

BULLETIN NO 25 - JUNE 2000

OLD PASSBOOK & TERM DEPOSIT ACCOUNTS: REVISED APPROACH

This office receives a large number of complaints from people who have:

- Found old passbooks showing credit balances;
- Presented them to the bank and asked for the funds; and
- Been told by the bank that it has no record of the account.

As a result of a decision of the Supreme Court of Victoria, *Westpac v Tyler* (1998) VSC 179 (unreported), the ABIO carried out a review of its approach to such cases. A discussion paper was issued in July 1999 and comments and feedback were sought from interested parties, including member banks. As part of the review, the banking adviser to the Ombudsman carried out a survey of member banks. The aim of the survey was to ascertain what records were kept by banks which might be relevant to an enquiry in relation to a particular account and to assess the likelihood of a passbook account being closed without the actual passbook.

Submissions were received from a number of banks including some very helpful submissions concerning the legislation relating to evidence in different States and Territories and the legal issues raised by the *Westpac v Tyler* case.

The submissions received and the information received from the banking adviser's survey have been taken into account in formulating a revised approach. The details of the revised approach and the reasons for any changes have been set out below.



BULLETIN

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In summary, the revised approach will be:

1. A complaint that a bank is refusing to pay the credit balance shown in a passbook, for the reason that the bank has no record of the account, will be treated as within the Ombudsman's Terms of Reference on the basis that the act or omission complained of is properly classified as a failure to pay on demand.

Therefore, provided a complaint in writing is made to the bank or the Ombudsman within six years of a demand for payment of the funds, it will be considered by the Ombudsman. Paragraph 20(d) excludes complaints where the act or omission occurs more than 6 years before the complainant raises the complaint in writing with the bank.

2. Where a passbook shows a credit balance but the bank has no current record of the account, the possibilities to be considered will be:
 - (a) The funds were withdrawn by the account holder without the use of the passbook now being presented;
 - (b) The passbook now presented is one which was reported lost or stolen and the account was in fact closed by the account holder with a replacement passbook;
 - (c) The credit balance was reduced at some point to zero by the debiting of fees and the account closed by the bank as an inoperative account;
 - (d) Funds were paid by the bank to the Commonwealth Treasury Unclaimed Monies Fund or, where applicable, were paid to a State fund;
 - (e) The funds remain in the account; or
 - (f) The account was unlawfully closed by the bank.
3. Information from both the bank and the complainant will be considered in determining whether the bank has a current liability to pay the amount shown as the balance. However, as a preliminary matter, complainants will be asked to make enquiries of Commonwealth Treasury Unclaimed Monies Fund records to determine whether the funds in the account have been paid to the Fund, if this has not already been done.

4. Complainants will be asked to provide information about the operation of the account, evidence of a search for any replacement passbook, and an explanation as to why the account has not been operated or the passbook presented (including for updating of interest) in the intervening period.

The passbook will be treated as conclusive evidence of the state of the account as at the date of the last transaction recorded. In relation to whether it represents the current state of the account, the Ombudsman will take into account both "positive" records of the bank, of closure of the account or transfer to unclaimed monies, and "negative" information from searches carried out by the bank of its records. Positive records will be given greater weight than negative information.

5. Before reaching a view that an account was lawfully closed on the basis of negative evidence of a bank, this office will need to be satisfied that the bank has carried out searches of all relevant existing records. In other words, the Ombudsman must be satisfied that the searches were carried out as far as records permit, whether or not those records are current. The search is expected to include records maintained by the bank outside the statutory period of seven years because, as a matter of practice, relevant records are often maintained beyond that period.
6. The records expected to be searched include:
 - Records of current savings accounts held with the bank;
 - The bank's customer information records;
 - Internal records of accounts transferred into any internal "dormant" or "inoperative" account and accounts transferred to the Unclaimed Monies Fund;
 - A search of all "closed account" records in existence; and
 - A search of all "lost/stolen passbooks" records in existence.
7. In providing to the ABIO information about the records which exist and details of searches undertaken, banks should ensure that the searches are undertaken and/or the information is confirmed by a person familiar with the records of the bank concerned.

8. It will not be readily inferred that the account was *closed* without the use of the passbook as this practice is, in fact, rare. An inference may be drawn however, that monies were *withdrawn* without the use of the passbook, as this is more common.
9. This office will take into account the fact that the bank has a mandatory obligation to transfer unclaimed monies to the Commonwealth and that interest does not accrue to monies paid into the Unclaimed Monies Fund. However it should be noted that since 1989 there has been a threshold applying to that obligation. From 1989 - 1993 the obligation was only in relation to accounts with balances over \$100. In 1993, this was increased to \$500.

Old Term Deposit Accounts

It sometimes happens that bank customers produce old records of term deposits such as certificates or maturity letters and seek information about whether the term deposit is still in existence. A slightly different approach will be taken to old Term Deposit accounts.

1. The view of this office is that when an enquiry by a customer is made, it is good banking practice to carry out a search to determine whether there are any existing records of the term deposit account.

In the view of this office, however, an old term deposit certificate is evidence only that funds were held in a term deposit account as at the date of the certificate until the date of maturity. It is not evidence that a term deposit account remained with the bank beyond the maturity date.

2. Further, complaints concerning old term deposit accounts, where the latest documentary record of the account produced by the complainant shows a maturity date prior to 10 May 1989, will be regarded as outside the Terms of Reference of this Scheme, because the act or omission in relation to such term deposit accounts is, in the view of this office, the failure to pay or roll over the term deposit funds on maturity, depending on the instructions given.

Accordingly, if the maturity date appearing on the documents produced is prior to 10 May 1989, then the complaint will be outside the Terms of Reference.

3. If the maturity date is after 10 May 1989, and paragraph 20(d) does not otherwise exclude the complaint, then the approach taken will follow that relating to old passbook accounts save that an inference that the funds were paid on the maturity date shown on the certificate will be more readily drawn if the account holder cannot produce either a later certificate or evidence of a complaint within a reasonable time after the maturity date shown on the certificate.
4. Time for the purposes of paragraph 20(d) will commence from the date of maturity shown on the certificate produced or, if the certificate provides that the term deposit will be rolled over in the absence of other instructions, then the date will be the next expected maturity date.

Issues which Arose as part of the Review

The discussion paper issued last year set out the facts of the Supreme Court of Victoria decision in *Westpac v Tyler*, the decision of the Magistrate's Court which was the subject of the appeal and the decision of the Supreme Court of Victoria on appeal, confirming the magistrate's decision.

Is the passbook a "banker's book"?

It was conceded both before the magistrate and on appeal, that the copies of the entries in the passbooks were afforded *prima facie* status by reason of the operation of the "banker's books of account" provisions in the *Evidence Act 1958 (Vic)*(s58B). The fact that the bank could not provide a record proving that the account had been closed, led to an inference being drawn that the account remained open and that the balance was as stated in the passbook.

This raises the question of whether a passbook should be given *prima facie* evidentiary status and also the nature of the evidence required to overcome any such *prime facie* status.

The rules of evidence in each State are different. For example, in Western Australia, a passbook, even if a "banker's book", is not *prima facie* evidence but it is evidence. There is no equivalent provision to section 58B of the Victorian Act in the Commonwealth or New South Wales Acts (see section 69 of the *New South Wales Evidence Act* and the *Commonwealth Evidence Act*). The South Australian Evidence Act refers to "business records" (*Evidence Act 1929 (SA)* s45(a)). The Evidence Acts of Tasmania, Western Australia and the Northern Territory contain "business records" provisions.

The view of this office is that a passbook, although evidence of transactions on the account, is not a “banker’s book of account” within the meaning of the Victorian or Western Australian legislation and is not a “business record” within the meaning of other States’ and Territories’ legislation. In other words, in the view of this office, the concessions made in *Westpac v Tyler* may not have been correct. The reasons are as follows:

- (a) The definition of “book of account” in the Victorian Act states that it includes ledger, day book, cash book, account book, and any other document used in the ordinary business of the bank, or in the ordinary course of any other business for recording financial transactions of the business;
- (b) Implicit in this definition is that the book is intended, in the ordinary course, to be a complete and accurate statement of the state of the account on any particular day;
- (c) It must also be a record kept by the officers of the bank (*R v Mitchell* [1971] VR 46);
- (d) A passbook, arguably, does not fit within this definition because, while it is updated by bank officers, it is intended to be a record kept by the customer of the state of the account (*Atlantic Lines Ltd v Economic Bank* (1904) 2 KB 465);
- (e) Transactions on the account are recorded in the bank’s records separate from the passbook;
- (f) The passbook will only be updated when it is presented, so that it may not, at any one point in time prior to presentation of the passbook, represent a complete and accurate record of the state of an account. In this context it is significant that the account may be operated and, more rarely, closed, without the passbook; and
- (g) The purpose of the provision is, principally, to avoid the need for underlying records of the bank to be produced to a court. In *Williams v Williams* (1988) 1 QB161, Sir John Donaldson MR at 167 said, in relation to the similar English Banker’s Books Evidence Act 1976:

“The Act in this form clearly contemplated that the bank had a series of books of various kinds which, in the ordinary course of business of the bank, were in every day use in that clerks made entries, that is to say wrote, in them. The transfer of any of these books to the court, with a consequent inability to make such entries, and indeed consult the books, would have been a very considerable inconvenience. Hence the power to provide certified copies not of the books, but of relevant entries in the books.”

What weight should the passbook be given?

Even if a passbook may be treated as a book of account for the purpose of the Victorian Evidence Act, it is *prima facie* evidence only of the “*entry and of the matters, transactions and accounts therein recorded.*” To that extent it is *prima facie* evidence only of the state of the account as at the date of the last record.

Because the view of this office is that while the passbook is evidence as to the state of the account, it is, at most, *prima facie* evidence of the state of the account as at the date the last transaction was recorded, it is not necessary to take into account State by State differences in determining the question for this office to decide.

What information will be taken into account?

The decision to be made is whether any credit balance shown in the account remains in the account as at the date of demand by the customer for payment.

Before making the decision it is appropriate, in the view of this office, to require information additional to the passbook, relating to whether the account has been operated or closed.

Information about the operation of the account may be provided by the holder of the account. Evidence on the question of whether the account has been closed may be provided by the bank.

A distinction was drawn in *Westpac v Tyler* between positive and negative evidence, with weight being given to records of the bank showing positively that two accounts had been closed. These bank records were accorded *prima facie* status and were, undoubtedly, banker’s books of accounts.

The magistrate refused to draw an inference that the third account had been closed from negative evidence (that it must have been closed because there was no record of the account).

The view of this office is that positive evidence from the bank that the account has been closed after the date of the last transaction recorded in the passbook will certainly overcome the evidence of the passbook. The best evidence of such closure will be a record of the account as a “closed account” or a record of the transfer of the account funds to the Unclaimed Monies Fund.

Provided, however, that the requirements as to searches by the bank are satisfied, this office will take into account negative evidence from the bank to the effect that the account must have been closed without the particular passbook prior to the date of the earliest relevant records located because there is no record of the passbook in the existing records of the bank. The search requirements are summarised above. This is consistent with the view of Smith J, in *Westpac v Tyler*, which was that it was open to a tribunal of fact to reach that conclusion.

It is noted that both the magistrate and the judge in *Westpac v Tyler* considered that the searches carried out by the bank had been sufficiently executed, according to both statutory requirements and internal bank procedure. Those searches were as far back as the records of the bank permitted including, it was noted by Smith J, searches of records which the bank had no statutory duty to maintain. In addition, it was considered important that any evidence as to the searches be given by a person familiar with the account keeping practices of the bank.

The relevance of the statutory duty to maintain records

The statutory requirement to maintain records for seven years is a requirement contained in section 1116 of the Corporations Law. Section 1116(2) sets out the prescribed period to maintain, make or keep any financial records. Under section 1116(2)(b), this period is seven years after the transactions covered by the records are completed.

This provision is sometimes relied upon by banks as a reason for not searching further than contemporaneous records. In the view of this office, the statutory obligation to maintain records for a period of seven years, is separate to any obligation to search records which are in fact in existence and to produce, if possible, the best evidence of what has occurred in relation to an account.

Summary of Banking Adviser's Survey

It appears from the results of the banking adviser's survey that closure of a passbook account without the passbook is not usual practice. If it were to be done, the customer would be requested to complete a lost/stolen passbook declaration which would be kept with the account closure. The normal requirements to close a passbook account were to have the customer present the passbook, sign some form of account closure request and for the signature to be verified.

Internal definitions of “dormant account”, “inoperative account”, and other similar terminology differed within member banks, ranging from four months to seven years. There is generally, a practice of transferring funds in a “dormant” account into an internal bank fund prior to any transfer to the Unclaimed Monies Fund. In other words, some banks treat accounts as dormant when they have not been operated for seven years, which triggers the obligation to pay the monies to the Unclaimed Monies Fund. Other banks treated an account as dormant if there had been no customer initiated transaction for a period of four months. This would need to be in accordance with the terms and conditions of the account as there would not otherwise be a right to remove funds from the account at such an early stage. Common banking practice, however, when an account is classified as dormant, inactive or inoperative is to attempt to contact the customer to confirm either reactivity or effect closure.

It was also apparent from the survey that relevant records may in fact be available, extending beyond the seven year period for which there is a statutory obligation to maintain records. This is particularly the case with records of lost/stolen passbooks, closed accounts and transfers to the Unclaimed Monies Fund. What this means is that simply because an account record may be older than seven years, the assumption should not be made that a record no longer exists. It also appears that it may be prudent banking practice to retain records of closed accounts for longer than the seven year statutory requirement, because production of a positive record of account closure is certainly the best way to overcome the evidence of the passbook and, in the view of the magistrate in *Westpac v Tyler*, was the only way to do so.

Ombudsman’s New Office

The office is now established in new premises. You are reminded that the new address of the Office of the Banking Ombudsman is:

Level 5
31 Queen Street
MELBOURNE VIC 3000

Telephone number, facsimile number, e-mail address, TTY number – all remain the same as before.

The numbers of individual staff members may, however, have changed. An up to date list of those contact numbers is available. Please contact Cressida Batterham-Wilson at my office if you would like a copy of that list.