



BULLETIN NO 24 . MARCH 2000

Code of Operation for Department of Social Security Direct Credit Payments

From 20 September 1991, banks in Australia have agreed to abide by the Code of Operation for Department of Social Security Direct Credit Payments (.the Code.). The Code governs the procedures for customers with outstanding debts or overdrawn accounts who receive social security payments. The Code was developed to help ensure that customers who receive social security payments have enough income to maintain an adequate living standard. The Code requires financial institutions to:

- consult with customers over outstanding debts and repayment arrangements;
- allow the customer to withdraw at least 90% of their social security payment, even if the account remains or becomes overdrawn; and
- review repayment arrangements at the request of the customer.

Repayments are not to exceed 10% of the social security payment without written consent from the customer.

This office recommends that all banks review their staff training in relation to the requirements of the Code. Anecdotally, it appears that there are still misunderstandings on the part of some bank staff about a bank.s obligations under the Code.

DSS Code of Operation

Banks, as members of the Australian Bankers. Association, have agreed to be bound by the Code. Relevant provisions of the Code include that:

- no penalty, interest or other charges will be imposed on a client.s account if discrepancies occur as a result of an error by an institution;
- the Code recognises that a major aim of the Social Security Act is to ensure that all payments made under it are available for the recipient.s use before other claims on the payment are considered;
- where a recipient of benefits has a debt to the institution for which he or she is legally responsible, the institution must allow the recipient to withdraw an amount equivalent to a minimum of 90% of that payment, irrespective of the balance of the account at the time of withdrawal, or of any other rights the institution might have in relation to that payment unless the recipient agrees in writing to a lesser payment. This provision would prevent a bank exercising a right of combination for example without agreement of the recipient;

- an account may only be frozen if reasonable efforts have been taken, the first being taken to contact the client and the client has not since contacted the institution. A frozen account must be reinstated as soon as the client makes contact and any supposed debt must then be discussed according to the procedures set out in the Code;
- in all debt recovery situations, the percentage of social security payments that can be withdrawn will have regard to a case by case assessment of such factors as:
 - - the client's needs, taking into account the subsistence nature of Social Security payments; and
 - any actions by the institution which may have contributed to the fact that the client is not legally entitled to the full amount of the payment and any other special circumstances.

CASE STUDY

The complainant lived in rural Tasmania. He received unemployment benefits, which were credited each fortnight to his savings account with the bank. He lived frugally and within his means until an error by the bank led him inadvertently to overdraw his account. An error in the bank's ATM led him to believe that he had an extra \$200 in his account. He withdrew this money and bought a beehive, thinking that his mother had put money into his account, which she did from time to time. The withdrawal overdrew his account by \$171.

The first he knew of the mistake was a phone call from the bank asking him to come into town to discuss his account. At this point his problems really began. The bank staff did not acknowledge that there had been an ATM error, accused him of *.diddling* the bank's computer, refused his request to discuss the matter with the manager, in private, and refused his offer to add the overdrawn amount to his small personal loan. Instead, he was told that the bank would take the money he owed them out of his next Social Security payment (he received \$320 per fortnight). This is what happened despite advice the complainant received from a Legal Aid solicitor that a bank can only apply 10% of a Social Security payment to a debt caused by its mistake. The same thing happened in respect of the next three fortnightly dole payments. Each time, the bank refused initially to allow him access to 90% of his dole and he had to argue with the teller and explain the position all over again before he was given access to his funds.

The complainant said that the bank's errors and conduct had caused him lost time and increased petrol expenses, which he could ill afford, and serious embarrassment, stress and inconvenience. He suffered from heart disease and believed that the stress caused by the situation with the bank had precipitated a heart attack.

In addition, during the period the complainant thought 10% of his dole was being applied to reduce the overdrawn benefit, the overdrawn balance in fact increased. The complainant queried whether he had overpaid the debt. The Ombudsman.s banking adviser confirmed that the complainant had not overpaid the debt but that instead bank staff had failed to ensure that 10% of his dole was left in the account and actually released too much money causing the overdrawn balance to increase.

The bank apologised for the error but refused to consider compensation. It questioned the complainant.s good faith, denied that he had suffered loss warranting compensation and said, in addition, that the complainant had been aggressive towards staff.

The complaint was resolved after a Recommendation by the Ombudsman that the bank pay compensation to the complainant for financial loss, stress, embarrassment and inconvenience and institute a training programme for staff of the bank.

The Ombudsman found that the bank had acted in breach of the Code of Operation for Department of Social Security Direct Credit Payments by refusing to allow the complainant to withdraw at least 90% of his DSS payment, failing to reach a workable arrangement with him for the payment of the overdrawn balance in a way which would not cause him undue hardship and failing to comply with his request to discuss the matter in private. The Ombudsman recommended that staff receive training in the operation of the Code.

New Direct Debit Arrangements . Proposed Guidelines

Members of APCA and major direct debit users have entered into new arrangements for the administration of direct debit requests to be implemented from 31 March 2000.

The new arrangements represent a major change to the conditions under which a bank will accept and process direct debits to customer accounts. The arrangements are set out in new direct debit request rules which form part of the Bulk Electronic Clearing System (BECS) procedures of the Australian Payments Clearing Association (APCA).

This office has been reviewing the proposed new arrangements in preparation for publishing guidelines on how we would approach disputes involving direct debits under those arrangements. We sent a letter to all members of the ABIO Scheme in December 1999 identifying some of the issues for banks and their customers and encouraging members of the Scheme to provide information on how those issues were being addressed. Some very helpful information has been received from members and also from APCA, which has clarified some of the intended features of the scheme.

Under the arrangements it is proposed that:

- direct debit authorities will now be in the form of a direct debit request (DDR), which will replace the existing PD-C. The DDR will not be sent to the financial institution at which the account is kept. The DDR will instead be held by the third party service provider (referred to in the rules as the debit user) seeking to debit the account;
- banks which are party to the APCA arrangements will accept and process debit requests from a third party debit user's financial institution without requiring proof of authority from the customer to do so or without otherwise checking the validity of the drawings. In other words, a customer's account will be debited upon a debit user asserting, by making the request through its own financial institution, that it holds appropriate authority;
- proof of authority will only be required by the accountholder's bank if an accountholder disputes that he or she authorised the third party to debit the account or disputes that the particular debit was authorised. In other words, authorisation will be established after the event if there is a dispute;
- the form and content of the authority can be determined by the third party debit user, subject to the approval of the debit user's sponsor bank, and need no longer be in a standard form. The authority may, but need not, specify the amount, frequency or conditions for debiting the account;
- it is proposed that the terms and conditions of the debit authority will be set out in a separate Service Agreement produced by the third party debit user. There are certain minimum requirements for service agreements;
- if a debit is processed without authority, the BECS rules provide for an inter-bank claims procedure which may be utilised by an accountholder customer in addition to any other rights the customer may have; and
- third party debit users which are part of the APCA scheme will be sponsored by a financial institution which will indemnify an accountholder's financial institution against a claim for loss in the event that a debit was not authorised.

Members of the ABIO scheme will be involved in the arrangements as both financial institutions sponsoring debit users (called a Sponsor FI in the BECS rules) and account-holding institutions accepting and processing debits to their customers' accounts (called a Ledger FI in the rules). The proposed approach set out below relates principally to complaints by customers that their bank (as a Ledger FI) has allowed an unauthorised debit to be processed to their account rather than complaints by debit user customers that their bank, (as a Sponsor FI)

has acted in error. Both kinds of complaints may, however, be considered by this office.

Proposed Approach

General principles: Administrative arrangements between third party debit users and financial institutions will not change the contract between the bank and its customer

The fact that, under the proposed arrangements, the DDR will be held by the Debit User does not alter the bank's contractual obligations to its account holding customer. In particular:

1. The fact that the bank no longer holds the form of authority, and so cannot check its own records to establish authority, does not relieve it of its legal obligation only to process debits to the account which the customer has authorised it to process or which it is required to process by operation of law;
2. The new arrangements do not override a customer's entitlement as between itself and the bank to withdraw any authority given to a third party by notice to the bank or instruct his or her bank not to accept a particular debit request;
3. While it is desirable that a third party debit user be notified by the account holder of any withdrawal of authority, and while DDR service agreements will request customers to direct such requests to the debit user, a bank is required to comply with any instruction from its customer countermanning a DDR, whether or not that instruction has also been sent to the debit user;
4. The claims process which is provided for in the rules is intended to provide additional protection to an account holder customer and is not intended to substitute for any right arising under the banker-customer relationship. While it is desirable for a customer to first seek to resolve any dispute with the third-party debit user, he or she is not obliged to do so and may make a claim direct to his or her bank; and
5. If the customer is not satisfied with the response of its bank or the debit user's bank to any claim, he or she is entitled to pursue the claim against his or her own bank, including by making a complaint to this office.

The BECS rules themselves expressly recognise, in clause 7.12 that:

- nothing in the rules is to be taken to require a customer's bank to accept and post a debit to a customer's account where to do so would be contrary to the customer's formal instructions to it; and

- a customer may give an instruction to cancel a DDR to his or her bank. If such an instruction is received by a customer's bank it should be forwarded by the bank to the third party debit user. (clause 7.12)

Complaints about unauthorised debits

While financial institutions accepting a direct debit will be indemnified by sponsor financial institutions against claims, and a claims mechanism is part of the new arrangements, this office will continue to consider complaints from bank customers relating to unauthorised debits to accounts.

Customers should not be told that any dispute is a matter between them and the debit user. While customers may be requested to try to resolve a dispute with the debit user first, they should not be discouraged from claiming against their bank. The inter-bank claims procedure established under the BECS rules includes a requirement that the debit user, through its sponsor bank, provide proof of authority within 7 days of notice of a claim. This may well provide a relatively fast means of establishing whether the debit user in fact held authority and if not, rectifying the error.

This office will encourage complainants to first seek to resolve any dispute by completing a claim form under the BECS rules at their bank and using the claims procedure provided for in the rules. Banks in turn should ensure that customers are advised of their right to make a complaint to this office should they not be satisfied with the outcome of any claim or should they not wish to continue with a claim made under the BECS rules.

The BECS rules say that a sponsor bank will pay a valid claim and a .valid claim. is defined to include one where .any relevant industry ombudsman or a court. has made a decision or order that a payment be made (rule 7.6).

Determining whether a particular debit is authorised

As between the bank and its customer, the bank has no authority to accept instructions in relation to the operation of the account from third parties in the absence of:

- a written order from the customer to the bank;
- an entitlement or obligation arising by operation of the contract between the bank and its customer; or
- an entitlement or obligation arising by operation of law.

The previous form of authority - the PD-C . was in a standard format and satisfied the requirement of a written order addressed to the bank. The new form of direct debit request (DDR) is addressed to the debit user and would not satisfy the requirement of a written order addressed to the bank. A bank may therefore need to establish that it was entitled to accept the direct debit request by reference to the terms and conditions of the account.

In the absence of appropriate terms and conditions, it is, in the view of this office, an open question as to whether the bank is entitled to debit a customer.s account solely on the assertion, made by a third party, that they have authority to debit a customer.s account.

The circumstances in which this office would regard a debit as being unauthorised include the following;

- the third party making the debit request did not hold a current direct debit authority;
- an existing direct debit authority had been rendered ineffective by operation of law;
- the amount debited exceeded the amount authorised by the customer in writing to be debited or was debited in breach of a condition of the authority (such as that a billing advice or notification of debit be sent first);
- the third party debit user had purported unilaterally to increase the amount or frequency of the debit without the express agreement in writing of the customer. To this extent, provisions in service agreements purporting to allow the debit user to change the authority simply by giving notice to the customer, but without the signature of the customer being obtained to the variation, may not be enforceable;
- the third party debit user was not legally entitled to the amount debited; and
- the customer had countermanded the authority in its entirety or stopped the particular debit whether by notice to the third party debit user or notice to the bank.

Liability for loss

If, in fact, the debit is unauthorised then the bank will be liable to its customer for loss suffered as a result of the breach of contract by the bank, irrespective of any right of indemnity it has under the new arrangements.

The loss could include:

- lost interest;
- dishonour fees . if other transactions are dishonoured because the account balance has been reduced;
- consequential losses such as opportunity costs;
- expenditure incurred because of lack of access to funds; and/or
- non-financial loss such as stress and inconvenience.

In other words, the loss could be greater than the amount actually debited, depending on:

- the circumstances;
- the length of time before the customer discovers the error, (which will in part be influenced by the statement cycle for the particular account);
- the length of time taken to reverse the debit; and
- the nature of any transactions on the account in the meantime.

The BECS rules do not limit any claim under those rules to the amount of the debit.

Further Review

The new direct debit arrangements represent a major change to the conditions under which banks will accept and process direct debits to customers' accounts. The ABIO will review its approach to complaints relating to debits under the arrangements in 12 months time once the level and nature of complaints can be better assessed. If it becomes necessary to do so, that review will be brought forward.

NEW PROCEDURES

For some time now, ABIO has been reviewing its procedures to determine how they could be improved.

The procedures have become a little unwieldy as they have been amended a number of times to reflect changes to funding. The end of the first 10 years of the scheme is a most appropriate time to introduce new procedures!

Our view is that the new procedures must be procedurally fair; easier to understand; encourage efficient handling of the complaint and allow appropriate level of investigation of a complaint.

In summary, under the new procedures there will be:

- No initial consideration.
- An investigation of all unresolved complaints, to an appropriate level

The level of resources required for any investigation will be reflected in the costing level of the investigation (3 levels).

There will be no 'ABIO View'. If a complainant or bank does not accept a case manager's finding, the case will be referred for an Ombudsman's Recommendation.

The new procedures mean:

- All complaints will be able to be investigated to their appropriate level;
- Unnecessary double handling which is time consuming will be avoided;
- The three level costing of investigations will better reflect the resources of ABIO required to complete each investigation;
- Proactive bank commitment to resolution will be able to be reflected in cost savings; and
- • Complaints should be able to be resolved more speedily.

The new procedures will come into effect on 1 July 2000. Before that time all relevant information will be provided to all member banks.

APPOINTMENT OF GENERAL MANAGER OF ABIO

I am pleased to announce that Diane Carmody has been appointed the General Manager of ABIO. In my absence, Diane will act as the Deputy Ombudsman. This title more accurately reflects the wide role and responsibilities Diane has in our office.

MOVE TO NEW PREMISES

We are moving to new premises at the beginning of June 2000. Our postal address, telephone numbers and fax number will remain the same. Our new address will be:

**Level 5
31 Queen Street
MELBOURNE VIC 3000**

**Colin Neave
Australian Banking Ombudsman**