



Strong banks – strong Australia

House of Representatives Standing Committee on Economics

Review of the four major banks (second report)

Australian Bankers' Association

ABA17QW: What is the legal status of the Code of Banking Practice? What are the consequences for a breach of the Code of Banking Practice?

Answer: It is a requirement of the Code that subscribing banks must, in any written terms and conditions, include a statement to the effect that the relevant provisions of the Code apply to the banking services offered in their contracts with their individual and small business customers and banks are therefore contractually bound by those relevant Code obligations. The courts have confirmed this binding contractual effect.

Two recent court cases illustrate the power of this requirement.

In 2015, the Victorian Supreme Court held that in *National Australia Bank v. Rice (and Rose)* the bank had breached its contractual warranty that it would comply with the relevant provisions in the Code to provide Mr Rose with a prominent notice of various matters before taking a guarantee from him. The breach by the bank meant that Mr Rose was entitled to set off against the debt owed to the bank his damages for breach of contract (reportedly millions of dollars).

In 2014, at first instance, and in 2015 on appeal, the Victorian Supreme Court held that in *Commonwealth Bank of Australia v. Doggett* the obligation under Clause 25.1 of the Code (as it then was) was incorporated into the bank's loan agreement with its customer, and that the bank had breached its obligation of a diligent and prudent banker requiring care in the formation of its opinion as to whether a borrower would be able to repay a loan.

Compliance with the Code more generally is overseen and monitored by the Code Compliance Monitoring Committee (**CCMC**). Under its mandate, the CCMC is able to determine if a Code subscribing bank has breached the Code. The CCMC also is empowered to conduct 'own motion' inquiries of a bank's compliance with the Code.

The CCMC is empowered to name a subscribing bank on the CCMC's website, in the next CCMC annual report, or both, in connection with a breach of the Code, where it can be shown that the bank has:

- Been guilty of serious or systemic non-compliance
- Ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time
- Breached an undertaking given to the CCMC; or
- Not taken steps to prevent a breach reoccurring after having been warned that the bank might be named.

The Financial Ombudsman Service (**FOS**) can take into account the provisions of the Code when determining banking disputes, irrespective of whether the bank concerned is a Code subscriber.



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The ABA has also worked with the banks and stakeholders on introducing industry guidelines to supplement the Code. For example, in 2013 the industry launched its financial hardship package, including the industry guideline on financial hardship and the 'Doing It Tough' website¹. This guideline has subsequently been reviewed and updated to take account of changing needs and expectations and was based on community feedback. The FOS has pointed to the guideline as best practice and encourages other financial institutions and creditors to adopt similar practices², noting the guideline goes beyond legal obligations.

¹ <http://www.bankers.asn.au/Consumers/Are-you-experiencing-financial-difficulty->

² https://www.fos.org.au/custom/files/docs/3_fos_approach_working_together_to_find_solutions_final.pdf