

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION



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Banking

Richard McMahon – Senior Manager, Credit, Retail Banking and Payments, 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.

ADIs are required to give all customers written terms and conditions applying to their accounts (including fees and charges). This requirement is part of the Banking Code of Practice and Customer Owned Banking Code of Practice,

which are voluntary industry Codes containing commitments by banks to their customers. The law may also require ADIs to give their customers similar information, depending on the type of account opened.

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

Accounts

[5.20] Types of accounts

In very general terms, 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).

Most ADIs also distribute 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 ADIs and others must follow when providing their services. For ADIs, this means that before an account is opened, the ADI must take steps to collect and verify information about 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, verifying the information could involve viewing documents, such as a driver's licence, or taking other steps (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:

1. produce false or misleading information or document in respect of the *AML/CTF Act* (eg, in relation to the person's identity); or
2. receive account services from an ADI using a false customer name or on the basis of customer anonymity; or
3. structure a transaction to avoid a reporting obligation under the *AML/CTF Act*.

[5.40] Transactions

ADIs offer a variety of ways for consumers to put money in or take money out of their deposit accounts. Some types of accounts, such as term deposits, may have restrictions on how and when money can be withdrawn.

Today, the majority of transactions are electronic. Many consumers receive their salaries electronically and can use telephone or internet banking to send money to the bank accounts of others. Consumers who want to withdraw cash often use automated teller machines (ATMs).

Common electronic transactions also include the use of credit or debit cards to make payments (either at the point of sale or when the card is not

present – such as through an online transaction), or telephone or internet banking.

In the past, people were more likely to receive money as cash or cheque, and it was more common to deposit or withdraw cash from their bank account in an over-the-counter transaction. Additionally, many savings accounts used to operate with a passbook that showed a history of

transactions. The use of cheques and passbooks has decreased in recent years.

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

Protections on electronic payments

[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 consumer, 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 regime to resolve mistaken internet banking payments;
- a regime for allocating liability between the customer and the Code subscriber in the event of an unauthorised transaction; and
- a tailored set of simpler requirements for low value products (with a maximum balance of \$500).

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

Who is bound by the code

The ePayments Code is currently voluntary, and only applies to businesses that subscribe to it. Most banks, credit unions and building societies have subscribed to the Code, as have a number of other payment 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 – 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. Those provisions outline the general position that a cardholder is not responsible for any losses where it is clear they, or a person authorised to perform transactions on the card, have not contributed to the loss. Additionally, cardholders are not responsible for 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; or
- 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 other transactions occurred before notification, the cardholder's liability depends on whether they contributed to the loss in some way.

Where a pass code was not needed for the transaction, the cardholder is liable if they

unreasonably delay reporting the card as lost or stolen.

Where a PIN or other passcode was used in the transaction, their liability does not exceed the smallest of:

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

Where the cardholder contributed to the loss

A common way in which cardholders may 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 the smallest of:

- 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 shown that some cardholders keep the PIN either on the card or nearby. Doing so may increase the likelihood of unauthorised transactions and lead to loss of protections under the ePayments Code.

Another way in which the cardholder may contribute to the loss is to delay notifying the card issuer of the

loss or known misuse of the card or PIN/passcode. However, the cardholder may only become liable for loss between the delay and when they notified the card issuer. 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.

[5.85] Contactless technology

Most cards issued by ADIs now contain a chip imbedded in the card in addition to the traditional magnetic strip. These chips are less susceptible to tampering than magnetic strips, and so provide additional protection to card issuers and cardholders. For transactions below a certain amount (eg, \$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 (eg, if 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, EFTPOS, Visa or Mastercard) provide additional protections which will generally see disputed amounts refunded to the cardholder's account.

[5.90] Complaints

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

Codes of practice

[5.100] There are two Codes of practice relevant to banking services. Those are:

- the Banking Code of Practice – all members of the Australian Banking Association, including the largest Australian banks, are subject to this code; and
- the Customer Owned Banking Code of Practice – many mutual banks, building societies and credit unions have subscribed to this code.

The Codes outline a range of minimum standards that ADIs must adhere to in their dealings with customers, including disclosure requirements and dealing with complaints.

Who is bound by the codes

The Banking Code of Practice has been adopted by the largest banks in Australia and by many other banks, and commenced on 1 July 2019. Most credit unions, mutual banks and mutual building

societies in Australia subscribe to the Customer Owned Banking Code of Practice; the latest version of this code commenced on 1 January 2018.

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

- Banking Code of Practice – www.ausbanking.org.au;
- Customer Owned Banking Code of Practice – www.customerownedbanking.asn.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 take extra care with vulnerable customers (Banking Code of Practice);
- to ensure that lending decisions are responsible and prudent;
- additional protections and safeguards for co-borrowers who may not receive a benefit from a potential loan;
- 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 in certain circumstances (Banking Code of Practice).

Protections for co-borrowers

Some ADIs offer loans to multiple people, each of whom are co-borrowers and liable to repay the loan amount. The Customer Owned Banking Code of Practice provides that subscribers to that code will not accept someone as a co-borrower if they are aware, or ought to be aware, that they themselves will not receive a benefit from the loan. The Banking Code of Practice requires that someone who will not receive a substantial benefit from the loan will only be accepted as a co-borrower where the ADI:

- has taken reasonable steps to ensure that person understands the risks associated with entering into the loan;
 - has taken into account the reasons why they want to be a co-borrower; and
 - is satisfied they are not suffering financial abuse.
-

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. The Banking Code of Practice also includes additional rules about the amount of time that must elapse between when the information described above is provided and when the guarantee can be accepted.

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 Regulatory Guide

165 *Licensing: internal and external dispute resolution* (RG 165).

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 external dispute resolution. 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

All ADIs are required to be members of the Australian Financial Complaints Authority (AFCA), the independent *external dispute resolution* scheme for financial complaints in Australia. AFCA is authorised by the Minister. ASIC has an ongoing oversight role, including approval of AFCA's Rules and material changes to the scheme. The AFCA Rules, available on AFCA's website, set out what complaints can be considered, the procedure for doing so and the available remedies.

Consumers can complain to AFCA without cost, and AFCA's decisions in relation to banking are binding only on its members. Consumers unhappy with a decision by AFCA are free to pursue their complaint through other avenues,

such as the courts. More information is available in ASIC Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority*.

Before 2018 there were two external dispute resolution schemes – the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO). Under the law at that time, those schemes were approved by ASIC.

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

[5.150] The court system

If a customer has a legal right (resulting, eg, from a breach of contract by an ADI or a right under the *National Consumer Credit Protection Act 2009* (Cth)), 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 AFCA 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.communications.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.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Banking Association

www.ausbanking.org.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 Financial Complaints Authority (AFCA)

www.afca.org.au

ph: 1800 931 678

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

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

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

