



Code Compliance Monitoring Committee

Website: www.bankcodecompliance.org

Email: info@bankcodecompliance.org

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Clause 35 - Internal Dispute Resolution

The Committee has recently received a small number of complaints where a bank has engaged external lawyers to institute debt recovery proceedings and, during this process, lawyers acting for the customer have made a complaint relating to the Bank's failure to comply with Clause 25.2 of the Code. In accordance with legal practice regulations, the customer's lawyer is unable to deal with the bank directly and must communicate through its appointed lawyers. The result has been increased legal costs passed onto the customer because internal dispute resolution procedures have not been applied to the unresolved complaint (a dispute as defined under Clause 40 the Code).

In recent determinations, the Committee has put the view that:

- Where a bank receives a complaint either directly or through its agent, which is not resolved immediately, the bank must act in accordance with Clause 35 of the Code. This includes applying the bank's internal dispute resolution processes to the complaint, providing the names and contact number of the person handling the complaint, adhering to the timeframes set out in Clause 35 and providing a response.
- It is not necessarily inconsistent with Clause 35 of the Code for a bank to engage external lawyers to resolve disputes. If a bank chooses to have its external lawyers manage such a dispute, the following minimum requirements apply in order to comply with Clause 35 of the Code:
 - The lawyers must comply with all conditions under Clause 35;
 - From the date notified of the complaint no legal costs may be charged to the Customer relating to the resolution of the complaint/dispute;

- The bank must accept any decisions made by its lawyers regarding the resolution of the dispute and accept any consequences resulting from its lawyers' actions; and
- The bank or its lawyers must tell the Customer or the Customer's agent that the lawyers will be handling the dispute resolution and that they are obliged to comply with Clause 35 of the Code.

The Committee's general view is that banks should recognise that the continued involvement of external lawyers can result in customers being put to significant additional hardship if the legal fees of these external lawyers are passed on. The Committee endorses statements made by the Banking and Financial Ombudsman (BFSO), to the effect that if banks fail to comply with their obligations under Clause 25.2 and subsequently issue legal proceedings, it raises the possible conclusion that any attendant legal costs were not properly incurred. In such circumstances, a bank may not be able to rely on the clauses contained in a mortgage or loan contract purporting to enable enforcement costs to be passed onto the customer. This is because such clauses are subject to an implied qualification that they only apply to costs "properly incurred".

The Committee is however concerned to make it clear that the complaint must be genuine and not simply a device to delay or thwart appropriate legal proceedings. Lawyers acting for customers should clearly distinguish a complaint from ongoing negotiations as part of legal proceedings so that banks can, through their agents, identify matters appropriate for internal dispute resolution.

Spotlight on Financial difficulty

In its last bulletin the Committee outlined its approach to bank compliance with Clause 25.2 of the Code relating to assisting customers in financial difficulty. This clause has continued to be in the spot light with the Committee being asked to participate in a range of fora regarding this central theme.

In June, CEO Kirsten Trott, joined Banking and Financial Services Ombudsman (BFSO) Legal Counsel Philip Field and ABA Director of Retail Policy, Ian Gilbert at the podium of the BFSO annual conference to discuss financial difficulty. The session received excellent feedback and valuable discussion was generated.

On 10 August, the Committee was also represented by its CEO at the House of Representatives Standing Committee on Economics Finance and Public Administration's roundtable public hearing for its inquiry into home loan lending practices and the processes used to deal with people in financial difficulty. Discussions centred on macro economic issues surrounding home lending and record credit levels as well as appropriate credit assessment by lenders and treatment of customers in financial difficulty. As part of those discussions the Parliamentary Committee was reminded of the obligations on

subscribing banks under the Code and it was suggested this example could be drawn upon to improve standards by other lenders.

The transcript is now available on the Parliamentary Committee's website: <http://www.aph.gov.au/hansard/reps/commtee/R10406.pdf> and the CCMC's submission can be found at: <http://www.aph.gov.au/house/committee/efpa/banklending/subs.htm>

Although subscribing banks have taken significant steps towards improving the handling of customers in financial difficulty, and the Parliamentary Committee was made aware of this, it is worth reminding banks of some key issues that remain, which include:

- Identification of customers who might be in difficulty. Collections and other customer facing staff should be appropriately trained to engage in genuine dialogue with customers to identify those in difficulty and comply with both limbs of Clause 25.2.
- Early access to superannuation should be a last resort. All efforts to work with a customer to come to an alternative payment arrangement should be explored prior to superannuation funds being accessed on the grounds of hardship.
- Bank systems must be sufficiently flexible. Such flexibility is required to identify customers in financial difficulty, negotiate with customers at any stage in the collections process, and to appropriately communicate with a customer's representative.

The Committee was recently represented by the CEO at a bank's internal workshop designed to progress its treatment of customers in financial difficulty. The Committee commends the bank on this initiative, aimed not only at improving compliance with the Code but leading practice in this important area. The Banking Ombudsman and Karen Cox from the Consumer Credit Legal Service of NSW, also attended the workshop.

The Committee has been assisting a regional bank with an interest in introducing a dedicated area to handle financial difficulty cases. The Committee supports the concept that a bank has specially trained staff to negotiate with and assist customers in financial difficulty. The Committee is grateful for the information provided by some banks which currently have a separate area for financial hardship cases.

Compliance Inquiries

We are pleased to report that Barbara Schade has returned from extended leave to head up our Compliance Inquiries. Barbara, who works Mondays, Tuesdays and Thursdays, has now commenced the Committee's Inquiry into bank compliance with the Debt Collection Guidelines, under Clause 29 of the Code. Clause 29 requires banks and their agents to comply with the ACCC's guideline, "Debt collection guidelines and the Trade Practices Act" dated June 1999.

The Inquiry, which will be focused on how banks handle communications with third party representatives such as consumer advocates and financial counsellors, has 3 stages:

1. Canvassing the views and experiences of financial counsellors and consumer advocates in dealing with banks on behalf of their clients;
2. A desk audit of all subscribing banks, and
3. Compliance visits to selected banks.

As well as assisting Banks to identify any areas of non compliance, the Committee is committed to using its Inquiry function to identify, share and promote best practice. In 2005 the ACCC and ASIC released the "*ACCC – ASIC Debt collection guideline: for collectors and creditors*". The Committee notes that the Code's Key Commitments include a commitment to continuously improve practice and monitor external developments and that ASIC, the ACCC and the BFSO (refer BFSO Bulletin 47) consider the 2005 guidelines to reflect best practice.

The Committee understands that many subscribing banks have already adopted practices in line with the 2005 guidelines. The Committee will, as part of the inquiry process, provide advice to banks on what it sees as emerging best practice, having regard, amongst other things, to the 2005 guidelines. The Committee acknowledges that Clause 29 of the Code is specific in its reference to the 1999 Guideline and that is the version with which the Code requires compliance. The Committee hopes that the question of the application of up-to-date guidelines will be resolved through the scheduled review of the Code (see below).

Following the completion of this Inquiry later this year, the Committee proposes to conduct its next inquiry into Clause 19, which deals with Direct Debits.

We welcome and value input from all interested parties. Queries or comments regarding Inquiries, should be addressed to Barbara Schade, Manager Compliance Inquiries on 03 8623 2011 or via email at bschade@bankcodecompliance.org.

Code Review

The Committee has received queries regarding the progress of the Review of the Code of Banking Practice, which is scheduled for this year. The Committee has been advised of the draft Terms of Reference for the Review, which provide for a deadline of November 2007. Queries about the Review should be addressed to the Australian Bankers Association.

Stakeholder engagement

The Committee continues to regularly engage with a range of stakeholders. Chief Executive, Kirsten Trott, addressed a group of financial counsellors and consumer advocates in Darwin in June. In addition to enabling participants to gain a better understanding of the Code and Committee procedures, the Darwin forum allowed the Committee to better understand some of the unique issues faced by remote and indigenous Australians. Background information was also provided to a workshop on banking issues attended by financial counsellors and consumer advocates in Queensland earlier this month.

As part of the Committee's continuing efforts to engage with small business, Consumer and Small Business Representative, David Tennant, and Chief Executive, Kirsten Trott, will address the ABA's Small Business Forum at their November meeting to provide information about the Code and to seek feedback on the experience of small business with the Code.

The Committee is discussing with the ABA the hosting of a Bank Forum to enable consultation on issues relevant to the review of the Code and to discuss developments in compliance monitoring. Once a date and venue has been finalised, the ABA will provide details to subscribing bank contacts.

Compliance statements

All subscribing Banks submitted their annual compliance statements to the Committee for the 2006/07 year. CCMC management have been visiting banks to gain a better understanding of the information provided in these statements, the nature of breaches reported and bank compliance regimes more generally. The Committee is working to ensure that the statements serve a genuinely useful function in terms of its compliance work.

Next Bulletin

The next bulletin is due to be released in November 2007.

Enquiries

If you have any enquiries about this bulletin or the work of the Committee more generally, contact Kirsten Trott on 03 9613 7353 or ktrott@bankcodecompliance.org