

JOINT CONSUMER ORGANISATIONS

SUBMISSION ON DIRECT DEBITS AND GUARANTEES IN RESPONSE TO THE REVIEW OF THE CODE OF BANKING PRACTICE ISSUES PAPER

15th June 2001

Mr Dick Viney
Banking Code of Practice Review
P.O. Box 2045
PARKDALE VIC 3195

Dear Mr Viney

Consumer Organisation Views – Direct Debits and Guarantees

DIRECT DEBITS

We understand there is an industry view that the Banking Code of Practice should not contain provisions relating to direct debits because this would result in inconsistency in application of the BECS rules established by APCA.

However, there are serious concerns for consumers in relation to direct debits:

- Inability, in many cases, to cancel a direct debit by giving notice to the bank and other financial institutions,
- Delays in rebating disputed payments while a complaint is being investigated, and
- misuse of the direct debit system (use of direct debits as a form of security for loans (pay day lenders) and repeated "presentation" when direct debit "bounces" being used as a form of harassment.)

Consumer advocates are strongly of the view that the Banking Code must establish as a priority a clear direct debit guarantee and implement the recommendations of the Issues Paper. Separately we strongly recommend that APCA rules on direct debits be amended to ensure appropriate consumer protection (including verification of authorisations) and capacity to stop direct debits with all financial institutions.

Consumers need certainty, and we believe a strong commitment in the Code is crucial, even though this may, in the future, encourage changes in the BECS rules and establishing clear accountabilities, cancellation and verification processes for direct debits.

Consumers must have assurances that:

- direct debits cannot be established on their account without their explicit authorisation

- any mistakes, non-authorised or contested direct debits will be refunded by their financial institution, and
- direct debits provided to third parties must be able to be cancelled by the consumer with their financial institution immediately and on request.

Consideration should also be given to applying a limit of 2 attempts on direct debits, and a requirement that the bank notify the customer when a direct debit “bounces” more than once.

We note that in relation to APCA decision making which impacts on consumers there has been no formal consumer representation, and this must be addressed separately from this review. Given the significant consumer concern regarding direct debits and other issues, this is undesirable, and out of step with current developments. Consumer consultation in relation to the current Banking Code Review and the review of the EFT Code has been an important part of the process, and welcomed by industry and regulators such as ASIC.

GUARANTEES AND INDEMNITIES

Unless otherwise noted here, we support the Interim Recommendations set out in the Issues Paper in relation to guarantees. The following comments either highlight elements of the Interim Recommendations that are considered to be of particular importance or contain suggestions for alteration to or further consideration of the Interim Recommendations.

Provision of information to guarantors

(i) Consent of principal debtor to provision of information

In our view it is imperative that the obligations imposed by the Code in respect of disclosure of information are absolute, and are in no way conditional on the consent of the principal debtor.

Where other legislative requirements or prohibitions impact upon the provision of this information it should be the responsibility of the member Bank to ensure the requirements are met in order that the information can legitimately be provided to the prospective guarantor. In the absence of full disclosure of relevant information the guarantee should not proceed.

(ii) Financial Information

It was argued in the JCS and ACA submissions that relevant information provided to the prospective guarantor should include the borrower’s purpose. It was concluded by the Reviewer that where the purpose was not included as part of the loan application or required as part of loan approval, it was “appropriate for the guarantor to seek out the borrower’s intentions direct from the borrower”.

The purpose of a loan may be an important factor for the prospective guarantor. While the guarantor can ask the borrower for information, it is much preferable for the bank to seek this information and disclose the purpose stated by the borrower to the guarantor when other information about the credit is provided by the bank. This would ensure that important information which the bank has isn’t withheld from the guarantor.

We would also seek clarification of the Interim Recommendation that “a bank be obliged to advise guarantors to seek financial advice”, in order to ensure that prospective guarantors are *directly* advised (or even actively encouraged) to seek *independent* financial advice, and that this advice is given *after* the prospective guarantor has been provided with all relevant information required to be given by the Bank.

Advice about the operation of the guarantee

We consider it to be fundamentally important that the provision of any advice regarding the guarantee is provided by the Bank directly to the prospective guarantor in the absence of the principal debtor, and that the guarantee is signed in the absence of the principal debtor. As the Reviewer has noted, this latter requirement is necessary “in recognition [of the fact] that many guarantors are vulnerable to pressure from other family members”.

The requirement that information and advice be given at least one day before signing the guarantee provides a very important protection to guarantors, and one which we consider to be undermined by the exception where the guarantor has received independent legal advice.

It is our view that the independent legal advice provided to prospective guarantors is often problematic, and cannot be relied upon as effective and complete protection for the guarantor. In any event, given that guarantors are often only brought into a transaction at the last minute, even where they receive comprehensive legal advice they should be afforded the opportunity to consider their options without unnecessary haste. Accordingly we consider the requirement for a one day waiting period should apply without exception.

While we note the Interim Recommendations give the guarantor a right to information regarding the loan upon request, we believe the Code needs to go further in ensuring the guarantor is kept aware of the status of the loan. The JCS suggested that the guarantor should be provided with statements of account and default notices in order to remain properly informed about the progress of the loan. Such information, particularly default notices, should be given to the guarantor whether or not a specific request has been made.

Right to withdraw

The Reviewer has sought further comment regarding whether the UCCC approach to withdrawal from a guarantee - section 53 (without the WA restrictions) is appropriate and practical in the context of the Code. Section 53 provides a right to withdraw in two distinct cases. The first of these is where the credit has not yet been provided, and the second is where the credit contract differs in some material respect from the proposed credit contract given to the guarantor prior to the guarantee being entered into.

While the first scenario obviously involves different or additional considerations in a commercial context it is our view that guarantors should be provided with this right, not least because the disruption withdrawal may cause a commercial transaction is

outweighed by the inherent and undisputed concerns regarding the problematic nature of guarantees.

We can see no reason why the Code should not allow withdrawal from a guarantee in the case envisaged by the second scenario.

Submitted by:

Louise Petschler, Finance Policy Officer
Australian Consumers' Association
57 Carrington Road, Marrickville 2204

Carolyn Bond, Co-ordinator
Consumer Credit Legal Service (Vic)
11-19 Bank Place, Melbourne 3000

Endorsed by:

- Consumer Credit Legal Service
11-19 Bank Place, Melbourne 3000
- Australian Consumers' Association
57 Carrington Road, Marrickville NSW 2204
- Consumer Credit Legal Centre NSW
72 Cooper Street Surry Hills NSW 2010
- Consumer Law Centre Victoria
Level 7, 20 Queen Street Melbourne 3000
- Queensland Consumers' Association
33 Dracon Street, REGENTS PARK Q 4118