

GUARANTEES – CODE OF BANKING PRACTICE

There are many facets to the Code of Banking Practice, (“Code”), however the one facet that banks have questioned the most is the disclosure requirement.

In this brief, we look at the disclosure requirements under the Code for a guarantor.

In many instances banks lend funds to borrowers that are special purpose vehicles that have no trading history and the bank relies solely on the security property. The guarantors are usually the directors of the borrowing company and the number of disclosure documents available in these circumstances is very limited.

There are however a number of banking transactions that involve new or additional facilities to existing bank customers or borrowers that are refinancing from other financiers. It is in these transactions that there will be more information to disclose because there are a number of documents provided to the bank in the process of obtaining credit approval or because the customer is a long-time customer and the bank has received a large amount of documentation over time.

Disclosure obligations are summarised as follows:

1. The bank must not give the guarantee to the borrower or to someone acting for the borrower to arrange execution (unless that person is acting as legal practitioner or financial adviser for a guarantor or where the guarantor is the sole director of the borrower company)
2. The bank must tell the guarantor if an existing or proposed facility will be



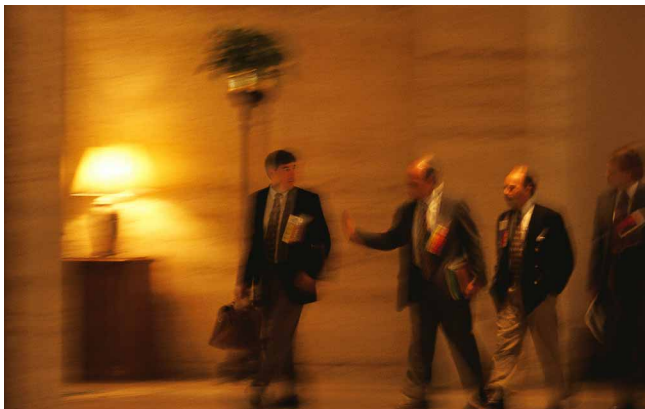
cancelled or not granted if the guarantee is not provided

3. The bank must provide a prospective guarantor with:
 - A Disclosure Pack
 - Time to consider – at least until the next day before the guarantor signs the guarantee (not required if independent legal advice is obtained after the disclosure is made)

Disclosure Pack and review period requirements are not necessary where:

- a guarantor is the sole director of the borrowing company
- a guarantor is a director of the borrowing company and signs a waiver of the review period and/or elects not to receive some or all of the Disclosure Pack items (note that some items cannot be waived)

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- the facility is a “commercial asset financing facility” and the guarantor is a commercial asset financing guarantor

A Disclosure Pack must contain at least the following, where available:

- A copy of the final letter of offer provided to the borrower by the bank and, if earlier letters of offer have contained conditions which have since been satisfied, details of those satisfied conditions
 - A copy of any related credit contract (such as a Deed of Loan)
 - A list of any related security contracts (including details of the property subject to the security) + a notice telling the guarantor that they can request copies of documents
 - A copy of any related credit report from a credit reporting agency
 - A copy of any current related credit insurance contract held by the bank
- A copy of any financial accounts or statement of financial position (eg Profit and Loss Statement) given to the bank by the borrower in the last two years
 - A copy of the latest statement of account for the facility to be guaranteed
 - A copy of any unsatisfied notice of demand by the bank on the borrower within the past two years in relation to the facility to be guaranteed
 - A copy of any statement of account for any facility where notice of demand has been made by the bank on the borrower or where there has been any dishonour by the borrower with the bank in the last 2 years
 - A list of any excess or overdrawings by the borrower of \$100.00 or more in relation to any facility with the bank within last six months
 - Any other information about the facility the guarantor reasonably requests

It is now becoming common practice for banks to issue a tick-box form that sets out all the disclosure documents either included in a Disclosure Pack or that are available to the guarantor on request. It should be noted that this practice is only sufficient if the guarantor is a director of the borrowing entity otherwise the bank must issue the disclosure documents to the guarantor.

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