CURRENT DEVELOPMENTS IN BANKING LAW

Recent Developments in Consumer Protection — The New Code of Banking Practice

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HISTORICAL OVERVIEW

If a starting point for the proposed code of banking practice has to be chosen, it is probably to be found in a document produced by a Treasury working group in September 1986 under the succinct title 'Recommended Practices to govern the relationship between the users and providers of Electronic Funds Transfer (EFT) Systems'. This document embodied a code which had been developed after a process of negotiation with State Ministers for Consumer Affairs and what has been described as 'other interests'. Although issued by a Commonwealth Government Department it was (and under its present title still is) self-regulatory in that it has no direct legal sanction and has been described (Jack Committee Report para 3.31) as resting on 'simple exhortation coupled with a monitoring role for Government and a threat of legislation if the code is not observed.' It has been observed (ibid) that 'it seems that this light touch has worked reasonably well in the Australian context.'

It is not proposed in this paper to deal with the EFT code of conduct even though, to some extent, some of the material in the paper involves comparisons with the codes of practice which are now in force in the United Kingdom and New Zealand and those codes do incorporate matters relating to EFT. The Australian EFT code of conduct has, however, long been the subject of separate studies whereas the function of the present paper is considered to be that of offering some introduction to the novel matter (so far as Australia is concerned) contained in the draft Australian code of banking practice which, with a very few exceptions, deals with aspects of banking practice other than those involving EFT.

The Australian moves towards a code of banking (as distinct from EFT) practice, like the 1971 amendments to the *Bills of Exchange Act*, can probably be said to owe their parentage to a report of a Committee appointed by the Parliament of the United Kingdom followed at a later stage by a report of an Australian committee. In the case of the bills of exchange legislation, the relevant committees were the Mocatta Committee in the UK and the Manning Committee in Australia. In the case of the code of banking practice, the committees were the Jack Committee in the UK and the Martin Committee in Australia. In the case of bills of exchange it took our Parliament 14 years to follow the legislative example of the UK. Our code of banking practice, when finalised, is unlikely to be equally tardy, but it is noteworthy that, both in relation to the cheque reforms and the introduction of a code of banking practice, New Zealand did not find it necessary to appoint any committees and quietly got in ahead of us and, indeed, (so far as the code of banking practice is concerned) a few days ahead of the United Kingdom.

The committee headed by Professor R B Jack in England was appointed in January 1987 and delivered its very weighty report in December 1988. In chapter 16 of its report, the Committee, after quoting Ogden Nash on the subject of conservative banks, dealt with what it described as 'second-tier' matters which

were those which were not considered suitable for legislation but had more to do with standards of banking practice. The Committee detected some shortcomings in current banking practice and considered the question whether improvements could be expected to occur 'as a result of simple exhortation in this report'. The Committee had little hesitation in answering this question in the negative, and its general approach was summed up (para 16.05) in the following passage:

> *'... we do not accept that, in the changing social perceptions of the times, good banking practice is a matter that can still be left, as it has been in the past, entirely to the discretion of banks. Banks must clearly continue to have a large say in it. But ... there is a legitimate public interest in the standards of banking practice set and applied by the industry, which should be reflected in some form of external assessment.'*

The Committee (para 16.08) concluded that something falling between statutory regulation on the one hand and laissez faire on the other, was required. They looked for an example to the then Australian EFT code (the 'Recommended Procedures') which was referred to (ibid) as follows:

> *'the Australian code of good practice on EFT ..., although compiled by a process of negotiation between interested parties and issued by the Federal Government itself, is self-regulatory in the sense that it has no statutory backing, and rests essentially on a threat of legislation if the code is not observed ... It was also shown that, in practice, all the major institutions have generally complied with the code, and that it has led to a marked improvement in the terms and conditions of banks' customer contracts, and a reduction in customer complaints.'*

While the Committee felt that there may be lessons to be learnt from the Australians' general approach, they expressed a preference for an alternative solution under which banks, including building societies, might be invited to formulate among themselves, within a specified period, an agreed code of banking practice which would respond to the specific recommendations of the report that concerned standards of best practice and were addressed to banks.

This is what in fact happened. A steering committee was formed on which the United Kingdom Association for Payment Clearing Services, the British Bankers' Association and the Building Societies Association were represented. This Committee issued a draft voluntary code in December 1990 with the assistance of an illustrative draft code constituting Appendix L to the Jack Committee's report, and a Government white paper responding to the report. The United Kingdom code in its final form came into force on 16 March 1992. The code is designed to be enforced by the UK Banking Ombudsman. There is, however, no formal monitoring. The code is regarded as self-regulatory and it is considered that every bank is on its best behaviour to comply. The reality, it seems, is that all banks are under such heavy pressure that if any one of them were to step out of line, the matter would quickly be brought to its attention.

Developments in New Zealand were influenced by a number of factors which included the recommendations of the Jack Committee and the UK Government's response to it, the establishment of the Australian Banking Ombudsman system, and the growth of concerns relating to such issues as privacy, confidentiality and banking practices generally. The development of a Banking Ombudsman system in New Zealand, for example, was seen as inevitable and relatively congenial since the Australian banks operating in New Zealand were already becoming familiar with the similar system which had begun to operate in Australia in 1989.

New Zealand was unique, however, in that its code of banking practice came before, rather than after, the establishment of a Banking Ombudsman scheme. As mentioned above, it was also unique in that it was not preceded by any parliamentary or other committee, although the submissions received from the public were reviewed by an independent expert. It is similar to the UK system to the extent that the New Zealand code was drawn up, with the help of input from the public and the NZ Ministry of Consumer Affairs, by people in the industry (the New Zealand Bankers' Association) and, in common with the UK code, the document represents an attempt to codify what the banks themselves regarded as minimum

standards of good banking practice. In this respect it is markedly different from the prospective Australian situation. The New Zealand code has neither statutory nor contractual force, but the situation is that all banks which belong to the New Zealand Bankers' Association are required to observe the code of practice and, since para 21.3 of the code requires subscribers to the code to do so, it follows that they also participate in the New Zealand Banking Ombudsman scheme. The New Zealand code was not, of course, adopted out of sheer altruism. It was a response to consumer pressure and was no doubt adopted in the hope that it would render statutory regulation unnecessary. It began to operate on 1 March 1992.

There seems to be some doubt about whether or not the New Zealand code has legal effect, but one would think that since the practice of bankers is an important element in the banker-customer contract and since, on the matters to which it refers, the code lays down minimum standards which, in the view of bankers themselves, should be observed, it seems unlikely that a bank could be heard to say that its practices may legitimately reflect lower standards than those laid down in the code. At the same time, if the banks are anxious to pre-empt the enactment of legislation dealing with banking standards then, as Mr Forrie Miller of Chapman Tripp Sheffield Young has observed in a paper dated November 1991, it seems unlikely that a bank would go to court and argue that the code is legally meaningless. Mr Miller has also pointed out that the law of representation and estoppel may also come into the matter. If a bank has represented that it will conduct itself in a certain way, then it may well be held to that representation even if, in practice, it has conducted itself in terms of a somewhat lesser standard. Similarly it has to be assumed that the New Zealand Banking Ombudsman and the judges administering any relevant legislation will be unimpressed by performances falling below the standards laid down by the code.

Turning now to Australia and relying, as ever, on the *Sydney Morning Herald* (1 June 1992), it appears that following the recommendations of the Martin Committee the immediate impetus for the establishment of a code of banking conduct came from a submission made to Cabinet by the Federal Treasurer in June 1992. The submission contemplated the establishment of a working group made up of representatives from the Treasury, the Reserve Bank, the Trade Practices Commission and the Attorney-General's Department. The theory was, according to the Treasurer's announcement, that the working group would be expected to consult closely with banking and consumer groups in working out the code.

The Treasurer's submission contemplated that the working group would be chaired jointly by the Treasury and the Trade Practices Commission, and this has occurred. The Treasurer's submission contained the significant, if somewhat chilling, observation that after the code has been completed, a monitoring group will ensure that banks adhere to it.

Thus, in the light of events which have happened in the United Kingdom and New Zealand, and with a particular impetus supplied by the Federal Treasurer's substantial endorsement of the relevant recommendations made by the Martin Committee, we now have for consideration and input, at least from the banking industry and consumer groups, the first draft code of banking practice which is the subject of this paper.

To sum up the historical aspect of this matter, the following schedule of relevant events is submitted:

September 1986	Issue of 'Recommended Procedures to govern the relationship between the users and providers of electronic funds transfer (EFT) systems'.
December 1988	Jack Committee Report (UK).
January 1991	The present EFT Code of Conduct.
November 1991	Martin Committee Report (Australia).
March 1992	New Zealand code of banking practice came into force. UK code of practice came into force. TPC Report on Guarantors.

June 1992	Treasurer's submission to Federal Cabinet.
November 1992	First draft Australian code of banking practice released to specific interest groups.

OVERVIEW OF DRAFT CODE

It is intended that, by courtesy of the Task Force, the text of the existing draft code will be made available to all delegates who attend the session at which this paper is to be delivered. In addition, an indication in summary form of the matters covered by the draft code may be gleaned from Table 3 (Comparison of Australian draft code with UK and New Zealand codes) which appears in a later section of this paper.

There are three points which should perhaps be made at this stage.

The first is that the code, at least in its present draft form, is intended to rest on a different foundation from that which underpins, for example, the code of conduct ('the *Privacy Code*') relating to credit information files and credit reports. The *Privacy Code* is one which, by virtue of section 18A of the *Privacy Act* 1988, the Privacy Commissioner was required to publish in the *Commonwealth Gazette* and which, on publication, attained the force of law by virtue of section 18B of the *Privacy Act* which declares in so many words that a credit reporting agency or credit provider must not do an act, or engage in a practice, that breaches the *Privacy Code*.

The proposed code of banking practice, however, is intended, it seems, to rest on two different and separate bases. One of those bases is best described in the words used by the Jack Committee when discussing the EFT code of conduct. That conduct was described as resting on 'simple exhortation coupled with a monitoring role for Government and a threat of legislation if the code is not observed'.

Additionally, however, by virtue of section 2, the code is intended to become self-executing in the sense that the code itself declares that its provisions shall be reflected or incorporated by reference in the contractual terms applying to all retail banking products and services which institutions offer from its commencement date. It further provides that even in the case of existing contractual arrangements which are not bound as to time by existing written contractual terms, institutions shall develop and apply terms and conditions documentation consistent with the provisions of the code and will insinuate these into the existing contractual relationship by a form of offer and acceptance constituted by giving 30 days' notice of the relevant terms and conditions followed by the customer's continuing use of the relevant product or service. By this means the observance of the code under the influence of simple exhortation and a threat of legislation will eventually lead to a situation where exhortation and threats are no longer necessary because the very act of observing the code will lead to the creation of banker-customer contracts reflecting the principles of conduct stated in the code.

The second point is that although the present draft is entitled '*Code of Banking Practice*' it refers throughout to 'institutions' rather than banks. The use of the term 'institutions' is explained in paragraph 1.1 which declares in so many words that the standards which are set out in the code, even though described as 'standards of good banking practice', are intended to be observed not only by banks but also by other financial institutions so long as they are engaged in offering retail banking products and services when dealing with their personal customers.

The possibility therefore exists that the code, when ultimately in force, is capable of application to at least some of the activities of non-bank financial institutions, and in this connection it may be significant that paragraph 27.8(iv), when referring to external avenues of complaint resolution which may exist, does not refer to the Banking Industry Ombudsman Scheme but to 'ombudsman schemes' in general.

The third point relates to the method of exposure of the draft code up to the present time. It was intended (as this commentator understands it) to be exposed to the banking industry, to other groups such as building societies and credit unions whose members provide products which are similar to retail

banking products, and to consumer interests both at the governmental and the community levels. It was not released to the public generally or to the media. It has, however, received quite wide publicity. In the result there have developed widespread perceptions about the draft code which to a degree have been based on an inadequate knowledge of its terms and an inadequate appreciation of its status as a discussion draft.

It may now be appropriate to give a general indication of the form and content of the draft code.

The code begins with an introduction which contains some definitions which are designed to limit the application of the code to retail banking products and services. The introduction refers to the division of the code into four parts. It also indicates the starting date of the code, and refers to the fact that:

(a) The Australian Payments System Council (as to which, see the next section of this paper) will monitor the operation of the code and publicly report on its findings annually; and

(b) The code itself will be reviewed by the Commonwealth Government from time to time, and at least every three years.

Section 2 of the draft code represents an attempt to introduce the code principles by one means or another into existing contractual arrangements where possible. It also declares that the provisions of the code are to be reflected or incorporated by reference in the contractual terms applying to all retail banking products and services which institutions offer after the commencement date.

Section 3 defines the objectives of the code which are stated to include the definition of standards of good banking practice and service, the definition of a set of key provisions that are fair and balanced, and the promotion of clarity in the relationship between institutions and their customers.

The status of section 4 is presently unclear. It may simply constitute drafting instructions or it may be intended to state fundamental principles. Basically, it declares that institutions and customers have an overriding obligation to deal openly, fairly and honestly with each other.

Section 5 in its various subdivisions requires that terms and conditions documentation be issued and lays down some rules as to the manner of expression of this documentation and the incorporation of other documentation by reference. It also deals with the manner in which terms and conditions promulgated in accordance with the code may be insinuated into an existing contractual relationship.

Section 6 deals with the availability of terms and conditions documentation and the disclosure of certain matters regarding fees and interest before a contractual relationship is entered into.

Section 7 deals with the opening of accounts and the obligation to explain the important terms and conditions applicable to any new account or service.

Section 8 deals with a number of aspects of variation to contractual terms and conditions and the periodical consolidation of variations.

Section 9 deals in considerable detail with matters which must be stated in terms and conditions documentation.

Sections 10 to 14 deal with additional information which is to be incorporated or otherwise disclosed or discussed in terms and conditions documentation relating to particular products including deposit accounts, loan products, cheque accounts, EFT cards, other payments services and foreign exchange services.

Section 15 is concerned with interest rates and charges.

Section 16 refers to a disposition within the task force to promote the use of summary statistics by consumers but, in the first draft at least, consists of nothing more than a brief discussion of some of the issues.

Section 17 for some reason displays a particular sensitivity in relation to the combination of accounts.

Section 18 contains nine sub-paragraphs dealing with privacy, access to information and the like.

Section 19 displays no interest in any defences which may be available to an institution by law but simply declares that institutions shall not deny to their customers the right to receive compensation for losses incurred as a result of fraud or negligence by the institution's employees or its agents acting in the course of their employment or agency.

Section 20 deals with the loss of credit cards, debit cards, cheque books and passbooks and related admonitions and notifications to customers. Section 21 deals with the provision of statements of account.

Section 22 is designed to relate the provision of credit to an assessment of the applicant's ability to repay. It is particularly concerned with the taking of mortgages and the sources of information to which regard may be had when assessing the customer's income capacity to repay the secured loan.

Section 23 deals with subsidiary credit cards.

Section 24 deals in ten sub-paragraphs with the matter of guarantees and third party securities and is concerned with such matters as the provision of information to the guarantor both before the execution of the guarantee and while it remains in force. This section is also designed to stress the character of the guarantee as a secondary liability, and to deal with the right of the guarantor to extinguish his or her existing and any future liability.

Section 25 leaves banking considerations aside for a moment to deal with advertising, but section 26 goes back to the banking considerations involved in the closure of accounts.

Section 27 deals in nine sub-paragraphs with dispute resolution, and section 28 requires staff to be trained in a way which will enable the employer institution to meet the requirements of the code.

The draft code concludes with references to annual reports to the Australian Payments System Council (APSC) with complaints data and as to compliance with the code. The APSC in turn is required to report annually to the Commonwealth Government on the complaints experience and compliance with the code by institutions. Finally, section 30 reiterates that the code is to be reviewed by the Commonwealth Government in consultation with institutions and their respective associations, relevant State and Territory Government agencies and consumer representatives at least every three years.

THE AUSTRALIAN PAYMENTS SYSTEM COUNCIL

Since this is a body which some delegates may not have encountered, a few words of description may be in order.

The APSC was established by the Commonwealth Government in June 1984 to oversee the evolution of the Australian payments system. It is required to have regard for public interest objectives, including aspects of competition between financial institutions and the stability of the financial system. It issued a very useful publication entitled 'The Payments System in Australia' in November 1990 and it also issues annual reports and other publications.

As an indication of the make-up of the APSC, its members as at September 1992 consisted of representatives of the following:

- Reserve Bank of Australia (Chair)
- Australian Association of Permanent Building Societies Inc
- Australian Finance Conference
- Small banks
- Commonwealth Bank of Australia
- Credit Union Services Corporation (Australia) Limited
- National Australia Bank Limited
- Australian Merchant Bankers' Association
- State Banks' Association
- Telecom Australia
- Australian Association of Permanent Building Societies Inc
- Australia and New Zealand Banking Group Limited
- The Treasury
- Westpac Banking Corporation

The executive of APSC consists of a Reserve Bank nominee as Head, together with an Executive Officer and a Secretary. A representative of the Australian Retailers' Association attends meetings of APSC when there are matters of interest to retailers, and the Council's constitution also includes provision for a representative of consumer interests.

COMPARISONS AND JUXTAPOSITIONS

It may well be instructive to make certain comparisons and juxtapositions. The Tables appearing at the end of this paper are designed to present these as follows:

1. Table 1 shows relevant recommendations of the Jack Committee, the UK Government's response to those recommendations, and the provisions of the UK code of practice which reflect those recommendations.

2. Table 2 shows the Martin Committee recommendations, the response of the Australian Government to those recommendations, the recommendations contained in the TPC paper entitled 'Guarantors - Problems and Perspectives' and the provisions in the draft Australian code which reflect the Martin Committee and TPC recommendations.

3. Table 3 contains a comparison (so far as it is possible) between the draft Australian code and the comparable provisions of the UK code and the New Zealand code.

COMMENTS AND CRITICISMS

A paper which contains more brickbats than bouquets is necessarily itself susceptible to criticism on the basis that it is destructive, one-eyed, or even the work of a hireling. The first draft code of practice has, however, been issued for the purpose of generating input. It would be tedious to list the sections in the

draft which, in the view of any particular commentator, require no input because they are already acceptable. Input is only necessary in relation to parts of the draft which are considered to be otiose or susceptible of improvement. For this reason, the following list of critical comments is submitted in the hope that something constructive may come from it. It should not be regarded as a manifestation of destructiveness for its own sake.

The present draft must also be viewed in its proper context. The decision that the first draft should be prepared by a group who may loosely (and non-pejoratively) be described as public servants, rather than bankers, was made by Government and not by the group itself. The group can also be fairly described as well-intentioned in the sense that, totally in keeping with the spirit of the times and the wishes of government, they accept that greater transparency should attach to banking practices and documentation. They accept that the nature of the practices and the thrust of bankers' documentation should be apparent to the people who deal with bankers and obtain finance from them. They believe that the documents in which these disclosures are made should themselves be clearly and succinctly expressed. They are hopeful, too, that if comprehensible transparency can be achieved in relation to these matters, then litigation will be reduced while the task of the Banking Industry Ombudsman in making determinations based on good banking practice will be made easier and less contentious.

Having said this, it must next be said that in the view of this commentator the Australian Government has gone about initiating the development of a code of banking practice in the wrong way. This is said without any disrespect whatever to the people who make up the task force. It is said, however, for the following among other reasons.

1. Both the United Kingdom and New Zealand accepted that bankers are the persons best acquainted with banking practice and that they are sufficiently regardful of the reputations of their industry and their own banks and, indeed, their own personal reputations and credibility, to be well able to resist any temptation to prescribe or recommend sub-standard criteria of banking practice. On the contrary, it is generally accepted that in drawing up the codes which are now in force in the United Kingdom and New Zealand, the bankers concerned have pitched their minimum standards at a level which in some respects is likely to require their banks to lift their game to a level higher than was previously the case. Those in authority in those countries have appreciated the reality that any group of bankers which set out to propound a code with a view to forestalling legislative regulation, would realise that its efforts would be doomed to failure and, indeed, derision, if it were to produce a code which set unacceptably low standards.

   In Australia, however, the so-called land of deregulation, the first draft of the code at least is the work of a committee of non-bankers or (to be fair to the Reserve Bank representatives) non-retail bankers. It may be considered a matter for regret that the preparation of the first draft at least was not entrusted to a group of practical bankers, leaving it as a matter for public and governmental input to recommend the raising of any standards which the authors of that draft were considered to have set too low, and then perhaps (as occurred in New Zealand) engaging some qualified and impartial person to adjudicate upon the standards which should be set and, if necessary, upon the matters which do, or do not, properly belong in a code of this kind.

2. With every respect to any lawyers who may have been on the working party, one cannot fail to wonder whether there was a sufficient appreciation of the difficulty and complexity of some of the legal matters on which the draft necessarily impinges. This would include a perception of the permutations, combinations and possibilities which may arise in a variety of factual situations and an understanding of the careful positioning which is needed when it is borne in mind that over-simplification can lead to a charge of inadequate disclosure, while over-comprehensive coverage may give rise to information overload.

   It is, of course, desirable that people understand the nature of what they are signing and the consequences of what they do. The fact is, however, that published works on the incidents of the banker-customer contract and the ins and outs of documents such as mortgages and

guarantees tend to be bulky and of greatly varying comprehensibility. A fuller appreciation of this fact should perhaps have caused the authors of the draft to hesitate before prescribing, with a few strokes of the pen, the provision of the series of explanations of legal rights (many of which will be irrelevant in all but isolated cases) and commentaries on matters of law and practice, some of them very complex, which are called for in the first draft of the code. At some stage the very commendable desire that customers, borrowers and sureties shall be fully informed must be tempered by a practical appreciation of what this involves. It is respectfully suggested that more specialist legal input may have assisted the working party in better appreciating this fact.

3. One of the most unfortunate aspects of the way in which the introduction of this code has been handled is that the moderation of any of its provisions which may, on reflection, be found to be excessive has now been rendered more difficult than was necessary or desirable. As mentioned earlier in this paper, it is probable that many of the provisions of the draft code, which were probably intended to be tentative and provisional, have, rightly or wrongly, been taken in some quarters to represent terms which, in the view of the Government, should appear in a code of banking practice. This, in turn, gives rise to the possibility that any departure from them is going to be seen as a submission to pressure from big business and a sell-out of vested consumer rights.

   It seems clear that this was not intended by the working party one of whose members has described the first draft as a 'chopping block' intended to constitute nothing more than a basis for discussion. Questions now arise, however, about what will happen in practice if consumer pressure makes it politically impossible for some of the provisions in the present draft to be moderated. With the best will in the world, a situation which in some respects may well be impossible has been allowed to arise.

It is now appropriate to consider the draft code in greater detail and in doing so it should be noted at the outset that some of these comments may well be of no more than ephemeral interest since a further draft code is on the way. Dr Tamblyn has indicated to the author of this paper that a number of areas of the first draft code are likely to be modified in the second draft. However, no details are yet available and so there is no alternative but to deal with the draft code as we presently find it.

It should also be said that, except where otherwise noted, the passages to which the following comments relate are unique to the Australian draft and, so far as it has been possible to ascertain, have no counterparts in the UK or New Zealand codes.

1. The detailed comments on the first draft code commence with paragraph 1.4 with particular reference to the proposition in that paragraph that the code 'operates without prejudice to Commonwealth and State Government laws and regulations concerning retail banking products and services'. The words 'without prejudice' may mean that if a particular matter is already governed by law, then the comparable provision in the code may be disregarded. Should this be the case, it would seem that some proportion of the draft may immediately be discarded and it can fairly be asked why those provisions were ever included. If, as is probably the case, the words 'without prejudice' were intended to mean that in case of conflict the code is to prevail, then we are confronted by the extraordinary situation that in relation to matters where the code on the one hand and the statute law of Australia on the other are in conflict, the views of the non-elected authors of the code are to prevail over those of the elected representatives of the people of Australia. This may be considered a very serious situation indeed, particularly when, as will be seen, the draft code trespasses upon a number of matters which are already regulated by law.

   The following are some examples of areas of the draft code which impinge upon matters which are already covered by the statute law:

   (a) **Paragraph 7.1**. This says nothing which is not said by the *Financial Transaction Reports Act* 1988.

(b) **Section 18**. This apparently assumes that the already draconian and unworkable requirements of the *Privacy Act* 1988 do not go far enough.

(c) **Section 25**. This appears to assume that the exigencies of the Trade Practices Commission's advertising code are inadequate.

2. The draft code does not expressly state that its provisions are to prevail over the rules of the common law in the same way as they are arguably intended to prevail over the rules of statute law. However, the implication is fairly strong that in cases of conflict, the code is intended to prevail over the common law. It is inconceivable that the authors of a draft code of banking practice were not aware of the relevant rules of the common law, and so the questions which arise include these:

(a) In cases where the code merely reproduces the rules of the common law, why was it considered necessary to add to the length of the code by repeating those rules?

(b) In cases where the code is more restrictive than the rules of common law, why should the work of the judges be set at nought by procedures other than those traditionally observed in cases of perceived serious judicial error, ie that of taking a test case to a higher court or that of encouraging the peoples' elected representatives to pass remedial legislation. Where, in short, is Dicey's rule of law?

The areas covered by the draft code which may be considered to be already covered by the common law include the following:

(i) **Para 17.1**. The rule that set-off may only be exercised where the accounts in question are operated by the same person or persons and are held in the same right: **Garnett v McKewan** ((1872) LR 8 Ex 10).

(ii) **Para 18.4**. Exceptions to the duty of confidentiality: **Tournier v National Provincial & Union Bank of England** ([1924] 1 KB 461). In referring to this example it has to be acknowledged that similar duplications are to be found in the UK and New Zealand codes which have been impliedly commended as having been drawn up by practical bankers.

(iii) **Para 26.2 (read in conjunction with para 8.1)**. Necessity to give 30 days' notice of intention to close an account. This may be considered to give inadequate attention to the proposition in **Prosperity Ltd v Lloyds Bank** ((1923) 39 TLR 372) that in some cases, 30 days' notice may be inadequate and, inferentially, that in other cases it may well be excessive.

(iv) **Para 19.1**. Cases where, by virtue of such concepts as contributory negligence, waiver and estoppel, legitimate defences are presently available by law to a bank even though it has allegedly been negligent.

(v) **Para 24.8**. The existing, and perfectly adequate, rules of the common law concerning the variation of the loan contract or the contract of guarantee, and exemplified by such decisions as **Ankar Pty Ltd v National Westminster Finance (Australia) Ltd** ((1987) 61 ALJR 245) and **Bond v Hongkong Bank of Australia Ltd** ((1991) 25 NSWLR 286).

(vi) **Para 24.10**. The existing rules as to the nature and extent of the liabilities (eg liabilities which have not yet matured) for which a guarantor must make provision or remain liable when he gives notice of desire to discontinue his liability: see, for example, Re **Dehy Fodders (Australia) Pty Ltd** ((1973) 4 SASR 538), albeit in a slightly different context.

3. There are also a number of respects in which the provisions of the draft code may be considered to be seriously impractical. These include the following:

(i) **Para 5.1**. On this commentator's understanding at least, it is not the case that 'all retail banking products and services' necessarily involve anything which could be dignified with the expression 'terms and conditions'. Examples which spring to mind are the purchase of bank cheques, the purchase of travellers' cheques and the remittance of funds overseas.

(ii) **Para 5.2(ii)**. How (it may fairly be asked) is contractual documentation to be drawn in a manner which, while remaining legally effective, is 'sensitive to the needs of persons from non-English speaking backgrounds and their special needs'?

(iii) **Para 7.3**. The formal adoption of a provision of this kind can hardly fail to open the way for the type of decision reached in **Corbett v State Bank of New South Wales** (unreported, SC of NSW, Hodgson J, judgment 20 October 1992) that an explanation given to a wife made no impression on her because of the influence being exerted by her husband, and that in **Westpac Banking Corporation v Koloff** (unreported, SC of NSW, Rogers CJ Comm D, judgment 18 November 1992) where an explanation was held to be inadequate although the parties were with the bank manager for over an hour which included approximately 20 minutes of explanation. One wonders how the institutions in the United Kingdom have accommodated themselves to the comparable provision which appears in para 3.4 of their code.

(iv) **Para 8.3**. It may be considered excessive and impractical to require written confirmation of temporary verbal changes in standing arrangements such as the granting of temporary overdrafts or temporary excesses over agreed limits, particularly as these are normally, if not invariably, entered into at the urgent request of, and for the benefit of, the customer.

(v) **Para 9.1(vi)**. It may well be impracticable to anticipate the costs which may be incurred if the negotiation and documentation of changes in terms is prolonged or contentious.

(vi) **Para 10.1(iii)**. The concept of an account 'lapsing' is one which is unfamiliar to this commentator. If it is equally unfamiliar to bankers, then it may be considered impractical to require bankers to incorporate written information relating to this concept in their terms and conditions documentation.

(vii) **Para 14.2(iii)**. Bearing in mind that the code is intended to deal with domestic customers who make infrequent, or in any event insignificant, remittances of moneys overseas, it may be considered that the reference to 'the availability of mechanisms for limiting ... risks', while frequently encountered in (and probably inspired by) the offshore loan cases, is out of place in the present context.

(viii) **Para 15.6**. The perceived evil towards which this paragraph is directed is not immediately apparent to this commentator at least, although it was apparently meaningful to the authors of para 4.3 of the UK code from which it may have been derived. Presumably the word 'charges' has been used advisedly and is not intended to cover interest. The quarantining of charges from the balances on which interest is electronically calculated would appear to be a practical impossibility.

(ix) **Para 17.1**. It is unclear why, by virtue of an appropriately framed contract, default in obligations other than payment obligations may not constitute a trigger for a combination of accounts.

(x) **Para 17.2**. The draft does not appear to recognise the pragmatic fact that if customers are informed in advance before a combination of accounts is effected, then the credit funds will undoubtedly disappear before the date for combination arrives.

(xi) **Para 18.5(I)**. At the very least, the institution's obligation to maintain accurate customer information should be conditioned upon the provision of accurate and up to date information by the customer. An obligation *in vacuo* to keep an institution's information accurate to the extent necessary for its actual or intended use is quite impracticable if the customer supplies inaccurate information or fails to supply up to date information at all.

(xii) **Para 22.2**. This provision fails to take account of the situations, such as property developments, which involve the purchase of land and the development of that land to enable the loan to be repaid. Certainly, developments of this kind have given rise to problems in the past, but they should not be totally prohibited. The provision would also appear to outlaw bridging loans which are an important and, indeed, indispensable factor in many cases involving the sale of one home and the purchase of another.

(xiii) **Para 24.1**. The sentence discouraging indemnities appears to be directed towards an evil which does not exist. If, on the other hand, it is directed towards the common provision under which, in the event of the moneys secured being irrecoverable on the footing of a guarantee, they may be recovered on the footing of an indemnity, then it strikes at the root of a long-standing and valuable convention which, so far as can be ascertained, has given rise to no injustices against sureties but has, on occasion, protected lenders themselves from injustice.

(xiv) **Para 24.2**. The Commonwealth Government itself, in its response to the Martin Report, has expressed its opposition to any provision along these lines. The implementation of this provision would be quite inimical to the granting of come-and-go overdrafts. The provision does not even allow for the possibility of a specified maximum as distinct from a specified amount.

(xv) **Para 24.4**. See the earlier comment on para 7.3 and the response of the UK Government to recommendation 13(5) in the Jack Committee Report which was, in short, that it is not appropriate for banks to explain the legal effects and possible consequences of guarantees.

(xvi) **Para 24.7**. The reference to institutions 'in accordance with [their] usual practice' providing the guarantor with a copy of the statement of account in respect of the guaranteed facility is simply not understood. This commentator's understanding is that, quite apart from the exigencies of the *Privacy Act*, the rules of the common law simply do not allow the provision of this kind of information in relation to the liabilities of a debtor except in the very unlikely and uncommon case of the debtor's having consented to this being done.

(xvii) **Para 24.9(1)**. The practicability of this provision may depend upon its interpretation and, at best, it offers infinite scope for argument about what constitutes 'all reasonable steps'. If the debtor is bankrupt, for example, does the institution have to wait for a final dividend? If the guarantor is wealthy and the debtor has nothing left but his furniture, is the institution obliged to seize and sell the furniture before proceeding against the guarantor?

(xviii) **Para 24.9(ii)**. The concept of a guarantor 'taking over' the obligations of the borrower is one with which a banking lawyer is not readily familiar. A guarantor may acquire certain rights by subrogation, but the performance of his obligations is not normally regarded as an act of novation.

(xix) **Para 26.1**. The matter may be covered by the reference to 'any relevant terms and conditions' and this may be what the authors of the New Zealand code had in mind when framing para 2.4 of that code. However, this paragraph would be more attractive on its face if it were to recognise that in the case of an account which is in debit, the closure of the account will certainly be dependent upon the customer's satisfaction of the relevant debit balance and the elimination of, or making of provision for, any contingent or unmatured liabilities.

(xx) **Para 26.3**. Since all work within a bank is performed by salaried staff, it may well be impossible to quantify the 'actual costs involved' in closing an account. The practical effect of this paragraph, if implemented, may therefore be that none of the undoubted opportunity costs involved in closing an account may be recoverable.

(xxi) **Paras 27.6 and 27.7**. These paragraphs appear to assume that in the case of all disputes nothing other than 'investigation' is required. In practice the resolution of disputes may well involve the determination of questions of law or a balancing of right and wrong leading to a mutually acceptable settlement.

4. A matter for some concern is the repeated use of subjective expressions. Examples include:

- *'important'* - paras 7.3 and 28.1(iii)
- *'key rights'* - paras 5.2(iii) and 5.3
- *'significantly'* - para 8.3
- *'where possible'* - para 7.3
- *'effectively'* - para 15.6
- *'where feasible'* - para 17.2
- *'encourage'* - para 20.1.

5. There are a number of instances where the requirements as to documentation appear to be excessive or impossible of satisfaction, particularly if the documentation is prepared with a full appreciation of the legal complexities which can arise in relation to the relevant matter. The question inevitably arises whether compliance with the exigencies of the draft code will not lead, almost inevitably, to the kind of evil which was present to the mind of the author of the *Contracts Review Act* 1980 (NSW) when, in listing the matters to which the court shall have regard, he referred to 'the physical form of the contract and the intelligibility of the language in which it is expressed'. At the same time, the relevant provisions appear to pay inadequate regard to the more pragmatic and, it is suggested, more common sense view exemplified by the decision of Grove J in **Bernhardt v Brassington** (unreported, SC of NSW, judgment 10 February 1993) that the detailed explanation of a mortgage and guarantee which was contended for by the mortgagor's counsel was quite unrealistic and that the nature of these documents is 'hardly esoteric'.

Examples of requirements which, it is suggested, involve an element of overkill or a lack of appreciation of the complexity of the issues involved, include the following:

(i) **Para 9.2(I)**. The decided cases demonstrate that there are many instances (frequently involving the implication or non-implication of an agreement to keep the accounts separate) where the right to combine accounts may well be contentious and quite incapable of being briefly outlined in a bland statement.

(ii) **Para 9.2(ii)**. It is only necessary to refer to section 18N of the *Privacy Act* 1988 to appreciate that a bank's obligations with respect to customer privacy cannot be set out briefly.

(iii) **Para 9.2(iii)**. It is assumed that what a bank is required to do under this paragraph is to outline its rights to vary or terminate the provision of the relevant product or service, rather than (as the words may be taken to suggest) supplying an academic discourse upon its rights to vary or terminate the provision of products or services in the abstract. It would clearly be preferable for the provision to be expressed in the manner which was presumably intended.

(iv) **Para 9.2(iv)**. It may be that the author of this paragraph entertained the hope that, in the interests of being good fellows, banks will commit themselves in advance to make full compensation for the consequences of any negligence of the part of their employees and agents, without regard to the wide variety of situations in which negligence can be a factor, or to the defences (referred to earlier) which by law may be available to them notwithstanding their own negligence. There appears to be no reason why banks should abandon any of the defences which the law has seen fit to confer upon them and, this being so, it may be considered virtually impossible for banks to visualise and document in a form which a court would regard as intelligible, an exhaustive outline of the situations which may apply in cases where there has been negligence on the part of their employees or agents.

The proposal also fails to take account of the very important questions which may arise in relation to consequential loss.

(v) **Para 9.3(i)**. Any information supplied in obedience to this paragraph would necessarily involve touching, at the very least, upon decisions such as those in **Brown v Westminster Bank Limited** ([1964] 2 Lloyds Rep 187) and **Greenwood v Martins Bank Limited** ([1932] 1 KB 371) and this alone would be enough to stun the customer into incomprehension. It may also be asked how a bank can fairly outline to a retail customer the differing views which exist in relation to the question whether the decision of the Privy Council in the **Tai Hing** case ([1986] AC 80) will be followed in Australia.

(vi) **Para 12.2**. The provision of the information referred to in this paragraph would require little short of a textbook, and even so would fail to supply information, which in a particular case may be of greater relevance, as to the remaining hundred or so sections of the *Cheques and Payment Orders Act* 1986, not to mention the common law. Failing the provision of such a treatise it will always be open to a court to hold, in the best *Contracts Review Act* manner, that something significant was missed. For example:

- What happens when a cheque is dishonoured may well go far beyond the fact that the drawer's account is re-credited and the depositor's account is debited. The position as between drawer and the payee may well need to be discussed, but this is surely not a matter on which either a drawee or a collecting bank should presume to give legal advice.

- The circumstances in which a cheque may be dishonoured are also infinite, and the consequences of overdrawing the account may well be unforeseeable at the time when the account is opened.

- The effect of an alteration to a cheque depends, among other things, on the court's perception of the nature of the alteration and who did it and why.

- The effect of placing an 'account payee' crossing on a cheque is still open to debate in the courts and among commentators.

- The reference to the 'handling', as distinct from the effect of, cheques which have words added to them is incongruous and in any event the effect of words added to a cheque must necessarily depend on the content of those words.

- The most important aspects of a bank cheque, eg clearance times and the fact that in certain circumstances payment may be refused, have not been mentioned.

- The cost of a special clearance may well depend on which kind of special clearance is employed and the distance between the branch of domicile and the branch of deposit.

6. This section concludes with a number of isolated but, it is hoped, not nitpicking observations:

(i) **Para 3.1 (ii) and 3.1 (iv)**. It is perhaps significant that para 3.1 (iv) contains a reference to cost effectiveness but the remainder of paragraph 3.1 does not. Just as it is the practice for every Act introduced into Parliament to be accompanied by a cost impact statement, it would be of very great interest to have a cost impact statement in relation to the implementation of all the recommendations contained in the draft code. In the end, of course, these costs have to be borne by the institutions' customers.

(ii) **Para 22.2(ii)**. Having regard to the stress on income capacity in sub-paragraph (i), it is extraordinary that the institution should be required to ensure that the agreement with the customer specifically envisages that the loan and associated interest and other costs are to be recovered from the mortgaged assets.

(iii) **Para 24.4**. Since para 24.5 recognises the possibility that the exigencies of 24.4 will not be satisfied, the word 'require' should not appear in paragraph 24.4.

(iv) **Para 27.3**. The expression 'dispute resolution procedures' is a cause for concern. A 'dispute resolution procedure' as generally understood involves the intervention of a court/arbitrator/conciliator/mediator whereas, at the initial stages at least, the investigation and attempted resolution of a dispute with an institution are going to be undertaken by an officer of the institution itself. To this extent therefore the use of the expression 'dispute resolution procedure' may give rise to misconceptions. If, of course, its real intent is to require, at the initial stage, an arbitration/conciliation/mediation in every case, then it would be most desirable for the provision to come out and say so.

(v) **Para 28.1 (i)**. The reference to the 'institution's commitment to implementing [the code]' may be considered to add insult to injury in a situation where the code is not a manifestation of self-regulation but, presently at least, has the appearance of being imposed from above.

(vi) **Para 29.2**. No institution is perfect, and it follows that this paragraph necessarily imposes an obligation of self-incrimination, something which was fashionable during the Cultural Revolution but has never been considered to form part of the Australian tradition.

(vii) It is not immediately apparent whether paras 4.1 and 4.2 are intended to remain as they stand or are more in the nature of drafting instructions. They appear to have no relevance to any of the objectives of the code which appear in para 3.1, they have no counterparts in the UK or NZ codes, and they take the matter no further than what is already expected by the courts and the Industry Ombudsman.

At the risk of appearing to be opposed to motherhood, this commentator believes that they should be removed at the earliest possible opportunity.

CONCLUSION

Experience in the United Kingdom and New Zealand has shown that, given a little pressure, the banking industry will raise no serious objections to the introduction of a code of conduct and, indeed, will take an active part in the drafting of such a code. All indications up to the present time are that upon such a code being introduced, its provisions will be respected.

There is, however, no precedent known to this commentator of a code of banking practice having been drawn up by persons who are not retail bankers. Of course, no first draft is perfect, and serious discussion and negotiation can only begin when there is a draft to work on. As this paper may have indicated, there are areas in the draft Australian code which may well call for reconsideration and revision, particularly as most of the provisions which appear to be susceptible of criticism are without precedent in the UK and New Zealand codes.

Unfortunately, however, the manner in which the Australian Government has chosen to progress the draft code has made it inevitable that political, as well as practical, considerations will be brought to bear in relation to many of its provisions whose revision or excision may come under consideration. This is likely to add greatly to the burdens of the members of the task force and to require the exertion of every ounce of their professionalism and diplomacy. It is unthinkable that Australia should end up with a code which is unworkable in any one or more of its aspects. This would bring the code into disrepute and lead to anarchy. In the view of this commentator it is a a matter for profound regret that the task of achieving a workable and respected code has been made infinitely more difficult, and the stresses imposed on those charged with its preparation have been made infinitely greater, by the political decision which has resulted in tentative proposals having achieved the perceived status of vested rights whose subsequent moderation will give rise to a degree of clamour which could have been avoided if the matter had been handled differently.

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I hasten to add, however, that none of those gentlemen or organisations is responsible for anything contained in this paper or, more particularly, for any of the totally personal views which I have expressed.

TABLE 1

EVOLUTION OF UK CODE

JACK COMMITTEE RECOMMENDATION	JACK COMMITTEE DRAFT CODE	UK GOVERNMENT RESPONSE	UK CODE PARAGRAPH
Rec 5(1)			
The duty of confidentiality should be defined by statute in the terms laid down in the **Tournier**.	A4	No-should be dealt with with in Code (para 2.12).	6.1
Para 5.40			
All existing statutory exemptions from duty of confidentiality to be consolidated.	A4(a)	No comment but 'massive erosion' denied (para 2.13).	-
Para 5.41			
Duty to public to be deleted.	-	No (para 2.14).	-
Para 5.42			
Disclosure in interests of bank to be limited to legal actions, inter-group (to prevent loss) and in relation to sale of bank.	A4(b)	Modification by Code may be desirable (para 2.15).	-
Para 5.43			
Disclosure by consent to be limited to express consent in writing for a specific purpose.	A4(c)	Modification by Code may be desirable (para 2.15).	-
Para 5.43			
Tacit consent to bankers' opinions to be implied if explanation given and no express refusal of consent.	A4(c)	No specific comment.	-
Para 5.45			
Additional exception allowing disclosure to a credit reference agency where there has been a breakdown of the banker customer relationship through customer default.	A4(d)	Banks must be able to give such information about customers who are in default (para 2.17).	-
Rec 5(2)			
A standard of best practice should:			
(a) Require banks to explain the rules of confidentiality to customers;	A4	Yes (para 24)	-

JACK COMMITTEE RECOMMENDATION	JACK COMMITTEE DRAFT CODE	UK GOVERNMENT RESPONSE	UK CODE PARAGRAPH
(b) Require banks to remind customers of their right of access under the *Data Protection Act* to computer records about themselves;	A4	Yes (para 1.14)	6.3
(c) State that no express consent should be sought in a way which puts the customer under pressure to give it;	A4(c)	No comment	-
(d) Require a letter to be written seeking consent to bankers' opinions.	A4(c)	No comment.	-
Rec 5.3			
Statutory exceptions to duty of confidentiality should not be extended without taking full account of consequences for banker-customer relationship.	-	Impliedly rejected (para 2.13).	-
Recs 6(3), 6(4)			
A standard of best practice should:			
(a) Require a bank, in any communication to its customer of the terms of the of the banker-customer contract, to ensure he is given a fair and balanced view of those terms and of the rights and obligations on each side and to give him reasonable notice of any proposals for variation of those terms;	A2	Yes (paras 14-15; 1.8)	3.1 3.2
(b) Require a bank to give all its customers a clear explanation of how the system of bankers' opinions works and invite them give or withhold a general express consent for the bank to supply opinions on them;	A5	Further protection of customers is not needed but Code should state that if further information on the system of opinions is sought, it will be given (para 1.16).	7.1
Rec 12(1)			
Standard of banking practice should require banks to allow customers a period of time for countermand wherever possible.	B7	Concept of artificial period not supported (para 1.29).	-

	JACK COMMITTEE RECOMMENDATION	JACK COMMITTEE DRAFT CODE	UK GOVERNMENT RESPONSE	UK CODE PARAGRAPH
Recs 13(1)-13(5)				
Standard of best practice should:				
(a)	Require banks to give their customers a simple explanation of the timing of the clearing cycle and the concept of cleared balances (13(1)).	B1	Yes (para 1.19)	See 10.1
(b)	Require banks to explain to their customers the basis of charging for the normal operation of the account including the method of calculation of fees and charges (including charges applied where an overdraft occurs without prior agreement) and charges for services such as stopping cheques and correspondence (13(2)).	B8	Strongly supported (para 1.30).	4.1
(c)	Require banks to ensure that in the case of agreed overdrafts the customer is always aware of the margin charged on base rate and the timing of debiting of interest(13(2)).	B8	Strongly supported (para 1.30).	4.1
(d)	Require banks to ensure that in a foreign exchange transaction the customer is made aware of the basis of the exchange rate and of any associated charges (13(3)).	B9	Apparent endorsement (para 1.32).	11.1
(e)	Require banks in direct marketing to exercise restraint and to respect objections to the use of personal information for marketing purposes and to desist from such activity on request (13(4)).	A6	Code should lay down good practice (paras 28, 1.12)	6.2 8.1
(f)	Require banks to ensure that prospective guarantors are adequately warned about the legal effects and possible consequences of guarantees and the importance of receiving independent advice (13(5)).	B10	It is not appropriate for banks to explain legal effects and possible consequences of guarantees. Code should require banks to advise prospective guarantors to seek independent legal advice (para 1.34).	12.1(ii)

JACK COMMITTEE RECOMMENDATION	JACK COMMITTEE DRAFT CODE	UK GOVERNMENT RESPONSE	UK CODE PARAGRAPH
Rec 15(2)			
A standard of best practice should require banks to establish clearly defined internal procedures for handling customer complaints; to ensure that customers are told how to lodge a complaint and how it would be dealt with; and to ensure that customers are made aware of the bank's internal procedures and of the procedures of the Ombudsman.	A3	Apparently supported (para 3.9)	5.1 5.2 5.3

TABLE 2

EVOLUTION OF DRAFT AUSTRALIAN CODE

MARTIN COMMITTEE RECOMMENDATIONS	AUSTRALIAN GOVERNMENT RESPONSE	TPC PAPER	DRAFT AUSTRALIAN CODE PARAGRAPH
59			
Banks should ensure greater disclosure in the area of foreign exchange transactions by advising in advance of all associated fees and charges.	To be considered for the Code.	-	14.2(i)
70			
Banks should continue to offer training opportunities to their staff especially with regard to improvements in customer relations.	Matter for industry consultation.	-	28.1
71			
Banks should speed up their implementation of effective complaint handling schemes and make known the existence of their complaint departments through brochures.	Matter for industry consultation.	-	27.1 27.3
74			
Banks should ensure that their assessment of risk and other related areas such as ability to repay are thoroughly investigated.	Matter for industry consultation.	-	22.1 22.2

MARTIN COMMITTEE RECOMMENDATIONS	AUSTRALIAN GOVERNMENT RESPONSE	TPC PAPER	DRAFT AUSTRALIAN CODE PARAGRAPH
76			
A Code of Banking Practice, contractually enforceable by bank customers and subject to ongoing monitoring by the Trade Practices Commission, be developed as a result of a process of consultation.	Qualified agreement - Government to develop a voluntary code in close consultation with interested parties.	Agree (para 5.1)	1.6
81			
The development of comprehensive procedures for resolving complaints and disputes be considered in the development of the Code of Banking Practice.	Government agrees - this issue to be covered by the Code.	-	27.1 to 27.8
84			
The obligation to maintain customer confidences should be expressly recognised by law and the only exceptions should be: (a) Where subpoenaed; (b) Disclosure under due process of law; (c) Disclosure pursuant to express consent in writing given for a particular purpose; (d) Disclosure to other credit providers and agencies subject to restrictions of the *Privacy Act*.	Disagree. The law on disclosure is clear and reasonable.	-	18.4
85			
The duty of confidentiality should extend to all information obtained by the Bank in relation to its customer other than information readily available to the public.	Qualified agreement - CTR Act exigencies must be excepted from any prohibition on disclosure.	-	18.1

MARTIN COMMITTEE RECOMMENDATIONS	AUSTRALIAN GOVERNMENT RESPONSE	TPC PAPER	DRAFT AUSTRALIAN CODE PARAGRAPH
86			
Customers should have access to all personal information concerning them contained in the records of the Bank.	Agree.	-	18.6 18.7
87			
Customers should be advised upon opening an account or commencing a relationship with a bank, and at intervals thereafter, of their right of access to personal information about them held by a bank.	Agree.	-	18.7
88			
Banks should be required to take reasonable steps to ensure that accurate files are maintained on customers.	Agree.	-	18.5(i)
89			
The use of unlimited guarantees should not be permitted.	Disagree. There is a need for potential guarantors to be better informed but it may be going too far to rule out unlimited guarantees.	Agree in the consumer context (para 5.4)	24.2
90			
The details of the relationship between a bank and a guarantor should be clearly laid down in a code of banking practice.	Agree. Precise details of the relationship to be included in a proposed code will need to be explored in discussions with interested parties.	Agree. Incorporation of certain specific undertakings recommended (para 5.2.1)	-
91			
The Code should require a bank to disclose to prospective guarantors all material facts known to it relating to the borrower and the proposed transaction.	Matter for consideration as part of the proposed code.	Agree. Legal problems can be overcome by suitable legislative amendment (para 5.3)	24.3

MARTIN COMMITTEE RECOMMENDATIONS	AUSTRALIAN GOVERNMENT RESPONSE	TPC PAPER	DRAFT AUSTRALIAN CODE PARAGRAPH
92			
The Code should require the Bank to advise the guarantor of the state of the borrower's account on inquiry or as soon as the account becomes overdue.	Matter for consideration as part of the proposed code.	Agree (para 5.3)	See 24.7
93			
The *Privacy Act* to be appropriately amended.	Agree.	Agree (para 5.3)	-
94			
The principle of disclosure of the terms of the banker-customer relationship should be incorporated into a code of banking practice.	Agree. Should be a basic element of the Code.	-	5.1 to 5.3 6.1 to 6.4 7.2, 7.3 8.1 to 8.3 8.5 9.1 to 9.3 10.1 11.1 12.1,12.2 13.1 14.1,14.2 15.1 to 15.4 18.7 20.2 21.1 23.1,23.2 25.1 to 25.5 27.3,27.5, 27.7
95			
The Code should incorporate a requirement for plain English documents.	Qualified agreement. It may be appropriate that documents continue to reflect the individual characteristics of the products.	Agree (para 5.6)	5.2(ii) and (iii)

MARTIN COMMITTEE RECOMMENDATIONS	AUSTRALIAN GOVERNMENT RESPONSE	TPC PAPER	DRAFT AUSTRALIAN CODE PARAGRAPH
96			
Banks should disclose all fees and charges and interest rates relating to all products and these should be clearly drawn to the attention of customers.	Agree. Disclosure to be considered in the Code.	-	8.1, 8.2 9.1, 10.1 14.1(i) 14.2(i) 15.1 to 15.5
100			
A right to personal information should be written into the Code of Banking Practice.	Agree. The matter of charges for the provision of information may need to be considered.	-	18.6 18.7

TABLE 3

COMPARISON OF AUSTRALIAN DRAFT CODE WITH UK AND NEW ZEALAND CODES

TOPIC	AUST PARA	UK PARA	NZ PARA
INTRODUCTION			
Function of Code - restricted to personal customers	1.1	Preface	1.1
Meaning of retail banking products and services	1.2		
Exclusion of bills of exchange - independent advice to be encouraged	1.3		
Code is without prejudice to laws and regulations	1.4		
Division of Code	1.5	1.3	1.3
Date of commencement	1.6	Preface	1.2
APPLICATION			
Code to be reflected/incorporated in all contractual terms	2.1		
Application to existing written contracts	2.2		
Documentation to be developed and applied where customer's use of product or service is not bound as to time by existing written contractual terms	2.3		

TOPIC	AUST PARA	UK PARA	NZ PARA
OBJECTIVES			
Objectives and governing principles of Code	3.1	1.2 1.4	
GENERAL OBLIGATIONS			
Overriding obligation of institutions	4.1		
Overriding obligation of customers	4.1		
AVAILABILITY AND DISCLOSURE OF TERMS			
Documentation is to be issued	5.1	2.2	2.2
Requirements as to documentation	5.2	3.1	2.2
Incorporation of other documents	5.3		
Variation of existing contractual terms so as to conform to Code	5.4		
PRE-CONTRACTUAL CONDUCT			
Notification of availability of documentation	6.1		
Provision of opportunity to read and consider	6.2		
Disclosure of application fee	6.3		
Interest rate risk premiums	6.4		
OPENING OF ACCOUNTS			
Satisfaction as to identity of customer	7.1	2.1 2.2	2.1
Tax file numbers	7.2		4.1
Explanation of terms and conditions applicable to service	7.3	3.4	
VARIATIONS TO CONTRACTUAL TERMS AND CONDITIONS			
30 days written notice of certain variations to be given	8.1	Compare 3.2	2.3 3.2
Public notification of other variations	8.2	Compare 3.2	4.4
Confirmation of oral instructions varying documented terms or significantly altering rights and obligations	8.3		

TOPIC	AUST PARA	UK PARA	NZ PARA
Bank may use customer's last known address; customer's duty to advise changes of address	8.4		
Issue of single document consolidating contractual terms and conditions	8.5	3.3	
TERMS AND CONDITIONS			
Terms and conditions documentation to state nature of fees and charges, basis of calculation of interest, frequency of interest debiting or crediting and other matters	9.1	4.1	5.1.2
Rights of set-off, obligations of privacy, rights to terminate or vary provision of a product or service and obligations with respect to fraud or negligence by employees to be stated in terms and conditions	9.2		
Outline of customers' obligations re unauthorised transactions remaining within limits (or in credit) and providing current address	9.3		
DEPOSIT ACCOUNTS			
Additional information to be incorporated in documentation	10.1		
LOAN PRODUCTS			
Additional information to be included in documentation	11.1		
CHEQUE ACCOUNTS			
Documentation to include material about fees and charges	12.1		
Aspects of cheques law and practice to be explained	12.2	10.1	7.2 and 7.3
ELECTRONIC FUNDS TRANSFER CARDS	13.1 Cross refers to EFT Code	13.1 to 20.3	11.1 to 20.1
OTHER PAYMENTS SERVICES			
Additional information to be included in documentation	14.1		8.2
Information and explanations to be provided re foreign exchange services	14.2	11.1 and 11.2	9.1 and 9.2

TOPIC	AUST PARA	UK PARA	NZ PARA
INTEREST RATES AND CHARGES			
Provision of schedule of interest rates, fees and charges	15.1	4.1 and 4.4	3.1
Disclosure of effective and annual interest rate	15.2		5.1.2(ii)
Fees and charges to be separately itemised	15.3		
Changes to rates, fees and charges to be notified to customers in advance	15.4	4.5	5.1.3
Fees or charges not previously disclosed are not to be applied without prior notification	15.5		
Charges not to be applied if incurred solely as a result of the application of charges for the previous charging period	15.6	4.3	
THE COMPARATIVE COST OF CREDIT	See 16.0		5.1.2(ii)
ACCOUNT COMBINATION AND SET-OFF			
Set-off only exercisable when customer is in default; accounts must be in the same name and the same right	17.1		
Notice of intention to set-off to be given if possible	17.2		
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TOPIC	AUST PARA	UK PARA	NZ PARA
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PAYMENT INSTRUMENTS			
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Customers to be notified of means by which theft or loss may be reported	20.2	17.2	15.1
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TOPIC	AUST PARA	UK PARA	NZ PARA
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Guarantor to be sent copy of arrears demands or default notices	24.7		
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Guarantor's written consent to be obtained to any variation of loan agreement or guarantee	24.8		
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TOPIC	AUST PARA	UK PARA	NZ PARA
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New customers may advise that they do not wish to receive marketing material		8.2	
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Employees to sign declaration of secrecy			10.2
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ATTACHMENT TO PAPER BY GEORGE WEAVER

CODE OF BANKING PRACTICE - TASK FORCE DRAFT

CIRCULATED ON 23 NOVEMBER 1992

(DRAFT ONLY: FOR DISCUSSION PURPOSES)

1.0 INTRODUCTION

1.1 This Code sets out standards of good banking practice to be observed by banks and other financial institutions ('Institutions') offering retail banking products and services when dealing with their personal customers ('customers').

(Consideration will need to be given as to the extent to which this Code might also apply to farmers and small business. The Task Force is of the view, nevertheless, that parts (at least) of this Code could be readily applied to farmers and small business to the extent that these groups also access standard retail banking products and services.)

1.2 In this Code, 'retail banking products and services' means all deposit, credit and loan accounts and related services offered or provided to customers for their personal, domestic or household use or consumption.

[1.3 'Retail banking products' does not include Bank Bills and other discounted bills of exchange. Where such financing arrangements are offered to their personal customers, Institutions shall encourage their customers to seek separate independent advice.]

1.4 The Code operates without prejudice to Commonwealth and State Government laws and regulations concerning retail banking products and services.

1.5 The Code is in four parts:

(i) Part A - Disclosure: establishes a requirement that Institutions shall issue terms and conditions documentation in respect of all retail banking products and services they offer and sets out the (minimum) information to be contained in such documentation;

(ii) Part B - Principles of Disclosure and Conduct: establishes principles for the disclosure of interest rates and other charges and of conduct with respect to particular banking practices and procedures;

(iii) Part C - Resolution of Disputes and Staff Training: establishes principles of conduct in these areas; and

(iv) Part D - Monitoring and Compliance: establishes procedures for monitoring of, and Institutions reporting on, observance of the Code.

1.6 The Code is effective from .... The Australian Payments System Council will monitor the operation of the Code and publicly report on its findings annually. The Code itself will be reviewed by the Commonwealth Government from time to time, and at least every three years.

2.0 APPLICATION

2.1 As of [the commencement date] the provisions of this Code shall be [reflected] [incorporated by reference] in the contractual terms applying to all retail banking products and services which Institutions offer from that date.

2.2 This Code does not apply to written contracts in existence prior to [the commencement date]. To the extent that it is possible, nevertheless, Institutions shall observe the principles of conduct stated in this Code in executing the terms of existing contractual arrangements.

2.3 Notwithstanding the provisions of Section 2.2, where a customer's usage of a retail banking product or service is not bound **as to time** by existing written contractual terms, Institutions shall develop and apply terms and conditions documentation consistent with the provisions of Section 5.4 of this Code.

3.0 OBJECTIVES

3.1 The objectives of the Code are:

(i) to define standards of good banking practice and service which customers are entitled to receive;

(ii) to define a set of key provisions that are fair and balanced to be included in contractual arrangements between Institutions and their customers;

(iii) to promote clarity in the relationship between Institutions and their customers, including through adequate disclosure of relevant contractual information; and

(iv) to define principles for establishing fair and cost effective processes for the speedy resolution of disputes between Institutions and their customers.

PART A: DISCLOSURE

4.0 GENERAL OBLIGATIONS

4.1 Consistent with this Code:

Institutions Have An Overriding Obligation To Deal Openly, Fairly And Honestly With Their Customers.

Customers Have An Overriding Obligation To Deal Openly, Fairly And Honestly With Their Institutions.

5.0 AVAILABILITY AND DISCLOSURE OF CONTRACTUAL TERMS AND CONDITIONS APPLICABLE TO RETAIL BANKING PRODUCTS AND SERVICES

5.1 Institutions shall issue terms and conditions documentation applicable to all retail banking products and services they offer.

5.2 Such documentation shall:

(i) be clearly identified as a terms and conditions document and provided separately from other marketing or promotional literature concerning the relevant product or service;

(ii) be expressed in clear and comprehensible language and be sensitive to the needs of persons from non-English speaking backgrounds and their special needs;

(iii) set out in unambiguous terms the key rights and obligations of both the Institutions and their customers, consistent with the requirements of this Code; and

(iv) be provided to customers at the time they enter into an obligation or contract and at any time on reasonable request.

5.3 Institutions may incorporate information into their terms and conditions documentation by way of reference to other readily available plain language documentation. In those circumstances, however, the terms and conditions document shall still state the key rights and/or obligations of the Institution and/or customer arising out of the relevant term or condition.

5.4 Subject to Section 8.0, in circumstances where customers' continuing usage of a retail banking product or service is not bound as to time by existing contractual terms as at [the commencement of this Code], customer acceptance of terms and conditions promulgated in accordance with this Code may, after 30 days of their being given notice of the terms and conditions, be deemed by their continuing usage of the relevant product or service.

6.0 **PRE CONTRACTUAL CONDUCT**

6.1 In offering or marketing retail banking products and services Institutions shall, in their advertisements and through notices at their branches, notify their customers of the availability of terms and conditions documentation applicable to the product or service.

6.2 Prior to entering into a contractual relationship, Institutions shall provide their customers with a reasonable opportunity to read and consider the terms and conditions applicable to the relevant product or service and shall encourage them to do so.

6.3 In circumstances where an application fee or similar charge is imposed, Institutions shall clearly disclose that fact in advance and whether the fee or charge is refundable in the event the application is rejected.

6.4 Where an interest rate risk premium will be applied, Institutions shall inform the customer of that fact, and of the reasons for the premium.

7.0 **OPENING OF ACCOUNTS**

7.1 Institutions will satisfy themselves about the identity of a person seeking to open an account. In particular, Institutions shall inform their customers of, and comply with, the *Cash Transaction Reports Act* 1988 in relation to the identification of persons opening or becoming signatories to an account.

7.2 Institutions shall inform their customers at the time they open an account of the requirements of the *Taxation Laws Amendment (Tax File Numbers) Act* 1988.

7.3 At the time a customer opens an account or commences the use of a service, Institutions shall, where possible, explain to the customer the important terms and conditions applicable to that account or service.

8.0 **VARIATIONS TO CONTRACTUAL TERMS AND CONDITIONS**

8.1 In circumstances where a contract allows, Institutions proposing to:

(i) impose **additional** fees or charges not originally provided for; or

(ii) otherwise increase a customer's actual or potential financial obligations (**other than by way of variation to interest rates**);

shall provide written notification of the change(s) to each customer at least 30 days in advance of the change(s) taking effect.

8.2 Variations to interest rates and other changes to contractual terms and conditions allowed under the contract shall, subject to any provision in the contract providing otherwise, be notified in advance by means such as:

(i) notification in the press; and

(ii) notification at branches;

but shall be confirmed in writing at the time of the next regular correspondence with the customer.

8.3 Institutions shall confirm in writing with their customers all instructions orally accepted, or arrangements orally agreed, that alter documented terms and conditions or which otherwise significantly alter the rights and obligations of either party with respect to a particular product or service.

8.4 Subject to the express terms of the contract, written notification shall be deemed to have been provided if forwarded to the customer's last known address. Customers have a responsibility to ensure that changes in their address are notified promptly to their Institution.

8.5 From time to time, Institutions shall issue a single document providing a consolidation of the contractual terms and conditions.

9.0 **TERMS AND CONDITIONS**

9.1 Institutions shall, in terms and conditions documentation applicable to all retail banking products and services they offer, state:

(i) the nature of all fees and charges that will or may apply to the product or service, and the circumstances in which they are, or will be, applied;

(ii) the basis on which interest (if any) is calculated and the frequency with which it is credited or debited;

(iii) that a schedule of current interest rates and fees and charges applicable to the product or service is available on request;

(iv) the frequency with which account statements will be provided;

(v) the manner in which customers will be notified of changes to interest rates, fees and charges, and variations to other terms and conditions applicable to the product or service; and

(vi) any costs that customers may incur if they seek to subsequently change the terms of the product or service.

9.2 In addition, Institutions shall state in their terms and conditions documentation their:

(i) rights to exercise 'account combination' or 'set-off';

(ii) obligations with respect to customer privacy;

(iii) rights to vary or terminate the provision of a product or service and, in particular, the circumstances in which this might occur; and

(iv) obligations to customers with respect to fraud or negligence by employees or agents of the Institution.

9.3 Terms and conditions documentation shall explain obligations customers have to their Institution, including with respect to:

(i) their (and the Institution's) liability for losses resulting from unauthorised transactions due to the loss, theft or misuse of payments instruments;

(ii) the maintenance of credit balances in their accounts or to remain within agreed loan limits; and

(iii) the provision of accurate and up-to-date information of their current address.

10.0 DEPOSIT ACCOUNT

10.1 In the case of deposit accounts, including term deposits, Institutions shall incorporate in their terms and conditions documentation the following information, **in addition** to that prescribed in Section 9.0:

(i) where more than one interest rate may apply, advice of that fact and of the respective balances to which they apply;

(ii) an explanation of any limitations which may apply to their obligations to meet customers' requests for payments to or from the account, including minimum balance and transaction requirements and cash withdrawal limits;

(iii) the circumstances under which an account will be deemed to have 'lapsed' and the possible consequences for the customer; and

(iv) in respect of term deposits, advice of:

- any penalties that may apply to withdrawals in advance of maturity; and
- the manner in which payment will be made to the customer, or by which the funds in the account may be re-invested, at maturity.

11.0 LOAN PRODUCTS

11.1 In addition to the information prescribed in Section 9.0, Institutions shall include in their terms and conditions documentation relating to all loan accounts and products, information as to:

(i) the manner in which the customer can repay the loan, including any cost penalties for early repayments;

(ii) any other costs that may be associated with varying the terms of the loan, including switching between a variable and fixed interest rate; and

(iii) the circumstances (if any) under which the Institution can or will vary loan repayments.

12.0 CHEQUE ACCOUNTS

12.1 In the case of a 'cheque account' or a product which can be accessed by a cheque facility, terms and conditions documentation shall incorporate, **in addition** to the information prescribed in Section 9.0 of this Code, a description of all fees and charges that will or may be applied to the operation of the cheque facility and the circumstances in which they will or may apply.

12.2 Institutions shall also provide their customers with a commentary on:

- the timing of the clearing cycle;
- the concept of cleared funds;
- what happens when a cheque is dishonoured or 'bounces';
- the circumstances in which a cheque may be dishonoured;
- the consequences of 'overdrawing' the account;
- the meaning and effect of an endorsement on a cheque;
- the handling of cheques drawn by customers who add wording to cheques, and the effects of crossing a cheque and marking it with the words 'not negotiable' and adding the words 'account payee only';
- the effect of an alteration to a cheque;
- the meaning and effect of a 'post dated' cheque;
- the meaning and effect of a 'stale' or out of date cheque;
- the procedures for, and the effect of, stopping or countermanding a cheque;
- a bank cheque and its purchase cost;
- the cost and effect of 'special' clearance of a cheque.

13.0 ELECTRONIC FUND TRANSFER (EFT) CARDS

13.1 Where transactions on an account can be initiated through an electronic terminal by the combined use of a plastic card and personal identification number, terms and conditions documentation shall also reflect the requirements of the EFT Code of Conduct.

14.0 OTHER PAYMENTS SERVICES

14.1 Where Institutions provide customers with other payments services, including direct debits and credits or automatic payments to or from their account, or access to their account by means of instruction via telephone or personal computer, Institutions will include in their terms and conditions documentation the following additional information:

(i) any fees or charges applicable to the service;

(ii) the deadline by which a customer may alter or stop - or countermand - a payment service; and

(iii) the Institution's rights to alter or adjust a standing payment service without prior reference to the customer.

14.2 In providing foreign exchange services, Institutions shall provide to their customers:

(i) details of the exchange rate and their commission charges which will apply or, when this is not possible at the time, the basis on which the transaction will be completed;

(ii) an indication of when money sent overseas on their instructions should normally arrive at the overseas bank and the means of transmission; and

(iii) an explanation of exchange rate movements, including the customer's exposure to risk from such movements and the availability of mechanisms for limiting such risks.

PART B: PRINCIPLES OF DISCLOSURE AND CONDUCT

15.0 INTEREST RATES AND CHARGES

15.1 Institutions shall, at the time of opening an account or commencing the provision of a service, or otherwise on request, provide to their customers a schedule of all interest rates, fees and charges applicable to the account or service.

15.2 Where any interest rate is disclosed, Institutions shall also disclose the effective annual rate of interest.

15.3 All fees and charges shall be separately itemised.

15.4 Changes to interest rates, fees and charges shall be notified in advance to customers in accordance with Section 8.0 of this Code.

15.5 Any fee or charge not previously disclosed shall not be applied without prior notification to the customer in accordance with Section 8.1 of this Code.

15.6 Institutions shall not apply charges to a customer's account if those charges were incurred solely as a result of the application of charges for the previous charging period. This limitation on levying charges on charges shall not apply when customers have effectively been notified in advance of the charges and given reasonable opportunity to fund their accounts.

16.0 THE COMPARATIVE COST OF CREDIT

(There is a disposition within the Task Force to promote the use by consumers of summary statistics - in the case of credit products, the internal rate of return variously known as the 'comparison rate' or the 'effective credit rate' - in appropriate circumstances to aid market transparency and facilitate informed decision making.

One approach would be to expect Institutions to calculate, publish and promote such statistics. Another would be for the Government to encourage others involved in the provision of financial information, such as independent advisers and financial commentators to do so, especially for products where particular care is needed with the use and interpretation of the statistics. A further option would be for Institutions to be prepared to make such calculations available to their customers on request.

There may also be uses for alternative means of information disclosure to customers such as those provided in industry disclosure standards and codes of practice, and by the 'Schumer Box' approach (see pages 158-159, PSA Report on Credit Cards). In any event more basic forms of information disclosure should be available to customers such as that provided for in Sections 9 and 15 of this Code).

17.0 ACCOUNT COMBINATION AND SET-OFF

17.1 Institutions shall not exercise any right of account combination or set-off other than in circumstances where the customer is in default of payments obligations. In any event, such rights may be exercised only where the accounts in question are operated by the same person or persons and are held in the same right.

17.2 Where feasible, Institutions shall inform their customers before exercising account combination or set-off.

17.3 In proposing to exercise any right to account combination and set-off, Institutions shall comply with the Code of Operation for Social Security Direct Credit Payments.

18.0 PRIVACY AND CONFIDENTIALITY

18.1 Institutions shall observe a strict duty of confidentiality with regard to information held about their customers (and former customers).

18.2 Institutions shall establish internal rules and procedures on the collection, use, disclosure, management and access to personal information held on customers (and former customers) and comply with all legislation relating to information privacy.

18.3 In collecting personal information, Institutions shall:

(i) use only lawful [and fair] means;

(ii) not use information which they know has been obtained illegally;

(iii) limit the collection to the extent necessary to conduct the customer's retail banking products and services; and

(iv) within the confines of (iii) above, collect only for purposes identified prior to the collection of that information. Any use of the information must be limited to the fulfilment of those purposes or other compatible purposes which are subsequently identified.

18.4 In addition to the limitations imposed by the *Privacy Act* 1988 Institutions shall limit disclosure of personal information to third parties, including related companies, to those cases where:

(i) subject to (iv) below, the disclosure is for the purposes of retail banking;

(ii) the disclosure is required or permitted by law or is in the public interest;

(iii) the disclosure is made at the request, or with the prior specific consent, of the customer; or

(iv) protection of the Institution's interests requires disclosure, except that the Institution's interests shall not justify the disclosure of personal information for marketing purposes to third parties, including related companies.

18.5 In their management of personal information, Institutions shall ensure that the information is:

(i) kept accurate to the extent necessary for its actual or intended use; and

(ii) protected by reasonable security safeguards against such risks as unauthorised access, loss, destruction, modification or disclosure, including processing of the information by a third party.

18.6 Customers shall have the right of access to all factual personal information about them held by an Institution. This right shall not extend to assessments of customers made by Institutions on the basis of the factual information they hold.

18.7 Institutions shall notify their customers in their terms and conditions documentation and at the time they open an account or service:

(i) that the Institution may hold information about the customer and that the customer may request the Institution to provide that information:

(a) within a reasonable and stated time;

(b) at no or minimal charge unless the information has previously been provided in the normal course of business;

(c) in a reasonable manner; and

(d) in a form that is readily intelligible; and

(ii) that where such a request is denied, there are procedures to allow customers to challenge that denial and what those procedures are.

18.8 Institutions shall designate a person competent to decide on the handling of personal information who shall be accountable to the Institution's management for the Institution's compliance with this Section.

18.9 Institutions will not provide 'bankers' opinions' (also called 'status opinions' or 'bankers' references') without the prior specific consent of the customer on whom the reference is sought.

19.0 FRAUD AND NEGLIGENCE

19.1 Institutions shall not deny to their customers the right to receive compensation for losses incurred as a result of fraud or negligence by the Institution's employees or its agents acting in the course of their employment or agency.

20.0 PAYMENTS INSTRUMENTS

20.1 Institutions should encourage their customers to:

(i) take reasonable care to safeguard their payments instruments, including their credit cards, debit cards, cheque and pass books; and

(ii) notify them as soon as possible of the loss, theft or misuse of their payments instrument(s).

20.2 Institutions shall inform their customers of the means by which they can notify the loss, theft or misuse of their payments instruments.

21.0 STATEMENTS OF ACCOUNT

21.1 Institutions shall provide customers with a printed record of all account transactions since the previous statement at least every six months unless:

(i) it is agreed that a passbook or other documentation will be the only record of transactions on an account;

(ii) there have been no transactions effected on the account during the past six months; or

(iii) the account can be accessed by an EFT card, in which case the requirements of the EFT Code of Conduct apply.

22.0 PROVISION OF CREDIT

22.1 In considering whether or not to lend, an Institution's first consideration must be the applicant's ability to repay.

22.2 Institutions shall not, in particular, accept a mortgage or other security over assets unless:

(i) they are satisfied that, at the time of making the loan the customer has the income capacity to repay the loan, including with regard to:

- information on the public record;
- information supplied by the applicant;
- information supplied by credit reporting agencies;

- prior knowledge of their applicant's financial affairs gained from past dealings;
- information supplied by other credit providers;
- credit scoring (a method used by lenders to assess whether a credit applicant is an acceptable risk by using a scoring system);
- purpose of the loan; or

(ii) the agreement with the customer specifically envisages that the loan and associated interest and other costs are to be recovered from the assets secured.

23.0 **SUBSIDIARY CREDIT CARDS**

23.1 When issuing a subsidiary credit card Institutions shall explain clearly and fully to the primary card holder, his or her potential liability for debts incurred by the subsidiary card holder.

23.2 When issuing a subsidiary credit card Institutions shall inform their customers of the means by which a subsidiary credit card can be cancelled or 'stopped', and the limitations that can apply in this regard in circumstances where it is not possible to surrender the card.

24.0 **THIRD PARTY SECURITIES**

24.1 Institutions shall not obtain indemnities from third parties where adequate security can be obtained by guarantee. Where an indemnity is sought the Institution will explain to the borrower and the provider of the indemnity the effect of the indemnity, including that the indemnity can be called upon even where the borrower is not in default. Providers of indemnities shall be required to acknowledge a recommendation that they seek legal advice before signing the indemnity.

24.2 Guarantees from third parties shall be for a specified amount.

24.3 Institutions shall not accept a guarantee unless the borrower consents to the guarantor being provided with both information obtained from the borrower on which the Institution assessed the borrower's application for the loan or credit facility and that referred to in Section 24.7.

24.4 Prior to the signing of the guarantee the Institution should require the guarantor to attend the Institution's office in person and, in the absence of the borrower, so that the Institution may explain the contract of guarantee including:

(i) the nature and extent of the facility being provided to the borrower;

(ii) that upon signing the guarantee the guarantor becomes legally bound to repay the borrower's loan up to the limit specified, including interest and enforcement expenses, if the borrower defaults;

(iii) that if security is also intended to be taken over the guarantor's goods or other property, those assets can be seized and sold by the Institution if the borrower defaults and the guarantee is enforced; and

(iv) that the guarantor should obtain independent financial and legal advice before signing the guarantee.

24.5 Where the guarantor is unable or unwilling to attend the Institution's office in person, the Institution shall, prior to the signing of the guarantee, provide the guarantor with a copy of the loan and guarantee contracts and advise the guarantor to obtain independent legal advice before signing the guarantee. Institutions shall allow the guarantor a reasonable period in which to examine the documents and seek legal advice.

24.6 Within 14 days of the signing of the guarantee, or such other period as prescribed by law, the Institution shall provide to the guarantor a copy of the executed loan and guarantee contracts along with any other notices or documents required by law.

24.7 Institutions shall send to the guarantor without undue delay a copy of any arrears demand or default notice which is sent to the borrower. Institutions shall, in accordance with the Institution's usual practice, also provide the guarantor a copy of the statement of account in respect of the guaranteed facility.

24.8 Institutions shall seek the written consent of the guarantor to any variation of the loan contract or the contract of guarantee.

24.9 The Institution shall not issue proceedings against, or realise securities granted by, the guarantor unless:

(i) the borrower is in default and the Institution has taken all reasonable steps to recover the debt from the borrower; and

(ii) the Institution has notified the guarantor in writing of the default and given the guarantor a reasonable opportunity to take over the obligations of the borrower or to enter into negotiations with the Institution for the purpose of determining the most appropriate manner for the guarantor to discharge his or her obligations.

24.10 A guarantor shall have the right at any time to extinguish their existing liability and discharge any future liability under the contract for guarantee by paying to the Institution, at the time of discharge of the guarantee, the outstanding debt of the borrower in relation to that particular guarantee.

25.0 ADVERTISING

25.1 Institutions shall include in their advertisements and promotional material all information necessary to ensure that they are balanced, accurate, unambiguous and not misleading or deceptive.

25.2 In determining whether advertisements or promotional material are balanced, accurate, unambiguous and not misleading or deceptive, Institutions should have regard to whether the advertisement or promotional material:

(i) conveys, overall, a truthful impression of the features of the product or service;

(ii) clearly discloses any special conditions or limitations applicable to the product or service; and

(iii) where reference is made to interest rates, also discloses with equal prominence that fees, charges and costs may also apply to the product or service and what those fees, charges and costs are.

25.3 Institutions shall ensure that where qualifications are used in their advertisements or promotional material that such qualifications are prominently displayed.

25.4 Institutions shall take all reasonable steps to ensure that relevant staff are familiar with the Institution's products and services prior to advertising or otherwise promoting those services to the public.

25.5 Institutions shall have procedures for the vetting and clearance in terms of the principles and procedures set out in this section of advertisements and promotional material produced by the Institution or produced on the Institution's behalf.

26.0 CLOSURE OF ACCOUNTS

26.1 Customers may request their Institution to close an account at any time, subject to any relevant terms and conditions.

26.2 Institutions can close a customer's account which is in credit balance by giving the customer notice in accordance with Section 8.1 of this Code.

26.3 Institutions shall not impose fees or charges for the closure of accounts in excess of the actual costs involved.

PART C: RESOLUTION OF DISPUTES AND STAFF TRAINING

27.0 DISPUTE RESOLUTION

27.1 Institutions shall have appropriate procedures for the prompt investigation and resolution of any complaint by a customer concerning matters covered by this Code. Such procedures are to contain at least the features specified in this Part of the Code and be easily accessible to customers.

27.2 Institutions shall ensure that their customers have access to an independent, external and low cost dispute resolution process, such as an Ombudsman scheme.

27.3 Institutions shall establish procedures for the lodgement of complaints by customers. Institutions will publicise widely the availability of their dispute resolution procedures and provide information in their terms and conditions documentation and in their promotional material on the means and procedures to lodge a complaint and to have the matter investigated.

27.4 Customers have the responsibility to disclose to Institutions all relevant information available to them regarding matters which are the subject of complaints.

27.5 When a customer lodges a complaint and the matter is not immediately settled to the satisfaction of both the customer and the Institution, the Institution will inform the customer in writing of the procedures by which the matter shall be investigated.

27.6 The Institution shall within 21 days of receipt from the customer of the relevant details of a complaint either complete its investigations and inform the customer in writing of the outcome or inform the customer in writing of the need for more time to complete its investigation. The Institution shall, unless there are exceptional circumstances of which it will inform the customer in writing, complete its investigation within 45 days of receipt of the customer of the relevant details of the complaint.

27.7 On completing its investigation of a complaint the Institution shall promptly inform the customer in writing of the outcome of the investigation together with the reasons for that outcome.