AUSTRALIAN CODE OF BANKING PRACTICE

GREGORY BURTON

Barrister-at-Law, Sydney

The final version of the much-debated, re-drafted Australian code of banking practice was released on 3 November 1993 by the Australian Bankers Association.

When one compares the final version with its draft predecessors, the differences are compelling and the politics one can only surmise were remarkable! I am not qualified to comment on the latter; others at the conference probably are.

Pressure for any published code can imply an agenda beyond clarification or disclosure of existing practice. It creates an occasion for implementing change, maybe even "progress" (which, like beauty, is in the eye of the beholder). The change sought by code is an alternative to legislation.

Compared with its draft predecessors, the code is much less a document of change than one of clarification and consolidation. Its main role, as an agent of change, is likely to be that codification will crystallise and clarify what are "the bank's usual terms and conditions" on various topics (I and other colleagues I know have been faced by the embarrassment when a bank cannot find the "usual terms and conditions" quoted in the standard facility letter on which the bank is seeking to sue).

The code may therefore lessen disputes on implied terms in some bank-customer contracts. It may also facilitate reliance by courts on evidence of banking practice beyond the arena of negotiable instruments.

The foundation work for a paper on the Australian code remains George Weaver's excellent paper in the published proceedings of last year's conference: *Banking Law and Practice 1993*, pages 153 et seq.

In this paper I propose to:

- describe the main terms of the Australian code;
- briefly compare those terms with codes in the United Kingdom and New Zealand; and
- comment or speculate on the code's relationship with the law and its potential role in curial and non-curial dispute resolution.

The comparative codes are:

- the United Kingdom *Code of Good Banking Practice*: original version December 1991 effective 16 March 1992; revised version effective 28 March 1994 (except paragraph

5.3 which deals with deduction procedures from 31 December 1996 for bank and building society interest and charges) — the revised version will be referred to; and

- the New Zealand *Code of Banking Practice* effective from 1 March 1992.

OBJECTIVES OF THE CODE

There is a change in emphasis between draft and final Australian code, signified by the omission of one draft objective — that the Code is to "define" a "set of key provisions" which are "fair and balanced" and which are to be included in contractual arrangements between banks and customers. A useful comparison might be the retreat from broad compulsory standard terms, prescribed by the regulators, in the Australian Law Reform Commission recommendations which led to the insurance contracts legislation in the mid-1980s. However, that legislation retained numerous statements both descriptive and prescriptive of the law, which have been largely removed from the final version of the code.

The objectives and principles in the preamble to the final version of the code indicate that the code's main purpose is not to write or re-write the fundamental terms of a bank's relationship with individual customers in their private or domestic banking business. Rather, it is to ensure that contracts are written in an environment of clarity and disclosure.

Where prescription or proscription does occur, it may reduce a category of transaction costs for both banks and customers, such as the plethora of litigation seeking to avoid allegedly misunderstood "all-moneys" securities.

The (somewhat ironical) result may be that some customers will have less room in the future to negotiate from behind a defence based on the *Contracts Review Act* 1980 (NSW) and/or the *Trade Practices Act* 1974 (Cth) section 52 or State or Territory equivalents, once those defences have survived the relatively low threshold of arguable facts needed to resist a summary judgment or summary dismissal application.

The NZ and UK codes are, on the whole, equally non-prescriptive in terms and similar in objective. However, the UK code preserves as a governing principle that banks, building societies and card issuers will act "fairly and reasonably in all their dealings with their customers" (clause 2.1(b)).

DEFINITIONS AND APPLICATION

Under the definitions in section 1.1, the code applies to banking services which are provided to customers who are natural persons (alone or in partnership) wholly or exclusively for the individual's private or domestic use. Excluded banking services are bills of exchange (as opposed to cheques), variations of terms of facilities and unauthorised overdrafts.

The definition of customer impliedly envisages that a customer will sign a declaration, at the outset of a service, which specifies whether or not the service is wholly or exclusively domestic or private.

Terms and conditions are defined to exclude terms implied by operation of law. The use of the words "specifically applied" in the definition encompasses express terms and appears to encompass nothing else, given the written disclosure obligation in section 2.1.

Standard fees and charges are defined to mean those normally applied to a particular banking service at a particular time.

The code is subject to the EFT code and Commonwealth, State or Territory legislation: sections 1.2 and 1.4.

Under section 1.3 of the code, from the time a bank publicly announces that it adopts the code it is bound by the terms of the code in respect of subsequently provided banking services within the defined limits and by the code provisions application on an on-going basis to banking services then being provided. The bank is also bound by the privacy and confidentiality provisions for on-going customers: section 12.12. The wording of section 1.3 envisages that a bank may announce differential adoption of the code in respect of different banking services.

Section 2.2 of the code requires a bank to include in the written terms and conditions of a defined banking service a statement to the effect that the relevant provisions of the code apply to the service, but need not set out the code.

DISCLOSURE AND PROVISION OF INFORMATION

These topics are dealt with in Part A of the code.

Section 2.1 requires the terms and conditions of a defined banking service to be provided to the customer. The terms and conditions are to be in writing, in English and such other language as the bank considers appropriate, to be distinguishable from promotional or marketing material, to be consistent with the code and to be clearly expressed.

The terms and conditions are to provided at or before the time the banking service contract is made unless impracticable, in which case as soon as practicable thereafter. There is no express provision for a "cooling off" period, even in the latter case.

The terms and conditions are to draw attention to the availability of the general descriptive information referred to in sections 6.1 and 6.2.

Section 2.3 requires the written terms and conditions to include (as relevant) information on the following matters:

- nature of applicable standard fees and charges;
- method of calculation of interest and frequency of its credit or debit (including if more than one interest rate applies, for instance, on default);
- procedure for notifying variations to the terms and conditions and to interest rates and fees and charges;
- requirements as to minimum balance and restrictions on deposit or withdrawal;
- on term deposits, the manner of payment of principal and interest and of dealing with funds at maturity, prepayment effects such as breakage fees and interest rate variation;
- loan repayment details;
- frequency with which account statements will be provided;
- a statement that information on current interest rates and fees and charges is available on request; and
- how a customer may alter or stop a payment service (such as a standing order or periodic debit).

Section 3.1 requires a bank to provide to a customer, prospective customer or "appropriate external agency" (undefined) the interest rate and standard fees and charges for a banking service offered by the bank, for use in preparing a comparison rate. Sections 4.1 and 5.1

enable similar comparisons by requiring standard fees and charges for various services to be made available in advance.

Section 6.1 requires the provision, on request, of "general descriptive information concerning" defined banking services, including where appropriate:

- account opening procedures;
- the bank's obligations concerning confidentiality, including how to instruct a bank not to give information about the customer to a financial services entity related to the bank;
- complaint handling procedures;
- the bank's right to combine accounts;
- bank cheques;
- the advisability of the customer informing the bank promptly of financial difficulty; and
- the advisability of a customer reading the terms and conditions which apply to a defined banking service.

Under clause 6.2, customers who open a cheque account (and other customers if they request it) are to receive general descriptive information on:

- the time generally taken to clear cheques and special clearance mechanisms;
- the effect of permitted cheque crossings including "not negotiable" and "account payee only";
- the significance of deleting "or bearer";
- how and when a cheque may be stopped;
- means of reducing the risk of unauthorised alteration of cheques; and
- dishonour of cheques (including post-dated and stale cheques).

Further disclosure requirements are listed as principles of conduct in Part B and are described below.

The content of "general descriptive information", where that term is used, is not defined. Whether or not an error, or expression of view on a controversial or legally unclear matter, will bind the bank as against a customer relying on it, will no doubt emerge for judicial determination. If so, it is likely to arise in one of the means, discussed in the last section of this paper, through which the binding status of code provisions will be debated.

PRINCIPLES OF CONDUCT

Part B of the code (sections 7 to 19) is said (in item (ii) of the introduction to the code) to contain "certain principles of conduct which a bank will follow in dealing with its customers".

Terms and operation of accounts and services; fees and charges

Section 7 requires ready availability of the terms and conditions of banking services on offer, disclosure of application fees or charges, the circumstances (if any) of their refundability, and disclosure of transaction fees on bank cheques, travellers cheques, inter-bank transfers and similar services at time of service or on inquiry.

Section 8 requires provision, on customer request, of "general descriptive information" about the identification requirements of the *Financial Transaction Reports Act* 1988 (Cth) and the options in respect of tax file number quotation. The general descriptive information may consist of or include government material.

Section 9.1 provides for minimum 30 day written notification to each customer affected by a new non-government fee or charge or a variation to provisions on calculation or frequency of interest. Under section 9.3, variation of existing fees or charges or other variations of terms or conditions may be by national or local media advertisement or by written notification to affected customers no later than the date of variation. A similar procedure is to be used to announce the introduction or variation of government charges unless a governmental authority does the publicity: section 9.2. A written consolidation of terms and conditions may be made available (by unspecified means) if a bank considers it is warranted by sufficient changes: section 9.5.

Under section 9.4, a bank may require prompt notification of customer change of address and can give written notification to last recorded mailing address.

Combination of accounts

Section 10 requires prompt notification of exercise of a right to combine accounts and observance of the code of operation for social security direct credit payments.

Foreign currency

In respect of foreign exchange services other than by credit or debit card or travellers cheque, section 11.1 requires a bank to provide details of applicable exchange rate and commission charges (or, if the foregoing are not known at the time, details of the basis on which the transaction will be completed) and an indication of the normal arrival time of the money at the overseas destination. Whether the latter means first arrival, crediting to overseas account of ultimate recipient or some other point is not defined.

Section 11.2 provides that, prior to granting a foreign currency loan in Australia, a bank shall provide to the customer a "general warning" in writing about the risks arising from exchange rate movements and shall inform the customer of the availability of risk limitation mechanisms if they exist. The content of the warning is unspecific and seems to add nothing to the general law.

Privacy and confidentiality

Section 12.1 is the only attempt in the final version of the code to re-state at least the general law and does so in terms of *Tournier's* case [1924] 1 KB 461, namely, that a bank has a general duty of confidentiality towards a customer except where disclosure is compelled by law, where there is a duty to the public to disclose, where the interests of the bank require disclosure and where disclosure is made with the express or implied consent of the customer. Unlike the NZ code, descriptive commentary on the general law exceptions, and a list of statutes under which disclosure may be compelled, are not given.

The restatement is expressed to be in addition to a bank's duties under legislation which is not identified but includes at least the *Privacy Act* 1988 (Cth) in its application to credit providers, Part VA of the *Income Tax Assessment Act* 1936 (Cth) dealing with tax file numbers and applicable provisions from time to time of consumer credit legislation.

Section 12.3 forbids a bank from collecting information relating to customers by unlawful means, whose only use may be to give the customer a further specific basis for private law remedies such as injunction, damages or possibly an account of profits.

Section 12.2 provides, subject to section 12.1, that a bank may disclose to a related entity of the bank:

(a) information necessary to enable an assessment of the customer's total liabilities (actual and prospective) to the bank and the related entity; and

(b) if the related entity provides financial services which are related or ancillary to those provided by the bank, information concerning the customer unless the customer instructs the bank not to do so. It has been noted that a bank is required under section 6.1(ii) to provide information on how to give such an instruction "upon request". Section 12.2(b) requires the bank to give such information to "those who become Customers after [the bank] adopts the Code".

Related entity is given the same meaning as in section 9 of the *Corporations Law*, under section 1.1 of the code.

Section 12.2 only contemplates information disclosure one-way under its express provisions: by the bank to the related entity. It does not contemplate information disclosure between related entities of the bank themselves, such as two finance company or other financial services subsidiaries. As a consequence, it appears only to cover disclosure for the assessment purposes of a particular related entity (or the marketing or other unspecified purposes of a related financial services entity), not for the purposes of a global assessment of customer liability to the group.

Section 11B(1)(a) of the *Privacy Act* defines a bank as a credit provider. Under sections 13(d) and 18B of the Act and the definition of "credit reporting infringement" in section 6(1), an interference with an individual's privacy by a credit provider is constituted by a breach of a provision of Part IIIA of the Act or of the *Privacy Commissioner's Credit Reporting Code of Conduct* issued under section 18A of the Act on 11 September 1991 and effective 24 September 1991 (with an amnesty for breaches to 25 February 1992).

Section 18N, by virtue of sub-section (9), extends beyond credit reports from a credit reporting agency to any form of record or information which bears on an individual's credit worthiness, standing, history or capacity. It prohibits disclosure of personal information derived from such a report except for defined circumstances.

Section 18N(1)(d) permits disclosure of such information to a corporation which is related to the credit provider within essentially the same meaning of related as appears in the *Corporations Law*: see sections 6(5B) and 6(8). There appears to be no restriction on the purpose of disclosure.

Section 12.4 requires a bank to provide a customer, on request, with information about that customer "which is readily accessible to the Bank and which may lawfully be provided". The seeming width of this statement, and tantalising reference to accessible information (from third parties such as credit reference bureaux to which the bank has access?) is reduced in impact by the restriction of customer information able to be requested to "the Bank's record" of the customer's address, occupation, marital status, age, sex, accounts **with the bank** and balances and statements relating to those accounts. Under section 12.5, the information need only be provided if the customer identifies as clearly as possible the requested information and its likely location if known to the customer. Section 12.6 permits reasonable cost recovery in respect of supplying customer information; section 12.7 provides that a customer may request correction of customer information. Requests for access to or correction of customer information are to be dealt with in a reasonable time: section 12.8.

A bank is prevented by section 12.9 from collecting, using or disseminating information about a customer's political, social or religious beliefs or affiliations, race, ethnic or national origins or sexual preferences or practices except for collection or use of such information "in accordance with this Code for a proper commercial purpose".

Section 12.10 requires a bank to take reasonable steps to protect personal information held by it relating to a customer against loss or unauthorised access, use, modification or disclosure. Bank staff with access to personal information concerning customers are to be required to maintain confidentiality with respect to that information.

Under section 12.11 a bank is required to comply, in relation to a "banker's opinion", with any applicable *Credit Reporting Code of Conduct* issued by the Privacy Commissioner under section 18A(1) of the *Privacy Act*. Paragraph 2.16 of the *Code of Conduct* presently in force requires the specific agreement of the individual to the banker's opinion on the individual's consumer credit worthiness.

Security of payment instruments

Section 13.1 provides that a bank "may" inform a customer of the advisability of safeguarding payment instruments such as credit and debit cards, cheques and pass books.

Irrespective of provision of such information, under section 13.2 a bank may require a customer to notify the bank as soon as possible of the loss, theft or misuse of the customer's payment instruments. However, under section 13.3 a customer must be informed of the consequences of non-compliance with such a notification requirement and the means of notification.

Account statements

Section 14 requires deposit account statements at minimum six monthly cycles unless a passbook or other form of documentation is agreed upon, there has been no transaction "effected by the customer" during the previous six months or the account is governed by the account statement provisions of the EFT code. The possibility appears to remain of a dormant account being depleted by periodic bank charges without the customer receiving a statement.

The UK code provides for maximum twelve monthly cycles (clause 4.6); the NZ code opts for six monthly maximum periods (clause 2.6).

Provision of credit

Section 15.1 requires a bank, in considering provision of credit to a customer, to take into account factors which **the bank** considers relevant in establishing whether, **in the bank's view**, the customer has or may have in the future the capacity to repay. These factors may include the customer's income and expenditure, the purpose of the banking service which involves the provision of credit, credit scoring and the customer's assets and liabilities. The provision seems to state the obvious.

Joint accounts and subsidiary cards

Section 16.1 requires a bank to provide customers opening a joint account with general descriptive information on withdrawals in the light of the customer's account operation instructions, how instructions can be varied and the nature of liability for indebtedness on joint account.

Under section 16.2, a bank instructed to issue a subsidiary debit or credit card is required to provide to the primary card holder general descriptive information on that card holder's liability for debts on the subsidiary card which may continue until the subsidiary card is surrendered even if cancelled or stopped, and means of stoppage or cancellation of the subsidiary card.

Guarantees and indemnities

What is in section 17 is the outcome of possibly the most debated section of the code, both as to philosophy and drafting.

Under section 17.1 the provisions apply to third party guarantees (in whatever form) provided by an individual for the purpose of securing any financial facility or accommodation provided by a bank **at the time the guarantee is obtained** to any person **other than**:

(a) a public corporation or any of its related entities;

(b) a corporation of which the guarantor is a director, secretary or member or any of that corporation's related entities;

(c) a trustee of a discretionary or other trust of which the guarantor or entity described in (b) is a beneficiary or discretionary object; and

(d) a partner, co-owner, agent, consultant or associate of any of the guarantor or the persons in (b) and (c).

The term "public corporation" has the meaning in section 9 of the *Corporations Law*. Associate is not defined but presumably does not include natural relatives of the guarantor since this would reduce the ambit of section 17 to nil (excluding even the Amadios!). If that is the case, the section catches "true" third party guarantees.

Section 17 effectively provides as follows:

- "All moneys" guarantees are proscribed, since the guarantee must be limited to a specific principal amount **plus** other liabilities such as interest and recovery costs which are described in the guarantee: section 17.2.

- Before accepting a guarantee a bank must provide a prospective guarantor with a written warning about the possibility of the guarantor's becoming liable instead of, or as well as, the borrower: section 17.4(i).

- A bank is required to recommend that the guarantor obtain independent advice: section 17.5.

- A guarantor may at any time extinguish the guarantor's liability under the guarantee by paying out the then actual or prospective (including contingent) liability of the borrower or the maximum liability of the guarantor under the guarantee (whichever is less), or by making other arrangements for release to which the bank agrees: section 17.7. Note the non-consensual provision of credit information to a guarantor who has paid out a guaranteed loan, under section 18N(1)(ba) of the *Privacy Act*; compare the more restrictive regime prior to enforcement under section 18N(1)(bg).

Disclosure to guarantor and customer confidentiality are balanced as follows under sections 17.3, 17.4(ii) and 17.6:

- A prospective guarantor must be informed that, if the borrower consents, the guarantor will be furnished with: a copy or summary of the obligations being guaranteed; a copy of any formal demand being sent to the borrower; and (on request by the guarantor) a copy of the latest relevant account statement (if any) provided to the borrower.

- If the borrower does not consent, the bank must inform the prospective guarantor that such consent has not been given and that, if the guarantee proceeds, the guarantor will have no right to receive these documents.

- The bank is then prohibited from accepting a guarantee from that prospective guarantor unless the guarantor agrees to proceed with an awareness of the foregoing matters including the absence of such consent.

The disclosure regime appears to be consistent with section 18N(1)(bh) of the *Privacy Act*, which permits credit information on the borrower to be provided to the prospective guarantor

with the specific agreement of the borrower. Compare the disclosure regime suggested by Mark Sneddon's article "Consumer Guarantees: a Proposal for Reform" in (1993) 4 *JBFLP* 92-107.

The NZ code clause 5.3 is much less specific. It extends to all guarantees by individuals (including directors of companies) but only imposes an obligation to advise prospective guarantors to seek independent legal advice because of the risk of ultimate liability. The UK code is substantially similar, except that it requires written notice (following prior advice) of the nature of a guarantee and the amount of the guarantee (including a statement as to whether or not the guarantee is unlimited).

Advertising

Section 18.1 re-states a bank's obligations under section 52 of the *Trade Practices Act* and its State or Territory equivalents in respect of its advertising or promotional literature. Section 18.2 complements the general duty by requiring any reference to an interest rate in advertising or promotional literature to indicate other fees and charges and that full details of relevant terms and conditions are available on application.

Account closure

Under section 19.1, and subject to terms and conditions of a specific financial service, a bank is obliged to close a credit account on customer request, may close a credit account by reasonable notice to the customer and repayment of the account balance, and may charge a reasonable estimate of closure costs.

MONITORING AND COMPLIANCE

The preamble to the code contemplates annual reports to the Reserve Bank of Australia (not the Trade Practices Commission) on the operation of the code and the resolution of disputes by the bank in question or by an external dispute resolution process. The EFT code is also reported on to the RBA.

The Australian Payment Systems Council ("APSC") has access to the reported information and may report to the Treasurer on it. There is also provision in the preamble for triennial review of the code itself.

The NZ code provides for a minimum of biennial review (clause 1.2). The preface to the UK code sets no specific review period. The second edition of the code came 2 years (March 1994) after the first (March 1992); the next edition is stated to be due in about 3 years (March 1997).

The NZ code does not appear to have a formal provision for reporting on compliance, nor does the UK code, although in the case of the latter it seems that compliance reports (signed by chief executives) were provided by participating institutions to the UK review committee.

DISPUTE RESOLUTION

Part C of the code (section 20) requires a bank to have an accessible internal dispute resolution process free to customers covered by the code: section 20.1. General descriptive information on time frames and procedures and the authority of the dispute resolving officer is to be available in branches (section 20.2) and presumably will be combined with existing brochures on the banking ombudsman.

A written statement of the bank's decision on a dispute must be provided if requested or if the request for resolution itself was in writing. If the dispute is not resolved to the customer's satisfaction, then the bank's decision must be confirmed in writing if not already done so and

with reasons for the bank's decision, and the customer must be provided with information on further action which the customer can take: section 20.3.

Section 20.4 requires the bank to have the banking ombudsman or an equivalent external, impartial, non-arbitral process to deal with disputes unresolved by the internal mechanism. The NZ code makes the banking ombudsman scheme compulsory. The UK code makes the banking ombudsman, the building society ombudsman or one of the other self-regulatory conciliation and arbitration schemes compulsory. Many of the UK banks who subscribe to the UK code do not participate in the UK banking ombudsman scheme.

Section 20.5 requires the external process to apply the law and the code and states that such process "may also take into account what is fair to both" the customer and the bank. This represents a preference for the banking ombudsman's interpretation of clause 15 of his terms of reference.

Disclosure of credit information to the banking ombudsman is permitted under section 18N(1)(bc) of the *Privacy Act*.

COMPARISONS: UK AND NZ CODES

Specific comparisons have already been made in respect of some provisions.

The New Zealand code covers "personal customers" and has substantially similar provisions to the Australian code concerning information, account operation, fees and charges, account closure, credit provision and advertising. Some matters are mentioned which are dealt with in Australia by credit, tax file number or financial transaction reports legislation or by the EFT code. The NZ code envisages revision in the light of privacy legislation as implemented in respect of credit providers: see, for example, Celia M Caughey, "Effects of the Privacy Act (NZ) on Banks" (1993) 4 *JBFLP* 159-168.

The United Kingdom code applies to banks, building societies and other card issuers in respect of their "personal customers". Again, it covers matters covered elsewhere in Australian law and has substantially similar provisions to the Australian code on matters of privacy and confidentiality, information disclosure and accounts to those in the Australian code.

Both the UK and NZ codes require banks to encourage customers promptly to notify circumstances of hardship and to give due consideration to notified circumstances: UK code clause 11.4; NZ code clause 5.2.3. The UK code goes on to oblige banks to use best endeavours to give practical information and to "try to help" but the latter is "subject to normal commercial judgment".

Both the UK and NZ codes go into greater detail on accuracy in marketing than does the Australian code. The effect in all likelihood would not exceed the impact of the Australian sanctions against misleading or deceptive conduct in trade or commerce.

The present United Kingdom banking ombudsman submitted for substantial revisions to the UK code on its first review, building on his comments in his annual reports and in his Ernest Sykes Memorial Lecture to the Chartered Institute of Bankers in 1991.

Matters sought by the ombudsman which were not included by the review committee (who consulted with industry, government and consumer groups) in the second edition of the UK code were as follows:

- extending the code to small business customers;
- spelling out that bank terms and conditions should be fair in substance;
- prohibiting unlimited guarantees and third party securities;

- more detailed "health warnings" to those who give third party securities; and
- quarterly account statements, at least for EFT/ATM accessible accounts.

(refer press statement by UK banking ombudsman 8 February 1984)

THE CODE, THE LAW AND THE BANKING OMBUDSMAN SCHEME

The Australian code's change of source between final version and draft predecessors showed a change of emphasis. The draft of the Treasury/TPC task force (with Reserve Bank and Commonwealth A-G's representation) in November 1992, revised in June 1993, was superseded by a draft from the Australian Bankers' Association in August 1993 which with relatively small changes became the final code.

Like his UK counterpart, the Australian banking ombudsman may make recommendations on any code of banking practice which has a bearing on the discharge of his responsibilities, to the council of the ombudsman scheme: Australian banking ombudsman scheme terms of reference clause 30.

The code is open to development in conjunction with the EFT code.

I have noted at the outset, when discussing the code's objectives, that the ironical result may be a reduction of available defences to claims by banks when they reach the courts. This assumes, of course, that the banks can put in place — and have observed by their staff — clear procedural compliance trails; the preamble to the code recognises the need for staff training. The banks have valuable experience of generating documentary evidence of compliance with the EFT code. A possible growth sector will be for consultants who can adapt to financial services the experience of industries who have needed to generate evidence of compliance with codes or requirements of trade practices or product liability legislation.

Conversely, the code may facilitate the customer's ability to use to advantage a bank's failure to comply with good banking practice in a disputed transaction.

Section 2.2 of the code may be interpreted as an incorporation of the provisions of the code into a particular bank-customer contract. Section 1.2 provides that a bank "will be bound by this code" in respect of relevant banking services and relevant customers from the time of public announcement of the code.

Both provisions are more specific, in terms of enforceable obligation, than the NZ code, which (in clause 1) by implication refers to adoption and describes itself as an exposition of "minimum standards of good banking practice to be observed by Member banks of the New Zealand Bankers' Association when dealing with their personal customers in New Zealand".

The UK code describes itself as exhortatory:

> "This Code set out the standards of good banking practice to be observed by banks, building societies and card issuers in their relations with personal customers in the United Kingdom. Individual customers will find the Code helpful in understanding how every bank, building society or card issuer subscribing to the Code is expected to behave towards them.
>
> It is a voluntary Code which allows competition and market forces to operate to encourage higher standards for the benefit of customers."

It is possible that, by reason of section 2.2, the provisions of the Australian code constitute terms of relevant bank-customer contracts, creating reciprocal obligations and rights for both bank and customer.

A bank could also expect to be estopped from denying the enforceability against it of relevant code provisions if a customer reasonably relied on those provisions and would suffer detriment if the provisions were not enforced against the bank. It would be difficult however to establish such an estoppel if a bank omitted to carry out code obligations which had not been publicised. For instance, many code provisions require publicity of prudential warnings or information. A customer who acted in the absence of such a warning would have difficulty establishing the relevant reliance. Mutual acceptance of the code may create a conventional estoppel, which would give opportunity for a bank to enforce provisions in the code which are for its benefit.

In circumstances of omission, a bank's silence may constitute a contravention of section 52 of the *Trade Practices Act* or its State or Territory equivalents in Fair Trading legislation.

The code may also facilitate the admissibility and cogency of evidence of recognised banking practice in banking cases outside the arena of statutory defences in respect of conversion of cheques: compare *National Commercial Banking Corporation of Australia Ltd v Robert Bushby Ltd* [1984] 1 NSWLR 559 at 574-575; on appeal, *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251 at 283 et seq, 288 et seq, 298-299.

There may also be scope for further scope for undermining the doctrine of privity of contract if the code forms a contract between participating banks for the expressed benefit of classes of customer, though this seems less likely to foresee than the banking ombudsman scheme which is based on clear contractual agreements between the participating banks.