



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Mr Steve French
General Manager
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The Treasury
Langton Crescent
PARKES ACT 2600

By email: consumerpenalties@treasury.gov.au

Dear Mr French,

**Civil Penalties for Australia's Consumer Protection Provisions -
Discussion Paper**

Thank you for your letter dated 26 September 2005 inviting the Australian Bankers' Association (ABA) to respond to the discussion paper released under the authority of the Ministerial Council on Consumer Affairs (MCCA) "Civil Penalties for Australia's Consumer Protection Provisions".

The ABA appreciates the time that has been made available within which to provide a response to the discussion paper. However, you will be aware that in the same period the financial services sector has been asked to provide detailed submissions to the Government on proposed refinements to the financial services reform legislation and to both the Financial Services Advisory Council and the Regulation Taskforce established by the Prime Minister and Treasurer in relation to the current level of regulation imposed on business and, in the ABA's case, on banks.

It has been possible only recently for the ABA to direct its attention to the discussion paper and we regret that the ABA's response is not as fulsome might otherwise have been the case.

However, we would be happy to discuss the matters covered in the discussion paper and this response in more detail with you if that would be of benefit.

At the outset, it is noted that the proposals in the discussion paper, if implemented, would increase the regulatory burden upon banks and other

Australian businesses at a time when the Government is examining ways of reducing the burden and cost of business regulation.

The basis of the proposals for civil penalties to apply in respect of breaches of the consumer protection provisions of both the ASIC and Trade Practices Acts appears to be that criminal penalties alone are insufficient to command adequate compliance with those laws and that an economic penalty would recoup for society any undue economic gains made by an offender.

In the main it is the consumer protection provisions of the ASIC Act that replicate like provisions in the Trade Practices Act that largely regulate relevant conduct by banks.

In the case of banks, the consequences of criminal conduct can be very serious for both the bank and the offender.

Australian banks are prudentially regulated by the Australian Prudential Regulation Authority (APRA). APRA is developing developed fit and proper person standards that are to apply to senior personal within a banking institution. A criminal penalty could mean that such a person in a senior position could lose their employment with the bank or at the least make a person aspiring to a senior position ineligible for a senior position within the bank.

Breach by a bank of the consumer protection provisions of the ASIC Act would result automatically in the bank having breached its general obligations under its Australian financial services licence issued under Part 7.6 of the Corporations Act 2001 (FSRA). Section 912A of the FSRA provides that a financial services licensee must

"Do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;"

In addition, the general obligations of the licensee under section 912A extend to it complying with the financial services law which include the consumer protection provisions of the ASIC Act and any Commonwealth, State and Territory legislation that covers conduct relating to the provision of financial services.

A breach of these conditions could lead to ASIC imposing additional conditions on the bank licensee and in the extreme case the Treasurer suspending or cancelling the licence.

The FSRA requires banks and other financial services licensees to have available for their retail customers an independent dispute resolution scheme that is able to compensate a consumer who claims to have been wronged by a licensee. The Banking and Financial Services Ombudsman Scheme (BFSO) meets these requirements under the legislation. The insurance industry and financial planning and advisory industry have their own arrangements.

Under section 912A (2) these schemes must be approved by ASIC for the purposes of the FSRA under ASIC Policy Statement 139 the schemes must report to ASIC any systemic breaches of the FSRA or serious misconduct.

In consultation with member banks', regulators and community groups, the ABA revised its Code of Banking Practice (Code) in 2003. The Code provides substantial consumer protection to customers of Code subscribing banks. The Code applies to individuals and small business customers. The Code covers any banking service that a subscribing bank provides to its customer including its conduct in providing to its customer a financial product of another company. Customers may have recourse to the BFSO in the event of a breach of the Code that gives rise to a financial loss of up to \$250,000.

Also, the Code Compliance Monitoring Committee (CCMC) has been established to monitor and report on banks' compliance with the Code. The CCMC is an independent regulator within the self-regulatory framework for the Code and comprises an independent chair (Tony Blunn AO), a consumer member (David Tennant of Canberra based CARE financial counselling services) and a banking member (Russell Rechner formerly head of retail at ANZ Bank). The CCMC has wide powers to investigate Code breaches including "shadow shopping" powers.

The CCMC has power to publicly name in its annual report a bank that is guilty of systemic or serious breach of the Code provisions or has failed to remedy a breach or comply with an undertaking given to the CCMC or failed to take steps to prevent the recurrence of a breach after having been warned it may be named. The annual report is available to ASIC.

The approach in some of the consumer protection provisions of the ASIC and Trade Practices Acts is evaluative unlike other legislation such as the Consumer Credit Code (UCCC) where civil penalties apply for breach of prescriptive requirements. This is not to suggest that the ABA supports the existence of a civil penalties regime in the UCCC. On the contrary, the ABA has consistently opposed that regime as there is evidence that the UCCC regime has contributed to the length and complexity of disclosure and contractual documentation to the disadvantage of consumers. The relevant point is that compliance with a prescriptive obligation is likely to be more certain for a business than an obligation where an evaluation of circumstances taking account of a variety of legislated criteria is required. An example of this is section 12CC of the ASIC Act that deals with unconscionable conduct in business transactions where there are some 11 criteria in sub-sections (2) and (3) and additional criteria in sub-sections (4) and (5). Another example is section 60 of the Trade Practices Act that is replicated in section 12DJ of the ASIC Act where undue harassment or coercion is proscribed. In 1999 the Australian Competition and Consumer Commission felt the need to develop debt collection guidelines in an attempt to define the boundaries of undue harassment or coercion in debt collection for the guidance and benefit of creditors and collectors.

The compliance obligations that a bank has under the FSRA, the Code, APRA's standards and other Commonwealth, State and Territory legislation are comprehensive and onerous. Banks have in place arrangements for their retail customers to seek redress for breaches of consumer protection laws and the Code and so they can do so simply, effectively and at no cost to them.

The banking industry has set standards of conduct for the financial services industry through its Code and as a whole conducts its business activities with a high level of legal compliance, integrity and professionalism.

The ABA therefore submits that the proposed extension of the civil penalties regime is unnecessary and would add to the already heavy regulatory burden faced by banks and other participants in the financial services sector. This would inevitably lead to increased costs for banks' customers and this would be inconsistent with the community's interests.

If the proposals were to proceed there should be an exemption for those financial institutions that are required to be licensed under the FSR and that are subject to prudential supervision by APRA.

The ABA would be pleased to discuss its views with you.

Yours faithfully,

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a small flourish.

Ian Gilbert