

**MINISTER FOR CONSUMER
AFFAIRS, VICTORIA**

SUBMISSION ON REVIEW OF CODE OF BANKING PRACTICE

1. General comments

Given that the Code of Banking Practice (CBP) was drafted in 1993, the CBP needs a thorough review to take into account numerous developments in the regulation of banking products and services. The Consumer Credit Code, for example has a significant impact particularly in the areas of disclosure, advertising, precontractual conduct, variation to terms and conditions, provision of credit and guarantees.

It is not intended in this submission to highlight in detail the changes needed to the CBP as a result of the developments in the law in the last seven years; rather, the submission has been confined to more general comments. In any event, the consultant is well placed to undertake the review task. It is hoped that interested parties will be given the opportunity to provide more detailed/specific comments when the first draft of the new code is available following the consultant's report.

2. Specific comments

Definitions

The current CBP does not contain adequate definitions of a number of expressions used throughout the CBP (eg "financial accommodation or facility" in section 17.1). It is hoped that the new draft will include a more comprehensive definition provision to assist in the interpretation of the code.

Coverage

The CBP only applies to private customers (meaning individuals) who use the banks' services "wholly and exclusively for private or domestic use". The CBP therefore excludes small businesses and corporations. The CBP will also not cover those individual customers who may use services (eg credit card facility) for mixed but predominantly private purposes. It is inappropriate that the protection of the CBP can be denied to persons acquiring services which may have a small element of non-private use. Further, the policy of excluding small businesses from the protection of the CBP should be reviewed.

Enforcement/Sanctions

The CBP does not clearly set out any remedies or sanctions for non-compliance with the code. Failing to specify appropriate remedies and the effect of a breach of the code's terms on the enforceability of a transaction undermines the code's effectiveness. A code should be as self-regulating as possible, including sanctions for breaches.

A good example of this is the General Insurance Code of Practice which empowers a Code Compliance Committee to impose sanctions on an insurer for breaches of the code including a requirement for an insurer to take rectification steps within a specified time, corrective advertising and naming non-compliant insurers (and detailing the nature of the breach) in the annual report of the Insurance Enquiries and Complaints Limited (IEC) which is responsible for the implementation and administration of the Code.

Comparison Rate

The CBP makes reference in section 3.1 to a comparison rate although the code does not elaborate on what the comparison rate is or how it is to be calculated. The inclusion of this provision will need to be reviewed in light of the moves to introduce a mandatory comparison rate for fixed term credit products in the Consumer Credit Code, as recommended in the Final Report of the Post Implementation Review. In any event, in the absence of immediate changes to the Credit Code, NSW is actively pursuing the introduction of a mandatory comparison rate in advertising in that State in the forthcoming Parliamentary Session. The CBP should reflect these changes.

Disclosure

Apart from bringing the disclosure provisions into line with the developments put in place by the Consumer Credit Code (and the recommendations for better disclosure as set out in the Final Report of the Post Implementation Review), the whole issue of disclosure is to be thoroughly considered by ASIC and the EFT Working Party in the context of the expanded Electronic Funds Transfer Code of Practice (EFT Code). Issues considered in the review of that code will also be relevant here and should be monitored when reviewing the disclosure provisions in section 2.

Variation to terms and conditions

Again, apart from amendments to this section to take into account the Credit Code, at the very least, section 9.3 should provide that advertisements should be followed by written notice to customers confirming the variation to the terms and conditions.

Privacy/Confidentiality

The CBP should incorporate the recent developments by the Federal Government in the application of National Privacy principles to the private sector (*Privacy Amendment (Private Sector) Bill 2000*). The CBP should include a provision similar to clause 21 of the EFT Code to ensure that the banking industry complies with the National Principles for the Fair Handling of Personal Information issued by the Australian Privacy Commissioner in 1998 until the national legislation comes into operation.

Guarantees

The CBP applies to guarantees signed by individuals who secure the liabilities of a borrower. The borrower cannot be a public corporation or a corporation of which the guarantor is a director or secretary or a trustee of a trust (including a discretionary

trust) where the guarantor is a beneficiary. Nor will the code apply where the borrower is a partner, co-owner, agent, consultant or associate of the guarantor at this time.

The CBP guarantee provisions, therefore, do not generally apply to eg a family business, where the wife is both guarantor and secretary/director of the borrowing family company, or is both guarantor and a beneficiary of the discretionary family trust for which a loan is made. This is a very common situation in small businesses, and, as stated above, the CBP's policy of excluding these types of customers/guarantors from the code should be reviewed.

Monitoring/Review

The CBP is to be reviewed every three years. However, the code does not specify who is to undertake the review. Since the inception of the code, consumer groups have been concerned that the review process is not independent enough and have recommended that an independent body or committee representative of both banking and consumer interests, be responsible for undertaking the review. The Martin Committee on Banking and Finance, which was the impetus to the introduction of a code of banking practice, recommended that the code be reviewed by the Trade Practices Commission (now the ACCC).

It is noted that ASIC has now taken over the role of the Australian Payments System Council in monitoring compliance with the code, but ASIC does not have a greater role in review of the code itself. Consideration should be given to expanding ASIC's role to including the regular review of the CBP (it already plays a major role in the review of the EFT Code).