CODE OF BANKING PRACTICE

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If you treat the Code as setting out high standards for banks, I take it everybody here must make that assumption, then Greg's paper certainly meets the standards in the Code itself. Clause 2.1, it has to be in English — his was, it has to be consistent — I was told once that I was being consistent, so I regard that as a compliment, it has to be clearly expressed — you might be interested in a bit of history about how that got there. The Commonwealth task force had the notion that banking documents should be in plain English and others were not sure what plain English meant in that context. When the banking task force was told that clearly expressed was plain English for plain English, they agreed to the inclusion, but I must say I think they were very suspicious about the change! And finally in clause 2.1, there is an obligation to draw attention to all important aspects of the Code, and Greg's paper certainly has done that.

That is not to say, however, that the document is perfect. Looking at it from my point of view for about the twentieth time, there are aspects of it which will cause concern to bankers, and partly some of these problems were unavoidable. There is a serious problem, I think, about precisely what the Code is intended to, and what in fact the Code does cover. It provides that it covers banking services, and it defines what banking services are to be for the purposes of the Code — deposit, loan or other banking facility. But nowhere do you find in the Code what this other banking facility might be. And the problem about it is that the nature of banks' activities seems to change so regularly, especially when you compare banks' activities today to the good old-fashioned days of the turn of the century, that it may be impossible to determine whether a particular activity undertaken by a bank, a particular service provided by a bank to its customer, is to be classified as a banking facility or not. And if you look at the range of products now being offered by all major trading banks, there will be some difficulty about this aspect of the Code.

The fact was that it was impossible for people to devise a comprehensive list of facilities provided, or services provided by a bank to its customer, to be workable. So this sort of general expression had to be used, knowing in advance that it will cause, or may cause, some difficulty. I might say that there are other phrases in the Code, perhaps not quite as likely to cause as much concern as the definition of banking service, which are also vague and ambiguous, and will help the lawyers in due course. For example, in clause 2.1 there is a reference to an ongoing banking service. I have been trying to work out what the difference is between an ongoing banking service and a non-ongoing banking service, and I cannot work that out.

I think that one of the things that is going to be of serious concern arises from what I understand to be one of the central objects of the Code, and that is to provide information to customers. It is true that the Code does not require banks to do more than provide information in most circumstances. But there is a composite obligation of a type. Detailed information must be provided to customers in respect of certain services. In some cases

advice must be provided to customers about the transaction to be entered into. When banks are positively required to provide information and advice, they tend to move outside their area of traditional activity, which is to meet a customer's demands (if the bank feels like doing that), and do take on a different standard of responsibility so far as the customer is concerned.

The original task force document in effect said that banks should become advisers to their customers. The banks quite properly resisted that because of the very clear risks that they would be confronted with becoming, in effect, financial advisers to their customers. But whilst the Code has, I think, struck a not unreasonable balance between a bank providing information and not constituting itself as an adviser, I think that the Code does, if implemented fully — as it will be — run the risk of taking banks outside their normal relationship with customers. Obligations to provide information can inevitably have dangerous consequences — information can be incomplete, information can be unintentionally wrong, and the provision of advice can change the legal duties owed by a bank to a customer. And I think that the banks will find that unless the staff who deal with customers are not only given information about this Code and how it is to operate, but are carefully trained to make sure that they do not transgress and convert the bank to a financial adviser to the customer, banks can see themselves being imposed with a whole range of liabilities which heretofore they have been able to avoid, at least in most cases.

Just by way of example, the foreign currency transactions that have to be dealt with. It is true that what the Code contemplates is a bank doing no more than a prudent bank would do in any circumstance, but a bank is now required to inform a customer of the availability of mechanisms, if they exist, for limiting risks on foreign currency transactions. Now to do that, that is to satisfy that type of obligation, the bank may have to give quite detailed information, making sure that it is understandable and is done in a comprehensible way, and that requires the staff of the bank who are going to be providing that information to have expertise and skills they may not have had in the past. So I think the inevitable consequence of the adoption of this Code is that the banks are going to have to put in place a very rigorous training programme for members of their staff, and maybe they will even have to select which members of their staff will carry out the obligations of providing information (which will inevitably include advice), just to make sure that some safe scheme is set up to avoid banks suffering liability.

There is another area that was of great concern to the Commonwealth task force which has been dealt with thus far pretty adequately by the Code, and that is in clause 15, which deals with the provisions of credit. The Commonwealth was very keen to have the banks not lend money to people who objectively should not borrow money from the bank. The Commonwealth wanted to set in place some objective criteria by which a bank should judge a customer's application for a banking facility.

The Code itself has avoided that, in a sense, by saying what sounds like a motherhood statement. That is, it sets out what a bank shall take into account when assessing a customer's application for funding — whether the customer has got sufficient income, why the customer is borrowing the money, and what the customer's assets and liabilities might be.

At the moment that sort of an obligation, which might be described, I suppose, as a non-obligation so far as banks are concerned, should not be of much concern. But I do not think that the general thrust of that provision is one which is going to go away in the future. I suppose it depends on how things turn out in the next three years or so, but I suspect that this is a provision which the Commonwealth is going to revisit in an attempt to impose objective standards on banks in relation to the provision of finance to customers, so as to impose liabilities on a bank by restricting their ability to recover and so on from customers, in circumstances where the bank should not have lent money to a customer. Now, as I say, I do not think that the Code goes that far yet. The Commonwealth certainly wanted it to do that, but this is an encroachment.

Another area that I think (both good points and bad points I suppose) has to be considered is the resolution of disputes. The internal process — that seems satisfactory enough. It is the

external process that might be of concern. It is not quite the Ombudsman scheme, but it is not dissimilar to it. What it does do, and I suppose it depends on whether you think that it is an acceptable procedure or not, is provide that the impartial external review procedure, that is, the review of disputes between banker and customer, is to be sorted out by the adoption of legal rules. Thus, the external review procedure will take into account what the contract between the parties is and what breach, if any, there might be of the contract, but also what is fair to both the customer and the bank.

Most lawyers would resist the notion that any dispute should be resolved by reference to the idiosyncratic views of the decision-maker. But the Code requires that to be done. That is, you are entitled to resolve a dispute with a bank by reference to general notions of fairness, not fairness according to law or fairness according to any principle, but just what the particular decision-maker thinks in a particular case is a fair thing. That, I think, is unwise — but it is there and nobody has a choice about it at the end of the day, I suspect. But it does show how those trying to impose these sorts of obligations on banks and to providers of other services in the community, want to move away from strict legal principle and the application of rules of law to solve disputes into a general area of what is fair and equitable, regardless of what the legal rights and merits might be.

Like all lawyers (they never agree on anything), I did disagree with one thing that Greg said. It is a minor point, it is about the adoption of the Code. I recall it was quite specific in its intention and may have failed to achieve the result, that is, whether the banks can adopt the Code for particular services rather than adopt the Code for all the services. Greg seems to have read the provisions as allowing the former. I think not. But in any event it is a nice legal problem about how the Code gets adopted by a bank. It says that it becomes binding when the banks say publicly that they adopt the Code. Now the Code might say that, but no lawyer can agree with that because making a public announcement that you are going to do something does not bind you to do anything. It will become binding when the banks write into their terms and conditions that the Code applies, or incorporate the provisions of the Code in their terms and conditions in some other way.

One question which is very important which has not been dealt with by the Code and will have to be sorted out on a case-by-case basis is, once adopted, what are going to be the legal consequences of a breach of the Code. That is, does it go to the enforceability of the security, does it give rise to a claim in damages? Probably there is no universal answer — it will depend on the nature of the breach, the circumstances in which the breach occurred, if a breach occurs, and perhaps even the consequences of a breach. I suppose it was impossible to deal with those sorts of things in a Code which proscribes or sets out standards of conduct, not intended to say what the legal consequences might be.

I just want to finish off by saying what I think are some of the main benefits or some of the most significant benefits of the adoption of the Code so far as banks are concerned. Greg points out, perfectly correctly, and it is one of the objects of the Code, that it is to avoid disputation by putting particular classes of customers in possession of sufficient information about the service which they are going to undertake, to make disputation unlikely. So that is a clear positive for banks — not for lawyers.

The dispute resolution provision in the Code is also common sense. That will no doubt help banks sort out any disputes. The internal resolution procedure should in most cases work satisfactorily. If it does not, the external dispute resolution procedure should, for the majority of cases, ultimately finally dispose of a problem. Again, good for banks, not good for lawyers.

The one thing that I think is important, which I do not know whether it got by anybody or not, is the privacy and confidentiality provision. In fact there the banks get a real positive result rather than have imposed on them a set of obligations. The ability of a bank to release what would otherwise be, or what ordinarily would be, private and confidential information of a customer to related entities of the bank, is quite important. Prima facie, that sort of conduct is impermissible without the consent of the customer.

Whilst impermissible, it is often illogical, because of the way that banks organise their services (or some banks) through separate corporate divisions. This means that the obligation of confidentiality which is owed, sometimes does not coincide with commercial common sense. I suppose lots of legal principles do not coincide with commercial common sense, but at least the particular problems that confronted banks who had no internal divisions of operation, but operation through separate corporations, has been dealt with. And it is going to be another area of interesting debate, because there is a limit to the purpose for which confidential information of a customer can be provided from the bank to a related company. It can be provided to the related company if it provides financial services which are related to or ancillary to those provided by the bank. And I would defy anybody to work out what that means. But it will give banks considerable scope where none existed, up until the adoption of this Code at least, for passing around information within the banking group itself without the risk of being in breach of contractual obligations of confidence to customers.

I think that is about all I want to say. Thank you.