20+ Years of Electronic Banking

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New Zealand has always been at the forefront of electronic banking. In 1978 as a student at Victoria University of Wellington I addressed EFT issues in a paper prepared for a course "The Law of Banking" taught by Professor Ellinger. The survey of American literature left me bemused since many of the articles addressed the problems of the "Automated Clearing House". New Zealand residents had enjoyed the benefits of automated cheque clearing for some time.

The adoption of electronic banking has continued. New Zealanders average 341 non-cash retail payment transactions each year. Of these, 225 are "pure" electronic transactions, 65 are cheques and 51 are credit card transactions.[1] Corresponding figures for Australia are 172 transactions per person. Of these, 38 are cheques and 43 are credit cards.[2]

While raw statistics are interesting and certainly illustrate the remarkable growth of electronic payments, it is more interesting to look at the legal development that has accompanied the growth. In my view, the history of electronic banking is the history of consumer protection for banking customers.

The consumer protection advances have been in two areas, Codes of Practice and the establishment in both countries of an office of Banking Ombudsman.

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[1]Bank for International Settlements, Statistics on Payment and Settlement Systems in Selected Countries, April 2003.

[2]It is not clear why NZ should have almost twice as many non-cash transactions per person as Australia.

1 EFT Codes

Electronic banking and consumer protection go hand-in-hand. It didn't need to be this way, but early terms and conditions for consumer EFT contained terribly unfair terms. It was not at all unusual to have conclusive evidence clauses that, in effect, made consumers responsible for the effects of poor system design.

This led to early and vocal calls for government intervention. Intervention was forthcoming, but not in the form of legislation. In Australia, the threat of legislation resulted in the establishment of an EFT Code of Practice. Both countries established Codes of Banking Practice. The latter Codes were "private" developments but in both cases the development was to ward off the threat of more formal intervention.

The result in both Australia and New Zealand was a "voluntary" Code of Practice. Australia has a "stand alone" Code while the New Zealand provisions are part of the Code of Banking Practice. The original Australian Code was revised in 2002 to include electronic transactions other than those initiated by a card and PIN. New Zealand consumers gain the benefits of the card/PIN provisions of the Code of Banking Practice.

1.1 Scope of protection

A quick comparison of the two protective regimes indicates that customers receive wider protection in Australia than in New Zealand although the "default" amount required to be paid is higher in Australia than in New Zealand (AU$150 vs NZ$50). The Australian Code covers a much wider class of transactions, but even when a transaction is within the scope of both Codes, the Australian protection may be greater.

Case 34 in the New Zealand Banking Ombudsman's Case Reports 2001-2002 will illustrate. From the report:

> While Mr J was in Sydney, he paid his hotel account with a Visa credit card. The hotel's electronic funds transfer at point of sale (EFTPOS) terminal would not produce a transaction slip. The hotel receptionist then used another EFTPOS terminal to credit the amount to his account and re-debit it. The two debits appeared on Mr J's credit card statement for the same amount in New Zealand dollars (NZD) but the credit appeared as a lesser amount, a difference of some NZD50.00. The difference occurred

> because the credit from the hotel was processed using a different exchange rate from the debits. All three transactions appeared on the credit card statement with the same transaction and processing dates.

The bank argued that "... the problem arose from an error on the part of the hotel for which, in terms of its Terms and Conditions of Use relating to credit cards, it was not liable." The argument was accepted by the Banking Ombudsman.

Of course, the error arose because of a fault in the EFTPOS equipment. Clause 8.2 of the EFT Code provides that an account institution may not avoid obligations by reason only that they are party to a shared EFT system and that another party has actually caused the failure. Although not wholly free from doubt, my own opinion is that the ABIO would apply these provisions to find for the consumer. The NZ result, in effect, rewards sloppy system maintenance. Mr J, not surprisingly, did not accept the result, perhaps feeling that there is something wrong with a system that throws the loss onto the only person who is completely incapable of avoiding the risk.[3]

1.2 Burden of proof

A further important difference is that the Australian Code specifically addresses the burden of proof problem. Clause 5E makes it clear that the "account institution" must prove "on the balance of probability" that the user has contributed to the loss if the user is to be held responsible for more than the default amount.[4] All reasonable evidence must be considered, including all reasonable explanations for the transaction occurring.[5]

The fact that the account has been accessed with the correct access method, while significant, will not of itself constitute proof on the balance of probability that the user has contributed to losses.[6]

The ABIO has acknowledged that these provisions of the Code require a change in the way that information is assessed.[7]

The NZ approach is illustrated by Case 39 of the Ombudsman's Case

[3] I am not suggesting that the Ombudsman's decision was incorrect. I am criticising the inadequate protective provisions which led to it.

[4] Currently AU$150.

[5] Clause 5.5(c).

[6] Clause 5.5(c).

[7] Bulletin 37, ABIO.

Note Compendium 2001–2002. Miss K left her handbag locked in her car for about five minutes while she attended a garage sale. The bag together with her card were stolen. The theft was reported immediately to the police and then to the bank. NZ$1500 had been withdrawn. The card had last been used the day before at a local supermarket.

From the Ombudsman's case report:

> I accepted Miss K's submission that she did not disclose her PIN. She had last used it at a supermarket the previous day and it was unlikely that the thief watched her using the card and then followed her until the next day, waiting for an opportunity to steal the card. I therefore came to the view, notwithstanding Miss K's strong assertion that she had not written the PIN down, that on the balance of probabilities the thief had found a written record of the PIN among the contents of the handbag in the half hour interval between the first unsuccessful attempt to access the account and the second successful attempt. There was simply no other credible explanation for the thief coming to know the PIN.

The case report contains no information about where the thief made the withdrawal. The half hour delay between attempts is puzzling if the PIN was written in "clear". It would be interesting to know if the first attempted PIN was "close" in any sense to the real PIN. I would expect these questions to be investigated under the Australian Code, particularly in view of the provisions explicitly permitting a disguised version of the PIN to be recorded.

The case shows that the NZ approach is to use the "balance of probabilities" but it does not address the question of burden of proof. This case would seem to suggest that the burden of proof was on the consumer.

My own view is that ordinary banking law principles show that the burden of proof is on the institution: see Tyree [2] at para 39.7.

2 Banking Codes

New Zealand was the first to have a Code of Banking Practice, first adopted in January 1992. The Australian Code was close behind, released in November, 1993 but not adopted until 1 January 1995.[8]

[8]Even then, some of the most important parts of the Code, dealing with credit and lending, were not implemented until 1 November 1997. The delay was thought necessary to accommodate the commencement of the Uniform Consumer Credit Code.

From a consumer protection point of view, there is little good to say about the Codes of Banking Practice. They seldom went beyond existing legal protection and sometimes reduced customer's rights below the existing level: see, for example, Tyree [1]. In both cases the Codes were drafted by the banks' lawyers with little input from consumer representatives.[9]

This has changed somewhat in recent years. The regular revision of the New Zealand Code now receives pubic input, but the results as measured by the third edition are disappointing.

The situation in Australia is more promising. The ABA commissioned Mr Richard Viney to make an independent review of the Code.[10] His recommendations are due to be implemented in August of this year. The proposed Code is a substantial improvement on existing Codes, and the ABA is to be congratulated on this development.

3 Institutions

The Australian Banking Industry Ombudsman (ABIO) was established in 1989 and commenced operation in June 1990. The New Zealand Banking Ombudsman (NZBO) was established in July 1992.

The operation of both schemes is similar. Consumers are required to take complaints first to the bank in question. If the consumer is dissatisfied with the results of the bank investigation, or if the investigation takes too long, then the complaint may be taken to the Ombudsman.[11]

While it is always possible to disagree with certain details, my own opinion is that both schemes deserve the highest praise. They provide effective, affordable and fair dispute resolution. That doesn't happen very often in the real world.

[9]For a discussion of the NZ Code, see Tyree, Kidd, Rickett and Webb [3]; for a discussion of the Australian Code, Tyree [2]; for some detailed background to the Australian Code, see Weeerasooria [4] at Chapter 15.

[10]See R T Viney, Reviewing the Code of Banking Practice in the New Environment, paper presented to the 18th Annual Australia Banking Law and Practice Conference, 7-8 June, 2001.

[11]See Tyree, Kidd, Rickett and Webb [3] for a discussion of the New Zealand scheme; Tyree [2] and Weerasooria [4] for a discussion of the Australian scheme.

References

[1] Alan L Tyree. Banking code losers. *Journal of Banking and Finance Law and Practice*, 6:49 – 51, 1995.

[2] Alan L Tyree. *Banking Law in Australia.* Butterworths, fourth edition, 2002.

[3] Alan L Tyree et al. *Tyree's Banking Law in New Zealand.* LexisNexis, 2003.

[4] W S Weerasooria. *Banking Law and the Financial System in Australia.* Butterworths, Sydney, 5th edition, 2000.