AUSTRALIAN BANKERS' ASSOCIATION

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Mr R T Viney
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Dear Mr Viney,

Review of the Code of Banking Practice; Response to Issues Paper

We are pleased to submit our comments to you in response to your Issues Paper dated February 2001.

The Issues Paper is a comprehensive document that reflects many of the changes that have occurred in the banking industry since the Code was first developed. These changes have posed challenges for both banks and their customers. We commend your work in researching, formulating and reporting these important matters. In turn, we believe that in our response you will see significant movement from banks to address the overwhelming majority of recommendations you have made. We can report that in working with our members on your Issues Paper our discussion have been positive and have tried to focus on problem solving and finding solutions. We trust you will see the fruits of this hard work in our response.

In managing this project we have operated from a prepared running sheet of positions on the recommendations that has evolved and changed as we have progressed. We had a sound consultation with representatives of the organisations that lodged the main consumer submission (Submission number 5 on the review website). This consultation gave us confidence that we were on the right track and where we might consider changes to our positions.

The running sheet approach was extremely valuable in getting to the heart of issues. We drafted possible clauses for amending the Code so that members could fully contemplate and commit to particular positions unambiguously.

This submission is comprised principally of that running sheet document. The draft clauses in the running sheet are illustrations of the positions we have reached. They are not and were never intended to constitute the final word on how the Code should be worded. Re-drafting the Code will follow the release of your final report. ABA's response to that report and establishing a consultative mechanism to ensure that all relevant views on the re-wording of the Code are received and given due consideration.

Some explanatory notes have been included with the annexed running sheet explaining some issues or pointing to areas where further work might be necessary or is already underway, for example on the issue of direct debits.

We summarise below our responses to what we understand are the main interim recommendations to supplement the notes that are part of the Annexure.

Changes to the Objectives and Principles

We fashioned the *"Key Commitments"* recommendations in a way that did not place banks in the position of the "adviser" to the customer in all circumstances. Under the Financial Services Reform legislation currently before the Parliament it is clear that licensee under that regime will have to ensure that their representatives who are authorised to provide financial advice do so competently. Not all bank staff would have such authority particularly those opening basic deposit product accounts. For lending products, banks will assist customers with their choice of product but advice on what product best suits a customer's circumstances is better left to their own advisers. There is a growth in financial intermediaries providing specific advice on banks' product ranges to their clients, both consumer and small businesses.

"Fairness" has been modified. We see it as a balancing exercise between the parties conduct and the bank and customer contract.

Banking Service

We agree that the definition of "banking service" in the current Code is too limited. Broadly speaking, we agree that it should be expanded to cover activities of banks only as the interim recommendation states.

Customer

Likewise, we agree that the Code should be extended to cover small business as defined in the FSR Bill. Our approach has been to treat, as far as possible, consumers and small business the same under the Code. This approach would see the Small Business Principles ("Banks and Small Business Working Together") that ABA released in July 1998 being superseded by the new Code.

Monitoring of Compliance and Sanctions for Breach

We have submitted a model for monitoring banks' compliance with the Code and imposing a sanction for the more serious cases of breach. It builds on the existing system where banks complete an annual return of compliance to ASIC. Under the proposed new arrangements this return would be submitted to a compliance monitoring committee set up independently within the Banking Industry Ombudsman's office.

The three person committee would be representative of banks, consumers and the general community and would have power to check that what is reported is consistent with consumers' experience. Banks that commit serious and repeated breaches of the Code despite requests to modify their conduct and rectify procedures would be liable to be named in the committee's published annual report on compliance.

Staff Competence

Banks will ensure their staff and agents are competent to undertake the tasks assigned to them and that they have an adequate knowledge of the Code. We have combined the interim recommendations about Code training and general staff competence into one provision.

Further Reviews of the Code and Consultative Forum

We have accepted the Reviewer's interim recommendations on three yearly reviews of the Code and proper consultation. We are moving forward with plans for establishing a consultative forum as mentioned in the note in the Annexure (item 10) and would like to hold a first meeting before the end of this calendar year.

Access to Banking Services and Low Cost Accounts

ABA members have already taken major steps forward in improving access to banking services for people holding Government concessional cards, for remote and regional communities where branches are closed and for people suffering disabilities. Details of these initiatives are available on ABA's website www.bankers.asn.au. Item 13 on the Annexure contains a commitment to further facilitating access to cater for the needs of the elderly and disabled. Also, we ensure the Code includes a reference to the ABA's bank closure protocol and basic bank account standard (subject to a forthcoming application to the ACCC for authorisation).

Disclosure

There is quite a lot of technical drafting that will be necessary once the final provisions of the FSR Bill are settled. Also, what the Code provides by way of disclosure for products covered by the FSR Bill will depend on Regulations and ASIC Policy Papers.

We agree that existing disclosures under the Code should remain and for the Code to extend some disclosures to prospective customers and to enlarge its provisions for providing copies of documents to customers.

Of specific mention here, item 20 contains a provision to address the "shadow ledgers" issue and item 21 removes an area of uncertainty about prior notice where an account's qualifying criteria change resulting in the imposition of fees where none were previously payable or a cessation on in interest payable on a deposit account where previously interest was paid.

Customers in Financial Difficulty

We have accepted the Reviewer's interim recommendation that a clause closely modelled on the UK Banking Code, clause 15, should be written into the Code. The modifications we have made do not, we believe, detract from the substantive provisions of clause 15. They simply clarify that the bank is not the financial adviser to the customer and that the bank may be able to assist with the customer as a debtor to the bank as distinct from liabilities owed to other creditors.

Credit Assessment

Banks agree that the appropriate standard for assessing a customer's ability to repay a credit facility is that of the diligent and prudent banker. Also, it is agreed that this test should apply to new facilities and to increases in existing credit limits. The note to item 29 in the Annexure explains banks reasons for not agreeing with the Reviewer's interim recommendation that credit facilities must be suited to the *stated* financial needs of the customer.

Direct Debits

ABA members agree that the problems that have emerged with direct debit arrangements since the introduction of the BECS rules are important and should be addressed. Significant progress had been made through APCA to clarify banks' responsibilities where a customer seeks to cancel a direct debit authority direct with the their bank. We understand that APCA is to undertake further consideration of the direct debit guarantee proposal and consultative arrangements where APCA rule changes might have consumer implications.

The two credit cards schemes, MasterCard and Visa, have agreed to look at the issues as they relate to DDRs affecting credit cards. It is noted that there is already some consumer protection in the case of unauthorised direct debits through the chargeback system. In this Code review, banks agree that more information about chargebacks should be provided to credit card holders and to claim a chargeback for the benefit of a customer in accordance with scheme rules. This will be a contractually binding obligation on the part of the bank.

ABA supports all efforts being made to improve consumer protection for the DDR system through APCA and the relevant credit card schemes.

Guarantees

Undoubtedly, issues surrounding the taking of guarantees are of great significance and importance to consumers generally, small business and also banks.

In formulating our response to the Reviewer's interim recommendation on guarantees, we have aimed to accommodate most of those recommendations.

A point of significant departure from the Reviewer's recommendations is in the areas of a bank placing itself in the position of adviser to a prospective guarantor. The interests of a bank and the interests of a prospective are in potential conflict. The bank is seeking the guarantee in its interests. The prospective guarantor is called upon to understand the risks in giving the guarantee and the nature of the liabilities he or she is about to undertake if the guarantee is given. From a bank perspective, it is appropriate and consistent with the avoidance of conflict of interest for any explanation about these matters to be provided by an independent professional adviser engaged by the prospective guarantor.

Pre-contractual disclosure by the bank of information to the prospective guarantor that a prospective guarantor would consider material to the risk being undertaken is a significant step towards protecting guarantors from incurring liabilities they might not fully understand or even know about. This provision goes much further than the disclosures that are required by the general law and by the Consumer Credit Code.

Mutuality and Set-off

Banks agree that more information should be available about these legal doctrines and a Code provision has been proposed in the Annexure. It does not go as far as the Reviewer has recommended mainly because of the difficulty of entrusting to non-lawyers the task of explaining legal concepts.

Other Interim Recommendations

We believe that our positions on joint debtors, subsidiary cards, dispute resolution and electronic communications are fully accepting of the interim recommendation in those respects.

At item 39 we have provided some brief responses to the matters on which the Reviewer sought further views. We suggest that these matters might be dealt with conveniently through a community consultative forum process as outlined in item 10.

We look forward to your final report in due course. We would be pleased to discuss our response with you if you wish.

Yours sincerely,

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David Bell

AUSTRALIAN BANKERS' ASSOCIATION

Australian Bankers' Association

Annexure to the Submission to the Issues Paper dated February 2001

For

THE REVIEW OF CODE OF BANKING PRACTICE

The following draft provisions embody most but not all of the Reviewer's interim recommendations. Our approach throughout this Annexure has been to draft provisions that reflect our general intent in responding to the interim recommendations. Our drafts are not intended to constitute the final word on how the Code should be worded. Re-drafting the Code will follow the release of the Final Report of the Reviewer, ABA's response to that report and establishing a consultative mechanism to ensure that all relevant views on the re-wording of the Code are received and given due consideration.

1. Changes to the Objectives and Principles

We suggest the following drafting:

"Key Commitments

We promise that we will

- *work towards continuously improving the standards of practice and service in the banking industry;*
- *promote better informed decisions about our products and services including by providing effective disclosure of information and*
- *provide information about your rights and obligations in relation to banking services"*

[***NOTE: We have drawn on the "key commitments" and "we promise" approach in the British Banking Association's Banking Code ("UK Code") Member banks are committed to promoting better informed decision making by customers about financial products. This can be done for example by explaining the features of their products and services and by providing other types of factual information. Banks are not supportive of a broadly based general commitment to provide financial product advice. Under the Financial Services Reform Bill 2001, banks will have to ensure that their staff who provide financial product advice are suitably trained for this purpose. The Bill draws a clear distinction between advice constituted by a recommendation or statement of opinion that could be taken as intended to influence a person to take up a particular product and conduct that is done in the ordinary course of a work of a kind ordinarily done by clerks or cashiers that is not tantamount to advice. Banks agree that any person seeking or needing financial advice would be referred to an appropriate adviser, not necessarily an adviser employed by the bank.***]

Fairness

We suggest the following drafting to cover succinctly the matter of fairness:

"*We promise that we will act fairly and reasonably towards you (our customers) in a consistent and ethical manner. In doing so, we will consider your conduct, our conduct and the contract between us."*

[NOTE: The Reviewer has proposed a slightly modified version based on the "fairness" provision in the New Zealand Code which provides:

> ***"1.7.2 In order to achieve these objectives, we will:***
>
> > ***(iv) act fairly and reasonably towards you, our customers, in a consistent and ethical manner.***
>
> ***1.7.3 What may be fair and reasonable in any case must depend on all the circumstances of the particular case, but we will take into account, among other things:***
>
> > ***(i) Our conduct and yours, having regard to the fact that the relationship between banks and their customers is contractual, with mutual rights and obligations;***

> *(i) The steps taken by us to ascertain your needs in order to enable you to make the choice that best meets your needs; and*
>
> *(ii) Compliance with this Code of Banking Practice."*

The Reviewer suggested, however, that the following should be substituted for section 1.7.3(i) of the NZ Code:

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

With respect, banks believe this approach does not place enough emphasis on the contractual relationship between the parties. As the Reviewer points out in his Issues Paper, statute and case law have substantially eroded the notion of contractual certainty. We believe that introducing the notion of "fairness" is a further but acceptable erosion provided there is some guidance on how "fairness" is to be judged.

Prudential principle

We suggest the following Re-drafting:

"In meeting our key commitments we will have regard to our prudential obligations".

[***NOTE:*** **T*he definition of "prudential matters" in the Banking Act 1959 ("Banking Act") is expressed:***

"prudential matters", in relation to a body corporate that is an AD1 or a NOHC, means matters relating to the conduct by the body corporate of any of its affairs:

> ***(a) in such a way as:***
>
> > ***(i) to keep itself in a sound financial position; and***
> >
> > ***(ii) not to cause or promote instability in the Australian financial system; and***
>
> ***(b) with integrity, prudence and professional skill."***

Under s.11AF of the Banking Act APRA has the power to determine the standards in relation to prudential matters with which ADIs must comply]

2. Definition of "*Banking Service*"

We suggest the following approach:

> *"Banking Service" means any financial service provided by a bank to a customer"*

[NOTE: The above drafting is intended to reflect the recommendation made by the Reviewer. It is intended to cover a bank product or service that a bank provides in its own right as principal either directly itself or through an agent and a product or service provided by a bank acting as an agent for another person, eg where a bank employee

promotes an insurance product offered by a related body corporate of the bank. The performance of that product would be the responsibility of the general insurer with the bank being responsible for its conduct in selling that product. The key aspect here is that all <u>bank products and services</u> provided by a bank in connection with its own or third party (related entity or otherwise) products would be covered. The definition is not intended to extend to the performance or functionality of non-bank products. Although the FSR will hold licensees accountable for the conduct of their representatives, the expanded definition of "banking services" in the Code would render the bank when acting as an agent primarily accountable to the customer for its conduct.]

3. Definition of "*Customer*"

This definition has to be drafted in plain terms. A shorthand version or illustration is:

"Customer" means an individual or a small business."

[***NOTE: The above drafting is intended to cover both individuals and small businesses. If this approach is adopted then provisions of the new CBP which apply to a "Customer" (i.e. "you") would also apply to a small business (subject to modifications where the small business situation is necessarily different). For example, provisions dealing with the following issues could apply to a small business equally with any other Customer:***

- ***disclosure of terms and conditions, fees and charges and interest rates;***
- ***dispute resolution processes (both internal and external);***
- ***the contractual obligation to comply with applicable legislation (including the FSR Bill (once enacted) and privacy and discrimination laws but not, of course UCCC);***
- ***notification of changes;***
- ***statements of account for non-credit products;***
- ***shadow ledgers;***
- ***debtor harassment (although the ACCC Guidelines on Debtor Harassment may not be applicable to small businesses in their entirety);***
- ***credit assessment;***
- ***chargebacks (on small business credit cards);***
- ***guarantees (the new guarantee provisions should apply to any financial accommodation facility provided to a small business (as well as an individual));***
- ***mutuality and set-off;***
- ***electronic communications;***
- ***information about banking services, cheques and joint accounts;***
- ***payment instruments;***

- ***advertising; and***
- ***closure of accounts.***

4. Small businesses

We agree that small businesses should be covered by the Code and suggest the following to illustrate the approach:

*"**small business**" means a business employing less than:*

(a) if the business is or includes the manufacture of goods – 100 people; or

(b) otherwise – 20 people.

[NOTE: This definition is taken from the Financial Services Reform Bill 2001. Aligning the Code with this definition will enable banks to provide consistent coverage to both individual and small business customers. By extending the Code to cover this class of small business ABA does not propose to review the Small Business Principles document because that Code will, in effect, supersede those Principles. Some drafting modifications in the Code will be necessary to cater for some situations where small business requirements differ from those of individual consumers.]

5. Monitoring compliance with the Code

All ABA member retail banks are committed to establishing an independent, transparent and efficient process for monitoring banks' compliance with this Code. Banks see this mechanism as fundamental to an effective code and have closely examined a range of possible models to achieve this. Set out below are the key criteria of an agreed model [1]

Proposed Model Structure Outline

1. A committee, the Code Compliance Monitoring Committee, would be set up within the Australian Banking Industry Ombudsman scheme. Agreement of the ABIO. to do this would be necessary.
2. The function, powers and composition of the CCMC would be spelt out in the Code. These could change if the Code were changed.
3. The CCMC would operate quite separately from the Ombudsman's dispute resolution function so as not to adversely affect that function.
4. The CCMC would be a committee of three:
   - One person having had relevant experience at a senior level in retail banking, appointed by the Code subscribing banks;
   - One person having relevant experience and knowledge as the representative of the general body of bank customers, appointed by the ABIO.

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[1] ABA's internal Code review working group has held many discussions over possible approaches to monitoring of compliance and have reached a majority consensus on this model. As Commonwealth Bank has submitted in its submission to the Reviewer, it recognises the importance of having independent compliance monitoring. CBA does not necessarily oppose the model proposed by ABA. It however regards as necessary that further analysis, evaluation and consultation take place on the various options to ensure the most effective mechanism is adopted.

- One person having had experience in industry, commerce, public administration or government service, appointed jointly by the ABIO and the Code subscribing banks.

5. The CCMC would employ a small to secretariat to service the CCMC
6. All decisions about banks' compliance with the Code would be the responsibility of the CCMC.
7. To ensure CCMC operated diligently, within power, efficiently and effectively, the CCMC would be required to commission an independent annual audit of its activities and for that audit report to be lodged with ASIC for publication. Agreement of ASIC to perform this role would be required.
8. Banks would continue to prepare their own annual compliance reports and to lodge them with the CCMC.
9. CCMC's functions and powers would be to:
   - Monitor Code compliance by comparing banks' annual reporting of compliance with CCMC's own experience gained through "shadow shopping" and the incidence of complaints from customers about banks' non-compliance.
   - Receive complaints about breaches of the Code and refer them to the banks concerned for response and remedial action where necessary.
   - Report annually on the level of compliance
   - Report in its annual report un-remedied, serious and systemic breaches by a bank with discretionary power to name the non-complying bank.

6. Sanctions

Sanctions against banks for breaches of the Code irrespective of whether financial loss is incurred by the customer is an issue closely tied to the compliance monitoring function. Disputes where the customer incurs a financial loss are already covered by the Banking Industry Ombudsman Scheme. The proposed compliance monitoring model above also contains proposals for handling serious systemic Code breaches and imposition of a naming sanction for repeat offenders.

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

We suggest the following drafting:

> "*We will ensure our staff and agents receive training and documentation so that they are competent to provide the Banking Services they are authorised to provide and that they have an adequate knowledge of the provisions of this Code* "

[***NOTE: The abovementioned drafting is, in broad terms, borrowed from the General Insurance Code of Practice "(GICP") (see clause 3).***

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

We suggest the following drafting:

> "ABA *will promote the Code including which banks subscribe to it and how to obtain access to the Code".*

[***NOTE: Some banks do not have branches. The intent is to give banks flexibility to send out a copy of the Code by mail from a central location if there is a request for a copy. Such a request might be made in person, by telephone or electronically.***]

9. Monitoring external developments including legislative changes

ABA agrees that this monitoring is necessary. We differ with the Reviewer on who best does this. We believe it is not for the Code monitoring mechanism, CCMC, to provide this function. Banks already do this on a routine basis and the Code could provide for subscribing banks to monitor external developments and legislative changes.

10. Arrange regular reviews of the Code and ensuring ongoing external representation and consultation in critical areas

We suggest the following drafting:

> "*We will commission an independent review of the Code every 3 years and sooner if appropriate. The review will be conducted in consultation with:*
>
> - *member banks;*
> - *consumer organisations;*
> - *the Australian Bankers' Association and other interested industry associations;*
> - *relevant regulatory bodies; and*
> - *other interested stakeholders.*
>
> *ABA will establish a forum for the exchange of views on the effectiveness of the Code. These views will be taken into account in the next review of the Code.*"

[***NOTE: This provision also picks up the Reviewer's interim recommendation that a forum for regular exchange of views between banks and consumer advisors on banking issues should be formed. ABA is currently working on this plan with the prospect of an early consultation with key groups on putting such a forum in place before the end of this year.***

11. Implementing changes

We suggest the following drafting:

> "*The Australian Bankers' Association will publish on its website the recommendations and report arising from a review of the Code and, at quarterly intervals, progress reports on implementation of those recommendations, to the extent those recommendations are accepted, until the implementation process is complete*".

12. Access to Banking Services

ABA has recently released details of a rural and regional branch closure protocol as part of a more comprehensive set of initiatives to improve access to banking services. The media release announcing these initiatives is accessible on the ABA's website <www.bankers.asn.au> Work is underway for the application to the ACCC for authorisation in respect of the basic banking account and on implementation of the disability action plan. Banks have agreed that the branch closure protocol should be signposted through the Code.

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

We suggest the following drafting:

> *"We recognise the special needs of elderly and disabled persons to have access to transaction accounts.*
>
> *We will consider and implement steps we might reasonably take to facilitate access and to educate such persons on the use and benefits of accessing banking services through new technologies."*

[NOTE: It is intended that this provision will apply to banks that operate through a physical branch network as distinct from "direct" banks that operate without branches or "over the counter" services and only deliver banking services electronically. Their customers are not affected by the transition from "over the counter" banking to direct banking.]

14. Low cost accounts for Banking Services

We suggest the following drafting to reflect the Reviewer's interim recommendation:

> *"If you are a low income earner or disadvantaged person we will provide you with details of our accounts that we think are most suitable to your situation if you are wanting to open an account or ask us for this information"*

[*NOTE: Although the Reviewer did not recommend that banks offer basic banking accounts , it is the wish of certain individual member banks to offer such accounts and, indeed the four large banks have each made announcements for making concessional accounts available for disadvantaged and/or elderly people. To achieve broader coverage according to the basic ABA standard announced in March 2001, authorisation from the ACCC is proposed for banks to agree to provide such accounts that, at the least, meet this standard. We are finalising an application for authorisation for lodgment with the ACCC.]*

15. Customer access to information entitlements and contractual rights

We suggest the following drafting:

> *"We will comply with all relevant laws and regulations relating to banking services including those concerning:*
>
> - *consumer credit products;*
> - *other financial products and services;*
> - *privacy; and*
> - *discrimination*

[NOTE: Giving an outline of these laws in the Code could make the Code an unwieldy large and complex document and could be ineffective. This would have to be updated every time the law changed or a court or regulator puts a different slant on what previously was the current understanding of the law. The UCCC provides for certain regulated information brochures to be made available to borrowers. There is also quite a deal of literature available from State fair trading bodies and other government agencies such as the Human Rights and Equal Opportunity Commission that explains relevant laws. Repeating this information in the Code would be repetitive and a duplication.]

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

The Reviewer has recommended that the Code not include the detail for Product Disclosure Statements. ABA agrees with this interim recommendation.

17. Which disclosure requirements should remain in the Code if all overlapping provisions are removed?

We suggest the following drafting:

"*We will provide expeditiously to any person on request:*

- *the terms and conditions of any banking service we provide;*
- *full particulars of fees and charges that are or may become payable for any banking service we provide;*
- *particulars of the interest rates applicable to any banking service we provide regardless of whether that service relates to a deposit or credit product.*

We will also provide to any person on request the information currently listed under sections 6.1 and 6.2 of the Code."

[NOTE: The Reviewer did not mention the inclusion of an equivalent to section 6.2 of the Code We support its retention.].

18. Other gaps

We are yet to do the analysis which identifies those Code disclosure obligations which are not replicated in, or superseded by, the disclosure requirements arising from the CCC or FSR. We will undertake this exercise in the re-drafting of the Code once the final text of the FSR is known and the proposed content of the Code is finalised.

19. Timing differences affecting notification of changes

We suggest the following drafting, which would be included by way of a qualification to section 9 of the existing Code:

> "*The abovementioned provisions do not apply to changes to products regulated by the Consumer Credit Code or Chapter 7 of the Corporations Law*".

[NOTE: The "change" provisions in the Code will need to be reviewed in light of the FSR Bill requirements.]

> To deal with the EFT Code issue we suggest the following drafting:
>
> "*We will comply with the provisions of the Electronic Funds Transfer Code of Conduct relating to notice of changes to the extent they are more onerous than the other requirements of this clause 9*".

[NOTE: Some of the provisions of the new EFT Code are more onerous.]

20. Statements of account

In relation to the statements of account for non-credit products we suggest the following drafting:

> *"We will give you a statement of all transactions relating to a deposit account at least every 6 months or as otherwise agreed unless*
>
> - *you and we have agreed that a passbook or some other method will be used to record the transactions;*
> - *no amount has been debited or credited to the account during the statement period (other than debits for government charges or duties on receipts or withdrawals); or*
> - *" unless we cannot, after taking reasonable steps, locate you".*

[NOTE: The timing of statements is a minimum standard of 6 months to align this provisions with the EFT Code of Conduct requirement.

We have borrowed the second exception from section 31(3)(b) of the CCC.]

21. Shadow ledgers

We suggest the following drafting:

"We will provide you with timely and accurate statements of account for loan accounts in accordance with the terms and conditions of your banking service, even if you are in default. Where we cannot do this automatically but only on request, we will ensure you are fully informed about the availability of statements and the method of requesting them"

[NOTE: This provision covers both consumer credit and other retail credit accounts. Also, for consumer credit accounts the right to rely on the exceptions in UCCC section 31(3) is sought. We note that the exception from giving a statement of account in section 31(3)(c) where a debt is written off only applies where no further amount has been debited or credited to the account during the statement period.]

22. Code clauses 9.1 and 9.3

We suggest the following drafting:

> *"9.3 We will give affected customers at least 30 days advance notice of an increase in the amount of a minimum monthly or other periodical account balance which determines whether account keeping or other fees are charged and, in the case of a deposit account, an increase in the minimum balance at which interest is payable."*

23. Notification of changes to the fees for stand alone transactions or service

We suggest the following drafting for 9.1, after “takes effect”:

“*9.1 …. except that such notice is not required where you cannot reasonably be located or you have engaged in the transaction or procured the service anonymously.”*

24. Notification of changes to interest rates for money market products

We suggest the following drafting to 9.3:

“*A Bank … except where the interest rate is linked to money market rates or some other reference rate, changes to which cannot be advised in advance.”*

25. Staff training

See the drafting at 7 concerning the education of staff about the Code so that staff must be competent to perform their assigned duties.

26. Copies of documents

We suggest the following drafting:

“*X.1 We will provide to you on request a copy of:*

- *any contract for a banking service you have with us and any mortgage or other security document you have given us;*
- *any statement of account relating to a banking service you have with us; and*
- *any notice previously given to you.*

X.2 We will give you the copy document:

- *within 14 days, if the original came into existence one year or less before the request was made; or*
- *otherwise within 30 days.*

X.3 A copy may be provided in the form of a computer-generated facsimile containing the same information as the original or in any other way you and we agree.

X.4 We do not have to give you a document if the request for the document is made

- *after two years of the discharge or termination of the original contract unless the document is still in use or it is reasonably foreseeable that it will be put in use; or*

- *within three months after we have given you a copy of the document.*

[NOTE: This new provision is broadly based on section 163 of the CCC. It is intended that there would be no obligation to provide a copy of a document that is no longer in existence where, for example, document retention policies and laws permit the destruction of documents after 7 years.]

27. Customers in financial difficulties

ABA agrees that section 15 of the UK Code is a good approach. The Code should incorporate 15 of UK Code but with the second and third sentences of 15.2 replaced along the following lines:

"*With your agreement, we will try and help you overcome your financial difficulties with us, for example, with your co-operation, developing a plan with you for dealing with your financial difficulties with us and telling you in writing what we have agreed. If the Consumer Credit Code applies to your credit facility with us we will explain the hardship variation provisions of that Code to you"*

[NOTE: We believe this draft better reflects the intent of the UK Code provisions that it is the customer's financial difficulties with the bank and not the customer's financial difficulties at large that are the objective. Also, it seems that such assistance from the bank should be available provided the customer agrees to receive help. In rendering this assistance to the customer in difficulty, banks do not intend their assistance to include financial advice. Our members wish to draw a clear line between helping customers with their financial difficulty with the bank and acting as their adviser.]

28. Debt recovery

We suggest the following drafting:

> *"We and our collection agents will comply with the ACCC guidelines on debtor harassment when collecting amounts due to us and we will require that our representatives do likewise."*

29. Privacy and confidentiality

ABA is developing a code for privacy to enable privacy disputes to be referred to the Banking Industry Ombudsman for resolution. Whether, logistically, that privacy code will be included in the Code will depend on the Privacy Commissioner's opinion and the potential for consumer confusion if parties to the privacy code are not also signatories to the Code.

30. Credit assessment

We suggest the following drafting:

> "*Before we offer or give you a credit facility (or increase an existing credit facility), we will assess based on our information about you whether we think you will be able to repay it. In doing so we will exercise the care and skill of a diligent and prudent banker*."

[NOTE: The Reviewer has recommended that any offer of credit should be suited to the customer's "stated financial needs". This is designed to end current credit practices called generally "pre-approved" offers of credit. This is a matter currently under examination by the Ministerial Council on Consumer Affairs and was raised in a paper on credit card overcommitment tabled at the July 13 meeting of MCCA. Further discussions are to take place with industry and consumers on this matter. A recent research report by KPMG "Credit Cards in Australia" provides a detailed analysis of the credit card market. Significantly, default rates on credit cards are at an historical low with those who have "pre-approved" credit limit increases showing default rates about half those for cardholders generally. ABA does not accept that a case has been made out for regulatory intervention either by legislation or through the Code. ABA will continue to liaise with government, regulatory and consumer bodies on this issue. Apart from this issue, the proposed recommendation has advisory implications for banks. In ensuring that a particular credit facility meets a customer's stated financial needs suggests that the bank, as credit provider, should take on the role of credit adviser to the customer. We do not support this role for banks. Such advice is more appropriately provided by independent advisers which, in the case of small business lending, are accountants or other professionals.]

31. Implementing Family Court decisions and Family Law settlements

ABA will develop a standard protocol based on member bank practices and procedures. This will be done in time for commencement of the reviewed Code.

32. Direct debits

ABA agrees that uncertainties in the practices of banks when a customer seeks to cancel a direct debit request (DDR) are undesirable and should be avoided. Participating banks in the Australian Paper Clearing Association (APCA) have recently moved through a change to APCA's rules to secure clarification of a ledger and sponsor bank's obligations when a ledger bank customer seeks to cancel a DDR. A letter dated July 2001 from APCA to the Reviewer sets out these arrangements that took effect on 20 July 2001.

A recent roundtable convened by ASIC to discuss cancellation of DDRs and other direct debit issues provided a forum for a very informed discussion of these issues. APCA has agreed to submit to its board at an early date proposals for a direct debit guarantee based on the UK Direct Debit Guarantee model mentioned in the Issues Paper. Credit card schemes, Visa and Mastercard, have agreed that they will examine the issue of cancellation of DDRs operating on credit card facilities. Chargebacks of unauthorised debits to credit cards have been available to customers for some time.

ABA will work with government, regulators, consumer and industry bodies and the Reviewer to develop appropriate solutions to these DDR issues.

33. Chargebacks

We suggest the following drafting:

"*We will include in the terms and conditions for our credit cards:*

- *general information on chargeback rights with examples;*
- *a prominent statement about how soon you should report a disputed transaction (so we can reasonably ask for a chargeback); and*
- *a warning that you may not be able to dispute a transaction if it is not reported in time.*

We will:

- *claim a chargeback right where one exists and the transaction is disputed within the required timeframe;*
- *claim the chargeback for the most appropriate reason;*
- *not accept a refusal of a chargeback by a merchant's bank unless it is consistent with the relevant card scheme rules; and*
- *include general information about chargebacks with statements at least once every twelve months."*

34. Guarantees

We mention again the opening note to this Annexure. In suggesting the following drafting we believe some additional modifications to the wording could be necessary to take account of guarantees applying to small business lending facilities.

We suggest the following drafting:

"*This section of the Code applies to every guarantee and indemnity (together called a "guarantee") obtained from an individual (called "the guarantor") for the purpose of securing any financial accommodation or facility provided by us to individuals or a small business."*

We suggest the following drafting:

"X.1 We will provide a prospective guarantor with any information we have which relates to the potential debtor and the transaction or facility to be guaranteed which a prospective guarantor would reasonably consider material in order to decide whether to give the guarantee. This information will include:

- *any representation about a future matter;*
- *information given by the debtor to us;*
- *any credit reporting agency and other expert report we have.*

However, we reserve the right to keep confidential our own internal opinions and will only be able to provide the above information to the extent permitted by applicable laws, especially those relating to privacy.

[NOTE: We have described the test of disclosure as what " a prospective guarantor would reasonably consider material". We believe that it is the non-disclosure of information that is material to the guarantee risk rather than non-disclosure of minor or inconsequential matters that the recommendation targets. We have suggested words to indicate that intent recognising that the words may need further work to achieve this and to make it clear what information banks have to provide to a prospective guarantor. Also, this test should be applied objectively as the bank will not be in a position to know all of the personal and financial circumstances of the prospective guarantor.]

X.2 When dealing with a potential guarantor we will also:

- *encourage the guarantor to seek independent legal and financial advice including on the legal effect of the guarantee;*

[NOTE: Banks see themselves as having a conflict of interest in their advising the prospective guarantor about the guarantee. They will "encourage" the prospective guarantor to seek advice. Also, not all situations call for independent advice to be given e.g. the sole director of a company who is asked to give a guarantee. Some mechanism that relieves the bank from this contractual obligation where legal advice is obviously unnecessary is needed. A further issue is the refusal of legal practitioners in several States from certifying that they have provided legal advice to a prospective guarantor. Their refusal prevents a bank from ensuring that such advice has been received.].

- *make the guarantor aware they can refuse to enter into the guarantee and that there are financial risks involved;*
- *provide the prospective guarantor (and after the guarantee has been given, on request) with a copy of*
  - ⇒ *any related credit contract or security contract;*
  - ⇒ *any related credit related insurance contract in our possession;*
  - ⇒ *any statement of account relating to the guarantee facilities; and*

- ⇒ *any notice previously given to the debtor in relation to the guaranteed facility;*

- *recommend that the guarantor signs the guarantee in the absence of the principal debtor.*

X.3 We will provide the documents referred to in [X.2] within[14 days] of receiving your request except that we do not need to do so if we have given you the requested information within three months before the request

[NOTE: The Reviewer did not suggest a time limit for providing the abovementioned information. In the interests of simplicity we have provided for a single time limit within which the request must be satisfied. An alternative approach would be as set out in s.34(2) of the CCC. That section requires information about a statement of account to be provided within 14 days of the information request if it relates to a period one year or less before the request is given or otherwise within 30 days. Further, s.34(5) provides that a statement relating to a matter which is more than seven years old does not need to be given unless the relevant amounts are currently overdue and payable. Further, s.163(4) of the Code allows a request for a copy of the contract document etc to be refused if the request is made more than the two years after a discharge or termination of the relevant contract

Also, we believe it would be appropriate to replicate the provision for providing copies of documents (see 26 X.4 and Note))]

X.5 A mortgage given by a guarantor to secure credit provided under a future credit contract of the same debtor or a future related guarantee is unenforceable in relation to that future contract or guarantee unless we have:

- *given the mortgagor a copy of the contract document of the credit contract or proposed credit contract or of the guarantee or proposed guarantee; and*

- *subsequently obtained a written acceptance for the extension of the mortgage from the guarantor*

*[**NOTE: This provision is largely based on s.43 of the CCC**]*

X.6 A guarantee will be unenforceable in relation to a future credit contract unless we have:

- *given the guarantor a copy of the contract document of the future credit contract; and*

- *subsequently obtained a written acceptance of the extension of the guarantee from the guarantor.*

X.7 A guarantor may, by written notice to us, limit the guarantee so as to:

- *place a cap on their liability (exclusive of interest and costs); or*

- *limit the amount or nature of the liabilities guaranteed*

except that we do not have to accept such a cap if:

⇒ *the amount of the cap is below the debtor's liability under the relevant credit contract at the time; or*

⇒ *the cap would prevent advances the bank is obliged to make or to secure the present value of an asset which is security to the loan (for example, a house under construction)*

X.8 A guarantor can, by written notice to us:

- *withdraw from the guarantee any time before the credit is first provided under the relevant credit contract; or*
- *withdraw after credit is first provided if the credit contract differs in a material respect from the proposed credit contract given to the guarantor before the guarantee was signed,*

and to the extent the guarantee guarantees obligations under the credit contract."

X.9 We will not enforce a judgment against a guarantor unless:

- *we have entered judgment against the principal debtor which has been unsatisfied for 30 days after we have made written demand for payment of the judgment debt; or*
- *we have been relieved by a court (or tribunal) from the obligation to obtain a judgement for the debt on the grounds that recovery from the debtor is unlikely* ***[NOTE: This provision reflects section 82 (b) of CCC and would seem to apply only where a CCC regulated contract is involved because courts do not have general discretion to require (and therefore to relieve a creditor from obtaining) a creditor to obtain a prior judgment against a debtor apart from the CCC]*** *; or*
- *we have made reasonable attempts to locate the debtor without success*
- *the debtor is insolvent; or*
- *we have reasonably determined that the costs of obtaining judgment against the debtor exceed the likely ability of the debtor to satisfy the judgment*

but these rules do not apply where the principal debtor is a small business.

35. Joint debtors

We submit the following drafting:

"X.1 *We will not accept a person as a co-debtor under a credit facility where, it is clear on the facts known to us, that person will not receive any direct benefit under the contract X.2 We will allow a person who is jointly and severally liable under a credit contract to terminate their liability in respect of future advances or financial accommodation on giving us written notice. This right does not apply unless we can terminate any obligation we have to provide further credit to any other debtor under the same credit contract.*

36. Subsidiary cards

ABA agrees that if the primary cardholder has taken reasonable steps to recover the subsidiary card unsuccessfully, he/she should not be liable for further transactions on the card. The Reviewer's recommendation is agreed to.

37. Mutuality and set-off

We suggest the following drafting:

"*When we open a new account for you, and you already have an account with us, we will provide you with information about mutuality and set-off between accounts and their consequences.*

[NOTE: It is intended that the customer would be informed by a generic pamphlet or other explanatory document to ensure consistency of message and remove possible mistake and confusion if counter staff were to undertake this task orally]

38. Dispute resolution

We suggest the following drafting:

"***Internal complaints handling***

We have an internal process for handling complaints with our customers. This process:

- *is free of charge*
- *meets the standards for complaint resolution schemes set out in Australian Standard AS4269-95 (you can check these standards at the Australian Standards website*
- *ensures you are notified of the name and contact number of the person who is investigating your complaint;*
- *requires an investigation to be completed within not more than [45] days (unless there are *circumstances such as delays caused by other institutions involved in the dispute); *follows EFT Code.*

- *ensures that you receive monthly updates of the progress of investigations if they continue beyond 45 days (except where we are waiting for a response from you and you have been advised that we need such a response); and*

- *requires us to provide written reasons for our decision on a complaint (subject to the provisions of this Code dealing with electronic communications).*

Our complaint resolution process is available for all complaints other than those that are resolved to your satisfaction immediately they are drawn to our attention.

External dispute resolution

We will have available to you an external impartial process for resolving disputes. This process will be free of charge and will be consistent with ASIC's regulatory guidelines for the approval of external complaints resolution schemes.

Availability of information about complaint and dispute resolution processes

We will prominently publicise the availability and accessibility of our internal and external processes for resolving complaints and disputes.

At a minimum, information about these processes will be readily accessible. In addition, we will provide a customer with information (subject to this Code's provision for electronic communications) about:

- *our internal process for dealing with complaints at the time the customer makes a complaint that is not immediately resolved to the satisfaction of both the customer and the bank; and*

- *the external process, at the same time as the customer is informed of the internal process and again when the customer is advised of the final outcome of the internal process [and that outcome does not wholly satisfy the customer's complaint].*

[NOTE: This drafting is based on the model proposed by the Reviewer.]

39. Electronic communications

We accept the Reviewer’s recommended wording subject to aligning it with the final version in the new EFT Code

40. Supplementary Issues arising from the Issues Paper

1) Incentives to rectify service problems

The Issues Paper raises three issues:

- Shortfalls at ATMs
- Direct debiting errors and
- Account queries

Suggesting there were insufficient incentives on banks to improve their services, and, particularly in respect of the first two matters, account reinstatements.

We believe improved IDR arrangements by banks ought to lift levels of customer satisfaction in these areas. ABA is prepared to engage with relevant stakeholders, including ASIC and the Reviewer, to look further at these issues.

2) Issues on which Further Views are Sought

The Reviewer raises ten additional on which comments are invited. Taking each of those points in turn as they appear on page xviii of the Issues Paper:

- Imposing an obligation through the Code upon banks to comply with other relevant codes would erode the voluntary nature of those codes and would not be supported by ABA.

- As we have mentioned previously in this response, we agree with the Reviewer’s recommendation that “fleshing out” FSR detail in the Code is not appropriate. That said, we would be prepared to discuss with relevant stakeholders and, in particular, ASIC on general areas that a PDS might cover with a bit more specificity than the current provisions of the FSR contemplate, but stopping short of detailing how those disclosures should be made.

- Using the media to notify changes to terms and conditions has been reserved in the majority of cases for changes to interest rates (because of their immediacy) and to bank and government fees and charges. We continue to support supplementary notification on later statement of account mailings confirming such notifications. ASIC has developed a Good Disclosure Guide for fees and charges that is supported by banks and which should enhance current disclosures.

- One member that currently has no consumer credit facilities but has a large portfolio of business facilities has said this change would require a major computer system enhancement. On behalf of that member we submit that some tolerance should be available to it under the Code to take account of that situation. In conjunction with that member we would be prepared to discuss the issues with the Reviewer.

- Our members support and observe Australian discrimination laws. Literacy is primarily a government function but banks have taken steps to improve their communication of key information to disadvantaged groups through plain English documents. We do not believe this is a matter for the Code to deal with but ABA would be prepared to look at ways that the problem of literacy might be alleviated.

- We agree that drawing customers attention to a bank's unilateral right to vary terms and conditions is desirable. This could be achieved by banks making that type of provision obvious in terms and conditions at point of sale and possibly in statement mailing once a year. It would be necessary to ensure that prominence given to such a term did not distract the customer from other equally or more important terms of the contract. We would expect that for products regulated by the FSR this would be a necessary disclosure in the PDS. Advertising the right of unilateral variation removes the disclosure of that right too far away from the more important point of sale disclosure and we would not support that measure. Heightened disclosures under the FSR legislation and this Code should provide some protection for customers on this issue.

- We refer to our comments above on incentives to rectify service problems and are prepared to engage with stakeholders to look at these issues.

- Following the direct debit roundtable on 26 July 2001, we would like to continue those discussions as they relate to the matter of placing a stop on a credit card account particularly in consultation with the relevant card schemes.

- We believe that our above drafting on guarantees accommodates this matter of the guarantor withdrawing before the credit is first advanced.

- Developing appropriate wording for limiting or terminating advances on joint account where one of the joint debtors' wishes to terminate liability for future advances is put forward above in paragraph 35 X.2.

On all of these supplementary issues we believe there is advantage for all concerned to work through those issues, amplifying the specific problems, researching the issues where this would help and looking at workable solutions. We look to our planned community forum process mentioned in this submission (paragraph 10) as a way of dealing with these matters so that the Code review can be finalised soon.

Australian Bankers' Association

August 2001