

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 3-5 June 2008

Question: bet 117

Topic: Code of Banking Practice

Hansard Page: E82-E83

Senator Murray asked:

Senator MURRAY—That is my observation after a long listening period. I want to ask you about the Code of Banking Practice. As I understand it, that is a voluntary code?

Mr Cassidy—You are wandering into territory which I think is more ASIC's.

Senator MURRAY—No, it is not. I will come to what I am after.

Mr Cassidy—I think you are right. It is a voluntary code.

Senator MURRAY—My impression has been that it has almost entirely been an area of interest for ASIC. I cannot recall the ACCC ever having anything to do with that.

Mr Samuel—I think that is right.

Senator MURRAY—There has, however, recently been a court case which indicates people are taking a relatively liberal view of the misleading and deceptive conduct provisions of the Trade Practices Act. You will know the one I am referring to. I do not know what they have decided, whether the case will be heard in the Supreme Court. I think that judgement is still pending. But I will quote to you from the Code of Banking Practice. It says it 'sets standards of good banking practice'. I do not have the primary document with me so I hope the quote I have got is accurate. It says:

The Australian Code of Banking Practice sets standards of good banking practice when dealing with individual or small business customers, prospective customers and their guarantors.

Then there is a sentence:

All banks that adopt the Code are contractually bound by their obligations under the Code. I do not want you to give me a legal opinion, because I do not think that is right; you need to look at each circumstance. But it has been suggested to me that a breach of the code, given that it says participants are contractually bound, could in certain circumstances therefore trigger the misleading and deceptive provisions, if people alleged that the conduct of the bank was contrary to their agreement. I raise this with you as a policy issue. What concerns me is that if this interpretation is possible then all the codes, which I think are part of the fabric of good governance in Australia, could start to be under some assault and people might not want to sign up to them anymore because of the liability issues. Do you understand where I am going with this?

Mr Cassidy—Yes.

Senator MURRAY—Has that been raised with you before, that issue or that problem?

Mr Cassidy—No.

Mr Samuel—I am not aware of it, no.

Senator MURRAY—You understand—

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Mr Samuel—I understand the issue, yes. I think we would have to take the issue on notice. But I am not aware of it.

Mr Cassidy—We will take it on notice and have a look at the proposition you put and try and give you, as best we can, our view in a hypothetical sort of way of whether that would take us to the misleading and deceptive conduct provisions or not.

Senator MURRAY—Without telling you how to do your business, what I want to alert you to is a potential problem I see. I think a code is a good thing and I think—

Mr Cassidy—Yes.

Senator MURRAY—if people are exposed to legal liability, that may be justified in some circumstances but it could be dangerous if it was general; it would result in people not signing up to codes. It might be an area you might want to give advice to the government on in due course.

Mr Samuel—We will take that on notice. We will have a look at the code, too, that you have referred to, the banking code, and just understand what—

Senator MURRAY—Particularly given the court case which is currently before the court. It is signalling that more liberal approach. Thank you for that.

Answer:

The Australian Bankers Association (ABA) announced on 28 May 2008 that it would be studying an Issues Paper produced for the Review of the Banking Code of Banking Practice. The ABA has been consulting with its member banks to discuss the recommendations by independent reviewer Jan McClelland.

The ACCC made a submission to this inquiry and is monitoring the progress of the Code review.