

## **Code of Banking Practice**

### **Guidelines for parties involved in Family Law property proceedings.**

#### **Background**

Under clause 38 of the revised Code of Banking Practice commencing in August 2003, subscribing banks agreed to publish guidelines setting out the manner in which they would:

- a) Deal with applications for transfers of mortgage and consents to transfer of title pursuant to a Family Court determination or approval; and
- b) Otherwise enforce debts affected by a family law property settlement.

Submissions to the 2000 –2002 review of the Code of Banking Practice referred to difficulties in implementing family settlements where there are joint debts and a jointly owned matrimonial home. In particular, the difficulties related to obtaining a bank's consent to the transfer of jointly owned property with a related mortgage to one of the parties and the bank's position if a settlement or court order re-allocates a joint debt of the parties to just one of them.

Where customers hold joint loan accounts, invariably the account holders will have a joint and several liability to the bank. This means that the bank is entitled to ask for the debt to be repaid by the parties jointly and by each of them severally (individually). An agreement between the parties for one of them to take responsibility for a joint and several debt will not change the right of the bank to require either or both parties to pay the debt. The bank has to agree to the re-allocation of liability before it is bound. For example if one spouse has a credit card debt and the other spouse agrees to assume responsibility for the debt, the bank's right against the credit card holder is not affected by the agreement unless the bank agrees to recognise the change of responsibility.

A person's liability to a bank can be either as a borrower or as a guarantor of another person's borrowing money from the bank. In these guidelines, a reference to a liability to a bank includes both borrowing and guarantee liabilities.

These guidelines are for the assistance of parties, their legal practitioners and representatives involved with family law property proceedings (including agreements for division of matrimonial property) and the division of their joint property that is subject to a mortgage to a bank and of their other joint and several liabilities owed to the bank.

#### **Guidelines**

- 1) Unless the Bank is a party to a court order or to a privately negotiated agreement between parties to a marriage, the bank is not automatically required to consent to arrangements such as the transfer of property mortgaged to the Bank or the re-allocation of debt between the parties. The bank has to agree to the re-allocation of liability or the transfer. [*Drafting Note: This statement does not take account of the Family Law Amendment Bill 2003 which, if passed, will enable the court to make orders binding third parties such as banks*].

- 2) While the bank will try to accommodate any new arrangements, it may need to conduct investigations into the parties' financial position so as to satisfy itself about the ability of the transferee of property or the party who has assumed liability for joint debts owed to the bank to fulfill the financial commitment to the bank by himself or herself, without undue hardship.
- 3) The bank might either agree to the transfer of the property subject to the mortgage and release the other party from further liability or retain its rights under the personal covenants in the mortgage against that other party.
- 4) In the majority of cases a bank would be reluctant to release joint debtors from their joint obligation to the bank where the debt is an unsecured liability.
- 5) Where a transfer of property subject to the bank's mortgage is contemplated, applicants should keep in mind the following points:
  - a) Allow sufficient time for the bank to make its assessment of the proposal; it is advisable to get in touch with the bank as soon as the likelihood of a settlement or court order altering the interests of the parties in mortgaged property arises;
  - b) Don't enter into the agreement or seek the court order until you know the bank will agree to the transfer.
  - c) The bank needs to make a fresh financial assessment of the party who is to assume responsibility for the mortgage debt as if it is a new loan application;
  - d) Where the court intends making an order requiring one of the parties (A) to pay a lump sum or an amount by instalments in settlement of the other party's (B's) interest in property, if A is to borrow that amount the bank will take that amount into account when assessing A's ability to service the existing loan facility. Depending on A's financial circumstances, the bank might not be satisfied that the existing facility together with the new obligation to B can be serviced by A without undue hardship.
  - e) Full financial particulars including the terms of the proposed agreement need to be provided to the bank;
  - f) If there are continuing credit facilities such as an overdraft on a joint (or several) account that are secured by a mortgage, the bank may have to stop further drawings on the account until the matter is resolved or unless both parties expressly agree to further drawings;
  - g) The bank is not able to divulge information about one of the parties to the other party or to their practitioners or representatives without that party's consent;
  - h) If there are other co-owners their consent will be required to any dealing with the property;
  - i) If other persons have guaranteed the parties' obligations to the bank, the consent of those guarantors might be needed before any re-arrangement of the facility;
  - j) There may be bank and other fees and costs payable for obtaining the bank's consent to a dealing and in connection with the dealing itself;
  - k) Each application for the bank's consent will be assessed on a case-by-case basis.
- 6) When there is a proposal that one party is to be responsible to repay the bank for jointly owed unsecured debt an application to the bank for consent to recognise the change in liability should be made. The points a) to k) above should be observed.

- 7) You will need to contact the bank to ascertain its likely attitude to releasing one of the parties as soon as possible after it becomes apparent that an agreement or court order is likely to provide for a re-allocation of liabilities.
- 8) If the court grants one party the sole right to reside in a property to the exclusion of the other party the bank's consent should be sought beforehand. The bank's rights against the other party under the mortgage over the property would be preserved unless the bank agrees to release the other party from the mortgage.
- 9) If the bank declines a transfer or to release a party from further liability it will be entitled to enforce that liability, if that becomes necessary.

These guidelines are intended to be for general information and guidance. They are not intended to be legal or financial advice. They are not a substitute for legal or financial advice. If you are contemplating or are involved in family law proceedings or a family law agreement you should seek specialist legal and financial advice. These guidelines may be adapted by individual banks to their specific practices and procedures and are published on each subscribing bank's website. Copies are available on request from the bank. This version above is published on the Australian Bankers' Association website at [www.bankers.asn.au](http://www.bankers.asn.au)