



Code of Banking Practice

Guidelines for parties involved in Family Law property proceedings.

Rabobank Australia Limited

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Background

Under clause 40 of the revised Code of Banking Practice as published by the Australian Bankers' Association, Rabobank Australia Limited is required to publish guidelines setting out the manner in which it 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.

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 (unless the court has specifically directed the bank to do so).

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 Rabobank and of their other joint and several liabilities owed to Rabobank.

Guidelines

1. If Rabobank is not a party to a court order or to a privately negotiated agreement between parties to a marriage, it is not automatically required to consent to arrangements such as the transfer of property mortgaged to Rabobank or the re-allocation of debt between the parties. However, the Family Court may make an order or grant an injunction that directs Rabobank to do a thing in relation to the property of a party to the marriage or to substitute one party for both parties in relation to the debt owed to Rabobank or even alter the rights, liabilities or property interests of a third party in relation to the marriage.
2. While Rabobank will try to accommodate any new arrangements where it is not bound by a Family Court order, 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 Rabobank to fulfill the financial commitment to Rabobank by himself or herself without undue hardship.
3. In the absence of a Family Court order directing it to do so, Rabobank 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 Rabobank would be reluctant to release joint debtors from their joint obligation to it where the debt is an unsecured liability.
5. Where a transfer of property subject to Rabobank's mortgage is contemplated, applicants should keep in mind the following points:
 - a) Allow sufficient time for Rabobank to make its assessment of the proposal; it is advisable to get in touch with Rabobank 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 Rabobank will agree to the transfer, or the Family Court order will result in the debt being repaid in full.
 - c) Rabobank 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 Rabobank will take that amount into account when assessing A's ability to service the existing loan facility. Depending on A's financial circumstances, Rabobank 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 Rabobank;

- f) If there are continuing credit facilities such as an overdraft on a joint (or several) account that are secured by a mortgage, Rabobank may have to stop further drawings on the account until the matter is resolved or unless both parties expressly agree to further drawings;
 - g) Rabobank 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) Any information that Rabobank considers to be commercially sensitive or for Rabobank's internal use only, will not generally be provided to the customer or to their practitioners or representatives.
 - i) If there are other co-owners their consent will be required to any dealing with the property;
 - j) If other persons have guaranteed the parties' obligations to Rabobank, the consent of those guarantors might be needed before any re-arrangement of the facility;
 - k) There may be bank and other fees and costs payable for obtaining Rabobank's consent to a dealing and in connection with the dealing itself;
 - l) Each application for Rabobank'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 Rabobank for jointly owed unsecured debt an application to Rabobank 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 Rabobank 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 Rabobank's consent should be sought before such orders are made. Rabobank's rights against the other party under the mortgage over the property would be preserved unless Rabobank agrees to release the other party from the mortgage or there is a Family Court order requiring the bank to do so.
9. Subject to any court order made affecting its rights, if Rabobank 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.



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