Essential Banking Law and Practice

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Introduction

This paper is not intended to be a summary of banking law and practice: that would be impossible in a relatively short paper and a one and a half hour seminar. It is intended, however, to provide:

- an overview of the some of the characteristics of banks and their legal relationship with their customers;
- a summary of the regulatory framework within which they operate; and
- an outline of some of the legal issues that arise for consideration by lawyers advising banks or their customers.

A selection of useful texts and references for further reading and information is included in the Appendix.

What is banking law?

Banking law is not a discrete area of law like contract or torts. It conveniently describes, however, the collection of legal principles which impact on banking transactions and on the banker-customer relationship. In that sense, the activity of banking is the location at which a diverse range of legal principles intersect which we call banking law.

Those legal principles are drawn from a range of sources, including common law, the Law Merchant, [1] equity and statute. In addition, for banks that subscribe to it, the Code of Banking Practice is a legally enforceable set of

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* The opinions expressed are the author's own, and are not intended as legal advice. Anyone needing such advice should seek assistance from a legal practitioner.

[1] See below, p3.

principles and rules incorporated into the contract between the bank and its retail customers.

Relevant legislation includes:

- *Banking Act* 1959 (Cth)
- *Reserve Bank Act* 1959 (Cth)
- *Australian Prudential Regulation Authority Act* 1998 (Cth)
- *Australian Securities and Investments Commission Act* 2001 (Cth), which contains in Division 2 the unconscionable conduct and consumer protection provisions in relation to financial services providers that are no longer in the Trade Practices Act
- *Corporations Act* 2001 (Cth), in particular Pt 7
- *Privacy Act* 1988 (Cth), in particular the credit information provisions in Part IIIA
- *Consumer Credit Code*, usually referred to as the *Uniform Consumer Credit Code*
- *Cheques Act* 1986 (Cth)
- State Fair Trading Acts, e.g. *Fair Trading Act* 1999 (Vic)

What is a bank?

It might be thought easier to start with a definition of 'bank' but this is also a fraught task. Weaver & Craigie's[2] description of the search for a definition of a 'bank' in statute and case law, illustrates the difficulty of the task and the amount of judicial and legislative energy that has been given to it.[3]

Much of the difficulty has arisen from the circularity of the traditional definition – that a bank is a person or body authorized to carry on or recognized as carrying on the business of banking. What constitutes the business of banking is the vexed question. It is an important one, however, because depending on whether a person or body is classed as a bank it will have a range of additional rights and obligations.[4]

Before setting out relevant Australian definitions, it is worth a short digression into history.

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[2] The Law Relating to Banker & Customer in Australia, 3rd ed., looseleaf, Thompson Lawbook Co at 1.800 – 1.1320

[3] See also A Tyree, 'Banking Law in Australia', 5th ed. Butterworths, 2005 Chapter 2.

[4] For example, banks have generally been exempt from money-lending legislation and whether or not a bill of exchange qualified as a cheque depended until recently on whether it was drawn on a bank. Banks are subject to the regulation of the Reserve Bank and the Australian Prudential Regulation Authority.

The modern term 'bank' comes from the 'banco' or merchant's bench in the marketplaces of medieval Italy: money dealing was conducted from a portable bench, which would be publicly broken in the event of failure of the merchant's business – the origins of the concept of bankruptcy. But banking as an activity is much older.

In ancient times the temple was likely to be the location of much of what we would recognise as banking business. In Mesopotamia, money could be borrowed at interest from the temple; in Greece, sanctuaries and temples were often the store house or place of safe custody for bullion and valuables; and in Jerusalem money-changers located in the temple precinct would exchange currency and allow interest on deposits with them.[5] The code of laws devised by Hammurabi, King of Babylon, between 2084BC and 2081 BC included references to charging interest on loans and a right of privacy in lending transactions.[6]

These early examples include some of the ingredients of what have come to be regarded as the key characteristics of banking: taking money on deposit and lending. [7] And the location within temples and their precincts would have provided another important ingredient - an air of security.

Recognisable 'bankers' appeared again in the middle ages, financing trade and wars, including the crusades,[8] although as Tyree notes,

> 'it was not until comparatively modern times that the deposit of funds by the wider community with a banker who was then expected to use the funds at his or her discretion for commercial lending was established.'[9]

The historically close association of banking with trade means that the Law Merchant – a body of rules reflecting the custom of merchants which was once administered separately from the common law – is an additional historical source of what is now included in banking law.[10]

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[5] See generally E Green, 'Banking: An Illustrated History', Phaidon Oxford 1989. For a history of the usury laws in the context of credit regulation see Chapter 1, Duggan and Lanyon, 'Consumer Credit Law', Butterworths, 1999.
[6] O'Donovan, 'Lender Liability', LBC Information Services, 2000 at [3.05]
[7]A further characteristic – the payment and collection of cheques - is regarded in England as being an essential ingredient but is not so regarded in Australia. *Commissioners of the State Savings Bank of Victoria v Permewan Wright & Co* (1914) 19 CLR 457; cf *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431, in particular Lord Denning's identification of the usual characteristics of the business of banking. *Re Roe's Legal Charge; Park Street Securities Ltd v Roe* [1982] 2 Lloyd's Reports.
[8] Green, ibid
[9] Tyree, at 2.3.
[10] For example, the law relating to bills of exchange. See Weaver & Craigie [1.210]

Modern Australian definitions

Banking Act 1959

It can come as a surprise to find that the *Banking Act* 1959 (Cth) (*Banking Act*), does not contain a definition of 'bank' – that term was taken out of the *Banking Act* in 1999 - although it does contain a definition of 'banking business' set out below.

This is not because banks have been abolished as a legal concept, but they have been re-named and other institutions brought under the new name. The financial services sector reforms of 1998[11] introduced the concept of an 'authorised deposit-taking institution' ('ADI').

Under s 5 of the *Banking Act*, an ADI is a body corporate authorized by the Australian Prudential Regulation Authority (APRA) under s 9 of the *Banking Act* to carry on the business of banking.

Authorised ADIs now include banks, credit unions, building societies, specialist credit card institutions and others – a full list is available on APRA's website, www.apra.gov.au.

The use of the names 'bank', 'banker' and 'banking' by an authorised ADI is still, however, subject to control under s66 of the *Banking Act* and the consent of APRA is required to use them.[12]

As a result, what we would readily identify as a bank is now, in legislative terms, an ADI which has the consent of APRA under s66 of the *Banking Act* 1959 to call itself a bank.

'Banking Business' under the Banking Act

Under section 5(1) 'banking business' means:

(a) a business that consists of banking within the meaning of paragraph 51 (xiii)[13] of the Constitution; or

(b) a business that is carried on by a corporation to which paragraph 51(xx)[14] of the Constitution applies and that consists, to any extent of

[11] Resulting from the Financial System Inquiry established by the Federal Government on 1996, known as the Wallis Inquiry
[12] See 'Guidelines: Implementation of Section 66 of the Banking Act 1959', www.apra.gov.au.
[13] 'Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money'.

(i) both taking money on deposit (other than as part-payment for goods or services) and making advances of money; or

(ii) other financial activities prescribed by the regulations for the purposes of this definition.

A noticeable omission from the definition of banking business was the involvement of banks in the Australian payments system[15] under which payments are made or funds transferred by such mechanisms as the collection and payment of cheques, direct credits and debits, debit and credit card payments and high value payments.[16]

This omission was partly rectified when two further activities were prescribed by the regulations to be 'banking business'.

By the 2001 amendments,[17] the provision of a purchased payment facility (PPF)[18] is banking business if APRA determines that:

- the purchaser may demand payment from the holder of stored value, in Australian currency of all or part of the balance held; and
- the facility permits a relatively wide class of payments to be made by a relatively wide class of payers

By the 2003 amendments,[19] the acquiring and issuing of credit cards by participants in a designated credit card scheme (such as MasterCard and VISA) became prescribed activities and so fall within the definition of 'banking business'.

Cheques Act 1986

The definition of 'bank' was also deleted, in 1998, from the *Cheques Act* 1986 (Cth) (*Cheques Act*), which now refers to a 'financial institution'. 'Financial institution' in turn is defined in s 3 (1) to mean:

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[14] 'Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.
[15] See the comments by Tyree at para. 2.5
[16] A payments system is 'a broad term which describes the payment instructions by which individual payments are made or funds transferred… the payment clearing arrangements by financial institutions exchange the resulting instructions; and payments settlement arrangements for the final transfer of value between institutions.' Payments System Board Annual Report, 1999. See also Tyree and Beatty, 'The Law of Payment Systems', Butterworths 2000.
[17] *Banking Amendment Regulations* 2001 (No 1) (Cth).
[18] For example, digital cash, stored value cards and travellers cheques.
[19] *Banking Amendment Regulations* 2003 (No 1) (Cth)

(a) the Reserve Bank;
(b) a body corporate that is an ADI (authorized deposit-taking institution) for the purposes of the *Banking Act 1959*; or
(c) (deleted)
(d) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution; or
(e) a person (other than a person referred to in paragraph (a), (b) or (d) who carries on the business of banking outside Australia.

Future definitions?

One of the difficulties of a definition based on the functions of the institution – a check-list approach - is that the activities of and services offered by institutions most of us would recognise as banks is changing and the last decade in particular has been a period of accelerated change.

The Regulatory Framework

Regulatory agencies

There are three main regulatory agencies for the financial system in Australia and their responsibilities are:

- Reserve Bank of Australia: monetary and banking policy and the stability of the Australian economy. The Reserve Bank includes within its structure the Payments System Board, which is responsible for payments system policy;

- APRA: prudential regulation of a range of financial institutions including banks, credit unions, insurance companies and superannuation funds. The aim of prudential regulation is, essentially, to ensure sound practices and financial stability; and

- Australian Securities and Investments Commission (ASIC): consumer protection and market integrity. It has responsibility for monitoring and reviewing financial industry codes of practice such as the Electronic Funds Transfer Code of Conduct. ASIC also has responsibility for enforcing company law and the licensing and conduct of corporations.

In addition the Australian Competition and Consumer Commission (ACCC) has an economy-wide role to protect competition. The responsibility for consumer protection in the financial services sector, however, lies with ASIC.

Banking and Financial Services Ombudsman

The Banking and Financial Services Ombudsman (BFSO) is not a regulator as such, nor is it a government agency: it is a dispute resolution scheme that is part of the regulatory framework.

The BFSO is approved by ASIC as an external dispute resolution scheme for financial services licensees under Part 7 of the *Corporations Act 2001* (Cth) (*Corporations Act*). Membership of an approved scheme is a licence requirement.[20] An important part of the BFSO's role as an external dispute resolution scheme is identifying and addressing systemic issues – issues which affect a number of customers. The BFSO reports to ASIC on systemic issues identified in its dispute resolution work. [21]

Consumer protection in financial services: ASIC's role

The role, powers and responsibilities of ASIC are set out in the *Australian Securities and Investments Commission Act* 2001 (Cth) (*ASIC Act*). They include the power to regulate unconscionable conduct and consumer protection in the financial services industry, contained in Part 2 Division 2.

It is important to be aware that the consumer protection provisions contained in Part IVA and Part V of the *Trade Practices Act* 1974 (Cth) (Trade Practices Act) no longer apply to financial services.[22]

This means that when considering bringing claims for misleading or deceptive conduct or unconscionable conduct, you will need to refer to and plead the relevant provisions in the *ASIC* Act. For example, the prohibition against misleading or deceptive conduct by a financial services provider is s12DA of the *ASIC Act*, not s52 of the *Trade Practices Act.*

Regulation of Financial Services and Markets

Chapter 7 of the *Corporations Act* was a new chapter of the *Corporations Act*, replacing the previous chapters 7 and 8, and was introduced via what is

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[20] See below for more about the dispute resolution framework under the *Corporations Act* and the Code of Banking Practice.
[21] See BFSO Annual Report 2005-200623-26, www.bfso.org.au
[22] Sections 51AAB and 51AF.

commonly known as Financial Services Reform.[23] It contains the licensing, disclosure and other conduct requirements for the financial services industry, including banks, and is the source of the obligation, for example, to provide internal and external dispute resolution mechanisms to customers[24] including the requirement that a licensed financial services provider be a member of an ASIC approved external dispute resolution scheme.[25]

Regulation of credit

The consumer credit provided by banks in Australia is regulated under the *Consumer Credit Code,* commonly referred to as the 'Uniform Consumer Credit Code' – hence the common acronym, 'UCCC' which is used in this paper.

The UCCC was introduced in 1996 to replace previous state-based credit legislation. It is 'template' legislation adopted in all states under a co-operative scheme, with the core statute being Queensland legislation. This means that when you buy a copy of the *Consumer Credit Code*, you buy the Queensland legislation, which has been adopted in Victoria via the *Consumer Credit (Victoria) Act* 1995.

The policy basis of the UCCC is 'truth in lending' and its objectives are to:

- Provide meaningful disclosure to debtors, mortgagors and guarantors at relevant pre-contractual, contractual and post-contractual stages;
- Ensure that the cost of credit is disclosed to prevent deception;
- Enable comparison between products, and encourage competition; and
- Achieve product flexibility by regulating substance not form.

The UCCC applies to credit:

- provided to a natural person or a strata corporation;

[23] *Financial Services Reform Act* 2001 (Cth) and the *Financial Services Reform (Consequential Provisions) Act* 2001 (Cth) amended the *Corporations Act* 2001 (Cth) as part of the Corporate Law Economic Reform Program (CLERP 6) which succeeded the Wallis Inquiry.
[24] In s912A
[25] Such as the BFSO. See www.asic.gov.au for a full list of approved EDR schemes and see below.

- wholly or predominantly (more than 50%) for personal, domestic or household purposes;

- for which a charge is or may be made for providing the credit; and

- where the credit provider is in the business of providing credit or credit provision is incidental to their business.

It covers credit contracts and by section 10, a hiring agreement where the hirer has a right or obligation to purchase the goods. It also, in a separate Part 10, covers consumer leases where the hirer does not have a right or obligation to purchase the goods.

So some of the questions to ask when determining whether the UCCC applies will go to:

- the status of the debtor;

- the purpose of the credit;

- if there is a guarantor, what is the status of the guarantor (the guarantor also must be a natural person or a strata corporation);

- the business of the person or body providing credit; and

- whether there is a charge: charge includes interest, or other fee or charge.

Once those questions are answered, the exceptions set out in section 7 and in the Regulations will need to be considered.[26] They include in outline:

- Short term credit – 62 days or less unless the fees and charges exceed 5% of the amount of the loan, or the interest rate exceeds 24% p.a.;

- Low value credit - $50 in most cases;

- Credit provided with no prior agreement;

- Where the only charge is an account charge not more than the prescribed maximum charge;

- Bill facilities;

[26] See sections 5A-8 of the *Consumer Credit Regulations*

- Where the credit provider is a pawnbroker trustee or employer – but the unjust transaction provisions[27]will still apply and in the case of employer loans the UCCC will apply if the employer is a credit provider and the credit is on the same terms as to other customers

There is also a monetary threshold for applications for changes to the credit contract on the grounds of hardship.[28]

In Victoria, regulatory responsibility for the UCCC is with Consumer Affairs Victoria, and the Victorian Civil and Administrative Tribunal (VCAT) has exclusive jurisdiction or re-opening contracts under s 70 and for imposing civil penalties under s102 for breach of the 'key requirements', and in other cases, concurrent jurisdiction with other courts.

The BFSO will also apply the UCCC, where relevant, to disputes that it considers.[29]

The Banker-Customer Relationship

What is the basis of the banker-customer relationship?

The banker-customer relationship is essentially a contractual one. It is traditionally expressed as a 'debtor-creditor' relationship: the bank accepts deposits from its customers and becomes their debtor; the bank lends money to customers and becomes their creditor. It is more than that, however, and contains other contractual incidents implied by the courts.

In addition, the contract is overlaid by equity, tort to a lesser extent and statute including consumer protection legislation.

Although described in those terms, the banker-customer relationship is not a normal debtor-creditor relationship where the debtor is required to seek out his or her creditor and repay the debt when it is due. A bank is entitled to and should wait for a demand for repayment – a withdrawal slip or equivalent – and the timing of the demand may be prescribed by the express terms of the contract, such as with term deposits.

[27] Ss 70-72
[28] See ss 66-69. These provisions used to be limited to loans up to $125,000. The monetary threshold is now linked to an ABS index of the cost of new houses in Sydney so it changes regularly. As at the end of June 2007 it was $305,690. For the up-to-date threshold see the government site www.creditcode.gov.au, a useful source of information about the UCCC generally. Also the Lawyers Practice Manual, Victoria chapter on consumer credit disputes..
[29] See for example, BFSO Bulletins 45 and 46 at www.bfso.org.au.

When considering the following incidents of the banker-customer contractual relationship, it is important to remember that these can be varied by express terms of the contract, which in turn are subject to limitations imposed by statute and rules of public policy. And as banking practice changes, the way in which they are expressed may also change.

The normal incidents of the relationship

The basic incidents of the banker-customer relationship[30] have been identified as:

- The bank undertakes to receive money and to collect bills for its customer's account;

- The bank borrows the money and proceeds from the customer and undertakes to repay them:
  - on demand,
  - at the branch of the bank where the account is kept,
  - during ordinary working hours;

- The bank promises to repay any part of the amount due against the unambiguous written order of the customer addressed to the branch of the bank where the account is kept;

- Conversely the bank will not pay away any part of the amount due to the customer without such order or other compulsion recognized by law;

- Any written order by the customer which requires the bank to pay a greater amount than the balance standing to the credit of the customer or an agreed overdraft limit may be declined *in toto:*

- The bank will not cease to do business with the customer except on reasonable notice;

- The bank undertakes to observe secrecy with respect to the customer's account, information acquired from the account, and other information acquired in the character of the customer's banker (subject to certain exceptions);

[30] From the extended summary, with case references, in Weaver & Craigie at [2.140]. The leading cases in articulating the ingredients are *Foley v Hill* (1848) 2HL Cas 28 and *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110

- The custom and usage of bankers is implied into the contract (if known and accepted);

- Both parties are bound by any statutory responsibilities or rights.

What are the customer's duties?

Under common law, the customer has only two duties:

- To use reasonable care in drawing cheques so as not to mislead the bank or facilitate forgery (the 'Macmillan duty');[31] and

- To notify the bank of known forgeries or misuse of the account (the 'Greenwood duty')[32] .

Attempts have been made at various times to extend the duties owed at common law by a customer to such things as discovering forgeries by reading statements;[33] taking care of a cheque book;[34] and running an organized business.[35] These have largely failed.

The absence of a common law duty does not, of course, prevent an obligation being imposed under the express terms of the contract, although it is necessary to ensure that important obligations are sufficiently brought to the attention of the customer.[36] The non-excludable warranty provisions contained in the *ASIC Act* should also be kept in mind,[37] as should the allocation of liability provisions of the Electronic Funds Transfers Code of Conduct.[38] And consumer protection provisions such as the prohibitions on misleading conduct and unconscionable conduct operate independently of the contract.

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[31] *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777, approved in *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd* (1981) 55 ALJR 574. For example, leaving spaces in the figures or words for the amount.

[32] *Greenwood v Martin's Bank Ltd* [1933] AC 51. The duty includes notification of known unauthorised transactions: *West v Commercial Bank of Australia* (1935) 55 CLR 319

[33] *Keptigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010.

[34] *Westpac v Metlej* (1987) Aust Torts Reports 80-102

[35] See the cases discussed by Tyree at para 6.20ff.

[36] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947, which although not binding on Australian courts is in the category of highly persuasive.

[37] S12ED of the *ASIC Act*: services rendered with due care and skill and reasonable fitness for purpose

[38] The EFT Code limits a customer's liability for unauthorised transactions and requires non-excludable terms and conditions to be included in the contract documents. See section 5 of the EFT Code, available at www.asic.gov.au

Does the bank owe a duty of care?

The duty owed by a bank has been expressed as a contractual duty 'to exercise reasonable care in carrying out the bank's part' of the contract.[39] The standard is that of the reasonable competent banker acting in accordance with accepted current practice.

Such a duty may, in limited circumstances, include a duty to question an otherwise valid mandate, e.g. a cheque validly drawn and signed by an authorised signatory.[40]

Does the bank owe a fiduciary duty?

The banker-customer relationship is not one of the accepted fiduciary relationships[41] and the contractual duty of a banker to a customer is not a fiduciary duty, except in special circumstances.[42] In the usual course the bank is entitled to prefer its own interests to those of the customer, unlike a trustee or a professional adviser such as a lawyer, and does not have a duty to provide advice.[43]

This can come as a surprise to customers who may believe that a bank has a duty to advise them that a transaction or product is not in their interests, for example:

- That a proposed business purchase is inadvisable because the business, to the knowledge of the bank, may not be sound ;

- That a proposed property purchase is inadvisable because, to the bank's knowledge from its valuation report, the value of the property is less than the purchase price; or

- That there may be other loan products which are more advantageous or which are more suitable to the customer.

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[39] *Selangor United Rubber Estates v Cradock* (No 3) [1968] 2 All ER 1073

[40] As in *Lipkin Gorman v Karpnale and Lloyd's Bank* [1991] 2 AC 548. See also *Varker v Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 and the commentary in Tyree at 5-4.

[41] *Golby v Commonwealth Bank of Australia* (1999) 72 FCR 134 at 136.

[42] See *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALJR 347, 391; *Commonwealth Bank v Finding* [2001] 1 QdR 168; *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 156 (18 December 2003)

[43] For a helpful summary of the law in relation to banks and fiduciary duties, and in relation to misleading conduct by silence, see the decision of Barrett J in *Timms v Commonwealth Bank of Australia* [2004] NSWSC 76

A bank, however, does not usually have such duties and 'cases in which a bank lending to a customer comes to occupy a fiduciary position in which it must prefer the customer's interests to its own are rare'.[44]

In cases where a bank has been found to have assumed a fiduciary duty, the common thread is that of some special feature in the facts: in simple terms that the banker has stepped, or been propelled by circumstances, out of his or her usual shoes and has engendered in the customer an expectation he or she will advise in the customer's interests.

The case of *Commonwealth Bank of Australia v Smith*[45] is an example. In that case the borrowers were inexperienced and accustomed over a long period of time to rely on the bank manager's advice. The bank manager gave advice when sought about the viability of the business they proposed purchasing, describing it as 'a good buy'. His advice included discouraging other sources of advice. And the geographical context was a small town.

The facts will therefore be crucial.

Duty to Disclose?

Misleading or deceptive conduct by silence.

Claims of misleading conduct by silence are sometimes brought in the alternative to a claim of breach of fiduciary duty.[46] The claim is, usually, that the bank was under a duty to disclose certain information adverse to the customer's interests. But it can be unhelpful to frame the claim as arising from a duty to disclose.

As summarized by Black CJ in *Demagogue Pty Limited v Ramensky*:[47]

> 'Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive…to speak of "mere silence" or a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the

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[44] *Timms v Commonwealth Bank of Australia*, at para 169.
[45] (1991) 102 ALR 453
[46] As in *Timms v Commonwealth Bank*
[47] (1992) 39 FCR 31 at 32

circumstances of the case, that if particular matters exist, they will be disclosed.'

In the context of guarantees, however, it may be appropriate to speak of a duty to disclose, based on the judgment of Gibbs CJ in *Commercial Bank of Amadio*.[48] Unlike the other members of the majority in the High Court, Gibbs CJ based his decision that the guarantee should be set aside not on unconscionable conduct but on undue concealment of unusual features of the transaction which the guarantors would not naturally expect to exist.[49]

Must the silence be deliberate?

One question that arises in a claim of misleading conduct by silence is whether the omission to speak must be deliberate or advertent: which in turn will have evidential importance for those seeking to prove it.

Conduct may be misleading or deceptive at law, even though it was not intentionally so. Intention is regarded as an unnecessary ingredient.[50] There is a suggestion in Miller's Annotated Trade Practices Act, 2004, at 1.52.50 that intention is relevant where it is claimed that silence or omission , rather than positive conduct, constitutes a breach of the statutory obligation.

Where the silence in issue is a failure to provide information then, Miller suggests, the plaintiff must show that the defendant deliberately withheld that information. This is based on section 4(2) of the *Trade Practices Act* which states that a 'reference to engaging in conduct shall be read as a reference to do or refusing to do an act'. In turn a reference to refusing to do an act is stated to include a reference to refraining (other than inadvertently) from doing an act.

Miller's suggestion is supported by *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 68 ALR 77.

Section 4(2) of the *Trade Practices Act* is mirrored in s12BA(2) of the *ASIC Act*.

Other sources of liability

Apart from statutory causes of action, a bank may have liability under a number of heads. A discussion of the duty of confidentiality is contained below. A useful analysis both of the sources of liability for a bank as lender

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[48] (1983) 151 CLR 447
[49] See the discussion in O'Donovan, 'Lender Liability' at [5.40].
[50] *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348

and the entry-points in the relationship when they can arise can be found in the text by Professor James O'Donovan, 'Lender Liability'. [51]

Apart from banking law texts, BFSO Bulletins[52] are another source of information about the ways in which a bank can be found liable to its customer. They cover issues such as:

- A bank's obligations as mortgagee exercising a power of sale;[53]
- A bank's obligations in the collection of debts[54] or when a customer is in financial difficulty;[55]
- A bank's obligations in making assessments of credit before lending;[56] and
- Issues that can arise when a customer has a decision-making disability.[57]

Breach of confidentiality

This is usually expressed as the duty in *Tournier's* case.[58]

The duty arises out of contract[59] and is founded on the historical expectations of banks that they will keep their customers' personal and financial information secret. It is qualified - Bankes LJ in *Tournier*[60] articulated three qualifications:

- Where disclosure is under compulsion of law;
- Where the interests of the bank require disclosure; and
- Where the disclosure is made by the express or implied consent of the customer.

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[51] 2000, LBC
[52] Available at www.bfso.org.au
[53] Bulletin 38
[54] Bulletins 50 and 47
[55] Bulletins 46 and 53
[56] Bulletins 45
[57] Bulletin 41
[58] From *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461
[59] Although a duty of confidentiality may arise in equity in relation to a prospective customer. See O'Donovan at [3.55]
[60] At 471-473

The Code of Banking Practice, in clause 22, contains an express acknowledgment of the common law duty, together with obligations under the *Privacy Act* 1988 (Cth). Clause 22 sets out four exceptions:

- Where disclosure is compelled by law;
- Where there is a duty to the public to disclose;
- Where 'our' interests require disclosure; or
- Where disclosure is made with 'your' express or implied consent.

The duty covers the state of the customer's account – how much they owe and what their other account balances are; the individual transactions on the accounts, the securities held by the bank and other information gained by the bank in the capacity as banker.

A claim for breach of the duty might arise where information is given to a person with no authority in relation to the account such as a spouse or relative; where information is given to a person the bank mistakenly believes to be the account holder or where information is insecurely held and as a result is inadvertently made available to third parties.

The Special Wives' Equity

What is called the 'special wives' equity' is an equitable basis for setting aside a guarantee given by a wife to secure borrowings of her husband. Although it can appear to be closely related, it has a different rationale to equitable principles relating to unconscionable conduct which are based on notions of a person under a special disability or disadvantage being exploited by a stronger party.[61] The High Court in *Garcia v National Australia Bank Ltd*[62] stated that the rationale for the equity is:

> 'not to be found in notions based on the subservience or inferior economic position of women. Nor is it based on their vulnerability to exploitation because of their emotional involvement.'[63]

It is based instead on the trust and confidence presumed to exist between a married couple.[64]

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[61] 'Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.' Per Deane J in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
[62] (1998) 194 CLR 395
[63] (1998) 194 CLR 395 at 404.

Garcia v National Australia Bank Ltd affirmed the 'rule', derived primarily from the judgment of Dixon J in *Yerkey v Jones,*[65] that applies where a husband obtains the execution of a guarantee by his wife.

The special wives' equity applies to make a guarantee/mortgage unenforceable if given by a wife and:

- She did not in fact understand the purport and effect of the transaction;
- She was a 'volunteer' that is, she gained no real benefit – with 'benefit' being given a narrow construction; and
- The bank took no steps to explain the transaction and she did not receive independent legal advice.

The rule in *Yerkey v Jones* is separate from undue influence so it is not necessary to show that the wife's will was overborne by the influence of her husband. The rule in *Yerkey v Jones* is also not subsumed by *Amadio*[66]. Liability for unconscionable conduct under *Amadio* contemplates that the creditor has notice of unconscionability factors: the rule in *Yerkey v Jones* does not require the lender to be on notice of any special disadvantage or disability.

A lender will not avoid the operation of the special wives' equity by *recommending* that a wife obtain independent advice. It must either explain the purport and effect of the guarantee to her or ensure that an independent adviser has explained it. The equity does not depend on the husband acting for the creditor in obtaining the wife's agreement to the transaction: the High Court declined to follow *Barclay's Bank v O'Brien*[67]

The important findings of fact in the *Garcia* case were that Mrs Garcia did misunderstand the application of the guarantee and did not understand that her obligations under it were secured by the mortgage over her home.

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[64] Ibid. The majority restricted the operation of the rule to wives although acknowledging that it might in future be extended to others in long-term, publicly declared relationships. Kirby J, dissenting, gave as reasons for rejecting the principle: historical anachronism; rejection of discriminatory stereotypes; marriage is not 'a suspect tendency'; economic arguments; and unacceptable discrimination. Some lower courts have extended the principles to all relationships of trust and confidence not just married women. See also the enunciation of the principle by Charles JA in *Kranz v National Australia Bank Ltd* (2003) VR 310.
[65] (1939) 63 CLR 649.
[66] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
[67] [1994] 1AC 180, in which the House of Lords rejected the reasoning of Dixon J in *Yerkey v Jones.*

It is also important that a narrow view of benefit was taken by the High Court – it found on the facts that Mrs Garcia obtained no real benefit from the transaction even though she was a director and shareholder in the debtor company. This was because of the court's view that the company was under the complete control of her husband.

And although bank officers explained the general effect of the documentation to Mrs Garcia, they didn't explain that the guarantees were secured by and linked to the mortgage of the jointly owned property

A further discussion of issues to do with guarantees is set out below in the section on the Code of Banking Practice.

Dispute Resolution and the Code of Banking Practice

The Role and Significance of the Code of Banking Practice

The 2004 revised Code of Banking Practice (the revised Code) is a document with which all lawyers who advise clients in relation to their financial or property-related affairs or disputes should be familiar. Although it is described as a voluntary code, once adopted by a bank it becomes contractually enforceable. Unlike most consumer protection legislation it applies to small business and investment customers as well as individuals. It gives customers of adopting banks an important set of rights in relation to matters including:

- Disclosure;
- Conduct;
- Provision of documents;
- Contractual enforceability of statutory obligations;
- Debt collection;
- Dispute resolution.

It contains obligations towards guarantors which go beyond the common law and provide for detailed information about the debtor's financial position to be given by banks to potential guarantors. It contains a key commitment to act fairly and reasonably in a consistent and ethical manner. It sets out a compulsory dispute resolution framework that should not be ignored by lawyers whose clients are in dispute with a bank.

The revised Code is the successor to the 1993 Code of Banking Practice (the 1993 Code). The revised Code took three years to come to fruition. Mr Richard Viney was appointed in May 2000. Following submissions from and consultation with interested parties, he published an Issues Paper in May

2001. There was further consultation and his Final Report with 61 recommendations was published in October 2001. The drafting process itself involved further consultation into 2002. A version of the revised Code was then launched in August 2002 for implementation in August 2003.

The publication and implementation of the revised Code was not straightforward. Prior to implementation, amendments were made to the 'launch publication' and even after implementation, some modifications were made by the ABA, mainly in relation to the guarantee provisions. As a consequence, apart from the 2002 'launch publication (which should be disregarded), there are in fact two revised Codes, one published and implemented in 2003, which some banks adopted, and a second modified version, published in 2004, which has been adopted by a greater number of bank members of the ABA.

Lawyers will therefore need to make sure that they know which version of the Code of Banking Practice they are looking at and whether the bank about whom or to whom they are providing advice has adopted the 1993, the 2003 or the modified 2004 Code.[68] And they should note that the Code of Banking Practice has come up for review again this year.

Issues arising from particular provisions of the revised Code

A detailed discussion of the main provisions of the revised Code (2003 version) is contained in BFSO Bulletin 39, published in September 2003, and it is not proposed to set out such a discussion here. There are, however, some provisions which raise relatively complex issues.

Acting fairly and reasonably

Clause 2.2 of the revised Code is a promise in the following terms:

> *'We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.'*

The inclusion of fairness and ethical behaviour as a contractual obligation in the agreement between a bank and its customer may be a startling concept to black letter lawyers, raising both eyebrows and questions such as, "What does that mean?", or even, "Where would such an obligation end?". Those used to a traditional banking culture may also ask, "Why does that need to be put in writing?".

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[68] A list of banks that have adopted the 2003 and 2004 Codes is on the ABA website www.bankers.asn.au . References in this paper are to the 2004 modified Code.

The inclusion of fairness, however, sits reasonably comfortably with a bank's existing obligations in equity and under statute, including its obligations under the *Corporations Act* as a financial services licensee.[69] Acting ethically, arguably, is no more than is required by an obligation to act fairly and honestly – although it may require a more considered choice between two legally available courses of action. It does not necessarily involve a duty to advise – a banker has not, traditionally, owed fiduciary duties to their customers.[70] But if, as social commentators such as Hugh Mackay suggest,[71] there are increasing pressures on the staff of corporate institutions in Australia to cut moral corners and put the bottom line first, a clause such as 2.2 may nevertheless have work to do.

It will be interesting to see whether the courts, when they come to decide cases raising interpretation and application of the Code of Banking Practice, identify conduct as being in breach of clause 2.2 that would not otherwise be in breach of statutory prohibitions such as those against misleading, deceptive or unconscionable conduct.

Financial hardship

The revised Code has introduced an obligation to try to help customers overcome their financial difficulties and, where appropriate, provide information about the hardship variation provisions of the Consumer Credit Code (UCCC).[72]

Clause 25.2 sets out the promise of an adopting bank:

> *'With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan. If at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them.'*

These are positive contractual obligations and a dispute about a breach of them could be brought to the relevant external scheme or even to a court or tribunal if the loss involved warranted the cost. It is important to understand that despite the reference to the UCCC, the first part of clause 25.2 applies not only to individual customers fitting the definition of a consumer but also to small business and investment customers.[73]

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[69] For example, under s912A(1)(a) to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'.
[70] As discussed above.
[71] For example in the chapter on business ethics in '*Right & Wrong: How to decide for yourself*', Hodder Headline Australia, 2004.
[72] UCCC ss66-68.
[73] See the definitions of 'small business' and 'you' and 'your' in cl 40 of the revised Code.

It is a promise to try to help customers overcome their financial difficulties not a promise to succeed, which raises interesting questions of how to establish that there has been a breach. It may, for example, have application where a customer is in default but makes an offer to repay the debt via a repayment plan or other arrangement. Responsible collection activity will not always, in any event, involve demand followed up in the shortest possible time by legal action, including bankruptcy or liquidation proceedings and will usually involve consideration of a reasonable, realistic proposal. This obligation, however, may provide a useful additional negotiating tool for lawyers acting for bank customers in difficulty with the repayment of a loan or other facility and should be kept in mind by lawyers acting on behalf of a bank to ensure that prior to taking legal action the bank has complied with its obligations.

Given also that the obligation in 25.2 is overlaid by the key commitment in clause 2.2 to act fairly and reasonably in a consistent and ethical manner, it might be argued that a bank is required to give genuine consideration to a repayment proposal, give legitimate reasons for any rejection of the proposal, consider alternatives, communicate in a fair and reasonable manner and not start or conclude enforcement action before communicating a response to any reasonable repayment proposal.[74]

Advising guarantors

Introduction

Lawyers advising potential guarantors, whether in the context of providing a certificate of independent advice or in the context of small business advice, need to be aware of what a potential guarantor is entitled to expect from a bank under the revised Code,[75] including what information must be provided. They will also need to make the appropriate decision about what to do with any information provided.[76]

Given the extended and explicit warnings required to be included in the guarantee document,[77] advisers should also be ready to deal with the questions the client may ask. The guarantee is required to contain a

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[74] These issues are discussed in BFSO Bulletins 46 and 53, available at www.bfso.org.au. Lawyers for financiers should also keep in mind the prohibition against harassment or coercion in the recovery of debts in s12DJ of the *ASIC Act* and the related ASIC/ACCC Debt Collection Guidelines, available at www.asic.gov.au.

[75] See cl 28 generally.

[76] The requirements of and exclusions contained in the lawyer's professional indemnity insurance should be kept firmly in mind. For information see www.lplc.com.au in particular 'Learning from Amadio' (April 2006).

[77] See cl 28.4(a)

prominent notice stating, for example, that the potential guarantor can refuse to enter into the guarantee. While this goes without saying in law, the blunt terms of the notice may well prompt the question "Should I do so?"

Problems with guarantees

The provisions of the revised Code significantly extend a bank's obligation to disclose information to potential guarantors, essentially limited at common law to an obligation to disclose information only if the transaction has unusual features.[78] An adopting bank is required, before taking a guarantee, to provide meaningful financial information to the potential guarantor, which should assist them to assess the level of risk involved in providing the particular guarantee. The provisions of clause 28 also have the important effect of extending to small businesses some of the protections offered by the guarantee provisions of the UCCC.

What has traditionally been the difficulty for guarantors, in making the decision to give a guarantee, is not so much understanding what will happen if the debtor doesn't pay but is assessing the chance that the debtor will not or will be unable to repay.[79] The BFSO Bulletin 22, Report on Relationship Debt, published in September 1999, observed in relation to family and spouse guarantee cases that:

> *While a guarantor may be made aware of the consequences if the borrower defaults, the expectation appears to be that the possibility of the borrower defaulting is a remote one. This may be influenced in particular cases by statements by the debtor or the lender or both that "your house is not at risk". It may result from a natural unwillingness on the part of the guarantor to believe that the worst will happen. The expectation was they would be helping the person to whom they were related, not giving their house to the bank.*[80]

The necessary information might conceivably include:

- Whether the guarantee is being asked for as 'top up' security because of concerns by the lender about increased risk of default;
- Whether the debtor has a history of overdrawings, excesses, arrears or significant defaults;
- The nature and the duration of the facility being secured by the guarantee and any related security arrangements.

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[78] See the discussion in Phillips & O'Donovan, *The Modern Contract of Guarantee*, p122ff, LBC (3rd edition).
[79] The situation will be different, of course, for sole director guarantors in relation to small business facilities or for other director guarantors who are actively involved in the business.
[80] Bulletin 22, page 15.

In the absence of information from the bank about account history and past defaults or irregularities the debtor themselves will be the guarantor's only source of information about the state of the debtor's affairs. There are obvious problems with this – a debtor in financial difficulty or otherwise unable to qualify for the facility sought, will have an interest in encouraging the guarantor to proceed with the guarantee by minimising negative information about the debtor's affairs. The instinct of the debtor, even a well-meaning one, may be to reassure the potential guarantor that the guarantee is only a formality. The related problem of obtaining information from the bank is that, because of the banker's duty of confidentiality, to do so requires the debtor's consent.[81]

How does the revised Code deal with the issue of the debtor's consent? It does not seek to override the banker's duty of confidentiality to the debtor – that consent is required is implicit. Rather it prohibits the taking of the guarantee unless the required information is provided. It therefore has a simple practical effect – if the debtor doesn't consent for whatever reason the bank cannot take the guarantee.

Overview of clause 28

The revised Code seeks to address the information imbalance between the bank and many guarantors by requiring the bank:

- to provide warning notices similar to those required by the UCCC but with the additional statement that 'you can refuse to enter into the guarantee';[82] and

- to provide information and copies of documents intended to give the potential guarantor or their financial adviser a picture of the financial situation of the debtor and the means to assess the financial risk of giving the guarantee.[83]

The Code also seeks to control the circumstances in which the guarantee is signed and the timing of signing. For most guarantors not involved in the business directly there will be a required one day gap between provision of

[81] The 1993 Code provided for some limited information to be given to the guarantor including a copy of the contract being guaranteed and the latest relevant statements of account, but only with the debtor's consent.

[82] See cl 28.4 As noted above, this goes with saying in law but is intended to counter what might be emotional pressure on the potential guarantor.

[83] 28.4 (b) – notices of demand, dishonours, excesses or overdrawings. 28.4(d) – copies of the credit contract, letter of offer, related credit reports from a credit reporting agency, financial accounts or statements from the debtor, statements of account in relation to the facility being guaranteed, unsatisfied notices of demand.

information and being asked to sign the document, unless the guarantor has had same day independent legal advice after receiving the information.[84] The bank promises not to give the guarantee to the debtor for signing by the guarantor.[85]

Clause 28 also provides some important post guarantee protections including:

- a limited right of withdrawal [cl 28.11];
- important provisions about future credit provision to the debtor [cl 28.12 and 28.13] and
- provisions about enforcement of judgments against guarantors.[86]

And, under cl 28.2 the guarantor's liability under the guarantee must be limited either to a specific amount plus other liabilities, such as interest and recovery costs, described in the guarantee or the value of a specified security at the time of recovery.

The modifications to the guarantee provisions

As noted above, changes were made to clause 28 in the one year period between launch and implementation, and again after the revised Code was implemented in 2003. Copies labelled as 'Launch Publication August 2002' should not therefore be used or relied on. The discussion below is about modifications made after the publication of the August 2003 version.

The main modifications were:

- to limit the obligation to disclose excesses or overdrawings to those of $100 or more;
- to change the obligation to provide copies of related security documents to an obligation to provide a descriptive list of related security documents and copies on request;
- to include an opt out provision for director guarantors in relation to the information and one day gap requirements.

In both the 2003 and 2004 versions, a number of the provisions of clause 28 do not apply to guarantors of commercial asset financing facilities and sole director guarantors.

[84] See cl 28.5 but note the effect of 28.25 and 28.16 on particular categories of guarantor.
[85] Clause 28.6, which also requires the bank to ensure that the guarantee is signed in the absence of the debtor where the bank attends the signing.
[86] See 28.14 but note this clause does not apply where the principal debtor is a small business.

The Code of Banking Practice – Dispute Resolution Framework

The dispute resolution framework described in clauses 35 – 37 of the Code of Banking Practice is an important part of the structure of the revised Code. It mirrors the dispute resolution requirements mandated by the 2001 amendments to the *Corporations Act*, in sections 912A.[87] Lawyers therefore need to be aware that even if a bank or other financial services provider has not adopted the revised Code, it will still have similar dispute resolution obligations to those set out in the revised Code.[88]

The revised Code provides for a two step process:

- Access to a free internal dispute resolution process that meets the Australian Standard AS4269-1995;[89] and

- Subject to jurisdictional limits, progress of an unresolved dispute to an ASIC approved external dispute resolution scheme.

The ASIC approval policy, contained in Policy Statement 139, requires an approved scheme to be:

- accessible;
- independent;
- fair;
- accountable;
- efficient; and
- effective.

Currently, there are seven ASIC approved external schemes in the financial services sector:

- **Banking & Financial Services Ombudsman Ltd (BFSO, formerly the Australian Banking Industry Ombudsman Ltd)**
  - disputes about banks, their associated entities and other financial services providers
- **Credit Ombudsman Service Limited (COSL, formerly the Mortgage Industry Ombudsman Service, MIOS),**
  - disputes about mortgage originators and finance brokers and others that are members of the scheme.

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[87] And the relevant regulation in the Corporations Regulations: 7.6.02.

[88] For example, non-bank members of the BFSO include American Express Australia Limited, Australian Postal Corporation, GE Money & Michael McHugh Lawyers trading as Independent Finance

[89] Which has recently been replaced by AS ISO 10002 and so it is likely that the reference in the Code will be updated in the current review.

- **Credit Union Dispute Resolution Centre (CUDRC)**
  - disputes about those Australian credit unions that are members of that scheme. CUDRC is managed under agreement by the BFSO.
- **Financial Industry Complaints Service (FICS)**
  - disputes about financial services providers including life insurers, funds managers, investment advisers and planners, stockbrokers and some superannuation providers.
- **Financial Co-operative Dispute Resolution Scheme (FCDRS)**
  - disputes from consumers about those Australian credit unions and building societies that are members of the scheme.
- **Insurance Brokers Disputes Limited (IBD)**
  - disputes about general or life insurance brokers. IBD is managed by agreement by the BFSO
- **Insurance Ombudsman Service Ltd (IOS, formerly Insurance Enquiries and Complaints Ltd)**
  - disputes about general insurance companies.

The majority of the schemes, together with the Superannuation Complaints Tribunal, which has a separate statutory basis, operate a shared 'front end' with a single telephone number, 1300 78 08 08 under the name 'Financial Ombudsman Service'[90] and share other resources. As at August 2007, the BFSO, IOS and FICS are in the process of converging.

What the schemes have in common is that there will usually be an initial facilitated negotiation period followed by investigation and decision (binding on the industry member only) if the dispute is otherwise unresolved.

The work of the BFSO

The legal issues arising in the banker-customer disputes that the BFSO deals with may include:

- Breach of contract, including the contractual duty to provide services with care and skill;
- Misleading or deceptive conduct;
- Unconscionable conduct;
- Breach of the provisions of the UCCC;
- Breach of the Code of Banking Practice;

[90] See www.fos.org.au

- Inappropriate allocation of liability for an unauthorised electronic funds transfer under the EFT Code; and

- Breach of the *Privacy Act*, including the National Privacy Principles, or the bankers' duty of confidentiality.

The subject matter of disputes can include:

- Unauthorised withdrawals from bank accounts by a third party or by error of the bank;

- Whether the bank undertook a reasonable assessment of a customer's ability to repay a loan or other facility before making the decision to lend;

- Representations made to customers about a product or service;

- The price obtained for a property on sale by the bank as mortgagee;

- Other action taken in enforcement of a debt;

- Delays in settlement;

- Errors in the calculation of repayments required on a loan;

- Non-disclosure of material information in the taking of a guarantee.

Banks will commonly be members of the BFSO scheme and may also belong to one or more other schemes depending on the range of their business. Non-bank members of the BFSO, which now outnumber bank members, include payment system providers, brokers, building societies, debt collection agencies and credit reference bodies.[91]

Advising clients using an External Dispute Resolution Scheme

What does this mean for a lawyer whose client is in dispute with a member of an external dispute resolution scheme such as the BFSO or who is acting for a member in a dispute with a customer?

Victorian lawyers have a professional conduct obligation to inform clients about 'reasonably available alternatives to fully contested adjudication' where

[91] For a list of bank and non-bank members, see www.bfso.org.au.

appropriate.[92] Advisers need to be aware of and ready to engage in the internal dispute resolution processes promised by an adopting bank or required under the Corporations Act of financial services licensee.

Lawyers need to familiarise themselves with the available external schemes to ensure that they are able to advise their clients about any appropriate scheme in jurisdiction terms and to know when a court or tribunal will be the more appropriate forum. They need to understand the processes involved, the rules or terms of reference, and understand what will be the most cost-effective way of assisting their client. And they need to understand the non-adversarial, inquisitorial nature of the investigation processes used by most schemes.

In some ways an external dispute resolution scheme is a foreign concept to many lawyers used to the adversarial system or to traditional forms of mediation. It involves some ingredients such as shuttle mediation and a form of arbitration which will be familiar to lawyers engaged in dispute resolution. The processes are conducted under the without prejudice privilege unless there is a resolution by agreement or decision accepted by both parties. But there are some differences to traditional forms of dispute resolution. The ASIC approved schemes:

- are free for customers to use;[93]
- may involve some investigation, including asking both parties for information and documents;
- although there are procedures, have relatively informal processes and the claim does not have to put in the form of pleadings;
- the decision is binding only on the industry member and not on the customer;
- hearings in person are rarely conducted – a decision will usually be made on the papers.

The processes are designed to be accessible to lay people without legal representation and to operate Australia-wide. Some schemes discourage legal representation; others such as the BFSO do not discourage it but make it clear that legal costs will not usually be recoverable as part of any compensation awarded. This means that it may not be cost-effective for the lawyer to be the point of contact with the scheme throughout the dispute but they may

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[92] Rule 12.3, Professional Conduct and Practice (Amendment) Rules 2003, published January 2005, Law Institute of Victoria Ltd: 'A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.'

[93] The schemes' budgets are recovered from industry members via a combination of flat membership fee and case cost models.

nevertheless be of assistance in helping their clients write the initial letter setting out the dispute and identifying the relevant documents to attach to the letter. Lawyers may also be of assistance to their clients in evaluating any offer made or formulating any counter offer.

Conclusion

Banking law is a wide-ranging and constantly changing area of the law. It focuses on an activity which has been at the heart of a strong economy since ancient times and which intersects with the lives of most individuals – anyone with a bank account. It is a challenging, interesting and important body of knowledge for lawyers.

Appendix

Australian Banking Law: A selection of useful references

Weaver & Craigie, *The Law Relating to Banker & Customer in Australia*, 3rd ed. , Thompson Lawbook Co, looseleaf

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Useful references and articles are on Alan Tyree's web site: http://www2.austlii.edu.au/~alan

Information about the Banking & Financial Services Law Association, including the annual conference and the annual scholarship and research essay prizes: www.bfsla.org.au

UK

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Ellinger EP, Modern Banking Law, Clarendon Press Oxford