

ADR Bulletin

Volume 7, Number 8

2005

Article 2

Dispute systems in the financial services industry — Part 1

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Anna Everett

Abstract

Extract:

Technological advances in the financial services industry have significantly changed the consumer–banker relationship. Once, where consumers could be guaranteed face to face encounters with their bankers, today they are increasingly encouraged to use automatic teller machines (ATMs) and on-line services for day-to-day banking. The days when reliance was placed on the bank as a trusted institution which owed a duty of care to its customers (and in some circumstances a more onerous fiduciary duty) have largely been replaced with limited liability contracts and faceless institutions.



Industry dispute management systems

Dispute systems in the financial services industry — Part 1

Anna Everett

Technological advances in the financial services industry¹ have significantly changed the consumer–banker relationship. Once, where consumers could be guaranteed face to face encounters with their bankers, today they are increasingly encouraged to use automatic teller machines (ATMs) and online services for day-to-day banking. The days when reliance was placed on the bank as a trusted institution which owed a duty of care to its customers² (and in some circumstances a more onerous fiduciary duty³) have largely been replaced with limited liability contracts and faceless institutions.

Consumer dissatisfaction with the financial services industry has steadily increased over recent decades, coinciding with the automation of the industry. The suggestion that there is a co-relation between the two is not new.⁴

The advent of the Australian Banking Industry Ombudsman Scheme in 1990 went some way towards addressing this dissatisfaction. Furthermore, the recent reforms to financial services licensing suggest that the industry is aware of its obligation to deal with consumer dissatisfaction.⁵

A consumer should have a right to be heard when dissatisfied with a bank's service. When a consumer complains, he or she is initially faced with a large corporation which may (possibly) ignore his or her concerns. An effective dispute resolution system is imperative in the financial services industry if consumer rights are to be upheld.

A practical example – Mr S and unauthorised ATM withdrawals

Mr S had an account which he operated with a debit card. Mr S had recently sold his home. He was expecting the mortgagee of his

former home to deposit the net proceeds of the sale to the account. He later learnt that his account had been closed, a new account had been opened, and that the sale proceeds had been deposited to, and subsequently withdrawn from, the new account via ATM withdrawals. He said he did not close his account nor open the new account, was unaware of the deposit of the net proceeds to the account, and did not withdraw the sale proceeds.⁶

Current position

The financial services sector has recently undergone a change. Financial service providers (including banks,

can pursue the complaint through the dispute resolution scheme.

As of March 2004 all retail financial service providers must be licensed under the *Corporations Act 2001* (Cth) (Corporations Act) Chapter 7. This Chapter was inserted into the Corporations Act¹⁰ in order to regulate and licence financial service providers. The Corporations Act requires certain financial service providers to have a dispute resolution system available for retail consumers.¹¹ The dispute resolution system must have both an internal and external component.

The internal dispute resolution (IDR) procedures must comply with the standards set by the Australian Securities and Investments Commission

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credit unions and building societies) are statutorily obliged to provide for consumer protection⁷ and to have in place regulated avenues for dispute handling.⁸ Along with a statutory obligation, banks, building societies and credit unions have a contractual obligation to adhere to their various Codes of Practice.⁹

Any complaints made by a consumer must initially be dealt with at the branch level. If the consumer is not satisfied with the result, then he or she

(ASIC),¹² and the entity must be a member of an external dispute resolution (EDR) scheme that has been approved by ASIC.¹³

Statutory requirements for internal dispute resolution

In order to satisfy ASIC's Internal Dispute Resolution (IDR) requirements, all financial service providers, including banks building societies and credit unions, must comply with the requirements set out in the Corporations Act¹⁴



and the corresponding *Corporations Regulations*.¹⁵ Under reg 7.6.02, entities that are subject to the IDR requirements¹⁶ must satisfy the elements of Australian Standards 4269-1995.

Australian Standards 4269-1995 is the standard setting out the elements for 'complaint handling'. The elements require the entity to have a complaints handling process which is:

- accessible
- visible
- fair
- responsive, and
- provides a range of remedies.¹⁷

The aim of the process is best articulated by clause 3.1 of the Standard:

The overriding aim of any complaints handling process is to turn dissatisfied consumers into satisfied consumers. This is best done by speedy and effective remedies at the first point of contact.¹⁸

Under its Policy Statement 165, ASIC explains how it will administer the dispute resolution provisions of the Corporations Act. Section A deals with IDR requirements. ASIC considers that the majority of complaints should be dealt with under the financial service provider's IDR scheme.¹⁹

An example of an internal dispute resolution system is provided by Suncorp-Metway bank. In its Customer Relations brochure²⁰ the bank explains the way a customer can make a complaint about the bank's products or services. Initially, the customer should alert the person who provided the service and if the problem is not resolved, the customer can address the complaint to the Customer Relations Department by phone, fax, mail or email.²¹ The bank will attempt to settle the matter within one working day of the initial complaint being made.²² If this cannot be done, then the bank will inform the customer of its progress within three working days.²³ If the complaint is complicated, the bank will attempt to settle the dispute within 21 (but no more than 40) days.²⁴ If the complaint cannot be resolved within this timeframe, the bank will advise the customer of its progress every 21 days giving written reasons for the delay.²⁵ Upon resolution of the complaint, the bank will advise the customer of its

decision, giving reasons for the decision.²⁶

A practical example – Mr S

Mr S contacted his bank and queried the state of his account:

*The [bank] said it closed the account because it was overdrawn. It said that Mr S had opened the new account and had produced photo identification when doing so. It said that Mr S must have performed the withdrawals (or must have compromised PIN security) since they were all performed with the correct PIN on the first attempt.*²⁷

Internal dispute systems design evaluation

Initiating dispute resolution at the branch level allows the consumer to resolve their dispute in a variety of ways. If the dispute involves a complaint about service, then the consumer can receive an apology directly from the service provider without having to go through formal avenues. The dispute will be resolved without cost to the consumer and will be resolved quickly, compared with more formal avenues.

A major problem with the initial internal dispute resolution requirements is that there is a lack of reporting of these disputes. It would be helpful to have information and statistics on the types of disputes that are resolved at first instance, and also the number of disputes, in order to have a better view of the effectiveness of such schemes. Under the Code of Banking Practice 2003, a Code Compliance Monitoring Committee (CCMC) has been established to monitor banks' compliance with their obligations under the Code, including their obligations to establish a Dispute Resolution Scheme. At present only 18 banks have adopted the revised Code of Banking Practice and the CCMC has yet to release a report on member banks' compliance with the Code of Banking Practice 2003.

Prior to the establishment of the Revised Code of Banking Practice, ASIC monitored compliance with the earlier code. In its final report²⁸ ASIC identified that the largest single cause

of disputes in the year to March 2003 was fees and charges (16.6%).²⁹ It is not clear whether this percentage is in relation to all disputes with member banks or whether this includes disputes at the branch level.

When assessing the effectiveness of a dispute resolution system, Rowe³⁰ suggests that an effective system should be readily accessible and should have multiple points of entry. In evaluating the internal dispute resolution requirements put forward by ASIC, it is clear that both principles are satisfied. A consumer who has a complaint with their bank can access information via the internet, over the phone or in person at their branch. They can make a formal complaint by contacting the banks' customer service representative by phone, mail or via the internet.

Ury, Brett and Goldberg³¹ developed a set of principles to be implemented when designing a dispute resolution system. According to the authors, a dispute resolution system should provide for a low-to-high-cost sequence.³²

The essence of this set of principles is that a dispute resolution scheme should prevent disputes in the first place through consultation and then only escalate from interest-based resolution to rights-based resolution when all other avenues have been exhausted. In so doing, the consumer should have opportunities to resolve their dispute quickly and without great cost. The object of the internal dispute resolution scheme put forward by ASIC is that, at this initial stage, a consumer can resolve his dispute with the bank in an informal and cost-effective manner.

A criticism of the internal dispute resolution process is that it does not establish a forum in which the consumer can voice his or her concerns. There is a lack of interest-based options for the consumer. For example, there is no requirement for the bank to have a negotiation model in place. The process at this initial stage is unilateral as the consumer is not involved in the decision-making process. This may be

due to the fact that the vast majority of complaints revolve around legal rights rather than interests as consumers are concerned about the legality of a bank's action in a set of circumstances. The reliance on the Australian Standard 4269-1995, entitled 'Complaint Handling' suggests that the bank will hear the complaint and deliver a decision. It could be that a more bilateral approach would resolve many more disputes at the initial stages and

stated above, the Australian Banker's Association has established a Code Compliance Monitoring Committee (CCMC) and as yet the CCMC has not released a report on compliance with the IDR requirements. Financial service providers are only required to have data available for ASIC to view and the information on individual financial service providers compliance is not, at present, available to the public, including researchers.

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allow for a broader range of consumer concerns to be dealt with effectively.

ASIC's policy statement *PS 165 Licensing; Internal and external dispute resolution*³³ sets out the guidelines for a financial services provider's internal dispute resolution procedures. ASIC applies AS 4269-1995 to financial services in this policy statement. It suggests that the elements of 'Complaint Handling' in the Australian Standards are a 'useful starting point for establishing and assessing IDR procedures'.³⁴ The fact that this Standard was established for a broader market than financial services is recognised³⁵ and ASIC goes further to explain how the Standard would apply to financial service providers.

Under AS 4269-1995, section 3.11, an internal dispute resolution system should include provisions for keeping records of complaints received. This data should be reported to senior management and be made available for inspection by ASIC if required.³⁶ As

The information available in the internal dispute resolution standards does not set out the remedies available to the consumer. A consumer may only want an apology from a discourteous bank staffer, or he or she may want to be reimbursed for an incorrect direct debit transaction. The Standards highlight the need for a range of remedies, yet do not set out the need for this range to be communicated to the consumer.

If the consumer is not satisfied with the outcome under the internal dispute resolution scheme, then he or she has recourse to an external dispute resolution scheme. Under ASIC's policy statement 165³⁷ an entity must also establish appropriate links between its internal dispute resolution procedures and the relevant external dispute resolution scheme for the complaints that it cannot handle directly. ASIC considers that an entity must provide for these links and its staff must inform its customers of their right to pursue



their complaint with an external dispute resolution scheme. The benefit of an external dispute resolution scheme is that it is independent and, because many financial institutions subscribe to the same scheme, its decisions will be consistent. This scheme is analysed in Part 2 of this article in the next issue of *The ADR Bulletin*. ●

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Endnotes

1. Whilst this paper focuses on the relationship between consumers and their banks, it is worth noting that the regulatory definition of financial service providers has expanded to include both banks and non-bank financial service providers.
2. *Quade v Commonwealth Bank of Australia* (1991) 27 FCR 569 at 600.
3. A fiduciary relationship arises where the client relies on the banker's advice or where the parties are not acting at arm's length: *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 476-7.
4. Goodman-Delahunty J *Promoting Consumer Complaints in the Financial Sector*. Keynote address at ASIC's Stakeholder Forum, *Capitalising on Complaints: Insights into Handling Finance Sector Complaints*, November 2001.
5. Goodman-Delahunty J, above note 4.
6. Banking and Financial Services Ombudsman: *Annual Report 2003-04*, p 32.
7. See generally Chapter 7 *Corporations Act 2001* (Cth).
8. *Corporations Act 2001* (Cth) s 912A.
9. See *Code of Banking Practice 2003*, the Building Society Code of Practice and the *Credit Union Code of Practice*. Available at <www.asic.gov.au/fido>.
10. In 2002 with a two-year transitional period.
11. *Corporations Act 2001* (Cth) s 911A.
12. *Corporations Regulations 2001* (Cth) reg. 7.6.02.
13. *Corporations Act 2001* (Cth)

- ss 912A(2)(b), 1017G(2)(b).
14. *Corporations Act 2001* (Cth) ss 912A(1)(g), (2).
15. *Corporations Regulations 2001* (Cth) reg. 7.6.02.
16. A licensee (s 912A(1)(g) and 912A(2)); an unlicensed product issuer (s 1017G); and an unlicensed secondary seller (s 1017G).
17. *Australian Standards 4269-1995*, cl.3.2-3.14.
18. *Australian Standards 4269-1995*, cl.3.1.
19. ASIC: *Policy Statement 165, Licensing: Internal and External Dispute Resolution*, November 2001.
20. *Customer Relations: Comments, Compliments, Complaints and External Dispute Resolution Schemes*, Suncorp. At <www.suncorp.com.au>.
21. Above note 20, p 6.
22. Above note 20, p 7.
23. Above note 20, p 7.
24. Above note 20, p 7.
25. Above note 20, p 7.
26. Above note 20, p 7.
27. Banking and Financial Services Ombudsman: *Annual Report 2003-04*, p 32.
28. ASIC: *Compliance with the Payments System Codes of Practice and the EFT Code of Conduct, April 2002 to March 2003*, p 4. December 2003.
29. ASIC, above note 28, p 4.
30. Rowe M P 'Dispute Resolution in the non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?' (1996) in Gleason S *Frontiers in Dispute Resolution in Labor Relations and Human Resources*, 1997.
31. Ury W, Brett J, Goldberg S 'Designing Systems for Resolving Disputes in Organisations: Developing and Maintaining Competitiveness' *American Psychologist* Vol 45(2), February 1990, pp 162-70, available at <<http://gateway.ut.ovid.com>>.
32. Above note 31 p 10.
33. Issued 28 November 2001.
34. Australian Securities and Investment Commission. PS 165 *Licensing: Internal and external dispute resolution*, p 8.
35. ASIC above note 34, p 24.
36. ASIC above note 34, pp 27-28.
37. ASIC Policy Statements are available on ASIC's website at <www.asic.gov.au>.