

**Consumer Credit Legal Centre (NSW) Inc  
Consumer Credit Legal Service (Vic) Inc  
Consumer Credit Legal Service (WA) Inc  
Consumer Law Centre Victoria Inc  
Care Inc Financial Counselling Service (ACT)  
Financial Services Consumer Policy Centre Inc**

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

**September 2000**

## **A. INTRODUCTION**

### **A.1 Joint Consumer Group Submission**

This submission to the Review of the Code of Banking Practice ["CBP"] is a joint undertaking of the following organisations representing consumer interests:

- **Consumer Credit Legal Centre (NSW) Inc**
- **Consumer Credit Legal Service (Vic) Inc**
- **Consumer Credit Legal Service (WA) Inc**
- **Consumer Law Centre Victoria Inc**
- **Care Inc. Financial Counselling Service (ACT)**
- **Financial Services Consumer Policy Centre Inc**

For information regarding the activities of these centres and contact details, please see Section E of this submission: *The process from here.*

The submission also draws on the results of a research Project undertaken by Consumer Credit Legal Centre (NSW) Inc, with financial assistance provided the Law Foundation of NSW and ASIC's Consumer Advisory Panel. The purpose of the Project was to investigate Financial Services Caseworkers' experience in relation to a range of consumer issues relevant to the ADI Codes of Practice. The Project involved a survey of caseworkers in metropolitan, regional and rural Australia, as well as workshops nationally and extensive consultation with community workers, financial counsellors, lawyers and other caseworkers. The statistical information and caseworker comment gathered through the consultation process are referred to extensively in the submission and inform its recommendations. A copy of the Consultation Report is enclosed.

### **A.2 Overview of our approach**

In the view of the organisations making this submission, the CBP has a vital role to play within the overall regulatory framework for financial services. Central to that role, as we see it, is the provision of genuine measures to protect consumers in relation to a number of areas of industry practice that are not dealt with elsewhere, either by legislation or in other industry Codes. Another important aspect of the role of the CBP lies in formulating standards of practice for the banking industry that go beyond minimum legal requirements; where possible, standards that are consistent with industry best practice.

In the context of the current Financial Services Reform Bill ["*FSR Bill*"] process, the Government has also suggested that the financial services industry Codes might play a role in interpreting or "fleshing out" the general obligations of the *FSR* legislation, in particular, in relation to disclosure<sup>1</sup>. We note, however, that industry Codes are seen by Government as only one means by which the legislative provisions might be fleshed out; others being through regulation and through ASIC policy statements. Our organisations do not wish to express any view at this stage on what role we think the CBP and the other ADI Codes of Practice ought to play in the process of giving detail to the *FSR* provisions — only to note that the development of minimum disclosure requirements, in particular, is not something that is appropriately left to industry alone to determine.

In Section D of this submission, *Submissions on Specific Issues*, we set out a range of specific proposals for dealing with issues that are either not addressed elsewhere in the scheme of regulation or that, in our view, require additional measures or safeguards going beyond what is currently provided for by the law. Our proposals build on the existing provisions of the CBP in some areas; in other areas, they indicate new issues for regulation by the Code. As we see it, the substantive provisions of the current CBP are, by and large, very weak from a consumer perspective. Indeed, it is fair to say that — except in a couple of areas, including Guarantees — they do little more than set out either existing legal obligations or the sorts of minimal measures that prudent self-interest would in any case dictate<sup>2</sup>. In addition, important aspects of banking practice as it impacts on consumers are not dealt with at all. We hope that the proposals for enhancing and extending the specific provisions of the CBP detailed in Section D will assist in the development of a more credible Code focussed on improving practices in a range of areas.

The credibility of the current CBP is not only challenged by its specific provisions, however. Of equal concern is failure of the Code to set out administrative processes for ensuring that the measures it adopts are promoted to industry and consumers and that they impact on industry practice; in short, that the CBP functions as an instrument of active regulation. The need for radically improved Code administration processes is discussed in Section B, *Submissions in Relation to General Issues*, of this submission. Other general issues dealt with in this Section are: Staff Training; Limitations on the coverage of the Code; and the question of Access to Banking Services. In Section C, *Submissions in Relation to Dispute Resolution*,

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<sup>1</sup> Financial Services Reform Bill, Commentary on the draft provisions, Feb. 2000, p.145

<sup>2</sup> No doubt, the distinct limits of the CBP from a consumer perspective reflect, in part, the way the original process of its development and drafting was controlled by the Australian Bankers Association to the exclusion of consumer and other stakeholders: see WS Weerasooria, *Banking Law and the Financial System* in Australia, 5th ed, 2000, Butterworths, at pp196-198.

we discuss our very considerable concern about the adequacy of the internal customer complaint processes of many, if not, most Banks and how the CBP provisions relating to dispute resolution might be strengthened as part of a strategy for dealing with this.

## **B. SUBMISSIONS IN RELATION TO GENERAL ISSUES**

- B1. Objectives and Principles**
- B.2 Code Administration and related matters**
- B.3 Staff training**
- B.4 Limitations on Coverage**
- B.5 Access to Banking Services**

### **B1. Objectives and Principles**

In our view, the CBP is unduly narrowly conceived. This narrowness is reflected, among other manifestations, in the way its Objectives and Principles are formulated. We would suggest the following extensions:

- the CBP should articulate a commitment to continuous improvement in standards of practice and service in the banking industry. It is not enough for the Objectives to state merely that the CBP is intended to "describe standards" [see Objectives (i)]. This formulation does not acknowledge either that banking industry practices and standards are, or ought to be, constantly evolving; or that the Code is, or ought to be, *instrumental* in producing better standards. The same lack of focus on the CBP as an active instrument of regulation is seen the absence of provision for administrative infrastructure for the Code: see *Code Administration and related matters* below;
- the CBP should adopt the stated Objective of promoting better informed decision-making by Bank Customers. Disclosure of information, as per the current Objective (ii), is merely one means of achieving this end (the provision of advice being another);
- consideration should be given to the inclusion of further Objectives, including an Objective of facilitating the education of consumers about their rights and obligations in respect of Banking Services; and an Objective of providing representation for consumer views in the administration and development of the Code<sup>3</sup>;
- the CBP should also contain an explicit commitment to the promotion of accessible and affordable banking services for all consumers: see discussion of *Access to Banking Services* below;

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<sup>3</sup> See Objectives, General Insurance Code of Practice

- apart from a reference in the external dispute resolution provisions [see 20.5], the CBP fails to articulate a commitment to "fairness" as a principle that should inform the dealings between Subscriber Banks and their Customers. In this respect the Code is at odds with what is now a generally accepted standard for industry Codes. We note, in this context, that the Principles statement at (ii) qualifies the stated Objectives of the Code by prescribing that they must be achieved "so as to preserve certainty of contract between a Bank and its Customer". This phrasing is defensive and backward-looking, in our view. It represents an implicit refusal to recognise developments in the area of general law and statutory unconscionable conduct in the past twenty years or more<sup>4</sup>, developments that have limited the operation of doctrines associated with the rhetoric of 'certainty of contract' in the interests of avoiding unfair (or 'unjust' or 'unconscionable') outcomes for consumers in particular cases. In our view, the 'certainty of contract' phrasing should be removed from the *Preamble*; and, the *Preamble* should include an explicit reference to *fairness* as a principle which informs the dealings between Code Subscribers and their Customers; and
- the reference to achieving the Objectives of the Code having regard to *prudential* considerations [see Principles at (ii)] seems irrelevant and inappropriate. We submit that it should also be removed.

## **B.2 Code Administration and related matters**

### **Code administration generally**

In our view, an industry Code like the CBP can only be an effective regulatory instrument if provision is made for its ongoing administration. We note that this view is consistent with government policy that industry codes should be supported by appropriate administrative structures.<sup>5</sup> We submit that the CBP is currently radically defective in terms of its

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<sup>4</sup> See David Harland, 'Unconscionable and Unfair Contracts: An Australian Perspective' in Brownsword, Hird and Howells (eds) *Good Faith in Contract: concept and context*, Hants, Dartmouth, 1999.

<sup>5</sup> *Fair Trading Codes of Conduct: Why to have them, how to prepare them*, A guide prepared by Commonwealth, State and Territory Consumer Affairs Agencies, June 1998, p 16; *Codes of Conduct: Policy Framework*, Released by the Hon Warren Truss MP, Minister for Customs and Consumer Affairs, March 1998, pp 15-17. See also *Taskforce on Industry Self-Regulation*, Draft Report, June 2000, p 65.

provision for Code administration; and that this deficiency needs to be addressed if the revised Code is to be credible.

Code administration covers such matters as:

- promoting the Code within the industry and educating industry members as to its requirements;
- promoting the Code to consumers and their advisers;
- monitoring compliance with the Code;
- providing a mechanism for complaints where it is alleged that the Code has been breached;
- enforcing compliance with the Code;
- monitoring the Code in the light of changes in the marketplace, the regulatory environment etc; and
- arranging for regular reviews of the Code.

The organisations making this submission do not have a final view as to how these functions should be performed, including by which body or bodies. We believe, however, that the Code itself needs to specify how and by whom the various Code administration functions referred to above will be performed.

We also believe that administration of the Code should probably be undertaken by a single body (in conjunction with ASIC). The envisaged body could be a new stand-alone committee or other entity comprised of representatives of the various stakeholder groups. Among other benefits, a body of this kind could provide a useful structure for ongoing dialogue between industry, consumer and government stakeholders about banking industry issues. It is important that these issues be discussed in an ongoing forum and not only in the context of occasional Reviews, such as the current one.

Another possible option would be for Code administration to be undertaken by the Australian Banking Industry Ombudsman. Locating the Code administration role within the ABIO (along the lines of arrangements operating within the general insurance industry) would be a way of limiting the duplication and cost associated with multiple industry bodies. In addition, the ABIO would be able to draw on its extensive experience as an organisation receiving enquires and complaints from consumers to identify compliance, training, consumer education etc issues. A compliance monitoring role with respect to the CBP would also go hand-in-hand with the obligation to monitor systemic conduct and serious misconduct which the ABIO will have, by virtue of PS 139, once the *Financial Services Reform Bill* reforms are in place.

As indicated, however, we have no final view on which body or bodies should undertake the Code administration functions — only that those functions must be undertaken if the CBP is to represent more than tokenistic self-regulation. This is an area requiring further discussion with all interested parties.

Some comments on specific aspects of the Code administration process follow.

## **Monitoring compliance**

The current monitoring regime under the CBP requires merely that Banks self-assess their compliance on an annual basis against a series of questions put to them by ASIC. ASIC then publishes the results of that self-assessment process<sup>6</sup>.

In our view, self-assessment by industry members *alone* is manifestly inadequate as a methodology for monitoring compliance with the CBP. The levels of documentary non-compliance and recurrent non-compliance by banks reported to ASIC for the April 1998 to March 1999 period are extraordinarily low and hardly consistent with consumer caseworker experience.<sup>7</sup> Nor are the levels of disputes recorded consistent with either caseworker experience or the number of complaints handled by the ABIO over the period.<sup>8</sup> Before any reliance can be placed on such figures they should be validated, or supplemented, by other forms of compliance monitoring which are undertaken by an independent, external body. We note that this would also appear to be the view of the regulator<sup>9</sup>.

We would favour an approach to external monitoring which targets identified problem areas for a defined period (eg one major area per twelve month period). One technique that could be employed would be "shadow shopping". Depending on the ultimate arrangement for

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<sup>6</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*, Australian Securities and Investments Commission, January 2000.

<sup>7</sup> *Caseworker Survey*, Part A, caseworkers indicated a high level of non-compliance with the provisions of the Code of Banking Practice in a number of areas: *Financial Services Caseworker Consultation*, Consumer Credit Legal Centre (NSW), July 2000, pp 5-10. By contrast, Banks reported extraordinarily low levels of non-compliance, only two instances of failure of documentation procedures were reported, and only three banks reported recurrent non-compliance with the Code during the reporting period, *Report on Compliance*, ASIC p 10-11.

<sup>8</sup> For the period April 1998 to March 1999 banks reported 8551 disputes, *Report on Compliance*, ASIC, p 12. The ABIO received 48,955 inquiries in 1998-9 and 5076 formal complaints: *ABIO Annual Report 1998-9*, p 8.

<sup>9</sup> The Report on Compliance for 1998-1999 states: 'ASIC is currently reviewing this process and is considering some form of external monitoring of compliance in addition to the current self-assessment system. ASIC has sought submissions from all institutions as to whether the monitoring process is adequate.' *Report on Compliance*, ASIC at 6.

administration of the Code, external monitoring could be undertaken / commissioned by either the Code administration body or ASIC. The CBP would need to require the cooperation of Subscribers with the external monitoring process. It should also specify that the results of external monitoring exercises are to be made publicly available in the form of reports by the Code administration body or ASIC (as the case may be).

We would further suggest that, unless compliance reports of the kind proposed identify the comparative 'performances' of specific institutions, their value as guides to consumers — and therefore as prompts to improved industry practices — will be distinctly limited.

### **A complaints process**

Compliance with the CBP should also be monitored through a process which allows individual consumers and other stakeholders (including consumer representatives, regulators, the ABIO, other industry members etc) to make complaints about breaches of the CBP. Currently, there is no body with responsibility for receiving, and investigating, such complaints. Admittedly, in the case of some breaches, the current ABIO processes will provide an appropriate reporting/ investigation mechanism. However, given its current Terms of Reference, the ABIO could only play a limited role in this area because, while most breaches of the CBP are unlikely to result in direct financial loss by an individual, the ABIO only handles matters involving direct loss to individuals.

The Code should therefore set out a process whereby Code contraventions can be dealt with by the proposed administration body. (As discussed above, the ABIO might itself become that body). This process should specify how complaints are to be made and investigated. Provision should also be made for a range of sanctions that may be applied in the event that contravention is established.

### **Enforcing compliance**

As the previous statement indicates, we are strongly of the view that the CBP must include provision for the imposition of sanctions if it is to be a credible instrument of self-regulation. We note that government policy is also generally supportive of the inclusion of sanctions in industry Codes;<sup>10</sup> and that provision is made for such in other comparable Codes.<sup>11</sup>

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<sup>10</sup> *Fair Trading Codes of Conduct: Why to have them, how to prepare them*, p 12-13; *Codes of Conduct Policy Framework*, p 18; *Taskforce on Industry Self-Regulation, Draft Report*, p 67.

<sup>11</sup> For example, see the *General Insurance Code of Practice*, 1999.

For a complaints process to be effective, it must be used by consumers. However, unless they can establish a loss which opens the way for compensation, consumers will generally not have any, or a sufficient, incentive to report breaches of the Code to the Code administration body. One way of addressing this issue - and in doing so of providing industry with a cheap compliance monitoring mechanism - would be to include in the Code, among other possible sanctions, a penalty provision under which the Subscriber would agree to pay a small sum to any Customer whose complaint that a Code provision had been breached was established. This sum would be paid irrespective of whether the Customer suffered any loss or damage in consequence of the breach. The *AAMI Customer Charter*<sup>12</sup> provides a possible model for a penalty provision of the kind proposed.

### **Publicising the Code**

The Financial Services Caseworker Consultation indicated that, while most of the caseworkers surveyed were aware of the CBP, only a relatively small minority could lay claim to "a reasonable knowledge" of its provisions.<sup>13</sup> During the Consultation, many caseworkers also complained about the difficulty they had had in getting access to a copy of the Code. The Consultation also revealed that many caseworkers regularly encountered situations where Bank "front line" staff were seemingly unaware of the Code (among other regulatory instruments).<sup>14</sup> These findings are consistent with our more general impression that there is a distinct lack of awareness of the CBP and its provisions except among specialist Bank staff, their legal advisers and a few consumer advocates.

We would suggest that this lack of awareness reflects, in part, the fact that there is no provision that the Code be publicised, nor any body charged with responsibility for publicity. As the inter-governmental *Guide to Fair Trading Codes of Conduct* states, for an industry Code to be of real value, consumers and suppliers (including the staff of suppliers) must be aware of its existence and be informed of its value, requirements and procedures.<sup>15</sup> More specifically, the *Guide* suggests that a Code should set out:

Σ how the industry is to publicise its Code, not just initially but continually;

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<sup>12</sup> See in particular Clause 15: 'Our commitment to quality service standards outlined in this Charter, is reinforced by our promise to pay a \$30 penalty if we fail to meet those standards.': <http://www.aami.com.au/customer/customer.htm>.

<sup>13</sup> *Caseworker Survey*, Section A: only 21% of survey respondents professed a reasonable knowledge of the Code of Banking Practice, *Financial Services Caseworker Consultation*, Consumer Credit Legal Centre (NSW), July 2000, p 6.

<sup>14</sup> 'There is a severe lack of knowledge amongst front line staff... of either Codes of Conduct or even the general law', Financial Counsellor, Qld, *Financial Services Caseworker Consultation*, Consumer Credit Legal Centre (NSW), July 2000, p 50; see also pp 14, 48-55.

<sup>15</sup> *Fair Trading Codes of Conduct: Why have them, how to prepare them*, p 20.

- Σ the kinds of information that members of the industry and consumers should be given; and
- Σ how and when consumers should be made aware of their rights and all the steps in the complaints process.

We submit that the CBP should be amended to reflect these proposals in relation to Code publicity.

### **Review and amendment**

Currently, the CBP makes only very limited provision in respect of the processes for its review and amendment. We submit that this provision should be supplemented by more detailed requirements setting out:

- how the Code is to be reviewed, including how the person or body responsible for undertaking the review process is to be chosen and, in general terms, the procedures to be adopted in undertaking a review. In this context, the CBP should specify arrangements for ensuring that reviews are independent, open and appropriately resourced;
- who should be consulted in connection with the review. This could be effected by including, after the reference to “interested parties” in the current *Preamble* statement, a non-exhaustive list of stakeholders (including, of course, bank customers and consumer organisations which assist or advocate on behalf of bank customers);
- how amendments to the Code will be agreed upon and implemented.

In our view, it is critical that consumer representatives and other stakeholders be consulted throughout the process of reviewing and amending the CBP – including at the stage where proposed changes are to be finalised and formulated as amendments to the Code text. See further under *The process from here* below.

### **B.3 Staff training**

The Caseworker Consultation indicated widespread concern about the level and adequacy of training of, in particular, counter and call centre staff of Banks. Awareness of the existence of the CBP, let alone its provisions, appears to be low; as does awareness of other legal and compliance requirements; for instance, obligations under the *Uniform Consumer Credit Code*. Most caseworkers interviewed complained about the difficulties they *regularly* experienced in getting access to Bank staff who understand relevant legal and related issues when negotiating

on behalf of their clients.<sup>16</sup> There was a widespread perception that the general quality of training of Bank staff had deteriorated in recent years and that this was related to major structural changes within Banks including: increased use of part-time and casual staff; increased dependence on call centre staff to deliver services and answer queries; and increased dependence on sub-agencies (particularly in rural areas).

In our view, the issue of staff training by Banks needs to be addressed in the context of the radical changes in methods of service delivery within the industry. For instance, a far greater commitment to the training of call centre staff is clearly needed across the banking sector. An enhanced commitment to staff training should also be reflected in the CBP. Thus, the *Preamble* clause relating to this issue should be strengthened so that it commits Subscribers to:

- ensuring — not just endeavouring to ensure — that their staff are appropriately trained; in other words, trained to a level that allows them to competently perform their duties; and, as part of this,
- ensuring that training is ongoing and covers *all* areas of regulation relevant to the staff member's work (not just the CBP). For instance, that it covers the *EFT Code of Conduct*, which most Bank staff appear to have considerable difficulty understanding and/or complying with.

Monitoring of staff training should also form part of the compliance monitoring regime discussed in the previous section.

## **B.4 Limitations on Coverage**

### **Application to "Banking Services"**

The CBP was conceived as an instrument for regulating “traditional” bank deposit and loan products, as well as (non-EFT) payment transaction services and related payment instruments: see definition of “Banking Service” at 1.1 and generally. Since the Code’s introduction, however, Banks have moved increasingly into other areas of financial services such as services relating to insurance and investment. Notwithstanding this development, in our view it is not appropriate for the scope of the Code to be expanded to cover all retail products offered by Banks. This would lead to unnecessary duplication and overlap with other

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<sup>16</sup> ‘I have ongoing difficulties getting to the appropriate decision-making area: different staff all the time and very poor responses.’ Financial Counsellor, WA, *Financial Services Caseworker Consultation*, Consumer Credit Legal Centre (NSW), July 2000, p 51; see also pp 48-55.

Codes and other regulation. Consideration could be given, however, to specifying as an obligation under the CBP that Subscribers also subscribe to the *EFT Code of Conduct* (currently under review) and, where relevant, other industry Codes, such as the *General Insurance Code of Practice*. The CBP could thereby function as a primary instrument of self-regulation.

A further issue in relation to the scope of products and services covered by the CBP concerns the list of exclusions from the definition of "Banking Service": see at 1.1. We can see no *prima facie* reason for the inclusion of these exclusions; and believe they should be removed. We note that the *ABIO Terms of Reference* do not include any comparable provisions but extend to "all financial services provided by Banks in the ordinary course of their business to individuals ..."<sup>17</sup>. Subject to the limitations suggested in the previous paragraph, we believe that this is the appropriate approach to be taken in the CBP.

### **Application to "Customers"**

Currently, the CBP only applies to an individual person who (alone or jointly) acquires a Banking Service "which is wholly or exclusively for his her private or domestic use": see definition of "Customer" at 1.1. In our view, as an absolute minimum, this definition should be expanded so that it is in harmony with the 'predominant purpose' test adopted in determining which borrowers and security-providers are covered under the *Uniform Consumer Credit Code*,<sup>18</sup> however we do not wish to exclude credit obtained for the purposes of investment.<sup>19</sup>

We would also strongly contend that the CBP should be amended so that it extends to small business customers.

The case for such an extension is unarguable, in our view. The unequal bargaining position of small business borrowers and account holders has been recognised in several major reports.<sup>20</sup> It is also regularly testified to by media reports, such as those in relation to the current controversy between the Commonwealth Bank and a number of farmers.<sup>21</sup> Further,

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<sup>17</sup> See *ABIO Terms of Reference*, Notes to the Terms of Reference, Note 7.

<sup>18</sup> See s 6(1)(b), UCCC.

<sup>19</sup> cf: s 6(4), UCCC.

<sup>20</sup> See 'Finding a Balance: towards fair trading in Australia', Report by the House of Representatives Standing Committee on Industry, Science and Technology, May 1997.

<sup>21</sup> See 'Bank 'shadow' plot keeps clients in dark', Sydney Morning Herald, 19th June 2000, p 2.

government policy is firmly in favour of the extension of consumer protection regimes to small business. This is reflected, for instance, by:

- the extension of the unconscionable conduct regime of the *Trade Practices Act* to small business with the adoption in 1998 of s51AC *Unconscionable conduct in business transactions*; and
- the adoption in the current *Financial Services Reform Bill [FSR Bill]* of a definition of “retail client” which encompasses “small business” (defined as a manufacturing business employing fewer than 100 people or other business employing fewer than 20 people).<sup>22</sup>

Finally, the shift to encompassing small business within the ambit of consumer protection regulation can also be seen in the self-regulatory context. Most pertinently, since July 1998, the *ABIO Terms of Reference* have allowed the ABIO to deal with complaints by “business applicants” (as defined by para. 19A<sup>23</sup>). The Expanded EFT Code Review Working Party has also decided that the revised *EFT Code of Conduct* will cover funds transfers by small business (although the exact scope of coverage has yet to be finalised).

An extension of the CBP to encompass small business customers could bring a significant enhancement of protections available to this group. For these benefits to be realised, however, a number of the substantive provisions will also need to be strengthened. See under *Specific Issues*, below.

On the question of how “small business” should be defined for the purposes of the proposed extension, we would suggest that harmonisation with the *FSR Bill* should be the priority concern and, therefore, that the CBP should be amended to make its coverage consistent with the *Bill*. We note that this is the approach which the ABIO has decided to adopt with respect to its *Terms of Reference*.<sup>24</sup> Consistency with the *ABIO Terms* is itself a further consideration favouring a definition of “Customer” similar to the definition of “retail client” in the *FSR Bill*.

## **B.5 Access to Banking Services**

As stated above, the current Objectives of the CBP are quite narrowly conceived. No commitments, are made, for instance, in relation to access to banking services. By contrast, survey responses indicated a very high level of concern about access to banking services:

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<sup>22</sup> s 761G, *Financial Services Reform Bill*.

<sup>23</sup> It was recently announced that this definition is to be extended to mirror the definition of “retail client” in the *Financial Services Reform Bill*, once passed.

<sup>24</sup> See: para 19A.

82% of survey respondents indicated they were concerned about some practices in this area, or about industry practices generally in this area. Existing high fee structures, ever-increasing fees, closure of branches and the move to electronic banking were identified as major barriers to access. Caseworker comments identified three groups who were particularly affected by these practices:

1. *Low income consumers*

As transactions by new technology increase, vast amounts of our economic and cultural life will be inaccessible to those who do not have a sophisticated transaction account with a financial institution. If low income and disadvantaged consumers are not protected by the mandatory provision of no or low cost basic banking, they may be pushed out of the banking market altogether.

2. *Consumers with difficulties using electronic banking*

The last decade has seen a technologically driven revolution in the manner of delivery of transaction services. While the introduction of EFT technology has revolutionised access to those who use the technology, large segments of the population are disenfranchised by it. Particular groups affected include: people with disabilities; people with literacy problems and the elderly.<sup>25</sup>

3. *Consumers in rural and remote regions.*

In the face of a trend towards branch closures, day to day contact between financial institutions and consumers seeking to carry out transactions, negotiate or obtain information is difficult for consumers in rural and remote regions who have to rely on postal and telephone services. Caseworkers also criticised financial institutions for delay and failure to deal with complaints made by rural customers; problems with complaints handling are exacerbated by distance.

Consumer organisations do not believe that all these issues can be dealt with in the context of a voluntary industry Code. Indeed, it is our view that legislative intervention — an option finding increasing favour in other jurisdictions<sup>26</sup> — is probably the only long term solution.

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<sup>25</sup> The Australian Bureau of Statistics estimates that 15.6% of the population is disabled and 83% of these have a handicap that affects their performance in day to day life; a 1989 survey of adult literacy by the Department of Employment, Education and Training found that 10% of respondents (which equates to over 1 million adult Australians) did not have basic literacy skills. There are approximately 1.3 million aged pensioners in Australia.

<sup>26</sup> cf: *US Community Reinvestment Act* (1977); *Reforming Canada's Financial Services Sector*, White Paper, June 1999 (<http://www.fin.gc.ca/newse00/00-047e.html>)

On the other hand, certain specific service obligations could be included in the CBP and we would urge acceptance of at least the following:

- that any consumer have a right under the Code to open a deposit account with any Subscriber Bank; and that this right not be limited by a minimum deposit or opening balance requirement or be subject to other conditions (such as that the consumer be currently employed);
- that all Subscriber Banks offer a basic banking account that, apart from having no minimum deposit or opening balance requirement, provides a specified minimum number of fee-free transactions per month including a specified minimum number of fee-free counter transactions. (The minimum number of fee-free transactions/counter transactions should be the subject of further discussion. It would be appropriate to grant Customers who for reasons of age, literacy or disability were not reasonably able to access their accounts by electronic means a higher fee-free limit on counter transactions); and
- that branch closures be subject to a notice period requirement as well as to a protocol whereby exit fees are waived if the Customer chooses to transfer his/her account(s) to another Bank.<sup>27</sup>

Consumer advocates are well aware that the banking industry does not currently accept that it has any social obligations in the area of access to services. We would suggest, however, that pragmatic self-interest should prompt a recognition of the potential benefits to Banks of a more responsive approach on this issue in the context of the current Review. As will be appreciated, the Review presents an opportunity for the industry to improve its parlous public image, as well as to further its ability to influence government on a range of matters. In this context, we note the recent comment made by the Prime Minister:

‘There is more to banking than the bottom line...Banks have got to understand there are social obligations...Australian Banks are very profitable by world standards and they have obligations.’<sup>28</sup>

In addition, there is increasing pressure for legislative intervention to guarantee the provision of banking services to the community (prompted in part by developments in other

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<sup>27</sup> cf: “Minimum Banking Services”, Discussion Paper, NSW Department of Fair Trading, July 2000, p 2.

<sup>28</sup> “ Banks may play role as pillars of the community” Australian Financial Review, 27 October 1999.

jurisdictions referred to above).<sup>29</sup> Banks may wish to consider how, in the context of the Review, they might seek to diffuse this pressure by addressing some of the very real concerns which prompt it.

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<sup>29</sup> See, for example, “Minimum Banking Services” Discussion Paper, NSW Department of Fair Trading, July 2000; *Finding a Balance: towards fair trading in Australia*, Report by the House of Representatives Standing Committee on Industry, Science and Technology, May 1997; *Regional Banking Services: Money too far away*, Report from the House of Representatives Standing Committee on Economics, Finance and Public Administration.

## **C. SUBMISSIONS IN RELATION TO DISPUTE RESOLUTION**

- C.1 Consumer concerns about Bank internal complaints handling/ dispute resolution**
- C.2 Role of the CBP in addressing consumer concerns about IDR**
- C.3 The CBP and external dispute resolution**

### **C.1 Consumer concerns about Bank internal complaints handling/ dispute resolution**

In our view, Bank customers are, generally speaking, not well served by the current internal complaint handling and dispute resolution ["IDR"] processes of the Banks. Support for this view is found in some carefully chosen comments of the Banking Ombudsman, Colin Neave, in the ABIO's 1998-1999 *Annual Report*. Mr Neave stated:

'We have seen an increase in complaints about issues relevant to the quality of service provided by banks. It appears likely that this level of complaint will continue to increase unless steps are taken by the banks to more effectively manage their relationship with their customers. I believe it would be helpful to consumers if banks directed additional resources to their internal dispute resolution processes, with greater responsibility devolved to those responsible within banks for settling disputes with customers.

Consumers would also benefit if the existence of the internal dispute resolution process maintained by each bank in accordance with the Code of Banking Practice, was given more prominence by banks. The promotion by all banks of a listed toll free number would appear to be a first step in this regard.<sup>30</sup>

Further to Mr Neave's comments, we note that, as the first step in its complaints resolution process, the ABIO sends a copy of the consumer's complaint to the Bank's senior management and encourages the Bank and the consumer to negotiate. A staggeringly high number of complaints are resolved without any further involvement of the Scheme directly following this action:

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<sup>30</sup> ABIO, *Annual Report 1998-9*, 'Ombudsman's Foreword', p 4.

Year	% Resolved by Bank
1994-1995	66.4%
1995-1996	69%
1996-1997	66.9%
1997-1998	67%
1998-1999	71.7%

We would suggest that the level of settlement of disputes following the ABIO's action in sending the complainant's letter to the respondent Bank, is a clear indication that many complaints against Banks that an internal dispute resolution process ought to be able to deal with are simply not being taken up by the Banks involved. This may be because Bank staff are not sufficiently aware of their Bank's existing complaint-handling procedures or, perhaps, as many caseworkers believe, because there is a systematic policy on the part of some/many Banks of not actually providing genuine, accessible complaint-handling processes.

Consistently with the ABIO' s experience, the Financial Services Caseworker Survey found a very high level of dissatisfaction with Bank processes for resolving customer complaints/ disputes. Thus, over 80% of responses from those who were in a position to comment indicated concern about industry practices, whereas fewer than 20% provided a positive assessment of industry practice. We also draw the Consultant's attention to the detailed comments and case studies in the Caseworker Report on issues including: practical barriers to making a complaint; delay and non-responsiveness in dealing with complaints; refusal to compensate or adjust accounts for losses suffered as a result of Institutional error following a complaint; and lack of referral to external ADR where a dispute was not resolved.<sup>31</sup> Finally, we note the numerous case studies of complaints in the sections of the Report on *Customers with Financial Difficulties* at pages 38-41, *Account Combination* at pages 41-44, *Cheques* at pages 45-46, *Uncleared Funds* at pages 46-47, *Closure of Accounts* at pages 47-48 and *Direct Debits* 49-51. These case studies document fairly explicit expressions of dissatisfaction by consumers; however, in only a few cases have the issues or "complaints" been investigated or dealt with by the financial institution.

In our view, the above body of material constitutes significant evidence for our contention that, by and large, the internal complaint-handling / dispute resolution processes of the Banks are currently not functioning to an acceptable level.

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<sup>31</sup> See *Financial Services Caseworker Consultation*, Consumer Credit Legal Centre (NSW), July 2000, pp 42- 48.

## **C.2 Role of the CBP in addressing consumer concerns about IDR**

A revised and strengthened CBP could assist in improving the situation in relation to Bank IDR processes. One area clearly requiring revision, if improvement is to occur, are the substantive IDR provisions themselves (paras. 20.1 to 20.3 of Part C of the CBP).

Under the *FSR Bill*, a Bank (as a condition of its licence) will have to provide its customers with access to an internal dispute resolution (“IDR”) process that has been approved by ASIC. The Commentary on the *Bill* indicates that the Government will require that proposed IDR processes be consistent with the Australian Standard on Complaints Handling AS4269-1995 (or its equivalent) before approval is given. This is a welcome development and, of itself, should prompt at least some revision of the IDR provisions of the CBP.

For instance, the Standard requires an adopting organisation to provide a process for dealing with “*complaints*”; “complaints” being defined as “any expression of dissatisfaction with a product or service offered or provided”. Given this definition, it should no longer be possible for the CBP to, in effect, fail to provide a procedure concerning complaints in their initial stage, as happens at present. (The IDR provisions are currently confined to “*disputes*” defined as arising “where a Bank’s response to a *complaint* by a Customer about a Banking Service provided to that Customer is not accepted”: see 20.1) As we have noted, there is widespread confusion among consumers and their representatives, as well as Bank staff, regarding the procedures available when a Customer first makes a complaint. Indeed, as also noted, in the view of many consumer representatives, some institutions are systematically failing to provide well publicised and accessible means for the majority of their Customers to be able to make complaints in the first instance. A requirement that the Bank’s IDR process be consistent with AS 4269-1995 should help address this problem.

Hopefully, the required adoption of the Standard will also encourage improvements in way complaints and disputes are dealt with once they have been made. Subscribers will be required to have in place procedures consistent with the values or guidelines set out in the Standard. It is hard to see how some current Subscribers to the CBP will be able to claim they are acting in accordance with those guidelines unless they upgrade their present arrangements considerably.

On the other hand, it needs to be noted that AS 4269-1995 is couched in fairly general or ‘open-textured’ language. As such, it is capable of accommodating a range of views about

what specific levels of customer service might be required for compliance with the Standard. Given this, it is our view that the current provisions of the Code should not merely to be replaced by a statement to the effect that a Subscriber will have an internal process for complaint handling that is consistent with the Standard. Rather, we contend that, in addition to such a provision, a number of specific service standard obligations, aimed at addressing the issues outlined above, should also be included.

While these obligations would need to be developed in consultation with the various stakeholders groups, we would expect to see standards being adopted by the CBP that were comparable with those currently applying to disputes coming under the *EFT Code of Conduct* [see Clause 11]. Matters requiring coverage would include:

- notification of the Subscriber's IDR process when the Customer first makes a complaint;
- the Subscriber's obligation to provide the Customer with contact details of an identified and accessible complaints officer;
- specific procedures for dealing with the complaint;
- time frames setting out how long the Subscriber should normally take to respond to the complaint (for instance, 21 days as per the *EFT Code*); and what is to happen if it takes longer; and
- when written reasons for a decision should be given.

The revised provisions should also specify general obligations to publicise the Subscriber's complaints handling process (including by making a description of it available through Internet sites and telephone banking services as well as through the Bank's branch network). Finally, consideration should be given to using the CBP to mandate the use of a standardised nomenclature for Bank staff and departments dealing with complaints. This may well assist Customers more readily to find their way to staff who can deal with their complaints.

This said, it also needs to be emphasised that strengthening the IDR provisions of the CBP will not, of itself, produce improved customer service in this area. However precise and detailed those provisions may be, they will amount to little unless, to state the obvious, they are complied with - unless, the dissatisfied Customer is *in fact* told about their Bank's complaint handling procedures at the time they raise their concern, or is *in fact* provided with a timely and substantive response if their complaint is rejected by the Bank. For these things to happen on a consistent basis, enhanced IDR provisions must be complemented by provisions in the CBP to establish effective compliance monitoring and greater Subscriber commitment to staff training: see discussion under *General Issues* above.

### **C.3 The CBP and external dispute resolution**

Under the *FSR Bill*, as well as having to provide their customers with access to an approved internal complaints handling/ dispute resolution process, Banks will also be required to provide access to an external ADR scheme which has been approved by ASIC. The Consultant will be aware that ASIC has developed a Policy Statement [PS139 *Approval of external complaints resolution schemes*] setting out detailed requirements that ADR bodies will have to meet in order to be approved by the regulator. In our view, the provisions of the CBP relating to external dispute resolution (ie 20.4 and 20.5) should be amended, in recognition of this, to require that Subscribers to the Code belong to an external scheme that has been approved by the regulator under the Policy.

## **D. SUBMISSIONS IN RELATION TO SPECIFIC ISSUES**

- D.1 Availability / Disclosure of Terms and Conditions**
- D.2 Disclosure of fees and charges**
- D.3 Disclosure in relation to credit**
- D.4 Variations to terms and conditions**
- D.5 Account statements**
- D.6 A right to copies of documents**
- D.7 Provision of credit**
- D.8 A positive obligation to inform Customers of available options when they are in financial difficulties**
- D.9 Debt collection practices**
- D.10 Account combination**
- D.11 Privacy and confidentiality**
- D.12 Unauthorised credit card and debit card transactions**
- D.13 Direct debits**
- D.14 Joint accounts**
- D.15 Subsidiary cards**
- D.16 Guarantees**
- D. 17 Mortgages**
- D.18 Advertising**

### **D.1 Availability/ Disclosure of Terms and Conditions**

During the Caseworker Consultation it was noted<sup>32</sup> that Terms and Conditions — as distinct from advertising-cum-information material — were not generally given to people at, or prior to, the time they made their application for a credit card or to establish a deposit account; but only subsequently when they received their card (and were probably already psychologically committed). Moreover, a number of caseworkers reported that, in their experience, some branches of Banks and other Institutions did not keep Terms and Conditions booklets on site and, therefore, could not provide copies, even on request, to prospective customers. Indeed, a recent informal survey of eight Sydney CBD branches of major Banks by CCLC (NSW) revealed that in no case could Bank staff provide Terms and Conditions for their credit card or basic personal loan facilities.

During the Caseworker Consultation it was also noted that, even if requested to do so, many (if not most) Banks and other Financial Institutions will not supply sample copies of contract and mortgage documents to prospective home loan borrowers *before* they make a loan application (and usually pay an application fee). In a number of cases, consumer services had been contacted by Bank Customers complaining about this.

We share the view, expressed during the Consultation, that this lack of ready availability to consumers of Terms and Conditions, and other standard contractual documentation, is not consistent with good disclosure principles. Nor would it appear to be consistent with clause 7.1, CBP. While we accept that not all consumers will want to read contractual material prior to applying for a Banking Service, we contend that they should be reasonably able to do so, if they choose, well in advance of making any decision to obtain or use a facility.

In consequence, it is submitted that the CBP should be amended to remove any ambiguity regarding whether a person who is not yet a Customer of the Subscriber, or has not yet made an application for a particular Banking Service, can obtain a copy of Terms and Conditions (or other contractual documents) relating to any Service. Thus, Clause 2.1 should be amended by the addition of the phrase "or prospective Customer" after "Customer" in the opening sentence. Similarly, Clause 7.1 should be expanded to state, not merely that Terms and Conditions shall be readily available, but also that they shall be given or forwarded to any Customer or prospective Customer upon request, whether or not the Customer or prospective Customer has made an application for the Banking Service .

Consideration should also be given to including further specific undertakings in this area in the Code. For instance, it could be required that Subscribers will:

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<sup>32</sup>See Consultation Report, pp.18-20, including comments and case studies therein.

- maintain stocks of Terms and Conditions booklets for the Subscriber's standard deposit, personal loan and credit card accounts at all branches;
- provide prominently-displayed information at all service distribution points (branches, ATMs, telephone services, Internet sites) about how Terms and Conditions for the Subscribers' Services can be obtained;
- supply sample copies of standard home loan contract and mortgage documents to prospective Customers upon request; and
- put the Terms and Conditions for Internet banking services, if provided, on the Subscriber's Internet site.

## **D.2 Disclosure of fees and charges**

In our view, there are several areas where the CBP could be amended to improve fee disclosure. Fee disclosure is the subject of two current reviews: a medium to long term review being undertaken by the Australian Securities and Investments Commission "Fee Disclosure Working Group"; and a shorter parliamentary inquiry by the Joint Statutory Committee on Corporations and Securities.

The general aim of both reviews is to establish procedures for improving fee disclosure. This may lead to recommendations for changed industry practice, amendments to the CBP and other ADI Codes, and /or legislative intervention.

The consumer movement has submitted recommendations to these reviews, which emphasise the need for improved fee disclosure at the point of sale (something which is not provided for in any current law or code): see Appendix B *Options for Improving Fee Disclosure* from the Consumer Group Submission to the Joint Statutory Committee.

We do not wish to make any specific recommendations for amendments to the CBP on this issue at this stage. We expect recommendations from both reviews will emerge in the near future. We may make further submissions to the CBP Review in due course.

## **D.3 Disclosure in relation to credit**

As indicated above, consumer groups believe that the CBP should be extended to encompass small business customers of Subscribers. One potential benefit of such a change is that it would allow small business lending to be brought within a regulatory framework which

imposed some disclosure (and other) obligations on Subscribers. As the Consultant will be aware, while the *Uniform Consumer Credit Code* ["UCCC"] sets out a detailed disclosure regime for consumer lending, it does not apply to either lending for business purposes or lending for investment purposes<sup>33</sup>. In our view, small business borrowers and borrowers for investment purposes are just as entitled to the protection of a disclosure regime in relation to credit products as are retail customers buying other types of financial services. Given, however, that the *FSR Bill* regime will not apply to credit, there is clearly a regulatory gap that needs to be filled. We believe that the CBP (and the other ADI industry Codes) have a role to play in filling that gap.

For this to happen, however, it is not sufficient merely that the CBP definition of "Customer" be extended. A major development of the Disclosures section of the Code, as it applies to credit, is also required. Currently, the only credit-specific requirement is to the effect that the Terms and Conditions of a loan must specify "the repayment conditions": see Clause 2.3(vii). This is a rather minimal requirement, to put it mildly.

While the organisations making this submission do not have a final view as to what specific disclosure requirements for loans a revised CBP ought to include, we would suggest that the requirements of Part 2 of the *UCCC* should be the starting point for further discussion of this issue. In particular, s15, *UCCC*, *Matters that must be in the contract document*, provides a list of matters that ought to be set out in any retail finance contract. In addition, the issue of whether small business and investor borrowers should also have the protection of pre-contractual disclosure requirements (for example, along the lines of s 14, *UCCC*) needs to be considered. Again, comparisons might be drawn with the position of the retail client under the *FSR Bill* regime.

#### **D.4 Variations to terms and conditions**

It is not clear from Clauses 9.1 and 9.3, CBP, whether an increase in the minimum balance for avoiding account-keeping fees is to be considered the introduction of a fee or charge: cf ABIO Bulletin, No. 23 December, 1999. We share the view, expressed by some caseworkers and others during the Caseworker Consultation, that where the "fee free" floor on an account is to be raised, Customers should receive advance written notice to their address. Accordingly,

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<sup>33</sup>For a loan to be regulated under the *UCCC*, it must be provided, inter alia, "wholly or predominately for personal, domestic or household purposes": s6(1), *UCCC*. Lending for investment purposes is excluded by s6(4), *UCCC*. (In passing, it might be noted that this latter exclusion is quite incongruous in the context of the *FSR Bill* and other legislation aimed at providing protection to the retail investor.)

Clause 9.1 should be amended to make it clear that it covers increases on minimum "fee free" balances.

## **D.5 Account statements**

As currently formulated, Clause 14, CBP, provides a very limited right to receive account statements. The right is confined to deposit accounts; statements only have to be provided every six months; and, no provision is made in respect of accounts where the Customer has not effected a transaction in the previous six months (even if fees or charges continue to be levied, or interest continues to be charged, against the account): see 14.1.

In our view, the right to receive account statements under Clause 14 needs to be extended and enhanced.

First, Clause 14 should apply in respect of all Banking Services. Admittedly, some Services are already subject to statutory or other Code requirements covering the provision of account statements (eg under the *UCCC* or the *EFT Code*); however, the CBP could clarify that compliance with another regulatory instrument satisfies the requirements of the Code. Importantly, if the CBP were extended to encompass Banking Services supplied to small business Customers of Subscribers — as we have proposed — the extended coverage would help ensure that regular statements were provided in respect of small business loan facilities.

The need to ensure that small business borrowers do receive regular statements was recently highlighted. On 16 August 2000 the Joint Statutory Committee on Corporations and Securities held a public hearing regarding the non-provision of bank statements to Commonwealth Bank customers. The customers involved were generally farmers or small business operators and the accounts involved were loan accounts or discounted bills.

The Financial Services Consumer Policy Centre, one of the groups making this submission, assisted the inquiry and conducted a small survey of CBA customers who had difficulty in gaining access to their statements. They reported a number of difficulties caused by lack of statements, including:

- inability to complete tax returns
- difficulty in budgeting
- inability to complete general accounts
- lack of information about interest rates
- lack of information about fees and charges

- refinancing problems
- insolvency related problems

At the above-mentioned public hearing, the Commonwealth Bank admitted that it had not been providing statements to some customers, and promised to amend its practices. (The Inquiry is continuing.) Clearly, these CBA small business borrowers would have been greatly assisted by a right to receive regular statements.

As well as being extended to apply to all Banking Services caught by the CBP, the account statement Clause should also be amended, in our view, to reduce the minimum statement period from six months to three months. In today's financial environment, six months between account statements is no longer satisfactory. Consumers need more regular statements so that they can: budget and plan effectively; monitor for unauthorised transactions; and assess the ever-changing impact of fees and charges.

Finally, Clause 14 effectively allows Subscribers to send no statements if there have been no transactions on an account for six months: see 14.1(ii). We submit that this provision should also be amended. Our preferred approach would be to require, at least, annual statements on "dormant accounts" but also to impose an obligation that the Subscriber inform the Customer in writing before any change to annual statements takes place. Note, however, that an account should not be considered to be "dormant" if fees or interest charges continue to be imposed. In these circumstances, statements should continue to be sent on a three monthly basis.

## **D.6 A right to copies of documents**

s163 of the *UCCC* gives debtors, mortgagors and guarantors whose contracts are regulated by the legislation a right to obtain, upon written request, copies of: (loan and security) contractual documents; any credit-related insurance contracts; and, any notices previously given. The credit provider's obligation to supply these documents is subject to time limits. s34 of the *UCCC* gives a debtor or guarantor a right to a statement containing full account details for the loan period; it also imposes time limits on the provision of the requested account details [see s34(2)]. These provisions are particularly important in situations where there has been a default, or a dispute has arisen, and the borrower or guarantor does not have access to, or has not kept, all the documentation relating to the loan in question.

In our view, the CBP should include a similar obligation to supply copies of contracts, account statements, notices etc in respect of any Banking Service regulated under the Code. A right

to charge the Customer for the reasonable cost of supplying any documentation requested could also be included.

## **D.7 Provision of credit**

See Clause 15, CBP. Concern about the credit assessment procedures of Banks and other Financial Institutions emerged as a dominant theme in the Caseworker Consultation: see Consultation Survey, Q8 and comments at pp. 24-27. 52 of the 61 Caseworkers who were in a position to comment on this issue had concerns about either aspects of the credit assessment practices of Banks/ some Banks or banking industry practices generally. The main area raised in relation to credit assessment concerned credit cards accounts; with caseworkers being highly critical of what were seen as inadequate procedures for assessing capacity to repay before cards were issued and, particularly, before credit availability limits were increased. In this last context, caseworkers were especially critical of the practice of sending cardholders pre-approved limit increases (requiring only that the cardholder sign and return the approval form). Concern was also expressed about the difficulty of finding space on the loan application forms of some Financial Institutions to include all existing financial commitments.

Although not raised in any detail during the Caseworker Consultation, another perennial concern of consumer representatives in this area has been the practice of “asset lending” (where finance is provided on the strength of the value of an asset given as security for a loan notwithstanding that a clear capacity to repay cannot be demonstrated). We understand that complaints to the ABIO alleging maladministration in lending frequently turn on allegations that a loan has been made on the basis of the security provided rather than demonstrated capacity to repay.

We further note that concern about the credit assessment practices of Banks and other Institutions has been raised in a detailed Discussion Paper recently published by the NSW Department of Fair Trading entitled *Credit Over-Commitment and Responsible Lending* (July 2000). Inter alia, the NSW DFT Paper places credit assessment practices in the larger social

context of ever increasing levels of household indebtedness<sup>34</sup>; as well as significant increases in the number of personal bankruptcies in the past decade<sup>35</sup>.

In our view, neither the failure to assess capacity to repay before a loan is granted or credit limit increased, nor reliance on the realisation of a security as the primary source of repayment, are consistent with good banking practice. Unfortunately, however, Clause 15 of the CBP (*Provision of credit*) — which might have been expected to articulate standards of good practice or appropriate conduct in this area — does not set any specific standards at all. (As currently worded, the language of the clause is more or less wholly discretionary. At best, it can be said to require that some form of assessment be undertaken before credit is provided; however, the form of assessment is left entirely to the Subscriber.)

In our view, Clause 15, CBP, should be strengthened to impose some specific obligations on Subscribers directed at mandating good banking practice in relation to lending. More particularly, the CBP should include:

- a positive obligation on the part of subscribing Banks to make such enquiries as are reasonably necessary in order to determine the Customer's capacity to repay any proposed loan or any proposed increase in available credit; as well as a statement that "reasonably necessary" enquiries would normally include, in the case of consumer loans, enquires as to the customer's: current income and expenditure; other current repayment commitments; current assets and liabilities; and credit repayment history;
- a requirement that the Subscriber would not lend or increase available credit to a Customer unless the Customer's capacity to repay, without undue hardship, was established on the basis of the above-mentioned enquiries; and
- a requirement that the Subscriber would not rely on the realisation of assets held as security as the primary source of repayment.

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<sup>34</sup> Australians owe about \$69 billion in personal debt (excluding \$252 billion in home loans). This level of indebtedness has increased by 10-15% per annum since 1995: 'Credit Over-commitment and Responsible Lending', Discussion Paper, NSW Department of Fair Trading, July 2000, p2

<sup>35</sup> The number of people filing for bankruptcy in Australia has doubled in the last ten years; only about 20% of bankruptcies relate to business dealings: 'Credit Over-commitment and Responsible Lending', p 3.

Further guidance to the development of substantive provisions relating to credit assessment might be obtained from the ABIO Guideline on *Maladministration in Lending*.

## **D.8 A positive obligation to inform Customers of available options when they are in financial difficulties**

As the Consultant will be aware, under the *UCCC*, a debtor is entitled to seek a variation in his/her loan repayments from a credit provider in certain circumstances: see s66, *UCCC*. In the event that the credit provider does not agree to the variation, provision is made for the debtor to apply to the Court to vary the repayments: see s68, *UCCC*. Unfortunately, under the *UCCC*, there is no obligation on the part of the credit provider to alert a debtor who may have a right to a loan variation that this option may be available to them.

It is a common experience of caseworkers that Bank and other Institution staff do not always raise the possibility of a repayment variation with unassisted Customers who contact them when they are in financial difficulties. Rather, quite frequently, early notification that the Customer is in financial difficulty — something the CBP encourages: see 6.1(vi) — serves merely to prompt the initiation of debt collection activity. By contrast, when a caseworker becomes involved, the variation option is considered (because the caseworker has raised it) and, frequently, new repayment arrangements are readily agreed. Often, indeed, essentially the same arrangements are agreed as the Customer had been seeking prior to the involvement of the caseworker.

This kind of situation is clearly unsatisfactory. For one thing, it adds unnecessarily to the pressure placed on scarce community and welfare sector resources.

We recommend that the Review consider measures that might be adopted under the CBP to enhance the possibility of Bank Customers being able to negotiate loan variation arrangements without assistance. A positive obligation on the Subscriber to alert a Customer experiencing financial difficulties to any right they may have to seek a variation under the credit legislation should be considered in this context.

## **D.9 Debt collection practices**

The CBP does not deal with the responsibilities of Banks in relation to debt collection activities. By contrast, the telecommunications industry body, ACIF [Australian

Communications Industry Forum], has approved an *Industry Code on Credit Management* which includes sections on action in respect of disputed amounts and collection agents. Inter alia, the ACIF Code requires that collection action not conflict with the ACCC Guideline on Debt Collection and s60 of the Trade Practices Act: see ACIF Code at p15. We understand that the ACIF Code has been forwarded to the Australian Communications Authority for approval.

The debt collection activities of the banking industry remain a source of considerable concern to consumer representatives; with 54 of the 57 caseworkers surveyed as part of the Caseworker Consultation indicating concerns about either aspects of the debt collection practices of Banks/ some Banks or banking industry practices generally: Caseworker Survey, Q14.

We strongly recommend that the CBP deal with debt collection issues. In our view, this would probably be best effected by the incorporation within the Code of a provision requiring Subscribers to adhere to the ACCC Guideline on s60. We note that the Guideline was developed after extensive consultation with all relevant stakeholders and that the standards it sets were arrived at after a considerable amount of negotiation and compromise. They are not standards with which mainstream financial institutions like Banks should have any difficulty complying.

#### **D.10 Account combination**

The issue of account combination [clause 10, CBP] as mechanism for dealing with loan arrears was discussed in detail during the Caseworker Consultation: Consultation Report at pp. 39-42. Many participants expressed a strongly negative view of the operation of this process by Banks and other Institutions. 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: cf 10.2. Points emphasised included:

- the impact of account combination on defaulting Customers can be sudden and severe, in some cases leaving people with no funds in their accounts for daily living expenses. The Consultant's attention is drawn to the numerous case examples provided in the Caseworker Consultation Report;

- account combination is arbitrary in that it impacts only on those customers of the Bank or other Institution who do not know to protect themselves by withdrawing their surplus funds in time; and
- the policy behind the *Code of Operation for Social Security Direct Credit Payments* is that no-one should be left without sufficient funds for essential living expenses. This principle should apply equally to defaulting Customers who are, for instance, low income earners but not in receipt of a Social Security benefit;

Regarding these last-mentioned Customers, the general view of Caseworkers was that, if it is to be exercised at all, the so-called "right to combine accounts" should only be exercised in respect of account balances above an agreed minimum amount. (This amount might be to be determined by reference to Social Security welfare payment levels). However, Caseworkers were generally hostile to the use of the procedure at all.

The organisations making this submission endorse this view. We would also note that the blanket "right" to combine accounts which the CBP asserts would appear to go beyond the common law position which limits the right of combination to situations where the accounts in question are sufficiently similar in nature<sup>36</sup>. Where one account is a deposit account and the other a loan account (as in the typical situation) it is doubtful, at least, whether this condition is met<sup>37</sup>.

We submit that the current Clause 10 should be replaced by a clause to the effect that Subscribers will forgo the use of account combination as a technique of debt collection.

## D.11 Privacy and confidentiality

The current CBP has been the subject of vigorous criticism regarding the level of privacy protection it offers to consumers. In 1998 Professor Alan Tyree summed up the criticisms in these words:

"The sections of the Code which deal with privacy and confidentiality are less favourable to the customer than might be expected. In some cases the Code erodes a customers' common law rights, in others it does not go as far as we should expect in a modern Code." (*Banking Law In Australia*, 3rd Edition, p.318)

<sup>36</sup> A. Tyree, *Banking Law in Australia* (3rd edition), Butterworths, 1998, at pp. 86-88

<sup>37</sup> *ibid* at p.88

The main criticism centres around the exemption in Clause 12.2 which allows the bank to disclose information to a related entity of the Bank. This exemption actually erodes common law rights established in *Bank of Tokyo Ltd v Karoon*<sup>38</sup> in 1987.

However, these criticisms of the existing Code have been overtaken by events. New legislation to amend the *Privacy Act 1988* [*Privacy Amendment (Private Sector) Bill*] has been tabled in Parliament and is due to be debated later this year. This legislation provides a comprehensive set of Privacy Principles which go much further than those in the CBP. The legislation allows industry associations to adopt their own Codes in order to implement the Principles set out in the legislation. (If they choose not to do so, the new privacy legislation will apply and complaints can be made direct to the Privacy Commissioner).

The preferred approach of the groups making this submission is for Codes to be amended to include compliance with the Privacy Principles, but to allow complaints to be made, in the first instance, to the relevant ADR scheme (in this case, the ABIO). One issue with this approach is that the industry must decide whether to vary any of the Principles. While the privacy legislation does not allow a lessening of the standards in the Principles, improvements or clarifications may be included.

One area which might be considered for improvement is the related entities issue outlined above. The new privacy legislation will allow a certain degree of information sharing between related entities, in effect resolving the issue in favour of the banks. However, this has the potential to create situations where customer data is shared between related entities in ways which would go beyond Customers' expectations or knowledge.

Some corporate relationships in the banking world are fairly obvious — most consumers would be aware of the relationship between AMP Insurance and AMP Banking. However, many others are less obvious — consider the relationship between Westpac and AGC, for instance.

In our view, consumers would benefit from an addition to the Privacy Principles in the CBP which read:

"Information must only be disclosed to related entities where disclosure is in the expectation of consumers; and

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<sup>38</sup> [1987] AC 45; 3 All ER 396.

Where Subscribers wish to rely on the related entities exemption in order to disclose customer information, they must take steps to ensure that consumers can ascertain the identity of all related entities. This could include, for example:

- identifying related entities on web-sites and product brochures
- explaining transfers between related entities in privacy policies
- explaining transfers between related entities in terms and conditions."

In addition, it is open to the industry to add explanatory guidelines to the Code's privacy provisions. Similar guidelines are proposed for the expanded EFT Code of Conduct (page 77 of the Second Draft, January 2000). However, such guidelines may be difficult to reach consensus on, and efforts should be concentrated on the text of the main Code at this stage. Further guidelines can be provided by the ABA or the ABIO at a later stage if required.

In summary, we recommend the following:

1. That the revised Code include a provision requiring compliance with the new privacy legislation (or in the absence of such legislation, the Privacy Commissioner's National Principles for the Fair Handling of Personal Information).
2. That the principles should appear as text in the Code, either as a section or as an appendix.
3. That an additional principle should be included to require further disclosure about related entities where a subscriber intends to rely on the related entities exemption to disclose customer information. (See proposed wording above).
4. That the Code allow complaints about privacy matters to be heard by the ABIO.

## **D.12 Unauthorised credit card and debit card transactions**

When the expanded *EFT Code of Conduct*, currently under review, is finalised, a regime will be in place for distributing liability for loss in the case of all unauthorised EFT transactions; however, the *EFT Code* will continue not to be applicable where the unauthorised use of the payment instrument is effected by forging the Member's signature. As far as we are aware, the CBP and the other ADI Codes provide the only context for regulating the distribution for liability for loss in these circumstances.

Clause 13 of the CBP refers to the unauthorised use situation; however, the clause currently merely requires that certain information be provided to the consumer about how the Subscriber Bank has determined the loss will fall in the case of unauthorised use. So, for example, under clause 13, the Bank must inform the Member about 'the consequences' — as determined by the Bank — of not advising as soon as possible of the loss, theft or misuse of a payment instrument: see 13.2 and 13.3(i). In effect, then, the Customer's position is determined by the Conditions of Use for the facility.

In our view, the Review should consider whether the CBP ought to incorporate a mandatory loss allocation regime covering unauthorised use of credit cards where that unauthorised use is not covered by the *EFT Code*. Requirements comparable with those of Clause 5 of the *EFT Code* (to the extent relevant) could be considered in this context. Indeed, it would be important that any development of the CBP in this area was consistent with the approach of the *EFT Code*.

In practice, most cases of unauthorised use of credit cards are resolved by virtue of the operation of the "chargeback" system which allows the cardholder/Customer's Bank to make chargebacks to the merchant's Bank in situations where the cardholder alleges that the transaction is unauthorised. It will then be up to the merchant to positively establish, if they can, that the transaction was in fact authorised. For the most part, this system appears to work quite well for consumers, in our experience. However, some problems can arise, partly as a result of the fact that Customers of Banks and other institutions are provided with very little information about how the chargeback system works and what they need to do in order to ensure that transactions they dispute are dealt with as chargebacks. We would therefore recommend that the Review consider how the CBP could be expanded to articulate and formalise the position of Bank Customers vis-a-vis the chargeback arrangements. One important aspect of this would be to consider how the CBP could be made to require that Subscribers give Customers information about the time frame within which a disputed transaction must be reported if it is to be charged back. There should also be an obligation on Subscribers to utilise the chargeback arrangements on behalf of their Customers where a chargeback right exists.

### **D.13 Direct Debits**

The Caseworker Consultation indicated a range of concerns about the operation of direct debit facilities. These are summarised at p.46 with some of the supporting comments set out at pp. 47-48. The Consultation Survey did not specifically address the operation of direct debit

facilities; the issue emerged in the context of responses to other questions including those in relation to unauthorised payments [Q15] and institutional error [Q18]. We understand that the ABIO also receives a considerable number of complaints each year that relate to direct debit facilities.

One issue identified by the Consultation that the CBP could readily address is the apparent failure, in many cases, of Institutions *automatically* to refund overdraw and transaction fees where the Institution is in error (ie whether or not a request has been made by the Customer). A provision mandating automatic refund of any such fees should be included in the revised CBP.

Issues identified by the Consultation concerning the cancellation of direct debit facilities and preventing unauthorised billing following cancellation also need to be addressed. While there is a clear need for better training of Institution staff and better education of consumers in this area, we submit that consideration should to be given, as well, to the possibility of streamlining/ simplifying the system for cancelling facilities and preventing unauthorised billing. In the experience of our agencies, while it is very simple to set up direct debit facilities, stopping such facilities can be extremely difficult, especially where a merchant continues to deduct payments in spite of the customer/ client's instructions to cease doing so. In our view, arrangements need to be investigated whereby Banks (and other ADIs) would automatically stop further payments to a biller upon receipt of a written notice from the Customer and/or when the Customer closes their account. We would like to see this issue addressed during the Review consultation process.

#### **D.14 Joint accounts**

In our view, information of the kind set out at 16.1, CBP, should be made available to prospective Customers upon request, as well as to Customers who have already made a decision to open a joint account. The provision of general information about joint accounts, including the risks associated with such accounts, should also be seen as part of the ongoing Customer education role of Subscribers: see discussion of *Principles and Objectives* above. These remarks are equally applicable in relation to 16.2, which deals with subsidiary cards: discussed in the next section.

As with a number of the CBP's clauses on specific areas, the clause relating to joint accounts merely requires that information about the Bank's procedures — whatever those procedures may be — is to be made available. The Code does not attempt to set out specific processes to

be followed by Banks when, in particular, they are obtaining instructions from joint account holders regarding the authorisation of withdrawals. For example, there is no requirement that joint account Customers' specific written permission must be obtained before one accountholder is permitted to use the account acting alone. Clients of some of our services have been shocked to discover that an ex-partner has been able to withdraw all the funds or available credit from an investment account or home loan redraw facility without the client's authorisation. This suggests that there may be a need for improved practices in relation to the processes for obtaining instructions regarding withdrawal authorisation. We recommend that this issue be considered in the context of the Review.

### **D.15 Subsidiary cards**

See Clause 16.2. We believe that the CBP should be amended to protect the position of the account holder Customer in the situation where the Customer seeks to cancel the subsidiary cardholder's right to access his/her account but is unable to return their card. As the Consultant will be aware, it is the general practice of Banks (and other card-issuing Institutions) to impose a condition to the effect that the Customer must both notify the Bank and return the subsidiary card before the card will be cancelled. However, the experience of our services, confirmed by the Caseworker Consultation, is that, in relationship breakdown situations, as well as in some situations where parents have given a subsidiary card to a child, the Customer may well not be able to return the card or otherwise stop the subsidiary card holder from continuing to use it to access his/her account.

Clearly, in these cases a Subscriber Bank has a *de minimis* obligation to ensure that all reasonable steps are taken to limit potential losses to the Customer from continuing unauthorised use of a subsidiary card. Indeed, this view is consistent with general Bank practice, as we understand it. Thus, even if the subsidiary card is not returned, Banks, upon notification by the Customer, will normally put a stop on all electronically-authenticated transactions and all non-electronic transactions requiring pre-approval (eg where the transaction is above the merchant 'floor limit' or is a cash withdrawal). Given that this is the general, if not invariable, practice in the industry, there can be no good reason why — as a minimum — the CBP should not both mandate an obligation to take these steps and relieve the Customer of liability for any loss subsequent to notification where that loss should have been prevented by the operation of a stop on further use of the subsidiary card. We understand that this approach is consistent with the way the ABIO determines complaints involving the question of liability for loss following continued unauthorised use of a subsidiary card after

notification by the Customer / account holder. The Expert Group on Family Financial Vulnerability made a similar Recommendation in its *Good Relations, High Risks* Report<sup>39</sup>.

Unfortunately, however, non-electronic merchant transactions below an authorisation floor limit are still permitted by Banks and other card Institutions. Thus, a subsidiary cardholder who has not surrendered his/her card will still be able to continue to process sub-floor transactions even after the Customer has withdrawn their mandate for the card to be used and notwithstanding any stops placed on use of the card by the Bank. In these circumstances, neither the Bank nor the Customer is able to take steps to stop unauthorised transactions (which may continue to be made until the card reaches its expiry date). This raises the question of who should bear the liability for unauthorised use in these circumstances.

While liability is currently imposed on the Customer (by the Conditions of Use for the account), in our view it would be more appropriate if liability were shifted to the Bank in the circumstances in question. A number of considerations, some of which were outlined in the Caseworker Consultation Report [see pp. 31-33], support this view. These include:

- the position of the Customer/ account holder is analogous to that of a guarantor; however, while the account holder is unable to prevent the incursion of further liability under the current CBP, the liability of a guarantor is limited to a specific amount under the Code [see sec. 17.2]. Under the *UCCC*, too, a guarantor cannot be made liable for more than the amount initially guaranteed without his/her express agreement. There is little justification for putting a principal cardholder in a worse position;
- after a credit or debit card is reported lost or stolen, the Customer cardholder will not normally be liable for any further unauthorised use. The very different treatment of Customers in the analogous subsidiary card situation is anomalous;
- Banks could require that all merchant terminals be on line or that merchants not on line get authority for all transactions or bear the loss (as against the account holder) if the secondary card holder's mandate has been withdrawn. The fact that Banks choose not to make their systems "full proof" against unauthorised use by subsidiary cardholders (and others) is a commercial decision for the Bank. But it is unclear why the Customer should bear losses resulting from unauthorised use which the Bank was in a position to prevent by having comprehensive authorisation processes in place; and

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<sup>39</sup> See *Good Relations, High Risks*, Report of the Expert Group on Family Financial Vulnerability (Feb, 1996); pp.53-56

- it is in the financial interests of Banks to encourage multiple account card users (ergo, they should shoulder responsibility in respect of continuing use by unauthorised additional card holders).

Given these considerations, we further recommend that the CBP mandate that Customers not be liable for continuing use of a subsidiary card after the Customer has notified the Bank that it wants the subsidiary card cancelled, conditional upon the Customer taking all reasonable steps available to the Customer to return the subsidiary card.

## D.16 Guarantees

We wish to make a series of specific proposals for extending the coverage of, and enhancing the protections afforded to, guarantors under Clause 17, CBP. These are set out in the following sub-sections. We put these proposals in the knowledge that there is a recognition on the part of all stakeholders that the position of third party guarantor is problematic. That the position of a third party guarantor is vulnerable and open to exploitation has been acknowledged by a series of recent reviews and reports from government, industry and advocates.<sup>40</sup>

Clause 17, CBP, as currently formulated, represents one of the few areas where the Code has provided substantial protection to Bank Customers, going beyond what either the Subscriber's legal obligations or its prudent self-interest would require anyway. The recommendations which follow seek to enhance and clarify that protection.

### *Removing limitations on coverage*

In our view, Clause 17.1, CBP, unduly limits the range of guarantors to whom the Code's provisions apply. While not as limited, in this respect, as the *Uniform Consumer Credit Code*, the CBP does exclude, in particular, many family member guarantors of business loans where the guarantor may be formally involved in the business (as a director, partner etc) but where, in fact, they have little, if any, real say in decision-making and/or access to information about the business. While it can be assumed that an individual guarantor of a loan

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<sup>40</sup> See *Australian Bankers' Association working with the community on relationship debt*, ABA press release 21 June 2000; *Guaranteeing Someone Else's Debts* New South Wales Law Reform Commission, Issues Paper 17, April 2000; *Good Relations, High Risks: financial transactions within families and between friends* Report of the Expert Group on Family Financial Vulnerability, February 1996.

to a public corporation will be able to protect their interests without any additional assistance, no such assumption should be made in relation to the persons referred to at (i), (ii) and (iii) of 17.1. In our view, these exclusions should be removed from the Code.

#### *Removing borrower's consent limitation*

As currently formulated, the CBP makes the provision of information to a guarantor in both the pre- and post-contract situation subject to the prior consent of the borrower: see 17.3, 17.4(ii), 17.6. In our view, this consent-of-borrower limitation, which is not consistent with the approach of the *Uniform Consumer Credit Code*, should be removed from the CBP. To state the obvious, the fact that a borrower does not want information given to a prospective guarantor may well indicate that the loan is high risk and therefore that guarantee is potentially very improvident from the security-provider's perspective. All the more reason, then, why the prospective guarantor *should* have an unrestricted right to the information in question.

We recognise that Subscribers have Banker-Customer confidentiality obligations to their borrower customers. However, such obligations do not present a barrier to the proposed change: if the Code were amended, Banks would simply have to make the consent of the borrower to the provision of information to the guarantor a condition of the loan. We believe that borrower consent would also be sufficient to deal with Bank obligations pursuant to the *Privacy Act* (both currently and following the implementation of the *Privacy Amendment (Private Sector) Bill*).

#### *Enhancing pre-contractual disclosure obligations*

The only pre-contractual information/ documentation that currently has to be provided under the CBP is a "written warning" about the possible future liability of the guarantor and (subject to the borrower's consent) "a copy or summary of the contract evidencing the obligations to be guaranteed": see 17.4. In our view, these requirements are far from sufficient. As regards the requirements themselves, we submit that:

- the content of the written warning needs to be specified. We suggest that it should cover the range of issues included in the prescribed information statement under the *UCCC*: see s51(1)(b), Regs s21 and Form 5A, *UCCC*;
- there needs to be a further prominent warning notice placed immediately above the place on the guarantee agreement where the guarantor is to sign; again, along the lines of the *UCCC* provision: see s50(3), Regs s20, and Form 4, *UCCC*; and

- the prospective guarantor should be entitled to a copy of the loan contract - not merely a summary of it: see s5, *UCCC*.

However, we would urge that the revised CBP should go well beyond these limited proposals in dealing with the issue of pre-contractual disclosure. More specifically, the banking industry must respond to the well-established and manifestly obvious fact that what guarantors often need, above all, if they are to make informed decisions about securing loans, is information about matters relating to the underlying loan transaction, such as: the purpose of the loan; the risks associated with the enterprise to be financed; the borrower's financial history and the borrower's current financial position. Banks rightly insist on being provided with this kind of information when assessing business and other loan applications; they do so because they want to be able to gauge the risks involved in any decision to lend. Guarantors are also taking risks — they are often risking their accumulated life savings or family home; they should be similarly informed; or, at least, be given every opportunity to be similarly informed, if they choose to be.

In consequence, the CBP should be amended to require Subscriber Banks to provide prospective guarantors with all relevant financial information about the borrower held by the Bank which a reasonable prospective guarantor would reasonably require in order to assess the financial risks associated with the proposed guarantee<sup>41</sup>. As the *Good Relations, High Risks* Report of the Expert Group on Family Financial Vulnerability suggests<sup>42</sup>, this would include:

- information about the transaction (for new loans this would include loan application/offer, terms and conditions and securities to be taken, and for guarantees for continuing accounts, such as overdrafts, it would include credit limit, purpose of loan, terms and conditions and other securities held or to be taken);
- information provided by the borrower to the financier (for personal loans this would include the borrower's statements of assets and liabilities, income and expenditure and for business loans it would include balance sheets, profit and loss statements, cash flow projections etc);
- credit reporting agency reports.

(See the previous section as regards the privacy implications of the above proposals)

*Enhancing obligation to recommend independent advice*

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<sup>41</sup> This formulation is adopted from *Good Relations, High Risks*, Report of the Expert Group on Family Financial Vulnerability (Feb, 1996); see Recommendations at p42

<sup>42</sup> *ibid* at p.43

In our view, Clause 17.5 should be amended to make it clear that the recommendation that independent advice be obtained is to be made directly to the guarantor (rather than through the borrower). There should also be an obligation to recommend that the prospective guarantor consider obtaining independent advice, eg from an accountant, financial adviser or financial counsellor, as to the financial risks involved in the guarantee<sup>43</sup>. (We note that it is becoming increasingly common for Banks and other financial institutions to do this anyway, especially following the decision of the NSW Court of Appeal in *Teachers Health Investments Pty Ltd v Wynne*<sup>44</sup> )

*Including separate interview requirement*

As a measure of protection against the exercise of influence or pressure on guarantors by borrowers, the CBP should also prescribe that guarantees not be explained to third party guarantors, or executed by them, in the presence of the borrower.

*Enhancing the post-contractual provision of information*

Just as guarantors must be properly informed before they enter into a guarantee agreement, they must also be kept properly informed about the progress of the loan arrangement. Further, they must have a right to full information and documentation in the event that the borrower defaults and demand is, or may be, made against the guarantor.

The provision of information after the guarantee has been entered into is dealt with at Clause 17.6, CBP. As already indicated, it is our strong view that the requirements to provide notices of demand and account statements under Clause 17.6 should not be subject to the borrower's consent. We also submit that clause 17.6(ii), relating to the provision of statements of account, needs to be substantially strengthened. More specifically, the requirements should be made consistent with s34 of the *UCCC* which: i) gives a guarantor a right to a statement containing full account details for the entire loan period [see s34(1)] (not just 'the latest relevant statements of account'); and, ii) imposes time limits on the provision of the requested account details [see s34(2)].

In addition, the CBP should give a guarantor a right to obtain, upon written request, copies of: the loan, mortgage or guarantee documents; any credit-related insurance contracts; any

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<sup>43</sup> See discussion in previous paragraph.

<sup>44</sup> (1995) 39 NSWLR 577.

notices previously given: cf s163, UCCC. See discussion under *A right to copies of documents* above.

*Other possible initiatives in relation to the protection of guarantors*

Apart from the above proposed amendments, which we regard as critical, we would also recommend that, as part of the Review, consideration be given to further amending the CBP:

- to give a guarantor a right to withdraw from the guarantee before credit is extended to the borrower: cf s53, UCCC;
- to give a guarantor a right to withdraw from the guarantee after credit is extended if the loan contract differs in any material respect from a proposed loan contract given to the guarantor before the guarantee was signed: see s53, UCCC; and
- where there has been a default by the borrower and legal action has been taken, to impose a requirement on the Subscriber Bank limiting immediate enforcement of a judgment against a guarantor until an attempt has been made to enforce against the borrower: cf s82, UCCC .

## **D. 17 Mortgages**

Clause 17.2, CBP, which requires that a guarantor's liability be limited to a specific amount, is one of the few conditions imposed on Subscribers by the current Code that goes beyond a Bank's legal obligations. Unfortunately, however, no provision is included in the CBP to control the use of the parallel practice of taking "all monies" or "all accounts" mortgages as securities.

Under the UCCC such mortgages can only be extended to new loans and/or related guarantees if the lender has given the mortgagor a copy of the credit or guarantee contract and has obtained the mortgagor's written acceptance of the extension of the mortgage: see s 43 (*All accounts mortgages*) UCCC. As we understand it, obtaining the mortgagor's agreement to any extension of an "all accounts" mortgage is now general practice within the banking industry whether or not the mortgage in question is regulated under the UCCC.

In our view, it is time that this practice was also formulated as an obligation under the CBP. Assuming the CBP is extended to cover small business Customers, and that Clause 17 is also extended as proposed above, appropriate protection would thereby be provided to individual co-borrowers and guarantors generally.

We also recommend that consideration be given as to whether other practices in respect of mortgages which are regulated under Pt 3 of the *UCCC* should also be dealt with by the CBP. In this context, the following provisions might be looked at: s 40 (*Mortgages over all property void*); s 41 (*Restriction on mortgage of future property*); s 44 (*Third party mortgages prohibited*); s 45 (*Maximum amount which may be secured*); s 47 (*Assignment or disposal of mortgage property by mortgagor*).

## **D.18 Advertising**

The current Code provides some minimal discussion of advertising at clause 18. Advertising must not be false and misleading (18.1) and where an interest rate is mentioned in an ad, the ad must also indicate whether other fees and charges apply (18.2).

There are, however, many problems with the advertising of bank products that will not be covered by these two requirements. It is important for the Code to deal effectively with advertising issues, as there is no general regulation of the advertising industry - there is a only voluntary and unenforceable code of ethics - and the ACCC will only investigate advertising under Section 52 of the Trade Practices Act if they have the resources available and consider it to be a priority issue.

Examples of advertising which fall through these gaps include:

- Ads for home loan products where they disclose a single interest rate in large type and mention that terms and conditions apply in small type. In fact, the advertised interest rate is a honeymoon rate and the ad does not provide the reversion rate at all. (AMP Banking)
- Ads for home loan products where the ad promises that the home loan rate will always stay low. However, the product is a variable product and while it is guaranteed to stay below the bank's standard rate there is no guaranteed margin. (Colonial State)
- Brochures for term deposit products which have one (high) interest rate on the cover and no other interest rates inside. The consumer can complete an application form and forward it with a cheque without referring to any other information. However, the interest rate will depend on the term and amount selected and only one product out of a large range will therefore attract the rate on the cover of the brochure. There is no explanation of this anywhere in the brochure (Numerous examples).

It would therefore be useful for the Code to cover advertising and to allow the proposed Code administration body or the ABIO to consider complaints about advertising. (In the case of the ABIO, this may require some consideration of the ABIO Terms of Reference to ensure that consumer watchdog organisations can complain about advertising where appropriate, rather than requiring an individual complainant.)

In addition, there is a developing consumer protection trend to require advertising to be accurate (rather than merely a prohibition on false and misleading). Putting this requirement as a positive proposition would be a useful development in this code, to promote a move away from the minimalist approach to disclosure outlined in the examples above.

There is also a trend towards requiring advertising to be clearly identifiable as advertising. For example, the new Best Practice Model for Building Consumer Sovereignty in Electronic Commerce (Treasury, 2000) states:

"Businesses should make sure that advertising is clearly identifiable and can be distinguished from other content, such as editorial comment, terms and conditions and independent product reviews." (clause 22.1)

In summary, we present the following recommendations regarding advertising:

1. Subscriber advertising should be accurate.
2. Subscriber advertising should be clearly identifiable as advertising.
3. Subscriber advertising should, where an interest rate is mentioned, disclose the full, comparable costs of the product.
4. That advertising complaints can be made to the proposed Code administration body or the ABIO by consumer watchdog organisations, without requiring an individual complainant.

## **E. THE PROCESS FROM HERE**

In our view, it is critical that consumer representatives and other stakeholders be consulted throughout the process of reviewing and amending the Code of Banking Practice – including at the stage where proposed changes are to be finalised and formulated as amendments to the Code text.

Queries regarding this submission may be directed in the first instance to Michael Funston at Consumer Credit Legal Centre (NSW) Inc.

The following organisations representing consumer interests were involved the writing of this submission.

**Consumer Credit Legal Centre (NSW) Inc** is a specialist NSW based community legal centre that undertakes advice, casework, education and policy advocacy in relation to financial services' issues and client matters.

Contact: Michael Funston,

p: 02 9212 4249,

f: 02 9212 4711

e: Michael\_Funston@fcl.fl.asn.au

**The Financial Services Consumer Policy Centre** is a non-profit consumer research organisation, examining all aspects of financial services from the perspective of low income and disadvantaged consumers.

Contact: Chris Connolly

p: (02) 9281 4164

f: (02) 9281 4574

e: director@fscpc.org.au

**Consumer Credit Legal Service (Victoria) Inc** is an independent non-profit legal service funded by Legal Aid and Consumer and Business Affairs Victoria. It assists individuals and groups who have been unfairly treated in the financial services market and who are disadvantaged in their access to legal redress. It also seeks to influence and effect reform to unfair practices and the law through its policy work, research and advocacy.

Contact: Carolyn Bond

p: (03) 96705088

f: (03) 670-7205

e: bond@vicnet.net.au

**Consumer Credit Legal Service (WA) Inc** works to redress the imbalance of power between West Australian consumers and Financial Institutions through legal advice and representation, community legal education, law reform and policy activities.

Contact: Su Mahalingam

p: (08) 9481 7665  
f: (08) 9481 7668  
e: Su\_Mahalingam@fcl.fl.asn.au

**Care Inc. Financial Counselling Service (ACT)** has provided information, advice, advocacy and education for low to moderate income consumers in the ACT since 1983.

Contact: David Tenant

p: (02) 6257 1788  
f: (02) 6257 1452  
e: cccls@dynamite.net.au

**The Consumer Law Centre Victoria** is an independent, non-profit, public interest legal centre. The centre practises public interest law for the benefit of consumers. This includes research and investigation, policy development, advocacy and lobbying, casework, advice, education and litigation.

Contact: Christine Rowley

p: (03) 9629 6934  
f: (03) 9629 6898  
e: christine@clcv.net.au

## Appendix A

### Options for Improving Fee Disclosure

*From the Consumer Group Submission to the Joint Statutory Committee on Corporations and Securities.*

This document sets out the various options for improving fee disclosure in Australia, and identifies which options have the support of consumer organisations.

It is difficult to consider each option in isolation, so links between options are indicated where appropriate.

#### Statements

Account statements remain the primary means of communication between banks and their customers. The ASIC Consumer Advisory Panel research on fee disclosure (Hereafter referred to as the CAP research) noted that there were good reasons for continuing to improve the level of fee disclosure made in statements. These included:

- Σ The statement was usually read, unlike most other possible modes of disclosure;
- Σ It provided information that only applied to this account / this consumer; and
- Σ It was a regular communication to the consumer, and as such had the greatest potential to educate the consumer, affect their attitudes and potentially change transaction behaviour to minimise fees.

There is currently a great deal of variation in the amount and type of fee disclosure made in account statements. Some banks describe each individual fee, others simply use the term "bank fee". A few banks provide a monthly breakdown of fees, most do not.

An example of one consumer's breakdown of fees from a large bank is:

<b>Monthly Transaction Summary</b>	<b>Total</b>	<b>Free</b>	<b>Charged</b>	<b>Amount</b>
Cheque withdrawals	5	4	1	\$1.00
[Bank] ATM withdrawals	3	3	0	\$0.00
[Bank] ATM Mini Statement	1	1	0	\$0.00
Non-[Bank] ATM Wdls/Eng	1	0	1	\$1.50
Total transaction fees				\$1.00

Account keeping fee				\$4.00
Non-[Bank] ATM fee				\$1.50
Total account fees				\$6.50

Generally, consumers would benefit from a move towards this style of fee disclosure. An additional improvement would be the provision of information on each statement reminding the consumer about the number of free transactions they were entitled to. Banks would also benefit from improved education of consumers about the true costs of certain banking behaviour, and a greater general understanding about banking costs.

The disadvantage of fee disclosure via statements is that it is "after the event". There are very few other items or services which consumers purchase which do not provide information about costs prior to the transaction.

Option 1	Recommendation	Time-frame
Improve fee disclosure in statements, to include a breakdown of monthly fees, and a reminder of the number of free transactions available	Seek voluntary compliance, review after 2 years	1-2 Years

## Brochures

Banks currently rely on brochures to meet their fee disclosure requirements. These brochures are provided to consumers at the time of opening an account, and are replaced when a large volume of changes to fees and charges occurs.

The CAP research and the research undertaken by the Financial and Consumer Rights Council survey results (hereafter referred to as the FCRC research) both note that consumers have little understanding of the fees and charges applicable to their own account, despite the provision of brochures. Most options for improving fee disclosure involve the introduction of additional disclosure, but there is also room for improvement in the provision of the brochures themselves.

Generally, consumer brochures can be made more accessible through a series of small improvements. The ASIC Stocktake of Consumer Education in Financial Services found that the best brochures share the following characteristics:

- They are written in plain language;
- They are available in appropriate community languages;
- They are printed in a large font; and
- They are dated.

In addition, brochures must be available in branches at all times.

Both the CAP research and the FCRC research identified a new option for improving fee disclosure - replacing brochures with personalised letters.

The CAP research suggested the use of "simplified, more personalised, mailed information":

"Mailed information and brochures were considered too complex in their presentation. Thus, participants suggested this needs to be simplified, more personalised and more prescriptive." (p. 5)

The FCRC research recommends that "clear and accurate information about fees and charges be provided to customers regularly and in a user friendly format, such as a personalised letter (without any accompanying advertising material)." (rec 5)

Option 2	Recommendation	Time-frame
Improve brochures and supplement them with personalised mailings	Seek voluntary compliance, review after 2 years	1-2 Years Voluntary

## Branch Signage

Australian bank branches carry very little signage about fees and charges. This is in contrast to UK banks, for example, where signs at each counter summarise major transaction fees, including warnings about non-customer charges.

The CAP research suggests that one of the benefits of more branch signage would be that people could read the information while waiting in queues - which has the potential to address customers who tend to use the most expensive means of withdrawing cash, over the counter. (page 6)

As noted above, fee disclosure brochures should be available at all times in branches. This could be complemented by perhaps one poster in each branch explaining the main fees and charges.

The disadvantage of this approach is that the information would not be personalised, and complex fee structures would be difficult to summarise in a readable font.

Option 3	Recommendation	Time-frame
Improve fee disclosure using branch signage	Ambivalent - trial of effectiveness might be useful	n/a

## Telephone Banking

Telephone banking provides one of the greatest opportunities for improved fee disclosure. The system is highly computerised and automated, and the information is accessed on-line. The costs of telephone banking have risen faster than nearly any other banking service, and as telephone banking was originally free (and promoted heavily as a cost effective alternative to traditional banking), this is an area that deserves a high priority.

The emphasis here should be on the provision of information about costs prior to incurring those costs. There are four main options:

Option 4	Recommendation	Time-frame
Disclose the cost of the transaction before each telephone banking transaction	Technically difficult, possibly annoying to regular consumers, possible cost implications - not recommended at this stage	n/a

Option 5	Recommendation	Time-frame
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Provide the option (eg on a menu) of ascertaining the cost of any telephone banking transaction.	Technically difficult but possible (perhaps with explanation). best option for improving consumer understanding	1-2 Years Law/Code
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Option 6	Recommendation	Time-frame
Provide general information about fees applying to that account before each transaction	Simple, but repetitive - not recommended	n/a

Option 7	Recommendation	Time-frame
Providing option to listen to general information about fees applying to that account	Simple, complements Option 5 if adopted. Essential if Option 5 not adopted.	1-2 Years Law/Code

The FCRC research recommended that customers using electronic banking products should be advised of the cost of each transaction and a monthly tally of costs, prior to agreeing to go ahead with the transaction. Option 4 and (at a stretch) Option 5 would satisfy this recommendation.

## Internet Banking

Internet banking also provides an excellent opportunity for improving fee disclosure. Information is easy to access through simple navigation tools, and access is on-line (so information should be reasonably up to date).

Again, Internet banking was promoted heavily as an affordable replacement for traditional banking, but Internet banking costs have risen dramatically.

The Internet also provides an opportunity to provide additional disclosure about all bank fees, not just Internet banking fees. However, not all bank customers have access to Internet banking, so improvements here should be seen as a small part of a wider package of improvements.

The options here are similar to telephone banking:

Option 8	Recommendation	Time-frame
Disclose the cost of the transaction before each Internet banking transaction	Technically difficult, possibly annoying to regular consumers - not recommended at this stage	n/a

Option 9	Recommendation	Time-frame
Provide the option (eg using a hotlink) of ascertaining the cost of any Internet banking transaction.	Best option for improving consumer understanding	Immediate to 1 Year Law/Code

Option 10	Recommendation	Time-frame
Provide general information about fees applying to that account before each Internet transaction	Simple, but repetitive - not recommended	n/a

Option 11	Recommendation	Time-frame
Providing option to view general information about fees applying to that account	Simple, easily personalised on web, complements Option 9 if adopted. Essential if Option 9 not adopted.	Immediate to 1 Year Law/Code

## ATMs

Fee disclosure on ATMs has grabbed most of the headlines and is certainly a prominent issue overseas. ATM fees have also risen sharply, and are deserving of close scrutiny. However, the fees applying to ATM transactions are complicated.

There are fees for using your own bank's ATM network (although such transactions are often included in the free transactions available). These fees usually apply to withdrawals and some mini-statements, but not inquiries

There are non-network ATM fees, where a customer uses an ATM from a competing network. These fees usually apply to both withdrawals and inquiries, and they are often excluded from your monthly free transactions. The structure of networks in Australia is incredibly complicated, and no consumer could be expected to know which ATMs are in or out of a particular network. This confusion is compounded by signage on most ATMs saying "all cards welcome here" or "these cards welcome here" with no distinction between network and non-network cards.

There are also surcharges. Surcharges are imposed by the owner of the ATM rather than your own bank. They are rare in Australia compared to overseas (especially the US) but are not banned. Surcharges have started appearing on some privately owned ATMs in pubs, hotels, garages and convenience stores. Surcharges usually apply to both withdrawals and inquiries.

Amidst all this confusion there is virtually no effective disclosure of fees prior to transactions. This is despite ATMs having three opportunities to advise consumers about fees - on the ATM signage, on the electronic screen and on the printed receipt.

There are numerous options for improving fee disclosure on ATMs. A package of the following measures could provide significant improvements in consumer understanding in this complex area.

Option 12	Recommendation	Time-frame
Disclose the cost of the transaction before each ATM transaction on the screen	Technically difficult, , possible cost implications - not recommended at this stage	n/a

Option 13	Recommendation	Time-frame
Provide the option (eg on the screen menu) of ascertaining the cost of any ATM banking transaction.	Technically difficult but possible. Strongly recommended.	1-2 Years Law/Code

Option 14	Recommendation	Time-frame
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Provide general information about fees applying to accounts on the screen at start up	Simple, but banks will resist as screen space reserved for marketing - not recommended	n/a
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Option 15	Recommendation	Time-frame
Provide option to view general information about fees applying to that account (possible screen menu option)	Simple, complements other options.	1-2 Years Law/Code

Option 16	Recommendation	Time-frame
Improve signage on ATMs - list network and non-network cards separately	Simple step to reduce misleading information	immediate voluntary

Option 17	Recommendation	Time-frame
Improve signage on ATMs - Warning sticker that non-network ATM fees may apply.	Simple. Will improve consumer understanding	immediate Voluntary

Option 18	Recommendation	Time-frame
Provide warnings on screen regarding surcharges where applicable	Absolutely essential	Immediate Law/Code

Option 19	Recommendation	Time-frame
Provide fee disclosure on printed receipts	Good complement for other disclosure, but no substitute for prior disclosure.	n/a Voluntary

## EFTPOS

Fee disclosure is not considered a priority issue in EFTPOS transactions. EFTPOS is successful because of its speed, simplicity and low cost to merchants. There are no viable options for improving fee disclosure at the time of EFTPOS transactions, although many of the options

discussed above (especially improvements in fee disclosure on statements, telephone banking, and Internet banking) will raise consumer understanding about EFTPOS transaction costs.

## Common Issues

Improvements in consumer understanding about bank fees can also be achieved through a number of additional measures:

Option 20	Recommendation	Time-frame
Banks to use common language/terminology in describing transactions and fees	Simple.	1-2 Years ABA Guideline

Option 21	Recommendation	Time-frame
Banks to use common definition of "month" when describing free transaction period	Simple, reduces complexity. Strongly recommended.	1-2 Years ABA Guideline

Option 22	Recommendation	Time-frame
Banks to provide more staff training regarding fees, especially new fees	Supported by FSU	Ongoing

Option 23	Recommendation	Time-frame
Banks to keep charges for duplicate statements, balance inquiries etc. "reasonable"	Important part of account management.  Good trade off with fee complexity.	Immediate Code/Voluntary

Option 24	Recommendation	Time-frame
Banks to be prohibited from charging fees for checking fee accuracy / fee queries	Unfair to charge consumers who believe they have been mis-charged	immediate Law/Code