

BCCC Guidance Note No. 2

Clause 10 – fair, reasonable and ethical behaviour

Clause 10 of the 2019 Banking Code of Practice (the Code) deals with banks' commitment to engage with customers in a fair, reasonable and ethical manner.

This Guidance Note explains:

- how the Banking Code Compliance Committee (the BCCC) assesses Code subscribing banks' compliance with clause 10 of the Code, and
- the circumstances under which the BCCC will consider clause 10.

About the BCCC

The Banking Code Compliance Committee (BCCC) is an independent compliance monitoring body established under clause 207 of the 2019 Banking Code of Practice (Code).

The purpose of the BCCC is to monitor and drive best practice Code compliance. To do this the BCCC will:

- a. examine banks practices
- b. identify current and emerging industry wide problems
- c. recommend improvements to banks' practices
- d. consult with and keep stakeholders and the public informed.

Guidance Notes

Guidance Notes are subject to change by the BCCC and this document reflects the BCCC's views as at the date of publication. The BCCC considers all matters on the basis of their individual circumstances and this document does not anticipate all possible issues that might come before the BCCC.

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Introduction

1. The Australian Banking Association (ABA) acknowledges that 'communities expect bank behaviours to meet high ethical standards, backed up by the right internal culture and practices'.
2. The ABA notes that the Code represents a stronger commitment to ethical behaviour and doing the right thing.¹
3. The purpose of this Guidance Note is to highlight how the BCCC will assess banks' compliance with clause 10, banks' commitment to ensure their staff engage in a fair, reasonable and ethical manner, which is underpinned by the Code's Guiding Principles. It also sets the BCCC's expectations of banks with respect to staff training and its supporting compliance and reporting frameworks as they relate to clause 10.

Clause 10 and the Guiding Principles

4. While banks' stronger commitment to ethical behaviour is interwoven through various provisions in the 2019 Code, the BCCC regards clause 10 as one of the Code's most important clauses. Viewed alongside the Guiding Principles that underpin the Code, clause 10 is as much about the culture of a bank as it is about the way its staff engage with customers.
5. Clause 10 of the 2019 Banking Code of Practice (2019 Code) provides:

How our staff engage with you

We will engage with you in a fair, reasonable and ethical manner.
6. In addition to an undertaking to "engage in a fair, reasonable and ethical manner", banks have also made a commitment to make decisions guided or informed by the Guiding Principles of the Code. The BCCC considers the Guiding Principles to be a lens through which bank staff will make decisions about how they help their customers. It expects that the culture and practices within the bank will reflect the Guiding Principles.

¹ https://www.ausbanking.org.au/wp-content/uploads/2019/05/Financial_Times_Live_Conference_speech.pdf

7. The Guiding Principles are:

1. *Trust and confidence*

- *We are committed to earning and retaining the trust of our customers and the community.*
- *We are committed to making promises and keeping them to deliver good customer and community outcomes.*
- *We will comply with all laws relating to banking services.*
- *We will protect your privacy.*
- *We recognise our role in society and our impact on the wider community.*

2. *Integrity*

- *We will act honestly and with integrity.*
- *We will be fair and responsible in our dealings with you.*
- *We will build and sustain a culture based on strong ethical foundations.*

3. *Service*

- *We will deliver high customer service and standards.*
- *We will ensure banking services are accessible, inclusive and provided to you in a fair and ethical manner.*
- *We will raise awareness of the basic (low, or no fee) banking products that we may offer.*
- *We will take a responsible approach to lending.*
- *We will work to help you if you are experiencing financial difficulty.*

4. *Transparency and accountability*

- *We will communicate with you in a clear and timely manner.*
- *We will be accountable in our dealings with you.*
- *We will be transparent in our communications with you.*

Banks' obligations under clause 10

8. Clause 10 of the Code has a broad application. It should form the backbone of a bank's internal culture and must be upheld by all staff.
9. Clause 10 obliges banks to act in a fair, reasonable and ethical manner in all their dealings with both existing and prospective customers and guarantors, whether in person, electronically or over the telephone. It extends to the design of banks' products and services, marketing and sales practices, processes and policies, and should be considered by banks when engaging third parties and authorised representatives to act on their behalf.

How the BCCC assesses banks' compliance with clause 10

10. The BCCC will assess whether a Code subscribing bank has engaged its customers in a fair, reasonable and ethical manner in every aspect of its monitoring work.
11. Clause 10 has three elements: 'fair'; 'reasonable'; and 'ethical'. The BCCC will consider these elements both collectively and separately, where appropriate. For example, the BCCC may focus on whether a bank has acted fairly as a standalone obligation.
12. The BCCC may assess whether a bank's conduct complies with clause 10 alone or alongside other Code obligations. For example, if the BCCC investigates an alleged breach of clause 167 (financial difficulty) of the Code, the BCCC will consider whether the bank has acted in a fair, reasonable and ethical manner. In some cases, the concept of fairness is clearly incorporated into other Code obligations. Clause 200 requires a bank's process for handling complaints to be fair and reasonable.²
13. In making this assessment, the BCCC will consider:
 - a) whether the bank can demonstrate that its engagement or decision making was guided or informed by clause 10 and the Guiding Principles
 - b) community standards and expectations, and

² This requirement also reflects the obligations in the Australian Securities and Investments Commission's Regulatory Guide 165 Licensing: internal and external dispute resolution.

- c) standards set by AFCA.

Training staff to comply with clause 10

14. Banks have an obligation to ensure their staff understand and comply with the Code. The BCCC expects all staff to receive appropriate training on the commitment made under clause 10 and, more broadly, expects banks to create a culture that supports and promotes this behaviour.
15. The BCCC expects banks to conduct regular checks of its training, key performance indicators and culture to ensure that staff are supported and empowered to meet the obligations of clause 10.

Compliance framework and reporting

16. Banks must build a strong compliance culture and framework that can robustly identify, investigate, record and report instances of non-compliance. Banks are also expected to take proactive steps to fully remediate any instances of non-compliance identified.
17. The BCCC expects banks to have adequate and appropriate training about the internal compliance frameworks in place and the compliance obligations to ensure that staff can competently identify possible Code breaches, investigate, record and report instances of non-compliance.
18. To ensure they are held accountable, banks should actively promote a culture that encourages and supports staff across the organisation to report instances of non-compliance. Customer-facing and operations staff are just as well placed as compliance staff to report Code breaches.
19. When investigating breaches of clause 10, the BCCC expects banks to consider the breach carefully and fully assess the root cause, not simply blame human error.
20. Banks should review staff conduct and consider whether the training, key performance indicators, incentive structure, processes and procedures supported compliance with

clause 10. Banks should address deficiencies in any of these areas as a matter of priority.

21. The BCCC expects that bank staff responsible for quality assurance activities and those who manage complaints are given regular training in relation to this obligation.
22. The BCCC expects that when the bank identifies, investigates and records a breach of **any** Code obligation that it investigates whether clause 10 has also been breached, and record and report the same, as appropriate.
23. The BCCC requires banks to report breaches of clause 10 in their biannual Compliance Statement in line with the guidance provided.

Concluding remarks

24. The BCCC notes APRA's Information Paper released in May 2019, on self-assessments of governance, accountability and culture, highlighted that the management frameworks of non-financial risk required significant improvement to meet an appropriate industry standard.
25. The BCCC considers compliance with clause 10 to be an important way of minimising non-financial risk. It expects that the bank's senior leadership consider and determine how clause 10 will be effectively embedded into its risk and governance frameworks.

Case studies and examples of non-compliance with clause 10

26. This Guidance Note will be updated periodically to include case studies that demonstrate both good practice and non-compliance with clause 10. The case study below is an example of conduct that would represent a breach of a bank's obligations.

Case study A

Sarah's ex-boyfriend, Brad, applied for a personal loan and credit card in her name without her permission. Brad provided the bank with copies of Sarah's rent

expenses, living expenses and bank statements to get the loans. Sarah did not know about the loans and would have been unable to meet the repayments.

Sarah told the bank she was living in an emotionally and financially abusive relationship and that the loans were taken out in her name without her permission. The bank informed Sarah that she was still liable for both loans and needed to continue to make repayments. Sarah knew she could not service the loans and was in financial difficulty.

Mary (a family friend) called the bank on Sarah's behalf and told them Brad had forced Sarah into taking out the loans. The bank informed Mary that Sarah would need to come into a branch to sign a supporting statutory declaration and that they should file a police report. The bank told Mary, they would not investigate the circumstances of the loan until Sarah signed the statutory declaration.

The bank failed to identify Sarah was in financial difficulty and did not investigate the circumstances of the loan when Sarah contacted the bank.

Sarah had identified herself as a customer experiencing vulnerability. As a victim of emotional and financial abuse she did not have control of the loans being taken out in her name, however the bank maintained that she was responsible for loan repayments.

After telling the bank about her circumstances on multiple occasions, the bank still required Sarah to complete a statutory declaration to "prove" her statements.

Sarah's situation was eventually resolved but the banks engagement with her was not fair, reasonable or ethical.

27. The following breach examples have been self-reported by banks to the BCCC. They include breaches of the obligations to act fairly, reasonably and ethically under the 2013 version of the Code and breaches of other clauses that the BCCC considers would likely to also be a breach of clause 10.

- A. A customer asked a branch staff member to change their address. The staff member changed all the addresses on the customer's file including one for an account held jointly with the customer's ex-husband. The customer had advised of ongoing relationship issues with the ex-husband, but the staff member did not identify signs indicating domestic violence. The ex-husband subsequently obtained the new address and made threats to the customer.
- B. The bank failed to inform customers about the limitations of credit card insurance product they had purchased. The insurance policy prevented customers from making a claim if they were on a disability pension or receiving Centrelink support.
- C. The bank charged credit card customers a higher annual card fee than the current annual card fee for that product.
- D. The bank charged customers an annual card fee that was higher than the publicly advertised fee.
- E. The bank was not providing customers with the full benefits of their offset account arrangements.
- F. The bank continued to charge fees and debit interest on deceased customers' accounts.
- G. The bank included an incorrect interest rate on emails sent to customers.
- H. The bank failed to remove access to an account following a marriage separation leading to unauthorised transactions.