

## CODE OF BANKING PRACTICE

### QUESTIONS AND ANSWERS

#### Question - Lindsay Powers (Minter Ellison Morris Fletcher, Sydney):

My question concerns the guarantor provisions under the Code. If the protection and the regulation is said not to apply to an associate of the borrower, my question to the panel is, associated in what way and to what extent?

#### Response - Gregory Burton (Speaker):

In fact, something that I did not read from my written paper was that "associate" is not defined, but presumably does not include natural relatives of the guarantor, since this would reduce the ambit of section 17 to nil, excluding even the Amadios. If that is the case, (if it is the case that I am right) the section will catch true third party guarantors. So to answer your specific question, Lindsay, it is not defined. I think the definition of "associate" in the *Corporations Law* (which is the source of some of the other definitions such as "related entity" and "public corporation" for instance) no longer in all its manifestations — at least, in its most general manifestations — catches natural relatives. So it may be that, even if one looked at the definition of "associate" in the *Corporations Law*, you would still exclude relatives from this provision. In other words the *Amadio* situation would be caught by section 17.

#### Question - George Weaver (Henry Davis York, Sydney):

I would like the panel's comments in relation to some questions arising under section 6 where it said that a bank has to give general descriptive information about such "minor" topics as the bank's right to combine accounts, bank cheques and, for instance, the account payee crossing. It seems to me in relation to these it may be said that the law is complex, in some respects the law is obscure, in some respects the law is there but nobody likes it and banks are waiting for a chance to get it changed — as for instance in *Tai Hing*. So would you agree with my perception that this is a bit of a minefield from the point of view of cases arising under the *Contracts Review Act* or even the *Trade Practices Act*, the danger being that if you say too little you can very easily be blown out on the basis that you have said too little, and if you say too much, you will almost certainly be blown out on the basis that you have made yourself totally unintelligible? I just wonder whether you agree with my perception that there are some problems lurking in these apparently bland provisions?

#### Response - Gregory Burton (Speaker):

George, I think the answer to that is, yes, advisedly — you are damned if you do, and you are damned if you do not, as you correctly point out. However, it may be a little better than the provision on which I think you made a similar comment last year, which was just simply "information". Certainly, I do not think one would have to reproduce, in the brochure, *Weaver and Craigie* on the various topics you mention.

What perhaps one could do — and this is in no way intended as advice and a general disclaimer of the widest sort is given! — is to give a general description of what is, for instance, a bank cheque or a right to combine an account, in terms of almost a definition; then to say that the law is complex and that this provision, or this brochure, does not intend to set out the law and customers should go to see someone other than the bank if you want to get more advice, and maybe suggest some sources such as legal or financial advisers. But apart from that, just try to give a definition, and where the law is controversial, say it is controversial — that may be the only protection one has. That could not be misleading, one would hope!

**Question - Ian Davidson (Barrister-at-Law):**

A quick comment and a question. I would perhaps disagree with our commentator, Ray Finkelstein, on a narrow issue. If a bank makes a public announcement that it will be bound by the Code, and I as a member of the public am at least aware of the announcement, I would have thought that *Carlill v Carbolic Smokeball Company* would suggest that the bank could be bound there.

A question for perhaps our Australian speaker and commentator: I had wondered whether the credit provision sections could increase liabilities to banks in the new "adding things to your home loan" products? As I see the advertisements telling me to put the kids' private school fees and the overseas holiday on the house, I just wondered whether speakers have a view whether the Code could increase risks for banks if at the end of the day we are not able to pay those loans?

**Response - Gregory Burton (Speaker):**

Ian, I do not see any difference, just thinking on the spot, between that and any other situation, because what one is looking at, under this provisions in the Code, is the capacity to repay. There is no exact tying of the money secured to the equity in the house. I think if you are going to have a problem, it is going to be more in the area (which I think is an emerging area at least in respect of some bank charges) that the advertisement does not say enough about what the implications may be, and therefore the *Trade Practices Act* may come into play. But I think that would be the area of potential liability more than the Code. I do not think this area would stand out any more than any other type of lending arrangement. But maybe you have some comments on why you think this may be different to an ordinary loan?

**Response - Ian Davidson (Barrister-at-Law):**

Well, I suppose I had thought that in the old-fashioned terms, if I needed to borrow for my overseas holiday it would be a shorter term loan, and if I am adding it on to the house it is likely to be spread out over a longer term, and that one's ability to repay, I would have thought, might be rather different than something borrowed for a purely consumable purpose as against something that is borrowed to purchase a house which one might have thought the value would appreciate. So that was the nub of the concern I had.

**Response - Gregory Burton (Speaker):**

I see your point, but it would still come back to the bank's judgment on the capacity to pay. The bank should have made it clear that the repayment schedule was over a longer term and that if someone became unemployed or so on, coming down from a high income, that that might affect their ability to pay, and it would then be against the house. But again, I think my previous comment applies.

**Comment - John Abbott (Chairman):**

I am sorry, we have literally run out of time. If you have any burning questions, perhaps you could approach a member of the panel during morning tea.

I am sure you will agree that Gregory, Ray and James have done an excellent job of explaining the Code to us and its possible effects, as well as giving us some insight into the English Code. I would like you to join with me in thanking them in the usual manner.