Bank Finance and Regulation Survey

AUSTRALIA
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I. BANKS AND FINANCIAL INSTITUTIONS SUPERVISION

1) Applicable laws and regulations. Provide a list of the main laws and regulations that refer to the supervision and control of banks and financial institutions. Give a brief summary of the substance of each of them.

Commonwealth Acts

(a) *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

The Act requires banks to undertake customer due diligence, reporting, record-keeping and develop an anti-money laundering and counter-terrorism financing program. The banking sector will also be obliged to conduct due diligence on its correspondent banking relationships and ensure appropriate identifying information is included in international electronic transfers of money.

(b) *Australian Securities and Investments Commission Act* 2001

The Act establishes the institutional framework of Australian Securities and Investments Commission (**ASIC**). Also, the Act prohibits unconscionable conduct in connection with trade or commerce and unfair contract terms in consumer contracts for financial products or services.

(c) *Banking Act 1959*

The Act provides generally for companies undertaking banking business, including banks, building societies and credit unions. One of the important features of the legislation is the role it gives to the Australian Prudential Regulation Authority (**APRA**) to safeguard depositors of authorised deposit institutions.

(d) *Competition and Consumer Act 2010*

The Act generally prohibits unconscionable conduct, misleading and deceptive conduct and false and misleading representation with respect to trade. Additionally, the Act implies certain conditions and warranties into contracts for the supply of financial services. The Australian Competition and Consumer Commission (**ACCC**) is the statutory body that administers the Act.

(e) *Corporations Act 2001*

The Act provides the general regulatory framework for corporations and financial institutions. Part 7 regulates the provision of financial products and services to retail and wholesale clients. ASIC is the statutory body that administers the relevant banking and financial services components of the Act. Additionally, the Act regulates the insolvency of Australian corporations.

(f) *Electronic Transactions Act* 1999

The Act stipulates the legal requirements for electronic communications and transactions.

(g) *Financial Sector (Collection of Data) Act 2001*

The object of the Act is to enable APRA collect information in order to assist the prudential regulation of bodies in the financial sector. In order to achieve that object, the Act provides for certain corporations to be registered by APRA and authorises APRA to determine reporting standards for corporations that are so registered.

(h) *Financial Transaction Reports Act 1988*

The Act stipulates reporting obligations on significant cash transactions to assist the control of tax evasion and organised crime.

(i) *Foreign Acquisition and Takeovers Act 1975*

The Act provides for government screening of a wide variety of transactions, which would place foreign persons in a position to control Australian business or to hold an interest in land. The Act empowers the Treasurer to hinder such transactions on the grounds of national interest. Generally, the Treasurer acts on the advice of the Foreign Investment Review Board.

(j) *National Consumer Credit Protection Act* 2009

The Act provides safeguards to protect consumers when obtaining credit. The Act requires businesses that engage in 'credit activity', such as finance brokers and mortgage managers, to hold an Australian credit licence.

(k) *Payment Systems (Regulations) 1998*

The Act renders the Reserve Bank of Australia (**RBA**) responsible for regulating payment systems, including new providers of payment facilities and holders of stored value.

(l) *Payment System and Netting Act 1998*

The Act stipulates the parameters within which the RBA can approve real-time gross settlement systems and netting arrangements.

(m) *Privacy Act 1988*

The Act regulates the handling of personal information by private sector organisations. Part IIIA of the Act, along with the Credit Reporting Code of Conduct, regulates the handling of information by reporting agencies and credit providers.

(n) *Reserve Bank Act 1959*

The Act provides for the constitution of the RBA and sets out its regulatory role as the central bank of Australia. The RBA acts as banker and financial agent of the Commonwealth by undertaking normal banking functions including dealing with bills of exchange, promissory notes, foreign currency, gold and the provision of loans, credits, guarantees and underwriting commitments.

Current Commonwealth Regulations

There are various regulations that supplement the legislation mentioned.

Codes of Conduct and Practice

There are a number of codes that exist in the banking and financial services sector. The codes are administered by a range of organizations including ASIC and industry-based bodies.

State Based Legislation and Regulation

Each state and territory also has a range of legislation that regulate banking and financial services.

2) Entities/Authorities in charge of the control and supervision. Purposes, powers and functions of each of them-their organization and structure (i.e. public or private, independency or body of the Government to which they belong, size, etc.)

National Regulatory Authorities

(a) Australian Competition and Consumer Commission (ACCC)

The ACCC is the statutory body that regulates the *Competition and Consumer Act 2010* (Cth). Its specific role within the financial markets is directed towards the compliance of competition and access provisions by entities that administer payment

and clearing systems. Its general role relates to the supervision of competition within the financial system, false and misleading conduct, anti-competitive behaviour and acquisitions that lessen competition.

(b) Australian Payments Clearing Association (APCA)

The APCA is a public company owned by the banks, building societies and credit unions. APCA co-ordinates, manages and ensures the operation of effective payments clearing and settlement systems. APCA sets, manages and develops regulations, procedures and standards governing payments clearing and settlement within Australia.

(c) Australian Prudential Regulation Authority (APRA)

APRA regulates the Australian financial services and insurance industries. The aim of APRA is to provide centralised regulation across the prudentially regulated sectors.

(d) Australian Securities Exchange (ASX)

The ASX is a publically listed company that functions as a market operator, clearing house and settlement system facilitator. The ASX also oversees compliance with its operating rules, promotes good corporate governance of Australian listed companies and helps to educate retail investors.

Austraclear Limited, owned by ASX, is the central depositary and clearing house for Australian traded debt securities. Other financial products generally trade as dematerialised securities on CHESS, operated by ASX Settlement and Transfer Corporation Pty Limited and settled by ASX subsidiary Australian Clearing House Pty Ltd. Other settlement and trading platforms are developing in Australia.

(e) Australian Securities and Investments Commission (ASIC)

ASIC operates as an independent government body under the direction of three full-time commissioners, appointed by the Treasurer. ASIC regulates companies, financial markets, financial services organisations and professionals. ASIC administers legislative instruments including the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

(f) Foreign Investment Review Board (FIRB)

FIRB is a government entity that examines proposals by foreign interests to undertake direct investment in Australia and makes recommendations to the Government on whether those proposals are suitable for approval under the Government's policy

(g) Reserve Bank of Australia (RBA)

The RBA is a statutory authority whose primary responsibility is to manage monetary policy. Additionally, the central bank maintains the stability of the financial system, promotes safe and efficient payment systems, manages Australia's foreign reserves, issues Australian currency notes and acts as banker to the Australian Government. The bank is governed by a board who is appointed by the Treasurer. The RBA meets monthly and communicates regularly with the Australian parliament and the Treasury.

Interbank payment obligations in Australia (both multilateral netting and RTGS system) are settled in exchange settlement accounts held by participants with the RBA.

3) Describe briefly the activities under supervision and give a list of the different types of licenses available.

The *Corporations Act 2001* Pt 7.1 regulates 'financial products', which is defined as a facility through which a person does one or more of the following:

(a) makes a financial investment;

(b) manages financial risk; and/or

(c) makes non-cash payments.

A financial product has 3 consequences in relation to licensing:

(a) Entities who seek to operate a 'financial market' require a market license.

A financial market is defined as a facility that offers to acquire or dispose of financial products are regularly made or accepted (s 767A).

Upon reviewing an application, the Minister must be satisfied with the adequacy of the applicant's procedures and arrangements to operate the market (s 795B).

(d) An entity that carries on a financial services business, which provides financial product advice, deals in those financial products or makes a market for them, requires a financial services license (s 911A).

The license is required if the business is carried on "in this jurisdiction". A provider is regarded as carrying on a business in a jurisdiction if they engage in conduct that intends to induce people in that jurisdiction (s 911D).

Upon reviewing an application, ASIC must have no reason to believe that the applicant would not comply with obligations of a licensee.

(e) An entity that operates a clearing and settlement facility, through which financial products are settled, requires a clearing and settlement facility licence. A clearing and settlement facility is a regular mechanism for the parties to fulfil obligations to each other that arise from entering into transactions (s 768A).

Upon reviewing an application, the Minister must be satisfied with the adequacy of the applicant's operating rules and arrangements for the supervision the facility (Pt 7.3 Div 3).

The *National Consumer Credit Protection Act 2009* (Cth) requires entities that engage in 'credit activities' to obtain an Australian credit licence. 'Credit activity' is defined as (s 6):

(a) providing credit under a credit contract or consumer lease;

(b) benefiting from mortgages or guarantees relating to a credit contract;

(c) suggesting or assisting in relation to a particular credit contract or consumer lease; or

(d) acting as an intermediary between a lender and a consumer (in relation to a credit contract).

ASIC will assess an application based on (s 37):

(a) the ability to comply with the obligations of credit licensees; and

(b) the extent to which the applicant is 'fit and proper' to engage in credit activities.

Furthermore, the *Financial Sector (Collection of Data) Act 2001* (Cth) requires certain corporations to be registered by APRA. According to s 7, a corporation must be registered by APRA if it is a foreign corporation which is a trading corporation formed within the limits of Australia and:

(a) the principal business activities of the corporation are the borrowing of money and the provision of finance; or

(b) the sum of the values of the corporation's assets in Australia (debts owing) exceeds 50% of the sum of the values of all the corporation's assets in Australia; or

(c) the corporation engages in the provision of finance in the course of carrying on a business (whether or not that business is its sole or principal business) of selling goods by retail and the sum of the values of such assets of the corporation exceeds $25,000,000.

Lastly, the *Payment System and Netting Act 1998* (Cth) requires entities who wishes to operate a real-time gross settlement system and/or netting arrangements to apply for approval.

According to s 9, the RBA may approve a real-time gross settlement system if it satisfied that:

(a) a legally enforceable arrangement between participants in the system for the irrevocable settlement of transactions in real time exits;

(b) the system rules establish a system administrator who has resources and competency;

(c) the system rules provide that if a settling participant goes into external administration, the system administrator may suspend that participant from the operation of the system; and

(d) the system rules require a settling participant to assume the obligations of any participant who fails to fulfil settling obligations.

According to s 12, the RBA may approve a netting arrangement if it satisfied that:

(a) netting occurs once on each business day;

(b) the governing rules establish a coordinator who has resources and competency;

(c) the governing rules provide that if a party to the arrangement goes into external administration the party must notify the coordinator and the coordinator may exclude the party from the arrangement; and

(d) the governing rules require a party to the arrangement to notify the coordinator if they have reasonable grounds to suspect that another party to the arrangement is insolvent.

4) Describe briefly non-regulated financial and banking activities.

Not applicable.

5) Describe briefly non-permitted financial and banking activities and/or government monopolies.

Entities undertaking banking and/or financial activities should comply with any and all applicable legislation. Any activities performed in contradiction to the specified laws may attract civil, administrative and criminal sanctions.

There are no prohibited government monopolies.

II. BANKING ACTIVITIES

6) Different types of banking licenses. Activities permitted under each of them. Activities prohibited.

There are four primary banking licenses.

It must be noted that approval to carry on a banking business does not necessarily mean that the entity can use the description "bank." Further approval for use of the work “bank”, to describe an entity’s business, must be approved by Australian Prudential Regulation Authority (**APRA**) (*Banking Act 1959* (Cth) s 66).

Banking Licence

Under the *Banking Act 1959* (Cth), if an entity is granted authority to carry on a banking business it is often referred to as an Authorised Deposit-Taking Institution (**ADI**).

Banking business refers to business that is carried on by a corporation which consists, to any extent, of both taking money on deposit (otherwise than as part-payment for identified goods or services) and making advances of money (*Banking Act 1959* (Cth) s 5).

Non-Operating Holding Company (NOHC)

An entity may apply to be a NOHC. A NOHC refers to an Australian company that has a wholly owned subsidiary who conducts a banking business and the holding company's sole business is the ownership and control of its subsidiary (*Banking Act 1959* (Cth) s 11AA). A body corporate would want a NOHC license particularly if APRA refuses or may refuse to grant a subsidiary of the holding company a banking licence unless the holding company holds a NOHC license (*Banking Act 1959* (Cth) s 11AA(1)).

Providers of Purchased Payment Facilities (PPF)

If a body corporate wishes to become a PPF provider then it must apply to APRA for authorisation.

The provision of a PPF is considered banking business if the facility (*Banking Regulations 1966* (Cth), regulation 3):

(a) allows the purchaser of the facility to demand payment of all, or any part, of the balance of the amount held in the facility that is held by the holder of the stored value; and

(b) is available as a means of payment, having regard to:

(i) any restrictions that limit the number or types of people who may purchase the facility; and

(ii) any restrictions that limit the number or types of people to whom payments may be made using the facility.

Specialist Credit Card Institution (SCCI)

SCCIs are a special class of ADIs that are authorised to perform a limited range of banking activities. Specifically, SCCIs may only perform credit card issuing and/or acquiring business and any other services related to credit card issuing and/or acquiring (*Payment Systems (Regulation) Act 1998* (Cth) s 11). SCCIs are not permitted to accept deposits (other than incidental credit balances on credit card accounts). Acquiring SCCIs are not allowed to maintain deposit accounts with their merchants and must separate funds awaiting settlement to merchants and any funds from merchants as performance bond in a trust account with an ADI authorised to accept deposits.

7) Procedures to be followed and requirements to be met to obtain each of the different licenses. Formalities to be fulfilled, documentation to be submitted, guaranties requested, time estimation, etc.

Banking Licence

The application process involves the following steps:

(a) preliminary consultation between APRA and the applicant;

(b) submission of a written application signed by two Directors of the applicant; and

(c) review of the application by APRA.

According to APRA guidelines, the overall licensing process can take from 3 to 12 months.

APRA will only authorise suitable applicants with the capacity and commitment to conduct banking business with integrity, prudence and competence.

The authorisation criteria, stipulated in the APRA guidelines, are minimum requirements that an applicant needs to meet for authorisation. The minimum requirements are;

(a) Capital

APRA will assess the adequacy of the start-up capital of the applicant on a case-by-case basis based on the scale, nature and complexity of the business plan.

Additionally, the applicant must satisfy APRA that they are able to comply with APRA's capital adequacy requirements.

(b) Ownership

Section 10 of the *Financial Sector (Shareholdings) Act 1998* (Cth) limits shareholdings of an individual or group of associated shareholders in an ADI to 15% of the ADI's voting shares. A higher percentage threshold may be approved by the Treasurer on national interest grounds.

Additionally, all substantial shareholders of an applicant must demonstrate to APRA that they are 'fit and proper' in the sense of being well-established and financially sound entities.

(c) Governance

Applicants must satisfy the requirements set out in *Prudential Standard APS 510 Governance* with regard to the composition and functioning of the board.

(d) Risk management

Applicants must satisfy APRA that the proposed (or existing) risk management and internal control systems are adequate and appropriate for monitoring and limiting risk exposures.

(e) Compliance

Applicants must satisfy APRA that their compliance processes and systems are adequate and appropriate for ensuring compliance with APRA's prudential standards and other Australian legal requirements.

(f) Information and accounting systems

Applicants must satisfy APRA that their information and accounting systems are adequate for maintaining up-to-date records of all transactions and commitments undertaken by the ADI, so as to keep management continuously and accurately informed of the ADI's condition and the risks to which it is exposed.

(g) External and internal audit arrangements

Applicants must demonstrate to APRA that arrangements have been established with external auditors in accordance with the requirements set out in *Prudential Standard APS 310 Audit & Related Arrangements for Prudential Reporting*.

(h) Supervision by home supervisor

Foreign bank applicants must have received consent from their home supervisor for the establishment of a banking operation in Australia. Only applicants that are authorised banks in their home country will be granted authorisation to operate as an ADI in Australia.

Non-Operating Holding Company (NOHC)

The NOHC application procedure and authorisation criteria are similar to that of the banking license.

In addition to the criteria stipulated above, a NOHC applicant must undertake all transactions with regulated entities within its corporate group at arm's length.

Providers of Purchased Payment Facilities (PPF)

The application procedure and authorisation criteria are similar to that of the banking license.

In addition to these requirements, APRA will impose an additional authorisation criterion of minimum start-up capital for PPF providers who hold stored value at risk. The amount of capital required will be assessed by APRA on a case-by-case basis.

Also, APRA guidelines stipulate that the a PPF provider is expected to adhere to the following conditions that are imposed on its authorisation:

(a) Restricted authorisation

The PPF provider must only conduct business as specified in Regulation 3 (as set out above). This condition restricts PPF providers from accepting deposits for the purpose of making advances of money.

(b) Segregate PPF business

PPF providers must exist as a stand alone entity and avoid possible contagion effects impacting upon PPF liabilities.

(c) Locally incorporated

Unlike ADIs, branches of foreign entities are not permitted to seek authorisation as a PPF provider.

It must be noted that ADIs authorised to carry on general banking business who also undertake the activities of a PPF provider are not required to gain PPF authorisation.

Specialist Credit Card Institutions (SCCI)

The SCCI application procedure and authorisation criteria are similar to that of the banking license.

Where an ADI has dual authorisation to operate as an ordinary ADI and to conduct its credit card business in a subsidiary SCCI, each operation is required to conduct its business in a way, which recognises and makes clear to others its separate authorisation.

8) Legal structure admitted/requested for each of the different licenses.

a) Different types of legal structures that may be used, i.e. corporations, limited liability partnership, branches, subsidiaries, etc.

Each of the licences described above are only given to body corporate applicants (*Banking Act 1959* (Cth) s 7).

b) Capital requirements and own fund rules.

Banking Licence

As mentioned previously, APRA will assess the adequacy of the start-up capital of the applicant on a case-by-case basis based on the scale, nature and complexity of the business plan. However, applicants proposing to operate as banks must have a minimum of $50 million in Tier 1 capital. Examples of Tier 1 capital include paid-up ordinary shares, general reserves and retained earnings.

All locally incorporated ADI are required to maintain, at all times, a prudential capital ratio (**PCR**) of 8 per cent of total risk-weighted assets, of which at least half must be made up of Tier 1 capital *(Prudential Standard APS 110 Capital Adequacy).* Additionally, an ADI will, at all times, be required to maintain a risk-based capital ratio in excess of its PCR.

Foreign ADIs are not required to maintain endowed capital in Australia. However, foreign bank applicants are expected to meet comparable capital adequacy standards, which must be consistent in all substantial respects with the Basel II Capital Framework, as required by their home country supervisors.

Non-Operating Holding Company (NOHC)

NOHC applicants must demonstrate to APRA's satisfaction that it will be in a position to ensure its subsidiary will be able to meet the capital requirements.

Providers of Purchased Payment Facilities (PPF)

According to *Prudential Standard APS 610*, a PPF provider must, as a minimum, have at all times Tier 1 capital equal to the minimum start-up capital as determined by APRA or 5 per cent of total outstanding stored value liabilities (whichever is the larger figure).

Specialist Credit Card Institutions (SCCI)

APRA will assess the adequacy of start-up capital for an SCCI applicant on a case-by-case basis.

Given their specialised nature that may concentrate on certain types of risks, locally incorporated SCCIs will normally be subject to a minimum capital ratio of 15 per cent.

Foreign ADIs are not required to maintain endowed capital in Australia. However, foreign bank applicants are expected to meet comparable capital adequacy standards, which must be consistent in all substantial respects with the Basel II Capital Adequacy Framework, as required by their home country supervisors.

c) Transfer of control and ownership regime. Is it regulated?

Each of the four licenses imposes conditions on the ownership of the institutions. Section 10 of the *Financial Sector (Shareholdings) Act 1998* (Cth) limits shareholdings of an individual or group of associated shareholders in an entity to 15% of the regulated institution's voting shares. A higher percentage threshold may be approved by the Treasurer on national interest grounds.

d) Personal requirement and restrictions that may apply in each case for officers, directors, shareholders, etc.

Each of the four licenses imposes regulations on the composition of the board. *Prudential Standard APS 510* imposes the following restrictions:

(a) the board of an institution must have a minimum of 5 directors;

(b) the board must have a majority of independent directors (refer to definition of independent directors below). However, there are some exceptions to this provision:

  (i) for an institution that is a subsidiary of another APRA-regulated institution or an overseas equivalent, the board of the institution must have a majority of non-executive directors (meaning a director who is not a member of management), but these non-executive directors need not all be independent. In these circumstances, an institution will be required to have at least 2 independent directors where the board has up to 7 members. If the board has more than 7 members then the institution will be required to have at least 3 independent directors; and

  (ii) for an institution that is a subsidiary of another entity, the board must have a majority of independent directors. However, independent directors on the board of the parent company or its other subsidiaries can also sit as independent directors on the board of the institution.

(c) the chairman of the board must be an independent director;

(d) a majority of directors present and eligible to vote at all board meetings must be non-executive directors;

(e) the chairman of the board cannot have been the CEO of the institution at any time during the previous 3 years;

(f) for locally owned and incorporated institutions, a majority of directors must ordinarily reside in Australia. For foreign-owned locally incorporated institutions, at least 2 of the director must ordinarily reside in Australia, at least one of whom must also be independent; and

(g) board representation must be consistent with an institution's shareholding. Where a shareholding constitutes not more than 15% of an institution's voting shares, there should not be more than one board member who is an associate of the shareholder where the board has up to 6 directors, and not more than 2 board members who are associates of the shareholder where the board has 7 or more directors. A director is taken to be an associate of a shareholder according to the definition of 'associate' in *Financial Sector (Shareholdings) Act 1998* (Cth) Schedule 1.

For the purpose of these prudential regulations, a director is not an independent if the director:

(a) is a substantial shareholder of the institution or an officer of the substantial shareholder;

(b) is employed or has previously been employed in an executive capacity by the institution and there has not been a period of at least 3 years between ceasing such employment and serving on the board;

(c) has within the last 3 years been a material consultant to the institution;

(d) is a material supplier or customer of the institution; or

(e) has a material contractual relationship with the institution.

In addition to the governance standards, directors and senior management of the proposed institution must satisfy APRA that they are fit and proper to hold the relevant position in accordance with *Prudential Standard APS 520 - Fit and Proper*. In reaching its view on the fitness and propriety of a director or manager, APRA will have regard to factors such as:

(a) the experience and expertise of the person;

(b) demonstrated competence in business;

(c) integrity in business activities; and

(d) reputation within the business community.

e) Special requirements/restrictions for foreigners either individual or legal entities (including short description of WTO/GATS commitments and exemptions).

The various conditions and specifications relating to foreign owned ADIs are mentioned throughout the survey responses.

The duty to protect depositors and the powers of APRA granted by the *Banking Act 1959* (Cth) Pt 2, Div 2 do not extend to 'foreign ADIs', that is, those which are foreign corporations which are authorised to carry on banking business in Australia (s 11E). A foreign ADI, which accepts a deposit from a person in Australia, must inform the depositor that the protective provisions of the Act do not apply.

9) Is there a Deposits Insurance? Is it mandatory or based on self-regulations? Provide a brief explanation of how it operates.

The Australian Government introduced the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008* (Cth) to implement a financial claims scheme to support the Federal Government's promise of a three-year guarantee of deposits in ADI up to $1 million (excluding deposits held in specialist credit card institutions and providers of purchased payment facilities).

The *Banking Act 1959* (Cth) Pt 2 Div 2AA stipulates that provisions relating to the financial claims scheme.

APRA is responsible for the administration of the financial claims scheme and for making payments to depositors.

The legislation allows the Minister to make a declaration about a specific Australian ADI that APRA has sought to wind up (*Banking Act 1959* (Cth) s 16AD). Since APRA cannot apply for a foreign ADI to be wound up, a ministerial declaration concerning a foreign ADI is not possible.

After the Minister makes a declaration, an account-holder who has a 'protected account' with a net credit balance with a declared ADI at the declaration time will be entitled to be paid by APRA an amount equal to the balance, plus any interest that had accrued before the declaration was made (*Banking Act 1959* (Cth) s 16AF). A 'protected account' must be either:

(a) prescribed under the regulations;

(b) kept under an agreement between the account holder and the ADI requiring the ADI to pay the account holder on demand or at an agreed time the net credit balance; or

(c) a 'covered financial product' (that is, one specified in a ministerial declaration) that is kept under an agreement between the account holder and the ADI requiring the ADI to pay the account holder on demand or at an agreed time the net credit balance.

It remains to be seen whether a lower monetary cap will be imposed by regulation prior to the end of the three year period (12 October 2011) indicated by the Federal Government.

10) Interest rate. Is it regulated? Should the answer be affirmative, explain briefly its regulatory framework.

Section 50 of the *Banking Act 1959* (Cth) (the **Act**) currently authorises the Reserve Bank of Australia (**RBA**), with the approval of the Treasurer, to make regulations controlling the rates of interest payable to or by authorised deposit-taking institutions. The formal power of the RBA to control interest rates by regulations co-exists with the much broader general power of the Governor-General to make regulations under s 71 prescribing matters which are necessary or convenient to be prescribed for giving effect to the Act.

There are no enacted regulations pursuant to s 50 of the Act.

11) Sanctions (civil, administrative, or criminal) for violations of the legal and regulatory dispositions.

If a person or entity contravenes the provisions of the *Banking Act 1959* (Cth) (the **Act**) they may be exposed to civil or/and criminal liabilities.

With respect to civil penalties, the Act (Schedule 2) stipulates that the court may order a person/entity to pay a pecuniary amount that it determined the Federal Court after having considered:

(a) the nature and extent of the contravention;

(b) the nature and extent of any loss or damage suffered as a result of that contravention;

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by the court in proceedings under the Act to have engaged in similar conduct.

With respect to criminal sanctions, the Act prescribes that certain contravention of the Act is an indictable offence and subject to 200 penalty units (as defined in *Crimes Act 1914*(Cth) s 4AA).

Additionally, the Act (s 65A) prescribes that an injunction can be granted against a person/entity who has engaged, is engaging or is proposing to engage, in conduct that constituted, constitutes or would constitute:

(a) a contravention of a provision of the Act, the prudential standards or a direction by the APRA;

(b) attempting to contravene the provision or direction;

(c) aiding, abetting, counselling or procuring a person/entity to contravene the provision or condition;

(d) inducing or attempting to induce a person/entity to contravene the provision or condition;

(e) directly or indirectly knowingly concerned in, or party to, the contravention by a person/entity of the provision or condition; or

(f) conspiring with others to contravene the provision or condition.

III. BANK SECRECY LAWS

12) Is clients' information protected? Are there any restrictions for its use?

The personal information of banking clients is protected by the National Privacy Principles in the Privacy Act 1988 (Cth) (the **Act**) and the common law duty of confidentiality owed by banks to its clients (*Tournier v National Provincial and Union Bank of England* [1924] 1 K.B. 461) (***Tournier***).

The Act also, together with the Credit Reporting Code of Conduct (the Code), impose limitations and obligations of credit providers and credit reporting agency when handling credit information. For the purpose of the Act, a credit provider generally refers to a bank, a corporation whose substantial business is the provision of loans or an entity that issues credit cards (s 11B).

Generally, a credit provider must refrain from using a credit report for any purpose other than assessing an application for credit made to the credit provider by the individual (s 18L). In addition, credit provider must refrain from disclosing information obtained in a credit report to a third party for any purpose (s 18N).

The Code fleshes out the legislative framework and is legally binding.

13) Should answer to number 12) be affirmative, please describe the legal framework, i.e. scope, limitation, exceptions.

The Act

A credit provider which is in possession or control of a credit report, is obliged to:

(a) take responsible steps to ensure its accuracy and security (s 18G);

(b) take reasonable steps to ensure that the individual can obtain access to the report (s 18H);

(c) take reasonable steps to ensure that personal information is accurate and not misleading (s 18J);

(d) give written notice to an individual if it refuses an application for credit based on information derived from a credit report. The notice must indicate the basis for the refusal, identity the credit reporting agency and inform the individual of his or her right to obtain access to the credit information file (s 18M); and

(e) refrain from giving a third party a credit report that contains misleading information (s 18R).

Section 18L stipulates that a credit provider must not use personal information derived from a credit report for any purpose other than assessing an application for credit made to the credit provider, unless the credit report was used for the purpose of:

(a) assessing the risk in purchasing a loan by means of a securitisation arrangement;

(b) assessing whether an individual is suitable to be a guarantor for a loan to be provided by the credit provider;

(c) improving the internal management of the credit provider, being a purpose directly related to the provision or management of loans by the credit provider;

(d) assisting the individual to avoid defaulting on his or her credit obligations;

(e) collecting payments that are overdue in respect of credit provided to the individual by the credit provider; or

(f) investigating whether the individual has committed a serious credit infringement.

Section 18N stipulates that a credit provider must not disclose a credit report or any personal information derived from the report to another person for any purpose unless:

(a) the report or information is disclosed for the purpose to create a credit information file or to include information in a credit information file;

(b) the individual concerned has agreed to the disclosure of the report;

(c) the report is disclosed for the purpose to enforce a guarantee;

(d) the report is disclosed to a mortgage insurer for the purpose of assessing whether to provide insurance to a credit provider in respect of mortgage credit given by the credit provider;

(e) the report is disclosed to a person or body that is established for the purpose of settling disputes between credit providers and their customers;

(f) the report is disclose to a Minister, Department of a State or Territory whose functions or responsibilities include giving assistance that facilitates the provision of mortgage credit to individuals;

(g) the report is disclosed to a person or body carrying on a business that involves the collection of debts on behalf of others;

(h) the report is disclosed to professionals (i.e. legal advisers, accountants) for the purpose for assessing whether to accept an assignment of debt owed to the credit provider; or

(i) the credit provider believes on reasonable grounds that the individual concerned has committed a serious credit infringement and the report or

information is given to another credit provider or a law enforcement authority.

The Code

The Code requires credit providers to establish procedures to deal with individuals' requests for dispute resolution relating to credit providing and to ensure staff dealing with this type of personal information becomes familiar with the rules.

Common law implied duty of confidentiality – *Tournier*

Tournier was a landmark UK case which held that, subject to certain exceptions, it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons either the state of the customer's account, any of his transactions with the bank or any information relating to the customer acquired through the maintenance of the customer's account.

The duty is subject to the following exceptions:

(a) where disclosure is under compulsion by law;

(b) where there is a duty to the public to disclose;

(c) where the interests of the bank require disclosure; and

(d) where the disclosure is made by the express or implied consent of the customer.

The Australian courts have adopted and applied the duty stipulated in *Tournier* (*Bodner v Townsend* (2003) 12 Tas R 232, *Crothers v Adkins* [2003] WASC 179, *Hambly v Joseph Charles Learmonth Duffy Pty Ltd* [2004] WASC 142 and *Louis v Commonwealth of Australia* [2000] TASSC 157).

Moreover, the duty and exceptions stipulated in *Tournier* is reflected in the *Banking Code of Practice* (s 22). The *Banking Code of Practice* is a voluntary code that sets standards of good banking practice for banks to follow when dealing with individual customers, small business customers or their guarantors.

14) Sanctions (civil, administrative, or criminal) for violations.

A credit provider that intentionally contravenes any provision of the Act is guilty of an offence punishable, on conviction, by fine between AUS$30,000-$150,000 (ss 18L(2), 18N(2), 18Q(9), 18R(2), 18S(3) and 18T).

Where a credit provider has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of the Act, the Federal Court or the Federal Magistrates Court may, on the application of the Commissioner or any other person, grant an injunction restraining the person from engaging in the conduct and, if in the court's opinion it is desirable to do so, requiring the person to do any act or thing (s 98).