Banking Ombudsman Scheme | Te Whare Rama Tōkeke

Practice note: Debt collection

December 2023

Introduction

We, like banks, regularly receive complaints about debt collection action. Many of these complaints stem from misunderstandings. A customer may not understand a bank's rights to recover debts, and a bank may not be fully aware of a consumer's financial situation. In the latter case, a bank may not need to initiate formal debt recovery action if it explains its contractual rights to the customer and can reach agreement on a satisfactory repayment arrangement with the customer, or the customer agrees to sell assets to repay the bank.

Perceptions play a part, too. A bank may see a deterioration in a customer's financial situation, while the customer may sense a hardening in the bank's attitude towards him or her, culminating in unfair and inflexible debt collection action. Customers can regard it as particularly unfair when a bank takes debt collection action after they experience unforeseen difficulties, such as loss of a job or a serious health problem. Banks should take reasonable steps to help customers understand their obligations under their credit contracts.[1]

Our scheme has the power to consider a complaint about a breach of a statutory obligation, industry code or principles of good banking practice.[2] We assess complaints about debt recovery action in light of banks' obligation to treat borrowers in default in a reasonable and ethical manner.[3]

We suggest banks share the guidance in this practice note with their debt collection agents, whose actions are generally their responsibility.[4]

Communicating with customers in default

The Responsible Lending Code requires banks to have policies and procedures about when and how they will make contact with customers when they miss a payment.[5] Banks must take particular care when contacting customers with mental health difficulties or impaired mental

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[1] Section 9C(3)(c) of the Credit Contracts and Consumer Finance Act 2003 says a "lender must assist the borrower to reach informed decisions in all subsequent dealings in relation to the [credit] agreement".
[2] Rule 2.3 of the Banking Ombudsman's terms of reference. See **Appendix 1** for rules applying to debt collection.
[3] Credit Contracts and Consumer Finance Act, sections 9C(3)(d) and 9C(4)(c).
[4] Clause 12:49 of the Responsible Lending Code sets out the steps a lender should take in complying with its lender responsibilities to ensure collection agents are acting appropriately.
[5] Clause 12.6 of the Responsible Lending Code.

capacity. Banks may have to make adjustments to their standard debt collection process for such customers.

A bank must ensure it has identified the correct person before taking any step to communicate with a customer. It must not disclose information about a customer's debt to a third party without the customer's consent. It should consider the information it passes on to a collection agent if the customer has given a work number or a shared phone number in a household as his or her contact number. Customers sometimes complain about bank staff leaving messages asking that the customer ring the bank with whoever answers the phone. We do not consider leaving such messages to be a problem. Banks ring customers for a variety of reasons, and a message to call back does not in itself suggest that a customer is behind with repayments. It may be prudent, however, to confirm with customers the best contact number when communicating about debt collection activity.

Banks should also take reasonable steps to ensure any third party does not become aware it is taking debt collection action against a customer. Banks must, for example, take reasonable steps to ensure they address mail correctly and have correct email addresses on file.

Case study: Bank's collection agent wrote to customer's workplace

A bank's collection agent wrote to Jeff at his workplace in Malaysia about his credit card debt. Jeff was a junior director of the company with some responsibility for the company's finances. The letter set out the bank's instructions to the agent to recover the debit, mentioned the possibility of legal proceedings, and said that listing the default with credit reference agencies would affect his credit rating. Another company officer opened the letter and showed it to a senior director. The company said its policy was for its central mail team to open all mail addressed to it. The company did not encourage or recommend staff give its address for receipt of personal mail. It also said it removed Jeff's access to its internet banking facility after learning of the contents of the letter, and it reminded him of his obligation to the company to maintain a good credit rating.

Jeff had not given his work address to the bank. In fact, he had not updated his contact details after taking up his new role overseas. The collection agency apparently found Jeff's employer via social media. We concluded the bank should not have sent personal mail of a confidential nature to Jeff at his place of work. It was a reasonably foreseeable risk that a letter addressed to a company would be opened by someone other than the addressee named on the envelope.

Contact for reasonable purposes only

Each contact with a customer should be made for a reasonable purpose only. A reasonable purpose includes advising of the default, discussing repayment arrangements, explaining the consequences of non-payment, and obtaining and passing on information. What is reasonable may depend on the circumstances. It may not be reasonable, for example, for a bank to continually contact a customer to demand payment when it is aware he or she cannot do so. Contacts that do not have an appropriate purpose or unreasonably frequent contacts or attempted contacts may constitute harassment.

Case study: Bank persisted with weekly calls despite customer's inability to keep up repayments

Hēmi stopped work to look after his terminally ill wife. With limited income, the couple were soon in arrears on debts owed to the bank. Hēmi entered into a repayment arrangement with the bank, but he was not able to keep to it. The bank rang him weekly about the debt. Hēmi became frustrated with these calls because he could not repay the bank and felt he was being harassed. After one call, the bank had made a diary note that the calls would continue until Hēmi agreed to a repayment arrangement. This statement was not made to Hēmi directly, but we considered it indicated the bank would continue to phone Hēmi when it was aware he could not make a sustainable repayment arrangement. We considered any such calls would not be made for a proper purpose.

Contact should be by appropriate means

A bank should try to contact customers by means appropriate to the circumstances.[6] We have considered cases in which banks have posted mail overseas and required a response within a short time, despite having the customer's email address. Such letters often reached the customer after the deadline, prompting the bank to take debt collection action.

A bank should use a customer's preferred method of communication, and adopt another method only if impractical, such as corresponding by mail about an urgent matter.

Case study: Bank ignored request to switch from phone to email communication

Jamie was in default with several bank loans. The bank called him over a three-month period to discuss options for repaying the debt. Jamie then asked the bank not to contact him by phone. He explained that he was autistic and had difficulty communicating by phone. He proposed email as an alternative method of contact. However, the bank continued to ring him. We found the bank breached the Code of Banking Practice principle to treat customers fairly and reasonably.

Phone contact

On each contact, the bank must ensure it is dealing with the right customer. Having identified the customer, a bank officer should identify him or herself and the reason for the call.

Banks should call customers during reasonable times, generally between 8am and 9pm.[7] Phone contacts outside these hours (unless otherwise agreed to with the customer) may not be reasonable. However, it may be reasonable to try to reach a customer outside these hours if attempts during normal hours prove unsuccessful. A bank should, however, take into account customers' reasonable wishes about when and how they can be contacted. Shift workers, for example, will have different expectations about what are reasonable hours.

[6] See also Responsible Lending Code, 12.7: "Policies relating to contact with borrowers should enable use of multiple methods of contact where known, and varied and spaced attempts to make contact … Where practical, some options for the borrower to respond to messages from the lender should be free of charge."
[7] Clause 2.8 of the Responsible Lending Code.

Communicating with customer representatives

Customers have a right to appoint a representative to act for them. If they do so regarding a debt, a bank should, before disclosing information to the representative, check that the customer has given authority to act and clarify the scope of the authority. If the authority is limited to a specific purpose or purposes, a bank or its agent may be entitled to contact the customer directly for clarification.

However, generally speaking, a bank or its agent should deal with any representative appointed by a customer. There are exceptions to this rule. Direct contact with a customer may be appropriate if the representative:

- has not responded to a bank's attempts at contact
- is not passing information on to the customer
- is not acting in the customer's best interests.

A bank must have a reasonable basis for bypassing the representative and contacting the customer directly.

Some banks have expressed discomfort about working with representatives who charge customers a fee to "clean up customers' credit record" or negotiate a repayment arrangement when banks provide such services for free. They have also questioned the competence of these representatives, the quality of their services and the frequent lack of validity in many of their arguments. New provisions in chapter 12 of the Responsible Lending Code suggests referring customers to organisations that provide free financial assistance. Clause 12.3 of the Code provides that lenders should consider training their staff and agents about financial mentoring services where appropriate, and mentions MoneyTalks, which provides an independent, confidential and free service.

Case study: Lack of co-operation entitled bank to bypass representative

Janice ran a business helping customers in debt. She had a client with a bank debt that had been referred to a debt collection agency. The client had a long history of entering into repayment arrangements but not adhering to them or keeping in contact with the agency. The agency had agreed to concessions in the past and had sought information from the client about his current circumstances to see if he met its policy for assistance. The client appointed Janice's firm to represent him over the debt.

Janice contacted the bank with various meritless complaints about the debt collection agency and the bank, including that the agency had contact the client directly after her firm had been appointed as representative. The bank gave us documentation showing substantial contact between Janice and the agency. Janice was not behaving reasonably towards the agency, which had been trying to assess whether her client qualified for help. The debt agency then contacted the client directly.

We considered the agency had a reasonable basis for contacting the client directly. Janice had not been forthcoming with the information it needed to assess her client's situation, and

the agency was concerned Janice was not passing on its requests to her client. Also, the failure to provide information was likely to increase the likelihood of eventual debt recovery action.

Disputes about debts

If a customer disputes a debt, a bank (or its collection agent) should suspend debt recovery action and investigate the dispute, provided the basis for disputing the debt is one of the following:

- The customer was not the borrower.
- The customer never incurred the debt.
- The customer repaid the debt or reached a settlement about repaying the debt.
- The debt did not exist.

The bank should notify the customer it has suspended recovery action and begun an investigation. It is the bank's responsibility, not the customer's, to establish that the debt exists, that the customer is the borrower, and that the debt has not been repaid or a settlement reached. The bank must tell the customer the outcome of its investigation. If the customer does not accept the outcome, the bank must refer the customer to us.

Some customers try to deny liability for debts using unusual and sometimes bizarre arguments found on the internet. Sometimes known as organised pseudo-legal commercial arguments, these claims are invariably time-consuming for banks to deal with, and customers often pursue them in an unreasonable manner, causing themselves unnecessary expense as arrears mount on their debt. The courts have never upheld these arguments. Nonetheless, we recommend banks take care to ensure there is no genuine issue obscured beneath such groundless arguments. We have guidance available on pseudo-legal complaints.

Case study: Recovery action far advanced before bank realised its error

A bank sought repayment of a debt from Harry, a person it believed was its customer. The name and address on its records appeared to be correct, and the date of birth was the same, except for the year. Harry insisted he was not the person who had borrowed the money. The bank initiated court action to recover the debt, and Harry was personally served with court papers. Harry continued to say he was not the borrower. The bank then decided to discontinue action. Harry said he found it distressing to have been served with court papers, and he incurred costs seeking legal advice. The bank accepted it could not establish to the necessary degree that Harry was the borrower, and it resolved the matter directly with him. Following best practice, the bank should have assessed Harry's assertion that he was not the borrower as soon as he made it.

A bank should not make a default listing until it has investigated a dispute and communicated the outcome to the customer. A bank's final response letter saying it considered it appropriate to make the listing must advise the customer of his or her right to make a complaint to us.

Case study: Bank listed debt that was still in dispute

Prisha, who had a debt with a bank, disputed dishonour fees and default interest on an account she had not been operating in accordance with its terms and conditions. The bank agreed to reverse the fees and interest, but failed to do so. Prisha tried unsuccessfully to resolve the matter at a branch. She ignored communications from the bank for about three months and made no repayments of any kind, including on the debt that did not arise from fees and interest. Prisha then received a bank letter saying her credit rating would be downgraded if she did not repay the bank. Prisha made a complaint, and bank removed the fees and interest from the debt. She did not accept that this satisfactorily resolved her complaint. After further discussion, the bank referred the debt to its collections department, which made a default listing. Shortly afterwards, the bank declined an application Prisha had made for credit because of the default listing. She complained to us.

We considered the bank had made numerous errors. It was certainly unreasonable for Prisha to have ignored the bank's communications, particularly since she was aware she owed more money to the bank than the fees and interest in dispute. However, the bank did not, in our view, fully investigate the dispute before referring the debt for collection. Nor did it let the complaints process run its course before taking this step or advise Prisha of her right to make a complaint to us. We recommended the listing be removed, and the bank did so. The bank and Prisha agreed on a repayment arrangement for the rest of the debt.

Enforcement action

A decision to send a debt for collection, make a default listing, take court action or any other debt collection step taken in accordance with the bank's contract with the customer, is usually an exercise of its commercial decision-making. However, we can consider complaints about how a bank carries out debt collection action, such as failing to follow the lender responsibility principles concerning debt collection, failing to make the required disclosure concerning debt collection, misleading conduct, and poor process or process failures.[8]

Collecting a debt

Banks and their debt collection agents must treat a debtor with respect and courtesy. We accept that bank staff may feel frustrated with customers they regard as deliberately avoiding repaying their debt or who respond aggressively to debt collection communications. However, we caution against making assumptions about a customer's behaviour or motivations. Some customers may not understand their debt obligations or they may be in a vulnerable situation. Besides, discourtesy invariably fuels complaints rather than resolving an outstanding debt to everyone's satisfaction.

Some years ago, we received a complaint involving a collection agency that wrote letters to a customer saying such things as "If you were so stupid [as] to allow your card to be stolen along

[8] Before starting debt recovery action, lenders must give consumers information about the credit contract, details of the debt collector, information about fees and interest, and the details of the dispute resolution scheme and other assistance and advice available: Credit Contracts and Consumer Finance Amendment Regulations 2020, regulation 23.

with the PIN number, then that is your fault!" and "Do not expect our client to wear the loss. You owed the above amount and you will pay!" Such unprofessionalism is rare nowadays, but standards do, on occasion, slip. Recently, a bank's debt collection agency sent a customer a letter that began: "Your failure to pay this account is unacceptable." Communicating with a customer using that tone and language is not consistent with a bank's obligation under the Code of Banking Practice to act fairly and reasonably.

Credit listings

A common complaint we receive is that a bank failed to tell a customer it would list a debt with a credit reference agency. Such customers often learn of this step only when they subsequently apply for – and are unexpectedly declined – credit because of a default listing. Banks must give notice of their intention to list a debt with a credit reference agency and explain the consequences of the listing.[9] Banks often give such notice through their standard debt collection correspondence, although we have noticed that banks sometimes omit the consequences of a listing when they update their standard recovery letters.

The consequences are severe, so clearly understanding these consequences helps customers make informed decisions about repaying an outstanding debt. We are likely to require the removal of a listing if a bank made it without informing the customer in a clear and timely fashion.

Case study: Default listing made without notifying customer

A court ordered Justine to repay a bank debt of $10,000 at $10 a week. She set up a weekly automatic payment of $10 from her account with another bank. She made the payments for seven years, after which she assumed the debt had been repaid. She had not heard from the bank about the debt in that time. The debt had not, in fact, been repaid in full, and two years after Justine had stopped making payments, the bank made a default listing against her name for the unpaid amount. It did not notify her of this move.

Two years later, Justine asked her own bank for an increase to her credit card limit, and a credit check revealed the default listing. The outstanding amount included default interest and collection costs. Justine arranged repayment of this amount over several months.

We found that notifying Justine before making the default listing would have given her the opportunity to repay the outstanding amount. She was employed, had made arrangements to repay the debt when she found out about it, and she would in all likelihood have taken up that opportunity. We recommended the listing be removed, and the bank did so.

For individuals, a default listing involves the disclosure of personal information. Thus, a customer must have given consent for a bank to disclose information to a debt collection agency and to make default listings. Customers usually give consent in the account terms and conditions or the account opening form. If they have not given consent, we are likely to require

[9] Code of Banking Practice (see chapter 5 of the 5th edition, which is reflected in the fairness and communiation principles in the 6th edition).

the bank to remove the listing. However, we would not generally expect a bank to remove a default listing unless it is one that should not have been made in the first place.

A default listing is important information for credit providers. When a bank refers a debt to an agent for collection on its behalf and/or arranges for a default listing, it must take reasonable steps to ensure the information it passes on to the collection agency is accurate. If it fails to do so, we may find that it has breached its privacy obligation to ensure the accuracy of information.

Case study: Inaccurate listing led to years-long dispute

Amir, the director of a company, arranged to open an account for the company. The bank incorrectly set up the account as if he were a sole trader. Amir did not personally guarantee the company's obligations to the bank. The business failed, and the bank demanded full repayment of the debt from Amir personally. Amir disputed the debt, explaining it was a company debt. The bank continued to seek repayment of the debt, and Amir continued to refuse to pay. The bank sent the debt to a collection agency, and a default was listed on Amir's credit record. Amir continued to dispute liability for the debt, and the debt collection agency forwarded his concerns to the bank for a response. The bank maintained its position that Amir was personally liable for the debt, and the debt collection agency resumed collection action. The situation continued for three years.

Amir again complained to the bank and, at this point, the bank discovered its error. It immediately instructed the debt collection agency to cease action and removed the default listing. It also offered compensation for stress and inconvenience. Amir sought a substantial amount of compensation, arguing the inaccurate listing had harmed both his personal and business affairs with his new bank. We did not consider the impact had been as great as Amir alleged. His new bank had declined a loan application, but the listing was not the reason for the decision because Amir was already in default with his new bank.

Banks' responsibility for actions of debt collectors

Clause 12.49 of the Responsible Lending Code sets out guidelines for the collection of debts. In short, banks should ensure their debt collectors are aware of their legal obligations. They should also properly consider any complaints about debt collectors they have engaged.

Complaints about debt collection action

When we look at complaints about debt collection action, the information and documentation we typically require includes:

- a copy of applicable credit contracts and other relevant contracts, such as general terms and conditions
- account opening forms
- details of defaults
- diary notes, internal emails, memos and any other records of a bank's decisions or actions regarding the debt and debt collection action undertaken

- a copy of communications, including phone calls, between the customer and the bank about the debt
- a copy of information held by the bank's debt collection agent
- a copy of the bank's debt collection policies.[10]

We may also look at whether any credit default listed on an individual's credit file meets the conditions of the Credit Reporting Privacy Code 2020.

[10] If a bank wishes to provide such information in confidence, it is able to follow the process set out in rule 14 of our terms of reference.

Appendix 1: Rules applicable to debt collection

Credit law

The lender responsibility principles of the Credit Contracts and Consumer Finance Act 2003 apply to credit contracts entered into by consumers, and cover default on credit contracts. Specifically:

> 9C(3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower …
>
> (d) treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including—
>
> (i) when breaches of the agreement have occurred or may occur or when other problems arise; and
> (ii) when a debtor under a consumer credit contract suffers unforeseen hardship;
>
> (iii) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner).

Regarding guarantors of consumer credit contracts, the Act says:

> 9C(4) The lender responsibilities are also that a lender must, in relation to a relevant guarantee that is taken by the lender …
>
> (c) treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise; and
>
> (d) ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that –
>
> (ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner …"

Part 5 of the Act applies to all credit contracts and says a credit contract may be reopened if:

> 120(b) a party has exercised, or intends to exercise, a right or power conferred by the contract … in an oppressive manner;

Responsible Lending Code

The Responsible Lending Code issued under the Act has guidance on compliance with lender responsibilities when consumers are in default and on appropriate debt collection practices (chapter 12).

The Code of Banking Practice

Members of our scheme undertake to follow good banking principles, as set out in the Code of Banking Practice. The code relates to all customers except wholesale customers. The code's principles require banks to:

- treat customers fairly and reasonably
- communicate with customers clearly and effectively
- act responsibility if they offer or lend customers money or credit, complying with all relevant laws
- deal effectively with customers' concerns and complaints.

Industry practice

In considering complaints about debt collection, we consider industry practice in assessing whether a bank has met the principles of the Code of Banking Practice.

Other legislation relevant to debt collection activity

- the Fair Trading Act 1986 prohibits misleading and deceptive conduct in trade, which covers debt collection activity
- the Privacy Act 2020
- the Credit Reporting Code 2020.

Appendix 2: Resources used in compiling this document

Material from New Zealand agencies

- Commerce Commission, Guidance for Debt Collectors, June 2015
- Commerce Commission, Debt collector warned for likely harassment, coercion, misleading claims, December 2019
- Privacy Commissioner website.
- Financial Services Federation, Responsible Debt Collection Code

Overseas publications on debt collection activity

- Australian Competition and Consumer Commission and Australian Securities & Investment Commission, Debt collection guideline: for collectors and creditors, April 2021
- Financial Conduct Authority, Consumer Credit Sourcebook, August 2022.

Guidance for dealing with vulnerable consumers

- New Zealand Bankers' Association, Guidelines to help banks meet the needs of older and disabled customers, January 2020
- Human Rights Commission, Reasonable accommodation of persons with disabilities in New Zealand, November 2015
- Money Advice Liaison Group, Good Practice Awareness Guidelines for Helping Consumers with Mental Health Conditions and Debt, third edition 2015.