

Supplement to BULLETIN NO 38

JUNE 2003

In this Bulletin:

- Fairness in debt recovery; and
- Bank record keeping survey.

Debt Recovery Action - Commercial Decision vs Fairness

As a further expansion of our approach to debt collection issues discussed in Bulletin No 34, June 2002, we have looked at the question of fairness in debt recovery. In particular, we have considered how the Ombudsman's obligation under the Terms of Reference to have regard to fairness impacts on a bank's right to exercise its commercial discretion in debt recovery matters, disputes about the latter being outside the Terms of Reference.

From time to time we receive complaints that a bank should not continue with its recovery action because, the disputant says, it should have been obvious to the bank that he/she was in the process of refinancing or selling property so that the debt could be repaid. The claim for loss is usually for the additional legal costs associated with engaging external solicitors and filing and serving the court originating process documents.

Typically, there is no dispute that the loan facility is in arrears. Sometimes the complaint is that there is no legal basis for passing on the enforcement expenses. This argument does not usually succeed as the entitlement of a bank to pass on the enforcement expenses is usually clearly covered in the loan agreement or the Memorandum of Common Provisions.

More recently, we have seen complaints that it is "unfair" for the bank to proceed with its recovery action. The issue raised is to what degree we can consider such disputes given that we have only a limited capacity to deal with disputes regarding a bank's commercial decisions.



BULLETIN

The Australian
Banking Industry
Ombudsman Limited
GPO Box 3A
Melbourne 3001
Tel: (03) 9613 7373
or toll-free
1800 334 777
Fax: (03) 9613 7345

A.B.N. 48 050 070 034

Taking into account:

- the obligation on the Ombudsman to have regard to fairness;
- the fact that the current draft of the new Code of Banking Practice includes an undertaking to comply with the Australian Competition and Consumer Commission's guideline "Debt Collection and the Trade Practices Act" dated June 1999; and
- as that guideline would fall within the meaning of an "applicable industry code or guideline" under the Terms of Reference,

we regard disputes about the manner in which debt recovery action is taken to be within the Ombudsman's jurisdiction to the extent that issues are raised concerning fairness or the guideline referred to above.

In terms of fairness, the question is under what circumstances would it be contrary to fairness for a bank to continue with its recovery action and incur additional legal costs?

When assessing this issue we will take into account the conduct of the borrower and the bank during the debt recovery process. The following questions could be asked in an investigation of a dispute to assist in the assessment as to whether the bank acted fairly in its debt recovery process:

1. Did the borrower have a realistic prospect of repaying the debt in full?
2. Did the bank allow the borrower an opportunity to repay the debt? Action may include:
 - (a) Entering into a repayment arrangement; and/or
 - (b) Setting a time frame to repay the debt that was reasonable in the circumstances.

If not, why not?

3. Did the borrower act in good faith in its dealings with the bank? Demonstration of good faith may include:
 - (a) Keeping the bank informed of the steps taken to repay the debt;
 - (b) Making payments towards the debt if possible;
 - (c) Keeping to arrangements or promises made;
 - (d) Giving the bank a clear time frame in which the debt would be repaid; and/or
 - (e) Agreeing to the bank obtaining a consent order for possession of property should a sale by the borrower not be achieved.

4. Would delay in the recovery process increase the risk that the debt would not be repaid? Relevant information might include:
 - (a) What was the size of the debt? What was the bank's valuation of the property? and
 - (b) Are there any other factors which might impact on the bank's right to recover the proceeds of the sale of the property?

If, taking the relevant facts into account, it appeared that the bank's legal entitlement and overall commercial position would not be materially prejudiced by allowing a reasonable amount of time for the complainant to sell the property, this office may conclude that it is appropriate for the bank to delay legal action and to do otherwise would be unfair. An example would be where information about the value of the property indicated that the property could be sold for an amount which would be more than sufficient to cover the current debt, additional interest incurred during the selling period and the selling costs.

Bank record keeping survey

ABIO Survey

ABIO recently conducted a survey of members in order to ascertain the record keeping practices of members of the scheme and to:

- Determine if there are standard record keeping practices;
- Assist in the development of a guideline for record keeping practices, if appropriate and necessary; and
- Assist in the early resolution of disputes by ensuring that requests for documents are appropriately directed and therefore more easily satisfied.

The questions were formulated in consultation with Legal Aid NSW who had experienced delays in bank retrieval of documents in the course of IDR processes.

Eight banks in total were surveyed, including the four 'majors'. Each was asked the questions listed below and the results were then collated by the Banking Adviser to the Ombudsman.

Survey questions

1. Which department(s) of the bank is responsible for retention of old records?
If not a department of the bank then who?
2. Where and in what form are old records kept? (for example customer's home branch, central storage facility within bank, external storage facility)
3. What is treated as an old record?
4. Does the bank have a written policy regarding retention periods for all bank records? If so please provide a copy.
5. Does the bank have the same record keeping policies for both consumer and commercial records?
6. For what time period are various records kept, including:
 - (a) Vouchers;
 - (b) Loan files (current and repaid including consumer and commercial);
 - (c) Security documents (current and repaid including consumer and commercial);
 - (d) Computer ledger records and journals;
 - (e) Correspondence;
 - (f) Records of discussions with customer (electronic and paper based);
 - (g) Bank statements (how long retained on system);
 - (h) Obsolete signature cards and authorities; and
 - (i) Other records (please specify).
7. What types of transaction records/vouchers are retained at the transacting bank?
8. What are the fees, if any, for retrieving documents and when are they imposed?
9. What is the usual time to retrieve documents? It is assumed it will depend on where they are stored and if so please specify the different time periods

10. When a debt is sold, what documents are sent to the assignee and what are retained?
11. Are copies of all records retained by the bank?
12. Is the practice the same for both consumer and commercial debts which are sold? and
13. Is there a special policy for debts sold to which the Consumer Credit Code applies? If so what are the differences?

Summary of responses

The results of the survey are summarised in the table attached.

Summary and comments

Definition of 'Old Records'

The term 'old records' is applied to describe any document that the bank has no current use for and includes computer reports, bank and customer generated vouchers, repaid home loan files, correspondence both internal, external, inward and outward and any other record the bank may view as of historical significance. A useful shorthand description is any record generated in the normal course which is not in active use.

Storage of Records

The majority of banks surveyed employ external contractors to provide storage facilities, transport old records to and from storage facilities, retrieve records as required and destroy records which are past retention dates. A bank may use multiple contractors and sites, as well as a mix of own record centres and contractors from state to state.

In most instances records are packaged by bank staff into boxes constructed for the purpose, the boxes are then labelled and shipped to the various storage centres. In the vast majority of cases the original documents are stored. Only one bank makes significant use of imaging technology to store some items 'on system'. Microfiche is also used for some records, predominantly account statements.

Business units retain some records for short periods (usually three to 12 months) where they may be required for business purposes. This practice mainly relates to branches, which usually retain transaction vouchers for a period.

Record Management Policy

All banks have written policies regarding old records management, available to relevant staff. In most cases the policy document is comprehensive.

Generally one internal department has responsibility for formulation and dissemination of old records policy and management of the contractors. The policies are consistent across commercial and consumer businesses and there is no special policy applied to consumer credit code debt.

Customer requests for archived documents or records

All banks indicated that retrieval of single documents where sufficient information was available to accurately identify the document would be achieved within 24 hours for urgent requests or up to five days for other requests. Multiple document retrievals or retrievals where details are not clear may take longer, the longest period indicated was four weeks for retrieval of eight or more items.

Retention periods

A summary of the retention periods for various documents is in the table above.

The retention periods are consistent across banks for the vast majority of documents. Several banks indicated that they hold some documents longer than the standard industry practice and longer than required by legislation.

In general retention periods comply with or exceed any legal requirements. There are two exceptions:

- Retention of electronically recorded notes of conversations with customers; and
- Credit card applications

Retention of electronically recorded notes of customer conversations.

Several banks indicated that they retain these records for shorter periods or the retention periods were not as clearly documented (if at all) compared to the equivalent paper based records. There is no apparent justification for the shorter retention period applied to electronically stored records. The impression gained from discussions with banks was that the retention periods might, to some extent be dictated by systems storage limitations.

Credit card applications

There was a wide disparity in practice – the minimum period reported was nine months, the maximum was ‘indefinitely’. It is essential, in our view, that credit card

applications be retained for the life of the account plus seven years. The application form provides proof of the necessary Privacy Act consent and proof of the customer's financial situation as at the date of application. This information should be retained and updated when necessary such as when a credit limit increase is sought or offered.

Fees charged for retrieval

Charges for retrieval vary with some banks charging on a per item basis (ranging from \$4 to \$13 per item) and others charging an hourly rate for retrieval time (ranging from \$60 to \$70). Generally the banks indicated a relatively lenient approach to the charging of fees with front line staff having delegation to waive fees in most instances. Discussion with various bank representatives suggested that waiver was most likely to occur, and in our view should occur, in instances where bank error has caused the need for the retrieval, for example, where statements were not received in the mail.

Procedures when a debt is sold

The four major banks indicated that they retain original documents and provide copies to assignees as required.

Two respondents indicated that they forward documents as required by assignee but do not retain copies as a matter of course – some documents may be copied or details recorded if considered necessary at the time of assignment. One respondent indicated that an independent trustee holds documents. Our view is that good practice requires that at least copies be retained.

Some of the documents likely to be forwarded to the assignee include:

- Loan contract;
- Mortgage;
- Valuations;
- Solicitors certificates;
- Lenders mortgage insurance certificate;
- Copy of credit application;
- Bank statements for the preceding 12 months;
- Collection notes from loan file;
- Customer demographics and other details recorded on the system; and/or
- Entire bank lending file.

One bank indicated that it did not sell bad debt. Some banks do not sell commercial debt at all while one only sells commercial debt relating to delinquent transaction accounts and another only sells commercial debt with total balances below \$50,000. In all cases where commercial debt is sold the process is the same as for consumer debt.

General comments

Our preliminary view is that, where a debt is sold, a bank should either retain copies of documents forwarded to the assignee or have the ability to retrieve the documents and, preferably, the debt itself where a dispute arises.

In all cases where debt is sold while a repayment arrangement is in place, full details of the repayment arrangement, which is of course binding on the assignee, should be provided to the assignee, including details of any verbal agreement.

While all banks indicated prompt response times to customer requests for documents, the impediment to achieving these times is often locating the document. The storage systems are heavily reliant on accurate labelling of records and correct storage under the various labels.

While retention periods are generally consistent with good practice, the practice in relation to retention of electronic diary notes and electronic diary notes appears to require improvement in some cases.

As always, we welcome feedback on the contents of this Bulletin.



Colin Neave
Australian Banking Ombudsman

Summary of responses

1. Who is responsible for retention of old records?	All banks have an internal department or departments responsible for coordinating policy and logistical issues regarding retention of old records. Only one bank does not employ contractors for the actual storage of documents and retrieval as requested by various departments of the bank.
2. Where and in what form are old records kept?	Only one bank uses electronic imaging for storage of loan files, all other documents are retained in paper form. Other banks retain paper-based files and records for the specified periods. One bank stores records at bank owned sites all other banks store records at secure sites provided by contractors. Most banks have multiple sites in various states.
3. What is treated as an old record?	Any document or form generated in the normal course of business which is no longer in active use
4. Does the bank have a written policy regarding the retention of old records?	Banks have well documented policies regarding retention periods, storage methods and retrieval processes.
5. Is the record keeping policy the same for Consumer and commercial records	Yes
6. What types of records are retained at the transacting bank/branch?	Some banks retain daily transaction vouchers such as deposit and withdrawal slips at branches or operations centres for periods up to 12 months. The shortest period is 2 days in one case, the majority retain records at branches for at least 6 months.
7. What are the fees for retrieving documents and when are they imposed?	See summary and comments
8. What are the usual times to retrieve documents?	Varies from 24 hours for urgent requests to 7 days, generally 3 to 5 days where easily identified.
9. When a debt is sold which documents are retained and what is sent to the assignee? 10. Are copies of all records retained by the bank?	<p>One bank (not a major) indicated it does not sell bad debt. The four majors retain original documents and provide copies as required Remaining respondents indicated they forward documents as required by assignee but do not retain copies as a matter of course, some documents may be copied or details recorded if considered necessary at the time of assignment. In one case documents are held by an independent trustee. Some of the documents likely to be forwarded to assignee include:</p> <ul style="list-style-type: none"> ◆ Loan contract ◆ Mortgage ◆ Valuations ◆ Solicitors certificates

	<ul style="list-style-type: none"> ◆ Lenders mortgage insurance certificate ◆ Copy of credit application ◆ Bank statements for the preceding 12 months ◆ Collection notes from loan file ◆ Customer demographics and other details recorded on system ◆ Entire bank lending file
11. Is the practice the same for both consumer and commercial debt?	Some banks do not sell commercial debt at all while one only sells commercial debt relating to delinquent transaction accounts and another only sells commercial debt with total balances below \$50,000. Two banks treat commercial debt the same as consumer debt. In all cases where commercial debt is sold the process is the same as for consumer debt.
12. Is a special policy applied for sale of consumer credit code debt?	No.

Retention Periods for common documents

Note: Where retention periods differed between banks the figure shown is the minimum retention period of the banks surveyed, except where indicated.

Item	Retention Period in Years
Account authorities	7 years from account closure or cancellation of authority
Account statements	7 years may be held on computer system or as microfiche
ATM Journal roles	7 years
Electronic records of correspondence and record of discussions not held on hard copy	Minimum: Not kept Maximum: 999 months
Commercial loan files	7 years from repayment date
Computer ledger records and journals	7 years
Credit card application forms	Minimum: 9 months Maximum: Indefinitely
Credit card assessments	Minimum: 7 years Maximum: Indefinitely
Credit card vouchers	7 years,
Customers cheques, deposit and withdrawal vouchers	7 years
Home Loan Files	7 years (after repaid)
Personal loan files	7 years (after repaid)
Record of discussions with customers (not part of loan file)	7 years in most cases but electronic records may be retained for shorter periods, 3 years in one case
Safe custody applications and registers	7 years from removal of packet to 20 years in most instances
Security documents	7 years (after repaid) some banks hold only until loan is repaid and then either destroy them or return them to customer depending on the bank.
Term deposit records	7 years