

9 January 2008

Michael Funston
Code Consultant
Public Affairs
ABACUS
GPO Box 4720
SYDNEY NSW 2001

By email: mfunston@abacus.org.au

Dear Michael,

RE: ABACUS DRAFT CODE OF PRACTICE

Consumer Credit Legal Centre (NSW) Inc. (CCLC) supports the review of the Code of Practice. We are pleased with the improvements in the scope and commitments of the Code.

CCLC strongly supports ABACUS having a robust Code as an indication of its commitment to its customers.

CCLC does have some proposed improvements for the Code and these are detailed below.

About CCLC

CCLC is an independent community legal centre providing legal advice, legal representation, and education to NSW consumers in relation to credit, debt and banking matters. CCLC also operates the Credit and Debt Hotline, a financial counselling information and referral service, which is the first port of call for many troubled debtors in NSW. In 2007 CCLC took over 11,000 calls for financial counselling information, legal advice and referrals to face-to-face financial counselling services. We also represented over one hundred clients in disputes with credit providers and debt collectors, including matters in courts, tribunals and external dispute resolution schemes.

CCLC regularly undertakes research, policy development and advocacy to promote the interests of disadvantaged consumers. CCLC runs an extensive website with self-help information including facts sheets, sample letters, complaint and court forms and guides to completing them. We offer workshops for financial counsellors, community workers and members of the public with special needs (such as new migrants). We have produced a number of kits and educational packages over the years.

Preliminary issue – Contractual liability and the Code

As the commentary paper accompanying the Draft Code states Abacus has not “sought to require subscribing institutions to give their members and customers contractual rights in respect of the Code’s commitments”. This contrasts with the

current approach of both the Code of Banking Practice and the Credit Union Code of Practice, and is a retrogressive step in our view. The draft Code arguably goes further than the Code of Banking Practice on some key issues of importance to CCLC clients. Failure to make these commitments contractually binding exposes the sector to the allegation that these commitments are hollow and without real substance. We note that the Australian Bankers' Association media release of 21 December 2007 in relation to the announcement of the latest review of the Code of Banking Practice, for example, strongly emphasises the contractual nature of that Code. More importantly, it is essential that the Abacus Code be contractually binding to ensure consistent commitment to the Code across all member organisations and to provide appropriate remedies for consumers if the Code is breached.

Fair products and fees (section 4)

CCLC is pleased to see the inclusion of provisions relating to fair standard Terms and Conditions in the Draft Code (4.1 – 4.3). We also think the inclusion of the requirements relating to exception fees in paragraph (4.5) is positive. In our view, however, this last-mentioned paragraph should go further. Specifically, we believe the requirement that exception fees will be “reasonable having regard to our costs” ought to be amended to say that they will “reflect our costs”. This would better reflect the law in relation to penalties in Australia.

Responsible lending practices (section 5)

The commitments on responsible lending are consistent with current best practice and are welcome. We have some reservations about the inclusion of the statement in (5.2) that, “in making this commitment, we are entitled to rely on your honesty and the accuracy of the information you provide to us”. While we understand why this statement has been included and have no objection to it as a general proposition, we are concerned that the statement may be interpreted as removing any responsibility on the part of the lender to ensure that loan applications, including especially those received through third party intermediaries (such as finance brokers), are consistent and plausible, and that apparent inconsistencies etc are investigated further.

In our experience, there are some finance brokers who regularly manipulate loan applications and then mislead the consumer about the purpose of those changes. There are also brokers who ask consumers to sign blank or semi-blank loan applications. It is essential that members of ABACUS only deal with reputable brokers and acknowledge when brokers are involved that additional procedures are in place to ensure loan applications made by brokers are accurate.

Disadvantaged consumers are also affected in other areas of lending that do not regularly involve intermediaries. Examples of inadvertent inaccuracies in loan applications by CCLC clients have included:

- Social security recipients who inadvertently declare their fortnightly income as weekly, and
- A mentally ill client who claimed an outrageously high income as a result of delusion.

Clearly allowing consumers access to credit they cannot repay is not in the interests of either the credit provider or the consumers. In our experience the above problems can

be filtered out in many cases provided sufficient questions are included on the application form (for example, income, employer, occupation and number of dependents can be cross-referenced for obvious discrepancies). Consumers should generally be obliged to act honestly and to provide complete and accurate information. However, CCLC contends that credit providers also have an obligation to take reasonable steps not only to prevent bad debt, but to protect particularly disadvantaged consumers. The current wording of the second sentence of clause 5.2 appears to shift too much of the onus back to the borrower, undermining the general commitment made in the opening sentence.

Joint accounts (section 6)

We are pleased to see that the Draft Code seeks to address perennial “relationship debt” issues in sections 6 to 10. With respect to (6.2), it would be useful to add a commitment that the permission of both borrowers must also be sought to *change* account access arrangements from two-to-authorise to one-to-authorise – while this may seem obvious, we have seen situations where financial institutions permit joint account holders to make this change unilaterally.

Safeguards for co-borrowers (section 8)

Paragraph (8.2) of the Draft Code, which follows the general approach of the Code of Banking Practice, is a valuable inclusion given the ongoing poor (and arguably illegal) practice of structuring what are in effect guarantee arrangements as joint loans.

CCLC is currently acting for a client in a regulated credit matter that, in our view, fits this description. We contend that our client should have no liability as co-borrower under the credit contract because our client obtained no benefit from the loan and was in effect a guarantor of the loan.

Safeguards for loan guarantors (section 9)

Generally, we think the commitments proposed in relation to loan guarantors are significant and consistent with good banking practice. We note that the Draft Code makes more comprehensive promises regarding the provision of information to guarantors than does the current Code of Banking Practice (see section 28, CBP).

There are, however, some additional elements that the regime should include, in our view.

First a section, similar to section 28.6 of the Code of Banking Practice, should be included. This states:

We will:

- (a) not give the Guarantee to the debtor or someone acting on behalf of the debtor, to arrange the signing (except a legal practitioner or financial adviser who is working for you); and*
- (b) ensure that you sign the Guarantee in the absence of the debtor where we attend the signing of the Guarantee.*

In CCLC's view, these are practical measures that help reduce the risk of undue pressure being applied to loan guarantors. We would urge Abacus to adopt them.

Secondly, we believe the proposed regime needs to include a further commitment in the situation where an existing guarantee is to be extended (see 9.10). In this situation, in our view, a status report updating borrower's financial position should be provided to the guarantor before the guarantee is extended. We think this is important to ensure the guarantor is put on notice of any deterioration in the borrower's financial position. It is also in line with the "full disclosure" philosophy of the section generally. Arguably, it is also a prudent course of action from the lender's perspective as failure to disclose a deteriorating borrower position to the guarantor when a guarantee is being extended could give the guarantor grounds for defending a claim in the event of the borrower's defaulting.

Thirdly, in our view, paragraph (9.14) as it stands provides very limited protection to guarantors in the enforcement context. More specifically, a "grace period" of 30 days before judgement is enforced against the guarantor will usually be of little assistance to our clients, it usually takes more than 30 days for a guarantor to arrange payment of a loan.

We submit that, at least in the "family equity" context, the Code should include a commitment to taking action to recover from the borrower first (i.e., not joint proceedings against borrower and guarantor). Specifically, in circumstances where there are two security properties and one is occupied by the borrower(s), the other by the guarantor(s), the credit provider should seek to sell the borrowers' property first, even if it is valued at less than the guarantor's home, or less than the value of the debt. The guarantor may then be able to avoid possession and sale of the guarantor's property by finding alternative finance or funds to cover the residual amount owing. Many of our clients are stunned to realise that when they go guarantor the bank can sell whichever home they like or both.

Notifying changes to your account (section 14)

In our view, (14.2) should be extended to explicitly include a commitment to advise borrowers not just of the interest rate increase, but also that the amount of their minimum repayments had changed, and the new minimum payment they would be required to make. This would be consistent with common practice, and would ensure that customers' information needs were met.

Disputed transactions – seeking a chargeback on your behalf (section 18)

We are concerned about the situation where a financial institution's Terms and Conditions may require customers to dispute transactions within an unnecessarily short period in order for the customer to get the benefit of the chargeback regime—in other words, within a time period *shorter* than that permitted under the card scheme rules. We are aware of at least one financial institution that has implemented this practice. CCLC submits that the Mutuals Code should explicitly address such attempts to reduce the availability of the chargeback mechanism by including a commitment to pursue chargeback rights to the extent they are available under the

relevant card scheme rules, and not to reduce card scheme rights in the Terms and Conditions for their products.

Closing your account (section 20)

The promise to *promptly* provide a payout figure on a loan could be given more rigour by adding an additional sentence to (20.2) specifying seven days as the maximum time the institution would take to provide this figure. Section 76, UCCC, requires the provision of payout figure on regulated accounts within 7 days. Using 7 days as a limit point would effectively generalise this statutory standard to all loan accounts (i.e., included unregulated credit). We recommend that Abacus adopt this approach.

If you are in financial difficulties (section 22)

CCLC is very pleased to see the inclusion of strong commitments on dealing with customers in financial difficulties in the Draft Code. This section clearly shows the commitment of ABACUS members to working with customers in financial hardship. Nonetheless, we believe the proposed procedures will need to go further in a couple of respects if they are to be fully effective.

We note in particular that (22.2) does not require the institution to give reasons if it is not able to assist a person in financial difficulties (see at 8th dot point). It is not clear to us how there can be any assurance that the institution has genuinely inquired into and considered the applicant's financial situation unless the institution is under an obligation to explain its decision to the applicant in its response. In the case of UCCC-regulated credit at least, the institution will in any case need to have reasons for its decision and record these against the possibility that the borrower may make a formal hardship application under the Act. We recommend that the Draft Code be amended accordingly.

In our view, paragraph (22.2) should also be amended to impose a requirement not to commence legal proceedings until the institution has formally advised the customer of its decision on the client's application and has given the customer a reasonable opportunity to respond. Currently, (22.2) does not address this issue. A similar approach should also be mandated in relation to the selling of distressed debts. We strongly urge the adoption of these measures.

Finally on this section, we query the implication of footnote 23 that a financial institution may not be able to remove an inaccurate reference from a consumer's credit reference file. This is simply not the case in our understanding. (The situation of an inaccurate listing needs to be distinguished from one where the listing was accurate and debt was subsequently paid. In the latter case, the listing cannot be removed until the 5-year period has expired.)

Debt collection and legal action (section 23)

In addition to the requirements set out in the Draft, which we endorse, there should also be a requirement that institutions should only to sell debts to entities that belong to an ASIC-approved EDR scheme. (The ACCC & ASIC *Guideline on Debt Collection* does not specify this.) It is essential that customers of ABACUS members

can feel confident that even if the debt is sold they will have a forum (through EDR) for raising a dispute.

Complaints about breaches of this Code and Appendix – How the Code is Administered

There should be a clear delineation between compliance monitoring and dispute resolution. Disputes may sometimes be resolved by compromise, whereas Code breaches should be resolved by improvements in compliance and ultimately, if necessary, sanctions. The essence of Code compliance is to ensure that publicly made commitments are actually met. At the same time, there should be clear recognition that compliance issues and disputes will often stem from the same set of facts. Further consumers/customers, or their advocates, should not be required to make strategic decisions about the best avenue for their complaint. There should be open lines of communication between the Code Compliance Committee, the Compliance Manager and relevant dispute resolution schemes. Specifically, there should be very clear and transparent procedures for:

- referral of code compliance complaints which reveal a dispute/loss aspect from the Compliance Manager/Compliance Committee to the appropriate EDR scheme
- referral of disputes including a possible Code Compliance issue from the EDR schemes to the Compliance Manager/Compliance Committee
- discussion/resolution of issues/responsibilities where there may be different possible interpretations of the Code, the facts, or the application of the Code to the facts in circumstances where there may be some overlap in jurisdiction to ensure as far as practicable that the approach is consistent and that consumers are not left without redress because of the way in which they originated their complaint.

Thank you again for the opportunity to comment. Please do not hesitate to contact me on 82041350 if you require any further information.

Yours faithfully,

Katherine Lane
Solicitor
Consumer Credit Legal Centre (NSW) Inc.