be found in the recently released document - 'Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business'. This 'Best Practice Model' sets out best practice for businesses engaging in electronic commerce activities with consumers. It is not specific to financial services businesses, however, the general practices that it promotes are relevant for banks and other deposit-taking institutions who are intending to offer transaction and other services using e-commerce.

The Best Practice Model was developed by the Ministerial Expert Group on E-commerce, in consultation with relevant stakeholders. It is intended that relevant industry associations and their members will adopt the Model as part of existing codes of practice.

We provided advice on the development of the Best Practice Model and believe that it represents good practice for businesses engaging in e-commerce. We strongly encourage banks to implement the Best Practice Model. There are a number of ways in which this could be done.

One option might be to develop a separate 'e-commerce code' for banks. This could incorporate the Best Practice Model and apply to all retail products and services supplied by a Banking group using e-commerce. The Banking Code could require membership of the e-commerce code.

However, this approach would create yet another code of practice, and contribute further to the proliferation of industry codes.

Another approach might be to incorporate specific provisions on e-commerce into the Banking Code, some of which would be applicable to all financial products supplied by Code members (including any products supplied as agents), while others would implement the detailed Best Practice Model principles as they apply to deposit-taking and credit products.

A revised code along these lines might therefore look something like this:

### Part A: General issues

- administration/monitoring/review of the Code;
- privacy (generally);
- compliance with other relevant codes;
- training;
- advertising; and
- internal and external complaint handling and dispute resolution.

### Part B: E-commerce

- identification of the business;

- commercial emails;
- electronic communications;
- electronic payments;
- security and authentication;
- accessibility; and
- disclosure of applicable law and forum.

Part C: deposit-taking and credit facilities

- disclosures (incorporating current Part A of Banking Code and sections 29 - 35 of the Best Practice Model); and
- principles of conduct (current Part B of Banking Code and sections 36 - 38 of the Best Practice Model).

Although this is not a perfect approach, it would minimise the risk of duplication of codes.

Incorporating the Best Practice Model into the Banking Code would require some amendment to existing provisions in the Code. For example, the Best Practice Model spells out more detailed requirements for internal and external dispute resolution, privacy, and Code administration, than are in the current Code. However, as we have already discussed, we think that the relevant provisions in the current Code should be substantially revised in any case.

## Electronic communications

Many of the disclosure and other requirements in the Banking Code require information to be provided in writing. However, it may often be more efficient and effective, for both consumers and businesses, to provide some or all of this information electronically.

As noted earlier, the FSR Bill currently provides that information such as the PDS can be provided to a consumer in electronic form.<sup>20</sup> There is no requirement that the consumer must agree to electronic communications. However, in practice, a business would not be able to provide a PDS in electronic form to a consumer who has not provided the business with an email address.<sup>21</sup>

This issue is also addressed in the current Working Group draft of the expanded EFT Code of Conduct.

Clause 22 provides that:

22.1 By a specific positive election after receiving an explanation of the implications of making such an election, a

<sup>20</sup> Proposed section 985C FSR Bill.

<sup>21</sup> There may be a possibility that a business could provide an electronic copy to a consumer by mail (eg by forwarding a disk containing the relevant information). However, in practice, this seems unlikely to occur, and would generally be more costly than providing information in printed format.

user ... may agree that a Code subscriber can provide by electronic communication to the user's electronic address nominated by the user any information which this Code requires the Code subscriber to provide (by writing or other means). The user may by notice to the Code subscriber vary the user's electronic address or terminate the agreement to receive electronic communication from the Code subscriber and the Code subscriber must inform the user of those rights.

22.2(a) Subject to paragraphs (b) and (c), making information available at a Code subscriber's electronic address (eg a web site) does not satisfy any requirement of this Code that the information may be provided to a user.

22.2(b) Where a user has viewed information available at a Code subscriber's electronic address (eg a web site), and has been given the opportunity to retain that information for specific reference (eg by saving or printing it) and has specifically acknowledged having seen that information and having been given that opportunity, the Code subscriber is to be treated as having provided that information to the user at the time that the user gave specific acknowledgment.

22.2(c) [relates to obligation to provide receipts.]

Clause 20.1 provides that:

'electronic communication' means a message transmitted and received electronically in a format that:

- (a) allows the message information to be presented to the recipient in a manner and format (eg visual display or sound recording) that is clear and readily understandable; and
- (b) allows the recipient of the message to retain the message information by subsequent reference (eg by printing the message information or storing the message information for later display or printing or listening).<sup>22</sup>

Similar clauses could be included in the Banking Code.

These clauses, as currently drafted, mean that making information available on a web site will not satisfy a requirement to send information by electronic communication.

This approach is consistent with the approach taken by the US Federal Reserve Board. The Board's interim rule of 20 March 1998<sup>23</sup> allows, with the consumer's agreement, electronic communications. However, making available information on a web site does not satisfy the requirement to send information by electronic communication.

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<sup>22</sup> *Second draft expanded EFT Code of Conduct and Commentary*, January 2000, p. 76.

<sup>23</sup> Docket No R-1002 (see Appendix).

# Section 5

## Consumer experiences with the Code

Before discussing whether there are any changes that could improve the specific provisions of the Code, we have set out relevant information and experience with the operation of the Code to date. As well as providing useful background to our more detailed comments, we hope that this information will assist in the review process.

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### Results of the monitoring exercise

As has already been noted, we are responsible for monitoring compliance with the Code. Our role is explicitly noted in the Code itself (see Monitoring section).

We are currently collating responses for the 1999/2000 monitoring period, and are thus not yet able to identify any trends or significant compliance problems. However, we reported earlier this year on the results of the 1998/1999 monitoring round.<sup>24</sup>

A copy of our report will be provided with this submission and it is also available on our Internet site ([www.asic.gov.au](http://www.asic.gov.au)).

Overall, banks reported a high level of compliance with the provisions of the Code. Only 2 institutions reported instances in which the bank's internal documentation and procedures failed to comply with the particular provisions of the Code. One instance involved a product for which it was not possible to provide advance notification of interest changes. As discussed later in our submission, this is an issue which may require Code amendment. The other reported instance of non-compliance was rectified immediately it was identified.

There were also three banks that reported an instance of recurrent non-compliance. These instances were each identified through an internal compliance audit. In each case, the failure was either rectified, or procedures were implemented to ensure future compliance during the reporting period.

The high level of reported compliance with the Code is encouraging and demonstrates a strong industry commitment to the Code. It is also

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<sup>24</sup> *Report on compliance with the Code of Banking Practice, Building Society Code of Practice, Credit Union Code of Practice and EFT Code of Practice, April 1998 to March 1999* (January 2000).

consistent with the results of earlier monitoring exercises that were conducted by the former Australian Payments System Council.

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## Complaints and disputes

Consumer complaints and disputes can provide useful pointers to areas where improvements in self-regulatory mechanisms (or other regulatory mechanisms) could be made.

As discussed in our monitoring report, the ABIO considered 1886 disputes regarding the Code between 1 April 1998 to 31 March 1999. Of these disputes, 500 were carried over from the previous reporting period.

The majority of Code-related disputes referred to the ABIO arose from complaints that a bank failed to act in accordance with the customer's instructions or authority or on undertakings given to the customer. A significant number of disputes were also referred to the ABIO in relation to PIN-based EFT transactions and delivery of banking services.

Banks also provided us with information on Code-related disputes that were resolved internally. For the 1998/99 monitoring period, banks reported that 8851 disputes were received, and that 7608 disputes were resolved through the banks' internal processes. The primary areas raised in the complaints received by the banks were:

- disclosure of fees and charges (20% of complaints received);
- banking service delivery - EFT (PIN-based) transactions (13%);
- other banking service delivery (eg loss of documents, failure to reply to correspondence, fraudulent transactions, or bank error leading to dishonour of transactions) (13%);
- imposition of proper interest rate, fee or charge (10%);
- disclosure of terms and conditions (6%);
- account combination (6%);
- account debiting/crediting (6%);
- disclosure of general information (4%);
- banking service delivery - statements (4%); and
- banking service delivery - instructions (3%).

There is a significant difference between the primary areas of dispute in matters considered internally by banks and the primary areas of dispute in matters that were considered by the ABIO. In part, this may indicate that some matters (eg complaints about EFT transactions) may be more difficult to assess and resolve through the bank's internal processes.

Complaints about banks are also made to regulatory agencies such as ASIC and, prior to July 1998, the Australian Competition and Consumer

Commission (ACCC). In general, however, the number of complaints made to regulatory agencies will be very low, particularly when there is an appropriate external dispute resolution body or process in existence.

Since we took on our new role, the complaints we have received about banks raised concerns about issues such as:

- misrepresentations about rights or exclusions;
- unsatisfactory responses to query/complaint;
- failure to comply with prescribed operations standards;
- unconscionable conduct;
- harassment, coercion, undue duress or unfair tactics;
- poor handling of complaints; and
- incorrect/excessive charges.

Complaints about banks that were received by the ACCC between 1 January 1996 and 31 December 1998 included allegations of:

- misleading or deceptive advertising;
- general misleading or deceptive conduct;
- misleading or deceptive behaviour in pre-contractual situations;
- undue harassment and coercion; and
- unconscionable conduct.

Also relevant is information we receive through our Infoline service. Many of these complaints are identified as suitable for resolution by internal or external dispute resolution processes, and appropriate referrals are made. Our complaints teams do therefore not assess the complaints.

Information from our Infoline staff suggests that the main issues raised by Infoline callers (in relation to deposit-taking institutions generally) are:

- lack of consumer understanding, or lack of disclosure, about key terms and conditions - including interest rates, repayment terms, and interest free periods;
- lack of consumer understanding of the differences between different accounts and different cards;
- failure of consumers to read their terms and conditions, and/or inability to understand those documents they do read;
- additionally, consumers tend to be embarrassed and reluctant to admit that they do not understand;
- in customer loyalty programs that involve deposit-taking institutions, consumers often do not know which of the partners is responsible if things go wrong;
- overcommitment is often an issue; and
- staff training and poor customer service.

We reiterate that the number of complaints made to the regulatory agencies is very small, particularly when compared to the complaints made to the institutions themselves or to the ABIO. Firm conclusions about issues of concern cannot be drawn solely on the basis of these complaints. In addition, not all of these complaints would raise issues that would be appropriate for inclusion in the Code. Many are adequately covered by legislation.

However, the fact that there are complaints made to the regulators and/or the ABIO about issues such as service delivery, disclosure and misrepresentation, and undue harassment, is relevant in considering whether the existing Code provisions are working effectively and/or whether there are gaps in the provisions.

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## Survey of caseworkers

In order to assist it in preparing this submission, ASIC's Consumer Advisory Panel commissioned research into the experience of financial services caseworkers with the various payment systems codes, including the Banking Code. We have already referred to some of the results of the survey in the earlier part of our submission.

Sixty-seven caseworkers and organisations were surveyed. They were asked to complete a detailed survey representing their experiences with the codes, although not all respondents answered every question. Caseworkers also participated in workshops to discuss the issues raised in the survey more generally and they provided numerous case studies to illustrate their concerns.

A copy of the report will be provided with this submission, and significant results from the survey and workshops are detailed throughout our submission. However, it is worth highlighting some of the general findings here.

Awareness and use of the Banking Code and its provisions by caseworkers was relatively high, particularly in comparison with the other payment systems codes. Overall, 70% of survey respondents had some awareness of the Code and its provisions, and 21% had a reasonable knowledge of the Code. Only 5 respondents (7%) had no awareness of the Code at all.

A smaller number of caseworkers referred to the Code in connection with their casework. Almost two-thirds (64%) of respondents occasionally referred to the Code in their work, although only 2 respondents (3%) regularly referred to the Code.

Of course, the Banking Code will not always be relevant in casework, particularly in circumstances where the more detailed provisions of the UCCC apply.

However, there is still room for increasing caseworkers' awareness and use of the Banking Code.

Other issues that raised concerns for caseworkers in this research included:

- lack of availability of terms and conditions documents;
- failure to provide consumer-friendly documentation;
- unfair exercise of the right to combine accounts;
- disclosure of personal information to third parties;
- failure to assess future capacity to repay when inviting applications for higher credit card limits;
- inability to cancel secondary cards;
- inadequate internal complaint resolution procedures; and
- direct debits and institutional errors.

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## Survey of internet sites

We recently conducted two surveys of the Internet sites of deposit-taking institutions. The first, and most detailed, took place in November 1999. In addition, a snapshot of the state of disclosure on these sites was taken between February and March 2000. The surveys only looked at those sites offering Internet banking services. They did not look at the larger number of sites provided by deposit-taking institutions that are promotional only.

In the surveys, we examined the level of consumer information that was available.

Our assessment of the disclosure of information was based on the information that was obviously available. A summary of the main results for the deposit-taking products offered by banks follows.

	<b>Banks 1999</b>	<b>Banks 2000</b>
Obvious listing of account keeping and transaction fees and charges, including those for Internet banking	69%	100%
Obvious listing of terms and conditions for Internet banking	90%	100%
Obvious reference to relevant code of practice	21%	42%
Obvious reference to an internal dispute facility	14%	33%
Obvious reference to ombudsman or arbitrator	0%	8%
Obvious reference to a privacy policy	14%	17%
Assurances of security of online transactions is published	62%	82%
Obvious advice on how to enhance the security of online transactions	21%	58%

We appreciate that Internet sites are rapidly being amended and developed, and that the survey results demonstrate only a snapshot at particular points in time. While noting that there remains room for improvement on web site disclosure it is pleasing to observe the high levels of disclosure for at least some important types of information.

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## Consumer issues survey

Also relevant to this review is the views of consumers themselves. Although we have not specifically surveyed consumers on their views of the payments systems codes, our Consumer Advisory Panel has recently conducted some research to identify the issues that are important to consumers and their advisers.

The Consumer Issues Survey involved in depth interviews with a small number of consumer advocate and financial supplier organisations, a number of focus groups of individual consumers, and a written survey distributed to financial counsellors and other informed agencies.

Some relevant themes coming from this research included:

- the need for a greater focus on the needs of low and fixed income consumers;
- the need for improvements in financial institution's internal dispute resolution processes;
- the need for improved consumer understanding of fees and charges for financial products; and contemporaneous provision of transaction costs;
- banking at the fringe, and the need for basic banking products;

- internet banking issues, especially surrounding disclosure of fees and charges.

While not conclusive or specific to codes, the results of the survey do support a view that some of the areas covered by the Code could be improved.

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## Other research

Other research and reports in the past have also identified similar issues as potentially capable of being addressed through the payments systems codes.

For example, in 1995, the former Prices Surveillance Authority reported on its *Inquiry into fees and charges imposed on retail accounts by banks and other financial institutions and by retailers on EFTPOS transactions*. Information disclosure was one of the issues examined in the Inquiry.

Some years earlier, the issue of third party guarantees was examined by the Martin Committee, and its 1991 report *A pocket full of change* made a number of relevant recommendations.

It is important to note, however, that neither the Banking Code nor the UCCC were implemented at the time of these reports.

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## Summary of consumer experiences

The information on consumer experiences with the Banking Code is not conclusive. However, it does support suggestions that, among others, the Code provisions on:

- complaint handling and dispute resolution;
- information disclosure and product explanation;
- credit assessment;
- account combination; and
- third party guarantees;

could be improved.

Similarly, the information suggests that it may be appropriate to consider whether the Code could also address issues such as:

- e-commerce and electronic banking (particularly disclosure issues);
- debt recovery practices; and
- direct debits.

# Section 6

## Other changes to the existing Code provisions

This section of our submissions provides further suggestions for changes that could be made to improve the existing provisions in the Code.

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### Code objectives and principles

The current Code objectives and principles are relatively limited in scope.

In reviewing the Code, and its role in the new regulatory framework, we think that it will also be important to review and update the objectives and principles. For example, the objectives and/or principles:

- could be reviewed and updated in light of the role eventually determined for the Code in the new regulatory environment;
- should refer to an overriding principle of ‘fairness in all the circumstances’; and
- could clarify that promoting information disclosure is not an objective in itself, but that it is intended to promote better and more informed decision making by bank customers.

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### Coverage for small businesses

The benefits of the Code are currently only applicable to bank customers acting in their personal, and non-business capacity. The Code is therefore not applicable to transactions and products offered to businesses, including small business.

However, in recent years, there has been a recognition that small businesses are often in a disadvantaged bargaining position when it comes to dealing with large organisations, particularly large financial organisations. In some cases, this has resulted in traditional consumer protection provisions being extended to protect small businesses. For example, an unconscionable conduct provision for small business has been incorporated into the Trade Practices Act, and the proposed definition of ‘retail client’ in the FSR Bill will include small businesses.

We note that similar extensions have occurred in the banking sector. In particular, small businesses can now access the Banking Ombudsman

scheme, and the ABA has released a set of principles for working with small business (“the small business principles”). These principles cover similar ground to many of the provisions in the Banking Code, although they are less specific.

In our recent submission to the review of the Credit Union Code of Practice, we suggested that the Credit Union Code be extended to cover small businesses, and that the definition of small business should be the same as that used in the FSR Bill. In the absence of the small business principles, we would suggest a similar approach to the coverage of small businesses in the Banking Code.

However, it could be argued that the existence of the small business principles reduces the need to extend the application of the Banking Code. While we are pleased to see banks take a proactive approach to their relationships with small businesses, we do have some concerns that:

- adoption of the small business principles is voluntary, and in fact banks can choose to adopt the principles in whole or in part;
- there is no obligation on banks to advise of their adoption of the principles; and
- there is no process for reviewing compliance with the principles by the banks who choose to adopt them.

In principle, we do not object to the suggestion that there may need to be different ‘consumer protection’ standards for small businesses than there are for traditional consumers. However, we consider that there is a need for improved transparency and compliance monitoring in respect of the principles.

One option might be to codify the small business principles in the Banking Code itself. The Code could then contain distinct sections applying to consumers and to small businesses, and the monitoring and administration provisions in the Code could apply to both sections.

Another approach might in fact be to expand the application of the Code to small businesses. This is the approach we have suggested in relation to the Credit Union Code of Practice.

We also note that the small business principles are due to be reviewed during this year, and we would like to participate in this review.

One other issue that is relevant here is that of access to statements when a customer is in default under a loan agreement. This is an issue that is currently being examined by the Parliamentary Joint Statutory Committee on Corporations and Securities,<sup>25</sup> and it may be appropriate

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<sup>25</sup> See Committee’s media release, 21/6/00, on [http://www.aph.gov.au/senate/committee/corp\\_sec\\_ctte/media\\_farmers.htm](http://www.aph.gov.au/senate/committee/corp_sec_ctte/media_farmers.htm), downloaded 17/8/00.

to incorporate any recommendations from the Committee into the Banking Code or small business principles.

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## Terms and conditions and other disclosure

The caseworker survey discussed earlier raises some important issues in relation to the disclosure obligations.

In general, the caseworkers surveyed did not rate the practices relating to disclosure of terms and conditions highly.<sup>26</sup> More than three-quarters of the respondents (78%) were either concerned about some practices in this area, or concerned about industry sector practices or conduct generally on this issue. Only 17% of respondents had generally positive or favourable experience of Banking Code here, and the remainder did not comment.

The workshops and discussions of caseworkers identified some specific issues of concern.

First, it appears that the terms and conditions for products (including credit products) are not always readily available at branches. This is despite the obligation contained in clause 7.1 of the Code. Caseworkers also report that financial institutions may not supply sample copies of loan and mortgage documents when requested.

If the Code is to be truly effective in promoting informed decision making by consumers, including those who are not (yet) customers, general and specific information about products and services must be more readily available.

Current problems in this respect should be somewhat overcome when PDSs are introduced as a result of the FSR Bill.

However, we note that consumer groups would also like to see the Code include provisions that require banks to:

- make readily available, to both current and prospective customers, copies of terms and conditions, sample contracts, fees and charges schedules, and general descriptive information; and
- draw consumer attention to the availability of disclosure information through appropriate means (eg displays or notices in branches, prominent links on web sites, etc).

Another issue that was raised by caseworkers was that of the complexity of much documentation.

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<sup>26</sup> The issues covered by the question in the survey included timing and form of disclosure, availability, prominence given to key terms, clarity and plain English usage, availability in community languages, and whether distinguishable from advertising material.

Many consumers have low literacy levels. For those consumers, the terms and conditions booklets and other documentation are difficult to understand. Again, this can inhibit the ability of these consumers to make informed decisions and to understand their rights and obligations.

The Code requires that terms and conditions documents be 'clearly expressed' (clause 2.1(iv)). However, there is no encouragement for banks to ensure that the needs of consumers with low literacy levels are met. We would strongly support efforts by this review or by banks generally to consider ways to encourage better disclosure documentation, either through the Code or through other mechanisms.

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## Disclosure of fees and charges

The question of whether the current fee disclosure regime is adequate will be considered in the current *Inquiry into fees on electronic and telephone banking* that has been established by the Parliamentary Joint Committee on Corporations and Securities. We have provided a submission to that Inquiry.

We are also chairing a Transaction Fee Disclosure Working Group. The aim of this group is to:

'provide consumers with the opportunity to better understand the transaction fee structures applying to their accounts so that they can make informed choices'.

Our initial views on whether, and how, the current fee disclosure provisions in the payments systems codes are detailed in our submission to the Parliamentary Committee Inquiry. A copy of our submission will be provided once the Parliamentary Committee gives the appropriate permission.

In our submission, we look at the need for effective disclosure, the adequacy of current disclosure regulation and practices, and some possible ways of improving disclosure practices.

We also discuss the results of some research commissioned from Chant Link by our Consumer Advisory Panel. This examined consumers' understanding of account and transaction fees and what, if any, changes they would like to see in the way in which fees are disclosed. A copy of the research report will be provided with this submission.

Finally, we make some suggestions for change.

It is also worth noting the views of caseworkers about current disclosure practices regarding fees and charges. In the survey referred to earlier in this submission, caseworkers were asked to rate the conduct of banks in relation to disclosure of fees and charges, interest rates, and other costs applying to products and services. This included timing of disclosure,

form of disclosure, notification of fee increases, whether any hidden fees including discourse of application fees, mortgage discharge fees, early termination payments, etc.

More than two-thirds of respondents (70%) to the caseworker survey said that they were concerned about some practices in this area, or were concerned about industry practices/conduct generally in this area. Only 20% of respondents had generally positive or favourable experience of fees and charges disclosure practices.

### **Recommended changes to the Code**

In our assessment, the most important short term reform would be to achieve improved disclosure on statements. This view is supported by the Chant Link research. Statements could include a summary of the costs of transactions undertaken during the statement period broken down by the number of transactions charged for and not charged for and, where this is relevant to the cost, the type of the transaction. They could also include information about the key variables influencing the fee charging regime. Under present fee charging regimes this would mean information about, for example, the number of free transactions per period and the impact of any minimum monthly balance, should be included.

The Banking Code could be one mechanism for encouraging improved disclosure along these lines.

Another suggestion for reform in this first stage could be to require institutions to provide access to non-transaction specific information about the fees regime applying to a particular account type through Internet and telephone banking.

### **Longer term changes**

In the longer term, we are of the view that the most important improvements relate to disclosure at the time of the transaction. While the precise formulation of goals in this area will depend a bit on the fee charging regimes of the future and on additional research about what consumers want, our initial view is that there should be optional access to information about the cost of a transaction and the impact of the transaction on the cost of future transactions prior to the transaction taking place through most, but not all, technologies. However, we do not see these longer term goals being dealt with in the Code at this time.

Reforms of these types would help ensure that consumers better understand the fee regimes applying to their products and are in a position to make informed choices which help them reduce the cost of their banking.

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## Notifying changes to fees and charges

As noted at the beginning of the submission, the FSR Bill should result in important improvements here. Other suggestions for changes to the Code are detailed below.

### **Clarification of clauses 9.1 and 9.3**

It is not clear from clauses 9.1 and 9.3 whether an increase in the minimum balance for avoiding account keeping fees is considered to be an introduction of a fee or charge (and thus 30 days notice is required before the change comes into effect). Clarification that such an increase does equate with the introduction of a fee or charge would assist. We note that the Banking Ombudsman's view that:

“On balance, our view is that good banking practice requires that written notice should be given to all affected customers 30 days before the change comes into effect of the change in the minimum balance to which an account keeping fee applies.”<sup>27</sup>

### **Notification of changes to the fees for stand alone transactions or services**

In the case of stand alone transactions, that do not form part of the standard features of an account, it will not always be possible to know who the affected customers will be. Some examples of stand alone transactions might include the issue of a bank cheque or a tax information notice (detailing interest received/paid for tax purposes).

There may therefore be merit in amending clause 9.1 so that the advance notification requirement does not apply where it is not possible to identify the affected customers and the fee is for a stand alone transaction. Disclosure of changes to fees for stand alone transactions can continue to be provided indirectly to customers under clause 9.3, and fees for stand alone transactions should continue to be disclosed under clause 4.1.

### **Notification of changes to interest rates for money-market products**

The Code currently provides (in clause 9.3), that changes in interest rates must be notified to customers no later than the day that the changes take effect. It has been suggested to us that such notification will not be possible for some products where the interest rate is linked to an external figure. One obvious example here is products where the interest rate is linked to money market rates.

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<sup>27</sup> Australian Banking Industry Ombudsman, Bulletin No 23, December 1999.

It may therefore be appropriate to amend clause 9.3 to ensure that it reflects current market practices.

### **Clarifying that terms and conditions can be unilaterally changed**

Concerns were raised in the Caseworker survey that consumers did not fully appreciate that the terms and conditions of financial institution products can be unilaterally changed, provided the requisite notice is given. They can be dismayed to find that a significant inducement to purchase (eg low or no account-keeping or administration fees) can be unilaterally varied. This was particularly thought to be of concern where the no or low fee feature is heavily promoted, and where the costs of early termination are high.

In that survey, caseworkers suggested that the payments systems codes should require that all advertising and point of sale promotion of fee free accounts should include specific reference, of equal prominence, to the institution's contractual right to introduce account keeping and administration fees in the future.

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## Third party guarantors

Clause 17 of the Code of Practice deals with third party guarantors. It provides information and disclosure requirements that are additional to those provided by normal contractual principles.

More detailed provisions in the UCCC also protect third party guarantors. However, there are some circumstances where the Banking Code provisions apply, but the UCCC provisions do not. For example, the Banking Code provisions will apply where a guarantee is provided to secure credit provided to a corporation (unless one of the exemptions in clause 17.1 applies). In contrast, the UCCC provisions do not apply where the debtor is a corporation.

There is anecdotal evidence that consumers are continuing to provide guarantees for family members, relations and friends, in circumstances where they do not fully appreciate the potential consequences. The consequences of this lack of appreciation can often be devastating, both financially and otherwise.

Additionally, the results from our caseworker survey showed that almost three-quarters (73%) of respondents were concerned about some practices in this area, or about general bank practices on this issue.<sup>28</sup> Only six caseworkers (9%) had generally positive or favourable experiences of

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<sup>28</sup> The survey question asked about caseworkers' experiences in relation to the processes for ensuring prospective guarantors are properly informed and act freely, and the provision of information to guarantors post-contract (including when the borrower defaults).

bank practices in relation to guarantees. (Eleven respondents (17%) expressed no views on this issue.)

It is therefore worth exploring whether there are further steps banks could take to improve consumer understanding, either through the Code or through other mechanisms. We have provided some possible suggestions in this regard, but we note that we have not yet fully explored them, and we have not yet formed any views on their suitability or practicality.

### **Facilitating appreciation of the risk involved**

Consumers do not always appreciate that financial institutions usually require additional security (such as a guarantee) because they have concerns that the borrower will not be able to meet their loan obligations. The fact that a guarantee is sought is, by itself, an indication that the creditor thinks that there is a risk that they will need to call on the guarantee.

Banks (and other financial institutions) could do more to ensure that consumers appreciate the reasons why a guarantee is sought. One suggestion might be to amend clause 17.4 to require banks to provide the prospective guarantor with a summary of the reason why a guarantee is sought and why the bank thinks that the principal debtor is a credit risk.<sup>29</sup> This information could be included with the warning required by clause 17.4(i).

We recognise that it will not always be appropriate for banks to share their full reasons for seeking a guarantee. However, a simple statement of reasons may be effective in bringing home the risk to the prospective guarantor.

The 1996 report by the Expert Group on Family Financial Vulnerability recommended that prospective guarantors be provided with information about the transaction, information provided by the borrower to the financier, and relevant Credit Reference Association of Australia reports.<sup>30</sup> Again, this type of information may help to provide the guarantor with a better appreciation of the risk involved. The Expert Group, however, did not recommend that financiers be required to provide the prospective guarantor with their internal opinions.<sup>31</sup>

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<sup>29</sup> See also discussion in *Guaranteeing someone else's debts*, NSW Law Reform Commission, Issues Paper 17, April 2000, p. 79 - 80.

<sup>30</sup> *Good relations, high risks*, Report of the Expert Group on Family Financial Vulnerability, February 1996, p. 42 - 43.

<sup>31</sup> Expert Group on Family Financial Vulnerability, *ibid.* p. 43.

### **A checklist for prospective guarantors**

Consumers also need to be more questioning when they are asked to provide a guarantee. In its September 1999 report on relationship debt,<sup>32</sup> the Australian Banking Industry Ombudsman suggested that prospective guarantors should be encouraged to ask questions of the lender such as:

- Why is the guarantee required?
- What will happen if I do not provide a guarantee?
- Can the guarantee be limited as to amount?
- Can the guarantee be limited so that it lapses if there is a significant change in my circumstances or if the marriage ends [where the prospective guarantor is the debtor's spouse].

The Ombudsman also suggested that prospective guarantors should be encouraged to ask themselves questions such as:

- Could I pay back the debt with my existing resources? Without selling the house? Now? In five years time? In fifteen years time?
- Is it possible that I will want or need to sell my house in the future?

The Code could include a requirement for banks to provide general descriptive material about guarantees to prospective guarantors. This material could include a checklist, based on the questions outlined above, and information about a guarantor's rights under clause 17.6 of the Banking Code to information about the principal loan. The material could be provided during (or immediately prior to) a meeting between the prospective guarantor and the bank.

However, it would be important to ensure that such material does not duplicate existing education material and contribute to problems of information overload. It would also be important to consider how material of this nature could be developed or adapted to meet the needs of consumers with low literacy, or from non-English speaking backgrounds.

### **Explanations to guarantors**

Banks do have an obligation to ensure the prospective guarantors understand what they are being asked to sign. In particular, banks should ensure that prospective guarantors understand:

- their likely exposure to risk;
- the structure of the transaction;
- the extent of the guarantor's liability if the guarantee is called upon; and

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<sup>32</sup> Australian Banking Industry Ombudsman, Bulletin no 22, September 1999.

- the fact that signing the guarantee is optional, and that they can ask that a second guarantor share the risk.

In general, we think that the explanation to a prospective guarantor should not be given in the presence of the debtor.<sup>33</sup>

In many cases, the prospective guarantor's decision can be influenced or affected by the debtor (even if that influence is not 'undue' within the meaning of the law). Ensuring that the debtor is not present during the explanation of a guarantee can minimise the direct effect of such influence. It can also prevent the debtor from interrupting and tempering or negating the information provided by the bank. Finally, it can provide a neutral space for the prospective guarantor to seek explanations or further information from the lender.

The Code could introduce a requirement that banks take all reasonable steps to advise a potential guarantor directly about the guarantee. The Expert Group on Family Financial Vulnerability in fact recommended that such a requirement be introduced in legislation, so as to apply to all financiers.<sup>34</sup> A copy of the Group's draft provision is at Attachment A.

This review could also consider whether a requirement that third party guarantees not be explained or signed in the presence of the debtor would assist.

Such a requirement would not always be effective in reducing the effects of influence from the debtor. Influence and feelings of responsibility will often be present, even if a separate interview is provided. However, providing for a separate interview may assist many guarantors.

### **Providing protection to guarantors of small business loans**

The UCCC does not apply to loans that are provided to corporations or are provided for predominantly business purposes. However, situations involving guarantees for business loans (including small business loans) are common and have the capacity to cause personal, as well as business losses. It may therefore be useful to consider the extent to which the Banking Code should provide appropriate protection for those guaranteeing small business loans.

The guarantee provisions in the Banking Code do not appear to be limited to loans provided for personal, domestic or household purposes. Nor is it limited to loans that are provided to individuals. As a result, many personal guarantees provided by individuals to small businesses appear to be subject to the provisions in clause 17. Some minor amendments to clause 17.1 may make this intention clearer.

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<sup>33</sup> See also NSW Law Reform Commission, *ibid.* p. 76 - 77.

<sup>34</sup> Expert Group on Family Financial Vulnerability, *ibid.* p. 45.

However, one common situation that will not be covered by the Banking Code is the situation where a personal guarantee is provided by:

- a family member who is also a director or secretary of the family company or other small business to whom a loan is made; or
- a family member who is also a beneficiary of a discretionary family trust for which a loan is made.<sup>35</sup>

One reason for including these exemptions is that such family members would expect to receive actual benefits from the loan that is provided to the business or trust.

However, there may be occasions where the director, secretary or beneficiary may in practice, have little access to information about the nature and extent of the risk involved, or about the loan and repayment history. The person may effectively be a 'non-participating director', and thus, in practice, may be in a similar position to a third party who is asked to provide a guarantee.

Further consideration might need to be given to the position of 'non-participating directors', secretaries, and beneficiaries who provide guarantees. This review might consider, for example, whether such guarantors should be provided with information about the guarantee and credit contract in the same way that other third party guarantors do. A provision which requires that enforcement action be taken against the debtor before calling on the guarantee (see below) may also be relevant for 'non-participating directors'.

### **Improved credit assessment of prospective guarantors**

We understand that it is not uncommon for credit assessment of prospective guarantors to be based solely, or primarily, on whether the guarantor has an asset that can be sold to meet the debt. The consequence of this approach is that those who have a significant asset (eg the family home), but are on low incomes, can be considered as suitable guarantors. This is despite the fact that such people would be unlikely to meet the criteria for granting a substantial loan.

Consideration could be given to whether there is a need to place restrictions on the extent to which banks can accept, as guarantors, persons who have limited income and only the family home as a major asset. We recognise, however, that there are arguments against taking this approach.

### **Enforcement**

Under the UCCC, credit providers must normally make efforts to enforce judgment against the principal debtor before calling on the guarantee. No such protection is provided in the Banking Code.

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<sup>35</sup> NSW Law Reform Commission, *ibid.* p. 68.

Given that there are some circumstances where the UCCC will not apply, and the Banking Code will, it may be worth considering an amendment to the Code to prevent a bank calling on a guarantee before it has taken reasonable steps to enforce the debt against the debtor.

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## Credit Assessment

Clause 15 of the Banking Code deals with processes for credit assessment. In part, this provision has been superseded by the provisions of the UCCC. However, as noted above, it may still be relevant and applicable in circumstances where the UCCC does not apply (eg for small business loans).

In the caseworker survey, 80% of the respondents said that they were concerned about the credit assessment practices of banks. Particular issues of concern included:

- failure to assess a consumer's future ability to repay before inviting them to apply for a higher limit on their credit card; and
- the use of pre-approved limit increases for credit cards.

This issue could perhaps be partly addressed by amending clause 15.1 to clarify that the clause applies in circumstances where an increase in a credit limit is sought or offered. However, it may be an issue that is more appropriately addressed in the UCCC.

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## Account combination

Another issue that is of significant concern to caseworkers is deposit-taking institutions' use of their rights to combine accounts. There was also widespread concern at the apparent lack of understanding of the requirements of the *Code of Operation for Social Security Direct Credit Payments* on the part of staff at branch level - both as regards combining accounts and more generally.

Caseworkers note that the impact of account combination practices can be sudden and severe, and it can often leave consumers without sufficient funds for living expenses. Used as a means of debt recovery, account combination can also be unfair to other creditors, who have to resort to more traditional (and transparent) mechanisms to recover debts.

Under the Code, banks must comply with the *Code of Operation for Social Security Direct Credit Payments* (clause 10.2). They must also provide written notification to customers after exercising the right to combine accounts.

However, it may be worth considering whether it is appropriate to further limit the right to combine accounts. Suggestions we are aware of, but haven't formed a view on, include:

- specifying that the right to combine accounts can only be exercised in respect of account balances above an agreed minimum amount. This could extend protection to consumers who are on low incomes, but are not receiving social security benefits; and
- limiting the extent to which funds can be combined or frozen to meet *future* liabilities or payments, which have not yet fallen due. Again, there are concerns that this practice can have severe and unfair consequences on consumers.

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## Staff training

Appropriate training is obviously a key issue for bank staff who deal directly with consumers. For example, staff need to be aware of the existence of the Code, and the particular provisions that are relevant to their duties.

Staff also need to understand the complaint handling processes, as it is well understood that failure to provide consumers with clear information about complaint handling will discourage them from making complaints. As noted earlier in this submission, caseworkers surveyed raised concerns that some bank staff are not receptive to complaints and do not fully understand the complaints process.

We also note a recent survey conducted by the Australian Consumers Association on the performance of bank telephone information services.<sup>36</sup> The results give some concern about the effectiveness of staff training and/or the provision of up-to-date and accurate information to call centre staff.

It is the responsibility of individual banks to ensure that their staff are given appropriate training on the code requirements. However, it would not be generally be appropriate for the Code to specify in detail the type of training that should be provided.

We would support retaining a provision on training in the Code, however, we would like to see the current provision strengthened in application. One alternative for the current provision is outlined below.

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<sup>36</sup> 'Hanging on the telephone', Australian Consumers' Association, *Choice* Jan/Feb 2000, pp. 14-18.

A bank shall ensure that staff receive adequate training and instruction so that they can competently carry out their functions relating to this Code. The obligation to provide training and instruction shall be ongoing and shall include training and instruction in the areas of:

- the requirements of this Code;
- consumer protection principles;
- legal obligations;
- complaint and dispute handling procedures; and
- product knowledge;

as may be appropriate in relation to the function, authority and responsibility of the staff member.

# Section 7

## Suggestions for new areas for Code coverage

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### Direct debits

One issue that was frequently raised in consultations on the caseworker survey is that of direct debits. Issues identified included:

- the prevalence of Institutional error and failure to automatically refund overdraft fees following errors;
- undue delay in re-crediting funds which had been erroneously deducted;
- consumer (and adviser) confusion about the procedure for cancelling direct debits - in particular, a lack of understanding about the need to cancel the authority in writing with the merchant; and
- inefficiency of the procedure for stopping unauthorised billing by merchants after the consumer has cancelled the merchant's mandate.

One improvement could be made by including in the Code an obligation for banks to automatically re-credit transaction or account keeping fees that are incurred when institutional error is involved. This could be addressed in the complaint handling provisions of the Code.

We also note that the Reserve Bank of Australia has developed a charter for direct debit customers. This is designed to govern the relationship between the biller and the customer.

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### Joint accounts and joint finances

Guarantees are not the only area where personal relationships can affect consumers' understanding and appreciation of financial risks.

The caseworker survey also raised concerns that consumers do not always appreciate the implications of 'joint and several liability', or of allowing a partner or family member to have a subsidiary card on a credit card account.

Problems often arise when relationships break down. For example, one party can continue to use a subsidiary card even though the primary cardholder has requested that the card be cancelled.

Caseworkers surveyed provided views on their experiences of the conduct of banks in relation to joint deposit accounts, joint loan accounts, and subsidiary cardholders (including provision of information about rights and responsibilities, handling of issues in the event of a relationship breakdown, and the process for cancelling subsidiary or additional cards.

Almost 70% of respondents stated either that they were concerned about some practices in this area, or were concerned about industry practices or conduct generally. Only 5 caseworkers (7%) said that they had generally positive or favourable experiences of bank practices in relation to joint accounts and additional cardholders. (The remaining caseworkers (23%) did not comment.)

In part, these are consumer education issues. Consumers need to have a better appreciation of the consequences of establishing joint financial arrangements. However, banks could also play a more active role in both explaining the implications and minimising the losses when relationships break down.

Practical steps that could be taken by banks could include:

- allowing cancellation of a subsidiary card on the request of the primary cardholder. We understand that, for technical reasons, such a stop can only be activated when the card is used electronically, or when telephone authorisation is required. However, given the prevalence of electronic transactions, even this limited stop could potentially have a significant impact.<sup>37</sup>
- allowing one party to a joint facility to limit their liability for any future transactions made using that facility.

It is worth considering whether the Banking Code could mandate such steps.

The Expert Group on Family Financial Vulnerability also suggested that consideration could be given to other steps, such as:

- sending a letter to the primary cardholder at the time they apply for a subsidiary card, specifically drawing their attention to the potential consequences of giving someone a subsidiary card. The cardholder could also be required to specifically acknowledge receipt of the letter before the subsidiary card was issued;
- providing primary cardholders with a standard form notice that they could give to the subsidiary cardholder as formal notice that their authority to use the card has been terminated, and perhaps

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<sup>37</sup> See also recommendation 12 of the Expert Group on Family Financial Vulnerability, *ibid.*, p. 55.

also warning that any further use of the subsidiary card may expose the user to criminal penalties for dishonesty offences.<sup>38</sup>

A further issue that arises in joint finances at the end of the relationship is that of the relationship between 'joint and several liability' and any property settlements made in family law proceedings. Property settlements may allocate joint debts to one party or the other, however, those arrangements do not bind the credit provider, who is free to enforce the debt against either or both parties.

We are not convinced that this issue is best addressed through an industry code. However, we would certainly encourage banks to develop guidelines about the manner in which they will enforce debts that are the subject of a family law property settlement.

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## Access to documents

Although the Code provides for standard form documents (terms and conditions, fee schedules etc) to be provided to consumers, there is no requirement to provide individually generated documents to consumers. We understand that consumers sometime have difficulty obtaining copies of documents that would be held on the files of their financial institution. This can include copies of correspondence, file notes, statements, and signed contracts. In other cases, quite significant charges may be imposed for copies of relevant documentation.

For example, two-thirds of caseworkers surveyed were concerned about some bank practices, or bank practices generally, on the issue of ongoing information about accounts (including account statements, provision of copy documents, and cost of obtaining information and documents).

Provision of such copy documents early in a complaint can often facilitate early resolution of that complaint. It would be useful if this review could look at whether the Code should provide for a right to copies of file documentation on request and, if so, whether any exceptions are needed. (For example, in the General Insurance Code there is an exemption in cases of fraud where the disclosure of information could prejudice the outcome of an inquiry).

On this point we would also note that access to copies of relevant valuations (eg house valuations) is also not always forthcoming. Often the loan establishment fee covers some or all of the cost of the bank seeking a valuation. If this is the case, there seems to be no reason why a copy of any valuation obtained could not be provided to the relevant consumer on request. The Code could contain provisions to this effect.

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<sup>38</sup> Expert Group on Family Financial Vulnerability, *ibid.* p. 55 - 56.

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## Debt collection practices

The Code does not deal with the responsibilities of banks (or their agents) in relation to debt collection activity.

However, the caseworker survey raised concerns about debt recovery practices of banks. Eighty-five per cent of the caseworkers surveyed rated the debt recovery practices of banks as of concern, while only four per cent had generally positive or favourable experience of bank practices in this area.

Almost every caseworker surveyed (95%) also stated that they had concerns about either some practices, or about practices generally, of banks in circumstances where consumers were in financial difficulties. Here, lack of flexibility was a common theme. There was a pronounced degree of dissatisfaction with the practices of bank representatives when it came to willingness to negotiate on repayment arrangements.

The survey results show that debt recovery practises are an issue of concern to some consumers and consumer representatives. It is important that consumers are treated fairly and with respect in all dealings with banks and their agents, even when they have defaulted on a payment arrangement. We are therefore of the view that the Code should deal with issues concerning debt recovery, and perhaps also with issues concerning responses to consumers in financial difficulties.

Last year, the ACCC released guidelines for debt collection in the context of section 60 of the Trade Practices Act (prohibition against undue harassment and coercion). These guidelines were developed after an extensive period of consultation and discussion with all relevant stakeholders. They represent an appropriate standard of practice for debt recovery, and thus they could usefully be included or referred to in the Code. In fact, in the caseworker survey, a number of caseworkers expressed the view that a relevant industry code should set out acceptable or unacceptable practices in detail, along the lines of the ACCC guidelines.

If the Code is to include standards of practice for debt recovery, it is important that the provisions apply to Code subscribers. However, they should also require Code subscribers to ensure that the practices of their agents meet the requisite standards. The practice of outsourcing debt collection is becoming more common. The Code can, therefore, only be effective in this area if it requires Code subscribers to be responsible for ensuring their agents meet the agreed standards.

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## Loyalty schemes

A number of banks are now involved in various loyalty schemes, normally in partnership with businesses in other industries. We do not

have any firm evidence about problems with these schemes at this time, however, we do understand that the Banking Ombudsman scheme has received a not insignificant number of consumer complaints about loyalty schemes. (We understand that the number of complaints has decreased in recent times, although this may be in part due to the fact that the Banking Ombudsman has formed a view that these complaints, in general, do not fall within the jurisdiction of the scheme.)

Although we have not specifically examined this issue, we understand that, for many of the schemes, the terms and conditions provide for complete discretion on the part of the scheme manager in relation to awarding and allocation of reward points and rewards. We also understand that the provisions for dispute resolution may not necessarily meet the accepted standards for external dispute resolution (eg those in PS139).

At this stage, we have not formed any firm views about whether the Banking Code should include provisions covering loyalty schemes. We note that one consequence of including provisions in the Code would be to clarify that the ABIO would have jurisdiction to deal with any consumer complaints.

If this issue is considered suitable for inclusion in the Code, matters that might be addressed in the Code could include:

- disclosure;
- notification of changes to loyalty partners;
- fees and charges;
- process for making claims;
- availability of claims;
- responsibility of multiple participants; and/or
- complaint and dispute handling procedures.

# Section 8

## Other matters

There are a number of issues that have already been raised in our submission, and may be best addressed (either partially or wholly) through forums other than the Code of Practice. These include:

- principles for dealing with joint debts that are the subject of family law property settlements;
- improved disclosure documents; and
- third party guarantors.

Some other issues are discussed below.

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## Explanation of products and services

While the Code provides for disclosure of a variety of information to consumers, it does not include any requirement for a bank to provide an explanation of the effect or ramifications of a transaction. Explanations provided in person will be particularly important for some groups of consumers, particularly those with lower financial sophistication.

The need for further explanations is also supported by the anecdotal information from our Infoline discussed above. Callers too often do not fully understand the terms and conditions of the products that they have purchased.

This review could examine ways in which consumer understanding of terms and conditions could be improved. One possibility might be to develop guidelines or protocols covering circumstances in which a personal explanation of the ramifications of a transaction will be volunteered. Such circumstances could be related to particular products, or particular groups of consumers. This should not restrict any obligations on banks to recommend that a consumer seek independent advice before committing to a transaction.

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## Customers from non-English speaking backgrounds

Information regarding financial services is complicated for many consumers, however, those whose first language is not English often face additional difficulties.

The review could examine the extent to which banks could meet the needs of these consumers. Often such solutions may be better delivered outside the Code.

Providing translations of important documents may be one way of meeting those needs, however, this will often be a costly exercise for smaller institutions.

The review could, however, explore the possibility of developing guidelines for selling products to consumers from non-English speaking backgrounds, particularly where complicated credit products are involved. One possibility may be to determine criteria for providing consumers with access to an interpreter service.

Another might be to specifically ask consumers whether they would like a face to face interview to discuss the terms and conditions of important documents.

We would welcome the opportunity to explore these issues further.

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## Cross selling / tied selling

Financial institutions are increasingly involved in cross-selling products and services. ASIC's consumer issues survey identified the potential for increased cross-selling activities to result in consumer detriment, particularly in terms of being pressured to take out a product that they are not comfortable with, or do not understand. Consumer focus groups in the consumer issues survey also noted that they were annoyed by cross-selling activity engaged in by financial institutions.

In our caseworker survey, the majority of respondents (86%) were either concerned about some of the selling practices of banks and their agents, or were generally concerned about bank practices in this area. Of course, concern about selling practices may not be confined to concern about cross-selling. However, comments made by caseworkers in the workshops did indicate that aggressive 'pushing' of financial products, particularly credit, by tellers and through the mail, was of concern.

We also understand that the ABIO scheme receives consumer complaints about cross-selling activities. Some of these concerns may be addressed under the new privacy legislation.

At this stage, we have not formed any views on whether there is sufficient consumer concern about aggressive cross-selling to warrant coverage of this issue in the Code. We recognise, of course that, cross-selling activities do provide opportunities for consumers to increase their awareness of other products and services that may be available to them.

However, it is an issue worth considering in this review. At the least, it may be an issue on which a watching brief could be kept. We note that the Canadian Bankers Association has developed a Statement of Tied Selling, and members of the Association agree to adhere to the Statement.<sup>39</sup> Among other things, the Statement gives the following pledge to customers:

*No bank will impose undue pressure on, or coerce, a customer to obtain a product or service from anyone, including the bank and any of its subsidiaries and affiliates, as a condition for obtaining a loan from the bank.*

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<sup>39</sup> [http://www.cba.ca/eng/Publications/TiedSelling/ts\\_e.htm](http://www.cba.ca/eng/Publications/TiedSelling/ts_e.htm), downloaded 20/01/00.

# Attachment A

## Extract from Expert Group Report

The following passage is taken from pages 63 and 64 of the Report of the Expert Group on Family Financial Vulnerability, *Good relations, high risks*, February 1996.

### **Recommendation to amend the Trade Practices Act 1974 regarding information disclosure and independent advice**

The Expert Group recommends that the following provisions be added to the *Trade Practices Act 1974*. We have no firm view about where the provisions should be located within the Trade Practices Act, but we think that the remedies which apply to a breach of section 52 of that Act should also apply to a breach of the provisions we propose.

xx(1) A corporation shall not in trade or commerce accept a guarantee from a person with respect to financial accommodation to be provided to a borrower unless and until the corporation has provided to the person relevant information about the borrower and the transaction or account to be the subject of the guarantee which:

- (a) is in the possession of the corporation; and
- (b) a reasonable guarantor would reasonably require in order to decide whether or not to enter the guarantee.

(2) A reference in subsection (1) to 'information' includes representations with respect to a future matter.

(3) In this section reference to a 'person' is a reference to a natural person.

(4) The information required to be supplied pursuant to subsection (1) shall be provided not less than one business day before the executed guarantee is provided to the corporation.

(5) In this section a reference to a 'guarantee' includes a reference to an indemnity. [The concept of 'guarantee' should also cover a co-borrower who is in substance a guarantor - that is, the person is to be primarily responsible for obligations with respect to the financial accommodation in circumstances where the corporation has reason to believe that the person will not obtain a direct benefit from the provision of the financial accommodation. The drafter will no doubt have views about how best to draft this extension to co-borrowers.]

(6) A person who executes a guarantee in circumstances where a corporation has not complied with the requirements of this section shall not be liable under the terms of the guarantee.

xy(1) A corporation shall take all reasonable steps to advise a person from whom a guarantee is to be obtained:

- (a) as to the nature of the legal obligations imposed by the prospective guarantee;
- (b) that there are or may be financial risks associated with the giving of the guarantee;
- (c) that the person should seek independent advice with respect to the matters set out in paragraphs (a) and (b); and
- (d) that, if the person decides to execute the guarantee, that should be done in the absence of the borrower.

(2) Whether a corporation has taken all reasonable steps in accordance with subsection (1) shall be determined with reference to:

- (a) the nature, size and circumstance of the transaction;
- (b) the ability of the person to understand the nature of the transaction and communications in English or any other language in which the advice is provided; and
- (c) the nature of the relationship between the borrower and the person.

(3) In the absence of exceptional circumstances, a corporation will not comply with subsection (1) unless the advice required to be given to the person is given in the absence of the borrower.