

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

14th EDITION



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Banking

Michael Blyth Australian Securities and Investments Commission

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[5.10] A person who opens an account with an *authorised deposit-taking institution* (ADI), which includes banks, building societies and credit unions, enters into a contract with that ADI with terms that depend on the type of account.

The Code of Banking Practice and Customer Owned Banking Code of Practice require ADIs to give all customers who open

an account the terms and conditions applying to their contract (including fees and charges), in writing, whatever type of account they have.

See Chapter 11, Contracts, for what is involved in a contractual relationship.

Accounts

[5.20] Types of accounts

There are various types of accounts that a person can hold. In very general terms, basic banking services are likely to involve either:

- a *deposit account* (including savings accounts, transaction accounts and term deposit accounts), or
- a *credit product* (including credit card accounts, personal or home loans and lines of credit).

ADIs typically also offer a range of other products and services including investment and general or life insurance products. These are not directly considered in this chapter.

Who can provide an account

Deposit accounts can only be provided by ADIs.

Credit products can be provided by both ADIs and other entities. See Chapter 13, Credit, for a detailed discussion of regulation of credit.

[5.30] Opening an account

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) sets out rules that must be followed by a ADI (and some other types of organisations) when providing its services. Before providing account services, the ADI must take steps to collect and verify information about the identity of its customers, including the account holder and also anyone else using the account.

The ADI must be reasonably satisfied that:

- an individual customer is who they claim to be, and
- for a non-individual customer (eg, a company), the customer exists and their beneficial ownership details are known.

This will involve collecting information about the people using the account (eg name, address and date of birth) and verifying that information. Depending on the individual ADI's processes, verification of the information could involve viewing documents, such as a driver's licence, or undertaking electronic verification (eg using information from a credit reporting body). If the ADI intends to access credit reporting information for this purpose it must obtain the customer's express consent.

In addition to the obligations placed on the ADI, the AML/CTF Act also makes it an offence for a person to:

- (a) produce false or misleading information or document in respect of the AML/CTF Act (eg, in relation to the person's identity or verification documents), or
- (b) receive account services from an ADI using a false customer name or customer anonymity, or
- (c) structure a transaction to avoid a reporting obligation under the Act.

[5.40] Transactions

Putting money in or taking money out of a bank account may be done by a variety of means.

In the past, people were paid cash by their employer, deposited cash into or withdrew it from their bank account in an over-the-

counter transaction, and paid for goods and services either with cash or by cheque.

Today, the great majority of transactions are electronic, whether using credit or debit cards, EFTPOS or telephone (including mobile telephone and other devices) or internet banking.

[5.50] Cheque accounts

Cheques in Australia are dealt with under the *Cheques Act 1986* (Cth). With increased reliance on electronic forms of banking, the use of cheques has decreased in recent years.

For detailed information about the law relating to cheques, refer to earlier editions of *The Law Handbook*.

[5.60] Passbook savings accounts

Most savings accounts used to operate with a passbook. Now, most institutions allow customers to operate an account with an electronic card, which can provide regular statements and debit slips on each withdrawal.

For detailed information about the law relating to passbook savings accounts, refer to earlier editions of *The Law Handbook*.

Electronic funds transfer

[5.70] The ePayments Code

The ePayments Code regulates consumer electronic payments including ATM, EFTPOS, debit and credit card transactions (including contactless transactions), online payments, internet banking and BPAY. It contains guidelines on what information should be disclosed to a cardholder, and what steps can be taken to resolve any dispute that may arise. The ePayments Code replaced the earlier Electronic Funds Transfer Code of Conduct, with effect from 20 March 2013, and includes:

- a new regime to resolve mistaken internet banking payments, and
- a tailored set of light touch requirements for low value products (with a maximum balance of \$500).

The ePayments Code does not cover transactions made using a credit card where the cardholder authorises the transaction by signature.

The ePayments Code is available at www.asic.gov.au, along with a register of current subscribers.

Who is bound by the code

While the ePayments Code only applies to businesses that subscribe to it, all banks, credit unions and building societies that provide services affected by the code do so, as do a number of other payment and financial services providers. Subscribers agree to be bound contractually by the requirements of the code, and must reflect this commitment in the terms and conditions applying to their payment services.

[5.80] Liability for unauthorised use

The most common complaint about electronic transactions is unauthorised use of the card or Personal Identification Number (PIN) – a transaction made by someone else without the cardholder's knowledge or consent. Liability for unauthorised transactions is dealt with in Chapter C of the ePayments Code which provides, for example, that a cardholder is not responsible for any losses:

- caused by the fraudulent or negligent conduct of the financial institution's employees or of merchants linked to the system
- resulting from transactions initiated by forged, faulty or expired cards
- resulting from transactions initiated by the card or PIN before the cardholder received it.

Where the card or PIN was not received

Mere delivery of the card to a person's address is not proof that it was received, and institutions cannot deem that mailing to the correct address is receipt.

In a dispute about receipt of the card or PIN, it is to be presumed that the card was not received until the card issuer proves otherwise.

Lost or stolen cards

Transactions after notification of the loss

A cardholder who notifies the card issuer that the card has been lost or stolen or that PIN security was compromised in some way is not liable for any further transactions on the account.

Transactions before notification of the loss

If transactions occurred before notification, the cardholder's liability depends on whether they contributed to the loss in some way.

If they did not contribute to the loss, but their PIN (or other passcode) was used in the transaction, their liability does not exceed whichever of the following is least:

- \$150
- the balance of the account
- the actual loss at the time of notification.

Where the cardholder contributed to the loss

The most common way in which cardholders contribute to a loss is to disclose the PIN or other passcode (voluntarily or negligently), or keep a record of it on or near the card so that it is available with the card if it is lost or stolen. In this case, the person is liable for whichever of the following is least:

- the actual loss
- the balance of the account

- the maximum amount that the cardholder would have been entitled to withdraw in the period before notification.

It's important to remember that, even if the cardholder has disclosed the password or kept a record of it on or near the card, the cardholder will only be liable if the card issuer can show on the balance of probability that this contributed to the loss.

Importance of PIN security

Surveys have repeatedly shown that 50% of cardholders keep the PIN either on the card or nearby. Doing so increases the likelihood of unauthorised transactions and may lead to loss of protections under the ePayments Code.

Another way in which the cardholder may contribute to the loss is to delay notification of the loss or known misuse of the card or PIN/passcode. However, the cardholder may only become liable for loss after he/she is deemed to have delayed notification. The cardholder does not become liable for loss that happened before the delay.

In this case, the person is liable for the actual loss, limited by whichever of the following is less:

- the balance of the account
- the amount they could have withdrawn.

Contactless technology

In recent years there has been an increase in the implementation of contactless technologies, which rely on a chip imbedded in a card rather than the traditional magnetic strip. These chips are far less susceptible to tampering than magnetic strips, and so provide additional protection to card issuers and cardholders. For transactions below a certain amount (eg \$35 or \$100) a PIN or signature may not be required and the card can simply be waved near or tapped against a terminal.

Some retailers do not require a PIN or signature for transactions below a certain amount (eg \$35) even where a card only has a magnetic strip.

In both cases, the ePayments Code will protect cardholders where the transaction is unauthorised, perhaps because the card was

lost. In addition to that protection, which may be reliant in part on notification of the card being lost, the card schemes (eg Visa or Mastercard) provide additional protections which will generally see disputed amounts refunded to the cardholder's account.

PIN or sign

From 1 August 2014, many retailers ceased accepting signatures for credit and debit cards at point of sale, meaning that cardholders must use (and remember) their PIN.

[5.90] Complaints

All institutions that are a party to the ePayments code must have complaints-handling procedures with certain minimum standards. See Disputes at [5.130] for information on how to complain.

Codes of practice

[5.100] The Code of Banking Practice (for banks) and the Customer Owned Banking Code of Practice (for mutual building societies and credit unions) outline a range of minimum standards that signatories must adhere to in their dealings with customers, including such matters as disclosure requirements and dealing with complaints.

Who is bound by the codes

The Code of Banking Practice has been adopted by all the major banks in Australia and by many other banks. Most credit unions, mutual banks and mutual building societies in Australia subscribe to the Customer Owned Banking Code of Practice.

The codes, together with a full list of subscribers are available at:

- Code of Banking practice – www.bankers.asn.au
- Customer Owned Banking Code of Practice – www.cobccc.org.au

[5.110] What the codes cover

The codes cover a number of important issues for consumers, including:

- disclosure of fees and charges
- privacy and confidentiality
- statements of account
- direct debits
- charge-backs on credit cards
- debt collection

- complaints handling.

[5.120] What the codes require

Some of the important commitments the signatories to these codes make to their customers include:

- to act fairly and ethically
- to inform a customer promptly after exercising the bank's right to combine accounts
- to ensure that lending decisions are responsible and prudent
- to work with customers to try to overcome financial difficulties
- to provide prospective guarantors with a range of information
- to provide details of accounts that may be suitable to the needs of low-income or disadvantaged customers where the customer advises that they are a low-income earner or a disadvantaged person (Code of Banking Practice).

Account combination

Account combination can occur where a customer has more than one account with a bank or other ADI. If the customer owes money on one account (other than on a credit account not in default), and has another account in credit, in some circumstances the bank may move funds between accounts to bring the first account into order. This right is subject to limitations, including that the accounts be held by the customer in the same

capacity (for example, it would not be possible to combine a business account with a personal account).

Information for guarantors

Guarantees involve a shifting of risk from a lender to a third party (not a borrower). The information that must be provided to prospective guarantors under the codes

includes general information about the risks involved in providing a guarantee, and information about the credit facility in respect of which the guarantee is being requested, to enable the prospective guarantor to better understand the particular risks involved in the transaction.

See Chapter 13, Credit, for a discussion of the regulation of guarantees.

Disputes

[5.130] Internal dispute resolution

All ADIs are required to have a formal *internal dispute resolution* process that meets requirements set by the Australian Securities and Investments Commission (ASIC). See ASIC RG 165 *Licensing: internal and external dispute resolution*.

RG 165 establishes a broad definition of complaint, which is essentially “an expression of dissatisfaction” about an ADI’s products or services where a response or resolution is implicitly or expressly expected. In respect of most types of disputes, an ADI has 45 days from receipt of the complaint to provide a final (written) response. A written response may not need to be provided if the complaint can be resolved to the customer’s complete satisfaction within five business days.

If the complaint is not resolved at this level, the customer can refer it to an external dispute resolution scheme. The ADI must advise the customer of this option at both the beginning and the end of the internal dispute resolution process.

[5.140] External dispute resolution

The Financial Ombudsman Service (FOS) and the Credit and Investments Ombuds-

man (CIO) are independent *external dispute resolution* schemes. In accordance with the requirements set by ASIC (see ASIC RG 139 *Approval of external complaints resolution schemes*), their services are free to consumers and their decisions are binding only on their members. Consumers unhappy with a decision of either scheme are free to pursue their complaint through other avenues, such as the courts.

Both schemes have detailed rules/terms of reference, including monetary limits, which can be found at their respective websites.

[5.150] The court system

If a customer has a legal right (resulting, for example, from a breach of contract by an ADI or a right arising out of the *National Credit Code*), they may seek to have it enforced in a court or, where it has jurisdiction to deal with the matter, the NSW Civil and Administrative Tribunal.

Customers may also pursue a dispute in court if they have complained to the Financial Ombudsman Service or Credit and Investments Ombudsman and are unhappy with the outcome.

Federal and state regulators

Complaints about the conduct of banks can be made to ASIC or NSW Fair Trading.

Contact points

[5.160] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.tisnational.gov.au.

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Bankers' Association

www.bankers.asn.au

ph: 8298 0417

Australian Human Rights Commission

www.humanrights.gov.au

ph: 9284 9600

Complaints Infoline

ph: 1300 656 419

General enquiries and publications

ph: 1300 369 711

Australian Information Commissioner, Office of the

www.oaic.gov.au

ph: 1300 363 992

Australian Securities and Investments Commission (ASIC)

www.asic.gov.au

www.moneysmart.gov.au

ph: 1300 300 630

Credit and Investments Ombudsman (CIO)

www.cio.org.au

ph: 1800 138 422

Customer Owned Banking Association

www.customerownedbanking.asn.au

ph: 8035 8400

Fair Trading, Office of

www.fairtrading.nsw.gov.au

ph: 133 220 or 9895 0111

Financial Ombudsman Service (FOS)

www.fos.org.au

ph: 1800 367 287

Information and Privacy Commission NSW (IPC)

www.ipc.nsw.gov.au

ph: 1800 472 679

Law and Justice Foundation of NSW

www.lawfoundation.net.au

ph: 8227 3200

Legal Aid NSW

Head office

www.legalaid.nsw.gov.au

LawAccess NSW

www.lawaccess.nsw.gov.au

ph: 1300 888 529

For a list of Legal Aid's regional offices please see website.

Treasury, Department of the

www.treasury.gov.au

ph: 6263 2111 or 1800 020 008

