



**COMMONWEALTH BANK OF AUSTRALIA**

**THE REVIEW OF  
THE CODE OF BANKING PRACTICE**

**RESPONSE TO THE REVIEWER'S  
ISSUES PAPER**

**7 AUGUST 2001**

## **INTRODUCTION**

The Commonwealth Bank Group regards the Review of the Code of Banking Practice as an important opportunity for the banking industry to consult broadly with relevant sectors of the community.

The Australian banking sector, like much of the Australian economy, has, in recent years, had to respond to global competition, technological advances and changes in government regulation. Banks now provide, often around the clock, a broader range of services, more efficiently, through more points of access, with overall savings to customers. These benefits are available through new delivery channels with which not all customers are yet familiar. Banks are taking steps to assist customers become accustomed to newer methods so that they have greater choice in their access to banking services.

The Issues Paper which the Code Reviewer, Mr Viney, released on 5 March has facilitated the dialogue between banks and the community by highlighting issues of concern and making interim recommendations on how these could be addressed. The Commonwealth Bank Group agrees broadly with the majority of Mr Viney's proposals.

The Commonwealth Bank Group has formed an internal working group with representatives from all relevant business units to consider issues raised by the Code Review. The working group has met frequently to ensure that the Group's participation in meetings and discussions with the ABA and member banks reflects the Group's overall perspective.

The Commonwealth Bank Group is hopeful that the Review process will result in a better understanding between banks and community groups of each other's perspective.

## **GENERAL COMMENT**

In discussing a number of issues, the Reviewer's Issues Paper implicitly advocated that a bank should provide a customer with financial and legal advice, outside of an explicit contractual commitment to do so. Such a requirement would impose fiduciary obligations on banks. To do so would add a new dimension to risk assessments on which the industry's financial soundness is based.

The courts have consistently held that banks are not obliged to act as advisers to their customers. In *Truebit Pty Ltd v Westpac Banking Corporation* (Federal Court, NG 456, 27 November 1997), Branson J. pointed out the commercial and conceptual unreality of requiring a bank to subjugate its own interests to those of a customer.

Furthermore, in respect of a corporate customer, a bank (by its actions in directing the customer on what is an appropriate course of action) could possibly be considered a shadow director for the purposes of the Corporations Law. The bank would be required to act in regard to the company in accordance with the obligations placed on directors by the

Corporations Law, such as to act in good faith and to exercise due care and diligence.

Requiring a bank not to regard its own commercial interests (for example a right to repayment or to enforce a security) as paramount is neither practical, feasible nor viable. This is not to say that a bank should not have concern for the welfare of its customers. Banks, like any private company, need to focus on customer satisfaction for their survival. However, in addressing the issues raised in the interim recommendations, the Group has worked consistently from the basis that a solution was sought which avoided presenting banks with an untenable conflict of interest.

### **SPECIFIC ISSUES**

The Commonwealth Bank Group broadly agrees with the majority of the Reviewer's interim recommendations. Where differences remain, the Group is hopeful that they can be resolved through the ongoing consultation process in the coming months. Key points of difference are addressed below.

#### **Key Commitments**

The Group supports the industry's public commitment to work towards continuous improvements in the standards of practice and service. The Group also endorses promoting better-informed decision making by its customers, particularly by providing effective disclosure of information.

In making explicit its adherence to the principle of treating customers fairly, the Group has been concerned to give definition to a concept which is not capable of easy explanation in legal terms. The Group believes that performance of the contract is fundamental to fairness between a bank and its customers. The contract embodies the rights and obligations freely agreed between both parties and its existence provides remedies for non-observance of those provisions.

The assets of a financial institution consist primarily of its enforceable contracts. It is important therefore for a bank's ongoing viability that the enforceability of those contracts is not jeopardised. In this regard, the Group welcomes the interim recommendation that a revised Code retain a bank's adherence to prudential standards as one of the Code's guiding principles.

On occasions, situations may arise that were not contemplated in the contract. In these circumstances, the behaviour of both the bank and the customer needs to be taken into account to determine what is fair.

#### **Scope of Code**

Reflecting the fact that many Australian banks provide a range of financial services, the scope of the Code should be widened to cover any financial service provided by a bank to a customer (defined as an individual or small business in certain situations, see below). In order to avoid duplication and the potential for confusion, in defining the Code's scope the Group believes it

should apply only to the selling of non-bank products, not the performance of those products. The Code would therefore apply to a bank's behaviour as an agent in selling non-bank products but the performance of the products, for example insurance, would continue to be governed by the industry specific regulation and codes.

The Group supports the extension of the Code's provisions to services provided to an individual regardless of whether they are for business purposes or private use.

### **Small Business**

The Group agrees that the Code can be expanded in certain areas to cover small business. There will be some provisions where this will not be appropriate because of differences in the nature of the business and risk involved. These should be decided specifically for each provision during redrafting of the Code.

How small business is defined for the purposes of the code needs further consideration. Alignment with the definition of retail client used in the Financial Services Reform Bill (FSRB) may be too wide and the Group favours use of the small business definition in the FSRB retail client definition.

### **Code Mechanics**

The Group understands that an independent compliance monitoring mechanism may boost customer confidence in the Code's operation. To ensure that this objective is achieved, however, the Group proposes a comprehensive examination of the strengths and weaknesses of all options be made before taking a final decision on which alternative to support.

While broadly agreeing with the interim recommendations on sanctions, the Group holds that the best means of enforcing the Code is to make it, as at present, part of a customer's contract with their bank and to provide an effective dispute resolution procedure. Consequently, the Group believes that only customers should be entitled to use the Code complaints provisions to seek redress for non-compliance. Other stakeholders will have the opportunity to raise concerns they may have about the Code's operations in the regular consultations to be held between banks and stakeholders.

The Group supports the Issues Paper's emphasis on effective dispute resolution procedures, both internal and external. It is a priority which the Group shares in ensuring its customers receive a high standard of service.

The Group agrees with the need for regular and transparent reviews of the Code, involving, as in the current case, a wide process of consultation. In order to keep abreast of changes in community views and expectations, the Group supports instituting regular consultations on banking practices with community, consumer and government bodies. If appropriate, proposals on

specific issues that arise would be prepared for consideration during the next regular Code review.

## **Access**

### Geographic Access

The Commonwealth Bank continues to be Australia's most accessible bank, with over 135,000 points of representation across the country, supplemented by telephone and Internet banking. Four out of five transactions are now conducted electronically. Furthermore, despite declining customer demand for day-to-day branch transaction services, the Group never closes a branch without ensuring alternative Commonwealth Bank face to face banking services are available.

### Low Cost Accounts

Customers accessing banking services through Woolworths' EzyBanking may receive up to 55 fee-free transactions per month, in over 640 Woolworths and Big W stores across Australia. This account has no account keeping fees or minimum balance requirements.

Regarding accessibility of Commonwealth Bank services for low income customers, over two-thirds of the Group's customers do not pay transaction fees. The Group does not charge personal customers monthly account keeping fees nor does it have a minimum balance requirement on accounts. The Commonwealth Bank Group also provides fee exemptions for special groups in the community. These include eligible aged and war veteran pensioners, customers of at least 2 years who are unable to use self-service banking because of a disability, youth under the age of 18 and full-time tertiary students irrespective of age. The Group forgoes over \$40 million in revenue annually by offering these concessions.

### Those Unable or Reluctant to Use Electronic Means Banking

In relation to assisting older and less mobile customers, the Group has conducted approximately 1,700 workshops through its "Banking Made Easy for Older Persons Program". This program, established in 1996, assists older members of the community feel more familiar with electronic banking thereby giving them greater choice in accessing banking services. The use of retired Bank officers as presenters is one of the main features of the program.

The commitment to facilitating access for its customers, led the Group to endorse the ABA initiative announced in March 2001 that ten retail members would be implementing a comprehensive program aimed at addressing key community concerns about affordability of banking services, better access to banking facilities for older people, people with disabilities and those in rural and remote areas.

The three key initiatives are:

- guaranteed minimum standards for safety net, basic bank accounts for holders of Commonwealth Government health concession cards;

- lodgement of a Disability Action Plan with the Human Rights and Equal Opportunity Commission to overcome access barriers to electronic banking; and
- adoption of a Transaction Services and Branch Closure Protocol for ongoing face to face banking services in rural and remote areas.

The Group believes that these initiatives, combined with the access policies it already has in place, meet the essential points of the Reviewer's interim recommendations on access issues.

### **Disclosure**

This area is difficult to make specific comments on given the need to consider the Code's interaction with the Uniform Consumer Credit Code (UCCC) and the Financial Services Reform (FSR) legislation once it is finalised. However, consistent with the Group's commitment to promoting better informed decision making, it is in broad agreement with the Reviewer's interim recommendations.

The revised EFT Code Clause 4.2 requires statements of account for non-credit products to be provided every six months, with customers offered the option of receiving their statements more frequently. In this case, the Group believes the Banking Code of Practice should be brought into alignment with the EFT Code rather than require a statement to be issued every three months.

The Group considers that the Code should complement obligations in other regulatory instruments rather than attempt to summarise and extend their scope. Accordingly, the Group does not agree with the interim recommendation that the Code include information on FSR, UCCC and other relevant laws.

### **Specific Consumer Issues**

#### Customers in Financial Difficulties

The issue needs careful consideration because, as outlined in the General Comment above, the potential conflicts of interest between the bank and its customers make the provision of advice by the bank impossible. The customer may also have a number of commitments to other institutions, rendering it inappropriate for the bank to advise on repayment priorities. The Group endorses though that the Code should provide guidelines on good practice for banks in dealing with customers who are experiencing financial difficulties in their relationship with the bank.

#### Credit Assessment

The Group supports a commitment in the Code that banks will exercise the care and skill of a diligent and prudent banker in assessing the level of credit that is within the customer's capacity to repay. Apart from benefiting the customer, it also reflects the bank's own interest in not providing credit that may not be repaid. Subject to having met the bank's requirements, the

Group believes that it is for the customer to decide the level of credit required.

#### Direct Debits

The concerns expressed to the Reviewer on the operation of the direct debits system should be addressed. APCA, the industry body responsible for the direct debits system, is taking action to meet consumer concerns. Since APCA, through its wider membership, is better able than the banks to reach an effective solution, the Group proposes that direct debit issues not be dealt with by the Code of Banking Practice.

#### Stopping Particular Credit Card Transactions

In relation to the Reviewer's question whether customers should be able to place a stop payment order on particular credit card transactions, the Group is concerned that this would undermine the widespread acceptance of credit cards by weakening a merchant's faith that they would receive payment.

#### Chargebacks

The Group believes that satisfactory commitments can be found to address the issues identified by the Reviewer.

#### Guarantees

Revising the regulatory framework around guarantees clearly has major ramifications for both banks and their customers. The rules must be made to cater for all customers, those familiar and those unfamiliar with commercial practices, who will come under the Code and must offer certainty for all parties.

The Group has been working on this basis in discussions with other banks and consumer groups. A significant number of the Reviewer's recommendations have been addressed and possible commitments identified. Two areas in particular require further attention: the information about the debtor and transaction to be provided to potential guarantors and the proposed obligation to ensure that the guarantor is informed of the legal effect of the guarantee.

While willing to provide information to the potential guarantor so they can make a well based decision, the Group requires that any commitment is made specific enough to be fulfilled. It is a concern that a bank could provide information in good faith and later have the guarantee challenged because a related, though immaterial piece of information, had been omitted.

On the issue of the guarantor recognising the legal effect of the guarantee, the brochure which the Group distributes to all potential guarantors and which they are required to acknowledge having read, urges in strong terms the need to obtain independent legal and financial advice. If the guarantor is adequately experienced or knowledgeable enough to make their own assessment, it is not for the bank to stop them providing the guarantee, often for a business with which they are involved. In the case where an individual

disregards the bank's recommendation that they seek advice, it is inappropriate for the bank to advise them itself because of the conflict of interest involved. The points made earlier under the General Comment are also relevant here.

Because of the amendments to the Privacy Act which will come into force in December, the Group cannot agree that any disclosure obligations owed to the prospective guarantor be made absolute and not conditional on the debtor's consent. In practical terms, the debtor's refusal of consent would send a clear caution to the prospective guarantor.

#### Joint and Several Liability

The Group endorses the Reviewer's interim recommendation that joint borrowers have the implications of joint and several liability fully explained before they sign the loan documents.

The Group understands the concerns which prompted the interim recommendation that joint borrowers not be given a loan where, on the facts known to the bank, both parties do not stand to benefit. The Group wants to discuss ways of preventing vulnerable people from being left with debts from which they derived no benefit. However, this is not a simple issue to resolve and the Group wants to avoid denying service to people who understand fully their obligations and are prepared to undertake an obligation, even if it appears to others they derive no obvious benefit.

#### **FORM OF THE CODE**

The Group believes that the revised Code of Banking Practice should be an easily understood statement of the principles governing the relationship between a bank and its customers. Where appropriate, its provisions could be fleshed out through the use of subsidiary guidance notes as with the UK Banking Code rather than expanding the text of the Code itself. The Code cannot, and should not seek to be, a compendium of all regulation relevant to banking. To attempt this would involve massive duplication or a serious risk of confusion if paraphrasing of legislation was utilised. In any case, it would obscure the principles which the Code is meant to highlight.

#### **CONCLUSION**

The Commonwealth Bank Group appreciates the strong contribution which the Reviewer's Issues Paper has made to the Review of the Code of Banking Practice. It has focused attention on the banking issues of most concern to customers. The consultative process which followed the release of the Issues Paper has been valuable in helping the Group to have a more rounded understanding of the issues identified.

While good progress has been made in addressing most of the Reviewer's interim recommendations, work needs to continue on a number of significant questions. The Group looks forward to an ongoing dialogue with relevant stakeholders to resolve these remaining issues and finalise a revised Code which reflects the interests of all the parties involved.