

CONSUMER AND BUSINESS AFFAIRS VICTORIA

Submission: Review of Code of Banking Practice Issues Paper

1. Introduction

The Review of the Code of Banking Practice ('the Code') Issues Paper discusses a number of important consumer issues and highlights the necessity for banks to improve their relationship with consumers. Consumer and Business Affairs Victoria (CBAV) supports the interim recommendations within the paper, as the proposed changes will result in significant improvement on current banking practice. While the interim recommendations are supported as a whole, this submission also comments briefly on particular recommendations and provides more detailed discussion on the issue of monitoring and administering the Code.

2. Changes to objectives and principles, fairness, scope of the code, small business & privacy and confidentiality

CBAV particularly supports the interim recommendations regarding the above issues.

3. Bank closures

The interim recommendation to include a protocol, in line with recommendation 20.1-20.4 of the Hawker Report, for bank closures is welcomed. Recommendation 20.1 states that banks should give three months' notice of intention to close a branch. However, it would be desirable to nominate a longer notice period if specific factors apply, as outlined in the Australian Consumer Association's (ACA's) submission. Such factors may include the fact that the nearest remaining branch of that bank is a significant distance away or where no other banks operate in that community.

CBAV notes the discussion of bank closures in the document *Reforming Canada's Financial Services Sector: A Framework for the Future*.¹ Under this framework, the Canadian government will require federal deposit taking institutions to provide four months' notice of branch closures to customers, including posting notice of the closing date in the affected branch. In the case of rural areas where there are no other financial institutions within a ten-kilometre radius of the branch being closed, federal deposit taking institutions will be required to provide six months' notice of closure. Notice includes notice to customers, local authorities and newspapers, in addition to notice being posted in the affected branch. This submission also notes that, under the Canadian model, the Financial Consumer Agency will have the discretion to conduct a consultation if there are concerns that a branch closure is taking place with insufficient consultation. Given the demographic and geographic similarities shared by Australia and Canada, this model is particularly worthy of consideration.

¹ Department of Finance, Canada, *Reforming Canada's Financial Services Sector: A Framework for the Future* http://www.fin.gc.ca/toce/1999/finserv_e.html, (15 May 2001) pp. 4-6.

Further, the inclusion of the Hawker Report recommendations 20.5 and 20.6 within the Code would be highly desirable. These recommendations place a positive obligation on the bank to ensure access to cash withdrawal and deposit facilities remain in a community where a branch closes, and to provide education and training for the community in alternative forms of banking. These obligations would encourage banks to consider branch closure only as a last resort.

4. Access to banking services for people unable or reluctant to use ATMs, telephone banking or Internet banking

CBAV recognises the need for banks to appropriately accommodate the needs of older people and people with disabilities. It is encouraging that the Australian banking industry has responded to this need through the development of an E-Commerce Industry Action Plan. The Plan implements the recommendations arising from the Human Rights and Equal Opportunity Commission's report on *Accessibility of E-Commerce and New Service and Information Technologies for Older Australians and People With a Disability*. However, it is important that the process of improving the accessibility of new technologies is continued. Imposing enforceable obligations on banks to enhance access to banking services for older people and people with disabilities would assist in this process. Accordingly, the interim recommendation regarding this issue is strongly supported.

5. Fee free or low fee accounts

It must be acknowledge that in recent times some banks have, of their own accord, moved to provide low cost accounts to particular groups. In addition, the ABA recently announced that banks have agreed to provide a "safety net" account, with a set of principles underpinning the provision of such an account. As outlined by ABA, the account should: have community and government support; provide minimal personal services; be simple to understand and operate; and be targeted to the needs of customers with access barriers.²

These initiatives represent a positive move for some consumers. However, for such accounts to achieve the principles of community and government support and meet the needs of customers with access barriers, the ABA's 'safety net' account model would require some minor changes. The current 'safety net account model falls short of the model supported by the New South Wales government, as it does not offer "at least 12 free transactions per month (allowing at least 4 counter transactions)" and is not available to full-time students. In addition, the Joint Consumer Submission (JCS) has suggested that a higher fee-free limit on counter transactions would be appropriate for certain customers and the ACA has raised concerns regarding the lack of detail of the types of charges consumers face for extra transactions. These features, and a means of benchmarking extra transaction charges, would need to be

² Australian Bankers Association, 'Principles Underpinning Model Safety Net, Basic Bank Account' <http://www.bankers.ans.au/2603015.htm> (16 May 2001).

incorporated into the safety net account model before government and community support could be assured.

In terms of this review, the interim recommendation that current or prospective consumers be provided with details of accounts which are most suitable to low income or disadvantaged customers is supported, as a means of ensuring consumers have adequate information. However, the recommendation only ensures that consumers are informed of the bank's most appropriate account. It does not require banks to make 'safety net' accounts available. To ensure that all consumers have access to affordable minimum banking services, the provision of 'safety net' accounts, with the above additions, is highly desirable. As the ABA has taken on the provision of 'safety net' accounts as an industry standard, it is appropriate to make provision for 'safety net' accounts in the Code.

6. Disclosure requirements

CBAV supports the comments made in the ACA submission regarding disclosure requirements. It also supports the reviewer's interim recommendations regarding overlap between the Code and the Uniform Consumer Credit Code (UCCC). Consistency between the Code and the UCCC helps avoid confusion and uncertainty. Especially applauded is the recommendation that full and summary information be provided to customers who are 'shopping around' for banking products, as argued in the ACA's submission.

In addition, this submission strongly supports the requirement that banks provide a comparative interest rate when information about a consumer credit product's interest rate is given. This requirement may be met by proposed amendments to the UCCC, which seek to introduce mandatory comparison rates for fixed term credit. In the event that the proposed UCCC amendment is not passed, such a requirement should be included in the Code.

The reviewer calls for further comment regarding unilateral changes to terms and conditions of financial products. The UCCC provides for notice periods to be given where unilateral changes to terms and conditions are made to allow review of an unconscionable change. The reviewer notes caseworkers' concerns that consumers are often not aware of the bank's right to unilaterally change interest and charges. This may cause confusion and engender a feeling of powerlessness in contractual dealings. This submission supports requiring banks to ensure the consumer (not the customer) is informed of the possibility of unilateral changes and of the current notice requirements under the UCCC.

7. Credit assessment

With a high level of personal debt in Australia, credit over-commitment is an important issue for banks, government and consumer groups to address. The interim recommendation that bankers exercise principles of due care and skill in assessing a

customer's capacity to repay against the level of credit or loan funds it agrees to lend is strongly supported.

Unsolicited increases to credit limits have been an issue of significant concern, especially with regards to vulnerable consumers. The proposed interim recommendation would address this concern and, as such, is applauded.

8. Direct debits and chargebacks

The interim recommendations regarding direct debits and chargebacks are strongly supported. The Code should also require banks to automatically reinstate losses incurred in the nature of additional interest, fees or charges and any other cost as a result of an incorrect or fraudulent credit transaction, once the bank is made aware of that transaction.

9. Guarantees

The interim recommendation that the scope of the Code be broadened in relation to guarantees is a welcome development. Particularly supported is the recommendation that guarantee provisions apply to guarantors of small business loans (whether incorporated or not) and the recommended requirement that obligations imposed by the Code in respect of disclosure of information be absolute and not conditional on the consent of the principal debtor.

The reviewer recommends that a bank be obliged to ensure the guarantor is informed of the legal effect of the guarantee but is only required to advise guarantors to seek financial advice. A guarantor is better informed when he or she is aware of how real the possibility of being financially responsible for the guaranteed debt is, and what that will mean in relation to his or her assets and savings. Lack of understanding of the financial effect of the guarantee is a predominant factor affecting vulnerable prospective guarantors.

For this reason it would be desirable to require banks to ensure a guarantor has received professional advice on the financial implications of guarantees.

10. Code monitoring and administration

CBAV endorses the observations of the reviewer and of other agencies in relation to code monitoring and administration. The comments made by ASIC in its submission to the Inquiry on Industry Self-Regulation on this issue are also noted, in particular that "effective compliance monitoring and enforcement is essential to:

- ensure the objectives of the self-regulatory regime are met;
- maintain confidence in the self-regulatory regime; and

- ensure that the self-regulatory regime is fully accountable for its performance.”³

In order to achieve these objectives, an effective industry code should include an independent body for code administration, a mechanism to monitor, review and report on administration of the code, a mechanism for review of consumer disputes, and a process for regular review and improvement of the code.⁴

CBAV supports the interim recommendations in the areas of administration and compliance, sanctions, education, external monitoring, code review, and change implementation. Specific comment on some of these issues follows.

10.1 Code administration

It is pleasing to note that there is strong and uniform agreement on the need for ongoing code administration. CBAV supports the statement made in the JCS that the Code is “radically defective” in terms of code administration. Accordingly, it is strongly supportive of the Code designating a code governing body and specifying and role and functions of that body in relation to code administration. It is of paramount importance that the code governing body is independent from the banking industry (and perceived as such) and makes adequate provision for representation by consumer advocates.

This submission does not express a firm view on which administrative model would be most appropriate for the Code. It is recommended that consideration be given to models of code administration that are generally considered to be working effectively. For example, the joint consumer submission to the Taskforce on Industry Self-Regulation identifies the General Insurance Code of Practice and the Code of the Australian Pharmaceutical Manufacturers’ Association as “well regarded schemes”. The code administration framework governing the Victorian electricity industry is also worthy of consideration.

It is recommended that the reviewer develop an agreed set of policy principles from which to assess models of code administration and recommend a suitable model for the Code. It is essential that stakeholders be consulted as part of this process.

10.2 Compliance monitoring

CBAV notes and strongly supports the concerns identified in the Issues Paper regarding the adequacy of existing processes for monitoring compliance with the Code. The current monitoring procedure, where banks conduct a self-assessment against a pre-determined questionnaire and ASIC reports on the results of this assessment, lacks transparency and accountability. It fails to meet the benchmarks established by the Policy Framework for Codes of Conduct in relation to continual

³ Australian Securities and Investment Commission, *Submission to the Industry Inquiry on Self-Regulation*, January 2000, p. 15.

⁴ Consumer Credit Legal Service (Vic), Consumer Law Centre Victoria, Financial and Consumer Rights Council (Vic), *Submission to the Taskforce on Industry Self-Regulation*, December 1999, p 5.

monitoring and review of members' performances and fostering a culture of continuous improvement.⁵ Accordingly, this submission supports all of the reviewer's interim recommendations in relation to code monitoring. In particular, it is imperative that the Code identify the body responsible for monitoring compliance and the procedures to be undertaken by that body in relation to compliance monitoring.

One option is for ASIC to maintain responsibility for monitoring the Code. It is interesting to note that a similar model is being established in Canada, which is in the process of legislating to establish a Financial Consumer Agency (FCA). The FCA has a range of functions, including enforcing consumer-orientated provisions of federal financial instruments and promoting greater consumer confidence in the financial system. The FCA also monitors and reports on industry self-regulatory initiatives through conducting compliance audits and engaging in 'shadow shopping'. Other options include locating responsibility for monitoring with the Australian Banking Industry Ombudsman or establishing a dedicated body to undertake this task. Regardless of the model chosen, it will be necessary to ensure that consumers' interests are adequately represented on the monitoring body, that the body operates independently of the banking industry, and that the processes of the code monitoring body are transparent.

ASIC emphasises the need for the Code to impose specific obligations on code members to ensure that adequate information is available to the monitoring authority for the purpose of assessing compliance. These comments are endorsed. Sanctions should apply for failure to comply with these provisions (see further discussion of sanctions below). The comments made by ASIC in relation to the importance of internal and external compliance monitoring procedures are noted and supported.

The reviewer may wish to note clause 1.6.3 of the General Insurance Code of Practice, which provides for a review of the Code every three years. This provision has two interesting features, in that it a) requires the review to be completed within a specified period of time (one year) and b) requires agreed changes arising from the review to be incorporated into the Code, subject to approval by ASIC. The reviewer could consider recommending the inclusion of similar provisions in the Code.

The inclusion of detailed public reporting requirements on compliance monitoring in the Code is supported. The Australian Pharmaceutical Manufacturers' Association (APMA) Code of Conduct makes provision for annual reporting on activities of the Code of Conduct Committee, including:

- a summary of the complaint, response and deliberations of the Committee;
- a record of attendance of independent organisations at Code of Conduct meetings; and

⁵ Commonwealth Department of Consumer Affairs, *Policy Framework for Codes of Conduct*, March 1998, p 18.

- performance indicators as to the time taken to deal with complaints and activities undertaken to increase awareness of the Code.⁶

The Code also requires the APMA to release a summary of all Code breaches in appropriate medical journals on a six monthly basis and to provide information on Code breaches to the general public and media outlets.⁷ Equally, if not more, detailed reporting requirements should apply to subscribers to the Code. Reporting criteria should also be specified in the Code.

10.3 Sanctions

It is important that the Code be amended to permit a range of sanctions to be imposed on subscribers who breach it. CBAV is extremely supportive of the recommendations made by the reviewer in this area.

It is important that the Code specify which individuals and organisations have standing to make complaints about Code non-compliance. The recommendation that the Code include consumers, consumer advocates, regulatory agencies and dispute resolution schemes as able to make complaints is supported. The submission notes that the ANZ Bank recently announced the introduction of internal customer advocates to assist in the satisfactory resolution of customer complaints.⁸ Banks' customer advocates, where they exist, should also have the ability to make complaints about non-compliance with the Code.

Any sanctions specified in the Code should be sufficiently broad as to accommodate situations where consumers have suffered financial and non-financial loss. This is particularly important in light of the limitations on the ABIO's ability to compensate customers for indirect loss or damage.⁹ The reviewer could consider a range of sanctions including undertakings, retraction statements (including corrective letters and advertising), naming, external compliance audits and fines. Such sanctions should also be able to accommodate more severe penalties for systematic and ongoing breach of the Code, including suspension or revocation of membership.

The comments of the JCS relating to mechanisms to encourage consumers to report breaches of the Code where non-financial loss is not involved are noteworthy. The JCS suggests that the Code could include a penalty provision under which a subscriber agrees to pay a small sum to any customers whose complaint that the Code had been breached was established, irrespective of the loss or damage suffered by the customer. The ANZ Bank recently announced a similar initiative in relation to its Customer Charter. According to the ANZ "[a] key feature of the Charter will be a financial donation payable by ANZ to the registered charity of the customer's

⁶ Australian Pharmaceutical Manufacturers' Association (APMA), *Code of Conduct*, cl 16.1. See also Australian Direct Marketing Association, *Direct Marketing Code of Practice*, cl 21.

⁷ *Ibid* cl 16.2.

⁸ ANZ Bank, 'ANZ announces customer and community initiative', *Media Release*, 20 April 2001.

⁹ Australian Banking Industry Ombudsman, *Terms of Reference*, cl 13.

choice, if it does not meet its complaint resolution standards.”¹⁰ The willingness of the ANZ to adopt processes to compensate consumers irrespective of loss suggests that it would be timely to incorporate similar provisions into the Code.

10.4 Staff training

The existing provision of the Code is inadequate and does not impose appropriate obligations on subscribers to provide training to staff and agents. This submission therefore supports the reviewer’s interim recommendation. However, there is also support for the comments made in the JCS about extending the ambit of staff training to include all relevant legal and compliance requirements. This should not only include industry-specific instruments such as the Code, Uniform Consumer Credit Code, EFT Code of Conduct and E-Commerce Industry Action Plan but also generally applicable legal mechanisms such as equal opportunity and anti-discrimination statutes and consumer protection law.

The provisions of the General Insurance Industry Code of Practice are attractive in this regard. Clause 3.3 of that Code requires training to be provided to a level that allows insurance agents to competently provide insurance services. In addition, insurers are obliged to ensure that agents receive adequate instructions and documentation, in addition to adequate training, and states that these obligations are ongoing. The reviewer may wish to give consideration to this model.

10.5 Code promotion

CBAV recognises that the Code cannot be of real value unless customers and consumer advocates have a sound knowledge and understanding of it. As ASIC observes, awareness of relevant codes can also play a role in increasing consumer confidence that code members meet standards that are above and beyond those required by law.¹¹ The absence of any obligation imposed on subscribers to promote and publicise the Code is therefore of considerable concern. This submission strongly supports the interim recommendation requiring the code administration body to promote the Code and oblige banks to display and provide copies of the Code.

Currently, there is no specific obligation imposed upon subscribers to promote, display and distribute the code in a format that is readily accessible by vulnerable consumers. People from culturally and linguistically diverse backgrounds and people with visibility problems are likely to have specific needs in this regard. While not directly comparable, the Victorian Gas Customer Supply Code requires gas suppliers to provide access to multi-lingual services to meet the reasonable needs of its customers.¹² Both the Victorian Gas Customer Supply Code and the Electricity Retail

¹⁰ ANZ Bank, ‘ANZ announces customer and community initiative’, *Media Release*, 20 April 2001.

¹¹ *Australian Securities and Investment Commission, Submission to the Review of the Code of Banking Practice*, September 2000, pp. 38-9.

¹² *Office of the Regulator General, Victoria, Victorian Gas Customer Service Code*, cl. 2.3.1.1(a).

Code also require suppliers to provide large print versions of their respective codes upon request, although a fee may be charged for this service.¹³

This submission recommends that the reviewer give consideration to recommending that subscribers ensure that code promotional activities are undertaken in a way that accommodates the needs of vulnerable consumers. It also recommends that subscribers be obliged to have copies of the Code available in a range of community languages and in a large print version. In order to increase awareness of the Code amongst people living in regional areas, subscribers should also be required to make the Code available via the internet. Further, material used in promoting the Code should advise consumers of who they can contact if they have any questions or wish to obtain further information about the Code.

10.6 Ongoing consultation

As the reviewer states, the establishment of a forum that guarantees regular discussions between consumer groups and the banking industry would be of great benefit. This submission strongly endorses the proposal that the Code establish such a forum. In doing so, it is noted that the reviewer is seeking comment on the structure of such a forum. One option for consideration is developing a consultative structure through state and territory consumer affairs agencies, who in turn report to the Ministerial Council for Consumer Affairs (MCCA). MCCA is comprised of all Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection and credit laws. Its role is to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues.

MCCA maintains considerable interest in banking issues, particularly in relation to minimum service standards.¹⁴ This interest could be fostered through MCCA entering into a memorandum of understanding with the ABA regarding responsibility for and arrangements relating to consumer/banking forums. Practically, this would mean that each state-based consumer affairs and fair trading agency would have responsibility for convening an annual forum involving consumer groups and members of the banking industry. Each state and territory would report to MCCA on the outcome of these forums. MCCA would then report to the ABA, the code governing body and ASIC on the outcome of the consultation process. Issues to be discussed at the forum, attendees, and administrative processes could be detailed in the memorandum of understanding. However, it would be appropriate for subscribers to the Code to meet the costs associated with conducting these consultations.

There are a number of advantages to this proposal. Firstly, it would maximise opportunities for consultation to occur at a local level and incorporate the views of a

¹³ Ibid cl 2.3.1.1.(b), Office of the Regulator General, Victoria, *Electricity Retail Code*, cl. 18.3.

¹⁴ New South Wales has tabled two papers for discussion on this issue – *Banks in Australia and Minimum Service Standards: USA Precedents for Regulation*, 1999, and *Minimum Banking Services Discussion Paper*, 2000.

range of stakeholders. Secondly, it would utilise existing consultative networks which state and territory consumer affairs agencies have developed with consumer representatives and advocates. Locating responsibility for organisation of a banking forum with state based consumer affairs agencies would therefore be extremely cost-effective. Thirdly, such an approach would complement MCCA's work in relation to banking issues and complement initiatives developed by consumer affairs and fair trading departments. The forum on credit over-commitment that was conducted by the NSW Minister for Fair Trading is an example of such an initiative. Fourthly, the involvement of an independent government agency will promote confidence in the integrity of the process and maximise transparency. The reviewer's comments on this proposal are welcomed.

11. Conclusion

CBAV appreciates the opportunity to consider and respond to the Issues Paper. The reviewer should be congratulated on his comprehensive and detailed discussion of issues and on the scope of his interim recommendations. These recommendations, if implemented, would result in significant improvements for consumers in their dealings with banks. They would also address many prominent concerns. The reviewer's final report is eagerly anticipated.