

Our Ref: CG 92/93-29
Your Ref:
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26 September 2000

Mr Richard Viney
Review of Code of Banking Practice
GPO Box 4612SS
MELBOURNE VIC 3001

Dear Mr Viney,

The Australian Competition and Consumer Commission (ACCC) is pleased to provide the following brief comments on the review of the Code of Banking Practice (the Code).

We have considered the extensive submission provided by the Australian Securities and Investments Commission (ASIC). We note in particular the surveys and code monitoring exercises that have provided valuable information about consumer experiences with credit products and the Code (in addition to ASIC's core jurisdictional responsibilities). The ACCC supports the recommendations that have been made in relation to these findings and feels that it would be unnecessary to duplicate this research or the subsequent commentary.

The ACCC would like the Review to note our additional comments in relation to the following:

- undue harassment and coercion;
- unconscionable conduct;
- interchange fees;
- convergence; and
- shadow ledgers.

Role of the ACCC

The ACCC is an independent statutory authority and is Australia's national trade practices and consumer protection law enforcement body. The ACCC administers the *Trade Practices Act 1974* (the TPA) and the *Prices Surveillance Act 1983*. It has additional responsibilities under other legislation.

The statutory objective of the TPA is to enhance the welfare of Australians through the promotion of competition and fair-trading and the provision for consumer protection. The TPA proscribes certain anti-competitive conduct and unfair trading practices.

The ACCC's stated goals are to:

- secure compliance with the *Trade Practices Act* by responding to complaints and inquiries and by observing market conduct and initiating action when required;
- improve market conduct;
- enhance competition in our regulatory activities;
- inform the community at large about the *Trade Practices Act* and its specific implications for business and consumers; and
- use resources efficiently and effectively.

Although the policy underpinning the *Trade Practices Act* is the promotion of competition, it is not competition at any cost to society. The Act recognises this by providing for asymmetries in information in markets through the consumer protection provisions and providing a process for authorisation of anti-competitive conduct. Such conduct can be authorised by the ACCC where the total public benefits of the conduct outweigh the detriment caused by the anti-competitive process.

If particular conduct is authorised by the ACCC, it receives immunity from Court action. The Act also provides a mechanism for people affected by an ACCC decision on authorisation to seek independent review of that determination by the Australian Competition Tribunal. The ACCC is not, to the full extent, the final arbiter of net public benefit in the authorisation process. The review will need to consider whether any changes to the Code will require authorisation.

The ACCC also has general responsibilities in relation to the development of codes of conduct. The ACCC encourages and provides assistance to industry to develop service standards and appropriate sanctions above the base requirements of the law.

The role of the ACCC in the financial services sector

On 1 July 1998, responsibility for most consumer protection matters in the financial services sector was transferred from the ACCC to the Australian Securities and Investments Commission (ASIC). From this time the ACCC has had consumer protection enforcement responsibilities in this sector only in respect of complaints about:

- credit;
- foreign exchange contracts;
- health insurance; and
- contraventions of section 51AC (unconscionable conduct in small business transactions).

The ACCC has co-operation agreements with each of the state and territory fair trading agencies. The consumer protection provisions of part V of the TPA are mirrored in the state and territory fair trading legislation. Those agencies also have additional consumer protection responsibilities in relation to the Consumer Credit Code.

ASIC now has responsibility for consumer protection issues relating to:

- deposit products;
- securities;
- futures contracts;
- contracts of insurance;
- retirement savings accounts; and
- superannuation interests

The ACCC and ASIC signed a co-operation agreement on 17 July 1998. This agreement sets a framework to facilitate, among other things, appropriate information exchange, assistance, referral of complaints, liaison, and referral of powers.

The ACCC is strategic in determining its enforcement and compliance activities, having regard to the following priorities:

- blatant disregard for the law;
- a history of previous contraventions of the law, including overseas contraventions;
- significant public detriment and/ or a significant number of complaints;
- the potential for action to have a worthwhile educative or deterrent effect;
- a significant new market issue; and
- a likely outcome that would justify the use of resources.

This allocation of responsibilities and the ACCC's priorities mean that the ACCC now has a narrow area of responsibility in consumer protection in financial services.

Complaints

The ACCC continues to receive complaints about the banking and finance sector. Where appropriate the ACCC refers those complainants to the Australian Banking Industry Ombudsman and other appropriate agencies. Anecdotal evidence suggests that many of those complainants are coming to the ACCC after finding no success with the ABIO.

The ACCC continues to receive allegations concerning:

- unsolicited credit;
- bait advertising;
- non-disclosure of fees and or applicable interest charges;
- misleading or deceptive advertising; and undue harassment and coercion;
- unconscionable conduct.

Not all of these complaints indicate breaches of relevant laws or codes. In fact many consumers when they approach the ACCC are seeking independent information before they pursue their complaint with the bank, or that they feel is not available from their bank. Many enquiries can be resolved at this stage. Consumers may be approaching the ACCC because they do not have confidence in their financial institution to provide them with independent information.

The ACCC support ASIC's recommendation to investigate ways to educate consumers about their rights and the ramifications of entering into certain products. Such information could be developed by an independent administration body or by the Australian Banking Industry Ombudsman.

Undue harassment and coercion

In June 1998 the ACCC commenced a project to look at debt collection in Australia. The TPA recognises that there may be legitimate reasons why a consumer may default on a debt. Such reasons may include unexpected financial difficulties, poor assessment of a debtor's capacity to repay a loan or a dispute about the debt itself. The TPA provides protection for consumers under section 60:

‘A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.’

The project looked at debt collection in Australia and overseas and developed both a set of guidelines and a guide to compliance with the TPA provisions. Full consultation was undertaken with stakeholders in industry, government and consumers. In looking at further strategies to deal with the issue, the report raised the possibility of enforcing the guideline through industry codes.

Consumer caseworkers, in the ASIC survey, expressed the view that industry codes should set out appropriate practices along the lines of the ACCC guidelines. The Commission has not formed a view as to whether these should be spelt out in the code, or whether the Code should refer to the ACCC guidelines. As mentioned above, the guidelines were negotiated in full consultation with all stakeholders which adds a greater legitimacy, but there may be industry specific considerations that could be spelt out in the Code. For example in the banking industry, debt collection services may be provided through a mix of in-house and outsourced activity. The Code needs to specify conduct to ensure that the debtor is not contacted excessively or receive conflicting advice from two different sources, both acting on behalf of the bank. Similarly, banks need to be accountable for the actions of their agents.

A copy of this report including the guideline and the compliance guide has been attached.

Unconscionable conduct

The TPA has specific provisions prohibiting unconscionable conduct in consumer and small business transactions. Due to the relative strengths of the parties, the ACCC continues to receive many complaints about unconscionable conduct by financial institutions.

Again, whilst the TPA contains broad prohibitions, the Code provides an opportunity to take the base level of the law and create a higher standard. This review, in consultation with stakeholder groups could look at specific circumstances to address the inherent imbalance between the bargaining power of the two parties. Such measures could include:

- a requirement to make available consumer and business information about guarantees;
- information in plain English and major community languages;
- additional training for bank staff, to recognise parties whose judgement or ability to understand documentation may be compromised; etc.

The Australian Bankers Association's *Banks and Small Business Working Together: A Set of Principles* (1998) should be evaluated with stakeholders and incorporated into the Code.

Interchange fees

The Payments System Board of the Reserve Bank and the ACCC are currently undertaking a joint study into interchange fees for debit and credit cards, and membership criteria for credit cards.

The objectives of the joint study are to:

- obtain information on interchange fees paid by financial institutions;
- clarify the basis on which interchange fees are currently set, looking particularly at the role of costs;
- assess whether current interchange fees are encouraging efficient provision of debit and credit card services; and
- obtain information on current restrictions on credit card scheme membership.

The ACCC encourages the review to follow this inquiry, as there may be implications for the Code, particularly in terms of disclosure and possibly for small business. A discussion paper should be available shortly.

Convergence

The ACCC recognises that there has been an increase in convergence in products and services offered by financial services institutions. This trend is likely to continue as new technologies and markets emerge. The Code will need to be flexible enough to accommodate these changes to ensure that gaps in coverage do not occur.

The ACCC does not have view about how this should be managed, but consideration could be given to:

- formal mutual recognition of applicable industry codes;
- requiring members to sign up to other relevant codes, depending on the services they provide; and
- the development of referral mechanisms to ensure that complaints do get heard etc.

Shadow ledgers

We note that the Brisbane office of the ACCC has, on a previous occasion information to the Review on problems arising from the use of shadow ledgers. This view is attached.

I hope that the foregoing has been of assistance. If you would like further information, please contact Anne Napier on 02 6243 1086.

Yours sincerely

Carl Buik
Consumer Protection