

NSW YOUNG LAWYERS BUSINESS LAW COMMITTEE
SUBMISSION OF THE REVIEW OF THE CODE OF BANKING PRACTICE
ISSUES PAPER

Summary of Interim Recommendations and issues on which further views
are sought

1. *Changes to the Objectives and Principles*

That:

- *in lieu of Objective 1, the Code articulate a commitment to continuous improvement in the standards of practice and service in the banking industry; and*
- *in lieu of Objective 2, the Code articulate a commitment to promoting better informed decision making by bank customers by all means available, including providing effective disclosure of information and providing appropriate advice.*

Young Lawyers agrees with this recommendation in principle.

2. *Fairness*

That the Code incorporate a principle of "fairness" in terms of the New Zealand Code, subject to substituting the following for Section 1.7.3(i):

"(i) Our conduct and yours and whether the circumstances of the case might justify not applying the strict terms of the contract".

Young Lawyers makes no comment on this recommendation.

3. *Prudential Principle*

That the prudential principle be retained in the Code.

Young Lawyers make no comment on this recommendation.

4. *Scope of the Code*

Definition of "Banking Service"

That the Code define "banking service" to mean any service provided by a bank to a customer.

Young Lawyers agrees that the definition of *Banking Service* should be extended in the manner recommended in the Report.

Definition of "Customer"

That the Code apply to any banking service provided to an individual, whether alone or jointly with another individual.

Young Lawyers is of the view that the definition of *Customer* should be extended as recommended.

Small Business

That the operation of the Code be extended to small businesses. We agree with the recommendation that the Code of Banking Practice should be extended to cover Small Businesses.

That the Code define "small business" in the same terms as FSR defines "retail client".

We do not agree with the recommendation that *Small Business* should be defined in the same terms as the FSR defines "retail client", the reason being that the FSR definition of "retail client" is more complex than required for the code. Only subsection 12 of definition of "retail client" is relevant to the definition of *Small Business*.

The definition of *Small Business* should include references to turnover, asset values and employee numbers. The New Business Tax System (Simplified Tax System) Bill 2001 (NBTS(STS)B) uses references to turnover and asset values to define STS Taxpayers, which are basically small businesses.

Young Lawyers suggests that the definition of *Small Business* be:

"Small Business means a business with

- (a) an average annual turnover of less than \$1,000,000;
- (b) depreciating assets with an end of year value below \$3,000,000; and
- (c) less than 100 employees in the case of a manufacturing business or less than 20 employees in all other cases.

The turnover and asset value figures are those used in the NBTS(STS)B. The turnover threshold may well be too low.

That:

- *the Small Business Principles be reviewed to ensure they are in the most appropriate terms for codification in the Code;*
- *the Small Business Principles as so reviewed be incorporated into the Code;*
- *the disclosure provisions of the Small Business Principles be expressed to apply only to credit products.*

Young Lawyers agrees that the revised Small Business Principles be incorporated into the Code.

However, we do not agree with the recommendation that Small Business Principles be expressed to apply only to credit products. The Small Business Principles should apply to all *Banking Services* provided to *Small Businesses*.

5. *Monitoring Compliance*

That:

- *the Code provide specifically for the organisation which will administer the Code and monitor and report on compliance with the Code by subscribing banks;*
- *the organisation have experience in consumer banking issues and have sufficient independence from banks;*
- *the ABIO Council and ASIC be among the organisations considered for the role;*
- *irrespective of what organisation monitors compliance with the revised Code, some independent compliance monitoring (including by "phantom shopping") will be utilised.*

Young Lawyers agrees with this recommendation.

6. *Sanctions*

That the Code:

- *entitles consumers, consumer advocates, regulatory agencies and dispute resolution schemes to make complaints about non-compliance with the Code;*
- *detail complaint making, investigation and decision making processes;*
- *ensure the investigation and decision making processes are impartial, fair, efficient and accountable; and*
- *provide an adequate range of sanctions.*

That the oversight of these processes rest with the Code monitoring agency.

Young Lawyers agrees with this recommendation.

7. *Educating Code Members (and their staff and agents) about the Code*

That the Code oblige banks to ensure all relevant staff and agents have an adequate knowledge of its provisions.

Young Lawyers agrees with this recommendation.

8. *Promoting the Code to Consumers, Consumer Advisors and the Public Generally*

That:

- *the Code require the Code administration body to promote the Code among bank customers, consumer advisors and the public generally.*
- *banks be obliged to display the Code, and have copies available on request by any person, at all branches.*

Young Lawyers agrees with this recommendation.

9. *Monitoring External Developments including Legislative Changes*

That the Code require the Code administration body to oversee and keep Code subscribers informed of legislative and other developments.

Young Lawyers agrees with this recommendation.

10. *Arranging for Regular Reviews of the Code and Ensuring Ongoing External Representation and Consultation in Critical Areas*

That at the minimum, the Code provides that the review process will ensure:

- *adequate consultation with interested parties;*
- *interested parties have adequate time to present views;*
- *the review process is transparent.*

That the Code establish a forum for regular exchange of views between banks and consumer advisors on banking issues.

Young Lawyers agrees with this recommendation in principle.

11. *Implementing Changes*

That the Code require ABA:

- *to promptly publish the final report and recommendations of any review; and*
- *to publish on ABA's website, at quarterly intervals, progress reports on implementation of a review's recommendations until the implementation process is complete.*

Young Lawyers agrees with this recommendation.

12. *Access to Banking Services*

That the Code incorporate the proposals made in Recommendations 20.1 to 20.4 of the Hawker Report.

Young Lawyers makes no comment on this recommendation.

13. *Access to Banking Services for People unable or reluctant to use ATMs, telephone banking or Internet banking*

That the Code provide that banks take all reasonable measures to enhance access to banking services for older people and people with disabilities.

Young Lawyers agrees with this recommendation.

14. *Low Cost Accounts for Banking Services*

That the Code require banks to provide details of their accounts which are most suitable to low income or disadvantaged persons who are prospective customers and also to existing customers whose present facilities may not be optimal.

Young Lawyers agrees with this recommendation.

15. *Customer Access to Information Entitlements and Contractual Rights*

That:

- *significant overlap between Code provisions and other laws, particularly UCCC and FSR, is undesirable and that overlapping Code provisions be deleted from the Code;*
- *there be included in the Code for information purposes only (and not as substantive provisions), material which advises consider and bank staff of disclosure rights and obligations arising under UCCC and FSR and other relevant laws and which summarises the principal features of these rights and obligations;*
- *in order to retain the essence of the current position whereby banks are contractually bound to meet their disclosure obligations under the Code, the Code contain a provision by which banks contractually bind themselves to their customers to meet their disclosure obligations under FSRB, UCCC and other relevant laws.*

Young Lawyers agrees with this recommendation.

16. *"Fleshing out" the necessary detail for PDS*

That the Code is not the appropriate medium for fleshing out the necessary detail of PDS for the purposes of FSR. However, this does not preclude using the Code to signpost where the fleshing out is actually done.

Young Lawyers agrees with this recommendation.

17. *Which Disclosure Requirements should remain in the Code if all Overlapping Provisions are removed*

That the Code require banks to provide to any person on request:

- *terms and conditions of any banking service;*

- *full particulars of fees and charges that are or may become payable in respect of any banking service;*
- *particulars of the interest rates applicable to any banking service; and*
- *the material currently listed under Code 6.1.*

That the Code also require banks to have the above material readily available so that requests can be met expeditiously.

Young Lawyers agrees with this recommendation.

18. *Other gaps*

That there be retained in the Code those existing Code disclosure obligations which are not replicated in, or superseded by, disclosure requirements arising from FSR or UCCC.

Young Lawyers agrees with this recommendation.

19. *Timing differences affecting notification of changes*

That:

- *UCCC and not the Code should specify the notice requirements for changes to UCCC regulated products;*
- *FSR and not the Code should specify the notice requirements for changes relating to fees and charges; and*
- *the existing Code notice requirements be retained for all other changes.*

Young Lawyers agrees with this recommendation.

20. *Statements of Account*

Statements of Account for Credit Products

That the Code apply the substance of UCCC requirements in sections 31 to 34 (inclusive) to small business statements of account and related information.

Statements of Account for Non-Credit Products

That:

- *Code clause 14.1 require a statement of account at least each three months;*
- *the existing exclusion in Code clause 14.1(ii) be replaced with a new exclusion confined to the occasion where no amount has been debited or credited to the account during the statement period; and*
- *Code clause 14.1(iii) be deleted.*

Young Lawyers makes no comment on these recommendations.

21. *Shadow Ledgers*

That banks automatically provide customers in default with statements of account as if the accounts were not in default.

Young Lawyers agrees with this recommendation.

22. *Code Clauses 9.1 and 9.3*

Suggested Clarification in Code

That unless FSR already so requires, the Code require all affected customers to be given 30 days' advance notice in writing of a change in the minimum balance to which an account keeping fee exemption or relief provision applies or a change in the interest rate tiers applying to a deposit account.

Notification of changes to the fees for stand alone transactions or services

That Clause 9.1 of the Code be amended so that notification is not required where it is not possible to identify the affected customers.

Notification of changes to interest rates for money market products

That clause 9.3 of the Code be amended to ensure that it reflects current accepted market practices.

Young Lawyers makes no comment on these recommendations.

23. *Staff Training*

That the Code require banks to ensure that staff are competent to discharge their functions efficiently.

Young Lawyers agrees with this recommendation.

24. *Copies of Documents*

That:

- *the Code require banks to supply on request, copies of contracts, account statements, notices and other relevant documents to customers, guarantors and persons acting for them, subject to the usual confidentiality and privacy requirements being satisfied; and*
- *the times within which copies are to be provided should be modelled on UCCC section 163(2).*

Young Lawyers agrees with this recommendation.

25. *Customers in Financial Difficulties*

That the Code contain a provision closely modelled on clause 15 of the UK Banking Code, but with an additional obligation on banks to advise customers in hardship of their rights under UCCC where the contract or guarantee is regulated.

Young Lawyers agrees with this recommendation. However, we suggest that banks be required to advise their customers in writing of their rights under the UCCC where the contract or guarantee is regulated.

26. *Debt Recovery*

That the Code require banks to:

- *comply with the Guideline; and*
- *ensure that their agents also comply with the Guideline.*

Section 60 of the TPA has not yet been tested in Court but the Guideline was developed to “help clarify community expectations of business when collecting debts”. While the Guideline is not law, it provides a framework for management of debt collection activities and identifies the type of conduct that the ACCC considers may contravene section 60.

In light of this, Young Lawyers agrees with the recommendation.

That apart, the Guideline is meant to be used in conjunction with the Compliance Guide. While it could be suggested that the specific reference to the Compliance Guide in the Guideline is enough to indicate its incorporation into this recommendation, it would be preferable that the Code specifically indicate required compliance with the Compliance Guide.

27. *Privacy and Confidentiality*

That:

- *until the Privacy Amendment (Private Sector) Act becomes fully operative, banks comply with the National Privacy Principles; and*
- *once that Act is fully operative, banks comply with the Act.*

Young Lawyers agrees with this recommendation.

28. *Credit Assessment*

That the Code contain a provision, in lieu of existing clause 15.1, that could be drafted along the following lines:

"A bank will exercise the care and skill of a diligent and prudent banker in assessing the level of credit or loan funds it agrees to lend to a customer in order to satisfy itself that the level of credit or the loan funds are suited

to the customer's stated financial needs and within the customer's capacity to repay."

Young Lawyers makes no comment on this recommendation at this stage.

29. *Implementing Family Court Decisions and Family Law Settlements*

That the Code provide that a bank shall, no later than 1 July 2002, publish guidelines setting out the manner in which the bank will:

- *deal with the applications for transfer of mortgages and consents to transfer of title pursuant to a Family Court determination or approval; and*
- *otherwise enforce debts affected by a family law property settlement.*

Young Lawyers makes no comment on this recommendation at this stage.

30. *Direct Debits*

That the Code provide for:

- *a Direct Debit Guarantee with features of the UK guarantee;*
- *an absolute obligation on Ledger F1.s to automatically reinstate losses incurred in the nature of lost interest, additional fees and charges and any other costs as a result of an incorrect direct debit which are reasonably ascertainable by the Ledger F1 when the direct debiting error is recognised; and*
- *an obligation on the Lodger F1 to provide other compensation for other losses as described in the ABIO guidelines.*

Young Lawyers agrees with this recommendation.

31. *Chargebacks*

That the Code require a bank to ensure that the terms and conditions of use of any credit card:

- *include general information on the existence and operation of chargeback rights;*
- *specify prominently an appropriate time frame for reporting a disputed transaction, being a timeframe which would allow the bank to request a chargeback but does not unnecessarily shorten the reporting time; and*
- *warn the cardholder that the ability to dispute the transaction may, but need not necessarily, be lost if they do not report in time.*

That the Code require a bank to:

- *process all disputed transactions as chargebacks where a chargeback right exists;*
- *use its best efforts to use the most appropriate reason code for the chargeback;*
- *not accept a rejection by the acquirer bank unless it is satisfied the rejection is reasonable; and*
- *include general information about chargebacks in or with statements of account at least once every twelve months.*

Young Lawyers agrees with this recommendation.

32. *Guarantees and Indemnities*

Application of Code to guarantors

That Code provisions relating to guarantees apply to all guarantees given by individuals in respect of facilities or accommodation provided by a bank to individuals or small business whether incorporated or not. For these purposes "small business" shall have the same meaning as "retail client" in FSR.

Young Lawyers agrees with this recommendation. For clarification, the definition of "retail client" in the FSR is of an individual, who obtains, inter alia, a financial product in connection with a small business.

Provision of information to guarantors

(i) Consent of principal debtor to provision of information

That the obligations imposed by the Code in respect of disclosure of information be absolute and not conditional on the consent of the principal debtor.

(iii) (sic) Financial information

That the Code require a bank to provide a prospective guarantor with all relevant information about the principal debtor and the transaction or facility to be guaranteed which:

- (a) is in the possession of the bank; and*
- (b) a prospective guarantor would reasonably require in order to decide whether or not to enter the guarantee.*

That for this purpose, information includes representations with respect to a future matter, and also includes information provided by the principal debtor to the bank and any credit reporting agency reports and other expert reports obtained by the bank. It would not include the bank's own internal opinions.

That banks be obliged to advise guarantors to seek financial advice.

Young Lawyers agrees with these recommendations. That is, that lenders should be required to provide the guarantor with information relevant to the financial position of the borrower. However, query whether this information should include any credit reporting agency reports, as they are generally confidential and can only be accessed with the consent of the relevant party, in this case, the borrower.

The consent issue can perhaps be remedied by a requirement that the consent of the borrower be made a condition of the contract.

We suggest that the consent of the borrower be made a condition of the contract be added to this subclause.

(iv) (sic) Advice about the operation of the guarantee

That:

- *a bank be obliged to ensure the guarantor is informed of the legal effect of the guarantee, (including advice that the guarantor can refuse to enter into the guarantee and that there are financial risks involved) either by the guarantor receiving independent legal advice or by being advised by the bank itself. Where the bank itself provides the advice, it must recommend to the guarantor that the guarantor obtain independent legal advice. This should be done in a face-to-face interview in the absence of the principal debtor. It is not intended that the bank or the legal adviser give financial advice;*
- *a warning notice similar to the UCCC notice appear directly above the signature of the guarantor to reinforce the verbal warning on any guarantee not regulated by UCCC;*
- *a bank shall ensure that the guarantor signs the guarantee in the absence of the principal debtor;*
- *a guarantor shall be given information and advice at least one day before signing the guarantee unless the guarantor has received independent legal advice;*
- *a bank shall provide a guarantor on request with full statements of the guaranteed account or accounts and copies of any applicable facility documents, securities, guarantees, credit related insurance products and any notices previously given to the principal debtor.*

In relation to point one (1) of this subheading, there are two issues:

- (i) The bank should not be providing the guarantor with information on the legal effect of the guarantee and the financial risks for conflict reasons and the fact that the bank is likely not to have the expertise to do both; and

- (ii) To make the guarantor obtain independent legal advice may unnecessarily delay transactions and will not deal with the problem of "relationship debt".

We suggest that this subclause be amended as follows:

"A bank be required to:

- (a) inform the Guarantor that there are legal and financial risks involved;
- (b) inform the Guarantor that he or she can refuse to enter into the guarantee; and
- (c) recommend that the Guarantor obtain independent legal advice.

In the event that the Guarantor does not wish to obtain independent legal advice, this should be confirmed in writing by the Guarantor to the bank".

In relation to point three (3) of this subheading, if it is agreed that the bank should not be providing advice on the guarantee then the words "and advice" must be omitted.

In relation to point four (4) of this subheading, the banks obligation to provide the guarantor with information should be expanded.

We suggest that this subclause be amended to the following effect:

"A bank must provide a guarantor, within a reasonable period of time, with full statements of the guaranteed account or accounts and copies of all applicable facility documents, securities, guarantees, credit related insurance products and any notices given to the principal debtor:

- (a) on request;
- (b) when the creditors financial position changes, including without limitation, all instances where the principal debtor repayments under the loan contract fall into arrears; and
- (c) when the terms of the loan contract are varied".

Form of guarantee (limitations)

That the Code provide that a bank shall not accept an all accounts or all moneys guarantee mortgage unless the mortgage contains a provision that it does not extend to any future contract or facility unless the mortgagor signs an extension of the mortgage after being provided with a copy of the new contract or facility.

Young Lawyers agrees with this recommendation.

Right to cap liability

That the guarantor be given a contractual right to vary the guarantee by reducing the cap on liability or limiting the amount or nature of the liabilities guaranteed, subject to appropriate qualifications to protect the bank's financial position.

That the Code adopt the requirements set out in UCCC Section 54 in relation to the extension of a guarantee to any future contract between the bank and the principal debtor.

Young Lawyers agrees with this recommendation.

Enforcement

That the UCCC rules relating to the enforcement of guarantees be applied by the Code to all guarantees given in respect of all debtors other than small business debtors.

The rule relating to enforcement of guarantees referred to is set out in Section 82 of the UCCC. The existing Code of Banking Practice has adopted section 82 but does not apply it to situations where the debtor is a small business debtor. If recommendation 4 is adopted then the Code will apply to small business debtors.

33. *Joint borrowers*

Signing up guarantors as co-borrowers

That the Code provide that a bank should not sign up a party as a co-borrower where, on the facts known to the bank, the party will receive a no direct benefit under the contract.

Young Lawyers agrees with this recommendation.

Extent of a co-borrowers liability

That the Code require a bank, before signing up co-borrowers, to take all reasonable steps to ensure that each borrower understands the full extent of his/her liability.

Young Lawyers agrees with this recommendation.

Termination of liability for future advances

That a bank shall ensure that under any contract it enters into where each party is jointly and severally liable, either party should be able to terminate that liability unilaterally in respect of future advances or financial accommodation by adequate written notice to the bank. Qualifications may be necessary to protect the bank's legitimate interests in relation to further advances it is obliged to make and in respect of contingent liabilities which may accrue in the future.

Young Lawyers agrees with these recommendations.

34. *Subsidiary Cards*

That where a primary cardholder advises the issuing bank that it wants a subsidiary card cancelled, the primary cardholder shall not be liable for continuing use of the card, provided the primary cardholder takes all reasonable steps to procure the return of the subsidiary card to the issuing bank.

Young Lawyers agrees with this recommendation.

35. *Mutuality and set off*

That the Code require a bank, when opening a new account for a customer who already has an account(s) with the bank, to state in writing whether the account will be segregated from the other account(s) and what the consequences are if the account is not segregated.

Young Lawyers agrees with this recommendation.

36. *Dispute Resolution*

Internal complaint handling

That a bank will have an internal process for handling complaints with its customers. This process will:

- *be free of charge;*
- *be consistent with Australian Standard AS 4269-95;*
- *ensure that customers are notified of the name and contact number of a person who is investigating their complaint;*
- *specify time frames (of not more than 45 days) within which an investigation must be completed (unless there are exceptional circumstances);*

[Note: Exceptional circumstances may include delays caused by other institutions involved in resolving the dispute.]

- *provide monthly updates on the progress of investigations that continue beyond 45 days (except in cases where the bank is waiting for a response from the Customer and the Customer has been advised that the bank requires such a response); and*
- *require the bank to provide written reasons for its decision in respect of a complaint [subject to any Code provisions on election for electronic communications].*

That the internal process will be available for all complaints other than those that are resolved to the consumer's satisfaction immediately they are drawn to the attention of the bank.

External dispute resolution

That a bank will have available to its customers an external and impartial process for resolving disputes. This process will be free of charge and will be consistent with the regulatory guidelines for the approval of external complaints resolution schemes.

Publicising and notifying Customers of complaints and dispute resolution processes

That a bank will prominently publicise the availability and accessibility of both its internal and external processes for resolving complaints and disputes.

That, as a minimum, information about internal and external processes will be readily accessible and on display in bank branches and through bank Internet sites and bank telephone banking services.

That, in addition, a bank will provide a Customer with written information [subject to any provision for electronic communication] about:

- (i) the internal process, at the time that a Customer makes a complaint that is not immediately resolved to the satisfaction of both the Customer and the bank; and*
- (ii) the external process, at the time that a Customer is advised of the final outcome of the internal process and that outcome does not wholly satisfy the Customer's claim.*

Young Lawyers agrees with the recommendations subject to the following. Firstly with respect to internal dispute resolution the Code should make explicit reference to the availability of the Australian Banking Industry Ombudsman scheme as an avenue of recourse if a complaint is not adequately resolved via internal means. It should be clearly communicated to the customer that the ABIO is an impartial body.

Secondly the Code should state that a customer is not bound to accept an adverse finding for either an internal or external dispute resolution.

Thirdly in the event of a complaint the Code should require that banks provide the complainant with relevant documentation such as the Australian Banking Association Code of Conduct, the Australian Banking Industry Ombudsman Scheme, Electronic Funds Transfer Code of Conduct, Australian Banker's Association Code of Practice for Farmers and the Farm Debt Mediation Act 1994.

37. *Electronic Communication*

That the Code provide for Electronic Communications in something like the following terms:

"Electronic communications:

- (1) *A customer may agree that a bank can provide by electronic communication to the customer's device, electronic equipment or electronic address nominated by the customer any information which this Code requires the bank to provide (by writing or other means). The customer's agreement must be by a specific positive election after receiving an explanation of the implications of making such an election. The customer may by notice to the bank vary the customer's nominated device, electronic equipment or electronic address or terminate the agreement to receive electronic communication from the bank and the bank must inform the customer of those rights.*
- (2)
 - (i) *Subject to (ii), making information available at a bank's electronic address (eg web site) does not satisfy any requirement of this Code that the information be provided to a customer.*
 - (ii) *Where a customer has viewed information available at a bank's electronic address (eg a web site), and has been given the opportunity to retain that information for subsequent reference (eg by saving or printing it) and has specifically acknowledged having seen that information and having been given that opportunity, the bank is to be treated as having provided that information to the customer at the time the customer gave the specific acknowledgement.*
 - (iii) *A specific positive election by the customer under (1) is not required in the circumstances described in (2)(ii).*
- (3) *Where a bank has provided or is treated as having provided information to a customer by electronic communication under (1) or (2) the bank shall provide a paper copy to the customer if the customer so requests within 6 months of the receipt of the electronic communication."*

Young Lawyers makes no comment on this recommendation at this stage.