

Our Reference: CPD2007/33025

8 January 2008

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Dear Michael

ABACUS Australian Mutuals - draft Code of Practice for Mutual Building Societies and Credit Unions

Thank you for giving ASIC the opportunity to comment on ABACUS Australian Mutuals' draft Code of Practice for Mutual Building Societies and Credit Unions (Code). I attach our comments, and apologise for the delay in responding.

ASIC congratulates ABACUS Australian Mutuals and its members on their progress to date in developing the draft Code.

We particularly welcome the clauses in the draft Code containing commitments about reasonable exception fees, protections for consumers experiencing financial difficulties, responsible lending and the structure of joint accounts.

ASIC notes that whilst ABACUS Australian Mutuals has not at this stage sought ASIC approval for its proposed Code of Practice in accordance with section 1101A, *Corporations Act 2001 (Cth)*, approval may be sought in the future.

Accordingly, ASIC's comments reflect the principles and criteria set out in ASIC Regulatory Guide 183 – Approval of financial services codes of conduct (RG 183).

If you have any queries in relation to this letter or preliminary queries regarding the exploration of obtaining ASIC code approval, please do not hesitate to contact me on 02 6250 3801 or my colleague, Miles Larbey on (03) 9280 3538.

Yours sincerely

Delia Rickard
Acting Executive Director, Consumer Protection



ASIC

Australian Securities & Investments Commission

ABACUS Australian Mutuals - draft Code of Practice – Mutual Building Societies and Credit Unions

**Comments by the Australian
Securities and Investments
Commission**

December 2007

Preface

The Australian Securities and Investments Commission (ASIC) welcomes the opportunity to provide comment on and contribute towards the development of ABACUS Australian Mutuals' draft Code of Practice for Mutual Building Societies and Credit Unions (Code).

ASIC notes that ABACUS Australian Mutuals (ABACUS) has not sought ASIC approval for its proposed Code in accordance with section 1101A, *Corporations Act 2001 (Cth)* (Corporations Act), but has not ruled out doing so in the future.

ASIC's comments reflect the principles and criteria set out in ASIC Regulatory Guide 183 – Approval of financial services codes of conduct (RG 183). We hope this will assist ABACUS in identifying issues to explore further if code approval is ultimately sought.

We encourage ABACUS to consider the benefits of obtaining ASIC code approval and invite ABACUS to discuss this with us.

Our comments reflect ASIC's consumer protection objectives under the *Australian Securities and Investments Commission Act 2001(Cth)* (ASIC Act) and Chapter 7, Corporations Act.

Our comments are divided into two sections. Section 1 covers substantive issues, whilst Section 2 deals with non-substantive issues.

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Section 1: Substantive Issues

- 1.1 This section sets out our substantive comments on the draft Code, following the order of the draft Code, rather than any order of significance.

Commencement date

- 1.2 ASIC notes that ABACUS states that there will be a 12 month transitional period before implementation of the proposed Code can occur (p 2, ABACUS Public Consultation Document).
- 1.3 ASIC seeks confirmation as to when ABACUS envisages that implementation will occur.

Enforceability of the Code

- 1.4 We note that Code subscribers will commit to comply with the Code, and will submit to the Code Compliance Committee in terms of its role to monitor compliance with the Code, including dealing with complaints about breaches of the Code. It is not clear, however, whether Code subscribers will contract directly with the Code Compliance Committee to be bound by the Code.
- 1.5 Further, ASIC notes that the consumer protections in the draft Code will not be incorporated in Code subscriber's terms and conditions.
- 1.6 This is not consistent with the current Credit Union Code of Practice (clause 2.2, Credit Union Code of Practice, p 6), or the Code of Banking Practice (clause 10.3, Code of Banking Practice, p 6). This is, therefore, likely to be considered a retreat from current levels of protection by consumers and consumer groups.
- 1.7 We understand that the reasons for this approach are:
- (a) Arguably non-compliance with the draft Code would constitute misleading and deceptive conduct;
 - (b) the draft Code will be applied by external dispute resolution schemes (EDR Schemes); and
 - (c) the giving of contractual rights is at odds with the aspirational style of the draft Code (p 3, ABACUS Public Consultation Document).

- 1.8 ASIC queries whether a consumer would be likely in practice to pursue a claim that non-compliance amounted to misleading and deceptive conduct. We also note that the success of such a claim is not assured.
- 1.9 We note that, assuming current jurisdictional limits for dispute schemes apply, not all consumers will be able to have their complaint about Code non-compliance dealt with by an EDR Scheme. For example, EDR Schemes impose monetary limits on their jurisdiction. Read literally the draft Code appears to involve a waiver of such limits, ie it states, without restriction, that unresolved complaints about a breach of the Code may be referred to the EDR scheme. If this were the case it would ameliorate the issue around contractual enforceability. However it is not clear that such is the intention.
- 1.10 Furthermore, we are concerned that there is a tension between the lack of enforceability in individual contracts with customers and the use of language in the Code such as “our key promises to you”, which implies a binding commitment at an individual customer level. This is likely to be confusing, if not misleading, for consumers.

ASIC suggests making the provisions of the draft Code contractually enforceable, either by requiring Code subscribers to contract directly with the Code Compliance Committee or by incorporating the agreement to comply into individual customer contracts (which would be consistent with the current Credit Union Code of Practice and the current Code of Banking Practice).

10 key promises

- 1.11 Notwithstanding our comments above about enforceability, ASIC strongly welcomes the aims and objectives conveyed in the 10 key promises. However, we are concerned that some aspects of the key promises are not consistent with other clauses of the draft Code. In particular:
- (a) **Key Promise 1** states that “*we will put our [customers’] interests first*”. Clause 4.1 states that standard terms and conditions will strike a fair balance between a customer’s legitimate needs and interests and the interests and obligations of the ABACUS member.
 - (b) **Key Promise 3** states that “*we will provide clear and accessible information, so you can choose the right product*”

for you". Clause 2.1 states that the information made readily available will be "generally sufficient to allow you to make an informed decision about [a] product or facility". .

Delivering on our key Promises – advertising

- 1.12 Clause 1 states that Code subscribers will ensure that advertising and promotional material is not "misleading" but does not refer to material that is "deceptive". This is inconsistent with the current Credit Union Code of Practice (clause 18.1), the current Code of Banking Practice (clause 30) and members' legal obligations under the ASIC Act.
- 1.13 ASIC suggests that you consider including a reference to deceptive advertising material.

Fair products and fees

- 1.14 Clause 4 provides that members will not adopt terms and conditions which are "*not reasonably necessary to protect ...[their] legitimate interests, or that ...[customers] are unlikely to be able to comply with*". This would appear to amount to a commitment not to include unfair contract terms and conditions. If this is the case, we suggest you state this explicitly.
- 1.15 Clause 4.5 provides that exception fees will be "*reasonable, having regard to our costs*" and be "*fairly applied*". ASIC welcomes this clause. We note that it aligns with the Ministerial Council on Consumer Affairs' proposed changes to the Uniform Consumer Credit Code, released for consultation in August 2007.
- 1.16 ASIC is interested in learning more about how it is envisaged that Code subscribers will determine whether an exception fee is "*fairly applied*" under the third dot point at clause 4.5, draft Code.

Responsible lending practices

- 1.17 ASIC welcomes clause 5 which commits to responsible lending practices. ASIC notes that this is a clause which ABACUS regards as containing a commitment which exceeds other comparable codes (p 3, ABACUS Public Consultation Document).
- 1.18 Footnote 12 excludes bridging finance arrangements, equity release products and redraw facilities from the requirement to base lending decisions on a careful and prudent assessment of a customer's financial position and capacity to repay. In relation to bridging

finance, we query whether such an assessment should still be made in that the loan still has to be repaid and a prudent lender would be expected to make an assessment of the borrower's capacity to repay, albeit from capital rather than income. We also note the lack of consensus on the meaning of the term "equity release products" and suggest that you consider clarifying the scope of this.

Joint Accounts

- 1.19 Clause 6.2 states that a consumer will be required to positively select whether a single account holder or both account holders' approval is required to access a joint-account. ASIC welcomes this clause.
- 1.20 Clause 6.2 goes on to say that members will inform customers how they can change account access arrangements. It is not clear whether authorisation of a single account holder or both account holders is required to make a change, or whether this is connected to the account operating instructions that have been selected. In certain circumstances, it can be difficult to obtain the authorisation of both parties to change account access arrangements.

Subsidiary cards

- 1.21 Clause 7 states that a customer should take "*reasonable steps to ensure that [a subsidiary] card is destroyed or returned to the member*".
- 1.22 We note that problems relating to subsidiary cards often arise in the context of a relationship breakdown, or where the subsidiary card holder is uncontactable. We would suggest therefore that "reasonable steps" should be interpreted on a case by case basis allowing for the particular circumstances.
- 1.23 We are also interested in discussing with you the relationship between this requirement and the provisions on liability for unauthorised transactions under the EFT Code of Conduct.

Safeguards to loan guarantors

- 1.24 ASIC welcomes the commitments in clauses 9.6 and 9.7 that members will not accept a guarantee unless the borrower agrees to the release of information to the guarantor, including a copy of the loan contract, details of any security, account statements and any other information relating to the borrower's credit history for the last 2 years.

- 1.25 We note that the comparable clause of the Code of Banking Practice includes the provision of any current credit-related insurance contract and the final letter of offer provided to the debtor. We suggest that you consider giving guarantors access to these documents under clause 9.
- 1.26 ASIC welcomes the commitment in clause 9.12 to provide the guarantor with a copy of any formal demand or default notice sent to the borrower and the latest statements of account, if requested.
- 1.27 We suggest that you consider whether the "prominent notice" at clause 9.5 should also state that the guarantor can request information about the transaction or facility to be guaranteed.
- 1.28 Clause 9.9 provides that a guarantor will be afforded a minimum of 24 hours to obtain financial and/or legal advice once they have received the information provided under clause 9, before being required to sign any guarantee.
- 1.29 ASIC queries how this commitment is intended to operate in practice, where the 24 hour period ends on a weekend or public holiday. We suggest that expressing this requirement in terms of "one business day" may address this.
- 1.30 We also note that 24 hours (or one business day) may not be a sufficient amount of time for many consumers to locate, engage and obtain advice from a lawyer and/or financial advisor, especially if they do not already have one.

Finance brokers

- 1.31 ASIC welcomes clause 10 which deals with finance brokers. ASIC notes that this is a clause which ABACUS regards as containing a commitment which exceeds other comparable codes (p 3, ABACUS Public Consultation Document).
- 1.32 Clause 10 provides that if a member engages a finance broker, they will require that broker to belong to the Mortgage and Finance Association of Australia (MFAA). ASIC understands that the objective of this requirement is to afford consumer access to ASIC approved EDR schemes and ensure that an appropriate level of conduct and accreditation are met.
- 1.33 We note that this requirement could potentially raise exclusive dealing, third line forcing issues under section 47, *Trade Practices Act 1974 (Cth)* (Trade Practices Act) given that the Finance Brokers

Association of Australia Ltd (FBAA) is another peak industry body for mortgage and finance brokers.

- 1.34 ASIC notes that clause 10 may become out of date if the proposed uniform *Finance Broking Bill* (Bill) is passed. The Bill imposes national licensing and EDR scheme membership requirements.
- 1.35 We are interested in how clause 10 will be progressed if the Bill is passed before the draft Code is implemented.

Statements of account

- 1.36 ASIC welcomes clause 13.3 and notes that it is consistent with ASIC's comments on good practice for disclosure of transaction fees on statements in Regulatory Guide 40 – Good transaction fee disclosure for bank, building society and credit union deposit and payment products (RG 40).

Notification of changes to account

- 1.37 ASIC notes that clause 14.1 imposes a requirement to give consumers advance notice of new fees and fee increases. It is not clear to us whether this clause covers notice about a reduction in the number of fee-free transactions that a customer is entitled to before a fee is charged. We suggest that clause 14.1 should apply to this, and that this should be clarified.
- 1.38 Clause 14.4 enables members to use a diverse range of communication methods when notifying consumers of changes.
- 1.39 ASIC recognises the need for flexibility in terms of notification in order to contain costs. However, we are of the view that where fee changes are involved, notification outside a statement (i.e. sending a separate direct letter or email) is most appropriate.

Electronic communications and statements

- 1.40 We note that ASIC is currently developing best practice guidance for electronic disclosure under Chapter 7, Corporations Act. We expect to release a consultation paper setting out draft practice guidance on this issue in early 2008.
- 1.41 We suggest that, if possible in terms of timing, you consider this consultation paper as work on the draft Code progresses.
- 1.42 We suggest that you consider including a commitment to not use hyperlinks in emails as a method of electronic communication due

to the risks of fraud associated with consumers clicking on hyperlinks in emails. This would not prohibit the use of emails referring consumers to a website.

Chargeback and disputed transactions

1.43 ASIC notes that clause 18 does not go as far as the current Code of Banking Practice in that there is no obligation to provide general information about a chargeback with credit card statements at least once every 12 months.

Financial difficulties, debt collection and legal action

1.44 ASIC welcomes clauses 22 and 23 which deal with financial difficulties, debt collection and other legal action.

1.45 We note that dot point 8 under clause 22.2 states that if a member is unable to assist a customer in financial difficulties, the member will advise the customer of any rights they may have to seek a change on grounds of hardship under the consumer credit laws.

1.46 ASIC queries whether it would be more appropriate for members to advise consumers of any rights under hardship variation grounds at the beginning of the financial difficulties identification process. This would enable consumers to fully assess the range of options available to them at that stage.

Complaints about members of the Code

1.47 ASIC welcomes ABACUS members' commitment to dealing with complaints in a prompt, efficient, fair and consistent manner.

1.48 We note that clause 26 does not refer to the current Australian Standard on complaints handling, AS ISO 10 002. We are interested in learning whether you are considering requiring members to comply with this standard.

Complaints about breaches of the Code and Code Compliance

1.49 Clause 28 and clauses 3 to 12 of the Appendix address code compliance issues and sanctions for breach.

1.50 ASIC seeks further information about the structure and functions of the Code Compliance Committee. In particular:

- (a) How the Code Compliance Manager will be appointed.

- (b) How the independent Chair of the Code Compliance Committee will be appointed.
- (c) Whether you have consulted the Consumers Federation Australia about its role in nominating a consumer representative for the Code Compliance Committee.
- (d) The powers and functions of the Code Compliance Committee. ASIC notes that some of these functions are briefly listed at clause 4, Appendix. However, we would be interested in further information about:
 - (i) The relationship between the Code Compliance Manager and the Code Compliance Committee.
 - (ii) How complaints not involving financial loss, but which fall outside the jurisdiction of the relevant EDR Schemes may be brought to the attention of the Code Compliance Manager and/or Code Compliance Committee.
 - (iii) The relationship between the Code Compliance Committee and EDR Schemes and other consumer protection bodies. For example, whether EDR Schemes will be able to forward information about wider ranging, systemic or emerging issues to the Code Compliance Committee.

1.51 ASIC also queries whether it is appropriate to include the name and contact details of the Code Compliance Manager given that this information may change during the life of the Code.

Other matters

1.52 We note that the current Code of Banking Practice deals with the following matters, which are not addressed in the draft Code:

- (a) The measures that code subscribers will take to enhance accessibility for vulnerable and disadvantaged customers (e.g. those who are elderly or have a disability) (see clause 6, Code of Banking Practice).
- (b) The provision of details of exchange rates, an indication of when money will be sent overseas and the provision of a warning in relation to the risks of exchange rate movements where foreign exchange services are provided (see clause 21, Code of Banking Practice).

- (c) How code subscribers will deal with family court determinations and property settlements affecting the transfer of mortgages, titles and enforcement of debts (see clause 38, Code of Banking Practice).

Section 2: Non-substantive issues

2.1 ASIC has identified the following non-substantive issues:

- plain English language requirements;
- use of definitions; and
- matters relating to the introduction, coverage and privacy.

Plain English Language requirements

2.2 ASIC recognises ABACUS' attempts to draft an accessible plain language document.

2.3 We note that footnotes have been used throughout the draft Code and that an Appendix has also been included.

2.4 We also note that the draft Code states that footnotes and the Appendix also form part of the Code (p 5).

2.5 We suggest that some of the information included in the footnotes and Appendix is important and may be more appropriately suited to the body of the Code.

Footnotes

2.6 ASIC recognises that in some instances, footnotes may lend clarity and additional information to the main body of the draft Code.

2.7 However, we think it is preferable that important information such as limitations, exclusions or carve outs are contained within the main body of the draft Code. For example, footnote 12 significantly limits the commitment to responsible lending in clause 5.1, draft Code. Our substantive concerns about this limitation are discussed at **Error! Reference source not found.** to **Error! Reference source not found.**

2.8 The majority of the footnotes in the draft Code provide cross-references. While we support the inclusion of cross-references, we suggest that these could be included in the main body of the draft Code.

2.9 Footnote 2 is a definition of "small business" (p 5). We suggest including this in the main body of the draft Code or a definitions section. Our comments about the Use of Definitions are set out at

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- 2.10 **Footnotes 8 and 15** refer to information being available at specific locations on ASIC's FIDO website. These references may become out of date over time. ASIC is currently reviewing and updating the information on its FIDO website. We suggest that you review the need for these references.
- 2.11 Clause 2.3 provides that a member will give consumers copies of terms and conditions for standard contracts on request. **Footnote 9** provides that members may not be able to give consumers copies of terms and conditions for non-standard products until they have been agreed. We suggest that this clarification could be included in the main body of the draft Code.
- 2.12 **Footnote 10** explains that the heading "*Standard Terms*" does not incorporate "specific terms". **Footnote 11** states that costs to members includes charges imposed by service providers. We suggest that these footnotes may be unnecessary.

ASIC suggests that ABACUS considers:

- Moving information in footnotes to the main body of the draft Code; and
- Deleting unnecessary footnotes.

Specific concerns about the use of an Appendix

- 2.13 ASIC notes that several significant matters are covered in the Appendix of the draft Code. For example, the Appendix deals with Code compliance, sanctions, publicity, amendment and review.
- 2.14 We suggest that given the significance of these matters, it may be more appropriate to include them in the main body of the draft Code.

ASIC suggests that the Appendix be incorporated into the main body of the draft Code.

Use of definitions

- 2.15 ASIC notes that the draft Code does not currently include a section devoted to definitions of terms used.
- 2.16 We understand that this may have been a conscious decision by ABACUS to create a more user friendly and accessible document.

However, our view is that a definitions section may make it easier to understand the draft Code.

2.17 The draft Code defines:

- (a) "*small business*" (footnote 2, p 5);
- (b) "*we*", "*us*" and "*our*" (p 5); and
- (c) "*you*" and "*your*" (p 5), which is varied at clause 9.1.

2.18 The terms, "*Code*", "*deposit accounts*", "*default fees*", "*exception fees*", "*credit facility*", "*direct debit facility*" and "*ASIC*" are used throughout the draft Code. These terms are not defined. We suggest that it may be helpful to define these terms.

ASIC suggests that ABACUS considers including a definitions section.

Introduction

2.19 Paragraph four, p 4 states that credit unions and building societies already comply with a range of regulatory requirements, including requirements under the Corporations Act. This refers to licensing and disclosure regulation. We suggest including references to requirements about advice and training staff.

Coverage

2.20 Paragraph 1, p 5, states that "*we*", "*us*" and "*our*" refers to your building society or credit union if it is "*affiliated*" with ABACUS. Paragraph 3, p 4 describes the draft Code as the industry code for mutual building societies and credit unions who "*belong*" to ABACUS. We suggest that you adopt consistent terminology here.

2.21 The sub-heading "*Coverage of Code*" refers to "*retail (individual and small business) members*" (p 5). We suggest that the word "*retail*" be deleted given this is essentially a legal expression and is not used again in the draft Code.

Privacy and confidentiality

2.22 We note that there is a typographical error in clause 21.1. The reference to 1998 should read 1988.